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## memo

to: Board of Commissioners; County Manager; Assistant County Manager; Planning Director; Chair, Planning Board; Chair, Environmental Review Board

from: Kevin W. Whiteheart

date: July 24, 2007

re: Environmental Reviews under Subdivision Ordinance § 5.2.A

I am responding to the email discussions last week regarding the Knolls at Ferrington subdivision and environmental assessments under § 5.2.A of the Subdivision Ordinance (“SO”). The discussion was very timely, as Chatham County was sued last week by a developer claiming the rulings of the Planning Board and the Board of Commissioners (“BOC”) were arbitrary and capricious. The emails highlighted numerous points of concern which most agree need to be addressed (and rather quickly). However, it is important to flesh out the errors in legal analysis and to correct misunderstandings of the applicable law. Clarification of these items is extremely important; a common base of understanding on the issues is critical for fashioning a workable and legally enforceable solution on environmental reviews in the future.

### 1. No Delegation of Decision-Making Powers to the Planning Board.

The email discussion suggested the Planning Board possessed powers to “require” certain actions via its advisory recommendations submitted to the BOC. Under N.C.G.S. § 153A-332, counties may adopt 1 of 3 allowed structures for making final decisions on subdivision applications.<sup>1</sup> Since 1985 Chatham County has vested final approval authority in the BOC with

<sup>1</sup> § 153A-332. Ordinance to contain procedure for plat approval; approval prerequisite to plat recordation.

A subdivision ordinance adopted pursuant to this Part shall contain provisions setting forth the procedures to be followed in granting or denying approval of a subdivision plat before its registration.

*[irrelevant section omitted]*

The ordinance may provide that final decisions on preliminary plats and final plats are to be made by:

- (1) The board of commissioners,
- (2) The board of commissioners on recommendation of a designated body, or
- (3) A designated planning board, technical review committee, or other designated body or staff person.

an advisory recommendation from the Planning Board. Statutorily then, Chatham County has not delegated any decision-making powers to the Planning Board; and this is unambiguously and consistently reflected in our Subdivision and Zoning Ordinances.<sup>2</sup> These statements are not meant to diminish the important role and hard work of the Planning Board; rather, they clarify the interplay of the duties and obligations imposed on each board by N.C.G.S. § 153A-332 and the Chatham County Ordinances.

## 2. Advisory Recommendations versus Commissioners' Authority.

The point raised in Section 1 above is necessary to clarify the questions raised in the emails about the Planning Board's capacity to bind the BOC to any action contained in the Planning Board's advisory recommendations. This is particularly germane to the Planning Board's recommendation of the Knolls at Fearrington sketch plan heard on July 16, 2007. To avoid any misunderstanding I have taken the recommendation directly from the 07/16/07 Agenda Abstract:

*"The Planning Board recommends granting sketch design approval with the requirement that an environmental impact assessment be prepared and reviewed by the Environmental Review Board prior to preliminary plat submittal.*

First, the analysis and legal conclusions in the emails incorrectly conclude that the BOC is bound by "requests", "requirements", or any other similarly worded directive for a § 5.2.A impact assessment issued by the Planning Board:

*"The planning board clearly has not been informed it has the authority to require environmental impact assessments under this section of the ordinance. If they had known they had this authority, their "request" would clearly have been voted upon instead as a "requirement." Can the commissioners override a requirement for an environmental impact statement voted for by the planning board? It would be my view they could not under this ordinance. I would also*

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<sup>2</sup> The Subdivision Ordinance is replete with language which clearly vests the Board of Commissioners with the sole authority to approve all sketch plans, preliminary plats and final plats, and directs the Planning Board in its advisory review role:

**4.4. B.1:** "Following the Planning Board review and action the sketch design map shall be submitted for review and action by the Board of County Commissioners."

**4.4. B.14:** "Following the Planning Board's recommendation, plats of major subdivisions shall be reviewed and approved by the Board of County Commissioners for preliminary approval prior to making any site improvements. ...The preliminary action by the Board of County Commissioners shall be the governing action."

**4.7. A.1:** "The sketch design plan along with the Planning Board's recommendation shall be forwarded to the Board of County Commissioners. The Board of Commissioners will review the plan and indicate their approval, disapproval, or approval subject to modifications within forty-five (45) days of the official submission date to the Board of Commissioners.

**4.7. A.2:** "Approval of the sketch design plan by the Board of County Commissioners serves as permission to prepare other required plans for preliminary review".

**4.7. B.1:** "Within sixty (60) days after the official submission date of the preliminary plat, the Planning Board will review it and indicate their approval, disapproval, or approval subject to modification. .... The Board of Commissioners will review the preliminary plat and indicate their approval, disapproval or approval subject to modifications within sixty (60) days of the official submission date to the Board of Commissioners."

**4.7. C.1:** "Within sixty (60) days after the official submission date of the final plat, the Planning Board will review it and recommend its approval, disapproval or conditional approval. .... The Board of County Commissioners will review the final plat and indicate their approval, disapproval or approval subject to modifications within sixty (60) days of the official submission date to the Board of County Commissioners."

*argue that since the planning requested this under the assumption that this was the most they could legally do, then the commissioners under this section should be bound to the request of the planning board.”*

As § 153A-332, § 153A-344 and the sections of the SO cited in footnote 2 demonstrate, the BOC has not delegated any binding statutory authority to the Planning Board. Consequently the BOC is not bound by advisory recommendations, and they may reverse, modify, override or ultimately disregard any or all parts of the Planning Board’s written recommendations.<sup>3</sup> Therefore, contrary to the email discussion, the Planning Board’s “request” or “requirement”, however worded, for an environmental assessment has no legal effect nor does it bind the BOC.

**3. Environmental Assessments under § 5.2.A are probably unconstitutionally invalid for depriving applicants of federal and state due process standards.**

As many sadly agree, the SO needs clarifying and updating. A prime example of these problems became obvious at Monday night’s BOC meeting on the Sketch Design Approval Request for the Knolls at Fearington subdivision.

During the meeting, Commissioners questioned why the Planning Board was “requiring” the developers to submit an Environmental Impact Assessment, and under what legal authority did the Planning Board use to require an assessment and order an ERB review. Although I did not hear a few parts of the discussion because of computer misbehavior, I do recall that SO § 5.2.A and the ERB’s charter to conduct reviews were offered as the legal bases for this requirement.

This raises the issue of the validity of § 5.2.A.1 of the SO. That portion of the Ordinance reads as follows:

**5.2 Additional Sketch Design or Preliminary Plat Information**

**A. Impact Assessment**

*(1) Environmental*

*Pursuant to Chapter 113A of the North Carolina General Statutes, the Planning Board may require the subdivider to submit an environmental impact statement with the preliminary plat if the development exceeds two acres in area, and if the Board deems it necessary for responsible review due to the nature of the land to be subdivided, or peculiarities in the proposed layout. The environmental impact assessment shall address the following areas:*

- a. The environmental impact of the proposed action;*
- b. Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;*
- c. Mitigation measures proposed to minimize the impact;*
- d. Alternatives to the proposed action;*
- e. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and*
- f. Any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented.”*

Statutes, ordinances and regulations are stricken down by courts when the language is so vague as to be meaningless. The term which courts use for this problem is that the statute is

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<sup>3</sup> David Owens, in his treatise on planning and zoning, states: “The governing board is not bound by the recommendations of the planning board”. *Land Use Law in North Carolina* (UNC Press 2007). For additional authority, Owens also cites *In Re Markham*, 259 N.C. 566, 131 S.E.2d 329 (*cert. denied*, 375 U.S. 931 (1963)).

“void for vagueness”. The legal test to apply is whether the ordinance has any meaningful standards to give discretion to the decision-maker for how to apply the ordinance.

The highlighted area of § 5.2.A. offers a prime example of a vague and standardless ordinance. In the very first sentence, the ordinance refers to an “environmental impact statement”. This term is nowhere defined in the SO, and there are no criteria in § 5.2.A to guide or inform an applicant what is required for an acceptable “environmental impact statement”. Granted, there are some North Carolina agencies that may require environmental impact statements, but § 5.2.A does not refer to or direct readers to these state agencies’ guidelines. Moreover, § 5.2.A does not indicate whether using a state agency’s definition of “environmental impact statement” is acceptable.

When an ordinance does not define a term, the courts look to the plain English definition of the word to provide a meaning. The Oxford English dictionary defines “statement” as a noun which connotes: 1). “the expression in spoken or written words of something such as a fact or intention” 2). “something that somebody says that is not a question or an exclamation and that expresses an idea or facts in definite terms”; or 3). “a specially prepared announcement or reply that is made public”. Note that the plain definition clearly refers to an expression of fact. Query, would a written statement from the developer setting forth a factual conclusion that the proposed development would have no environmental impact satisfy the “environmental impact statement” referred to in § 5.2.A?

To complicate matters, the second sentence of § 5.2.A refers to an “environmental impact assessment”. Again, this phrase is nowhere defined in the SO. Courts employ the legal maxim *mutatis mutandis* which means each word employed in a legal document has an exact meaning which the drafter is required to define. So, while the average reader might rationally conclude that an “environmental statement” and an “environmental assessment” refer to the same thing, the law does not allow such an inference. Employing the Oxford English Dictionary, it defines “assessment” as: 1). “a judgment about something based on an understanding of the situation”; 2). “a fair assessment of the project”; or 3). “a method of evaluating performance and attainment”. As the Oxford Dictionary definitions show, a “statement” and an “assessment” contemplate completely different actions. Unfortunately, the reader of the § 5.2.A has no idea whether a statement or an assessment is called for, and must guess which route to take.

Finally, § 5.2.A fails to identify any meaningful criteria for the Planning Board or the BOC to determine when an environmental impact “statement” or “assessment” is “necessary”. In § 5.2.A, the term “necessary” is followed by the nebulous modifying clause “for responsible review due to the nature of the land to be subdivided, or peculiarities in the proposed layout”. The modifying clause is almost devoid of meaning, since it lacks any criteria for determining what aspects of the “nature of the land” or what types of “peculiarities of the proposed layout” trigger a review. There are numerous logical guesses one could make about the meanings of this clause. The same goes for items (a) through (f) under § 5.2.A.1.

In short, § 5.2.A is so vague and meaningless as to be easily struck down by the appeals courts. And even though the ERB has come up with proposed “triggers” to help address these issues, they have not been adopted as an ordinance by the BOC and therefore carry no legal significance or weight. Consequently, under § 153A-323 the County is prevented from imposing on applicants the criteria recommended by the ERB until a public hearing is held and the BOC adopts the recommendations as an official ordinance.

**4. Ordering environmental assessments using § 5.2.A as it is currently written subjects the County to lawsuits. The County's likelihood of successfully defending the ordinance is low.**

While § 5.2.A does provide for an Environmental Assessment, using this ordinance as it's currently written as a legal basis to require environmental assessments can and will lead to lawsuits against the County. The emails discussed the likelihood of applicants filing suit if they are required to conduct environmental assessments. The legal analysis suggested that few people would file lawsuits, and if so their only legal theory was to claim a denial of due process rights based on an "arbitrary and capricious" application of § 5.2.A.

It is extremely important to note that Section 5.2.A is at risk under two separate due process claims: 1). the ordinance is void for vagueness; and 2). application of the ordinance is arbitrary and capricious. While the stronger claim, in this situation, is the "void for vagueness" claim, it is worth remembering that the County was sued last week for "arbitrary and capricious" denial of a sketch plan. A brief explanation of these 2 theories is important to understand the substantial risks faced by the County.

**a. "void for vagueness".**

Governing bodies (here I am referring to counties) which enact ordinances or regulations have the duty to craft the language carefully so that it is easily understood what actions or steps are required or prohibited by the law. Courts reviewing an ordinance apply a threshold test: does the ordinance "apprise ordinary persons of reasonable intelligence what is required to abide by the law's requirements". *State v. Garren*, 117 N.C.App. 393, 451 S.E.2d 315 (1994); *Town of Atlantic Beach v. Young*, 307 N.C. 422, 298 S.E.2d 686, cert. denied, 462 U.S. 1101 (1983). Courts examine whether the ordinance contains clear and defined standards, or whether a person would have to guess at its meaning, and thereby run the risk of losing a substantive right or property interest if they guessed wrong. If you recall, at the 7/16/07 BOC meeting, a representative of the Knolls at Farrington project declined to voluntarily conduct an environmental assessment when asked directly by Board members. He publicly stated that he did not want to prepare an environmental assessment because § 5.2.A did not set out any guidance for what he was required to assess. His comments are very revealing, as they indicate the vagueness of § 5.2.A to the average reader.

**b. "arbitrary and capricious".**

The courts apply separate tests for due process violations asserted against governing boards, depending on whether they are acting in a legislative or quasi-judicial capacity. The courts give greater deference to legislative decisions made by boards, and grant them a "presumption of validity". However, governing boards which conduct hearings to determine if an applicant has met the standards in an ordinance act in their quasi-judicial capacity.<sup>4</sup> Due to the many discretionary standards contained the SO, the Planning Board and the BOC act in their quasi-judicial capacities on sketch plans and preliminary plats.

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<sup>4</sup> The North Carolina appellate courts have ruled that governing bodies which render decisions based on ordinances containing discretionary standards, the hearing is quasi-judicial and the decisions rendered are therefore subject to much tighter due-process scrutiny. *Guilford Financial Services LLC v. Town of Brevard*, 356 N.C. 655, 576 S.E.2d 325 (2003). Since the ordinances regarding final approval of sketch plans and preliminary plats in Chatham County contain discretionary standards throughout the Subdivision Ordinance, the Board is therefore acting in its quasi-judicial capacity. It is immaterial whether the ordinance defines the hearing as legislative.

These quasi-judicial decisions are subject to a much greater legal scrutiny for “arbitrary and capricious” application of an ordinance. When a board acting in a quasi-judicial capacity is sued for an arbitrary and capricious denial of a substantial right (i.e. denial of a sketch plan), the initial burden of proof is on the plaintiff to show an absence of stated, objective standards. The burden of proof then shifts to the governing body to prove the standards used and to identify the reasons why the applicant failed to meet the standards. This last sentence is important, as will be explained in more detail below.

## 5. Conclusions and suggestions regarding § 5.2.A:

Our quasi-judicial decisions requiring environmental assessments for sketch plans or preliminary plats place us in a very difficult position. Under N.C.G.S. § 153A-330 decisions based on sketch plans, preliminary plats and final plats must be based only on standards explicitly set forth in the ordinance.<sup>5</sup> Section 153A-330 was amended in 2005 to stem the tide of lawsuits against counties which were using undefined or inapplicable standards to deny subdivision requests. Moreover, when boards render decisions denying sketch plans, preliminary plats or final plats, individual board members must state for the record the reasons for denial. I do not recall if it is a regular practice for individual members of the Planning Board and BOC to state in the open meetings their reasons for denial.

As it appears from Sections 3 and 4 above that § 5.2.A is very susceptible to attack for due process claims of vagueness and arbitrary and capricious decision-making, I believe that defending these claims could be very problematic. Remember the statement that the burden of proof shifts to the governing board to prove its decision to deny a sketch plan was not arbitrary and capricious, and was based upon explicit, objective standards contained in the ordinance? This task could prove almost impossible if the minutes of the Planning Board and the BOB do not reflect the individual members of the boards stating their reasons for denial during the meeting. This leaves the County without a legally sufficient evidentiary basis to defend potential lawsuits based on § 5.2.A.

I believe the ERB has several environmental reviews awaiting their consideration. Since the ERB recommendations on “triggers” and stream buffers has not been acted upon, and there are no procedural rules or standards yet created for the ERB, this is may be a good time to review what action items are needed to ready the ERB for its work. Given the legal issues surrounding § 5.2.A, I would respectfully suggest that the Board of Commissioners consider what action, if any, should be taken on these pending ERB reviews in light of the issues raised in this memo. I would also suggest that the Board consider whether it is appropriate for the Planning Board to continue to request environmental assessments under the current version of § 5.2.A.

I would appreciate any feedback you have and I am ready to assist in any decision of the Board.

Sketch plan review memo.doc (07.24.07)

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<sup>5</sup> § 153A-330. **Subdivision regulation.**

A county may by ordinance regulate the subdivision of land within its territorial jurisdiction. .... Decisions on approval or denial of preliminary or final plats may be made only on the basis of standards explicitly set forth in the subdivision or unified development ordinance. Whenever the ordinance includes criteria for decision that require application of judgment, those criteria must provide adequate guiding standards for the entity charged with plat approval. (1959, c. 1007; 1965, c. 195; 1973, c. 822, s. 1; 2005-418, s. 2(b).)