

FILED

STATE OF NORTH CAROLINA

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IN THE GENERAL COURT OF JUSTICE

COUNTY OF DURHAM

DURHAM COUNTY C.S.C.

SUPERIOR COURT DIVISION

09 CVS 004125

SOUTHERN DURHAM DEVELOPMENT
INC.,

per [signature]

Plaintiff,

v.

MOTION TO INTERVENE

DURHAM COUNTY,

Defendant.

NOW COMES the Haw River Assembly (“HRA” or “Intervenor-Applicant”), pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, and hereby moves this Court for leave to intervene as Defendant-Intervenor in the above-captioned matter. In support of said motion, HRA shows the Court the following:

1. HRA is seeking to intervene in this action as a matter of right and participate fully as a party in defense of Durham County’s decision to commence a formal process for the proposed changes to the watershed boundary establishing critical area on the northeast part of Jordan Lake, around the Upper New Hope Creek arm, sought by Southern Durham Development, Inc. (“Southern Durham”).

2. On June 12, 2009, Southern Durham commenced this civil action challenging, *inter alia*, Durham County’s decision to proceed with the formal planning process on whether to move the watershed boundary based on a privately commissioned survey (“Southern Durham’s Survey”). On June 24, 2009, Southern Durham filed its Complaint asserting nine claims against Durham County, including a claim seeking a declaratory judgment that the alleged

administrative relocations of the critical area boundary, suburban tier boundary, and UGA boundary were valid, and a claim seeking a declaratory judgment that the BOCC action requiring a formal process for consideration of these changes was invalid. (Complaint ¶¶ 151-222.)

3. Southern Durham contends the critical area boundary in dispute in the civil action should be moved westward, based on its survey of the 216 mean sea level normal pool elevation of Jordan Lake, and that its property, consisting of 165 acres, should be deemed within the suburban development tier, rather than the rural tier and, furthermore, that the Urban Growth Area boundary for Durham should be moved to coincide with the expanded suburban tier. Southern Durham contends that all of these changes could be (and, it alleges, in fact were) accomplished administratively, without a public process regarding the relocation of the critical area boundary and changes in development tiers. (Complaint ¶¶ 41-53.) Based on these purported changes, Southern Durham also seeks to have its property rezoned to enable higher density, mixed-use development. (Complaint ¶ 65.)

4. Moving the critical area boundary in accordance with Southern Durham's Survey would, among other things, result in smaller watershed protection overlays in Durham County (Complaint, Ex. T, Letter from S. Medlin, Durham County, to J. Ventaloro, NCDWQ, June 9, 2008.)

5. To protect the interests of its members, HRA became involved in the dispute over the proposed change to the Jordan Lake critical area boundary, which preceded the filing of this action.

6. HRA is a non-profit Corporation organized under the laws of the State of North Carolina in 1982. HRA's purpose is to protect and restore the Haw River and Jordan Lake, which is also part of the Haw River watershed. HRA works to promote environmental

education, conservation and pollution prevention; serves as a voice in the public arena; and equips people with the tools and knowledge to be effective guardians of Jordan Lake and Haw River. HRA has participated in development of a nutrient management strategy to protect Jordan Lake from non-point source pollution associated with development, as well the development of a Total Maximum Daily Load under the federal Clean Water Act for Jordan Lake, which is listed as impaired on the Clean Water Act's 303(d) list. (Chiosso Aff. ¶ 4; 8.)

7. Many of HRA's members live, work and recreate in the Jordan Lake watershed area. Over 40 HRA members reside in Durham County, and Jordan Lake is the presumed drinking water source for over 100 members. (Chiosso Aff. ¶ 5.) The recreational, environmental, health, economic, aesthetic, and quality-of-life interests of HRA's members in the Jordan Lake watershed are detailed in Affidavits filed herewith.

8. Concerned about the proposed changes to the critical area watershed boundary and the lack of appropriate public process to vet those changes, HRA, among other things: submitted a letter to DWQ on December 5, 2008, expressing concern about moving a watershed boundary based upon a private developer's survey; attended the Durham Board of County Commissioners ("BOCC") work session on March 23, 2009, during which the BOCC determined to hold a public hearing on the critical area boundary issue; and submitted oral and written comments at the April 13, 2009, public hearing, urging the BOCC to reject Southern Durham's Survey and send the requested changes to the Jordan Lake critical area boundary through appropriate public process. (Chiosso Aff ¶ 10.)

9. On April 13, 2009, the BOCC voted to commence a formal process for the proposed changes to the critical area boundary requested by Southern Durham.

10. Also in June 2009, with the support of 130 concerned citizens, HRA commissioned a survey of the disputed area on the Upper New Hope Creek arm which indicated that the critical watershed area boundary should be moved, if at all, upland, resulting in a critical area considerably broader and more protective of water quality in Jordan Lake than the Southern Durham Survey. (Chiosso Aff. ¶ 10, Att 5.) On July 22, 2009, reciting the results of its survey, HRA requested that the Durham Planning Commission deny the application to relocate the critical area boundary in accordance with Southern Durham's Survey and deny the related plan amendment regarding development tiers. (Chiosso Aff. ¶ 10, Att 6.)

11. Upon reviewing the Complaint and after having an opportunity to consider factual assertions and legal arguments raised therein, HRA determined it should intervene in the civil action commenced by Southern Durham to protect its interests relating to water quality in the Jordan Lake watershed and, perhaps more fundamentally, its interests in ensuring critical area boundary changes and any related zoning changes and plan amendments, which will increase watershed development and directly impact water quality in Haw River and Jordan Lake, are vetted through an appropriate public process.

12. Rule 24 (a)(2) of the North Carolina Rules of Civil Procedure provides that intervention is available as of right upon "timely application" when the applicant "claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

13. HRA's Motion to Intervene satisfies the initial timeliness requirement. At this stage, no responsive pleading has been filed by Durham County, no scheduling order has been

issued, and no discovery or mediation has been conducted. The intervention of HRA will not unduly delay or prejudice the adjudication of the rights and duties of the original parties.

14. In addition, HRA meets the other requirements for intervention as of right. HRA claims an interest relating to the transaction which is the subject of the action, namely, the proposed changes to the critical area watershed boundary around Jordan Lake and the importance of public participation, including participation of HRA and its members, in Durham County's consideration of these changes and any future similar watershed boundary changes and related zoning requests.

15. Furthermore, HRA is so situated that the disposition of this matter may as a practical matter impair its ability to protect this interest. Settlement by Durham County or ultimate disposition of this case in favor of Southern Durham will prejudice HRA's right to participate in a public process for consideration of a change to the critical area boundary location and will set a dangerous precedent for developers and local governments to wholly exclude the public from weighing in on similar future changes.

16. Moreover, HRA's interests are not adequately represented by existing parties. At the outset, Durham County may consider settlement with the developer out of Court because of liability concerns, rather than vigorously defend the rights of HRA and its members to participate in a public process for consideration of zoning changes that will promote development in a rural area of Durham County and the Jordan Lake watershed.

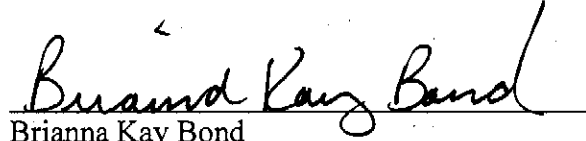
17. In the alternative, HRA is entitled to permissive intervention, pursuant to N.C. R. Civ. P. 24(b)(2), as its defenses and contentions present common questions of fact and law with those of this action, and such intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties.

18. Pursuant to Rule 24(c), this motion is accompanied by a Proposed Answer setting forth the claims and defenses for which intervention is sought. The Proposed Answer is attached to the memorandum submitted in support of this motion.

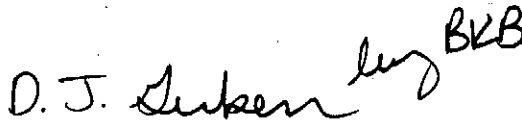
WHEREFORE, for the reasons stated above and set forth more fully in the memorandum filed herewith, HRA respectfully requests that this Court grant its Motion to Intervene as a matter of right pursuant to N.C. R. Civ. P. 24(a)(2), or in the alternative, permit permissive intervention pursuant to N.C. R. Civ. P. 24(b)(2).

This the 10th day of August, 2009.

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