This will be long but I believe it sets forth pertinent points about 3 proposals which are currently before the BOC. I want it to be perfectly clear these opinions and interpretations are mine alone. I have been practicing real estate land and land use for 40 years. I also have been heavily involved with reading and interpreting laws and ordinances and even participating in drafting legislation in my past. All this background serves no purpose other than to say that I did not formulate these opinions and interpretations off the top of my head; I have put some thought into what I have written.

I. POTTS STREET DEVELOPMENT

Municipalities are statutory creations by the legislature and only given the powers prescribed or permitted by state statute (NCGS §160A). These specific powers are set forth in the statute.

A. STATE STATUTE:

(i) "CHAPTER 143. STATE DEPARTMENTS, INSTITUTIONS, AND COMMISSIONS

ARTICLE 21. WATER AND AIR RESOURCES

N.C. Gen. Stat. 143-214.5 (2017)

§143-214.5. Water supply watershed protection

(a) Policy Statement. -- **This section provides for a cooperative program of water supply watershed management and protection to be administered by local governments consistent with minimum statewide management requirements established by the Commission**. If a local government fails to adopt a water supply watershed protection program or does not adequately carry out its responsibility to enforce the minimum water supply watershed management requirements of its approved program, the Commission shall administer and enforce the minimum statewide requirements. The reduction of agricultural nonpoint source discharges shall be accomplished primarily through the Agriculture Cost Share Program for Nonpoint Source Pollution Control.

(b) Development and Adoption of Water Supply Watershed Classifications and Management Requirements. -- **The Commission shall adopt rules for the classification of water supply watersheds and that establish minimum statewide water supply watershed protection requirements applicable to each classification to protect surface water supplies** by (i) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, or (iii) a combination of both (i) and (ii). The Commission may designate water supply watersheds or portions thereof as critical water supply watersheds and impose management requirements that are more stringent than the minimum statewide water supply watershed management requirements. The Commission may adopt rules that require that

any permit issued by a local government for a development or construction activity conducted by that local government within a designated water supply watershed be approved by the Department prior to issuance. **Any variance from the minimum statewide water supply watershed management requirements must be approved by the Commission prior to the issuance of a permit by a local government.** Except as provided by *G.S. 153A-347* and *G.S. 160A-392*, the power to implement this section with respect to development or construction activities that are conducted by State agencies is vested exclusively in the Commission.

(c) Classification of Water Supply Watersheds. -- The Commission shall assign to each water supply watershed in the State the appropriate classification with the applicable minimum management requirements. The Commission may reclassify water supply watersheds as necessary to protect future water supplies or improve protection at existing water supplies. A local government shall not be required to submit a revised water supply watershed protection program to the Commission earlier than 270 days after it receives notice of a reclassification from the Commission.

(d) Mandatory Local Programs. -- **The Department shall assist local governments to develop water supply watershed protection programs that comply with this section**. Local government compliance programs shall include an implementing local ordinance and shall provide for maintenance, inspection, and enforcement procedures. As part of its assistance to local governments, the Commission shall approve and make available a model local water supply watershed management and protection ordinance. The model management and protection ordinance adopted by the Commission shall, at a minimum, include as options (i) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, and (iii) a combination of both (i) and (ii). **Local governments shall administer and enforce the minimum management requirements.** Every local government that has within its jurisdiction all or a portion of a water supply watershed shall submit a local water supply watershed management and protection ordinance to the Commission for approval. Local governments may adopt such ordinances pursuant to their general police power, power to regulate the subdivision of land, zoning power, or any combination of such powers. In adopting a local ordinance that imposes water supply watershed management requirements that are more stringent than those adopted by the Commission, a county must comply with the notice provisions of *G.S. 153A-343* and a municipality must comply with the notice provisions of *G.S. 160A-384*. This section shall not be construed to affect the validity of any local ordinance adopted for the protection of water supply watersheds prior to completion of the review of the ordinance by the Commission or prior to the assumption by the Commission of responsibility for a local water supply watershed protection program. Local governments may create or designate agencies to administer and enforce such programs. The Commission shall approve a local program only if it determines that the requirements of the program equal or exceed the minimum statewide water supply watershed management requirements adopted pursuant to this section.

(d1) A local ordinance adopted to implement the minimum statewide water supply watershed management requirements applicable to agriculture and silviculture activities shall be no more restrictive than those adopted by the Commission. In adopting minimum statewide water supply

watershed management requirements applicable to agriculture activities, the Commission shall consider the policy regarding agricultural nonpoint source discharges set out in subsection (a) of this section. The Commission may by rule designate another State agency to administer the minimum statewide water supply watershed management requirements applicable to agriculture and silviculture activities. If the Commission designates another State agency to administer the minimum statewide water supply watershed management requirements applicable to agriculture and silviculture activities, management requirements adopted by local governments shall not apply to such activities.

(d2) **A local government implementing a water supply watershed program shall allow an applicant to average development density on up to two noncontiguous properties for purposes of achieving compliance with the water supply watershed development standards if all of the following circumstances exist**:

(**1) The properties are within the same water supply watershed. If one of the properties is located in the critical area of the watershed, the critical area property shall not be developed beyond the applicable density requirements for its classification**.

(2) Overall project density meets applicable density or stormwater control requirements under *15A NCAC 2B .0200*.

(3) Vegetated buffers on both properties meet the minimum statewide water supply watershed protection requirements.

(4) Built upon areas are designed and located to minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas, and maximize the flow length through vegetated areas.

(5) Areas of concentrated density development are located in upland areas and, to the maximum extent practicable, away from surface waters and drainageways.

(**6) The property or portions of the properties that are not being developed will remain in a vegetated or natural state and will be managed by a homeowners' association as common area, conveyed to a local government as a park or greenway, or placed under a permanent conservation or farmland preservation easement unless it can be demonstrated that the local government can ensure long-term compliance through deed restrictions and an electronic permitting mechanism**. A metes and bounds description of the areas to remain vegetated and limits on use shall be recorded on the subdivision plat, in homeowners' covenants, and on individual deed and shall be irrevocable.

(7) **Development permitted under density averaging and meeting applicable low density requirements shall transport stormwater runoff by vegetated conveyances to the maximum extent practicable.**

(8) **A special use permit or other such permit or certificate shall be obtained from the local Watershed Review Board or Board of Adjustment to ensure that both properties considered**

together meet the standards of the watershed ordinance and that potential owners have record of how the watershed regulations were applied to the properties.

(e) Assumption of Local Programs. -- The Commission shall assume responsibility for water supply watershed protection, within all or the affected portion of a water supply watershed, if a local government fails to adopt a program that meets the requirements of this section or whenever a local government fails to adequately administer and enforce the provisions of its program. The Commission shall not assume responsibility for an approved local water supply watershed protection program until it or its designee notifies the local government in writing by certified mail, return receipt requested, of local program deficiencies, recommendations for changes and improvements in the local program, and the deadline for compliance. The Commission shall allow a local government a minimum of 120 days to bring its program into compliance. The Commission shall order assumption of an approved local program if it finds that the local government has made no substantial progress toward compliance. The Commission may make such finding at any time between 120 days and 365 days after receipt of notice under this subsection by the local government, with no further notice. Proceedings to review such orders by the Commission shall be conducted by the superior court pursuant to Article 4 of Chapter 150B of the General Statutes based on the agency record submitted to the Commission by the Secretary.

(f) State Enforcement Authority. -- The Commission may take any appropriate preventive or remedial enforcement action authorized by this Part against any person who violates any minimum statewide water supply watershed management requirement.

(g) Civil Penalties. -- A local government that fails to adopt a local water supply watershed protection program as required by this section or willfully fails to administer or enforce the provisions of its program in substantial compliance with the minimum statewide water supply watershed management requirements shall be subject to a civil penalty pursuant to *G.S. 143-215.6A(e)*. In any area of the State that is not covered by an approved local water supply watershed protection program, any person who violates or fails to act in accordance with any minimum statewide water supply watershed management requirement or more stringent management requirement adopted by the Commission for a critical water supply watershed established pursuant to this section shall be subject to a civil penalty as specified in *G.S. 143-215.6A(a)(7)*.

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with *G.S. 115C-457.2*.

(h) Planning Grants to Local Governments. -- The Secretary may make annual grants to local governments for the purpose of assisting in the development of local water supply watershed protection programs. The Secretary shall develop and administer generally applicable criteria under which local governments may qualify for such assistance. Such criteria shall give priority to local governments that are not then administering zoning ordinances in affected water supply watershed areas.

(i) Every State agency shall act in a manner consistent with the policies and purposes of this section, and shall comply with the minimum statewide water supply watershed management requirements adopted by the Commission and with all water supply watershed management and protection ordinances adopted by local governments.

My Comments

The State Statute establishes minimum standards for the cities and towns to follow in the enactment of its watershed ordinances. All ordinances shall comply with state statute.

Section (a)(d2) establishes the concept and criteria of density averaging. This minimum must be followed by the cities and towns. Section (a)(d2) further contains requirements of zoning and enforcement of those requirements.

(ii) **§ 160A-360. Territorial jurisdiction**

(a) All of the powers granted by this Article may be exercised by any city within its corporate limits.

Here we have the granting power of the State to municipalities

B. TOWN ORDINANCE:

(i) 1.2 AUTHORITY (General Authority in Planning Ordinance Preamble) The development regulations contained in the Planning Ordinance have been adopted **pursuant to the specific authority granted to municipalities by the North Carolina General Statutes (NCGS) in Sections 160A-372, 160A-381 and 160A-381**. The enumeration of these sections of the general statutes is not intended to exclude any other section of the general statutes which grants or confirms authority to municipalities to promulgate ordinances, rules, or regulations similar or identical to those set forth in the Planning Ordinance.

Our Ordinance states our planning and zoning power comes through the State.

(ii) 17.1 AUTHORITY AND ENACTMENT (Authority specifically in the WATERSHED PROTECTION OVERLAY DISTRICT). The Legislature of the State of North Carolina has, in Chapter 160A, Article 8, Section 174, General Ordinance Authority; and in Chapter 143, Article 21, Watershed Protection Rules, delegated the responsibility or directed local governmental units to adopt regulations designed to promote the public health, safety, and general welfare of its citizenry. The Davidson Board of Commissioners does hereby ordain and enact into law the text contained herein to satisfy said statutory requirements.

(iii) 17.8 DENSITY AVERAGING

A. A density averaging certificate shall be considered one development request.

B. **Overall impervious area/amount of the paired parcel averaged-density development, calculated by built-upon area, shall not exceed the impervious that would be allowed if the parcels were developed separately**. The parcel pair shall be located in the same water supply watershed and preferably in the same drainage area of the watershed. Parcel pairs may be located in the Critical Area and in the Protected Area. However, if one of the parcels is located in the Critical Area and one is located in the Protected Area, the Critical Area parcel shall not be developed beyond those impervious amounts allowed in the critical area provisions of the Davidson Planning Ordinance. A property in a more restricted watershed area shall not acquire impervious rights from a property in a less restricted area of the watershed. The purpose of this provision is to preserve open space in the more sensitive areas of the watershed.

C. The paired parcels may include or be developed for residential or non-residential purposes.

D. **Buffers shall at least meet the appropriate minimum Davidson Planning Ordinance water supply watershed protection requirements** on both parcels in the parcel pair.

E. **The portion of the parcel(s) which is not developed as part of the paired parcel, but that is being averaged in the land area being evaluated to meet the built-upon surface area, shall remain in an undisturbed vegetated or natural state.** A metes and bounds description of the space to be undisturbed and limits on use shall be recorded on the subdivision plat, in homeowner covenants, and on individual deed and shall be irrevocable. The resultant impervious area/amount for the two lots combined shall not exceed the original allowable impervious amount for each individual lot if they were developed separately. It shall be noted on the plat that the Planning Director shall reserve the right to make periodic inspections to ensure compliance.

F. A Density Averaging Certificate shall be obtained from the Watershed Review Board (Board of Adjustment) to ensure that both parcels considered together meet the standards of the ordinance and that potential owners have record of how the watershed regulations were applied to the parcel pair. Only the owner(s) of both of the paired parcels may submit the application for the Density Averaging Certificate. A site plan for both of the parcels must be submitted and approved as part of the Density Averaging Certificate. If such a certificate is granted, no change in the development proposal authorized for either parcel shall be made unless the certificate is amended. Upon issuance of such certificate, one copy will be forwarded to the North Carolina Division of Water Quality (DWQ). Included with the Density Averaging Certificate will be a site plan, registered plats for both properties, a description of both properties, and documentation reflecting the development restrictions to the parcel pair that will remain undeveloped.

G. The Watershed Review Board **shall make written findings supported by appropriate calculations and documentation that the paired parcel averaged-density development plan as a whole conforms to the intent and requirements of this Article and Section, and that the proposed agreement assures protection of the public interest.**

H. **The undisturbed land area shall be recorded in the deed for the parcel to which it applies. The Density Averaging Certificate** shall be recorded in the deed for each of the parcels in

the parcel pair. Both the designated undisturbed land area and the certificate shall be noted on the subdivision plat that applies to each of the parcels.

I. Stormwater runoff from paired parcel averaged density-averaged development which meets the low-density option development requirements shall be controlled by vegetative conveyances to the maximum extent practicable and shall be approved by Mecklenburg County Storm Water Services', Water Quality Program.

J**. <u>Stormwater runoff from paired parcel averaged density development which meets the high-density option development requirements shall be controlled on the parcel(s) where the high-density development is occurring in accordance with the criteria specified in the Davidson Water Quality Design Manual and the Davidson Planning Ordinance for high-density development</u>**.

K. No parcel for which a watershed variance has been granted, or would be required, may be included as part of a parcel pair.

L. Compliance with criteria A - L shall be evidence that the parcel pair

There are several notes about our density averaging ordinance.

1. Our ordinance is silent on non-contiguous parcels but State Statute would control anyway and require the non-contiguous parcels when using density averaging.

2. The development is one parcel having been deeded to the current owner as a 21+ acre parcel. The large parcel is contained in Deed Book 29594 Pg. 700

3. The combined impervious area of both parcels must be the same or greater if dealing with the parcels separately. – We only have one parcel.

4. Buffers are required on both parcels.

5. The portion of the parcel used to provide the open space must remain in an undisturbed vegetated or natural state.

6. Density averaging shall be determined by our Board of Adjustment with written findings of fact and if they find averaging meets our ordinance criteria, then they will issue a Density Averaging Certificate.

6. The undisturbed area shall be recorded on a filed plat.

All these criteria must be meet and followed but in the Potts Street development we are dealing with one large parcel of 21+ acres (Deed Book 29594, Pg. 700) so there are no 2 parcels on which to density average as required by State and Town law. Also there can be not claim that they are non-contiguous. I have no knowledge of this density averaging going before the Board of Adjustment.

(iv) **1.3 JURISDICTION** These regulations apply to the development and use of all land and structures within the corporate limits of the Town of Davidson, North Carolina, and within the extraterritorial jurisdiction exercised by ordinance as now or hereafter fixed, and as indicated on the Planning Ordinance Map on file at the Davidson Planning Department. This map and its boundaries shall be incorporated and made part of this ordinance.

Under State law and our Ordinance we have no authority to plan or zoning outside of our Town limits, (exception is Extra-territorial, which is inapplicable here). The portion of the property that Potts St. is proposing to use as open space lies in Cornelius jurisdiction. We cannot plan or zone within Cornelius. Ignoring the non-contiguous requirement and the requirement that it be 2 separate parcels, if you look at our ordinance it requires certain planning details which would fall within the Cornelius jurisdiction. Legally we cannot do this development as proposed. We can only apply our zoning ordinance to the property within our Town limits and that portion of the property must meet all of our requirements including open space. By the State law and our Planning Ordinance, requiring the open space to be where it is now and its later maintenance, it amounts to zoning in Cornelius' jurisdiction. We have no zoning and certainly no enforcement over land in Cornelius' jurisdiction.

In conclusion, the Potts Street development cannot be approved as planned because it falls outside our zoning jurisdiction, it does not meet the requirements for density averaging and does not contained the required open space for development in Davidson.

II. HOTEL SITE Conditional Zoning and Common Law Vested Rights

As a preliminary statement, there are 2 ways that a developer can obtain vested rights; by statutory authority and by court case law (common law). In the particular issue concerning the "hotel" parcel (4A), statutory authority is not applicable.

Common law vested rights arise only if a certain set of circumstances exist. Our NC courts have said the **developer must prove** the existence of 3 elements before common law vested rights arise:

"A party claiming a common law vested right in a nonconforming use of land must show: (1) substantial expenditures; (2) in good faith reliance; (3) on valid governmental approval; (4) resulting in the party's detriment." MLC Auto., LLC v. Town of S. Pines, 207 N.C. App. 555; 702 S.E.2d 68; 2010.

In order to further understand whether common law vested rights apply we need to look at the zoning which applies to the questioned land. The zoning is and has been Conditional at all relevant times. In our ordinance, TOD Planning Ordinance Section 2.2.17, it is stated that conditional zoning allows for flexibility and the ability to create additional controls which can establish specific development standards to insure quality development. Under Conditional, specific site plans must be submitted by a developer in order for the BOC to consider such plans being proposed. ("A Conditional Planning Area ["CPA"] **application must be made by the owners of the property.**

Since no permit or approval has been granted for the hotel site, we start from scratch. There are no common law vested rights by my interpretation of the law since the critical criteria of plan approval has never been obtained. A site plan has been submitted by the developer requesting approval of a 4 story hotel with a reduced number of parking spaces. Since the zoning is conditional, the BOC has the right to place any conditions it sees fit. I would encourage the BOC to at a minimum require the size of a hotel be reduced so it can have all its parking on its property and not ask the Town to provide parking.

III. Beaty Property

Since we have moved into the contract negotiation phase, I would suggest 2 contingencies to be in the contract:

1. The part of the development property shown as “park” remains property of the developer and then the resulting community association. That a permanent easement be placed upon the park property for the enjoyment and use of the public with no restrictions to impede such use. I also would require certain amenities (swings, jungle gym, etc) as requested by our Park and Rec Dept. This would put the requirement of maintenance of the pond and the park itself on the developer and the Town would still receive taxes on this portion.

2, Since the development would be creating the increased traffic, the developer would be required to install whatever road widening or intersection improvements need to be had at Beaty and Main, Beaty and Griffith and along Beaty itself.

These seem like reasonable requirements to alleviate situations that arise solely as a result of the development.

I in no way condone the selling of Beaty property since it is an asset we can never replace. Unlike the purchase price which will disappear very soon, this land would benefit our Town in perpetuity, I believe if we can make a strong stand, the BOC could reject the contract and not sell this land. My 2 suggestions above are designed to make this development more expensive to build but at the same time help alleviate some of the issues this development may cause.