

June 1, 2009

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VIA E-MAIL AND FIRST CLASS MAIL

Mr. Mike Ruffin, County Manager
Durham County Government
201 E. Main St., 2nd floor
Durham, NC 27701RE: Request for Durham County to pursue recusal of Planning Commission Chairman
George Brine

Dear Mike:

We represent Southern Durham Development, Inc. ("Southern Durham"). Southern Durham's property ("Property") lies within the area subject to the Interpretation of the Durham City-County Planning Department dated January 6, 2006 ("Interpretation") in which it was determined that the Property is not located within one mile of the 216 msl of Jordan Lake and therefore is not within the critical area of the watershed overlay imposed in this area of the County by the Unified Development Ordinance ("UDO"). The Interpretation was approved by the N.C. Division of Water Quality ("DWQ") on February 4, 2009. In spite of Southern Durham's strong objections, Durham County recently decided to subject the issues covered by the Interpretation and DWQ's determination to the equivalent of a zoning map change and comprehensive plan amendment process in which a series of public hearings will be conducted. One set of these hearings is scheduled to take place before the Durham City-County Planning Commission.

Our understanding is that the County itself is the "applicant" for the purpose of this process. Southern Durham is not involved, and as you know considers the entire process to be illegitimate. That having been said, we are concerned that the already flawed process will be further compromised if Chairman George Brine takes part in the Planning Commission hearings.

Over the past year Chairman Brine's actions have demonstrated that he is personally opposed to the actions taken by DWQ and in the Interpretation to correctly locate the Jordan Lake Critical Area and Urban Growth Boundary affecting the Property. In particular, Chairman Brine was one of three applicants on a petition for a declaratory ruling (the "Petition") from the N.C. Environmental Management Commission ("EMC") attacking the DWQ determination approving the Interpretation. As shown in the attached memorandum from the chair of the EMC, this Petition was baseless, and eventually it was withdrawn in order to avoid its dismissal.

As you know, Southern Durham's Property is the subject of a pending rezoning request. The Interpretation and DWQ determination are integral to that rezoning request, and therefore the process in which the County now is engaged may have a material impact upon that rezoning request. Chairman Brine has publicly stated his personal opposition to this rezoning, and we believe that his opposition to the proposed project is a prime motivation for his opposition to the Interpretation and DWQ determination, and the filing of his Petition with the EMC.

Mr. Mike Ruffin

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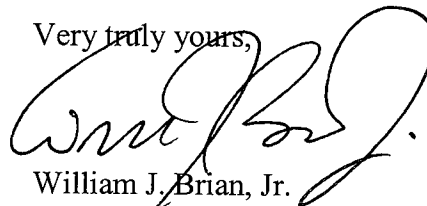
Since Chairman Brine is personally opposed to both the Interpretation and to the DWQ approval of the Interpretation, he must be personally opposed to the County's proposed map change and comprehensive plan amendment, which are designed to accomplish the same things already accomplished by the Interpretation and the DWQ determination. Likewise, we have no doubt that he still will be personally opposed to Southern Durham's rezoning request when it arrives at the Planning Commission as well.

We have reviewed the Planning Commission's Rules of Procedure, the Interlocal Agreement governing Durham County and the City of Durham's Planning functions, and the Durham County Ethics Policy (the "Ethics Policy"). All of these documents impose duties upon the members of the Planning Commission to act in a fair and unbiased manner. Specifically, section 1(a) of the Ethics Policy requires public officials to be "impartial" so that "the public maintain confidence in the integrity of its government." Chairman Brine is anything but impartial on any of these issues. In light of his personal position on these matters, any involvement by Chairman Brine in the public hearings and deliberations regarding Durham County's application will further taint this already deeply flawed process and will be substantially prejudicial to Southern Durham's property rights.

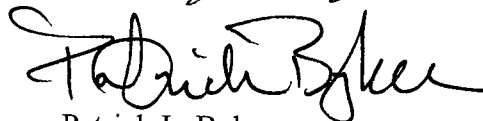
Since Durham County is the "applicant" in the current process, it is the proper party to request that Mr. Brine recuse himself from participating further in this matter. Southern Durham strongly and respectfully urges the County to make this request. We also request that Chairman Brine be instructed to have no communication with other Planning Commission members regarding the County's application and that he play no role with respect to procedure or the scheduling of the County's case before the Planning Commission. The Planning Commission's public hearings and deliberations on the County's application will begin on June 9, 2009. Therefore, the County should address these issues with Chairman Brine immediately.

Please contact us at your earliest convenience to let us know if the County will request Mr. Brine to recuse himself from all of these matters. We look forward to hearing from you soon. In the meantime, if you have any questions, we trust that you will contact us. Thank you.

Very truly yours,



William J. Brian, Jr.



Patrick L. Byker

cc: Chuck Kitchen, Esq., County Attorney

Lacy Reaves, Esq.

Attachment

MEMO

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TO: EMC Members

FROM: Steve Smith, EMC Chair

DATE: 4-20-09

RE: **Declaratory ruling request** –Jordan Lake Water Supply Watershed Boundary

15A N.C.A.C. 2I.0603(a) provides: “the Commission Chairman shall make a determination on the completeness of the request for declaratory ruling based on the requirements of this Section, and he shall make a recommendation to the Commission on whether to issue or decline to issue a declaratory ruling”.

- In 2005 the owner of several parcels of land in southwest Durham County (now Seven Five One Investments, LLC) requested that the Durham Planning Director re-determine the location of the Jordan Reservoir normal pool and presented a survey (the 2005 Puckett survey) to support its request.
- In locating the Jordan Reservoir normal pool previously, Durham had used U.S.G.S. topographic maps that predated the filling of Jordan Lake.
- In January, 2006 the Durham Planning Director determined that the 2005 Puckett survey represented better information about the normal pool location and used it to determine what he considered to be the proper location of the one mile Critical Area and the five mile Protected Area of the Jordan water supply watershed. He believed he had authority to do this under the Durham Unified Development Ordinance (UDO).
- This interpretation had the effect of reducing the surface area within the boundary of the Jordan Reservoir normal pool. Consequently, the one mile Critical Area and the five mile Protected Area associated with the normal pool location were reduced by approximately 230 acres.
- At that time, the Planning Director also adjusted the Durham Urban Growth Area, which affected the UDO Development Tier map. This resulted in a substantial portion of the property owned by Seven Five One Investments, LLC (Intervenor here) being included in the Durham Urban Growth Area, (UGA). Previously this property had been excluded from the Durham UGA and covered by the Jordan Critical Area.
- Based on the Intervenor’s property being inside the UGA and outside the Critical Area, in January 2008 the Intervenor proposed a zoning map amendment from Rural Residential to Mixed Use with Development Plans. The Intervenor intends to develop a mixed-use project to include commercial, office, residential and institutional land uses.
- In 2008, Durham received notice from DWQ that Durham had acted outside its authority when it adjusted the normal pool location and the watershed boundaries. 15A NCAC 02B.0104 states that all revisions to the EMC-adopted Critical and Protected Area boundaries or to the local government’s interpreted Critical and Protected Area boundaries must be approved by the EMC prior to adoption by the local government.
- At its November 10, 2008 meeting, the Durham County Commissioners, by a vote of three to two, directed the Durham Planning Director to submit the 2005 Puckett survey to the EMC and to request approval of the normal pool location shown on that survey.

MEMO

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- In November 2008 DWQ requested additional information from the Durham Planning Director who requested that information from the Intervenor. In December 2008 the Intervenor provided to DWQ additional information including a 2008 survey conducted for him by Murphy Geomatics (the 2008 Murphy Survey).
- DWQ is not limited in the scope of information it can consider in deciding a water supply watershed boundary.
- The EMC has delegated to DWQ the authority to decide boundaries of water supply watersheds.
- It is not uncommon for DWQ to accept revised maps that are based on privately funded surveys, as long as those surveys are conducted in accordance with the standards of practice for land surveying in North Carolina. It is standard practice for governmental agencies to place the burden on licensed surveying and engineering professionals to produce maps and other data to satisfy regulatory program requirements.
- At its April 13, 2009 meeting, the Durham County Board of Commissioners voted to send consideration of the Jordan water supply watershed boundary location through a re-zoning procedure as spelled out in its UDO, including a public hearing process.
- 15A NCAC 2I.0603 (c) provides: "whenever the Commission believes for good cause that the issuance of a declaratory ruling is undesirable, the Commission may refuse to issue such ruling." 15A NCAC 2I.603d (3) defines "good cause" to include the following:
 1. Finding that there has been a similar determination in a previously contested case or declaratory ruling;
 2. Finding that the matter is the subject of a pending contested case or litigation in any North Carolina or Federal Courts;
 3. Finding that no genuine controversy exists as to the application of the statute, order or rule to the specific factual situation presented;
 4. Or finding that the factual context put forward is the subject of the declaratory ruling was specifically considered upon the adoption of the rule being questioned, as evidenced by the rule-making record."
- N.C.G.S. § 150B-4(a) states "on request of a person aggrieved, an agency shall issue a declaratory ruling... when..."
- N.C.G.S. § 150B-2(6) defines: "person aggrieved" 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."
- Petitioners provide no evidence that they are "directly or indirectly affected substantially in his or its person, property, or employment by administrative decision."

RECOMMENDATION:

- Dismiss the Request for Declaratory Ruling based on lack of standing of Petitioners.
- In the alternative, issue a declaratory ruling upholding the DWQ decision approving Durham's decision locating this section of the Jordan Lake normal pool.