

[329] September 29, 1997

Mr. Preston Howard, Director Division of Water Quality Department of Environment and Natural Resources P. O. Box 27687 Raleigh, North Carolina 27611-7687

Re: Advisory Opinion; Application of New Setbacks Under the Swine Farm Siting Act; N.C.G.S. § 106-803

Dear Mr. Howard:

The 1997 General Assembly amended the Swine Farm Siting Act, N.C.G.S. 106-800, et seq., to increase applicable setbacks for components of swine farms. You have asked whether such setbacks are to be applied to new or expanded swine farms which have received permits from the Division of Water Quality (DWQ) but did not commence construction or expansion prior to the date the amendments became law.

The Swine Farm Siting Act was amended by S.L. 1997, c. 458, s. 4.1. As the result, N.C.G.S. § 106-803 now reads as follows:

"§ 106-803. Siting requirements for swine houses, lagoons, and land areas onto which waste is applied at swine farms.

(a) A swine house or a lagoon that is a component of a swine farm shall be located:

(1) At least 1,500 feet from any occupied residence.

(2) At least 2,500 feet from any school; hospital; church; outdoor recreational facility; national park; State Park, as defined in G.S. 113-44.9; historic property acquired by the State pursuant to G.S. 121-9 or listed in the North Carolina Register of Historic Places pursuant to G.S. 121-4.1; or child care center, as defined in G.S. 110-86, that is licensed under Article 7 of Chapter 110 of the General Statutes.

(3) At least 500 feet from any property boundary.

(4) At least 500 feet from any well supplying water to a public water system, as defined in G.S. 130A-313.

(5) At least 500 feet from any other well that supplies water for human consumption. This subdivision does not apply to a well located on the same parcel or tract of land on which the swine house or lagoon is located and that supplies water only for use on that parcel or tract of land or for use on adjacent parcels or tracts of land all of which are under common ownership or control.

(a1) The outer perimeter of the land area onto which waste is applied from a lagoon that is a component of a swine farm shall be at least 75 feet from any boundary of property on which an occupied residence is located and from any perennial stream or river, other than an irrigation ditch or canal.

(a2) No component of a liquid animal waste management system for which a permit is required under Part 1 or 1A of Article 21 of Chapter 143 of the General Statutes, other than a land application site, shall be constructed on land that is located within the 100-year floodplain.

(b) A swine house or a lagoon that is a component of a swine farm may be located closer to a residence, school, hospital, church, or a property boundary than is allowed under subsection (a) of section if written permission is given by the owner of the property and recorded with the Register of Deeds.

S.L. 1997, c. 458, s. 4.2, provides the effective date of these requirements. It reads as follows:

"Section 4.2. The amendments to subsection (a) and (a1) of G.S. 106-803 made by Section 4.1 of this act and G.S. 106-803(a2), added to G.S. 106-803 by

Section 4.1 of this act, apply to any new liquid animal waste management system for which construction commences on or after the date this act becomes law and to any expansion of an existing liquid animal waste management system for which construction commences on or after the date this act becomes law."

The effective date language is clear and unambiguous. Any person commencing the new construction or expansion of a covered animal waste management system must build in compliance with the new setbacks. This is true, even if the DWQ-issued permit (or certificate of coverage) was based on an application or site evaluation with lesser setbacks. The validity of the water quality permits would not be affected; the new Swine Farm Siting Act provisions would merely require an application supplement (or a supplement to the plans and specifications on file with DWQ) to reflect the new location of the system components.

This opinion assumes that a person who has not begun construction or expansion did not rely on the DWQ permit to incur substantial expenditures. If that fact situation were to arise, we would need to revisit this issue to determine if some common law vested rights theory might be invoked by the permittee. For your information, the most recent explanation of this theory is found in *Browning-Ferris Industries v. Guilford County Board of Adjustment*, (filed May 6, 1997), ___ N.C. App. ___, ___ S.E.2d ___ (1997), which includes the following discussion:

The common law vested rights doctrine is "rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions" and "has evolved as a constitutional limitation on the state's exercise of its police powers." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986). A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations "substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building," *Town of Hillsborough v. Smith*, 276 N.C. at 55, 170 S.E.2d at 909; (2) the obligations and/or expenditures are incurred in good faith, *Id.*; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party, *Id.* (requiring building permit); *In re Campsites Unlimited*, 287 N.C. 493, 501, 215 S.E.2d 73, 77 (1975) (permit not required for vesting if permit not required under law in effect at time of expenditures); *Mecklenburg County v. Westbery*, 32 N.C. App. 630, 635, 233 S.E.2d 658, 661 (1977) (a mistakenly-issued permit cannot give rise to a vested right); *Warner v. W & O, Inc.*, 263 N.C. 37, 41, 138 S.E.2d 782, 786 (1964) (expenditures made prior to issuance of permit "not made in reliance on the permit"); see *Avco Com. Developers v. South Coast Reg. Comm'n*, 553 P. 2d 546, 551 (1976) (Preliminary governmental approval not sufficient to support vested right); and (4) the amended ordinance is a detriment to the party. See *Russell v. Guilford County*, 100 N.C. App. 541, 545, 397 S.E.2d 335, 337 (1990); see also David W. Owens, *Legislative Zoning Decisions* (Institute of Government, 1993). The burden is on the landowner to prove each of the above four elements. (Slip Op. at p. 3)

It is unlikely a person who has not commenced construction would be able to meet the burden on proving a common law vested right, but in our opinion this option is potentially available and DWQ should be aware of it.

Thank you for bringing this matter to our attention. If you require further information, please feel free to contact this office again.

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Kathryn Jones Cooper Special Deputy Attorney General