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M E M O R A N D U M

TO: Caswell County Board of Commissioners
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David Owen
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FROM: Thomas E. Terrell, Jr.
Fox Rothschild, LLP

DATE: July 27, 2020

RE: **Status of Carolina Sunrock Projects**

Commissioners,

I send this memo to report my assessment of the status of Carolina Sunrock's quarry and asphalt projects. I am pleased to discuss any aspect of my findings and recommendations with the Board.

I. Issues for Determination

The Board of Commissioners sought an outside opinion on the legal status of Carolina Sunrock's plans to develop a quarry and asphalt plants in an unzoned portion of Caswell County after the County imposed a moratorium on certain land uses on January 6, 2020.

The questions to be resolved are (1) whether Carolina Sunrock has vested rights to proceed with its projects despite the enactment of the moratorium; and (2) what is Carolina Sunrock's status in light of that determination.

This analysis is complicated by the county's adoption of an Environmental Impact Ordinance (EIO) in 2003 that requires consideration and discussion of these projects' environmental impacts but does not contain an approval component.

II. Process of Review

All represented parties were notified by email and letter in early June that the county had hired outside counsel to review the facts and advise the county on applicable law. All parties agreed to participate in an open process where project opponents were invited to explain why Carolina Sunrock's claims of vested rights were invalid, and attorneys for Carolina Sunrock were allowed rebuttal.

The process evolved into a hybrid form of arbitration and mediation where Mr. Ferrell and I met by phone or video conference with different parties to invite reasoned arguments regarding our doubts or hesitations about certain legal claims and the importance of various cases and statutes. The local chapter of Blue Ridge Environmental Defense League was represented by Mr. Scott Oakley. Although not an attorney, he was included in most correspondence, but ultimately informed us that BREDL had elected not to hire local counsel for this legal determination.

Attorneys for all parties were prepared, passionate, and highly professional.

III. Facts and Background

The areas of Caswell County described as the Anderson Community and Prospect Hill are not subject to county zoning regulations. Citizens in these unincorporated communities have always possessed the freedom to use their land as they chose, subject only to the State Building Code and minimal ordinances governing the subdivision of land, erosion control, flood prevention, and water supply watershed protection. Although certain types of land uses are subjected to an environmental assessment or environmental impact study as required by the EIO, the EIO is an information review exercise rather than a permit approval process.

Carolina Sunrock identified land in these communities for two asphalt plants and a rock quarry, both uses that are subject to rigorous permitting by the North Carolina Department of Environmental Quality. Attorneys for the Lawyers' Committee for Civil Rights Under Law assert that the population of the Anderson Community is more than 65% African American and that a high percentage are elderly. These claims are acknowledged and not denied, but for purposes of this vesting analysis it is not necessary to consider demographic distinctions.[1]

NCDEQ does not engage in state permit review until a permit applicant demonstrates that it has local approval. Local approval for all state permitted projects denotes initial land use approval in the form of a zoning consistency determination, special use permit issuance, or, in the case of landfills, the adoption of a franchise ordinance. NCDEQ's subsequent issuance of state level permits (e.g. air quality and mining permits) is a green light to a local government that it may then review and issue the permits that rely upon NCDEQ's approved designs and imposed requirements.

[1] There are forums in which environmental justice issues can be raised, including, arguably, the county's EIO process and in some parts of state level review.

Carolina Sunrock knew that this part of the county was not subject to local zoning regulations, but NCDEQ requires written documentation. Upon Carolina Sunrock's request, the county (through planner Brian Collie) informed Carolina Sunrock on August 19, 2013 that the 19.25 acres in Book 16, PG 777 "is not zoned. The use of this property to establish a legitimate asphalt/concrete plant would be permissible."

On September 17, 2018 and again on October 23, 2019, the county (through manager Bryan Miller) informed staff counsel to Carolina Sunrock that "Caswell County does not presently have a zoning ordinance; thus there are no use restrictions that would prohibit the use of Property for the Business or for any other lawful purpose. . . Caswell County does not have any permitting requirements for the business."

And on November 7, 2019, Mr. Hoagland (planning director) signed a Zoning Consistency Statement for a "drum mix hot asphalt plant and truck mix ready concrete plant and quarry operations," providing that "the proposed operation is consistent with applicable zoning and subdivision ordinance."

According to timelines presented by Carolina Sunrock's attorneys, there were voluminous emails, telephone calls and meetings between representatives from Carolina Sunrock and staff or boards from the county in the two years prior to enactment of a moratorium. The company has presented financial accountings showing that, prior to enactment of the moratorium, it spent $822,000 on the Prospect Hill Quarry and Distribution Center (Site 1), $1.7 million on its Burlington North Asphalt Plant (Site 2), and $603,000 on the Prospect Hill Asphalt Plant (Site 3).

Carolina Sunrock does not claim that it has vested rights to construct asphalt plants or a quarry. It does claim, however, that it is vested to proceed with its permit applications to NCDEQ and the county under the county's laws that existed before the moratorium was passed because it made substantial expenditures in good faith reliance on representations, beginning in 2013, that the county was unzoned and had no use restrictions.

IV. The Theory and Law of Vested Rights

As a basic primer on the underlying law, our state protects citizens from changes in the law when they have made substantial expenditures in good faith reliance on a governmental approval. *Keiger v. Board of Adjustment,* 281 N.C. 715, 190 S.E.2d 175; *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904; *Koontz v. Davidson County Bd. of Adjustment,* 130 N.C. App 479, 503 S.E. 2d 108 (1998.

Vested rights can also arise when, at the time expenditures are made, there was no approval process or permit requirement in place. *In Re Campsites Unlimited,* 287 N.C. 493, 215 S.E.2d 73 (1975).

Another form of vesting called "permit choice" refers to the statutory right of landowners to continue to develop under the rules that existed at the time an application was filed or an initial permit was issued. N.C. Gen. Stat. § 143-755; S.L. 2019, 111. Although now codified in state law, the origin of permit choice was in case law, which remains valid law. See, for example, *Robins v. Hillsborough,* 361 N.C. 193, 639 S.E. 2d 421 (2007).

Finally, the enabling legislation on moratoria contains its own provisions acknowledging the limitations of a moratorium ordinance on a vested project.

V. Legal Analysis

A. Statutory Vested Rights Pursuant to N.C. Gen. Stat. § 153A-344(1)(c).

Neighbors and the Anderson Creek Community argue that Carolina Sunrock did not obtain statutory vested rights pursuant to N.C. Gen. Stat. § 153A-344(1)(c). They are correct. Carolina Sunrock did not participate in this form of vesting approval through site plans presented to and approved by the county. This point needs no detailed discussion.

B. Expenditures in Good Faith Reliance on Governmental Information

Carolina Sunrock made expenditures prior to the moratorium's enactment that would be considered "substantial" under any fact scenario posed to our appellate courts in previous cases. These expenditures were made in good faith reliance upon the government-confirmed absence of local zoning approvals to develop the asphalt plants and a rock quarry in this part of Caswell County.

These expenditures included groundwater studies, air quality studies, and the hiring of numerous experts and consultants to prepare studies for a myriad of permits. More specifically, Carolina Sunrock purchased land and equipment, and obtained driveway permits, stormwater permits, conducted extensive site planning and civil engineering studies, spill containment plans, and other studies necessary to proceed through state level review or to obtain local or state permits that were outside of or were to be obtained in processes parallel to state level permitting.

C. Governmental Permit Not Required to Obtain Vested Rights

The N.C. Supreme Court declared in *In Re Campsites Unlimited*, 287 N.C. 493, 215 S.E.2d 73 (1975) that a property owner could become vested even in the absence of permit issuance if there was no permit or zoning approval required before a project began.

In *Campsites*, Stanly County was unzoned in all rural areas. It ordered the developer of a 155-acre campground to cease construction after the county enacted a new zoning ordinance that would render the campground development noncompliant. At the time the zoning ordinance was passed, Campsites had paid, or became obligated to pay, approximately $275,000 for the purchase of the land, engineering and surveying fees, road construction, and other expenses. The Court held that because the developer was proceeding lawfully and incurring expenses in reliance upon no zoning, he would therefore be vested and able to proceed unimpeded by the newly adopted ordinance.

Attorneys for neighbors argue that *Campsites* is distinguished from the Carolina Sunrock situation because no permits were required at all in *Campsites*. This fact portrayal is incorrect. In *Campsites*, many permits would have been required, including grading permits, building permits, water and sewer permits, and permits for a marina. But these permits were not required in order for the developer to buy the land and spend substantially on surveying and engineering costs – so-called "soft costs" that were also made in the present matter.

D. *Browning-Ferris and PNE AOA Media*

Neighbors represented by Calhoun, Bhella & Sechrest claim that *Browning-Ferris v. Guilford County*, 126 N.C. App. 168, 484 S.E. 2d 411 (1997) and *PNE AOA Media v. Jackson County*, 146 N.C. App. 470, 554 S.E.2d 667 (2001) control the disposition of this case. After careful review I disagree, both on distinguished facts and because later courts recognized an applicant's rights to proceed under the law that existed at the time of application, which rights were later codified in N.C. Gen. Stat. § 143-755.

Both of these cases pertain to applicants who claimed rights to begin immediate construction of a project, versus Carolina Sunrock which makes no such claim. *Browning-Ferris* involved a waste company's claim of vested rights to construct a transfer station based upon a planning director's affirmation that a transfer station was a permitted right at the time of inquiry. Not only did Browning-Ferris not perfect its rights to construct the transfer station by pulling a permit before an ordinance changed, but the court found it had not suffered harm because it could proceed under the new law.

In *PNE AOA Media*, Jackson County passed a moratorium on billboards and the applicant claimed it was vested in the absence of local laws. The court held that its rights were not vested because it never obtained the necessary NCDOT permit that had always been required, even before the ordinance was enacted.

Both *Browning-Ferris* and *PNE AOA Media* have limited application in light of more recent cases that protect an applicant's rights to proceed under laws that existed at the time of original application. See, for example, *Robins v. Hillsborough*, 176 N.C. App. 1, 625 S.E. 2d 813 (2006) ("Plaintiff argues the trial court erred in granting summary judgment in favor of defendant because plaintiff is entitled to rely upon the language of the zoning ordinance in effect at the time he applied for the permit. We agree."); *Robins v. Hillsborough*, 361 N.C. 193, 639 S.E. 2d 421 (2007) ("Thus, we modify and affirm the portion of the Court of Appeals opinion concerning plaintiff's right to have his application reviewed and a decision made under the zoning ordinance in effect on 21 January 2003.") See also *Woodlief v. Mecklenburg*, 176 N.C. App. 205, 625 S.E. 2d 904 (2006) (Defendants "[were] entitled to rely upon the language of the ordinance in effect at the time [Griffith] applied for the permit.") and *Lambeth v. Town of Kure Beach*, 157 N.C.App. 349, 351, 578 S.E.2d 688, 690 (2003)

The principles in *Robins, Woodlief*, and *Lambeth* were later codified in N.C. Gen. Stat. § 143-755 (titled and commonly referred to as the "permit choice" statute), which provides:

> (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 applicable 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 to the rule, map, or ordinance prior to acting on the development permit
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> E. Effect of Moratorium.

On January 6, 2020, Caswell County passed a one-year moratorium on "polluting industries" and specifically listed quarries and asphalt plants among those industries affected.

The primary focus of this analysis is to determine the extent to which the moratorium applies to Carolina Sunrock and whether the moratorium prevents it from proceeding in the normal course of its permit applications with NCDEQ or with local permitting. It is my opinion that (1) the language of the moratorium statute itself protects Carolina Sunrock from the moratorium's effect; (2) Carolina Sunrock also became vested to proceed under the law that existed prior to January 6, 2020 under the controlling principles in *Robins* and *Campsites*; and (3) the provisions of N.C. Gen. Stat. § 143-755 (permit choice) apply.

N.C. Gen. Stat. § 153-340(h) (the moratorium statute) expressly excludes applicants and property owners whose rights have vested pursuant to "substantial expenditures . . . made in good faith reliance on a prior valid administrative . . . approval …"

Here, Carolina Sunrock proceeded to expend substantial funds in good faith reliance upon the County's written affirmations that no zoning existed, there were no use restrictions. In 2013 and 2018, the county additionally confirmed that no changes in the applicable local law were anticipated. In full, the relevant statute section reads:

> A development moratorium with a duration of 61 days or longer, and any extension of a moratorium so that the total duration is 61 days or longer, is subject to the notice and hearing requirements of G.S. 153A-323. Absent an imminent threat to public health or safety, a development moratorium adopted pursuant to this section shall not apply to any project for which a valid building permit issued pursuant to G.S. 153A-357 is outstanding, to any project for which a conditional use permit application or special use permit application has been accepted, to development set forth in a site-specific or phased development plan approved pursuant to G.S. 153A-344.1, to development for which substantial expenditures have already been made in good faith reliance on a prior valid administrative or quasi-judicial permit or approval, or to preliminary or final subdivision plats that have been accepted for review by the county prior to the call for public hearing to adopt the moratorium. Any preliminary subdivision plat accepted for review by the county prior to the call for public hearing, if subsequently approved, shall be allowed to proceed to final plat approval without being subject to the moratorium.

A substantial portion of Carolina Sunrock's expenditures, like the developer in *Campsites*, were made for preliminary studies that would enable it to proceed to next steps in the process for local and state permits.

The moratorium statute is, on its face, even broader than the permit choice statute because it incorporates the language "valid administrative approvals" which would include the Zoning Consistency Determinations the county gave Carolina Sunrock. The Zoning Consistency Determinations were legally accurate, and the county was obligated to provide them.

Although the permit choice rules refer to permits already issued, the holding in *In Re Campsites* would necessarily mean that permit choice applies when an applicant or property owner begins a long and labyrinthine approval process that does not have a specific zoning approval as a necessary and initial component. ("The only significance of the building permit in those [previously cited] cases was that such permit was required, under the ordinance in effect at the time of its issuance, in order to make the proposed use of the property lawful. In the present instance, there was no county ordinance or other law in effect at the time Campsites began its development of its property which required Campsites to obtain a permit therefor. It was then lawful for Campsites to proceed as it did. Consequently, those decisions declare the [common law vesting] law applicable to the present case" *In Re Campsites,* 287 N.C. at 501, 215 S.E.2d at 77-78).

The combined holdings in *Lambeth*, *Woodlief*, and *Robins* further support the position that Carolina Sunrock became vested to proceed under the laws that existed prior to the moratorium's passage and need not be repeated here.

Legal counsel for both groups of opponents argue that even if Carolina Sunrock were otherwise vested, the moratorium would nonetheless apply under the "imminent threat to public health or safety" exception in N.C. Gen. Stat. § 153A-340(h). That provision does not apply here.

Asphalt and concrete mixing plants and rock quarries exist by permit throughout the State of North Carolina in areas far more populated than the area in question. To rely upon this exception, the county would have had to make findings based upon medical, biological, chemical, epidemiological, or other evidence that these particular facilities in these specific locations presented "an imminent threat to public health or safety." Claims of imminent threats to health or safety in this case are merely conclusory and arbitrary as a matter of law in the absence of such findings by the Board of Commissioners based upon substantial evidence. A broad claim that all quarries and asphalt plants pose imminent dangers to health and safety is contradicted by North Carolina law.

F. The Environmental Impact Ordinance

In 2003 the County enacted an Environmental Impact Ordinance whose processes are similar to the environmental assessment and environmental impact statements of both National and State Environmental Policy Acts. It appears that this ordinance was properly adopted, and Carolina Sunrock is not immune from its application. At some point prior to initiation of construction, Carolina Sunrock must have an EIS accepted by the Board of Commissioners. The EIO's existence and application, however, though irrelevant to the legal analysis of vested rights, merit comment.

As prologue to my comments below, NEPA and SEPA are valuable tools for the protection of this country's and this state's environmental health and future. These state and federal laws should be protected, not gutted, as detractors have claimed for decades. But they are awkward, very expensive, and unnecessary policies when replicated at the local level.

By its terms, the EIO does not result in approval or denial of permits or projects. Rather it is an informational and evaluative tool with extremely limited application and no specified time for initiating an application or making a submittal. Sec. 14-71(b) only provides that the Board of Commissioners must accept the final EIS prior to the beginning of construction. It does not prevent an applicant from

proceeding to other permits or land studies. Sec. 14-69(a)(1) provides as an option that "The EA *may be submitted* prior to submittal of the development application." Similarly, its commencement and completion requirements are vague.

The EIS is costly and time-consuming for all parties without meaningful purpose in the context of the County's permitting process. Pursuant to Sec. 14-69(5), "The board of commissioners *shall receive the EIS and all comments as information only.* The information presented may be used *only* to determine compliance with specific development standards established in applicable development ordinances, including, but not limited to, the watershed protection ordinance, the subdivision ordinance, and the flood prevention ordinance."

Upon review, it appears that the watershed protection ordinance and flood prevention ordinance are the only ordinances the EIS could apply to, but these ordinances' requirements (e.g. density and impervious surface calculations) are primarily objective standards rooted in basic arithmetic and engineering. In all other local governments I am aware of, an applicant or its engineer would prepare the paperwork and studies for the watershed and flood prevention permits and have them processed by staff level review.

The EIO's public hearing process creates legal problems for the county if the EIO is found to be a surrogate zoning ordinance. In zoning law, a county may not treat an administratively issued permit in a legislative fashion by considering the opinions of citizens from public hearings in the application of objective standards. *Nazziola v. Lancraft Properties, Inc.*, 143 N.C. App. 564, 545 S.E.2d 801 (2001); see, also, *County of Lancaster, S.C. v. Mecklenburg County, N.C.*, 334 N.C. 496, 434 S.E.2d 604 (1993) for a discussion of the distinctions between types of governmental decisions.

The EIO is problematic in other ways. Adequate and informed application of such an ordinance requires a budget commitment to hire staff trained in groundwater sciences, the science of air particulates and their effect on human health, computer modeling for a variety of scientific studies, and many other sciences claimed to be studied in an EIS, including, but not limited to biology, zoology, chemistry, and botany.

Although attorneys for neighbors properly point out that the EIS is designed to cause reflection on alternatives, such an ordinance not only costs business and industry tens of thousands of dollars and months of time, it creates a false impression that the studies have an impact on the ultimate application of existing ordinances for the protection of local citizens. Citizens are better protected by standard zoning ordinances that require neighborhood meetings as part of the process. Most industries with a potential pollution component are state-regulated and use well-established standards and protocols for resolving impacts and ensuring compliance.

Attorneys with the Morningstar firm correctly point out that the 50-page EIS limit is inadequate to address all of the requirements of an EIS and subjects any applicant to a moving goal line with county staff or neighbors demanding more. Additionally, all laws should be written so that a reasonably informed citizen should be able to know when he or she has complied with the law's requirements. This is not the case with the EIO. It not only is extremely broad but it contains no standards or requirements that inform an applicant when it has met its obligations.

Finally, the EIO has been ignored for years, and applying it now in a public way commits the county to its use in all future cases. The costly and cumbersome processes imposed upon county staff would possibly be worth it if the EIO contained detailed standards and resulted in permit approvals or denials.

VI. Determinations and Recommendations

Based upon my extensive review of the materials, statutes, cases, and arguments presented by all parties, I present here a summary of my findings, determinations and recommendations:

1. Carolina Sunrock is not vested, by statute or common law, to begin construction on its proposed asphalt plants and quarry because it has not yet obtained the necessary permits and approvals from the County and State for the construction of the projects.

2. For reasons explained, Carolina Sunrock is vested to proceed with its applications for the asphalt plants and quarry under the laws that existed prior to the enactment of, and unaffected by, the moratorium.

3. Unless repealed, Carolina Sunrock is required to complete, and the Board of Commissioners must receive, an EIS related to the quarry and at least environmental assessments related to the asphalt plants.

4. The Watershed Protection Permit and Flood Hazard permits previously issued should be held in abeyance and reissued or confirmed, with modifications as necessary, after the acceptance of an EIS for the quarry and EA for the asphalt plants.

5. The County should repeal its Environmental Impact Ordinance as to all current and future projects. In its place, it should rely upon state permitting of what some consider to be polluting industries. By doing this, Caswell County would join the vast majority of counties in this state.