TO: **Tom Terrell**
FROM: **Lawyers' Committee for Civil Rights Under Law**
Date: **July 9, 2020**
RE: **Questions Regarding Proposed Carolina Sunrock Hazardous Industrial Development in Caswell County**

This information is provided in response to the questions posed in your June 2, 2020 letter regarding the proposed Carolina Sunrock industrial development of a quarry and asphalt plant in Caswell County.

1. Who do we represent and where do they live?

We represent the Anderson Community Group, which includes residents of a predominantly (>65%) African American neighborhood immediately adjacent to the proposed asphalt plant off Hughes Mill Road to the south of Sunrock's proposed site, as well as residents of the Hughes Mill Branch neighborhood to the north.

2. Are there other attorneys involved in this matter?

Although not included in your June 2 letter, as you know, Jim Conner of Calhoun, Bhella & Sechrest, LLP has been retained by another group of residents living near the Prospect Hill proposed quarry operation.

3. Does Sunrock have a vested right to develop these facilities? Does the County's January 6 moratorium apply to these proposed developments?

a. Sunrock does not have any vested rights to develop these projects.

Sunrock's "vested rights" argument is inconsistent with North Carolina law. Pursuant to N.C. Gen. Stat. § 153A-344.1(c), "[a] vested right shall be deemed established with respect to any property upon the valid approval, or conditional approval, of a site specific development plan or a phased development plan, following notice and public hearing by the county with jurisdiction over the property." N.C. Gen. Stat. §§ 153A-344.1(d)(5). Additionally, if a vested right may be terminated if "[a] permit [is] mistakenly issued in violation of an applicable State law *or local law or local ordinance."*), 153A-362 (emphasis added).

The County's Environmental Impact Ordinance does not allow the commencement of "[c]onstruction or installation of any major development project" until after the "filing of a FONSI or acceptance of the final EIS by the board of commissioners." Neither

condition has yet be met, nor has the public hearing required by § 14-69(b)(4)[1] been held. Thus, regardless of any prior zoning consistency determination (of particularly little significance here, because there is no zoning in this portion of the County) or issuance of minor permits to date, Sunrock has no statutory claim to vested rights unless and until it "valid approval" that it has complied with the County's Environmental Ordinance.[2] Such compliance requires acceptance of the completed Environmental Impact Statement (EIS) by the planning department or planning board, a period of notice and comment, compilation of all comments, and a public hearing by the county board of commissioners. *See* Caswell Code § 14-69(b). Given that none of these prerequisites have taken place, Sunrock cannot establish a statutory claim of vested rights.

Nor does Sunrock have a vested right to proceed under common law, which requires an affirmative showing that there has been "(1) substantial expenditures; (2) in good faith reliance; (3) *on valid governmental approval*; (4) resulting in the party's detriment." *MLC Automotive, LLC v. Town of Southern Pines*, 207 N.C. App. 555, 561, 702 S.E.2d 68, 73 (2010) (emphasis added). As noted above, Sunrock has not been given "valid government approval" by the County pursuant to its Environmental Impact Ordinance, nor have the necessary prerequisites to such approval (acceptance of a complete EIS, notice and public hearing) been met.

To our knowledge, Sunrock has not begun construction on the concrete and asphalt plant. Even if it has, Sunrock cannot show that any expenditures it may have made were in good faith reliance on the County's approval, since it continues to fail to comply with the terms of the Ordinance. In fact, rather than attempting to show good faith compliance, correspondence from Sunrock has been expressly critical of the Ordinance and contemptuous of the idea that it should be required to comply with its plain terms. *See e.g.* Letter from William Brian to Matthew Hoagland, March 11, 2020 (submitting the identical materials sent in support of state permits as the EIS submittal for the County); Letter from William Brian to Matthew Hoagland, April 2, 2020 (claiming that the EIS Ordinance "appear calculated to create" "delay and confusion," and that "the entire process is an ill-defined administrative formality."); Letter from William Brian to

[1] "The hearing shall take place no later than 30 days after the close of the public review period or receipt of comments from the state clearinghouse, whichever is later." Caswell Code of Ordinances, § 14-69(b)(4).
[2] Sunrock counsel's letter of April 2, 2020 indicates it knew that its proposed projects would require not only an Environmental Assessment under the ordinance, but the higher level Environmental Impact Statement because of the health and well-being threat its projects pose to nearby residents: " Given the amount of public controversy surrounding Sunrock's projects, it was clear to us that an EIS was going to be required, regardless of any EA that was submitted." April 2, 2020 Brian letter to County at 3.

Brian Ferrell, May 19, 2020 ("the County lacks the authority to require Sunrock to provide environmental statements or disclosures").

b. The County's January 6, 2020 moratorium prohibits any further development of these projects.

On January 6, 2020, the Caswell Board of Commissioners adopted an "Ordinance Establishing a One Year Moratorium on Polluting Industry Development in Caswell County" (the "Moratorium"). The purpose for the Moratorium is set out in Section 2, and states that it has been established to

> *protect the health of the citizens* of Caswell County against the potential adverse health effects from harmful emissions, noise, and contamination of both water and air; *protect the public safety of the citizens* against potential failure of containing and controlling of fire and explosion and increased traffic and damage to roadways," (emphasis added).

Assuming *arguendo* that Sunrock did have any vested rights to develop these projects, the express language regarding the purpose of the Moratorium meets the provisions of N.C.G.S. § 153A-340(h),which contains a specific exemption to any vested rights argument when there is "an imminent threat to public health and safety."

> Except in cases of imminent and substantial threat to public health or safety, before adopting an ordinance imposing a development moratorium with a duration of 60 days or any shorter period, the board of commissioners shall hold a public hearing and shall publish a notice of the hearing in a newspaper having general circulation in the area not less than seven days before the date set for the hearing. 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.

Our clients have provided substantial evidence to the County regarding the imminent public health and safety risks the development of these projects presents, particularly for the elderly, African American, and low wealth residents who live immediately adjacent to the proposed site. In addition, the County Health Department recently sent a letter to the state Department of Environmental Quality asking it to delay its hearing and public comment on the permit for this project, noting that it needed time and additional assistance to in conducting an assessment of the potential health risks from the development and operation of these facilities (see attachment A). The Health Department's request is consistent with the language and purpose of the Moratorium, which is to give the County more time to assess the imminent risks to public health and safety these projects may present. The County has reasonably determined that additional time is needed to evaluate the presence and impact of polluting industries, because of the potential threat to public health and safety they present. Therefore even if Sunrock had met the standard to claim a vested rights exemption to a development moratorium generally, it would not apply here.[3]

It should also be noted that most of the cases cited by Sunrock in its letters are related to zoning changes. Sunrock cites *Finch v. City of Durham* to support the claim that they obtained vested rights even without local approval if there is no zoning. That is not what the opinion in that case actually reflects however. The N.C. Supreme Court upheld the city's actions and ruled against the property owners' vested rights claim, noting that

> Plaintiffs had neither obtained a building permit, nor begun actual construction in good faith reliance on the existing zone. Plaintiffs therefore had acquired no vested right to go forward with the proposed motel development. In view of the preliminary stage of the proposed development and the timing of plaintiffs' acquisition of the property, the action was not so

[3] In *Davidson Cty. Broad., Inc. v. Rowan Cty. Bd. of Comm'rs,* 186 N.C. App. 81, 92,649 S.E.2d 904, 913 (2007), the Court of Appeals affirmed the denial of a conditional use permit for a radio tower based on evidence of a potential threat to public health. In reviewing the whole record, the Court said "Although Petitioners did present evidence from which the Board could have found that the tower would not pose an unreasonable or unjustifiable safety hazard, there was also substantial evidence to support the Board's findings that the tower would be a safety hazard." Similarly, there is substantial evidence in this matter to support the conclusion of the Board of Commissioners that polluting industries—and these projects in particular—present an imminent threat to public health and safety.

> arbitrary, capricious or unreasonable, as applied to them, as to require its invalidation on that basis.

Id., at 373, 384 S.E.2d at 20. The Court concluded with this quote from *In Re Appeal of Parker,* 214 N.C. 51, 59, 197 S.E. 706, 709 (1938):

> When the most that can be said against [zoning] ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

Sunrock cannot establish either a statutory or common law claim of vested rights to proceed with these projects because it has failed to comply with the Environmental Impact Ordinance (the relevant local land use planning ordinance in this case) or acted in good faith reliance on a valid governmental approval. Additionally, because the Moratorium as adopted expressly addresses imminent threats to public health and safety, any vested rights exception to its provisions would not apply.

4. Is the EI ordinance legal, and can it be used to deny projects?

It seems clear from that the EI ordinance is "legal" under Chapter 153A-4 and the NC Environmental Policy Act, G.S. 113A-1 et seq. Counties clearly have authority to create and enforce environmental protection and other land use ordinances, and that authority includes consideration and regulation of health impacts, noise and traffic-related criteria. Additionally, the Ordinances Enforcement section states that "Construction or installation of any major development project shall not commence until subsequent to the filing of a FONSI or acceptance of the final EIS by the board of commissioners." (Sec. 14-71).While the preceding sections of the ordinance focus on process, public disclosure and input, the "Purpose" section supports the argument that the County can deny development projects pursuant to the ordinance:

> ARTICLE III. - ENVIRONMENTAL IMPACT ORDINANCE
> Sec. 14-66. - Purpose; intent
>
> The intent of this article is to provide *a mechanism for full disclosure of anticipated impacts of developments* and *to make such information publicly available so that citizens of the county may have input into developmental issues before they become moot*. More specifically, it is the intent of this article to require the preparation and evaluation of environmental impact

> documents for projects that either require certain state permits or require a local land use permit for development within environmentally sensitive areas, as provided in section 14-68.

The EIS acceptance (completion and compliance with all provisions of Sec. 14-70), public hearing, and ultimate County assessment and determination of compliance with local development standards are the key elements. The word "moot" would not be used unless the County has authority under the ordinance to delay, work with developers to revise or modify, or deny projects which the citizens have had input on and oppose. Importantly, §14-68(c) makes clear that the county can require an EIS even if a federal or state agency has issued a FONSI:

> The county may require preparation of an EIS pursuant to subsection (c) of this section, notwithstanding a FONSI on the part of federal or state agencies.

Additionally, the General Assembly has determined that local legislative policymaking should be given a broad construction. *See* N.C.G.S. §153A-4 ("It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.") The power to deny projects that do not comply with the provisions of the Environmental Impact Ordinance is "reasonably expedient" to the exercise of the County's power under Chapters 113A and 153A to protect the health and safety of residents.

5. Are there policy arguments that should be considered in light of absence of zoning?

The County should consider the intent and spirit of N.C. Gen. Stat. § 143-215.108(f). While the specific language of the statute refers to compliance with a local "zoning or subdivision ordinance," it is clear from the context (and the express requirements for the local government "to make a determination" that the proposed facility complies with local land use ordinances) that the agency's permitting process is supposed to work in conjunction with, *not supersede,* local legislative policymaking. To hold otherwise would allow industries to subvert local land use regulation entirely, and the ability of residents to hold local elected officials accountable to protect the health, safety and welfare of the communities they represent. The statute also states "This subsection shall not be construed to affect the validity of any lawfully adopted franchise, local zoning,

subdivision, or land-use planning ordinance or to affect the responsibility of any person to comply with any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance." The list demonstrates that the provisions of the state are not narrowly limited to traditional zoning ordinances. The County's Environmental Impact Ordinance is, by its express terms and intent, a land use planning ordinance, and therefore its provisions must be respected in the permitting process.

Additionally, as noted above, the General Assembly has determined that local legislative policymaking should be given a broad construction. *See* N.C.G.S. §153A-4. To limit the scope of § 143-215.108(f) solely to local zoning undermines this established public policy and the local control of land use planning and development for the many communities across the state that do not have zoning ordinances. While Sunrock did seek and receive notice from Caswell County that it would comply with zoning regulations, this means little with regard to protecting nearby residents since Caswell County has no zoning ordinance. However, the County has taken measures to protect its residents for environmentally adverse industrial development through its Environmental Impact Ordinance.

Under that Ordinance, Caswell County required Sunrock to submit Environmental Assessment Applications for both the proposed asphalt and concrete plant as well as the Prospect Hill quarry operation, and rejected those applications as failing to meet the requirements of the Ordinance. *See* Sec. 14-69(b)(1). At the end of last year and in response to residents' outcry against Sunrock's planned operations, the County issued a moratorium on industrial developments in the unzoned areas of the County.

On March 11, 2020, Sunrock submitted to Caswell County documents it entitled "Environmental Impact Statement" (EIS) consisting of the same documents it provided to DAQ as part of its Air Permit application. That submission fails to meet the very clearly technical requirements under § 14-70 of the Ordinance. The County has not approved that EIS, nor has it held the required public hearing. *See* § 14-69(b)(4).[4] The express and mandatory terms of § 143-215.108(f) regarding compliance with local ordinances -- "The Commission *shall* not act upon an application for a permit under this section until it has received a determination from each local government" (emphasis added) -- is sufficient justification to stop the permit process until each of the provisions of the ordinance have been fully met. That is, until an EIS that complies with the Ordinance has been accepted

[4] Available at https://library.municode.com/nc/caswell_county/codes/code_of_ordinances?nodeId=CD_ORD_CH14EN_ARTIIIENIMOR

by the planning department, the notice and comment period takes place received, and a public hearing on the EIS is held and there is a determination of compliance "with specific development standards." Sec. 14-79 (b).

The Ordinance's specific and detailed requirements undermine Sunrock's claim that it is pre-empted by N.C.G.S. § 113A-8(b) ("Any ordinance adopted pursuant to this section shall exempt those major development projects for which a detailed statement of the environmental impact of the project or a functionally equivalent permitting process is required by federal or State law, regulation, or rule."). It is clear from the express language in § 14-70 that neither the State nor the federal air quality permitting requirements are "functionally equivalent" to what the County ordinance requires.

Sec. 14-70 sets out the technical requirements of the EIS. It must include a description of all environmental consequences of the project, including direct and indirect effects and significance; and an assessment of impacts on land resources, air quality. Water resources, biological resources, loss of wildlife habitat and affected species, human health, noise and traffic. The EIS must also include a comprehensive assessment of alternatives and mitigation measures for these impacts. These specific elements of the EIS, which the local government has determined are necessary for it to effectively evaluate the potential harms to the health and safety of its residents, are unique to the Ordinance are cannot pre preempted by the more limited permitting assessments of the State or federal approving agencies.

Caswell County
Public Health
Prevent. Promote. Protect.

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Health Director: Jennifer Eastwood, MPH

Attachment A

North Carolina Department of Environmental Quality
Attention: Secretary Director Michael Regan
217 West Jones St.
Raleigh, NC 27603

June 24, 2020

Secretary Regan,

I am submitting this letter at the direction of the Caswell County Board of Health, in response to a request made in public comment at its most recent board meeting. The purpose of this letter is to formally request a postponement of the Public Hearing and Public Comments on June 29, 2020 regarding a proposed rock quarry and asphalt plant in Caswell County.

On May 18, 2020, a group of concerned citizens from the Anderson community request the assistance of my department to conduct an "imminent health risks" assessment to determine whether allowing the concrete and asphalt plant to operate in their community would pose an unreasonable health risk to the citizens who live in that are. First of all, our department is currently leading Caswell County's response to the SARS-COV-2 pandemic. This public health response has strained our resources to capacity. In addition, I did not feel that our local Health Department had adequate experience or training to conduct an assessment or this magnitude.

For these reasons, we requested the assistance of the NC DHHS, Occupational and Environmental Epidemiology Branch. I understand that the OEE Branch is in the process of conducting a review of pertinent information and will soon have a summary of their findings available. We respectfully ask that NCDEQ postpone the public hearing that is scheduled to be held on June 29, 2020 and extend the period for public comments until this report can be reviewed. We further ask NCDEQ to mindfully consider the impact of these facilities on the health of citizen in the surrounding communities and do everything in its power to keep our county as safe as possible.

Sincerely,

Jennifer A. Eastwood, MPH
Public Health Director
Caswell County Health Department

CC: Michael Abraczinskas, Virginia Guidry; Caroline Long; Bryon Shoffner; Cornell Wright; Anita Foust; William Compton; Naeema Nuhammad; Jennifer White