STATE OF NORTH CAROLINA
CASWELL COUNTY
WATERSHED REVIEW BOARD

In the Matter of the Appeals from The Issuance of Watershed Protection Permits and Special Non-Residential Intensity Allocation Permits to Carolina Sunrock LLC and to ETREE LLC

CHAIRMAN'S ORDER ON MOTIONS TO DISMISS

PRELIMINARY MATTERS

THESE MATTERS came before the Caswell County Watershed Review Board ("WRB") on the appeals made by more than 50 appellants seeking reversal of the issuance by the Caswell County Watershed Administrator of Watershed Protection Permits and Special Non-Residential Intensity Allocation ("SNIA") Permit for two sites in Caswell County. The first site is an 84.2 acre site located at 12971 NC Highway 62, and is referred to as the "Burlington North" site. By applications dated December 5, 2019 and December 20, 2019, respectively, Carolina Sunrock LLC sought a Watershed Protection Permit and a SNIA Permit to build a hot mix asphalt plant, ready mix concrete facility, offices and future shop at the Burlington North site. Those permits were approved by the Watershed Administrator on January 7, 2021 and January 4, 2021, respectively. By applications dated January 8, 2020, ETREE LLC sought a Watershed Protection Permit and a SNIA Permit to build a hot mix asphalt plant, ready mix concrete plant, quarry and assorted facilities on a 630-acre site located at 1238 Wrenn Road, referred to as the "Prospect Hill" site. Those permits were approved by the Watershed Administrator on January 5, 2021 and January 6, 2021, respectively. The Watershed Protection Permits and the SNIA Permits for both sites were issued pursuant to authority granted to the Watershed Administrator by Article 10 of the Caswell County Unified Development Ordinance ("UDO").

Numerous individuals and the Day-Holt Chapter of the NAACP filed appeals from the issuance of the permits for the two sites. Pursuant to Caswell County UDO Section 10.10.6.1, appeals from determinations made by the Watershed Administrator under UDO Article 10 are made to the Watershed Review Board (per Section 10.10.6, the Caswell County Planning Board acts as the Watershed Review Board with jurisdiction to hear appeals from determinations made by the Watershed Administrator). Appellants Anita Foust, Byron Shoffner and the Day-Holt Chapter of the NAACP are represented by attorney Valerie Bateman in the appeals. Foust, Shoffner and the NAACP (the "NAACP Appellants") filed their appeal on February 3, 2021. All other appellants (the "Remaining Appellants") filed their appeals separately and on various dates between February 2, 2021 and February 6, 2021, and are represented by attorneys James Conner and Shannon Arata. Carolina Sunrock LLC and ETREE LLC (who hereinafter are referred to

collectively as "Sunrock") are represented by attorneys William Brian and Jeffrey Roether. Caswell County is represented by County Attorney Brian Ferrell. Several of the Remaining Appellants have withdrawn their appeals (Jean Roberts, Herman Roberts, Kim Merritt and Lawrence Merritt, Jr., Sylvia Saunders and Homer Saunders, Jennifer Connor and John Connor, and Stephen and Virginia Pietsch) and therefore are no longer parties to the appeals.

On September 19, 2022, Sunrock filed a motion to dismiss the appeals. Sunrock sought dismissal of the NAACP appeals "to the extent they raise any issues other than those arising directly under the Caswell Count Watershed Ordinances." And Sunrock sought dismissal of the Remaining appeals in their entirety. Caswell County joined in the motion to dismiss. Pursuant to N.C. Gen. Stat. 160D-406(d), the Chairman of the WRB has authority to hear and decide "objections regarding jurisdictional and evidentiary issues, including, but not limited to the timeliness of an appeal or the standing of a party". The WRB conducted a hearing to consider the motions to dismiss on November 15, 2022. Counsel for all parties were given and took the opportunity to submit briefs prior to the hearing, and all counsel were given the opportunity to and took the opportunity to be heard at the hearing. This Order constitutes the WRB Chairman's decision on the motions to dismiss. Pursuant to N.C. Gen. Stat. 160D-406(d), any party aggrieved by the Chairman's decision has the right to appeal that decision to the entire WRB.

DISCUSSION

As an initial note, Sunrock has argued that the various appellants, or most of them, do not have legal standing to maintain their appeals. That issue is not now before the Chairman or the WRB on these motions and, therefore, for purposes of this discussion the Chair will assume (but does not make any formal determination) that at least one appellant does have legal standing.

The WRB has such authority as is granted to it by the Caswell County Unified Development Ordinance ("UDO"). The UDO establishes environmental regulations for Caswell County's planning jurisdiction and, as is relevant here, Part II of UDO Article 10 establishes the Watershed Protection Regulations pursuant to which the permits now being appealed were issued. The record indicates that the Burlington North site is located in the "Stoney Creek Balance of Watershed" area and the Prospect Hill site is located in the "South Hyco Creek Balance of Watershed" area. Both the Stoney Creek Balance of Watershed and the South Hyco Creek Balance of Watershed are located in the WS-II-BW area pursuant to the UDO. Therefore, the standards found in UDO Section 10.8.3 apply to both sites.

The Watershed Administrator has the duty to administer and enforce the provisions of Article 10, including the issuance of the types of permits involved in these appeals. The standards to be applied by the Watershed Administrator to the permit applications in the WS-II-BW area and on this appeal are found in UDO Section 10.8.3 *et seq* and section 10.8.11. Non-residential uses are allowed in the two watershed areas, provided the development does not exceed 12% built-upon area, but greater density of up to 70% built-upon area may be permitted by the Watershed Administrator by issuance of a SNIA Permit pursuant to UDO Section 10.8.3.5. UDO Article 10 is thin with respect to the standards to be applied by the Watershed Administrator when reviewing permit applications, but one thing that is clear is that the Watershed Administrator "shall issue" such permits pursuant to the regulations found in Article 10 upon receipt of a complete application

for a use allowed in the Watershed area and satisfying the density limits established in the UDO. The Watershed Administrator was bound to issue the challenged permits once Sunrock had submitted applications which satisfied the criteria established by the Watershed Protection Regulations. *County of Lancaster v. Mecklenburg County*, 3345 N.C. 496, 506-507, 434 S.E. 2nd 604, 611-612 (1993).

Here, in January 2021, the Watershed Administrator issued Watershed Protection Permits and SNIA Permits for both sites, and appellants have appealed the Watershed Administrator's decisions. The WRB is empowered to "hear and decide appeals from any decision or determination made by the Watershed Administrator in the enforcement of these regulations." UDO Section 10.10.6.1.

The NAACP Appellants argue in opposition to the motions to dismiss that (1) the Watershed Administrator should not have issued the permits because Jordan Lake has been designated as a "critical area", (2) the Watershed Administrator should have applied, but did not apply, the Caswell County High Impact Development Ordinance enacted by Caswell County after the applications had been submitted, and (3) that Sunrock's plans do not comply with various State regulations. The Remaining Appellants argue that the permits should not have been issued due to the existence of a moratorium on polluting industries adopted by the Caswell County Board of County Commissioners in early January 2020 (the "Moratorium Ordinance") which expired on July 6, 2021.

The Moratorium Ordinance adopted by the Caswell County Board of County Commissioners on January 6, 2020 established " a one (1) year moratorium on any approval required by Caswell County for any Polluting Industry Development". The Moratorium Ordinance was extended for an additional six months, until July 6, 2021, by an ordinance adopted by the Caswell County Board of County Commissioners on January 4, 2021. Sunrock's applications for the Burlington North site were filed in December 2019, prior to the adoption of the Moratorium Ordinance, and its applications for the Prospect Hill site were filed in early January 2020, just a few days after the adoption of the Moratorium Ordinance. While the moratorium was in effect, Caswell County considered and on December 21, 2020 ultimately adopted a High Impact Development Ordinance which, by its terms, would apply to developments such as those proposed by Sunrock.

However, we must consider the impact of the "permit choice" statute found at N.C. Gen. Stat. Section 143-755(a) on the situation presented here. The statute reads in part as follows:

> (a) If a development permit applicant submits a permit application for any type of development and a rule or ordinance is amended, including an amendment to any land development regulation, between the time the development permit application was submitted and a development permit decision is made, the development permit applicant may choose which adopted version of the rule or ordinance will apply to the permit and use of the building, structure or land indicated on the permit application. If the development permit applicant chooses the version of the rule or ordinance applicable at the time of the permit application, the development permit applicant shall not be required to await the outcome of the

amendment of the rule, map or ordinance prior to acting on the development permit.

Here, Sunrock's applications were submitted before the Moratorium Ordinance was adopted (for the Burlington North site) and after the adoption of the Moratorium Ordinance but before any changes were made to any of the applicable watershed protection or other ordinances (for the Prospect Hill site). Sunrock has made clear by its arguments in these appeals that it chooses to proceed under the Watershed Protection Regulations and all other applicable regulations as they were in effect in December 2019 and early January 2020 when the applications for those permits were submitted. The WRB is aware that the Moratorium Ordinance in and of itself did not change any of the provisions of UDO Article 10 under which the challenged permits were approved and issued. Rather, the Moratorium Ordinance established a moratorium on "any approval required by Caswell County for any Polluting Industry Development."

Two points are important to note with respect to the chronology here. First, the permit applications for the two sites were submitted in December 2019 (Burlington North site) and early January 2020 (Prospect Hill site) before any changes were made to Caswell County's land use regulations relative to the two sites. Second, the Moratorium Ordinance expired in July 6, 2021, more than one year ago.

The WRB Chairman has tried to reconcile the language in the Moratorium Ordinance prohibiting "any approval required by Caswell County" (which would seem to apply to the Permits involved in these appeals), with the permit choice statute which allows Sunrock to decide which set of rules it wants to be applied to its applications because they were filed before any changes to the otherwise applicable ordinances took effect. Given the language of the permit choice statute, and case law holding (paraphrasing) that because land use regulations are in derogation of common law property rights any ambiguity in the regulations must be resolved in favor of the property owner (*Yancey v. Heafner*, 268 N.C. 263, 266 (1966)), the WRB Chairman holds that the Watershed Administrator made no error when he issued the Watershed Protection Permits and SNIA Permits for each of the sites in January 2021. Even though the extended Moratorium Ordinance was still in effect in January 2021 when the permits were approved, N.C. Gen. Stat. 143-755(a) provides that Sunrock need not have waited for the outcome of any potential ordinance amendments before acting on the Permits (though it appears that they have done so anyway).

Insofar as the NAACP argues that it was error for the Watershed Administrator to have approved the permits because Sunrock's plans for the two sites do not comply with State or Federal regulations, the WRB Chairman finds that the Watershed Administrator's authority under the Watershed Protection Regulations extends only as far as the UDO allows, and that review for compliance with State or Federal regulations or with other County regulations which are not found in UDO Article 10 are beyond the authority granted by UDO Article 10 to the Watershed Administrator and the Watershed Review Board. Therefore, those grounds for appeal are dismissed as a matter of law. And, any arguments based on vested rights, or lack thereof, enjoyed by Sunrock is immaterial to this appeal because the permit choice statute, N. C. Gen. Stat. 143-755, applies to the challenged permits without regard to whether SunRock enjoyed vested rights. The statute gave, and gives, Sunrock the right to proceed under the rules in effect on the day they applied for the challenged permits.

For all the reasons stated, Sunrock's motion to dismiss, in which Caswell County joined, is granted and the appeals herein are dismissed in their entirety.

Therefore, the motion to dismiss is granted, and the appeals are dismissed.

Signed this ___ day of January 17, 2023.

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Russell Johnston, Chairman,
Caswell County Watershed Review Board