### BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION

N RE:	)	
	)	
STHER W. FRYE, and	)	INTERVENOR'S MOTION
MOORE COUNTY WILDLIFE	)	TO DENY THE PETITION
AND CONSERVATION CLUB, INC.	)	FOR DECLARATORY RULING
	)	
Petitioners.	)	
MOORE COUNTY WILDLIFE AND CONSERVATION CLUB, INC.	) ) )	TO DENY THE PETITION

Intervenor, Town of Southern Pines, respectfully submits this Motion to Deny the Petition for Declaratory Ruling filed by Esther W. Frye, *et al.* (the "Petition").

#### BACKGROUND

On July 25, 2011, the Petitioners, Esther W. Frye and the Moore County Wildlife and Conservation Club, Inc., filed a Petition for Declaratory Ruling purporting to seek from the Environmental Management Commission ("EMC") a ruling concerning the application of the facts involved with the issuance by the Town of Southern Pines of a Conditional Use Permit, involving its stormwater protection ordinance, to the provisions of 15A NCAC §§ 2B .0215, 2B.0311, and 2H .1006.

N.C. Gen. Stat. § 150B-4 provides that

"On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency. Upon request, any agency shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency."

The term "person aggrieved" is defined as:

"any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6).

The Petition purportedly seeks a ruling as to

"the applicability of 15A NCAC 2B .0311(m), 2B .0215, and 2H .1006 to a fact situation in which the TOSP proposes to permit a cluster development having an overall density which violates the density requirements of 15A NCAC 2B .0215(3)(b)(i)(A)by exceeding the 24% built-upon area limit. The TOSP proposes to use 11 acres of its remaining 5/70 allocation for the commercial section of the 46.12 acre cluster development in contravention of 15A NCAC 2B .0215(3)(b)(i)(D)(1), which requires the 'overall density' of a cluster development to meet the density requirement of 15A NCAC 2B .0215(3)(b)(i)(A)."

#### THE PETITION SHOULD BE DENIED

#### BECAUSE THE PETITIONERS LACK STANDING

It is alleged that Esther W. Frye "resides at and owns property located at 3141 Airport Road, Carthage, NC 28327." Pet., p.1. It is further alleged that Ms. Frye's property is adjacent to the Tyler's Ridge development, and lies within one mile of Mill Creek, a water classified as WS-III/HQW@. It is further unspecifically alleged for both Petitioners that they "live, work, fish, canoe, swim, recreate or own property near, or adjacent to, HQW-designated surface waters" and that "activities of Southern Pines will violate the environmental protections afforded these surface waters by the HQW designation." Pet., p.1. The fact that Ms. Frye lives within one mile of Mill Creek establishes no effect directly or indirectly on her person, property or employment, because it makes no specific allegation as to Ms. Frye that she has any connection to any HQW-classified water in any way more direct than any resident of the State. As such the Petition fails to make the necessary showing that Ms. Frye is a person aggrieved, and entitled to Declaratory Ruling. The Petition should be denied as to Ms. Frye as she does not satisfy the threshold showing that she is a person aggrieved.

It is alleged that the Moore County Wildlife and Conservation Club, Inc. (the "MCWCC") owns a 60-acre parcel of land bisected by Mill Creek. Pet., p. 1. This allegation is supported by an affidavit signed by Gary Leopper, president of MCWCC. Mr. Leopper further contends that "as development and impervious surface in the watershed of Mill Creek has increased, Mill Creek has flooded the road leading to MCWCC's ranges with increasing frequency and duration." Pet., Exh. 11. Mr. Leopper's affidavit provides no basis for his assertion, and no suggestion that Mr. Leopper has made any inquiry into the incremental amount of development and impervious surface as it relates to the incidence of flooding, or has the expertise to draw any such conclusion. Additionally, there is no suggestion that the interpretation and application of EMC rules challenged by the Petition will result in increasing frequency and duration of flooding more than any other interpretation. Moreover, HQW waters are distinguished based on their biological, physical or chemical characteristics. 15A NCAC 2B .0101(e)(5). The EMC's mandate relative to HQW waters is contained in the Antidegradation Policy, which provides that HQW waters should not be degraded below the water quality necessary to maintain the existing and anticipated uses of those waters. 15A NCAC 2B .0201(d). Mr. Leopper's affidavit on behalf of MCWCC alleges no effect directly or indirectly on the property of the MCWCC as a result of water quality effects due to the application and implementation of the HQW rule, the purpose of which relates to water quality and not flooding.

The affidavit of Denise M. Smith, attached to Mr. Leopper's affidavit, alleges that her "family" is a member of MCWCC and that members of her family swim, fish, canoe and kayak

<sup>&</sup>lt;sup>1</sup> The Articles of Incorporation on file with the Secretary of State for the Moore County Wildlife and Conservation Club, Inc., provide that "[t]he Corporation shall have but one class of members and all shall be voting members priviledged [sic] to hold any office." The implication is that membership is limited to individuals. As Ms. Smith states that her family is a member, she does not claim that she is a member and does not represent MCWCC. Articles of

in the waters of Mill Creek. Pet, Exh. 11. It is unclear whether Ms. Smith is a member of MCWCC, and whether the family member or members who belong to MCWCC are the ones who use Mill Creek, or live on Warrior Woods Lake. Ms. Smith asserts that "when grading and clearing occurs upstream of her home, the water in Warrior Woods turns a muddy brown color after we have heavy showers." Id. There is no assertion that the condition of Warrior Woods affects MCWCC in any way. Irrespective of which members of her family may or may not be members of MCWCC, live in her home on Warrior Woods Lake, or whether her affidavit purports to represent MCWCC, no connection is established between the interpretation of the rules sought by the Petition and the change in color in Warrior Woods when heavy showers coincide with grading and clearing occurring upstream of her home. Land disturbance unrelated to development density, indeed, unrelated to any use regulated under the rules challenged by the Petition, is capable of creating sediments which escape and flow downstream in "heavy showers." The affidavit of Ms. Smith, for a variety of reasons, alleges no effect directly or indirectly on the property of the MCWCC as a result of the application and implementation of the HQW rule.

In either case, neither Mr. Leopper nor Ms. Smith connects their allegations to any harm to the person, property or employment of the MCWCC, or its members, that will occur or may occur as a result of the application by the Division of Water Quality of the rules to the facts involving the Conditional Use Permit issued by the Town of Southern Pines to the Tyler's Ridge development. In respect to future development, there is no way to project that the location of any future project which would be affected by the ruling would in any way be considered to affect the person, property or employment of any of the Petitioners. As such the Petition fails to

Incorporation of Moore County Wildlife Club, Inc., a non-profit corporation, ¶ 4. http://www.secretary.state.nc.us/corporations/Corp.aspx?PitemId=4587073.

make the necessary showing that the MCWCC is a person aggrieved and entitled to Declaratory Ruling.

The Petition should be denied as to MCWCC as it has not satisfied the threshold showing that it is a person aggrieved.

# THE PETITION SHOULD BE DENIED BECAUSE THE MATTER IS INAPPROPRIATE FOR A DECLARATORY RULING

In determining whether to grant the Petition for Declaratory Ruling, the Town of Southern Pines urges that the EMC consider that the Town Council of the Town of Southern Pines has approved the application for Conditional Use Permit for the Tyler's Ridge development. The proceeding below is based on a record that was assembled during the process for permit issuance. This matter is not appropriately before the EMC because the record of the Conditional Use Permit proceeding, which is the best repository of the facts in this case, is not before the EMC. Thus, the EMC is being asked to issue a Declaratory Ruling on a set of facts that cannot be complete. Instead, the EMC has before it an incomplete selection of conclusory assertions, partial facts, documents, argument, and legal conclusions, ostensibly presented as a "given state of facts." Of course, many of the "facts" are subject to dispute. Petitioners never actually identify any of the statements or assertions in their Petition as the "facts" apply to one or more of at least three different rules. In essence, the EMC is being put in the position of assembling its own set of so-called "facts" out of a series of statements ostensibly in support of the petition, and then attempting to apply those facts to one of three rules.

A paragraph-by-paragraph assessment of the "supporting" statements, and the paucity of facts presented, follows:

- 1. Alleged facts purporting to establish that Ms. Frye is a person aggrieved.
- 2. Alleged facts purporting to establish that MCWCC is a person aggrieved.

- 3. Conclusory statements regarding standing of Petitioners which conjoins Petitioners, and alleges violations by the Town of Southern Pines of unspecified environmental protections with a vague reference to HQW designation.
- 4. A summary paraphrase of two EMC rules which ignores the unusual nature of the stream classification assigned to Mills Creek and McDeeds Creek, and presents no facts.
- 5. An allegation unsupported by documentation and a paraphrase regarding the application of the reclassification of Mills Creek and McDeeds Creek, presenting no facts.
- 6. Reference to a memo allegedly prepared by the Division of Water Quality in connection with an alleged 2007 Petition for Declaratory Ruling<sup>2</sup> regarding the application of the reclassification of Mills Creek and McDeeds Creek to a different proposed development, presenting no facts.
- 7. Three excerpts from the memo referenced in paragraph 6, presenting no facts.
- 8. A conclusion, without documentation, regarding the outcome of an alleged 2007 Petition for Declaratory Ruling<sup>3</sup> presenting no facts.
- 9. A conclusory statement relying on documents which have not been certified as true copies. To the extent the documents may be shown to be genuine, the Town of Southern Pines believes that the assertion by Petitioners is an oversimplification at best and possibly a misrepresentation of the data provided in the documents.
- 10. The statement contains factual and legal conclusions that may be in dispute and, in any event, pertains to zoning issues, over which the EMC has no authority, and mixes zoning terminology, with terms used in EMC rules, but which have different meanings in each usage.
- 11. The statement contains factual and legal conclusions, that may be in dispute, with no fact presented.
- 12. The statement contains factual and legal conclusions, that may be in dispute, with no fact presented.
- 13. The statement contains factual and legal conclusions, that may be in dispute, followed by selected excerpts from email communications with staff of the Division of Water Quality which the Petition presents without context. In any event, it presents no facts against which to apply the rules.
- 14. The statement is a factual and legal conclusion that may be in dispute. No fact is presented.
- 15. The statement is speculation unsupported by any fact and irrelevant to the issue for which the Petitioners purport to seek a Declaratory Ruling.
- 16. The statement is a legal conclusion mixing zoning terminology with terms used in EMC rules.
- 17. This statement is merely a request for oral argument, but it is worth noting that the complexity is a function of the Petitioners' reluctance to identify a given state of facts to which the EMC is being asked to apply its rules.

<sup>&</sup>lt;sup>2</sup> Neither the alleged Petition for Declaratory Ruling nor any documentation of the outcome of the Petition is attached.

<sup>&</sup>lt;sup>3</sup> See fn.2.

There is no assurance the facts presented by the Petition are complete and accurate (indeed, the "facts," such as they are, have been assembled by an advocate for only one side of this dispute, casting uncertainty as to whether they are complete or accurately presented -- a dilemma that an adversary proceeding with sworn testimony and cross-examination is designed to address, in stark contrast to a Declaratory Ruling proceeding, which is premised on the application to a rule or statute of a set of *given* facts), and it is certain that the "facts" as presented in the Petition would be subject to dispute among interested parties. The EMC procedure, which is not designed to elicit testimony, or provide cross-examination, is ill-fitted for the resolution of disputed facts, and thus, this matter is not a good candidate for a Declaratory Ruling. Any ruling on the basis of the "set of given facts" as presented in the Petition would be subject to dispute and second-guessing because the facts on which it was purportedly based are not settled, and cannot be settled in this proceeding.

The characterizations in the Petition that a proposal by the Town of Southern Pines "violates" requirements of an EMC rule and stands "in contravention" of that rule, and further provides its own interpretation of the rule, exposes the Petition as an attempt merely to collaterally challenge the permit issued by the Town of Southern Pines. The text following Petitioners' "request" provides a litany of arguments, legal conclusions, and characterizations which do not provide the facts to which the Petitioners seek a ruling as to the applicability of EMC rules, as required by N.C. Gen. Stat. § 150B-4, but instead constitute a document more closely resembling a brief in opposition to the issuance of the permit.

As an example, the EMC would be ill-advised to issue a declaratory ruling on the application of the facts contained in a permit application to the decision by the Director to issue or deny a permit, because the organic statute, e.g., N.C. Gen. Stat. § 143-215.1(e), and the Administrative Procedure Act, at N.C. Gen. Stat. § 150B-23, provide a process to elicit the case-

specific facts more comprehensively, in a trial-type adversary proceeding using sworn testimony before a disinterested Administrative Law Judge. This is the manner in which the Administrative Procedure Act was designed to address fact-specific disputes of aggrieved parties over the permitting and enforcement functions of agencies, which are defined in the Administrative Procedure Act as "contested cases." A contested case is defined as

"an administrative proceeding . . . to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges . . . ."

N.C. Gen. Stat. § 150B-2(2). Indeed, if the EMC was to decide to issue a Declaratory Ruling on disputed or hypothetical facts, it is questionable on constitutional grounds whether the Ruling would be reviewable in the Courts because the lack of facts that are not sufficiently concrete may not present a justiciable controversy. \*\*See\*\* Dickson, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," 2 Campbell L. Rev. 1 (1980).

WHEREFORE, on the foregoing grounds, Intervenor respectfully requests that the EMC deny the Petition for Declaratory Ruling.

Respectfully submitted this the 2 day of August, 2011.

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<sup>&</sup>lt;sup>4</sup> Proceedings under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, presume full development of disputed facts through an adversary proceeding in which there is a justiciable controversy. *See* Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

#### CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing INTERVENOR'S MOTION TO DENY THE PETITION FOR DECLARATORY RULING and a proposed ORDER to be served on the following individuals by depositing a copy of the same in the United States mail, first class, postage prepaid, and by electronic mail as a courtesy, addressed as follows:

Brenda E. Menard, Esq.
Assistant Attorney General
N.C. Department of Justice
Environmental Division, 3<sup>rd</sup> Floor
114 W. Edenton Street
Raleigh, NC 27602
bmenard@ncdoj.gov

Marsh Smith, Esq. Law Office of Marsh Smith, P.A. P.O. Box 1075 Southern Pines, NC 28388-1075 marsh@marshsmithlaw.com

and, as a courtesy, by depositing a copy of the same in the United States mail, first class, postage prepaid, and by electronic mail, addressed as follows:

Francis W. Crawley, Esq. Assistant Attorney General N.C. Department of Justice P.O. Box 629 Raleigh, NC 27602 fcrawley@ncdoj.gov

This the  $\triangle \frac{1}{2}$  day of August, 2011.

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## BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION

IN RE:		
ESTHER W. FRYE, and MOORE COUNTY WILDLIFE AND CONSERVATION CLUB, INC.	ORDER DENYING PETITION FOR DECLARATORY RULING	
Petitioners.	)	
Pursuant to N.C. Gen. Stat. § 150B-4, the Environmental Management Commission		
hereby DENIES the Petition for Declaratory	Ruling, on the following bases:	
1. Petitioners have not shown that they are persons aggrieved as required by N.C.		
Gen. Stat. § 150B-4, and therefore lack standing.		
2. The Petition for Declaratory Ruling did not satisfy the requirements on N.C. Gen.		
Stat. § 150B-4 in that it did not provide a discernible set of facts on which a ruling could be		
made as to the applicability of EMC rules to such facts, because the matters set forth as facts in		
the Petition were in dispute, conclusions that were not supportable as facts, hypothetical, or legal		
arguments.		
This Order entered by the Environmental Management Commission this the day of		
August, 2011.		
FOR THE ENV	TRONMENTAL MANAGEMENT COMMISSION	
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Stephen T. Smith, Chairman		