MEMORANDUM

TO: The Mayor and the BOA

FROM: Nick Herman

RE: Legal Considerations about Town Stormwater Management on Private Property

DATE: May 21, 2019

This Memorandum discusses, in general terms, the legal implications of potential Town efforts to prevent or mitigate stormwater problems on private property if the Town assumes maintenance or control over stormwater infrastructure on private property. These legal implications present important consequences and considerations for the Town—not only from a liability perspective, but also from a practical and fiscal perspective.

As you know, the Town regularly installs and maintains stormwater infrastructure on its roads, right of ways, and on other Town owned property. To date, the Town has rarely installed or maintained stormwater infrastructure on private property (except as part of the Town's own drainage system), even as the Town regulates stormwater infrastructure on private property in Article VI of the LUO, which qualifies at Section 15-251.2(f) of that Article that the Town's stormwater regulations for private property "shall not create liability on the part of the town…for any flood damages that result from reliance on this ordinance."

If the Town installs, maintains, repairs, or otherwise directly assumes responsibility over stormwater infrastructure on private property (assuming the consent of the private property owner), at least three legal principles are implicated: (1) the constraints of the "public purpose" doctrine; (2) the level of stormwater service that the Town must provide to all similarly situated private property owners; and (3) the liability of the Town for assuming responsibility over stormwater infrastructure on private property.

As for the "public purpose" doctrine, Town funds expended to improve or maintain stormwater infrastructure on private property would be justified only if such action were reasonably necessary to enhance the Town's stormwater infrastructure on the Town's own property for the benefit of others in a "public" sense; and the application of this doctrinal limitation would depend on the specific facts of the situation.

Assuming the public purpose doctrine is satisfied to justify the expenditure of Town funds for stormwater infrastructure on private property, generally the Town must provide the same level of service or benefit to other similarly situated private property owners.

As for the liability of the Town for assuming responsibility over stormwater infrastructure on private property, N.C. law is well established. The case law states that the Town will be liable for the maintenance of and actionable injuries from stormwater infrastructure on private property when the Town has adopted or expressly assumed—in some legal way by agreement or dedication or otherwise—control or management over such private infrastructure. *See Asheville Sports Properties, LLC. V. City of Asheville*, 199 N.C. App. 341, 683 S.E.2d 217 (2009); *First Gaston Bank of North Carolina v. City of Hickory,* 203 N.C. App. 195, 691 S.E.2d 715 (2010).

The foregoing presents important considerations for the BOA in its legislative discussion of ways to prevent, ameliorate, or rectify stormwater problems on private property. That is, assuming that an action by the BOA on this subject satisfies (1) the public purpose doctrine, (2) a level of same service provided to all similarly situated private property owners, and (3) an assumption of liability by the Town for stormwater infrastructure on private property, the question is: what is the financial cost to the Town for this undertaking from an implementation standpoint and liability standpoint.

The BOA should know that, although there may be mechanisms by which the Town could assume responsibility over stormwater infrastructure on private property, other local governments have not

chosen this path in light of the limitations or constraints mentioned above—i.e., the public purpose doctrine, providing a level of service to all similarly situated persons, and the financial cost associated with such an undertaking. That being said, the BOA is legislatively free to consider a different approach in light of the constraints mentioned above.

One such approach, pointed out by Mike Brough in a Memo to the Board in 1997 on "Town Participation in Solving Drainage Problems on Private Property," was the then policy of the Town "that, if a drainage ditch was shown on the officially adopted map [of the Town's "public drainage system"] and the property owner agreed to dedicate to the town a drainage easement, the town would accept the offer of dedication and would thereafter maintain the ditch as part of the town's drainage system." Mike stated that "[t]his approach established a clear dividing line between what the town considered public and what it considered private, and also helped to reduce the demands on the public works department's budget… [But] apart from this approach, however, the town has no more authority to spend public funds to correct a drainage problem on private property, even if the problem is one that the town allegedly should have prevented, than the town would have to spend public funds to repair a private dwelling in order to correct building code violations that were not caught in the inspection process."