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Vote on a Legislative Public Hearing request by the Chatham County Board of Commissioners to consider amendments to Section 10.13, Table of Permitted Uses; 11.2 Specific requirements; 11.3, Environmental Impact Assessment; and 17.9, Additional Information for Certain Conditional Use Permits (new section) to incorporate standards for high impact land use activities, including oil and gas exploration.

..ABSTRACT

Action Requested:

Vote on a Legislative Public Hearing request by the Chatham County Board of Commissioners to consider amendments to Section 10.13, Table of Permitted Uses; 11.2 Specific requirements; 11.3, Environmental Impact Assessment; and 17.9, Additional Information for Certain Conditional Use Permits (new section) to incorporate standards for high impact land use activities, including oil and gas exploration.

Introduction & Background:

In August 2015, the Board of Commissioners adopted an ordinance instituting a temporary moratorium on oil and gas development activities within Chatham County. Section 7 of the moratorium includes two tasks to be completed during the moratorium. The moratorium was extended twice to July 2018 and January 31, 2019 to provide additional time to complete an oil and gas exploration study and draft amendments to the county's land use regulations (moratorium documents can be viewed on the following website - <http://www.chathamnc.org/government/departments-programs/planning/natural-gas-oil-information>).

Discussion & Analysis:

The Commissioners adopted the moratorium in response to legislative changes to the rules governing oil and gas exploration and development at the state level. It has also provided time to evaluate potential impacts of these activities on the county and develop supplemental standards to the state rules. The NC Department of Environmental Quality Oil and Gas Program webpage contains background information about the potential for oil and gas exploration in the state, as well background information leading to the development of the state regulatory program <https://deq.nc.gov/about/divisions/energy-mineral-land-resources/energy-group/oil-gas-program>).

At the state level, Session Law 2011-276 started the process to evaluate oil and gas exploration and required the NC Department of Environmental Quality to draft a study to provide recommendations to the Legislature. The study was required to address the following items:

- Oil and gas resources present in the Triassic Basins and in any other areas of the state
- Methods of exploration and production
- Potential impacts on infrastructure and water resources
- Potential environmental, economic and societal impacts
- Potential oversight and administrative issues associated with a regulatory program
- Consumer protection and legal issues
- Other pertinent issues

The Legislature received the Oil & Gas Study report in May 2012

(<https://deq.nc.gov/about/divisions/energy-mineral-land-resources/energy-group/oil-gas-program/studies>) followed by passage of Session Law 2012-143 on July 2, 2012. The 2012 session law set in motion the process to update and modernize the oil and gas regulatory program and reconstituted the Mining and Energy Commission. In July 2014 the Mining and Energy Commission produced updated rules that were approved by the Rules Review Commission in December 2014 and January 2015 (<https://deq.nc.gov/about/divisions/energy-mineral-land-resources/energy-group/oil-gas-program>).

As part of the 2012 statutory changes, restrictions were included to limit the ability of local governments to regulate oil and gas exploration. The following are excerpts from GS 113-415 with several areas highlighted that apply to local governments.

§ 113-415.1. Local ordinances regulating oil and gas exploration, development, and production activities invalid; petition to preempt local ordinance.

(a) It is the intent of the General Assembly to maintain a uniform system for the management of oil and gas exploration, development, and production activities, and the use of horizontal drilling and hydraulic fracturing for that purpose, and to place limitations upon the exercise by all units of local government in North Carolina of the power to regulate the management of oil and gas exploration, development, and production activities by means of ordinances, property restrictions, zoning regulations, or otherwise. Notwithstanding any authority granted to counties, municipalities, or other local authorities to adopt local ordinances, including, but not limited to, those imposing taxes, fees, or charges or regulating health, environment, or land use, **all provisions of local ordinances, including those regulating land use, adopted**

by counties, municipalities, or other local authorities that regulate or have the effect of regulating oil and gas exploration, development, and production activities within the jurisdiction of a local government are invalidated and unenforceable, to the extent necessary to effectuate the purposes of this Part, that do the following:

(1) Place any restriction or condition not placed by this Article upon oil and gas exploration, development, and production activities and use of horizontal drilling or hydraulic fracturing for that purpose within any county, city, or other political subdivision.

(2), (3) Repealed by Session Laws 2015-264, s. 56.2(a), effective retroactively to June 4, 2014.

(4) In any manner are in conflict or inconsistent with the provisions of this Article.

(b), (c) Repealed by Session Laws 2015-264, s. 56.2(a), effective retroactively to June 4, 2014.

(c1) If a local zoning or land-use ordinance imposes requirements, restrictions, or conditions that are generally applicable to development, including, but not limited to, setback, buffer, and stormwater requirements, and oil and gas exploration, development, and production activities would be regulated under the ordinance of general applicability, the operator of the proposed activities may petition the Oil and Gas Commission to review the matter. After receipt of a petition, the Commission shall hold a hearing in accordance with the procedures in subsection (d) of this section and shall determine whether or to what extent to preempt the local ordinance to allow for the regulation of oil and gas exploration, development, and production activities.

(f) A local zoning or land-use ordinance is presumed to be valid and enforceable to the extent the zoning or land-use ordinance imposes requirements, restrictions, or conditions that are generally applicable to development, including, but not limited to, setback, buffer, and stormwater requirements, unless the Oil and Gas Commission makes a finding of fact to the contrary. The Commission shall determine whether or to what extent to preempt local ordinances so as to allow for the establishment and operation of the facility no later than 60 days

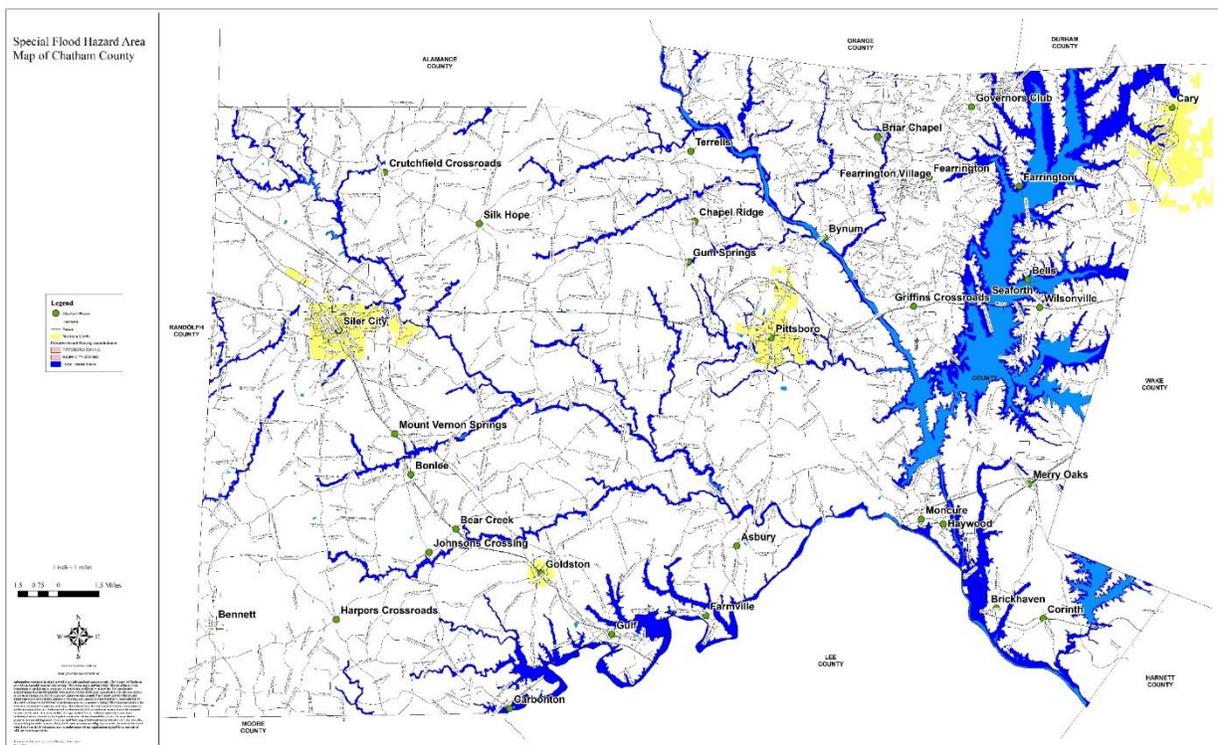
after conclusion of the hearing. The Commission shall preempt a local ordinance only if the Commission makes all of the following findings:

- (1) That there is a local ordinance that would regulate oil and gas exploration, development, and production activities, or use of horizontal drilling or hydraulic fracturing for that purpose.
- (2) That all legally required State and federal permits or approvals have been issued by the appropriate State and federal agencies or that all State and federal permit requirements have been satisfied and that the permits or approvals have been denied or withheld only because of the local ordinance.
- (3) That local citizens and elected officials have had adequate opportunity to participate in the permitting process.
- (4) That the oil and gas exploration, development, and production activities, and use of horizontal drilling or hydraulic fracturing for that purpose, will not pose an unreasonable health or environmental risk to the surrounding locality and that the operator has taken or consented to take reasonable measures to avoid or manage foreseeable risks and to comply to the maximum feasible extent with applicable local ordinances.

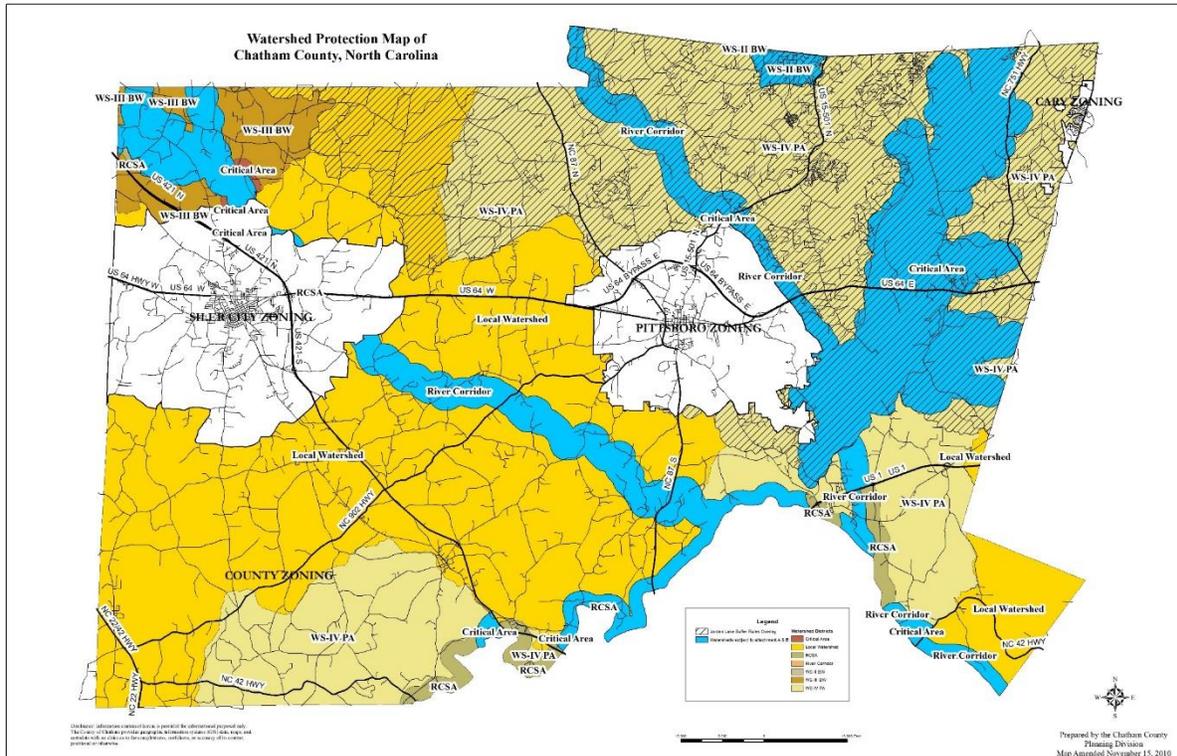
Based on direction from the Legislature, the Mining and Energy Commission moved forward with drafting rules to outline the regulatory framework for managing oil and gas exploration (<http://reports.oah.state.nc.us/ncac/title%2015a%20-%20environmental%20quality/chapter%2005%20-%20mining%20-%20mineral%20resources/subchapter%20h/subchapter%20h%20rules.pdf>). There are a number of topics that are addressed in the rules that include:

- Financial bond requirements and reclamation
- Well site construction standards (includes prohibited substances .1604)
- Setback distances
- Pit and tank construction standards
- Well site maintenance and security
- Closure requirements
- Chemical disclosure

- Environmental testing
- Water management plan requirements
- Waste management plan requirements
- Well site reclamation
- Operation and Production requirements for wells.



Watershed protection regulations were adopted in 1993 and became effective in 1994. The Watershed Protection Ordinance limits non-residential uses (no industrial uses are allowed) in the River Corridor, WS-III Critical Area, WS-IV Critical Area, and WS-II Balance of Watershed. This list of permitted uses is provided in attachments A and B of the Watershed Protection Ordinance, which can be viewed at the following link <http://www.chathamnc.org/home/showdocument?id=24490> . The following map highlights the restricted watershed districts in blue.



In August 2015, the Board of Commissioners adopted a moratorium on oil and gas development in the county, which has been extended twice and is set to expire at the end of January 2019. There are two tasks outlined – first, a study of the potential impacts of oil and gas exploration on Chatham County and second, development of regulations to address items that aren't covered under the state rules. The full text of the tasks outlined in the moratorium follows:

- a) **Studies:** The Board of Commissioners will hire a consultant or consultants with expertise regarding fracking and other oil and gas development activities and their impacts on the natural, man-made, and social environments and its economic benefits and costs. The consultant(s) will be tasked to study Chatham County and to analyze state and federal regulatory programs and to prepare a report for the Board regarding the full range of expected impacts on Chatham County, including financial impacts. The study will include the most current analysis of impacts in localities similar to Chatham County in other states and the effectiveness of local ordinances in managing these impacts. This study and report should be completed within the first year of the moratorium and will include the consultant's conclusions as to whether additional time is needed for thorough study.

- b) Development of Conditional Use Ordinance: Upon completion of the study and report. The Board intends to develop a draft conditional use ordinance and/or other ordinances based on the report and the consultant's advice which will be coordinated with the revisions to the County's comprehensive zoning ordinance. The draft ordinance will be made for public review and comment and at least one public hearing will be held. Based on public comments the Board will finalize the ordinance and initiate the adoption procedure. Development of the ordinance and final approval is estimated to take one year.

To complete the first task, the county contracted with Charles Yuill to prepare a report on the impacts of oil and gas development in Chatham County and the final report was presented in October 2017. The report included a brief history of fracking, Fracking and Chatham County, State Regulations, and Recommendations. The report is also available on the county website - <http://www.chathamnc.org/government/departments-programs/planning/natural-gas-oil-information> .

The report includes that hydraulic fracturing is unlikely to occur in Chatham County due to the small acreage of the rock formation needed for fracking. Additionally, the formation has relatively shallow depths in Chatham County creating situations where shallow fracking could occur and this is where depths well depths are less than 3,000 feet. This also results in a greater likelihood of vertical fracking wells; therefore horizontal fracking is not likely to occur. Last, there are higher risks for groundwater contamination because of the short distances between the bottom elevations of zones of concerns, such as groundwater aquifers, and the top elevation of the formations to be fracked.

The second task in the moratorium is drafting ordinance amendments and Chatham County and Lee County staff have been working in partnership with Poyner and Spruill to develop draft regulations. Discussion initially started with identifying areas that weren't adequately addressed by the state rules and it became apparent that this approach had several flaws. First, it's difficult to identify all potential issues of concern since many of them will be site specific. Second, the likelihood of pre-emption increases because the standards would focus solely on oil and gas exploration. Another issue that was discussed was the legislation for Environmental Impact Assessments (EIA) that was amended by the Legislature. The amendment increased the threshold for requiring an assessment from 2 acres of disturbance to 10. Since some hydraulic fracturing sites could have less than 10 acres of disturbance the EIA requirement would not apply as part of the permitting process.

The approach that has been developed includes several amendments to the Zoning Ordinance. First, two additional uses are proposed to be added to the Table of Permitted Uses – “Oil & Gas Exploration and Development” and “Natural Gas Compressor Station”. These uses are proposed to be allowed in all districts upon issuance of a conditional use permit. There was discussion about limiting the two new uses to industrial areas, but there was concern that this approach would likely result in pre-emption since these operations are dependent on the underlying geology. Second, a new section, 17.9 Additional Information for Certain Conditional Use Permits, is proposed that allows for a special study to determine if a use is consistent with the findings for issuing a conditional use permit. It would be prepared by a consultant mutually acceptable to the applicant and county and the cost of the study would be paid by the applicant. The special study would not apply when an environmental impact assessment is required. Third, the special study provision is proposed to apply to a wider range of uses that currently require a CUP in the Zoning Ordinance. The uses include:

- Asphalt manufacture or refining
- Cement, lime, plaster manufacture
- Coal or coke yards
- Electric light and power generation
- Flammable liquids – bulk plants and storage
- Foundaries
- Garbage and waste incinerators
- Industrial chemical manufacture
- Mining
- Natural gas compressor station
- Oil and Gas Exploration and Development
- Rodenticide, insecticide and pesticide mixing plants
- Sanitary landfills
- Tanneries and tanning operations

- Tar and waterproofing materials manufacture
- Textile manufacture

Last, Section 11.3 Environmental Impact Assessment has been amended to clarify the provisions contained within that section.

A public hearing on the amendments was held on October 15, 2018. Staff and Glenn Dunn, attorney with Poyner and Spuill, provided a presentation and comments on the proposed amendments. Mr. Dunn's comments included that regulations cannot be specific to oil and gas exploration but must be generally applicable, flexible, and apply to other high impact uses. Two speakers provided verbal and written comments. Written comments were also provided by the Duke Environmental Law and Policy Clinic (written comments have been provided on the county website).

Public comment included that the county should consider requiring a health impact assessment; additional uses need to be added to the table of uses including gas storage, plastics manufacturer, helium processing, and small scale liquid gas plant; oil and gas exploration should be restricted to industrial zoning districts; flaring needs to be addressed; blast zones are needed around hydraulic fracturing pads; delete the last sentence of section 17.9 which states that a special study is not applicable if an environmental impact assessment is required; and seismic testing is needed. Additional comments included that a conditional use permit is not adequate because the standards for a quasi-judicial hearing require expert testimony that could limit neighboring property owners participation; oil and gas exploration is a form of mining and should therefore be restricted to heavy industrial zoning districts; and that areas around Jordan and Harris Lakes should have exclusion zones for hydraulic fracturing operations.

The Planning Board discussed this request during their December 4, 2018 meeting and several speakers provided comments and expressed various concerns about oil and gas exploration (written comments are available on the county website). Their comments included concern about a fault line in the area where hydraulic fracturing could occur; impacts on Harris nuclear plant; need for a setback from reservoirs and lakes; concern that earthquakes could occur; and that the comprehensive plan encourages preservation of rural character and that oil and gas exploration are inconsistent with that vision. Glenn Dunn, attorney with Poyner and Spruill, was in attendance to answer questions from the Board.

Planning Board comments included that conditional use permits are disadvantageous for neighboring property owners; oil and gas exploration is incompatible with residential development; and concern about impacts to Jordan and Harris Lakes. The following is a

list of some of the questions from Planning Board members and responses from the attorney and staff:

- Can the moratorium be extended? Yes, but it may be an issue legally if someone were to challenge the extension.
- Can oil & gas exploration activities be restricted to the Heavy Industrial zoning district instead of allowing a conditional use permit (CUP) in all districts? The General Assembly set-up the statute to limit local government authority of oil and gas exploration and a rezoning to a district that covers only a small portion of the county would have higher likelihood of pre-emption. Regardless of whether there is a rezoning or CUP requirement the information that is submitted is similar. However, a CUP requires that the applicant address the findings of fact included in the ordinance which are applicable to a wide range of uses.
- How difficult is the pre-emption process and if a CUP is subject to pre-emption why not make the review process more restrictive? The CUP process is quasi-judicial and demands more scrutiny from a legal perspective. The decision making process is based on facts that are submitted during a hearing where cross-examination is allowed, unlike a rezoning process where a board decision may yield to public pressure.
- Can an overlay district be established over the lakes and adjoining property? The watershed regulations have a ½ mile protection around Jordan Lake and Duke Energy owns the property surrounding Harris Lake and the NRC permit issued for the nuclear plant does not include drilling in the area covered under the permit. An overlay district may also be more susceptible to pre-emption if it is intended to prohibit oil and gas exploration.
- Can the special study also apply in situations where an environmental impact assessment is required? It can apply in this situation, but the proposed text would need to be revised (note: this revision has been made in the final draft under consideration for adoption).
- Are appointments to the Oil and Gas Commission controlled by the Legislature or Executive Branch? Executive
- If someone files a pre-emption petition based on the denial of a CUP how would it be evaluated? The criteria for pre-emption are favorable to local governments if there was a reasonable request for information about the impacts of the activity and the denial of the CUP is based on the responses provided.

- Is it better to have a CUP in all districts or limit it to industrial zoned areas? If there is a pre-emption claim and the county requires a rezoning prior to issuance of the CUP, the Oil and Gas Commission will only evaluate the rezoning, not the CUP. This could be a disadvantage for the county because there is less information provided with a rezoning application. In this scenario the CUP application would not be evaluated by the commission because the county review process wouldn't allow the CUP to proceed to a decision if the rezoning is denied.
- Would an applicant have to apply for a CUP in the following scenario? The county requires a rezoning to heavy industrial prior to considering a CUP and a rezoning application is submitted and ultimately denied by the county. The applicant then submits a pre-emption petition to the Oil & Gas Commission and the commission overturns the denial of the rezoning. Would the applicant then have to apply for a CUP from the county? No, if the county refuses to rezone a property and that decision is overturned by the commission the applicant bypasses the CUP process and can proceed with drilling.
- Can a peer review of the special study be required as is currently required for environmental impact assessments (EIA) that are submitted for certain major subdivisions? When an EIA is required, the applicant contracts with a consultant of their choosing and the county is not involved in that process, which is the reason for the peer review by a different consultant contracted by the county. The special study provision requires that the applicant and county agree on the consulting firm so there shouldn't be a need for peer review. Additionally, selecting peer review consultant would be complicated procedurally because the county would need to have a list of several on-call consultants to cover the various industries covered by the special study requirement.

The Planning Board by a vote of 7-2 recommends adoption of the proposed amendments to the Zoning Ordinance with a revision to the last sentence of Section 17.9 to require a special study when an environmental impact assessment is required instead of not requiring one.

The Planning Board by a vote of 7-2 also recommends adoption of the consistency statement provided below.

Staff and the attorney discussed comments provided by residents and the Planning Board and the following revisions have been made to the proposed amendments since the Planning Board meeting:

- Added the following use to the Table of Permitted Uses: Gas and Petroleum Processing (Subject to additional requirements of Section 17.9) - Note: This use is proposed to be allowed as a CUP in in the Heavy Industrial zoning district.
- Revised the following use to include “production”: Oil and Gas Exploration, Development and Production (Subject to additional requirements of Section 17.9) – Note: This use is proposed to be allowed as a CUP in the Heavy Industrial zoning district.
- Revised the last sentence of Section 17.9 to read: This Section 17.9 is also not applicable to an applicant for a conditional use permit for which an environmental impact assessment is required by Section 11.3 of this Ordinance.

How does this relate to the Comprehensive Plan:

Goal: Conserve Natural Resources, Recommendation 1: Maintain and improve water quality, Natural Resource Policy 1: Ensure the long-term quality of water resources. Strategy 1.8: Update policies and regulations to limit impacts of natural gas exploration and extraction. Complete the Natural Gas Impacts Study, a parallel effort to identify the potential impacts and appropriate strategies to minimize, mitigate, or avoid such impacts. Coordinate with regional partners, such as Lee County, to establish regulations for site planning, development, and restoration based on best practices.

Recommendation:

The Planning Board by a vote of 7-2 recommends adoption of a resolution approving the following consistency statement:

Goal: Conserve Natural Resources, Recommendation 1: Maintain and improve water quality, Natural Resource Policy 1: Ensure the long-term quality of water resources. Strategy 1.8: Update policies and regulations to limit impacts of natural gas exploration and extraction. Complete the Natural Gas Impacts Study, a parallel effort to identify the potential impacts and appropriate strategies to minimize, mitigate, or avoid such impacts. Coordinate with regional partners, such as Lee County, to establish regulations for site planning, development, and restoration based on best practices.

The Planning Board by a vote of 7-2 recommends adoption of an ordinance amending the Zoning Ordinance approving the request by the Chatham County Board of Commissioners to amend the Chatham County Zoning Ordinance as described in “Attachment #1”.