

BILL NO. 2009-01

NYE COUNTY ORDINANCE NO. 369

SUMMARY: An amendment to Ordinance 316 by changing the submitting designee from the Code Compliance Officer to the Compliance Review Committee for submitting documents to the Hearing officer; an amendment to the “Penalty Policy Guidance Document” by adding Section 3(C), Administrative violations; and other matters properly relating thereto.

TITLE: **AN AMENDMENT TO ORDINANCE 316 BY CHANGING THE SUBMITTING DESIGNEE FROM THE CODE COMPLIANCE OFFICER TO THE COMPLIANCE REVIEW COMMITTEE FOR SUBMITTING DOCUMENTS TO THE HEARING OFFICER; AN AMENDMENT TO THE “PENALTY POLICY GUIDANCE DOCUMENT” BY ADDING SECTION 3 (C), ADMINISTRATIVE VIOLATIONS FOR ADMINISTRATIVE, NON DUST GENERATING VIOLATIONS, A MODIFIED PENALTY CALCULATION WILL BE USED; AND OTHER MATTERS PROPERLY RELATING THERETO.**

WHEREAS, the Nye County Board of County Commissioners (“Board”) recognizes that its prime duty is to protect the health, safety and general welfare of the residents of the County; and

WHEREAS, pursuant to NRS 278.250, the Board may divide the County into zoning districts and, thereafter, regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land by zoning regulations adopted in accordance with the master plan, for the purpose of preserving the quality of air resources within such district; and

WHEREAS, in accord with such authority, the Board has established the Pahrump Regional Planning District (“District”); and

WHEREAS, the Board has recognized that within the District, unless proper precautions are taken, the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land creates dust that impairs the quality of the air in the District; and

WHEREAS, in accord with that recognition and pursuant to the authority of NRS 278.250, the Board previously adopted the Pahrump Regional Planning District Dust Control Regulations (Nye County Code Chapter 15.28) (“Dust Control Regulations”); and

WHEREAS, pursuant to NRS 244.361, the Board may by ordinance, regulate, control and prohibit, as a public nuisance, the excessive emission of air pollution within the boundaries of the County; and

WHEREAS, the Board determined that violations of the Dust Control Regulations will and do lead to excessive emission of air pollution within the District; that violation for the Dust Control

Regulations therefore should be deemed to be a public nuisance; and that an ordinance providing for the full effectuation of the Dust Control Regulations is necessary for the purpose of preventing this public nuisance,

WHEREAS, pursuant to NRS 278.262 et seq., the Board may appoint hearing officers to carry out the provisions of the Dust Control Regulations; and

NOW, THEREFORE, the Board of County Commissioners of Nye County, State of Nevada, does ordain:

1. VIOLATIONS OF THE DUST CONTROL REGULATIONS DEEMED A PUBLIC NUISANCE.

- A. Violations of Nye County Code Chapter 15.28, the Pahrump Regional Planning district (“District”) Dust Control Regulations, as amended now or in the future (“Dust Control Regulations”), lead to excessive emission of air pollution within the District; and, therefore, shall be and are deemed to be a public nuisance and subject to regulation, control and prohibition pursuant to NRS 244.361.
- B. For purposes of this Ordinance, the word “violation” shall be defined as provided in Nye County Code Chapter 15.28.040(A).

2. ISSUANCE AND ADJUDICATION OF NOTICES OF ALLEGED VIOLATION.

- A. The Nye County Air Quality Program Administrator shall issue a written Notice of Alleged Violation (“NOAV”) to any person who is alleged to have committed a violation of the Dust Control Regulations.
- B. The NOAV shall specify:
 - i. The specific regulation violated;
 - ii. The facts constituting the violation;
 - iii. The time frame under which corrective action must be taken; and
 - iv. The proposed penalty to be paid for the violation.

- C. All NOAVs will be adjudicated by a hearing officer appointed by the Board for that purpose, and by the procedures hereinafter provided.

3. HEARING OFFICER(S) SHALL BE APPOINTED.

- A. The Board shall appoint one or more hearing officer(s), for the purpose of assisting the Board in enforcing the Dust Control Regulations.
- B. Any hearing officer appointed by the Board shall serve at the pleasure of the Board, in accordance with any applicable personnel ordinance or regulation; and he or she may be

removed at any time by action duly taken by the Board.

C. A hearing officer may be appointed to serve either part or full-time.

4. QUALIFICATIONS AND COMPENSATION OF HEARING OFFICER.

A. A hearing officer must be a licensed architect, attorney, engineer or a member of the American Institute of Certified Planners, or possess qualifications that the Board deems to be substantially similar to those required for licensing in such professions.

B. The Board shall set the compensation of the position of hearing officer as it deems appropriate.

5. DUTIES AND AUTHORITIES OF HEARING OFFICER.

A. During Air Quality Appeal Hearings and Adjudications (“Hearings”), the hearing officer shall hear, consider, decide and/or adjudicate all matters submitted to him or her relating to the enforcement of the Dust Control Regulations, including but not limited to:

- i. Adjudication of non-contested notices of alleged violations of the Dust Control Regulations, submitted with Settlement Agreements;
- ii. Hearing, consideration, decision and adjudication of notices of alleged violation for which the proposed penalties are contested; and
- iii. Hearing, consideration, decision and adjudication of notices of alleged violation for which both the facts and penalties are contested.

B. The hearing officer may take final action on a Notice of Alleged Violation (“NOAV”) issued pursuant to the Dust Control Regulations.

C. The hearing officer may issue subpoenas to compel attendance of any person at the Hearing of a matter submitted to him or her.

D. The hearing officer may issue subpoenas duces tecum to compel the production of books, records and other documents material to the Notice of Alleged Violation at issue.

6. RULES OF PROCEDURE.

A. The Hearing shall be held at a time, date and place established by the hearing officer, provided that:

- i. The Hearing must be held not later than 65 days after the matter is submitted to the hearing officer, unless a longer time is stipulated to by the cited person.
- ii. Notice setting forth the time, place and purpose of the hearing must be sent at least 10 days before the Hearing to the cited person;

- B. All testimony shall be provided under oath after identification by name and address, and recorded verbatim, by human or electronic means.
 - i. The hearing officer may inquire of any witness following any segment of testimony.
 - ii. Upon request, the hearing officer shall provide a transcript at the expense of the requesting party.
- C. A cited person may be represented at the hearing by legal counsel of his or her choice.
- D. Members of the public may be heard on cases before the hearing officer.
- E. Every decision by the hearing officer shall be memorialized in an Order of Adjudication.
 - i. Each Order of Adjudication shall be filed with the Clerk of the Board.
 - ii. Each Order of Adjudication shall be served by the hearing officer on the cited party, by U.S. certified mail first class prepaid.
 - iii. All dates for petition for rehearing and appeal shall be calculated from the date of service of the Order of Adjudication, allowing for three (3) calendar days for actual service by mail.

7. ACTION ON VARIOUS TYPES OF CASES.

- A. Non-contested NOAVs: When the Compliance Review Committee and cited party have agreed on the facts and penalty submitted to the hearing officer, the hearing officer may:
 - i. Adjudicate the non-contested agenda item and impose the agreed-upon penalty; or
 - ii. Reject the proposed penalty; in which case, the NOAV shall be removed from the Non-contested agenda and, unless good cause exists, set for hearing before the same hearing officer at a subsequent hearing.
- B. NOAVs with contested penalties: When the Compliance Review Committee and cited party agree on facts submitted to the hearing officer but disagree on the penalty, the Air Quality Program Administrator shall place the NOAV on the contested agenda before the hearing officer.
 - i. The Compliance Review Committee and the cited party shall inform the hearing officer of their respective recommended penalties and supporting reasons.
 - ii. The hearing officer shall decide the appropriate penalty, which need not be that

proposed by either the Compliance Review Committee or cited party; provided, however, that in no event shall the penalty imposed be more than \$10,000.00 per day for each violation cited.

- C. Contested NOAVs: When the Compliance Review Committee and cited party disagree on the facts and the penalty, the Air Quality Program Administrator shall place the NOAV on the contested agenda before the hearing officer.
 - i. The Compliance Review Committee and cited party shall provide testimony and supporting reasons before the hearing officer regarding the facts and recommended penalties.
 - ii. The hearing officer shall consider all of the records, including testimony and documentary evidence and shall determine whether there is clear and convincing evidence supporting the NOAV.
 - iii. If the hearing officer sustains the NOAV, he or she then shall impose a penalty, which shall not exceed \$10,000.00 per day for each violation declared supported by the evidence.

8. ISSUANCE OF STOP ORDERS.

- A. The Air Quality Program Administrator shall issue a Stop Order if any proposed construction, installation, alteration or establishment will not be in accordance with the provisions of Nye County Code 15.28.
 - i. A person served with a Stop Order shall immediately stop all activities specified in the Stop Order.
 - ii. A person served with a Stop Order may apply for its revocation at any time, setting forth the facts upon which he or she believes that the reasons for the issuance of the Stop Order no longer exist.
 - a. If the Air Quality Program Administrator finds that the reasons for the issuance of the Stop Order no longer exist, the Air Quality Program Administrator shall withdraw the order promptly,
 - b. If the Air Quality Program Administrator finds that the reasons for the issuance of the Stop Order still exist, or that other reasons exist for continuing a Stop Order in effect, the Air Quality Program Administrator shall, within 48 hours, issue a written statement detailing the reasons for continuing the Stop Order.
 - iii. The Air Quality Program Administrator's determination to impose and/or continue a Stop Order shall be reviewed during the NOAV adjudication process by the hearing officer; and the hearing officer's Order of Adjudication shall uphold, modify or overturn the Stop Order.

9. **PENALTIES.**

- A. Any person who violates any provision of the Dust Control Regulations shall be punished by a fine of not more than \$10,000.00 for each day of each violation.
- B. In addition to any penalty imposed by the hearing officer, via the NOAV process, the Air Quality Program Administrator may request that the District Attorney institute by indictment or information a criminal prosecution of any person believed to be violating the Dust Control Regulations.
- C. Violation of any provision of this Ordinance may be prosecuted as a misdemeanor punishable by fine not to exceed \$1,000.00 and/or imprisonment in the County jail not to exceed six (6) months.

10. **PAYMENT OF PENALTIES.** All penalties levied by the hearing officer shall be paid to the Nye County Air Quality Program Administrator, and will be used to maintain the Air Quality Program or other natural resource management programs of the County.

- A. All penalties are due and payable upon assessment.
- B. Failure to pay such penalties within five (5) calendar days of their imposition shall constitute a separate violation of the Dust Control Regulations and will subject the cited party to additional cases of alleged violations with separate and additional penalties.

11. **FAILURE TO TAKE PRESCRIBED CORRECTIVE ACTIONS.** Failure to comply with any order of the hearing officer requiring corrective action constitutes a separate violation of the Dust Control Regulations, and subjects the cited party to additional cases of alleged violations with separate and additional penalties.

12. **REHEARING OF FINAL DECISIONS.**

- A. Any petition for rehearing of a matter previously before the hearing officer must be based upon a mistake of fact or misapplication of the law made by the hearing officer, or failure of the hearing officer to completely dispose of the matter before him or her.
- B. A petition for rehearing must be filed with the hearing officer within fourteen (14) calendar days of the date the Order of Adjudication was served (allowing three additional days for mail service).
- C. The hearing officer shall determine whether rehearing of a matter is warranted; and he or she shall notify the cited party, the Code Compliance Officer, and the Compliance Review Committee in writing of his or her decision to grant or deny the petition.
- D. If the petition to rehear the matter is denied, the date of service of the written notice of that denial (allowing three (3) days for mail service) shall be used to calculate the date by which an appeal must be submitted.

13. **APPEALS OF HEARING OFFICER'S ORDER OF ADJUDICATION.**

- A. Any cited person aggrieved by the Order of Adjudication may appeal that decision of the hearing officer to the Board.
 - i. For the purposes of this Ordinance, a cited person shall be deemed to be aggrieved if he or she appeared, either in person, through an authorized representative or in writing, before the hearing officer, on the matter which is the subject of the Order of Adjudication.
 - ii. An appeal to the Board must be filed with the Clerk of the Board within 10 days of the date of service of the Order of Adjudication.
 - iii. An appellant shall pay to the Clerk of the Board a fee for the filing of appeal of Fifty Dollars (\$50.00) at the time of filing of the appeal; provided, however, that the fee may be waived if the Clerk determines that the appellant is indigent.
- B. The Board shall hear the appeal at a regular or specially agendized meeting of the Board.
 - i. The appeal hearing must be held not later than 45 days after the appeal is filed.
 - ii. Notice setting forth the time, place and purpose of the hearing must be sent at least 10 days before the appeal hearing to the appellant, the Code Compliance Officer, the Compliance Review Committee and the hearing officer.
 - iii. All testimony shall be provided under oath after identification by name and address, and recorded verbatim, by human or electronic means.
 - iv. An appellant may be represented at the appeal hearing by legal counsel of his or her choice.
 - v. Members of the public may be heard.
 - vi. The Board, in reviewing a decision of the hearing officer, shall be guided by the statement of purpose provided in NRS 278.020.
- C. Every decision of the Board shall be memorialized in an Order of Affirmance, Order of Modification or Order of Reversal.
 - i. Each Order of the Board shall be filed with the Clerk of the Board, not later than 60 days after the appeal is filed.
 - ii. Each Order shall be served by the Clerk of the Board on the appellant, by U.S. mail first class prepaid.
 - iii. All dates for appeal, as hereafter provided, shall be calculated from the date of service of the Order, allowing for three (3) calendar days for actual service by mail.

14. **APPEAL OF BOARD'S APPELLATE DECISION.** Any person aggrieved by the Board's Order of Affirmance, Modification or Reversal may appeal that decision to the district court in and for Nye County, by filing a petition for judicial review within twenty five (25) calendar days after the date of filing of Order with the Clerk of the Board, as set forth in NRS 278.0235.
15. **SEVERABILITY.** If any provision of this ordinance or amendments thereto, or the application thereof to any person, thing or circumstance is held to be invalid, such invalidity shall not affect the validity or provisions or applications of the ordinance or amendments thereto which can be given effect without the invalid provisions or applications, and to this end the provisions of this ordinance and amendments thereto are declared to be severable.
16. **REPEAL.** This ordinance supersedes and repeals any and all parts of the Nye County Code and Nye County ordinances or parts of ordinances in conflict herewith.
17. **CONSTITUTIONALITY.** If any section, clause or phrase of this ordinance shall be declared unconstitutional by a court of competent jurisdiction, the remaining provisions of this ordinance shall continue in full force and effect.
18. **EFFECTIVE DATE.** This ordinance shall be in full force and effect from and after passage, approval and publication as required by law.

Proposed on the _____ day of _____, 2009.
Proposed by Commissioner _____.

Passed on the _____ day of _____, 2009.

VOTE: AYES: Commissioners _____.

 NAYES: Commissioners _____.

 ABSENT: Commissioners _____.

BOARD OF COUNTY COMMISSIONERS OF
THE COUNTY OF NYE, STATE OF NEVADA

By: _____
Joni Eastley, Chairman

ATTEST:

Sandra Merlino, Nye County Clerk
and Ex-officio Clerk of the Board

This ordinance shall be in force and effect from and after _____, 2009.