



## Chatham County Planning Board Minutes February 20, 2024

The Chatham County Planning Board met in special session on the above date and the meeting were as follows:

<u>Present</u>		<u>Absent</u>
Jon Spoon, Chair	Clyde Frazier, Vice-Chair	Tony Mayer
Mary Roodkowsky	Shelley Colbert	
Norma Hernandez	Eric Andrews	
Elizabeth Haddix	Amanda Roberson	

### Planning Department

Jason Sullivan, Director, Chance Mullis, Assistant Director, Angela Plummer, Zoning Administrator, Kimberly Tyson, Subdivision Administrator, Hunter Glenn, Planner II, and Dan Garrett, Clerk to the Planning Board.

- I. CALL TO ORDER:  
Chair Spoon called the meeting to order at 6:30 p.m.
- II. DETERMINATION OF QUORUM:  
Chair Spoon stated there was a quorum, 9 members were present.
- III. APPROVAL OF AGENDA:  
Approval of the Agenda – Ms. Robertson asked if the Planning Board Rules & Procedures and Code of Ethics could be part of the discussion. Motion made by Ms. Haddix, seconded by Mr. Frazier. The agenda was approved, 9-0, unanimously.
- IV. ELECTION OF THE OFFICERS:  
Mr. Sullivan held the election for the Planning Board Chair and Vice-Chair. Mr. Frazier nominated Mr. Spoon for the Chair position. Ms. Robertson nominated Ms. Roodkowsky for the Chair position. Mr. Sullivan held a vote for Mr. Spoon and the vote was 5. Mr. Sullivan held a vote for Ms. Roodkowsky and the vote was 4. Mr. Spoon was voted to the Planning Board Chair position for one year.  
  
Chair Spoon held the elections for the Vice-Chair position. Chair Spoon nominated Ms. Haddix for Vice-Chair. Ms. Robertson nominated Ms. Roodkowsky for the Vice-Chair position. Chair Spoon held a vote for Ms. Haddix and the vote was 2. Chair Spoon held a vote for Ms. Roodkowsky and the vote was 7. Ms. Roodkowsky was voted to the Planning Board Vice-Chair position for one year.

V. DISCUSSION WITH COUNTY ATTORNEY:

Mr. Bob Hagemann is the Chatham County Attorney, who is an attorney with Poyner & Spruill, LLP, and is on retainer with the county. Mr. Hagemann was asked to come to the Planning Board to discuss the different procedures the board will observe and experience as well as their role in the process.

- Mr. Hagemann thanked the Planning Board members for having him tonight and would like to have more of a dialog rather than a lecture, so everyone feels comfortable asking questions or clarification. Mr. Hagemann stated he would like to cover the submitted questions and go over the three different types of Land Use decisions, legislative, quasi-judicial, and administrative. Mr. Hagemann said he would also like to touch on open meetings law and public records as well.
- Mr. Hagemann said a legislative decision is a decision only made by the Board of Commissioners (BOC), which is primarily rezoning cases and text amendments to an ordinance. Commissioners have the broadest discretion of all the three different types of Land Use decisions. In fact, I am not aware of a single case in North Carolina history where a court ruled that the denial of a legislative decision whether it is a rezoning or text amendment that was overturned. The Planning Board will see all of those cases and make recommendations to the BOC. In the legislative cases the Planning Board has the most discretion than the other Land Use decisions.
- Mr. Hagemann said the second decision is quasi-judicial, and the only involvement with the Planning Board for this type of decision will only be Special Use Permits (SUP). Most of our quasi-judicial cases have mostly been minor, non-conventional, and none of them have gone to court. We have a SUP application going on right now that is in the middle of a hearing, and under our current ordinance, you as the Planning Board get to hear this case and make a recommendation to the BOC after they hold the hearing. Mr. Hagemann stated this item required a special study of the Environmental Impact Assessment (EIA), which also included a peer review. The Environmental Review Advisory Committee (ERAC) reviewed the EIA and the peer review and were prepared to make a presentation to the BOC. Mr. Hagemann pulled up the North Carolina Statute Chapter 160D section 301a, "A local government may by ordinance provide for the appointment and compensation of a planning board or may designate one or more boards or commissions to perform the duties of a planning board." Following subsection b is seven duties assigned to the planning board and it does make it clear that the BOC can give those duties to another board, but they have not given them to ERAC. So, ERAC is not recognized in our ordinance as having a role in a SUP. The Planning Board however does have these duties, but the problem we will run into is section b.6., "To provide a preliminary forum for review of quasi-judicial decisions, provided that no part of the forum or recommendation may be used as a basis for the deciding board."
- Mr. Hagemann said because of the way we have our process structured right now, the BOC will hold the public hearing, then the item comes before the planning board, then back to the BOC for the decision. Because of Chapter 160D-301 b.6., your recommendation may not be used as a basis for the BOC. How it should be is the applicant would come before the planning board before the public hearing to provide a preliminary forum and to help orchestrate a better application if needed before going to the public hearing. We currently have this in reverse, staff and I are working on different issues like this to be fixed in the Unified Development Ordinance, (UDO). Chair Spoon asked if there was any value in the way that we conduct this now and should this particular item be placed on consent because we have no bearing on the decision? Ms. Haddix stated it is not that the BOC cannot consider it, it just cannot be the basis for the deciding board. Mr. Hagemann said here is the problem with that, quasi-judicial means sort of court like, it is an evidential hearing where there are standards, evidence, and facts. The deciding body, the BOC, is supposed to hear the evidence, with no ex-parte communication, no gathering of evidence outside of the hearing. It is a trial, and the parties have a due process right to know the evidence and to question witnesses, cross examine witnesses, and then the BOC will need to make findings and facts, then the

board will apply their factual findings to the legal standards to determine whether or not the applicant has met their burden to be entitled to the SUP.

- Ms. Colbert said when this item comes to the Planning Board after the public hearing, doesn't the process provide the public an opportunity for their input? Not so much for the commissioners, but for the applicant to take into account the public's concerns. Mr. Hagemann stated that is a great question, but what happens is it raises a bigger point, it creates false expectations. One of the realities is people are not familiar with Land Use laws and all they really know is they elected this official, and they want them to vote a certain way, but in reality, they cannot always do that. Mr. Smith asked who is the professional to represent the public? Mr. Hagemann stated in a legislative process anyone can speak and be the representative. Chair Spoon asked if Mr. Hagemann has seen an HOA hire a lawyer or a professional to represent the community. Mr. Hagemann said yes, that can happen so the public is represented, but it can be expensive.
- Mr. Sullivan stated we are considering doing away with special use permits all together and looking at some other options. Mr. Hagemann said we could do away with SUP and just have conditional use rezoning. I really do not like my elected officials involved in quasi-judicial processes because of the false expectations from the public.
- Mr. Hagemann said the third category is administrative, which is even more constrained as the other decisions. The administrative decisions you see are the subdivision items that come before this board. The administrative decisions are really just check the box situations which means, does this application meet all of the requirements in the ordinance, and if so, there is no discretion. Mr. Hagemann talked about the situation where Briar Chapel had some Final Plats coming before the board and really what the planning board is looking at is the Final Plat consistent with what was approved during the First Plat process. In this case, leading up to the Final Plat there were some sewage spills, pipe issues, and odors which are legitimate concerns, but that does not give us any basis to deny a Final Plat. The developer did not own or operate the wastewater treatment utility and it was not their responsibility. Whatever fault that there was, it was not the developers issue and why should they be punished for Final Plat approvals for something they have no control over. There is also a preemption issue, State law puts NCDEQ largely in charge of enforcement and in fact the operator of the plant had received notices of violations. My job is to help the commissioners to understand what they are allowed to do and what will lead us into litigation. Lastly, in order for me to have any fighting chance to defend a denial in court, what criteria or what standard is not met.
- Chair Spoon said one of the boxes that they needed to check was to provide ample and suitable sewer, but we had evidence that it was not true. Mr. Hagemann stated there was a preemption issue there, because in the subdivision process the applicant can either have septic systems or a package plant that they can tie into. The treatment facility was there and the enforcement for any issues is controlled by NCDEQ. If there were no septic systems on the plan or no sewer to tie into, then yes, the box would not be checked and there would be a legitimate reason for denial. Mr. Hagemann stated he had to publicly explain why the commissioners where required to allow this Final Plat to be approved. Ultimately, the BOC did not vote on the item, and it was approved by default.
- Ms. Colbert asked about the Preliminary Plat or the First Plat, what should we be looking at if we have a disagreement regardless of the staff recommendation. Mr. Hagemann stated if the parcel is in the correct zoning such as R1 residential, with a minimum of 1 acre lots, and all the other requirements of the subdivision ordinance such as the setbacks, the size of the roads, the required buffers, and so on. If they layout a subdivision and it meets all of the standards, we have to approve it. We do not have the authority to deny a plan if it meets all of the standards just because we do not like it. What that is doing is second guessing the rules and not giving the applicants a clear direction or set of standards to follow. If you do not like the rules or the standards, then send a recommendation for a text amendment to the ordinance, change the rules. The BOC's job, the planning board's job, and staff's job is to do an assessment to see if

the plan meets the rules, and if it does not meet the standards and it is denied, I need to know what standard is not met so I can defend our decision. Chair Spoon stated we made some changes to the conservation subdivision standards because we did not like the applications being submitted and it did help a lot going forward. Mr. Hagemann said he understands when an adjoining property owner lives next to a nice wooded and secluded area, but then a subdivision development is planning to come, and they are upset because they do not want all these new neighbors. The issue is that the land was already zoned as residential and is allowed. If the Planning Board is going to deny a subdivision application, then the BOC needs to know what standard has not been met before they can deny it, otherwise, I will not be able to defend the denial decision in court.

- Mr. Andrews said we also need to be aware of the incredible amount of money that is spent by the applicants before it even comes to the planning board, because they think if they meet x, y, and z, the expectation is an approval decision. Ms. Colbert stated very recently we had an applicant who provided information and there was a discrepancy in the engineering report. There is still room for scrutiny over what is being presented because mere assertions are not facts. Mr. Hagemann stated he agrees and in fact that is the role of this Planning Board to review the application and provide a voice if the staff were to happen to miss something. Ms. Colbert said sometimes the public, as part of that process is bringing forth information that was not available to the staff and they raise concerns, and it can be looked at more deeply.
- Ms. Robertson said we had a bad plan before us, but it checked all the boxes, but we asked them to take a month to see if they could work a few things out to make the plan better and work with the neighbors. Ultimately, the majority of the members voted a recommendation to deny the application, in the meantime some Planning Board members did some digging, and a report was provided that did identify some reasons for the denial. Subsequently, I did speak to our commissioners and asked them how they would like us to handle a subdivision that is fundamentally a bad plan and does not uphold the standards that we have in Chatham County. The commissioners said we needed to look at the UDO and make sure bad plans like that one did not come through the process anymore. What is the best way to let the commissioners know that a particular plan is bad even if it meets the standards and checks all the boxes? Mr. Hagemann stated let us talk about that issue and also the open meetings issue as well. Your Planning Board ordinance mentions a minority report, but how do you complete a majority report after the meeting has ended? Ms. Robertson said in this case it was just two members who drafted the report. Mr. Hagemann said that also raises the question, is the report just their option or are they speaking for all of the people that voted with them and would they have voted the way they voted had they known this is what they were voting on.
- Mr. Hagemann said he wants to touch on e-mail communication and how they should be conducted going forward. North Carolina open meetings law says if the majority of the body meets in person or electronically it triggers the open meetings law and is an official meeting and it needs to be open and available to the public like this meeting is tonight. That law was written before we had e-mail in existence and where is the line you do not want to cross, because there is a line. The general consensus is Mr. Sullivan can send an e-mail to all of you at the same time asking if you will be at the scheduled meeting and that is not a violation of the open meetings law. All of you can reply with your response to his question. That is not the business of the board, nothing is being discussed other than attendance. However, when you as members start debating and discussing the substance of your business as a group on e-mail, that is getting very close to a line we do not want to cross. Vice-Chair Roodkowsky asked if we could discuss procedural issues rather than substantive issues? Mr. Hagemann said that is still the business of the board and would not recommend it. Ms. Robertson asked about a quorum and when it is allowed to discuss something, and when it is not a violation of the open meetings law? Mr. Hagemann stated you have 10 members, so 5 of you can get together and have a discussion and it is not going to trigger the open meetings law. Mr. Frazier asked if it is okay to share information to 3 people and then 4 people such as the report Ms. Haddix and Mr. Mayer prepared? Mr. Hagemann said it is not triggering the law, but there is also the spirit of the law.

Let us say the Chair is wanting to get the temperature of the board about something and sends all of you an e-mail but asks that you just reply back to him. In reality he is almost taking a vote, but it is not a binding vote and legally, I think I could defend that, but is it a great idea, I am not sure that it is. We just need to be mindful of our communications and if something becomes more than a quick response, there should be caution.

- Ms. Haddix stated the reason I wrote that report and Mr. Mayer participated, we each had an understanding of why we voted the way that we did. We collected information individually and some of the information was discussed during the meeting, but some was discussed after the meeting. The vote happened and what we understood from Mr. Sullivan was we needed to give a reason for the denial with evidence in the ordinance for what standards had not been met. That was the purpose of that report, it was not to influence the vote. Mr. Hagemann said he understands the reason for the document and in a minority, five of you can get together outside of a meeting and write a report on how you may feel about something without open meetings law violation, the problem in this case is the report could have been perceived as a representation of how the majority felt when in reality, it may have only been the way two members of the majority vote felt. Ms. Haddix stated the report was not a majority report, it did clearly state this was the work and opinion of Ms. Haddix and Mr. Mayer.
- Ms. Haddix said maybe it would be better to have a clear understanding of what was asked of us at that meeting after we voted. Mr. Sullivan said I tried to stress that we needed the reason and where the standard was not met during the meeting, so it was on the record within the meeting minutes. Ms. Haddix said she misunderstood, because it seemed to be needed before the item went to the BOC. Mr. Sullivan said towards the end of the meeting that is where we needed to go because we ran out of time, but ideally when there is a motion for denial the standard that was not met would be mentioned so it is on the record.
- Ms. Colbert said the requirement for the minority report is that you had to have voted in the minority. This was a minority report from the majority. The context of the Ethics document and the Rules & Procedures say that all communication to the BOC will be through the Chair or the Planning Director. In this case Chair Spoon voted differently so all communication and supplemental information should have gone to Mr. Sullivan to be included in the abstract, that would have been procedurally correct. Ms. Colbert said after an item was voted on should you be able to retroactively apply fact gathering after a decision had already been made, that concerns me. Mr. Andrews stated if we are voting to deny something and then we are looking for a reason to substantiate it afterwards, is that a valid reason to deny the item in that meeting. Mr. Hagemann said yes, ideally you would identify the reasons before the vote that way everyone knows what they are voting on and if they agree with those reasons.
- Vice-Chair Roodkowsky asked what would have been the best way to address that issue because it was the second meeting of the subdivision item and an action was required at that meeting, would it be okay to adjourn or a recess for a short period of time to collaborate to avoid this type of situation. Mr. Hagemann said yes, a recess is allowed for a minority to get together for a few minutes and then bring the basis for doing so back to the board and then that way everyone knows what they are voting on.
- Ms. Robertson said maybe the better way to handle that situation was if it did in fact check all the boxes and it did require an approval, but it was a bad plan the voting minority could draft a report and then share that with the commissioners, so they are aware that yes, the plan was approved, but it is a bad plan, and this is why within the minority report. Mr. Hagemann said that is allowed and within your regulations to do so. Mr. Smith asked if Ms. Haddix and Mr. Mayer could have addressed the commissioners at the BOC meeting about this issue. Mr. Hagemann said yes, there are public comment sessions, but it is my job to remind the commissioners what is legal and again, we do not want to create false expectations.
- Ms. Robertson said are we doing the commissioners any favors by not informing them of a bad plan when it comes before them? I feel that they should be aware and informed of the issues this a particular plan. Mr. Hagemann said one of the duties of the Planning Board is to prepare, review, maintain, and periodically

update and recommend to the governing board a comprehensive plan. Develop and recommend policies and ordinances, so if you see something or a plan you do not like, but you cannot find a standard not met, initiate a text amendment, and change the ordinance. You would reluctantly have to approve this plan but make the changes, so it does not keep happening.

- Mr. Hagemann said we need to keep moving along on our agenda and I wanted to touch on attorney fees. If we as a county go to litigation to defend a decision there can be very significant attorney fees if we do not win the case. The county would be responsible to pay the other parties' attorney fees for the entire case and as an example there was a case where \$300,000 was paid, so it is very significant. Mr. Smith asked if we should have personal liability insurance. Mr. Hagemann said the county has a policy to defend their officers and employees.
- Mr. Hagemann said he is going to spend some time to look over the Planning Board Code of Ethics and also the Rules & Procedures because these seem a little out of date and Chapter 160D has a section that has been around for about three years now that we could look at helping make some amendments. Chair Spoon said when we have a light agenda, we can take some time to go through these documents. Mr. Hagemann said yes, we can work through this together with staff and Chapter 160D. There was some board discussion about ethics and conflict of interest and what determines close association with an applicant and what does not. Mr. Hagemann read from Chapter 160D-109 under Conflict of Interest, "A governing board member shall not vote on any legislative decision regarding a development regulation adopted pursuant to this Chapter where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member. A governing board member shall not vote on any zoning amendment if the landowner of the property subject to a rezoning petition or the applicant for a text amendment is a person with whom the member has a close familial, business, or other associational relationship." An example of associational relationship would be like this, if you go to the same church as the applicant and you ask them how is your day going? Is that a close associational relationship, no it is not. Now if the applicant is your fraternity brother and the best man in your wedding, your family's vacation together every summer, yes that is a close associational relationship and would be an ethical problem. Vice-Chair Roodkowsky quoted the Planning Board Code of Ethics, "Any interest in real property enjoyed by Planning Board members or any of the aforementioned third parties, lying near or in any way affected by the decisions of the Planning Board." Vice-Chair Roodkowsky asked, does that mean you cannot vote on something in your subdivision? Mr. Hagemann said with the way the current ethics code is written, I would have problems with it and that is why we need to revise the ethics code.
- Mr. Hagemann said he received a question that asks what is a reasonable basis for rejecting a staff recommendation. You are not really rejecting the staff recommendation, you are making your own recommendation which does not have to be consistent with the staff recommendation, it just needs to be solid. Staff may miss things, you as a board may find things in your research or discussion. Staff does a great job of doing the groundwork and weeding out any issues before it comes to this board to make your life easier. However, if you find something you are not bound to follow their recommendation.
- Mr. Hagemann asked if there was any more clarification needed on e-mail communications. Ms. Colbert said on more than one occasion she has provided to the whole board information I had found in either public record or governmental sources, is that something we need to be concerned about if you are simply providing information? Mr. Hagemann stated he is okay with that, as long as the body does not start

conducting business about it. Mr. Frazier said some of the information shared could be seen as an argument for approval, there was nothing said to persuade one way or the other in any way, the information was just provided. Is that problematic? Mr. Hagemann said he does not think that will violate the open meetings law. Mr. Frazier said we could lobby our other board members as long as we don't engage in a debate or discussion. Mr. Hagemann said just remember that those e-mails are public record and just do not debate.

- Mr. Hagemann said there was a question about abstention while voting. I did not see anything in the planning board ordinance about it, the BOC have it in their rules and procedures a failure to vote without being excused is an affirmative vote. In your case, I think you can abstain, you are not doing your job, but it is allowed. Mr. Andrews said he recently abstained his vote on the water plant item because he felt that it was far out of the scope of his expertise, he did not feel comfortable giving a recommendation to the BOC. Mr. Hagemann said if I understand your rules that is permissible. Chair Spoon asked the board members not to start abstaining just because there might be a hard decision on an item.
- Mr. Hagemann said there was a question about if more people get involved in a particular application can we limit the participation to citizens who only live in the county. I do not think you can do that and trying to do so would be very difficult and awkward.
- Mr. Hagemann said there was a question about what happens if there is a tie vote. If that happens, it is nothing, the motion did not pass. Another motion would be in order, but if it is a deadlock of 5 and 5 vote, you pass it along to the commissioners without a recommendation.
- Mr. Frazier said in the Rules & Procedures it says cancelation of a regular meeting is subject to the North Carolina open meetings law, I do not know what that means. Mr. Hagemann said he does not know what that means either, there is nothing clear as to who has the authority to cancel a meeting. Chair Spoon said we recently canceled a meeting due to bad weather. Mr. Hagemann said if you, as the Chair says we are not having the meeting and nobody shows up, then there was not a meeting. Ms. Colbert said the Rules & Procedures says the board shall meet once a month, I understand emergencies or bad weather, but the problem that I have with cancelling meetings even if there is nothing on the agenda from a procedural standpoint is the meeting is scheduled to receive public input and we could discuss other matters that get pushed aside because of long agendas. The rules do say we shall have a regular monthly meeting and I feel that we should be sticking to that. Mr. Hagemann said there is no legal requirement that the Planning Board meet monthly, that is a provision in the rules, there is no State law requirement. There is not a consequence, and nobody is going to file a lawsuit because the Planning Board did not meet last month.
- Mr. Hagemann said there was a question about the Chair not making a motion. There is no legal prohibition on the Chair making a motion, it is customary normally to allow another member to make the motion, but I have seen the Chair of the commissioners make a motion. The Chair normally oversees the meeting and the debate but can make a motion if needed.
- Mr. Hagemann said in closing, my biggest ask of you as the Planning Board is to be thoughtful of the position you are putting the elected officials in when you are making a recommendation. In many ways you are not only providing an advisory role, but also a bit of a political cover for them and to do the opposite by putting them in a difficult political situation, I encourage you to avoid that if you can. I go back to false expectations, if you as a board vote 8-3 to recommend a denial of a subdivision the public is going to be

very happy with you, but then I have to counsel the commissioners and inform them we have to approve this or we will be in litigations.

- Chair Spoon said Mr. Hagemann and Mr. Sullivan are going to review our Code of Ethics and Rules & Procedures to make sure they are up to date and if we need to spend some time in a meeting updating those, we will do that on a light agenda. Ms. Robertson said there are some items in the Rules & Procedures that we are not doing such as a report of the previous year to the BOC and we are supposed to review the budget of the Planning department. It would be good for us to review these documents and make changes where they need to be made. Ms. Colbert asked if an annual report was ever written and presented to the BOC. Mr. Sullivan said it was many years ago when the last report was done.
- Ms. Colbert said our Rules & Procedures say we should refer to Robert’s Rule and even though it is not the most perfect way to conduct this type of a meeting, but we have had some meetings where we were talking over each other, interrupting each other, and times when a discussion was cut off without everyone’s input, and I hope going forward we do a better job following the spirit if not the letter of the rules. It is important for us to have a full discussion and to keep the agenda moving forward, it is important not only for us as a board, but also to the public and their observations as to how this board operates. We need to do a better job about raising our hands to be recognized and allowing everybody to have an opportunity to speak. Ms. Robertson said we have the option to have a parliamentary role and that might be something we look into and have someone who is more aware and can share that knowledge with us and we can decide if that is something we would like to do. Mr. Frazier said I feel that our discussions and procedure has improved recently with fewer interjections and more hands being raised. We are close to where we need to be.
- Chair Spoon thanked Mr. Hagemann for his time and input for the Planning Board.

VI. ADJOURNMENT:

There being no further business, the meeting was adjourned at 8:11 p.m.

Signed: \_\_\_\_\_ / \_\_\_\_\_  
Jon Spoon, Chair Date

Attest: \_\_\_\_\_ / \_\_\_\_\_  
Dan Garrett, Clerk to the Board Date