MEMORANDUM

TO: **Travis Morgan for the Planning Board**

FROM: **M. Janelle Lyons**

OUR FILE: **08251.0000001**

SUBJECT: **TOWN OF PINEVILLE**

DATE: **February 6, 2025**

Introduction and Background

My understanding is that the Planning Board has considered a zoning application to amend the zoning ordinance to no longer require that the principal dwelling on a lot containing a private residential quarter be owner-occupied. The Planning Board advises the Mayor and Town Council on zoning and land use decisions in the Town.

My understanding is also that Mr. Morgan has spoken to the Board regarding the prodigy of cases that find zoning decisions based upon ownership are illegal, and that recent down-zoning restrictions in S.B. 382 make it unlawful to down-zone without written consent from all impacted owners.

The Planning Board desires to recommend that Council either:

1. require owner occupation of the primary dwelling for a consecutive period of time prior to allowing non-owner occupation of the primary dwelling, or
2. to no longer allow accessory units

Town Council has asked the Planning Board to reconsider their recommendations. Mr. Morgan has asked me to give the Planning Board a lengthier legal opinion at the next Planning Board Meeting, which tends to meet the last Thursday of the month at 4 pm.

Legal Opinion on Proposed Recommendations

Executive Summary

It is my opinion that both of the Planning Board's recommendations are in violation of current NC state law.

Local Government Authority to Zone

North Carolina local governments are created by the state and derive all their powers by delegation from it. The North Carolina Supreme Court has stated, "It is a well-established principle that municipalities, as creatures of statute, can exercise only that power which the

legislature has conferred upon them." BellSouth Telecommunications, Inc. v. City of Laurinburg, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724 (2005) citing Bowers v. City of High Point, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994); Homebuilders Assn. of Charlotte v. City of Charlotte, 336 N.C. 37, 41–42, 442 S.E.2d 45, 49 (1994).

Further N.C. Gen. Stat. Ann. § 160A-4 states:

> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

N.C. Gen. Stat. Ann. § 160A-4

"The original zoning power of the State reposes in the General Assembly[,][i]t has delegated this power to the 'legislative body' of municipal corporations." Allred v. City of Raleigh, 277 N.C. 530, 540, 178 S.E.2d 432, 437 (1971) (internal citation omitted).

N.C. Gen.Stat. § 160D-701 titled Purposes of Zoning Regulations sets out the authority of cities and towns to engage in zoning:

> Zoning regulations shall be made in accordance with a comprehensive plan and shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements; and to promote the health, safety, morals, or general welfare of the community. The regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the local government's planning and development regulation jurisdiction. The regulations may not include, as a basis for denying a zoning or rezoning request from a school, the level of service of a road facility or facilities abutting the school or proximately located to the school.

See Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjustment, 169 N.C. App. 587, 588–89, 610 S.E.2d 255, 257 (2005)

N.C. Gen.Stat. § 160D-702 titled Grant of Power sets out the authority of cities and towns to engage in zoning:

> A zoning regulation may regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lots that may be occupied; the size of yards, courts, and other open spaces; the density of population; the location and use of buildings, structures, and land.

Zoning decisions are subject to review and interpretation by the court, if sought by an aggrieved landowner, because zoning boards/administrators are sitting in a quasi-judicial capacity when making decisions. See N.C. Gen.Stat. § 160D-406 titled Quasi-judicial procedures.

> (a) Process Required. - Boards shall follow quasi-judicial procedures in determining appeals of administrative decisions, special use permits, certificates of appropriateness, variances, or any other quasi-judicial decision.
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> (b) Notice of Hearing. - Notice of evidentiary hearings conducted pursuant to this Chapter shall be mailed to the person or entity whose appeal, application, or request is the subject of the hearing; to the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and to any other persons entitled to receive notice as provided by the local development regulation. In the absence of evidence to the contrary, the local government may rely on the county tax listing to determine owners of property entitled to mailed notice. The notice must be deposited in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the local government shall also prominently post a notice of the hearing on the site that is the subject of the hearing or on an adjacent street or highway right-of-way. The board may continue an evidentiary hearing that has been convened without further advertisement. If an evidentiary hearing is set for a given date and a quorum of the board is not then present, the hearing shall be continued until the next regular board meeting without further advertisement.
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> (c) Administrative Materials. - The administrator or staff to the board shall transmit to the board all applications, reports, and written materials relevant to the matter being considered. The administrative materials may be distributed to the members of the board prior to the hearing if at the same time they are distributed

to the board a copy is also provided to the appellant or applicant and to the landowner if that person is not the appellant or applicant. The administrative materials shall become a part of the hearing record. The administrative materials may be provided in written or electronic form. Objections to inclusion or exclusion of administrative materials may be made before or during the hearing. Rulings on unresolved objections shall be made by the board at the hearing.

(d) Presentation of Evidence. - The applicant, the local government, and any person who would have standing to appeal the decision under G.S. 160D-1402(c) shall have the right to participate as a party at the evidentiary hearing. Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the board.

Objections regarding jurisdictional and evidentiary issues, including, but not limited to, the timeliness of an appeal or the standing of a party, may be made to the board. The board chair shall rule on any objections, and the chair's rulings may be appealed to the full board. These rulings are also subject to judicial review pursuant to G.S. 160D-1402. Objections based on jurisdictional issues may be raised for the first time on judicial review.

(e) Appearance of Official New Issues. - The official who made the decision or the person currently occupying that position, if the decision maker is no longer employed by the local government, shall be present at the evidentiary hearing as a witness. The appellant shall not be limited at the hearing to matters stated in a notice of appeal. If any party or the local government would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the board shall continue the hearing.

(f) Oaths. - The chair of the board or any member acting as chair and the clerk to the board are authorized to administer oaths to witnesses in any matter coming before the board. Any person who, while under oath during a proceeding before the board determining a quasi-judicial matter, willfully swears falsely is guilty of a Class 1 misdemeanor.

(g) Subpoenas. - The board making a quasi-judicial decision under this Chapter through the chair or, in the chair's absence, anyone acting as chair may subpoena witnesses and compel the production of evidence. To request issuance of a subpoena, the applicant, the local government, and any person with standing under G.S. 160D-1402(c) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall

issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive. The chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be immediately appealed to the full board. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

(h) Appeals in Nature of Certiorari. - When hearing an appeal pursuant to G.S. 160D-947(e) or any other appeal in the nature of certiorari, the hearing shall be based on the record below, and the scope of review shall be as provided in G.S. 160D-1402(j).

(i) Voting. - The concurring vote of four-fifths of the board shall be necessary to grant a variance. A majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter under G.S. 160D-109(d) shall not be considered members of the board for calculation of the requisite majority if there are no qualified alternates available to take the place of such members.

(j) Decisions. - The board shall determine contested facts and make its decision within a reasonable time. When hearing an appeal, the board may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made. The board shall have all the powers of the official who made the decision. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing, reflect the board's determination of contested facts and their application to the applicable standards, and be approved by the board and signed by the chair or other duly authorized member of the board. A quasi-judicial decision is effective upon filing the written decision with the clerk to the board or such other office or official as the development regulation specifies. The decision of the board shall be delivered within a reasonable time by personal delivery, electronic mail, or first-class mail to the applicant, landowner, and any person who has submitted a written request for a copy prior to the date the decision becomes effective. The person required to provide notice shall certify to the local government that proper

notice has been made, and the certificate shall be deemed conclusive in the absence of fraud.

(k) Judicial Review. - Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160D-1402. Appeals shall be filed within the times specified in G.S. 160D-1405(d). The governing board of the local government that is a party to the judicial review of the quasi-judicial decision shall have the authority to settle the litigation, subject to Article 33C of Chapter 143 of the General Statutes. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, s. 51(a), (b), (d); 2021-168, s. 3(a).)

A reviewing superior court "sits in the posture of an appellate court" and "does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board." Mann Media, Inc. v. Randolph Cnty. Plan. Bd., 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) citing Coastal Ready–Mix Concrete Co. v. Board of Comm'rs of Nags Head, 299 N.C. at 626–27, 265 S.E.2d at 383. The proper standard for judicial review will depend upon the particular issues presented by an aggrieved landowner, but generally the court will:

(1) Review the record for errors in law,
(2) Insure that procedures specified by law in both statute and ordinance are followed,
(3) Insure that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
(4) Insure that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
(5) Insure that decisions are not arbitrary and capricious.

Mann Media, Inc. v. Randolph Cnty. Plan. Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)

Zoning Issues Before the Board

The first recommendation is illegal based upon the prodigy of cases that ownership cannot be considering in zoning decisions.

In North Carolina, local governments may use development regulations to regulate the use and division of land, but not to regulate the ownership of land. In Graham Court Assocs. v. Town Council of Chapel Hill, 53 N.C. App. 543, 281 S.E.2d 418 (1981), the North Carolina Court of Appeals ruled that zoning may regulate land use, but not the form of ownership. In that case, the town's ordinance regulated multifamily rental apartments distinctly from multifamily owner-occupied condominiums. After a property owner was denied a permit to convert an apartment to a condominium, they challenged the ordinance. The court ruled that the multifamily development would have the same impacts whether it is occupied by renters or owners. As such, zoning cannot legally distinguish between the

two, nor require extra permits to change from renter-occupied to owner-occupied. The North Carolina Court of Appeals reaffirmed that rule in City of Wilmington v. Hill, 189 N.C. App. 173, 657 S.E.2d 670 (2008). A Wilmington ordinance required that, in order for a residential property to have an accessory apartment (e.g., a garage apartment or in-law suite), the owner of the property must reside on site, either in the principal residence or the accessory residence. The court ruled the requirement for owner-occupancy was an unconstitutional regulation of ownership and beyond the scope of delegated zoning authority.

The second recommendation is "down-zoning", and illegal pursuant to current NC S.B. 382.

Article 6, Development Regulations, N.C. Gen.Stat. § 160D-601 titled Procedure for adopting, amending, or repealing development regulations specifically states:

> (d) Down-Zoning. - No amendment to zoning regulations or a zoning map that down-zones property shall be initiated nor is it enforceable without the written consent of all property owners whose property is the subject of the down-zoning amendment, unless the down-zoning amendment is initiated by the local government. For purposes of this section, "down-zoning" means a zoning ordinance that affects an area of land in one of the following ways:
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> (1) By decreasing the development density of the land to be less dense than was allowed under its previous usage.
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> (2) By reducing the permitted uses of the land that are specified in a zoning ordinance or land development regulation to fewer uses than were allowed under its previous usage. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, ss. 12, 50(a), 51(a), (b), (d).)

An amendment to the Zoning Ordinance which would no longer allow accessory dwellings, when they have been previously allowed, would be considered "down zoning," reducing the permitted uses, in violation of NC statutes.