

MEMORANDUM IN SUPPORT OF CONDITIONAL ZONING APPLICATION

OF

JOHNSTON FAMILY- TAPROOT DAIRY

The Applicant in this matter, comprised of the descendants of S. E. Johnston and wife, Juanita Johnston, are all of the owners of the lands sought to be conditionally zoned from RC to Conditional District Zoning (CD-2020-01) . This matter is currently before the Henderson County Planning Board for its review and recommendation to the Commissioners of Henderson County, which Board of Commissioners will be ultimately be the deciding body relative to the application.

The purpose of this Memorandum, particularly in view of the presentation limitations imposed on the public hearing by the Covid-19 crisis, is to present for the Planning Board (and ultimately for the Board of Commissioners), a general overview of the facts and law surrounding the application, and to encourage the Planning Board to recommend the approval of the application to the Board of Commissioners.

GENERAL CHARACTER AND HISTORY OF THE PROPERTY

The property which is sought to be conditionally zoned by the Applicants is an approximate 297 acre portion (hereinafter “the Project”)of a larger tract (319.66 acres) located on Butler Bridge road in the far northern portion of the county. The property is illustrated on the maps attached to the application, and otherwise presented in the hearing. Of the total acreage, Applicants are reserving a nineteen (19) acre parcel and two small additional areas along Butler Bridge Road (comprised of approximately 3.66 acres) and those tracts will remain under their current Regional Commercial District (RC) zoning designation. Applicants seek to have the remainder of 297 acres conditionally zoned to allow the presence of a major residential housing project. The nature and scope of the project are specifically set out in the application and other presentation documents, and will only be addressed herein in general concept.

The property as a whole has been generally known in the past to the public as “Taproot Dairy.” Its prior use, for a period of time encompassing several generations of this family, has been for agricultural use. The property was used primarily as a dairy farm, with ancillary agricultural uses including the growing of corn crops and hay. As the dairy farming industry declined in profitability, the family chose several years ago to close down the dairy operation and apply the property to the growing of crops only until such time as an alternate use for the property could be found.

More than twenty years ago, the Johnston family realized that farming the property was not going to continue in the future to be practical from an economic perspective. In the days of development of “mega-farms” by large corporate entities, and due to the general decline of the dairy farming industry as a whole, it became impossible for families operating small dairy farms to survive. In addition, due to the location of the Project property in an Urban Services Area of the county, as well as its proximity to sewer, water, and transportation service areas, it became clear that the highest and best use of the property was no longer an agricultural use. Over a period of time in excess of twenty years the family has attempted to market the property for other uses recommended by the economic advisors of Henderson County, including seeking to market it for industrial use or development of a commercial center. Despite those efforts, no viable purchasers have come forth to purchase the property. However, the interest of various entities in developing the property for high density residential use has increased dramatically, leading the family to the unavoidable conclusion that the current highest and best use for their property is a residential application.

In 2018, the family contracted to sell the Project property area to an individual for proposed development. That individual presented a proposed conditional zoning application to the county, which came before both the Planning Board and the Board of Commissioners. That application was not recommended by the Planning Board, and because of a tie vote before the Commissioners was not passed by that board. As a result of these actions, the contract for sale terminated. However, while observing the process of that separate applicant seeking approval by both the Planning Board and the Board of Commissioners, the Johnston family identified various issues that it believed needed to be modified and readdressed before attempting to market the property again.

As a result of the lessons learned from the previous applicant’s failure to obtain approval, the family embarked on a new plan of development that involves:

- (1) substantially lower residential density (approximately 50% lower than the previous plan)
- (2) recognition and preservation under conservation standards of large land areas within the flood plain and flood way along both Cane Creek and the French Broad River, as well as dedication of a portion of those areas to public greenway use
- (3) widening and improvement of roads within the Project
- (4) establishment of significant open area within the Project
- (5) careful consideration of issues of sidewalks, street lighting, paths and recreational areas, and safety considerations, and

(6) recognition of the existence of the airport flight path, and development of an aviation easement for the benefit of the airport which ensures that all residents are aware of the noise and other factors created by the same.

These changes and issues have been incorporated into the application in advance of filing, recognizing that they are issues that the Planning Board and the Board of Commissioners would want to see addressed. The Applicant believes that careful consideration has been given in the current plan to all relevant issues, and that the conditions self-imposed by Applicant have resulted in the Project having a totally different character and extent than that which was submitted by the prior applicant.

When Applicant commenced this conditional re-zoning process, Applicant did not have a contract with any person or entity to sell the property. Applicant did however work with a prospective development entity during the planning process, insisting on application of the conditions set forth in the current application. Applicant is pleased to announce with the filing of this Memorandum that Applicant has in fact now contracted to sell the property to D. R. Horton, Inc., and is excited and pleased to be in that contractual relationship. That contract is contingent upon and directly related to approval of the existing conditional re-zoning application. D. R. Horton is one of the largest residential building companies in the country. Applicant believes it to be reputable, and committed to providing the public with quality affordable housing. D. R. Horton has expressed to Applicant its pleasure and excitement over being involved in the Henderson County community.

LEGAL POSTURE OF APPLICANT AND ROLE OF PLANNING BOARD

It would be remiss to not address briefly the legal aspects of the current application and the role of the Planning Board in that process.

Zoning in general is designed to promote and protect the general health and well being of the community at large, while at the same time allowing landowners to make such free use of their properties as they may desire. As stated by the North Carolina Court of Appeals in 2007: "Zoning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property. Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined to prevent arbitrary, capricious or oppressive action under the guise of law." Davidson County Broad., Inc. v. Rowan County Bd. of Comm'rs, 186 N.C. App. 81, 649 S.E. 2nd (2007). Notwithstanding this cautionary note, the Courts and legislature have recognized that there exist circumstances under which County Commissioners, by legislative action, may adopt regulations affecting the use of land to protect the health, safety and well being of the community. It is

however required, as a condition of zoning, that all such actions be taken consistent with an adopted Comprehensive Plan of land use.

North Carolina General Statute §153A-341 provides in part that:

“(a) Zoning regulations shall be made in accordance with a comprehensive plan.”

It is therefor necessary in all stages of this proceeding to consider the application process in light of the existing Comprehensive Plan of Henderson County. The importance of this consideration is further highlighted in subsequent portions of NCGS §153A-341, as it establishes what is required of a governing body in denying or approving any application for amendment to current zoning:

“(b) Prior to adopting or rejecting any zoning amendment, the governing board shall adopt one of the following statements which shall not be subject to judicial review:

(1) A statement approving the zoning amendment and describing its consistency with an adopted comprehensive plan and explaining why the action taken is reasonable and in the public interest.

(2) A statement rejecting the zoning amendment and describing its inconsistency with an adopted comprehensive plan and explaining why the action taken is reasonable and in the public interest.”

In recognition of this emphasis to the governing body, in this case the Board of Commissioners and preliminarily to the Planning Board, Applicant will address herein specifically the manner in which the current application for conditional re-zoning is consistent with and in support of the principles set forth in the Comprehensive Plan.

The procedural question then becomes “What is the role of the Planning Board in this process, if the Board of Commissioners is ultimately the governing body which makes the decision?” That question is also answered by this same statute which provides that:

“(c) Prior to consideration by the governing board of the proposed zoning amendment, the planning board *shall advise and comment on whether the proposed amendment is consistent with any comprehensive plan.* (emphasis added) The planning board shall provide a written recommendation to the governing board that addresses plan consistency and other matters as deemed appropriate by the planning board, but a comment by the planning board that a proposed amendment is inconsistent with the comprehensive plan shall not preclude consideration or approval of the proposed amendment by the governing board.” N.C.G.S. §153A-344 (c)

The statute further provides that the Board of Commissioners shall not vote on the proposed amendment until they have received the recommendation of it's appointed Planning Board, so obviously the Planning Board serves an important function within this limited scope. That scope is, as stated, "to advise and comment on whether the proposed amendment is consistent with (the) comprehensive plan". Technical review has already been accomplished by committee, and additional conditions can still be imposed by the Commissioners.

The undersigned attorney did not serve as counsel to the separate and prior applicant. The Johnston family did not actively participate in the planning of the previous application. We are however aware that a member of the Planning Board in the prior hearing stated essentially that " We can do better for Henderson County." This applicant, the Johnston family, agrees with that statement. The existing application includes and incorporates many changes and conditions that were arrived at thoughtfully by the Commissioners of Henderson County. We believe that with those changes, as well as with other additional conditions applied, including most significantly the severe reduction in density and expansion of open areas, roads, sidewalks, and lighting systems, this project is thoroughly and absolutely consistent with the Comprehensive Plan. We encourage the Planning Board to recommend the same for approval to the Henderson County Board of Commissioners.

As the Planning Board is essentially comprised of the same members as in 2019, and as the Planning Board is already basically familiar with the property as a result of that prior application, I will illustrate herein, from time to time, characteristics of the project by reference to the prior application. This is **not** intended to imply that this is an amendment to the prior application, as the total character of the project has changed as well as the parties to the same. It is simply an attempt to avoid waste of time and effort of the members of the Planning Board revisiting aspects with which the members are already familiar.

RELEVANT ASPECTS OF COMPREHENSIVE PLAN OF 2020

Henderson County, through its Board of Commissioners, has for many years recognized in it's Comprehensive Plan the following needs and principals:

1. To provide affordable and sufficient housing to the citizens of Henderson County.

Figure H.3 of the 2020 Comprehensive Plan provides the following information:

Figure H.3 Projected Number of Future Housing Units

	2010	2020
<i>Population Projection</i>	108,029	126,523

<i>Projected Population in Households</i>	<i>105,251</i>	<i>122,627</i>
<i>Projected Population in Group Quarters</i>	<i>2,778</i>	<i>3,896</i>
<i>Projected No. Occupied Housing Units</i>	<i>45,172</i>	<i>52,630</i>
<i>Projected No. Vacant Housing Units</i>	<i>6,750</i>	<i>7,864</i>
<i>Projected Total Number of Housing Units</i>	<i>51,992</i>	<i>60,494</i>

(Source of Population Projections: N.C. Office of State Demographics)

(NOTES: Based on 2.33 persons per household from the 2000 U.S. Census;

Population in Households projected using trend from 1990 to 2000.)

(Vacant Units projected using 2000 vacancy rate of 13%.)

The following language (excerpted) is taken directly from the Comprehensive Plan:

Figure H.3 details the relationship between current and future population, existing housing stock, and future housing needs. Evaluating the number of housing units in 2000 (42,996) as compared to that of 2020 (60,494) reveals that at least an additional 17,498 housing units will be needed to accommodate population growth. Note that the numbers shown in Figure H.3 are based upon projections made by the North Carolina Office of State Demographics. State population projections were utilized in this instance because State demographers use special formulas in the projection of housing units – particularly group quarters – that take into account decreases in estimated persons per household.

Figure H.3 projects the need for 8,502 new housing units between 2010 and 2020. Projections shown in Figure H.3 should, however, be viewed as a low-end estimate of housing needs. Population projections for 2020, found in Section 2, are even higher and suggest the need for as many as 3,000 additional dwelling units to accommodate population growth between 2010 and 2020.

Multi-family rental complexes (apartments, condominiums, etc.) are also permitted in most residential districts with special standards. However, **development of multi-family units is generally limited by the absence of sewer and water. The County should consider designating additional areas for high-density residential development and targeting such areas for sewer and water development where necessary. New zoning districts that permit greater densities may be required.** (emphasis added)

Most of the county's current and future housing needs have been and will continue to be met by private-sector market forces. Henderson County government can aid the private sector by assisting along the margins, where market forces might not adequately provide for the needs of certain populations. The County can also assist by incorporating flexibility into its land development regulations to provide the market with greater opportunity to respond to changing housing demands and needs.

As part of its recognized and stated plan to accommodate growth needs in a responsible fashion, the Comprehensive Plan acknowledged the need to:

“A. Revise County ordinances to allow the private sector to develop a broad range of housing choices.

The County will ensure an adequate supply of land zoned for dense housing.

The County will work through the countywide sewer and water master plan recommended in Section 3, *Sewer and Water Element* to ensure that sewer and water services are provided at appropriate locations to support that objective.

The *Growth Management Strategy Element* generally directs such housing to the Urban Services Area and Community Service Centers. The following changes will be made to the County's land development ordinances:

a) Incorporate new zoning districts that allow for higher density development to be applied in areas where services are provided.”(emphasis added)

The Comprehensive Plan recognizes that denser housing should be located in areas where existing public utilities and infrastructure exist, and in the designated Urban Services Area:

“By comparing these maps to maps 03, 09, and 11 **the reader will note that the highest residential densities, the majority of existing commercial and industrial land uses, and the majority of proposed future industrial land uses lie primarily within the urban core of the county where sewer and water services either exist or are possible and where topographical features can support such development. Development policies and regulations will continue to make efficient use of existing and future infrastructure and will protect the rural qualities of areas not served by infrastructure by encouraging the further concentration of commercial, industrial, and intense residential development within the urban core of the county.**”

The proposed Project is squarely within these stated goals. The Project is located totally within, and is centrally located in, the designated Urban Services Area (USA). The following is a description of the patterns of development envisioned within the USA. The USA is defined by the Comprehensive Plan as follow: “*The Urban Services Area is that area within which most urban services and urban- scale development is currently concentrated, and within which such development should generally be concentrated through the year 2020.*” Within the USA the Comprehensive Plan provides that : “Wide ranges of residential densities will exist. **Over the long term, land use regulations and policies should favor higher density development, consistent with natural constraints and the availability of urban services.** At the same time, policies and regulations should protect existing less-intensely developed communities.” (emphasis added) The Comprehensive Plan directly contemplates the need for developments such as this project within the USA by stating: “**Substantial investments in affordable housing development should occur within the USA.**” “Sewer and water infrastructure investments should be focused within the USA first and foremost. Priority should be given to economic development sites, commercial districts, **dense residential areas**, schools, and existing areas prone to septic failure within the USA.”

The Comprehensive Plan further in part recognizes the need to move toward project wide density, as opposed to individual lot size restrictions. It anticipates new zoning regulations providing that:

5. New zoning districts and Open Use district density requirements will manage density by regulating overall, project-wide density rather than by simply setting a minimum lot size. The total numbers of units within a given area can work out to

be the same on a given project. However, taking the project density approach gives the developer the flexibility to adjust setbacks and lot sizes to fit various needs, from adjusting for topography to creating affordable lots. It is a more land-efficient way of controlling overall community density.

This recognition led the way to the conditional zoning regulations now in place, and support the approach of this application for a Conditional Rezoning that allows for a consistent and thoughtful plan of residential development. At the same time, the Comprehensive Plan recognized that conditional rezoning should be carefully undertaken, so as to allow owners and developers of land to have some certainty of procedure and substance:

Among other things, the following should be considered:

I. Expanded use of conditional and special use procedures. Such procedures should be developed with care to minimize undue or arbitrary discretion, to create clear and understandable expectations, and to avoid a process that is overly burdensome to the applicant.

This application provides the opportunity to the Planning Board and to the Commissioners to allow land use that accomplishes the goals of the Comprehensive Plan while at the same time recognizing the right of the land owner to develop within the parameters of those goals.

The Comprehensive Plan recognized other ancillary issues that were important to new development, which aspects the Project currently proposed accomplishes. Those are, in part, as follows:

9. Identify and incorporate measures to enhance the walk ability of new development.

The Project has provisions for developed sidewalk systems and paths that exceed the requirements of the LDC.

12. Maintain current County land development regulations which contain provisions that allow developers to create “open space” developments whereby a portion of the project is permanently set aside from development, and the development potential from that portion is transferred to the remaining area to be developed.

Though affected by a recent text amendment to the LDC, the Project sets aside in perpetuity large areas of green space both in the flood plain and on the “high ground”, utilizing the same for conservation purposes, while at the same time not seeking density bonuses which could otherwise result from those provisions.

13. Incorporate generous conservation design incentives and standards into land development codes. Such incentives will allow increased development density in exchange for the conservation of floodplains, steep slopes and protected mountain ridges, sensitive natural areas such as key habitats and wetlands, agricultural land, historic sites and structures, and other important sites and features.

As noted, the Project voluntarily sets aside and protects large areas of lands of this sensitive or conservation character without seeking density bonuses.

14. More generally, voluntary land clustering and compact design principles will be incorporated into the Development Code. Such principles encourage walkability, reduce infrastructure and development costs, allow for the realization of conservation objectives, reduce vehicle travel distances and times, and allow developers to reserve areas for future development when allowable density increases as a result of an expansion of the USA.”

These principals have been generally incorporated into the Master Plan of the Project, and soundly accomplish these stated goals of the Comprehensive Plan.

19. Identify and incorporate Stormwater Management standards and requirements.(Natural Resources Element, Action Strategy N-02.E).

The Project in many aspects incorporates and accomplishes these standards.

20. Maintain and clarify existing 30-foot stream setback requirements and streamside vegetation requirements as described in the Natural Resources Element of this Comprehensive Plan.

The Project incorporates these standards.

The North Carolina Supreme Court in 2001, essentially defined the process of Conditional Zoning, as it comes before the Planning Board and Commissioners by this application, stating as follows:

Conditional **use zoning** occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the **use** of his property to a particular **use** or to subject his tract to certain restrictions as a precondition to any rezoning. The practice of conditional **use zoning** is an approved practice in North Carolina, so long as the action of the local **zoning** authority in accomplishing the **zoning** is **reasonable**, neither arbitrary nor unduly discriminatory, and in the public interest. N.C. Gen. Stat. §§ 160A-381, 160A-382 (1999). The only **use** which can be made of the **land** which is conditionally rezoned is that which is specified in the conditional **use** permit.” Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment, 354 N.C. 298, 554 S.E.2nd 634 (2001).

When an applicant for a conditional use permit produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a prima facie showing of entitlement to a permit. Davidson, supra.

The burden of an applicant for a conditional use permit to show its prima facie compliance with all requirements and conditions of a **zoning** ordinance is a burden of production, and not a burden of proof. To hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not

impossible, burden on an applicant for a conditional use permit. An applicant need not negate every possible objection to the proposed use. Davidson, supra.

THE PROJECT AS IT RELATES TO THE COMPREHENSIVE PLAN

Applicant contends that the Project as proposed is consistent in all respects with the Comprehensive Plan, and that it is consistent with both the LDC and the neighborhood in general. In that regard, Applicant states that:

1. The density of the Project is based upon a total of 699 units, which number accomplishes a level of concentration of use that is consistent with the goals of the Comprehensive Plan, but which minimizes the impact of the Project on the surrounding community.

The prior applicant sought approval of a total of 1218 units, including both single family homes, multi-family homes, and townhouses, and apartments. The current application eliminates multi-family units, and limits townhouses to 227 units.

If the density allowed under the current RC zoning was applied to an anticipated 286 acres, more than 4,500 units could be approved on the property. If the density of Residential District One (R1) was applied in successive subdivision applications, as many as 2,288 units could be approved on the same acreage. Despite this potential, the current Applicant seeks approval of only the 699 units for the total acreage in question, which is approximately 31% of the density which could be applied under R1 zoning.

The density approval sought by this application is essentially identical to the density of the Riverstone subdivision directly across Butler Bridge Road from the property. However, the proposed Project seeks to mitigate certain areas of development that appear to have been of concern in Riverstone. Applicant has widened the streets, provided a central access thoroughfare with a divided medium, has added additional sidewalks and walking areas, all designed to promote safety and enjoyment of the property by residents. All of these improvements are in excess of the requirements for a major subdivision in an R-1 zone under the provisions of the LDC. In addition, the Project has a density only slightly in excess of that of Hollabrook Farms and the Glens of Aberdeen, both of which exist on substantially smaller tracts located in the Town of Mills River and in close proximity to the project.

It should be noted that none of the other subdivisions in proximity to the project have dedicated large areas of open space in the flood plain or flood way to perpetual restrictions of a conservation nature. This Project will accomplish preserving a large tract of that type of ground in a conservation state in perpetuity.

2. The Project utilizes public sewer and water facilities which are currently available within a reasonable distance. The presence and utilization of these public utilities are consistent with the goals of the Comprehensive Plan.

The property of the Project actually has direct access to a forced pressure sewer main of the Cane Creek Sewer and Water District. However, for responsible development purposes, the development will instead use a gravity flow sewer line to that same system on the opposite side of Interstate 26. All such use will be under the direction of the appropriate utility and health

authorities and will comply with the same. Use of the public sewer system eliminates the potential problems caused by alternative individual septic systems. It has already been determined that the Cane Creek system has the capacity to service the project.

The Project has direct access within a reasonable distance to public water, and in fact has two alternative public water resources. Regardless of which system is utilized, all water service will be from public systems and water wells will not be required. It has already been determined that the water systems have adequate capacity to service the project.

3. The Project is in an area of the county with a previously developed road system that gives the Project responsible access to health, commercial and public resources. The Project is in close proximity to Hwy. 25 corridor and the facilities located in the Town of Fletcher. The Project is close to both Park Ridge Hospital and the Urgent Care Facilities of Mission/Pardee Hospitals located in both Mills River and Fletcher. The Project has reasonable access times to Pardee Hospital. The Project will have probably the closest, fastest and best access to Mission Hospital of any housing project in Henderson County.

Because of it's location, the Project can be quickly and reasonably served by all fire, law enforcement, and other emergency response services available in Henderson County.

4. The Project, through self-imposed perpetual restrictions, recognizes and adopts conservation standards for use of the flood plain and flood way areas along the French Broad River and Cane Creek. Those restrictions are set forth in detail in the application itself. In general, there will be a prohibition against developing or using those areas for any purposes inconsistent with the conservation use standards of the LDC, and will be preserved for passive

recreation opportunities for both the residents of the subdivision and other members of the community. The Applicant has determined to dedicate an area along the French Broad and Cane Creek to facilitate establishment of a greenway along the same which can be utilized and enjoyed in perpetuity by the public. Even though Applicant technically has the right to fill and develop up to 20% of the flood plain area, that right is being waived by the Applicant.

5. When the prior applicant sought approval of a more dense project, the Commissioners of Henderson County identified and specified various areas of development and facilities that they believed would be reasonable and appropriate for a project of this magnitude in this area of the county, which specifications exceeded in many instances the requirements of the LDC for major subdivisions. This Applicant has sought to adopt and maintain all of those prior identified concerns and solutions into the current plan. These are set out with specificity in the application, but include additional and extensive sidewalk requirements, special lighting limitations, surface water runoff and control issues and many other improvements designed to improve the project.

6. As previously stated, the Comprehensive Plan stresses that projects with dense housing should be located or concentrated in the designated Urban Service Area. This is in part to maximize the benefit of existing infrastructure, and also to give greater flexibility in preserving the open or sensitive character of other areas which do not have the current or prospective ability to support significant housing growth. The proposed project is located squarely within the Urban Service Area, and the property character and location has all of the positive attributes that justify its inclusion in the USA from a planning perspective.

It is inevitable that Henderson County is going to continue to grow. By utilization of this Project to supply the county with much needed affordable housing, other areas of the county which do not have existing infrastructure to support this number of homes can be better preserved for a less dense housing atmosphere. This project, with its conservation standards, has the added benefit of leaving significant open green space for visual and physical enjoyment, while still accomplishing the housing needs.

7. Some local residents have expressed the desire to see a commercial shopping/dining/recreation center develop in the Fletcher/Mills River area. To that end, the Applicants have withheld approximately 22 acres from the proposed Project area, retaining the current RC zoning designation, in the hope that, with the increased local population arising from this project and adjoining developments, a commercial developer will be attracted to this site for that purpose or another compatible purpose. Though the current economic condition of the State may make that unlikely in the immediate future, 19 acres of the reserved property is in direct view of I-26, is the closest portion to the Highway 25 corridor, and has all of the same available infrastructure. These elements should make this reserved land attractive for a commercial use of this character.

8. The Asheville Airport Authority, through the person of the airport executive director, has expressed concerns about the fact that this Project is located within the runway flight path of the Asheville Regional Airport. It is apparent however from admissions of that representative at the technical review committee meeting that those concerns are not based significantly in issues of safety. In fact, there has been only one (1) officially reported incident of safety involving the

airport (aircraft in flight) since the year 2002. In that incident a small plane crashed, but was outside of the flight path of the airport when it crashed. The project property is more than four (4) times the distance the FAA requires from the end of a runway. The flight path already crosses Riverstone and hundreds of other individually owned homes. It is highly unlikely that an aircraft approaching or taking off that developed an emergency would land or attempt to land in a straight-away fashion. Instead, it is considerably more likely that in such an event the aircraft would attempt to set down in the flood plain areas on the west side of the French Broad, which are open and undeveloped for miles, which areas are within a few hundred feet of the center of the flight path and outside the boundaries of Riverstone or the proposed Project.

Recognizing that the airport has a greater concern that it will get sued over issues of noise, dust and noxious odors, the Applicant has addressed that issue with the development of an "Avigation Easement" in favor of the airport. This will be a perpetual easement, binding on the land and subsequent owners within the Project, that would effectively waive the owners rights to sue (if any such right existed) over these types of issues. Developing this easement also insures that future owners have knowledge of the flight path issues, and that they willing accept any such issues. This is addition to the mandatory disclosure rules that already exist under North Carolina law.

Notwithstanding that the Applicant denies that any realistic risk exists by virtue of proximity of the Project to the airport, the Applicant has taken action to prevent what could in fact become a significant hazard and risk to air flight to and from the airport. Though Applicant can't control the tendency of ducks and geese to utilized the French Broad and Cane Creek,

Applicant has proposed to establish a perpetual restriction upon the lands of the Project that lay within the flood plain and flood way that would **prohibit** development of open wetlands or other habitat that would attract and increase the numbers or type of wildfowl in the area. Applicant believes that so doing will significantly decrease the risk of future “bird strikes” arising from wildfowl present in the airport’s arrival/descent corridor. It should be noted that in the absence of these self-imposed restrictions Applicant as a matter of right is entitled to develop wetlands upon this property, which practice would generally be encouraged by the public in the absence of the airport.

9. The Project has another location feature that is worthy of note in this process. The property is bordered on the North by a stream and golf course, as well as having its own reserved open space and proposed greenway on that side. It is bordered on the East by I-26, which prevents the project from having direct visual or other impact on that entire border. It is bordered on the West by the French Broad River with undevelopable flood plain in agriculture on the other side, again insulating the project from other development. It is only on the South, across Butler Bridge Road, that other development exists, with that development being consistent in type and scope to the proposed Project. Properties to the South are fully developed out at this point. Essentially this creates an island of privacy around the Project, helping preserve a more rural character even with the density of housing proposed. As is shown by the overview plan of the Project, attached hereto as Exhibit A, the development essentially creates a private enclosed environment that is both attractive and secure. This use, as conditionally proposed, is certainly more pleasant than other alternative uses to which the property could be put as a matter of right within an RC zone.

With all factors being considered, it is apparent that the Project, as proposed by Applicant, is consistent with the goals and planning guidelines promulgated by the Comprehensive Plan of 2020 for Henderson County, as well as with all prior versions thereof. It is further apparent that it meets and exceeds all requirements established for major subdivisions under the terms of the current Land Development Code.

CONCLUSION

The undersigned author, as attorney to the Applicants, is accustomed to presentation of the matters contained herein in an oral format. Seeking to adjust to the requirements of a “virtual” or electronic meeting is difficult for the Applicants and we are certain for the Planning Board itself. We have elected to present our position pursuant to this written presentation and the visual presentation of our engineer to both expedite the process and in the hope doing so will allow substance to take precedence over procedure. We thank the Members of the Planning Board for their attention to these matters.

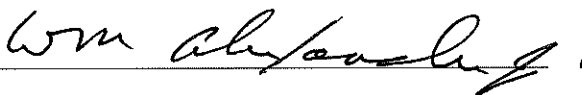
The Applicant believes that this Project, for which conditional zoning designation is sought, will be a continuing and substantial benefit to the citizens of Henderson County. Applicant believes that approval of this application will achieve the true goal of zoning and land use planning, to allow land owners to freely maximize the value and use of their lands while balancing in a responsible fashion our duties to each other as citizens to protect the public health, safety and welfare.

Most importantly and for the reasons set out above, Applicant asserts to the Planning Board that the proposed Project is in all respects consistent with the guidelines, purposes, and

stated goals of the Comprehensive Plan for Henderson County. Applicant is confident that upon review of this matter, giving due consideration to all competent evidence, the Planning Board will see fit to recommend to the Board of Commissioners approval of the conditional zoning application with a finding that the Project is consistent with the Comprehensive Plan. Applicant respectfully requests that the Planning Board recommend to the Board of Commissioners the approval by that Board of the application of Applicant for conditional rezoning of the subject property as outlined in the application, based upon that consistency.

This Memorandum respectfully submitted to the Henderson County Planning Board by the undersigned as counsel to the Applicant, this the 19th day of May, 2020.

Law Offices of William M. Alexander, Jr., PLLC

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Exhibit A