MEMORANDUM

Poyner Spruill LLP

To: Jason Sullivan, Planning Director

From: Bob Hagemann, County Attorney

Date: November 2, 2021

Re: Legal issues regarding proposed amendments to the Chatham County Subdivision Regulations and Conservation Subdivision Guidelines

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This is in response to your request that I review proposed amendments to the above-referenced ordinances. Specifically, you asked me to comment on: (1) the proposed amendment to the Subdivision Regulations that would provide for a review by the Environmental Review Advisory Committee (ERAC) of Environmental Impact Assessments (EIA) and peer reviews; and (2) whether the County could prohibit off-site septic systems and, if so, could they be prohibited only in certain types of subdivisions.

1. EIA Amendment

The proposed amendment regarding ERAC review of an EIA and peer review would add the following new subsection to Section 5.2.C.(2)b. of the Subdivision Regulations:

> (3) The peer review shall be forwarded to the Environmental Review Advisory Committee to review the adequacy of the EIA and the peer review of it. They shall have 45 days to complete their review.

As you know, the primary thrust of the National Environmental Policy Act (NEPA) and the North Carolina Environmental Policy Act (SEPA) is to require federal and state decision-makers to consider the environmental impact of discretionary decisions, including the environmental impact of alternatives. Legal compliance with these laws is essentially limited to a review of whether the appropriate environmental documentation was prepared, whether the documentation was adequate, and whether the documentation was considered in making the discretionary decision.

Of relevance, SEPA authorizes local governments to require, by ordinance, private developers of major development projects to submit detailed statements of the impact of such projects. *See* G.S. 113A-8. In Chatham County those detailed statements are referred to as an Environmental Impact Assessment. For purposes, I assume, of ensuring that a developer-provided EIA is "adequate," the current ordinance provides for a "peer review." In practice, it is assumed that the EIA is prepared by a qualified and experienced expert hired by the developer, and the peer review is conducted by a qualified and experienced expert hired by the County (with the cost paid by the developer). Against this background, the proposed amendment would, as noted above, subject the EIA and the peer review to review for adequacy by the ERAC.

While I can't say that the proposed amendment is legally defective, I do see potential practical problems and questions that should be considered. First, assuming the professional peer review determines that the EIA is adequate, what additional benefit is provided by an adequacy review by a lay board (please note that by using the phrase "lay board" I am not passing judgement on the qualifications or competence of any member of ERAC)? And how would such a disagreement be resolved? Second, the proposed ordinance is silent on the actions or remedies that would be available should ERAC find deficiencies in the EIA or peer review. Finally, there is potential legal peril should ERAC make an adequacy determination that stops a project and challenged as inconsistent with legal adequacy standards developed by the courts that are, presumably, understood by professionals who engage in the preparation of EIAs and conduct peer reviews.

In short, I am not making a legal recommendation against the proposed amendment. I do, however, urge the Planning Board and Board of Commissioners to carefully weigh and evaluate the benefit of the proposed amendment against potential problems that it may create.

<u>2. Off-Site Septic Tanks</u>

In 2019, the General Assembly amended G.S. 130A-335 by adding a new subsection (c2) to read:

> Notwithstanding any other provision of law, a municipality shall not prohibit or regulate by ordinance or enforce an existing ordinance regulating the use of off-site wastewater systems or other systems approved by the Department under rules adopted by the Commission when the proposed system meets the specific conditions of the approval.

Implicit in this express preemption of municipal (*i.e.,* city or town) authority is that counties are not similar preempted. So, in my opinion, the County may prohibit off-site septic systems.

Furthermore, it is my opinion that there may be rational reasons that would justify differentiating between conservation and conventional subdivisions, and between minor and major subdivisions. For example, conservation subdivisions are by their nature designed to be more conscious of environmental impacts and concerns. To the extent that off-site septic systems pose potential problems that on-site systems do not, prohibiting them in conservation subdivisions would appear to be rational. Similarly, allowing off-site systems in minor subdivisions which, by definition, create fewer lots than major subdivisions, would appear to be a rational distinction.

I am happy to discuss these matters further or in more detail with you, the Planning Board, and the Board of Commissioners.