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# AN ACT TO CLARIFY WHEN A COUNTY OR MUNICIPALITY MAY ENACT ZONING ORDINANCES RELATED TO DESIGN AND AESTHETIC CONTROLS (SESSION LAW 2015-86)

## LOCAL GOVERNMENT IMPLEMENTAITON AND ANNOTATED LEGISLATIVE HISTORY WITH ANALYSIS

PIEDMONT PUBLIC POLICY INSTITUTE

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# Piedmont Public Policy Institute



The Charlotte, North Carolina, region is blessed with a vibrant, diversified and expanding economy, and is one of the fastest growing metropolitan areas in the United States. With this strong economic growth come both opportunities and challenges. Governments at the local, regional, state and federal levels are constantly seeking to address these issues through a wide variety of policies, programs, ordinances, rules and laws.

These government decision-makers must be fully informed if they are to craft effective and efficient solutions to the myriad of challenges. They should take in to account the economic and practical impacts of their actions. Too often, policy decisions have been made on the basis of limited information and incomplete analysis, without a rigorous examination of costs, innovate alternatives and market-based approaches. In order to foster informed decision-making, the business community must help bring comprehensive and authoritative research and analysis to the public policy debate.

Responding to this need, John Crosland, Jr. was joined by Allen Tate, Jr., and other leaders in the real estate and business community to help form the Piedmont Public Policy Institute (PPPI), a non-profit 501(c)(3) research and education organization. The mission of the PPPI is to:

- Provide much-needed research and analysis on a range of important public policy issues, ensuring that economic and business aspects of these matters are considered;
- Partner with universities, corporations, other organizations and individual experts to conduct authoritative research projects;
- Issue reports and policy papers digesting these research results and disseminate them electronically and in print; and
- Sponsor educational conferences and forums

Based in Charlotte, North Carolina, the PPPI addresses issues of relevance to policy makers, the business community and the public in Charlotte-Mecklenburg, the region, across the State of North Carolina and in other local communities and states around the nation.

The PPPI Board of Directors gratefully recognizes the Crosland Foundation for providing the funding to conduct this research study. Since the Crosland Foundation was formed in 2001, it has generously supported the PPPI's research on issues impacting housing affordability.

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# I. INTRODUCTION

In recent decades, a number of local governments in North Carolina have imposed aesthetic design requirements on certain types of development within their jurisdictions. This has proven to be controversial. While the home building industry in particular argued that such requirements increase the cost of housing and potentially price entry-level buyers out of the market, local governments contended that aesthetic controls maintain or enhance the appearance of communities and neighborhoods. The North Carolina General Assembly interceded in this debate by adopting Session Law 2015-86 which clarifies and affirms that local governments in the State do not have the power under the State's zoning and subdivision statutes, except in certain limited circumstances, to impose purely aesthetic design mandates on single- and two-family residential development.

This study examines in detail that legislation and its consideration by the General Assembly over three successive legislative sessions, as well as issues related to implementation of that legislation by three towns in Mecklenburg County. The section-by-section analysis of S.L. 2015-86 as it progressed through the legislative process is included in this study to provide substantive guidance on the origins of the statute's language and to facilitate understanding of the General Assembly's intent in enacting the legislation. In addition, this study includes section-by-section annotations to serve as a guide to statutory and programmatic references in the statute.

In 2012, the School of Government at the University of North Carolina at Chapel Hill issued a report detailing the prevalence of aesthetic design controls across the state. That study noted that of the local jurisdictions that responded to its survey, 41% mandated design standards of some type and 15% imposed them on single family development. The types of aesthetic controls imposed on single family development included exterior cladding type, roof pitch and materials, mandatory front porches, garage door placement, architectural style, building color, etc. Cities and towns were more likely to impose these standards than counties, and the larger municipalities were more likely to mandate them than smaller municipalities. *See* D. Owens and D. Batten, *2012 Zoning Survey Report: Zoning Adoption, Administration, and Provisions for Design Standards and Alternative Energy Facilities at 14-20, accessed at* https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/pzlb20.pdf.

The home building industry has been opposed to these types of aesthetic design standards for residential development due primarily to the increase in housing costs resulting from their implementation. In particular, industry representatives expressed concerned about the impact on entry-level housing and first-time homebuyers who could be priced out of a market because of higher costs driven by aesthetic standards such as mandatory brick exteriors, front porches and garage location limits. The Aesthetic standards were also said to limit buyer choice and to decrease diversity in neighborhoods. *See* the May 5, 2014, presentation by J. Michael Carpenter, Executive Vice President and General Counsel of the N.C. Home Builders Association to the LRC House Study Committee on Property Owner Protection and Rights, *accessed at* http://www.ncleg.net/documentsites/

committees/BCCI-6618/05-05-2014/5-5-14%20Powerpoint%20%20Appearance%20Standards%20(Mike%20Carpenter).pdf.

After S.L. 2015-86 was adopted in 2015, many local governments in North Carolina took actions in response to the statute, and this study begins by examining the actions of three towns in Mecklenburg County. Whether these and other local jurisdictions succeeded in complying with not only the letter but also the spirit and intent of the statute may prove to be a matter of continued discussion and debate across the state. It is the purpose of this study to provide all parties involved in those continued deliberations a valuable resource to help better understand the actions of the General Assembly in adopting this statute as well as the issues encountered in complying with S.L. 2015-86's clarified limitations on aesthetic design controls on single- and two-family home structures.

## II. TEXT OF SESSION LAW 2015-86

For ease of reference, the full text of S.L. 2015-86 is set out below.

**GENERAL ASSEMBLY OF NORTH CAROLINA**
**SESSION 2015**

**SESSION LAW 2015-86 SENATE BILL 25**

**AN ACT TO CLARIFY WHEN A COUNTY OR MUNICIPALITY MAY ENACT ZONING ORDINANCES RELATED TO DESIGN AND AESTHETIC CONTROLS.**

**The General Assembly of North Carolina enacts:**

**SECTION 1. G.S. 160A-381 is amended by adding new subsections to read:**

**"(h) Any zoning and development regulation ordinance relating to building design elements adopted under this Part, under Part 2 of this Article, or under any recommendation made under G.S. 160A-452(6)c. may not be applied to any structures subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings except under one or more of the following circumstances:**

- **(1) The structures are located in an area designated as a local historic district pursuant to Part 3C of Article 19 of Chapter 160A of the General Statutes.**
- **(2) The structures are located in an area designated as a historic district on the National Register of Historic Places.**
- **(3) The structures are individually designated as local, State, or national historic landmarks.**
- **(4) The regulations are directly and substantially related to the requirements of applicable safety codes adopted under G.S. 143-138.**
- **(5) Where the regulations are applied to manufactured housing in a manner consistent with G.S. 160A-383.1 and federal law.**
- **(6) Where the regulations are adopted as a condition of participation in the National Flood Insurance Program.**

**Regulations prohibited by this subsection may not be applied, directly or indirectly, in any zoning district, special use district, conditional use district, or conditional district unless voluntarily consented to by the owners of all the property to which those regulations may be applied as part of and in the course of the process of seeking and obtaining a zoning amendment or a zoning, subdivision, or development approval, nor may any such regulations be applied indirectly as part of a review pursuant to G.S. 160A-383 of any proposed zoning amendment for consistency with an adopted comprehensive plan or other applicable officially adopted plan. For the purposes of this**

**subsection, the phrase "building design elements" means exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms. The phrase "building design elements" does not include any of the following: (i) the height, bulk, orientation, or location of a structure on a zoning lot; (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of neighbors; or (iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.**

**(i) Nothing in subsection (h) of this section shall affect the validity or enforceability of private covenants or other contractual agreements among property owners relating to building design elements."**

**SECTION 2. G.S. 153A-340 is amended by adding new subsections to read:**

**"(l) Any zoning and development regulation ordinance relating to building design elements adopted under this Part, under Part 2 of this Article, or under any recommendation made under G.S. 160A-452(6)c. may not be applied to any structures subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings except under one or more of the following circumstances:**

**(1) The structures are located in an area designated as a local historic district pursuant to Part 3C of Article 19 of Chapter 160A of the General Statutes.**

**(2) The structures are located in an area designated as a historic district on the National Register of Historic Places.**

**(3) The structures are individually designated as local, State, or national historic landmarks.**

**(4) The regulations are directly and substantially related to the requirements of applicable safety codes adopted under G.S. 143-138.**

**(5) Where the regulations are applied to manufactured housing in a manner consistent with G.S. 153A-341.1 and federal law.**

**(6) Where the regulations are adopted as a condition of participation in the National Flood Insurance Program.**

**Regulations prohibited by this subsection may not be applied, directly or indirectly, in any zoning district, special use district, conditional use district, or conditional district unless voluntarily consented to by the owners of all the property to which those regulations may be applied as part of and in the course of the process of seeking and obtaining a zoning amendment or a zoning, subdivision, or development approval, nor may any such regulations be applied indirectly as part of a review pursuant to G.S. 153A-341 of any proposed zoning amendment for consistency with an adopted comprehensive plan or other applicable officially adopted plan. For the purposes of this subsection, the phrase "building design elements" means exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms. The phrase "building design elements" does not include any of the following: (i) the height, bulk, orientation, or location of a**

**structure on a zoning lot; (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of neighbors; or (iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.**

**(m) Nothing in subsection (l) of this section shall affect the validity or enforceability of private covenants or other contractual agreements among property owners relating to building design elements."**

**SECTION 3. This act is effective when it becomes law. The act clarifies and restates the intent of existing law and applies to ordinances adopted before, on, and after the effective date.**

**In the General Assembly read three times and ratified this the 10th day of June, 2015.**

**s/ Daniel J. Forest President of the Senate**

**s/ Tim Moore Speaker of the House of Representatives**

**s/ Pat McCrory Governor**

**Approved 10:00 a.m. this 19th day of June, 2015**

## III. CASE STUDIES OF LOCAL GOVERNMENT ACTIONS IN RESPONSE TO S.L. 2015-86

After the Governor signed S.L. 2015-86 into law on June 19, 2015, local governments across North Carolina reacted to this clarification of their legal authority in a number of different ways. This study begins with three brief case studies reviewing and analyzing the actions that the Mecklenburg County towns of Mint Hill, Davidson and Huntersville took in response to the legislation. While their responses were similar in some respects, they also differed in important ways. Taken together, their actions provide instructive illustrations of how these local governments addressed a number of issues of first impression in implementation of and compliance with S.L. 2015-86.

A. Town of Mint Hill

The Town of Mint Hill is located largely in Mecklenburg County, southeast of the City of Charlotte, with a minor portion of the town in Union County, North Carolina. It had a population of 24,700 in 2013 and encompasses approximately 24 square miles in area. Effective July 1, 2011, the town adopted a Unified Development Ordinance (UDO), which incorporates both its zoning code and subdivision ordinance as well as other development regulations. *Accessed at* http://www.minthill.com/planning_ department.php? Planning-Zoning-Unified-Development-Ordinance-90.

The Mint Hill UDO includes a number of sections that impose design element requirements on single-family developments. One such provision is UDO Section 7.1.2, Special Requirements for One-Family Dwellings with Zero Lot Line. Among other requirements, subsection C. Design Standards, of that provision mandates that the zero lot line home must:

> [H]ave the street appearance of a single-family home, with an attached double garage, with doors. The garages shall load from the side or rear. Front load garages are prohibited. The architectural design and materials must be consistent with the other dwellings within the conventional portion of the development. Each dwelling unit shall have a separate drive with a turn around area that will accommodate four (4) conventional, standard-sized vehicles, limiting street parking and each driveway shall be paved with concrete or brick pavers, beginning at the street and continuing throughout the drive/turn around area.

The Mint Hill UDO also includes special design requirements for single-family homes in Conservation Subdivisions, and those requirements are found in 7.3.3.B. Standards:

> * * * *
>
> 3. House Size. The minimum house size shall be one thousand six hundred (1,600) square feet of heated living space for a single-story house and one thousand eight hundred (1,800) square feet of heated living space for a two-story house.

4. Exterior Materials. Exterior materials shall be brick, stone, stucco, or cementitious fiber board or shakes. At least fifty (50) percent of homes shall have brick and/or stone on all four sides of the home. With the exception of approved accent materials on the architectural elements such as gables and dormers, mortarless brick is prohibited.

5. Garages. All houses shall have a standard attached two-car garage. No more than fifty (50) percent of the lots shall have garages located closer to the public street than the house itself.

6. Driveways. All driveways shall be paved with concrete from the street and should only be wide enough to accommodate two (2) cars parked side by side. Each lot shall have a driveway and each driveway shall accommodate four (4) cars. Garages count for required parking.

7. Slab Foundation. Any house built on a slab foundation shall have a brick or stone veneer skirt on the exposed exterior of the foundation.

8. Chimneys. All exposed chimneys shall have a brick or stone veneer.

9. Roofs. Roof pitch shall be a minimum of 6/12. If fiberglass shingles are used, they must be 'architectural shingles.' Three-tab shingles are prohibited. No monopitch roof shall be less than 3/12.

* * * *

Similarly, the Mint Hill UDO contains two Downtown Overlay Districts in Section 7.4., which provides for Downtown Neighborhood and Downtown Town Center developments. Examples of the extensive design elements imposed on single-family development in 7.4.4.2, include:

A. General Requirements.

(1) Useable porches and stoops should form a predominate motif of the building design and be located on the front and/or side of the home. Useable front porches are at least six (6) feet deep and extend more than fifty (50) percent of the facade.

(2) Garages with front loading bays shall be recessed from the front facade of the house and visually designed to form a secondary building volume. All garages with more than two (2) bays shall be turned such that the bays are not visible from the street. At no time shall the width of an attached garage exceed the greater of twenty (20) feet or forty (40) percent of the total building facade.

(3) Fences or walls shall be no greater than six (6) feet in height behind the front building line. Fences shall be no greater than four (4) feet in height and walls no greater than three (3) feet in height in the front yard setback.

(4) Garage doors are not permitted on the front elevation of any detached house on a lot less than fifty (50) feet wide.

(5) All front entrances shall be raised from the street grade (at the curb or sidewalk) a minimum of one and one-half (1½) feet. (Exceptions may be granted by the Administrator to accommodate accessibility for the elderly/disabled on a site by site basis.)

(6) Decorative mailboxes shall be uniform throughout the development.

B. Materials.

(1) A minimum of fifty (50) percent of the total dwelling units shall have brick and/or stone on all vertical walls of the home, with the exception of approved accent materials on the architectural elements such as gables and dormers. Residential building walls of other units shall be wood clapboard, wood shingle, wood drop siding, primed board, wood board and batten, cementitious fiber board, brick, stone or masonry stucco. Accessory buildings with a floor area of one hundred forty-four (144) square feet or greater shall be clad in materials similar in both type and appearance to the principal structure.

* * * *

(3) Residential roofs shall be clad in wood or architectural shingles, clay tile, or standing seam metal (copper, zinc, or terne) or materials similar in appearance and durability.

(4) Foundation walls (except those under porches) shall be finished with brick or stone. The crawlspace of porches may be enclosed with a combination of brick, stone, and wood lattice.

C. Configurations.

(1) Main roofs on residential buildings shall be symmetrical gables or hips with a pitch between 6:12 and 12:12. Monopitch (shed) roofs are allowed only if they are attached to the wall of the main building. No monopitch roof shall be less then 3:12.

(2) Two (2) wall materials may be combined horizontally on one facade. The heavier material should be below.

(3) Exterior chimneys visible from public streets shall be finished in brick or masonry stucco. All other roof equipment should be screened from the view of the fronting street.

(4) The crawlspace of buildings shall be enclosed.

D. Techniques.

(1) Overhanging eaves may expose rafters.

(2) Flush eaves shall be finished by profiled molding or gutters

After the passage of S.L 2015-86, and in response to the law, the Town of Mint Hill considered and adopted Ordinance No. 665 on November 12, 2015. That ordinance is reproduced below in its entirety.

Section 3.8 - Voluntary Residential Development

Background; Statement of Purpose.

Session Law 2015-86 (the "New Legislation") amends N.C.G.S. 160-381 and provides that "Any zoning and development regulation ordinance relating to building design elements...may not be applied to [residential] structures subject to regulation under the North Carolina Residential Code for One and Two Family Dwellings." The New Legislation expressly states that it "clarifies and restates the intent of existing law and applies to ordinances adopted before, on, and after the effective date." The New Legislation does create some exceptions to the general prohibition of design regulation of residential structures including when the design standards are voluntarily consented to by the owners of the property.

The town's Unified Development Ordinance (UDO) includes several sections that include regulation of building design elements of residential structures as an integral and essential part thereof. These ordinances that include regulation of building design elements of residential structures as an integral and essential part thereof are:

Section 7.12 Special Requirements for One-Family Dwellings with Zero Lot Line

Section 7.3.3. Special Requirements for Conservation Subdivisions.

Section 7.4 DO-A and DO-B Overlay Districts (Downtown Overlay Code).

ZC13-4 Mint Hill Commons (collectively the "Existing Design-Dependent Provisions"; each an "Existing Design-Dependent Provision").

All of the Existing Design-Dependent Provisions were initially adopted and approved by the Town Board based on the understanding that it was legally permissible to regulate building design elements of residential structures. Moreover, those sections of the Existing Design-Dependent Provisions regulating building design elements are of such import that implementing the other sections of the Existing Design-Dependent Provisions without the building design elements would cause results not contemplated or desired by the town when such ordinances were adopted and are not contemplated or desired by the town now.

There are existing sections of the UDO that permit residential development that do not include regulation of building design elements of residential structures as an integral and essential part thereof (i.e. are not the Existing Design Dependent Provisions) and which accordingly are not affected by the New Legislation (the "Permitted Residential Standards").

The purpose of this ordinance is to comply with the New Legislation by providing that the Existing Design-Dependent Provisions shall no longer be applied to any residential development in Mint Hill without the voluntary consent of the owner(s). The Permitted Residential Standards remain unchanged by the New Legislation and residential development is permitted pursuant to and in accordance with the Permitted Residential Standards.

A. Existing Design-Dependent Provisions No Longer Applicable to Residential Development Unless Voluntarily Consented to by the Owners; Permitted Residential Standards Remain Applicable. All Existing Design-Dependent Provisions shall no longer be applied to any residential development without the voluntary consent of the owner(s). Owners that desire to voluntarily comply with Existing Design-Dependent Provisions and develop pursuant to

and in accordance with the Existing Design-Development Provisions may do so as set forth herein. The Permitted Residential Standards remain applicable and Owners that do not desire to voluntarily comply with Existing Design-Dependent Provisions may develop pursuant to and in accordance with the Permitted Residential Standards.

B. Development Previously Approved Pursuant to Existing Design-Dependent Provisions; Previous Voluntary Compliance; Vested to Continue in Accordance with the Applicable Existing Design-Dependent Provision.

   i. Any completed residential structures developed pursuant to any of the Existing Design-Dependent Provisions shall be considered to be structures for which owners have voluntarily complied with the Existing Design-Dependent Provisions and accordingly shall be vested and allowed to continue in accordance with the applicable Existing Design-Dependent Provisions.

   ii. Residential structures under construction in developments approved pursuant to an Existing Design-Dependent Provision shall also be considered to be structures for which owners have voluntarily complied with the Existing Design-Dependent Provisions and accordingly shall be vested and allowed to continue in accordance with the applicable Existing Design-Dependent Provisions.

   iii. Proposed residential development for which there has been a Site Plan approval pursuant to an Existing Design-Dependent Provision shall also be considered to be development for which owners have voluntarily complied with the Existing Design-Dependent Provisions and accordingly shall be vested and allowed to continue in accordance with the applicable Existing Design-Dependent Provisions.

C. New Development; Simple Process to Confirm Voluntary Compliance. For any new development, an owner may elect to voluntarily comply with an Existing Design-Dependent Provision. Any owner that desires to develop in accordance with an Existing Design-Dependent Provision and accordingly desires to voluntarily comply therewith, shall provide written statement to that effect to the Administrator confirming and then shall be permitted to develop pursuant to and in accordance with the applicable Existing Design Dependent Provisions. Any approved Site Plans shall include written confirmation of the same. Additionally, the conditional district zoning process remains available for owners that desire to voluntarily propose residential development plans not contemplated by the Permitted Residential Standards.

The action by the Town of Mint Hill in response to the passage of S.L. 2015-86 provides an informative case study to begin this analysis of such actions by representative local governments in the Charlotte area. The Town of Mint Hill begins by declaring in its ordinance that "design-dependent" provisions were adopted with the belief that they were legally permitted and that they are important in that eliminating them would cause "results not contemplated or desired." With this as predicate, the town proceeded to retain all of the "design-dependent" districts and overlays in their entirety, while adding a declaration that use of such districts henceforth would be "voluntary." If a developer or landowner did not wish to "volunteer" to develop using the aesthetic design standards, then only the zoning districts' underlying "Permitted Residential Standards" would be applicable and enforced. It amounted in essence to an all or nothing approach on the Town's part. There was no apparent attempt

made to retain the unique aspects of the four districts and overlays that were allowable under S.L. 2015-86 (density, lot size, building setbacks, etc.), while deleting the void aesthetic design elements set out at length above for the dwelling structures in the districts.

Mint Hill's approach raises a number of as-yet untested questions. One fundamental issue is whether S.L. 2015-86 requires local jurisdictions to eliminate prohibited "design elements" from *all* zoning districts or overlays, or whether a local jurisdiction may continue to include "design elements" within its UDO districts or overlays along with a "voluntary applicability" provision. This question may turn on a court's interpretation of whether such provisions mandating design elements were void *ab initio* since S.L. 2015-86 only "clarifies and restates the intent of existing law and applies to ordinances adopted before, on, and after the effective date." *Id.* at Sec. 3. It may also turn on whether the void design element requirements can, or must, be severed from the allowable unique standards in the districts involved. The Town of Mint Hill clearly did not want to do this, and its ordinance was structured in such a way as to try and avoid it.

In addressing this question, it may also be helpful to consider whether retaining such design elements in an ordinance complies with the requirement in S.L. 2015-86, that the property owners "voluntarily consent" to such design elements. As discussed below in the section-by-section analysis of the voluntary consent provision in S.L. 2015-86, the term "voluntary consent" is significantly more unilateral on the part of the petitioner than the more bilateral language (conditions may be proposed "by the petitioner or the city or its agencies") found in the zoning enabling statutes. *See* §160A-382(b). In addition, as also noted below, the term "voluntary" is defined as "without compulsion or solicitation." Based on those factors, it would be reasonable to conclude that for design elements to be valid under S.L. 2015-86 the owner or petitioner seeking the rezoning or development approval must proffer *without solicitation from the local jurisdiction* the design elements that would be acceptable to the property owner(s). In light of this, it would be important for a reviewing authority to consider whether retaining the prohibited design elements in the ordinance would in effect be the local jurisdiction maintaining a *continuing solicitation* of those prohibited design elements in exchange for allowing modified development standards in the zoning districts or overlay districts involved.

An additional issue for consideration is whether Mint Hill's declarations in its ordinance regarding vesting are consistent with the requirements of S.L. 2015-86. In its ordinance, the town declared that the impacted owners received vested rights when they were deemed to have "voluntarily consented" to develop under the prohibited design dependent provisions. However, when the owners had a site plan approved, began construction, or completed construction of the structures, there is no indication that the town afforded those owners any option to decline to comply with the prohibited design dependent provisions and develop or build in those locations. As noted above, the town could have approached this problem differently by severing and deleting the void design elements while maintaining the allowable development standards (such as minimum lot size and dimensions) that are unique to those specific districts. Had the town done this, it might have avoided potential nonconforming situations with development previously permitted, under construction or built out, that one must assume was the reason for the vesting provisions of its ordinance.

Lastly, Mint Hill's approach in its Downtown Overlay Districts, for instance, leaves a land owner or developer with a dilemma: either proceed with single family development under Permitted Residential Standards (i.e., minimum ½ acre lots) that as a practical and financial matter may not be feasible in a downtown location or the "voluntary" acquiescence to expensive and otherwise prohibited design elements as the only feasible way to develop in that location. These are all questions which get to both the letter and intent of S.L. 2015-86, important matters in determining compliance with the law by local governments.

B. Town of Davidson

The Town of Davidson encompasses 5.1 square miles and is located on the northernmost end of Mecklenburg County. The town reports that the 2012 Census indicated a town population of just under 11,300 residents. With a median household income of $83,750, Davidson is home to Davidson College. The town's vision statement specifies that it "is a town that has long been committed to controlling its own destiny as a distinct, sustainable, and sovereign municipality. Our town's sense of community is rooted in citizens who respect each other; in racial and socioeconomic diversity; in pedestrian orientation; and in the presence of a liberal arts college. We believe our history and setting guide our future." *Accessed at* http://www.ci.davidson.nc.us/472/Mission-Statement.

Effective on May 1, 2015, Davidson adopted its revised unified development ordinance, referred to as the Davidson Planning Ordinance (DPO). The Preface to the DPO indicates that it embodies the long-held new urbanism planning concepts implemented in Davidson. *Accessed at* http://www.ci.davidson.nc.us/1006/Planning-Ordinance.

Section 4 of the DPO, Site and Building Design Standards included a wide range of specific design requirements. For example, Section 4.4.1 in subsections A-F mandated in great detail building height, form and massing, façade articulation, façade transparency, materials, and architectural details. Similarly, the DPO mandated detailed design elements for detached and attached housing, including garage placement and garage door locations and dimensions. DPO Subsections 4.5.2.E. and F. Townhome and Live-Work units also had mandated design elements, such as porches, stoops or courtyards at individual unit entrances, and prohibitions on front-loaded garages. DPO Subsections 4.5.3.A. and D. Accessory structures also had specific controls on door widths for street-facing structures. DPO Subsection 4.5.8.B.4. These design standards for residential building are enforced through review by Davidson's unified Design Review Board and Historic District Commission established in DPO Subsection 3.3.1, which empowers that Board to "[r]eview and approve the building schematic design of all individual buildings in approved plans."

With the passage of S.L. 2015-86, the Planning Director of the Town of Davidson recommended certain changes to the ordinance to conform to the new Act, along with other clarifying changes or corrections to the language of the recently-adopted DPO. The amendments to the DPO proposed by the

Planning Director and as subsequently modified and adopted by the Board of Commissioners of the Town of Davidson on January 12, 2016, took a number of different approaches to modify the applicability of the prohibited design elements. *See Minutes of that meeting accessed at* http://www.ci.davidson.nc.us/ 73/Meeting-Agendas-Minutes.

A broad statement was adopted in the Applicability provision of Section 4, which added a bulleted reference: "[s]hall not be applied in any manner prohibited by NC G. S. 160A-381." In addition, throughout DPO Section 4 an asterisk was placed next to specific design elements and the following note was inserted at the end of the sections where asterisks appeared:

> *Not applicable to Detached House, Townhouse, or Live/Work building types: 1. Located outside of a local historic district or outside an area designated as a historic district on the National Register of Historic Places; and, 2. Reviewed under the North Carolina Residential Code for One and Two-Family Dwellings.

*See*, DPO Subsections 4.4.1.C (Façade Articulation); D (Façade Transparency); E (Materials) and F (Architectural Details); 4.5.2.E (Detached & Attached Houses Building Type – Articulated Roofs) and F (Garage Bay Width); 4.5.3 (Townhouse and Live/Work) and .8.B.4. (Size of Accessory Structure).

The Town of Davidson took a somewhat different approach in a few subsections where the town's preference (if not strict requirements) were also made clear. In DPO Subsection 4.4.1.E.10 (Materials), the old text read: "Vinyl siding is prohibited, except on attached house building types." This was changed to read: "Vinyl siding is prohibited on all building types except on Live/Work units reviewed under the residential building code, Detached House and Townhouse building types; *however it strongly is discouraged on these building types*." (Emphasis Added.) That language leaves little doubt about the town's position on vinyl siding in Davidson. In a similar manner, in DPO Subsection 4.5.2.B (Detached & Attached House Building Type), the old text read: "Where home designs are repeated in new development, materials, color, and detailing shall be varied to distinguish between homes." The new text was identical, except that "shall" was changed to "should," making the provision precatory rather than mandatory, but again clearly showing the preference of the town. It is arguable that this approach complies with the letter of S.L. 2015-86, but much harder to make the case that "strongly discourages" language complies with the intent of the Act.

As can be seen, one of the primary approaches taken by Davidson to address S.L. 2015-86 was to retain in its DPO the prohibited design elements but then to insert "carve out" exceptions for specified design elements of detached houses, townhomes and live-work units and for reviews by the Design Review Board. This was different than the approach taken by the Town of Mint Hill and is an example of severing (by means of the "carve out" exceptions) of the prohibited design element controls while retaining the remaining ordinance provisions for the housing types involved.

A close review of the actions by Davidson, however, raises the question of whether the Town too narrowly construed the limitations of S.L. 2015-86. A couple of examples illustrate this issue. For

instance, in DPO Section 4.5.2, there is no "carve out" asterisk next to Subsections B or C. (Subsection B requires that "materials, colors and detailing" must be varied if home designs are repeated in a new subdivision, and Subsection C requires that detached houses should be "integrated" with attached housing by among other things "detailing and material use.") Although the design elements are variable based upon the facts of each specific situation, there is certainly a question as to whether these provisions continue to dictate design elements – i.e., colors, materials and detailing, which is prohibited by S.L. 2015-86.

In addition, Subsection F of Section 4.5.2 of the DPO addresses placement of attached garages for detached and attached houses. As a general proposition, Subsection F requires attached garages to be recessed some distance behind the front façade of a house, with certain delineated exceptions, and it mandates that individual garage doors not be narrower than 10 feet in width. The only "carve out" asterisk for these specific standards appears next to the garage door width minimum, and the Town continues to dictate recessing garages behind front building facades in many circumstances. *See also* DPO Sections 8. A. and B which dictate garage door locations for lots 60 feet or less in width (must be accessed from an alley) or more than 60 feet in width (flush with the front of the building façade if side loaded and recessed 10 feet if front loaded). This is arguably problematic in that S.L. 2015-86 specifically enumerates that "location" of "garage doors" is a design element that local governments cannot dictate. This raises the question as to whether Davidson's retained mandate on recessing garages or requiring that they open to alleys is consistent with the plain meaning and intent of the Act.

The Davidson and Mint Hill actions – retaining prohibited design elements for certain purposes and building types – also raise the fundamental question of whether local governments in North Carolina have authority under their zoning or subdivision ordinances to mandate design elements on building types *other than* those building types specified by S.L. 2015-86. It is instructive on this question to examine the wording of S.L. 2015-86, which states explicitly in Section 3, that it "restates and clarifies existing law." If North Carolina zoning and subdivision law, as the General Assembly clarified in S.L. 2015-86, never allowed design elements to be imposed by local governments on detached and Townhome units, except under certain delineated circumstances, on what basis can it be concluded that those same provisions of North Carolina law somehow confer authority on local governments to impose those design elements on other building types, such as multifamily units or commercial buildings? As noted this is a fundamental issue and may need further clarification by the General Assembly or possibly the courts.

C. Town of Huntersville

The Town of Huntersville is located within Mecklenburg County north of the City of Charlotte and south of the Towns of Cornelius and Davidson. It enjoys a substantial border with both Lake Norman and Mountain Island Lake and is bisected by Interstate 77 which runs north-south through the town limits. As of 2010, the town limits encompassed just over 31 square miles, and it exercised its extraterritorial zoning authority over an additional 32 square miles of territory. Huntersville has grown rapidly in recent years, with its population increasing from 3,014 in 1990 to 46,773 in 2010. Medium

range projections put its expected population by 2030 at just under 90,000 residents. *See* Huntersville 2030 Community Plan adopted on June 20, 2011, accessed at www.huntersville.org/Departments/ Planning/PlansStudies/ Huntersville2030CommunityPlan.aspx.

In 1996, the town adopted comprehensive zoning and subdivision ordinances designed to implement a 1995 Community Plan that included "a mixture of land uses and residential building types following Traditional Town Design principles." Subsequent updates to the town's comprehensive plans were adopted in 2003 and 2011, along with ordinance updates and amendments. Id.

Thus, for some number of years, the Huntersville Zoning Ordinance included design elements and standards for both "Detached Houses" and "Attached Houses." For Detached Houses, Article 4 of the Huntersville Zoning Ordinance required a set of design principles that included mandates such as:

A. ….development shall generally employ building types that are sympathetic to the historical architectural vocabulary of the area in their massing and external treatment. ….
B. The front elevations facing the street, and the overall massing shall communicate an emphasis on the human scale and pedestrian environment.
C. Each building should be designed to form part of a larger composition of the area in which it is situated. Adjacent buildings should thus be of similar scale, height, and configuration.
D. ….The scale and pitch of roofs should thus be similar across groups of buildings. Excessively grandiose roof pitches with multiple changes of outline are not acceptable.
E. Porches should form a predominant motif of house designs, and be located on the front or side of the dwelling. When attached to the front, they shall extend over at least 15% of the front façade. All porches should be constructed of materials in keeping with those of the main building.
F. Front loaded garages, if provided, shall meet the standards of Section 8.16.

The "Principles" included in the Detached House provisions of Article 4 were followed by more detailed prescriptive or proscriptive provisions labeled "Configurations." Those requirements included:

A. Main roofs on residential buildings should be symmetrical gables or hips with a pitch of between 4:12 and 12:12. Monopitch (shed) roofs should be attached to the wall of the main building. No monopitch shall be less than 4:12.
B. Balconies should generally be simply supported by posts and beams. The support of cantilevered balconies should be assisted by visible brackets.
C. Two wall materials may be combined horizontally on one façade. The "heavier" material should be below.
D. Exterior Chimneys should be finished in brick or stucco.

Under the "Attached House" type in Article 4, effectively the same design standards applied.

As referenced above in Subdivision F. of the standards for Detached Houses, Subsection 8.16 of the Huntersville Ordinance was a key provision for imposing design standards on garages. Subsection 8.16.1 mandated that "[o]n lots greater than 60 feet in width, front loading garages shall be recessed at least 10 feet behind the primary plane of the front façade of the structure." For smaller dwellings with 1,400 square feet or less of heated area, "single bay front loading garages may be built flush with, but may not project in front of, the primary plane of the front façade of the structure," and in addition, double bay front garages in such houses were required to be "recessed at least 10 feet behind the primary plane of the front façade of the structure." Under this subsection garages could not be located less than "20 feet from the back of the public sidewalk." Lastly, for lots "60 feet or less in width, alley access is required if on site parking is provided except as provided below [in subsection 8.16.2]."

Under subsection 8.16.2, attached and detached single family homes could have front or side entry garages under a number of restrictive conditions, including allowing a double bay front loaded garage based on average block cross slope and if it is "recessed 10 feet behind the front façade of the dwelling unit, the garage has two single bay width doors, and the garage width must be less than the width of the remaining portion of the front façade of the dwelling." 8.16.2(c).

A number of Huntersville's General Zoning Districts as found in Article 3 of the town's Zoning Ordinance also included aesthetic design-type requirements. For instance, the Rural District, under 3.2.1(d)(4) [numbering inconsistencies in original] required that:

> 4. **Compatibility with Surrounding Development.**
> Along existing streets, new buildings shall respect the general spacing of structures, building mass and scale, and street frontage relationships of existing buildings.
>
> - New buildings which adhere to the scale, massing, volume, spacing, and setback of existing buildings along fronting streets exhibit demonstrable compatibility.
> - New buildings which exceed the scale and volume of existing buildings may demonstrate compatibility by varying the massing of buildings to reduce perceived scale and volume. The definition of massing in Article 12 illustrates the application of design techniques to reduce the visual perception of size and integrate larger buildings with pre-existing smaller buildings.
> - A single-family detached house established on a lot of one acre or more that is created according to the provisions of Article 8.1, paragraph 1, need not adhere to the spacing, massing, scale, and street frontage relationships of existing buildings along an existing street or road, but shall, at a minimum, observe a front setback of 40 feet and a lot width of 90 feet. This paragraph shall take precedence over the requirement of Article 4: Lot Types/Detached House for placement of a building on its lot.
>
> b. On new streets, allowable building and lot types will establish the development pattern.

Similar requirements applied to Transitional Residential Districts (3.2.2(d)(5)); Neighborhood Residential Districts (3.2.4(d)(1)); Neighborhood Center Districts (3.2.5(d)(1)); Town Center Districts (3.2.6(d)(1));

Highway Commercial District (3.2.7(d)(1)); Traditional Neighborhood Districts (3.2.11(d)(1)); Transit Oriented Development – Residential (3.2.13(d)(2)); and Manufactured Home Overlay (3.3.1(d)(1)).

Late in 2015, the Planning Director for Huntersville proposed to the Mayor and Board of Commissioners of the town a series of amendments to the Huntersville Zoning Ordinance in response to the mandates of S.L. 2015-86. A public hearing was held on December 21, 2015 on those recommendations. *See* full Agenda and Minutes of that meeting *accessed at* http://www.huntersville.org/TownGovernment/AgendaMinutes.aspx. Basically, the proposal sought to make precatory rather than mandatory the design standards set out above. The first section of the proposal inserted a bulleted proviso in the "Compatibility with Surrounding Development" subsections of each of the general zoning districts cited above. That proviso read: "Nothing in this subsection shall be interpreted to conflict with the building design element provisions as found in GS160A-381(h) for structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings." In similar fashion, the proposal inserted a cross-reference in the "General Requirements" sections of those general zoning districts cited above, which read: "See Section 8.16 Standards for Residential Lot Widths, Alleys, Garages and Parking in Residential Districts." Lastly, under Article 4, Detached House, the first Principle under Architectural Standards would be changed from "… development ***shall*** generally employ building types…." to "development ***should*** generally employ building types…." (Emphasis added.)

The proposal then went on to address those standards as set out in Section 8.16, by eliminating the mandate that on lots wider than 60 feet, front loading garages must be recessed at least 10 feet behind the primary plane of the front façade of the structure, as well as the exception to that requirement for dwellings with 1,400 square feet of heated area or less. A number of new requirements were added dealing with alleys and driveway length and width. A primary point of contention with representatives of the real estate industry who commented at the public hearing was the requirement for alleys on lots of 60 feet or less, which the industry contended would require rear-loaded garages located on those alleys, and thus effectively mandate the "location" of the garage doors. *See* the Request for Board Action at 2/1/2016 from the Huntersville Planning Director to the Mayor and Board of Commissioners of Huntersville *accessed at* AgendaMinutes.aspx.

The final action by the Huntersville Board of Commissioners included the provisos and the cross references relating to the general zoning districts. They also *deleted in their entirety* the Architectural Standards (Principles, Configurations and Techniques) in the Article 4 Detached House and Attached House sections, rather than merely modifying those sections to be precatory rather than mandatory as had been proposed originally. In a compromise with representatives of the homebuilding industry, alleys were required for lots 50 feet or narrower rather than 60 feet or narrower, builders would be able to apply for a conditional use district rezoning allowing them to avoid alleys on lots 50 feet or narrower upon certain showings, and driveway lengths and widths were set so as to reduce the impact on street frontage while still allowing flexibility in garage setbacks. In addition, the recess requirements for front and side loaded garages found in 8.16 were deleted as inconsistent with S.L. 2015-86. (*Note* the different conclusion on this point by the Town of Davidson discussed above.) However, design "recommendations" were inserted regarding front-loaded garages, including items such as having a

building feature project in front of, or flush with, a garage and having a column separating doors on two-car garages. (The building industry representatives continued to argue that mandating alleys – and thus the location of the garage doors on those alleys – in and of itself violates the S.L. 2015-86 limitation on garage door locations.) *See* Subsection 8.16 as amended at March 7, 2016 meeting of the Huntersville Town Board *accessed at* AgendaMinutes.aspx.

The actions by the Huntersville Board of Commissioners to bring their town's zoning ordinance into compliance with S.L. 2015-86 appear to have accomplished much of that goal while also illustrating certain issues that may still warrant further consideration. Initially, it is unclear whether the approach taken regarding the general zoning districts of continuing to require design elements driven by "Compatibility with Surrounding Development," but then adding a proviso declaring that nothing in that provision shall "be interpreted to conflict" with the requirements of S.L. 2015-86 and also cross referencing Section 8.16, is sufficient from either a legal or practical standpoint. First, what the actual proviso means is in some doubt. Does the "nothing shall be interpreted to conflict" language mean that the Town has determined that nothing in the compatibility provisions actually conflicts with S.L. 2015-86 and therefore the compatibility provisions are wholly enforceable? Or rather, does it mean that users of the ordinance may determine for themselves if any of the compatibility provisions can be "interpreted to conflict" with the Act and thus they need not be followed? From a more practical interpretative standpoint, the proviso and carve out approach runs the risk of being vague and confusing to users of the ordinance who would be forced to judge for themselves the breadth and extent of the exceptions to the rule laid down by the town.

Further, the proviso and carve out approach raises the same question discussed above regarding Mint Hill's and Davidson's respective ordinance revisions of whether under S.L. 2015-86 zoning districts can continue to include any of the prohibited design elements, or if those offending design elements must be stricken from the wording of the ordinance. This may turn on the related issue discussed above in relation to Davidson's actions about whether municipalities have the legal authority to mandate design standards for building types other than those types specified in S.L. 2015-86. If not, then the proviso and carve out approach serves to retain in the ordinance design element language that was void.

In addition, the Huntersville approach raises the difficult issue of when does a certain ordinance provision that does not directly require design elements actually result *de facto* in imposing prohibited design elements? In the Huntersville situation, does requiring alleys for lots below a certain width, lead to de facto placement of garages on those alleys? If that is the result of the alley requirement, does that violate the S.L. 2015-86 prohibition on mandating the location of garage doors? It is a relatively clear example of how one ordinance provision may have an indirect or practical result that could conflict with the specific prohibitions of S.L. 2015-86. Examples of this type of problem are challenging to identify and from a drafting standpoint to address in statutory language. As noted below, however, there are two separate provisions in S.L. 2015-86 that prohibit "indirectly" applying the design elements, which evidences the drafters' concern on this point.

## IV. ANNOTATED LEGISLATIVE HISTORY AND SECTION-BY-SECTION ANALYSIS

### A. OVERVIEW OF GENERAL ASSEMBLY ACTION

On June 19, 2015, the Governor of North Carolina signed into law Senate Bill 25, which upon his signature became Session Law 2015-86. This was the culmination of efforts which originated in the 2011-2012 Session of the North Carolina General Assembly with the introduction in the Senate of S.B. 731 by Senator Dan Clodfelter of the 37th District in Charlotte, North Carolina. Senators Gunn and Hartsell co-sponsored the bill which underwent considerable change during its consideration by the Senate Commerce Committee. Senator Clodfelter later offered a number of substantive and clarifying amendments on the Senate floor and the bill passed the Senate by wide bipartisan margins. The bill was referred in the House of Representatives to the Committee on Government and Job Development where it died at the end of the 2011-2012 Session.

In the 2013-2014 Session of the General Assembly, the bill was reintroduced in the House as H.B. 150 on February 26, 2013. The primary sponsors of the bill were Representatives Dollar, W. Brawley, Moffitt and Jordan, and additional sponsors were Representatives R. Brawley, Bryan, Ford, S. Martin, Ramsey, Samuelson, Setzer, Speciale, Szoka, Warren and Whitmire. On that same date, Senator Clodfelter filed a Senate version of the bill, S.B. 139, with primary co-sponsors Senators Gunn and Tarte and additional co-sponsors Senators Clark, Daniel, Hise, Hunt, Jenkins, McLaurin and Walters. The version of the bills as filed in the 2013-2014 Session had undergone substantial changes from the final version of S.B. 731 in the preceding legislative session. After consideration by the Regulatory Reform Committee and its Subcommittee on Local Government, H.B. 150 passed the House by wide bipartisan majorities and it was referred to the Senate. In the Senate, the bill was first referred to the Committee on Rules and Administration of the Senate and then re-referred to the Senate Committee on Commerce. That Committee reported out a Committee Substitute which was then adopted. (On April 7, 2014, Senator Clodfelter was appointed Mayor of Charlotte and he resigned his seat in the N.C. Senate.) Although the bill was placed on the Senate Calendar for floor action on May 19, 2014, it was withdrawn and re-referred to the Committee on Rules and Operations of the Senate where it again died at the end of the Session.

On February 3, 2015, early in the 2015-2016 Session, the bill was refiled in the Senate as S.B. 25 and in the House as H.B. 36. Senators Gunn, Apodoca and Tarte were the primary sponsors of S.B. 25, along with 13 co-sponsors. Representatives Dollar, Brawley, Jordan and Glazier were the primary sponsors of H.B. 36 which had 35 co-sponsors. After referral to the Committee on Rules and Operations of the Senate, S.B. 25 was again referred to the Committee on Commerce which reported the bill favorably and it passed the Senate by a wide bipartisan margin (second reading vote in favor of 43-7). The Bill was referred to the House Committee on Regulatory Reform from which it was reported favorably on June 8, 2015 and it passed the House the next day also by a wide bipartisan margin (second reading vote in favor of bill 98-17). The Governor signed S.B. 25 into law nine days after it was ratified by the General Assembly.

Despite passing without modification or amendment in the 2015-2016 Session, the earlier versions of the bill in the 2011-2012 and 2013-2014 Sessions underwent a number of significant modifications in committee and on the floors of the House and Senate. In addition, as noted above, significant modifications to bill took place between these two sessions. In contrast, between the 2013-2014 sessions and the 2015-2016 Sessions, the bill remained unchanged before its reintroduction in the latter Session.

To facilitate analysis and understanding of the evolution of S.L. 2015-86 from its original incarnation as S.B. 731 in 2011 to its final form as S.B. 25 in 2015, this study sets out, on a section-by-section basis the legislative history of S.L. 2015-86. That legislative history is presented in reverse chronological order with the final language of each section presented first. Earlier versions of the language of the particular section are then shown if amendments or modifications took place between versions of the bill or by floor action. In order to improve clarity, some amendments or modifications are shown in "edit" format (with insertions <u>underlined</u> and deletions ~~stricken through~~), although most frequently that is not necessary.

Also on a section-by-section basis, this study sets out cross-references and annotations of each section of the final language of S.L. 2015-86 to assist the reader in understanding the context of that particular section. It is intended that the legislative history and annotations will facilitate the understanding of how the fundamental concepts in the bill evolved into the final language of the statute, providing an authoritative resource to better discern how the General Assembly clarified and restated its intent in granting zoning and subdivision regulation powers to local governments in North Carolina.

Please note that this analysis encompasses only Section 1 (applicable to cities, towns and villages) and Section 3 (enacting and applicability clauses) of S.L. 2015-86, and not Section 2 (applicable to Counties). The zoning and subdivision powers of towns and cities in §160A-381 and counties in §153A-340 do not differ in any respect material to this analysis.

B. SECTION-BY-SECTION LEGISLATIVE HISTORY AND ANNOTATED ANALYSIS

## SHORT TITLE

1. LEGISLATIVE HISTORY

**AN ACT TO CLARIFY WHEN A COUNTY OR MUNICIPALITY MAY ENACT ZONING ORDINANCES RELATED TO DESIGN AND AESTHETIC CONTROLS.**

Above is the Bill title as modified by Amendment 1 to S.B. 731, adopted 5/17/2011. This same language carried through verbatim to S.L. 2015-86.

**AN ACT PROVIDING FOR ZONING CONTROL OF STRUCTURAL DESIGN AND AESTHETICS IN DESIGNATED HISTORIC DISTRICTS.**

The original Bill Title in S.B. 731 as introduced by Sen. Clodfelter on 3/24/2011, 2011-2012 Session, is shown above.

2. ANNOTATED VERSION OF FINAL LANGUAGE

**AN ACT TO CLARIFY[1] WHEN A COUNTY OR MUNICIPALITY MAY ENACT ZONING ORDINANCES RELATED TO DESIGN AND AESTHETIC CONTROLS.**

[1]*See* Spruill v. Lake Phelps Vol. Fire Dep't, Inc., 351 N.C. 318, 323, 523 S.E.2d 672, 676 (2000) (in construing a statute with reference to an amendment, the legislature presumably either alters or clarifies the statute's meaning). In *Spruill* the Supreme Court also noted that "[t]his Court has previously ruled that the title of a statute may be used as an aid in determining legislative intent." *Id.*

The change of the Short Title of the bill makes it clear that the intent of the General Assembly was to "clarify" existing law on the subject of local governments' ability to impose aesthetic controls in the circumstances described in S.L. 2015-86, rather than to *modify* the powers of local governments. *See also* Section 3 of S.L. 2015-86, the effective date provision, which indicates that the act "clarifies and restates the intent of existing law…." It also appears that the original Short Title of the bill did not reflect the actual intent of the bill, since the bill did not seek to change how design and aesthetics were controlled in historic districts and only addressed historic districts specifically to exempt them from the application of the bill.

## REFERENCE TO SUBSECTION TO BE ADDED

1. LEGISLATIVE HISTORY

**Section 1. G.S. 160A-381 is amended by adding new subsection to read:**

**(h) ……..**

In the 2015-2016 Session, S.B. 25 as introduced changed "(g)" reference to "(h)". In 2011-2012 and 2013-2014 Sessions all versions of the bill read "(g) ….

2. ANNOTATED VERSION OF FINAL LANGUAGE

**Section 1. G.S. 160A-381 is amended by adding new subsection to read:**

**(h)[1] ……..**

[1]This renumbering was necessitated because in the 2013-2014 Session, H.B. 74 (S.L. 2013-413) added a new section (g) to G.S. § 160A-381 as follows:

> (g) A zoning or unified development ordinance may not differentiate in terms of the regulations applicable to fraternities or sororities between those fraternities or sororities that are approved or recognized by a college or university and those that are not.

This required redesignating the citation in S.B. 25 to "(h)".

## SUBSECTION (h) – APPLICABILITY PROVISION

1. LEGISLATIVE HISTORY

**(h) Any zoning and development regulation ordinance relating to building design elements adopted under this Part, under Part 2 of this Article, or under any recommendation made under G.S. 160A-452(6)c. may not be applied to any structures subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings except under one or more of the following circumstances:**

This is the wording of the applicability provision as enacted in S.L. 2015-86. It had been carried forward verbatim from House Regulatory Reform Committee substitute to H.B. 150 reported favorably on 3/14/13, in the 2013-2014 Session. That Committee substitute included only non-substantive clarifying and elaborating wording changes to H.B. 150 as introduced at the beginning of the Session.

**(g) Regulations relating to building design elements adopted under Parts 2 and 3 of Article 19 of this Chapter, or adopted pursuant to any recommendation made under G.S. 160A-452(6)c., may not be applied to ~~single family residential~~ any structures ~~in zoning districts with densities of five or fewer dwelling units per acres~~ subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings except under the following circumstances:**

Immediately above is the language of the applicability provision in H.B. 150 as introduced on 2/26/2013, in the 2013-2014 Session. This fundamental modification to the applicability of the bill was developed by the bill sponsors between the 2011-2012 and 2013-2014 Sessions of the General Assembly. (Changes are shown above in "edit" format for ease of reference.) It deletes the concept of zoning districts and maximum densities, but retains the applicability to structures (regardless of their location in any particular zoning district) if they are subject to the referenced North Carolina Residential Code for One- and Two-Family Dwellings.

**(g) Regulations relating to building design elements adopted under Parts 2 and 3 of Article 19 of this Chapter, or pursuant to any recommendation made pursuant to G.S. 160A-452(6)c., may not be applied to single family residential structures ~~containing four~~ in zoning districts with densities of five or fewer dwelling units per acre, except under the following circumstances:**

Amendment 1 to S.B. 731, offered by Senator Clodfelter and adopted by the Senate on 5/17/2011, made substantial changes to the wording of the above section. (These changes again are shown in "edit" format for ease of reference.) The most significant modification was to insert as shown the concept that the limitations would apply to single family structures in certain zoning districts with designated maximum dwelling unit densities. It also deleted "four" and substituted "five." This evidences the evolution of thought discussed in the Annotation section below as to how best to describe the applicability of the bill, with the primary constant being applicability to a "structure" that is further defined or limited in some manner.

**(g) Regulations relating to building design elements adopted under Parts 2 and 3 of Article 19 of this Chapter, or pursuant to any recommendation made pursuant to G.S. 160A-452(6)c., may not be applied to residential structures containing four or fewer structures, except under the following circumstances:**

With the one minor exception noted below, the above was the applicability provision in S.B. 731 as introduced by Senator Clodfelter on 4/19/11, in the 2011-2012 Session. The Bill was referred to the Senate Commerce Committee. The Commerce Committee substitute was adopted on 5/10/11, and in what was essentially a technical correction it modified the phrase "four or fewer structures" to read "four or fewer dwelling units".

2. ANNOTATED VERSION OF FINAL LANGUAGE

**(h) Any zoning and development regulation ordinance relating to building design elements adopted under this Part[1], under Part 2 of this Article[2], or under any recommendation made under G.S. 160A-452(6)c[3]. may not be applied to any structures subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings[4] except under one or more of the following circumstances:**

[1]The "this Part" referred to is Part 3 of Article 19 which is the Article in Chapter 160A of the General Statutes that confers zoning enabling powers upon municipalities in North Carolina. That general grant of power is found in §160A-381(a):

> For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. … A zoning ordinance 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.

A number of recent North Carolina cases have examined the exercise of zoning (and subdivision regulation) powers of municipal and county governments. The disputes have centered on the ability of local governments (primarily counties, but municipalities operate under similar statutory authorities), absent specific local bills granting such powers but citing general grants of authority under the zoning enabling statutes, to impose impact fees or other fees on new residential development to pay the cost of public infrastructure to meet future needs of a community. *See* Durham Land Owners Ass'n v. County of Durham, 177 N.C. App. 629, 630 S.E.2d 200 (2006) (Durham County did not have statutory authority to impose a school impact fee); Union Land Owners Ass'n v. County of Union, 201 N.C. App. 374, 689 S.E.2d 504 (2009), disc. rev. denied, 364 N.C. 442, 703 S.E.2d 148 (the Court noted that "[d]efendant may not use the APFO [Adequate Public Facilities Ordinance] to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly." Id. at 381, 689 S.E.2d at 508; Lanvale Properties, LLC v. County of Cabarrus, 366 N.C. 142, 731 S.E.2d 800 (2012), (the Court denied the ability of Cabarrus County, which had cited its zoning and subdivision powers, to charge fees to new developments under its APFO). The Court also noted that such fees were not "voluntary" when in effect development could not proceed unless they were paid. *Id.* at 162, 731 S.E.2d at 814.

[2]The "Part 2 of this Article" reference is to the statute that enables municipalities to regulate the subdivision of land under the following grant of power: "A city may by ordinance regulate the subdivision of land within its territorial jurisdiction. In addition to final plat approval, the ordinance may include provisions for review and approval of sketch plans and preliminary plats." § 160A-371. Such subdivision ordinances pursuant to § 160A-372 (a), may:

> [P]rovide for the orderly growth and development of the city; for the coordination of transportation networks and utilities within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision or, alternatively, for provision of funds to be used to acquire recreation areas serving residents of the development or subdivision or more than one subdivision or development within the immediate area, and rights-of-way or easements for street and utility purposes including the dedication of rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11; and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions that substantially promote public health, safety, and the general welfare.

[3]This is a reference to action by official "Appearance Commissions" which may be established by municipalities and counties under § 160A-451. An Appearance Commission "shall make careful study of the visual problems and needs of the municipality or county within its area of zoning jurisdiction, and shall make any plans and carry out any programs that will, in accordance with the powers herein granted, enhance and improve the visual quality and aesthetic characteristics of the municipality or county." These commissions may be empowered specifically to "formulate and recommend to the appropriate municipal planning or governing board the adoption or amendment of ordinances (including the zoning ordinance, subdivision regulations, and other local ordinances regulating the use of property) that will, in the opinion of the commission, serve to enhance the appearance of the municipality and its surrounding areas." § 160A-452(6)c.

[4]This clause is fundamental to the applicability S.L. 2015-86 and it went through significant changes in the drafting process. As originally introduced by Senator Clodfelter in 2011, the provision utilized the term "residential structures" containing a certain number (or fewer) of dwelling units. Later in that Session, he introduced an amendment that modified the proviso to "single family" residential structures in "zoning districts" with certain maximum densities. That language was modified after the end of the 2011-2012 Session and as the bill was being redrafted for introduction in the House at the beginning of the 2013-2014 Session, to "structures" subject to regulation by the N.C. Residential Code for One- and Two-Family dwellings. That language carried through to final enactment of S.L. 2015-86 in 2015. This final language served to broaden the bill's applicability by eliminating linkage to any particular zoning district or density within a zoning district but focusing on structures of a particular type wherever located.

By way of background, the Residential Code for One- and Two-Family Dwellings applies "to the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, removal and demolition of detached one- and two-family dwellings and townhouses not more than three stories above grade plane in height with a separate means of egress and their accessory buildings and structures." R101.2, *accessed at* http://codes.iccsafe.org/app/book/toc/2012/North_Carolina/Residential/All_Parts/index.html.

## EXCEPTIONS CLAUSES - CLAUSES (1) [Historic District], (2) [National Register] and (3) [Historic Landmarks]

1. LEGISLATIVE HISTORY

**(1) The structures are located in an area designated as a local historic district pursuant to Part 3C of Article 19 of Chapter 160A of the General Statutes.**
**(2) The structures are located in an area designated as a historic district on the National Register of Historic Places.**
**(3) The structures are individually designated local, State or national historic landmarks.**

The above language carried through verbatim to S.L. 2015-86, and the precise wording originated in the Senate Commerce Committee Substitute to H.B. 150 adopted on 4/23/13, 2013-2014 Sess. Prior to referral to the Senate, Amendment No. 2 to H.B. 150 was adopted by the House on 3/20/13 and in a technical correction it substituted "Register" for "Registry".

**(1) The structures are located in an area designated as local historic districts pursuant to Part 3C of Chapter 160A of the General Statutes.**
**(2) The structures are listed on the National Registry of Historic Places.**
**(3) The structures are individually designated as local, State, or national historic landmarks.**

This is the language of the first three exception clauses in H.B. 150 as favorably reported from the Regulatory Reform Committee on 3/14/13 (the bill had been referred to the Subcommittee on Local Government of the Regulatory Reform Committee).

**(1) Structures located in areas designated as local historic districts pursuant to Part 3C of Chapter 160A of the General Statutes.**
**(2) Structures located in areas listed on the National Registry of Historic Places.**
**(3) Structures located in individually designated local, State, or national historic landmarks.**

Above are the referenced clauses in H.B. 150 as introduced on 2/26/13, 2013-2014 Session. The primary change to wording of these clauses from S.B. 731 in the prior Session was to exempt from applicability "structures" located in the designated areas, as opposed to exempting the "areas" themselves. This appears to be consistent with the use of the word "structures" in the applicability clause as discussed above.

**(1) In areas designated as local historic districts pursuant to G.S. 160A-400.4.**
**(2) In areas listed on the National Register of Historic Places.**
**(3) To individually designated local, State, or national historic landmarks.**

The above language is from the Commerce Committee Substitute for S.B. 731 as adopted on 5/10/11. It separated the original subsection (1) into two subsections (1) and (2), and added subsection (3).

> **(1) In areas designated as local historic districts pursuant to G.S.160A-400.4 or in areas listed on the National Register of Historic Places; or**

This is the original language of S.B. 731 as introduced by Senator Clodfelter on 4/19/11 in the 2011-2012 Session. The bill was referred to the Senate Commerce Committee.

2. ANNOTATED VERSION OF FINAL LANGUAGE

> **(1) The structures are located in an area designated as a local historic district pursuant to Part 3C of Article 19 of Chapter 160A of the General Statutes. [1]**
> **(2) The structures are located in an area designated as a historic district [2] on the National Register of Historic Places.[3]**
> **(3) The structures are individually designated local, State or national historic landmarks.[1]**

[1]There is an extensive statutory basis for historic districts under both state and federal law and regulation.

In North Carolina, historic districts "established pursuant to this Part [3c] shall consist of areas which are deemed to be of special significance in terms of their history, prehistory, architecture, and/or culture, and to possess integrity of design, setting, materials, feeling, and association." §160A-400.3. In order to designate either a landmark or historic district a municipality must first establish or designate a historic preservation commission, and the members of the commission must have a "demonstrated special interest, experience, or education in history, architecture, archaeology, or related fields." §160A-400.7. Once a designation is made the following requirements apply under §160A-400.9(a):

> From and after the designation of a landmark or a historic district, no exterior portion of any building or other structure (including masonry walls, fences, light fixtures, steps and pavement, or other appurtenant features), nor above-ground utility structure nor any type of outdoor advertising sign shall be erected, altered, restored, moved, or demolished on such landmark or within such district until after an application for a certificate of appropriateness as to exterior features has been submitted to and approved by the preservation commission. ****
> For purposes of this Part, "exterior features" shall include the architectural style, general design, and general arrangement of the exterior of a building or other structure, including the kind and texture of the building material, the size and scale of the building, and the type and style of all windows, doors, light fixtures, signs, and other appurtenant fixtures. In the case of outdoor advertising signs, "exterior features" shall be construed to mean the style, material, size, and location of all such signs. Such "exterior features" may, in the discretion of the local governing

board, include historic signs, color, and significant landscape, archaeological, and natural features of the area.

[2]The statutory definition of "historic conservation district" under federal law is an area that contains historic property, buildings having similar or related architectural characteristics, cultural cohesiveness, or any combination of those features. *See* 54 U.S.C. §300305.

[3]The National Register of Historic Places is maintained by the Secretary of the Interior and it is composed of "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering and culture." 54 U.S.C. §302101. National Historic Landmarks are also included on the Register. *See* 54 U.S.C. §302102. The actual National Register of Historic Places can be found online at https://www.nps.gov/nr/nrlist.htm.

## EXCEPTIONS CLAUSES - CLAUSE (4) [Safety Codes]

1. LEGISLATIVE HISTORY

**(4) The regulations are directly and substantially related to the requirements of applicable safety codes adopted under G.S. 143-138.**

This is the language as set out in H.B. 150, as filed on 2/26/2013 in the 2013-2014 Session, and carried through verbatim to SL 2016-86 as enacted. H.B. 150 as filed, deleted the reference to "fire and life" as modifiers to "safety codes" in the 2011 version of bill.

**(2) Where the regulations are directly and substantially related to the requirements of applicable fire and life safety codes adopted under G.S. 143-138.**

Above is the language in S.B. 731 as introduced by Senator Clodfelter on 4/19/11 in the 2011-2012 Session, and this clause remained unchanged during 2011 action on the bill.

2. ANNOTATED VERSION OF FINAL LANGUAGE

**(4) The regulations are directly and substantially related to the requirements of applicable safety codes adopted under G.S. 143-138[1].**

[1]The foundational requirements of the safety codes referenced under §143-138 are as follows:

(a) Preparation and Adoption. - The Building Code Council may prepare and adopt, in accordance with the provisions of this Article, a North Carolina State Building Code. ****

(b) Contents of the Code. - The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings and structures, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings and structures; requirements concerning means of egress from buildings and structures; requirements concerning means of ingress in buildings and structures; rules governing construction and precautions to be taken during construction; rules as to permissible materials, loads, and stresses; rules governing chimneys, heating appliances, elevators, and other facilities connected with the buildings and structures; rules governing plumbing, heating, air conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; and such other reasonable rules pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large.

(b1) Fire Protection; Smoke Detectors. - The Code may regulate activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion, or related hazards. Such fire prevention code provisions shall be considered the minimum standards necessary to preserve and protect public health and safety, subject to approval by the Council of more stringent provisions proposed by a municipality or county as provided in G.S. 143-138(e). ****

## EXCEPTIONS CLAUSES - CLAUSE (5) [Manufactured Housing]

1. LEGISLATIVE HISTORY

**(5) Where the regulations are applied to manufactured housing in a manner consistent with G.S. 160A-383.1 and federal law.**

This is the wording of this section as set out in H.B. 150, Senate Commerce Committee substitute adopted on 4/23/13, 2013-2014 Session, and carried through verbatim to S.L. 2015-86. The Senate Commerce Committee had deleted a comma between “housing” and “in” as found in H.B. 150 as passed by the House on 3/20/13. The House had adopted Amendment A1 to H.B. 150 offered by Representative Moffitt on 3/19/2013 to delete “or modular”.

**(5) Where applied to manufactured or modular housing, in a manner consistent with G.S. 160A-383.1 and federal law**

This clause was not found in S.B. 731 as originally filed by Senator Clodfelter on 4/19/11 in the 2011-2012 Session. The Senate adopted Amendment No. 1 offered by Senator Clodfelter on 5/17/11 to add this clause as a new clause (6). The clause was subsequently renumbered to clause (5) when H.B. 150

was filed on 2/26/13 in the House during the 2013-2014 Session, and H.B. 150 did not include the previous clause (5) relating to density bonuses from the 2011-2012 version of the bill.

The "density bonus" clause referenced above was as follows:

> **(5) Where such regulations are imposed as conditions relating to the allowance of density bonuses or modifications of open space, setbacks or required yards, lot coverage, lot size, buffering or screening regulations otherwise generally applicable in a zoning district.**

This clause (5) was not found in S.B. 731 as originally filed by Senator Clodfelter in the 2011-2012 Session, but was added by his Amendment No. 1 on 5/17/11. As noted above, it was deleted in its entirety when H.B. 150 was filed on 2/26/13 in the House during 2013-2014 Session.

This deleted clause is of interest since it set out circumstances whereby certain design elements could be adopted ("imposed" in the wording of the clause) as a condition of receiving density bonuses or other modifications to development standards. It is not clear whether this was a reference to conditions found in a general zoning district, an overlay district, or to conditions imposed in a conditional rezoning process. If a general or overlay district, then deleting this exception clause supports the proposition that it is not permissible after the enactment of S.L. 2015-86 to continue to enforce ordinance provisions that impose design elements for the lessening of otherwise required setbacks, etc. It is also interesting to note that there may have been an inherent conflict within the bill as then drafted, since a later section of S.B. 731 directly prohibited applying design elements in either traditional zoning districts or parallel conditional districts. That conflict, if any, apparently was resolved when the "voluntarily consented" proviso was first introduced in H.B. 150 in the 2013-2014 Session, as discussed at some length below.

2. ANNOTATED VERSION OF FINAL LANGUAGE

> **(5) Where the regulations are applied to manufactured housing in a manner consistent with G.S. 160A-383.1 [1] and federal law [2].**

[1]The referenced section of the General Statutes follows:

> **§ 160A-383.1. Zoning regulations for manufactured homes.**
>
> (a) The General Assembly finds and declares that manufactured housing offers affordable housing opportunities for low and moderate income residents of this State who could not otherwise afford to own their own home. The General Assembly further finds that some local governments have adopted zoning regulations which severely restrict the placement of manufactured homes. It is the intent of the General Assembly in enacting this section that cities reexamine their land use practices to assure compliance with applicable statutes and case law, and consider allocating more residential land area for manufactured homes based upon local housing needs.

(b) For purposes of this section, the term "manufactured home" is defined as provided in G.S. 143-145(7). [G.S. 143-145 (7) Manufactured home. - A structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width, or 40 body feet or more in length, or, when erected on site, is 320 or more square feet; and which is built on a permanent chassis and designed to be used as a dwelling, with or without permanent foundation when connected to the required utilities, including the plumbing, heating, air conditioning and electrical systems contained therein. "Manufactured home" includes any structure that meets all of the requirements of this subsection except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary of HUD and complies with the standards established under the Act.]

(c) A city may not adopt or enforce zoning regulations or other provisions which have the effect of excluding manufactured homes from the entire zoning jurisdiction.

(d) A city may adopt and enforce appearance and dimensional criteria for manufactured homes. Such criteria shall be designed to protect property values, to preserve the character and integrity of the community or individual neighborhoods within the community, and to promote the health, safety and welfare of area residents. The criteria shall be adopted by ordinance.

(e) In accordance with the city's comprehensive plan and based on local housing needs, a city may designate a manufactured home overlay district within a residential district. Such overlay district may not consist of an individual lot or scattered lots, but shall consist of a defined area within which additional requirements or standards are placed upon manufactured homes.

(f) Nothing in this section shall be construed to preempt or supersede valid restrictive covenants running with the land. The terms "mobile home" and "trailer" in any valid restrictive covenants running with the land shall include the term "manufactured home" as defined in this section.

[2] The National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401, *et seq.,* as amended, and federal regulations adopted under the Act, 24 CFR Part 3280 - Manufactured Home Construction and Safety Standards, *et seq*. These regulations encompass “all equipment and installations in the design, construction, transportation, fire safety, plumbing, heat-producing and electrical systems of manufactured homes which are designed to be used as dwelling units. This standard seeks to the maximum extent possible to establish performance requirements. In certain instances, however, the use of specific requirements is necessary.” 24 CFR §3280.1.

## EXCEPTIONS CLAUSES - CLAUSE (6) [National Flood Insurance Program]

1. LEGISLATIVE HISTORY

**(6) Where the regulations are adopted as a condition of participation in the National Flood Insurance Program[1].**

This is the clause as set out in H.B. 150, Regulatory Reform Committee substitute as approved on 3/14/13 in 2013-2014 Session, and carried forward verbatim to S.L. 2015-86. The Committee substitute deleted the word "such" and substituted the word "the", between the words "Where" and "regulations" as worded in H.B. 150 as filed on 2/26/13, which originated the clause. The clause was not found in S.B. 731 from 2011-2012 Session.

2. ANNOTATED VERSION OF FINAL LANGUAGE

**(6) Where the regulations are adopted as a condition of participation in the National Flood Insurance Program[1].**

[1] *See* 42 U.S.C. §4001, *et seq.,* as amended. The National Flood Insurance Program incentivizes local government participation in the National Flood Insurance Program by prohibiting any federal assistance for construction in areas of flood hazard unless the local government participates in the program. 42 U.S.C. §4106(a). Federally regulated lending institutions must also notify borrowers whether their properties would be eligible for federal assistance in the event of a flooding event. 42 U.S.C. §4104 (a) and 4106 (b).

North Carolina participates in the National Flood Hazard Program and permits local governments to "adopt ordinances to regulate uses in flood hazard areas and grant permits for the use of flood hazard areas that are consistent with the requirements of this Part [and the federal program requirements]." §143-215.54 (a). Under the North Carolina program, **a** "local government may delineate any flood hazard area subject to its regulation by showing it on a map or drawing, by a written description, or any combination thereof, to be designated appropriately and filed permanently with the Clerk of Superior Court and with the Register of Deeds in the county where the land lies. A local government may also delineate a flood hazard area by reference to a map prepared pursuant to the National Flood Insurance Program." §143-215.56 (c).

## EXCEPTIONS CLAUSES - CLAUSE (7) (Moved)

1. LEGISLATIVE HISTORY

**(iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.**

This is the final wording of the clause as included as the last provision of subsection (h) of the subsections added by S.L. 2015-86, and carries forward verbatim from the clause as moved by the Senate Commerce Committee substitute for H.B. 150 adopted on 4/23/13. The relevant portion of that provision reads: "The phrase 'building design elements' does not include … (iii) regulations adopted ….."

**(7) Where the regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.**

This clause (7) in the list of Exceptions Clauses was not part of the language of S.B. 731 as originally introduced in the 2011-2012 Session, nor was it included in H.B. 150 as originally introduced in the 2013-2014 Session. Representative Dollar first introduced this clause (7) by means of Amendment No. A2 to H.B. 150 adopted by the House on 3/20/13. This clause was subsequently deleted as clause (7) of the Exception Clauses and moved to new subdivision (iii) of the final sentence of subsection (h) by the Senate Commerce Committee substitute for H.B. 150 adopted on 4/23/13.

2. ANNOTATED VERSION OF FINAL LANGUAGE

**The phrase 'building design elements' does not include … (iii) regulations adopted pursuant to this Article governing the permitted uses[1] of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.**

[1]The operative intent of this sentence is to make it clear that S.L. 2015-86 does not limit the ability of local governments to employ their zoning and subdivision regulatory powers to allow or permit certain **uses** on land or in structures, even if those local governments cannot impose building design elements on those same structures.

For cities' ability to regulate uses *see* § 160A-382(a), which provides:

> **"**For any or all these purposes, the city may divide its territorial jurisdiction into districts of any number, shape, and area that may be deemed best suited to carry out the purposes of this Part; and within those districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or ***use of buildings, structures, or land***. Such districts may include, but shall not be limited to, general use districts, in which a variety of uses are permissible in accordance with general standards; overlay districts, in which additional requirements are imposed on certain properties within one or more underlying general or special use districts; and special use districts or conditional use districts, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit and conditional zoning districts, in which site plans and individualized development conditions are imposed." (Emphasis added.)

## DIRECTLY OR INDIRECTLY APPLIED AND VOLUNTARY CONSENT PROVISION

1. LEGISLATIVE HISTORY

**Regulations prohibited by this subsection may not be applied, directly or indirectly, in any zoning district, special use district, conditional use district, or conditional district unless**

**voluntarily consented to by the owners of all the property to which those regulations may be applied as part of and in the course of the process of seeking and obtaining a zoning amendment or a zoning, subdivision, or development approval, nor may any such regulations be applied indirectly as part of a review pursuant to G.S. 160A-383 of any proposed zoning amendment for consistency with an adopted comprehensive plan or other applicable officially adopted plan.**

This language, reported favorably on 3/14/13 by the House Regulatory Reform Committee in the 2013-2014 Session, was carried forward verbatim into S.L. 2015-86.

**Regulations prohibited by this section may not be applied, directly or indirectly, in any zoning district, special use district, conditional use district, or conditional district unless ~~specifically~~ voluntarily consented to by the owners of all of the property to which they may be applied as part of and in the course of the process of seeking and obtaining a zoning amendment or a zoning, subdivision, or development approval, nor may any such regulations be applied indirectly as part of the review pursuant to G.S. 160A-383 of any proposed zoning amendment for consistency with an adopted comprehensive plan or other applicable officially adopted plan.**

This provision was reported favorably on 3/14/13 by the House Regulatory Reform Committee. That Committee made a number of substantive and important changes to the language and those are set out above in "edit" format for ease of reference. The "directly or indirectly" clause the Committee added made it clear that efforts to impose design elements through even "indirect" means was prohibited. The substitution of "voluntarily consented to" for "specifically consented to" substantially changed the meaning of the phrase, as discussed below, as did making it subject to a rezoning or development approval.

**Regulations prohibited by this section may not be applied in any zoning district, special use district, conditional use district, or conditional district unless specifically consented to by the owners of all of the property to which they may be applied, nor may any such regulations be applied indirectly as part of the review pursuant to G.S. 160A-383 of any proposed zoning amendment for consistency with an adopted comprehensive plan or other applicable officially adopted plan.**

Above is the substantially-modified and expanded language of this section in H.B. 150 as filed on 2/26/13, in the 2013-2014 Session. The changes added a more complete list of zoning districts where design element requirements are prohibited, inserted a major exception to that prohibition by allowing for circumstances where a property owner or petitioner specifically (later voluntarily) consents to design elements, and also expanded the prohibition to "indirect" imposition of design elements as part of adopted "plans." As discussed above, the somewhat related concept of allowing design elements in limited circumstances (i.e., to receive density bonuses or development standard reductions) was first

introduced in the original version of subsection (5) of the Exceptions Clauses, added by Senator Clodfelter through Amendment No. 1 to S.B. 731 on 5/17/11, and later deleted.

> **Regulations prohibited by this section may not be applied either in traditional zoning districts or through districts designated as parallel conditional districts.**

This is the original language as included in S.B. 731 introduced by Senator Clodfelter on 4/20/11, and it remained unchanged in the 2011-2012 Session.

2. ANNOTATED VERSION OF FINAL LANGUAGE

> **Regulations prohibited by this subsection may not be applied, directly or indirectly[1], in any zoning district, special use district, conditional use district, or conditional district[2] unless voluntarily consented to by the owners of all the property to which those regulations may be applied[3] as part of and in the course of the process of seeking and obtaining a zoning amendment or a zoning, subdivision, or development approval[4], nor may any such regulations be applied indirectly as part of a review pursuant to G.S. 160A-383 of any proposed zoning amendment for consistency with an adopted comprehensive plan or other applicable officially adopted plan[5].**

[1] The phrase "directly or indirectly" evidences the concerns of the drafters that zoning authorities may, while meeting the explicit letter of the statute, retain or adopt ordinance provisions that violate the spirit and intent of the statute by imposing requirements that can only be met through employing building design elements, even if those building design elements are not directly set out in the offending ordinance provision. *See* discussion in Chapter 1 of this study relating to the requirement to construct alleyways and the necessity to then construct garages on those alleys, and whether that violates the prohibition on mandating "location" of garage doors.

[2] The four types of zoning districts set out in this sentence are provided for in the following zoning enabling statute provision:

> **§ 160A-382. Districts.**
> (a) For any or all these purposes, the city may divide its territorial jurisdiction into districts of any number, shape, and area that may be deemed best suited to carry out the purposes of this Part; and within those districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land. Such districts may include, but shall not be limited to, ***general use districts***, in which a variety of uses are permissible in accordance with general standards; overlay districts, in which additional requirements are imposed on certain properties within one or more underlying general or special use districts; and ***special use districts or conditional use districts***, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit and

***conditional zoning districts***, in which site plans and individualized development conditions are imposed. (Emphasis added.)

[3]The language of S.L. 2015-86 that permits all the owners of a property to consent "voluntarily" to building design elements during the process of seeking and obtaining a zoning amendment or other approval is substantially different and narrower than the language of the zoning enabling statute providing for specific conditions to be "mutually approved" for special use, conditional use or conditional districts. The relevant provision, § 160A-382 (b), of the zoning enabling statute provides:

> Property may be placed in a special use district, conditional use district, or conditional district only in response to a petition by the owners of all the property to be included. Specific conditions applicable to these districts may be proposed by the petitioner or the city or its agencies, ***but only those conditions mutually approved by the city and the petitioner*** may be incorporated into the zoning regulations or permit requirements. Conditions and site-specific standards imposed in a conditional district shall be limited to those that address the conformance of the development and use of the site to city ordinances and an officially adopted comprehensive or other plan and those that address the impacts reasonably expected to be generated by the development or use of the site. (Emphasis added.)

The differences in language between S.L. 2015-86 and the zoning enabling statute are significant. The language of S.L. 2015-86 is unilateral on its face, whereas the language of the enabling statute is explicitly bilateral. S.L. 2015-86 does not provide that specific conditions (i.e., building design elements) may be proposed by the "petitioner ***or***" a zoning authority, as does subsection (b) of the enabling statute. (Emphasis added.) Further, S.L. 2015-86 uses the term "voluntarily consent" rather than the term "mutually approved," as does subsection (b) of the enabling statute. These differences in wording must be interpreted as intentional, so that under S.L. 2015-86 only the property owner(s), and not the zoning authorities, may take the initiative to proffer building design elements and such proffer must be "voluntary" (i.e., an act done "without compulsion or solicitation." *Black's Law Dictionary*, Second Ed. Online). For a zoning authority to propose that building design elements be incorporated as a condition for zoning amendment approval or permit issuance would certainly appear to be "solicitation" of the landowners for that purpose, thereby negating the voluntary nature of any consent.

In addition, it is instructive that between the 2011-2012 Session and the introduction of H.B. 150 at the beginning of the 2013-2014 Session, subsection (5) of the Exceptions Clause of the Bill added by Amendment No. 1 by the Senate in 2011 was deleted in its entirety. That deleted subsection, as noted above, included the phrase "where such regulations [building design elements] are **imposed** as conditions…." (Emphasis added.) This is in stark contrast to the final "voluntarily consented to" language in S.L. 2015-86 as discussed immediately above, and an additional illustration of the intent of the General Assembly to make it clear that the normal bilateral nature of proffering conditions (or even imposition of conditions by a zoning authority) is not applicable in the context of S.L. 2015-86.

It is also of some interest to note that during the 2016 "Short Session" of the North Carolina General Assembly, an unsuccessful attempt was made to reference "design elements" in H.B. 483 which proposed changes to North Carolina's land use regulatory statutes. The Senate Judiciary Committee substitute to H.B. 483 as passed by the Committee on June 21, 2016 in Section 9 of the bill included an amendment to the provisions of G.S. 160A-381 (c) that prohibited boards of adjustment, planning boards or city councils from issuing special use or conditional use permits with conditions that a city could not otherwise impose directly. The amendment sought to illustrate what conditions could not be imposed by means of a special use or conditional use permit and they included "… building design elements within the scope of subsection (h) of this section not ***voluntarily offered*** by petitioner…." (Emphasis added.) Although H.B. 483 as finally enacted as S.L. 2016-111 did not include this language, it is instructive to consider the interpretation of subsection (h) as approved by the Senate Judiciary Committee in this particular proposed amendment.

[4]*See* § 160A-384 and -385 for the processes used to adopt or amend zoning ordinances or districts.

[5]The final clause of this provision of S.L. 2015-86 is another example of the drafters' intent to prohibit "indirect" actions intended to result in impermissibly imposed building design elements. In this case it pertains to the mandatory review of zoning regulations or amendments for their consistency with comprehensive or other officially adopted plans (i.e., small area plans in Charlotte-Mecklenburg) and the possibility that such plans might include references, either in text or illustrations, to building design elements. Under S.L. 2015-86, any building design elements in any such comprehensive or other adopted plans may not be imposed as part of the consistency analysis and determination.

The comprehensive or other adopted plan review requirement in the enabling statute at § 160A-383 provides:

> Zoning regulations shall be made in accordance with a comprehensive plan. When adopting or rejecting any zoning amendment, the governing board shall also approve a statement describing whether its action is consistent with an adopted comprehensive plan and any other officially adopted plan that is applicable, and briefly explaining why the board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.
>
> The planning board shall advise and comment on whether the proposed amendment is consistent with any comprehensive plan that has been adopted and any other officially adopted plan that is applicable. 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.

## DEFINITION OF BUILDING DESIGN ELEMENT

1. LEGISLATIVE HISTORY

**For the purposes of this subsection, the phrase "building design elements" means exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms.**

This is the final language as enacted in S.L. 2015-86. It was carried forward verbatim from the Senate Commerce Committee Substitute for S.B. 731 adopted on 5/17/11, 2011-2012 Session.

Amendment No. 1 to S.B. 731 adopted by the Senate on 5/17/11 deleted the phrase “type of style or exterior” and substituted the phrase “type or style of exterior”.

**For purposes of this subsection, the phrase "building design elements" means exterior building color, type of style or exterior cladding material, style or materials of roof structures or porches, exterior nonstructural architectural ornamentation, location or architectural styling of windows and doors, including garage doors, the number and types of rooms, and interior layout of rooms.**

As shown immediately above, the S.B. 731 Senate Commerce Committee Substitute approved on 5/10/11, substantially expanded the coverage of the section. The Substitute added the phrase “style or materials of roof structures or porches,” added the phrase “location or” to “architectural styling of windows or doors,” and added “including garage doors” at end of the clause “location or architectural styling of windows and doors”. These changes are shown above in “edit” mode for ease of reference.

**For purposes of this subsection, the phrase "building design elements" means exterior building color, type of style, or exterior cladding material, exterior nonstructural architectural ornamentation, architectural styling of windows and doors, the number and types of rooms, and interior layout of rooms.**

Above is the language in S.B. 731 as introduced by Senator Clodfelter on 4/19/11 in the 2011-2012 Session.

2. ANNOTATED VERSION OF FINAL LANGUAGE

**For the purposes of this subsection, the phrase "building design elements" means[1] exterior building color; type or style of exterior cladding material[2]; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural**

**styling of windows and doors, including garage doors[3]; the number and types of rooms; and the interior layout of rooms.**

[1] One method to help give additional context to what zoning authorities may NOT regulate is to examine specifically what zoning regulations MAY cover. The general grant of zoning authority is found in N.C. Gen. Stat. § 160A-383 and reads as follows:

> Zoning regulations 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; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. 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 such city.

It is instructive that the Short Title of S.L. 2015-86 states that the Act is to "***clarify*** when a county or municipality may enact zoning ordinances related to design and aesthetic controls." (Emphasis added.) This indicates that the Act was not intended to modify existing law, but rather to make clear that existing law (i.e., § 160A-383) was not intended to allow the type of zoning regulation prohibited by S.L. 2015-86 in the circumstances set out. It is reasonable to conclude therefore, that the general grant of authority under §160A-383 did not include the power to regulate these building design elements before, and certainly does not after, S.L. 2015-86. *See also*, the discussion below regarding Section 3 of S.L. 2015-86 for additional confirmation that clarification of existing law was intended by the General Assembly.

[2] The phrase "exterior cladding material" is meant to address the situation where zoning authorities either required a certain exterior material (i.e., brick), or they prohibit a certain exterior material (i.e., vinyl siding, see *Town of Davidson Planning Ordinance*, 4-9, 4.4.1.E.10 (prior to amendment)). Either the requirement for brick or the prohibition on vinyl can significantly increase the cost of home construction. For example, Karla Hammer Knotts, a principal of Knotts Builders, a production and custom home builder in the Charlotte region, estimates that the difference in cost to a consumer purchasing a typical 2,400 square foot home between vinyl siding and cement board siding (e.g. Hardie Board) would be approximately $9,000 more for cement board siding; the difference between vinyl siding and brick would be approximately $30,000 more for brick; and between cement board siding and brick, the difference would be approximately $20,000 more for brick. With homes of different sizes, the proportionate cost differential between the exterior cladding materials would be similar.

[3]An additional commonly-employed architectural design control has been to require that garage doors (i.e., the front of garages) be at least even with or recessed some distance behind the front setback of the home. The justification for this is the argument that a home with a garage extending

beyond the front setback of the remainder of the front of the house creates an undesirable appearance because of the perceived emphasis placed upon the garage. Additional common requirements are for side- or rear-entry garages, or garages facing alleys. Building Industry representatives argued strongly that on smaller lots with moderately-priced houses these types of requirements can be problematic, impacting the design, size and cost of home construction. *See* May 5, 2014 presentation of J. Michael Carpenter.

## REQUIREMENTS NOT CONSIDERED BUILDING DESIGN ELEMENTS (FINAL SENTENCE OF SUBSECTION (h))

1. LEGISLATIVE HISTORY

**The phrase "building design elements" does not include any of the following: (i) the height, bulk, orientation, or location of a structure on a zoning lot; (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of neighbors; or (iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.**

This is the final wording in S.L. 2015-86, as carried forward verbatim from Senate Commerce Committee substitute to H.B. 150 adopted by the Senate on 4/23/13, 2013-2014 Session. That Senate Commerce Committee substitute bill moved the clause "regulations adopted pursuant to this Article governing the ***permitted uses*** of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings" (emphasis added) from clause (7) of the Exceptions Clauses to a new subdivision (iii) of the definitional exclusions to the term "building design elements." This clause (7) was not part of the language of the bill in the 2011-2012 Session, or part of H.B. 150 as originally introduced in the 2013-2014 Session, but was added by Representative Dollar in Amendment No. A2 to H.B. 150, which was adopted by the House on 3/20/13.

**The phrase does not include any of the following: (i) the height, bulk, orientation, or location of a structure on a zoning lot; and (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of neighbors.**

The House Regulatory Reform Committee substitute bill was reported favorably on 3/14/13 and included the amended provision above. That substitute bill deleted subdivisions (iii) related to accessory buildings and parking and loading, and (iv) related to signs.

**The phrase does not include: (i) the height, bulk, orientation, or location of a structure on a zoning lot; (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, and to protect the privacy of neighbors; (iii) features related to**

**accessory buildings and parking and loading areas; and (iv) off-premises and on-premises signs.**

Above is the provision as modified by Amendment No. 1 to S.B. 731 as introduced by Senator Clodfelter and approved on 5/17/11. This provision was carried forward verbatim to H.B. 150 as introduced in the House on 2/26/13, 2013-2014 Session.

**The phrase does not include buffering or screening of development to minimize visual impacts or impacts of light and noise on surrounding, parking and loading areas, or signage of buildings or collections of buildings.**

This is the language of the provision as originally introduced in S.B. 731 by Senator Clodfelter on 4/19/11 in the 2011-2012 Session.

2. ANNOTATED VERSION OF FINAL LANGUAGE

**The phrase "building design elements" does not include any of the following: (i) the height, bulk, orientation, or location of a structure on a zoning lot[1]; (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of neighbors[2]; or (iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings[3].**

[1]These are typical development standards included in many zoning ordinances. *See City of Charlotte Zoning Ordinance*, Section 9.205 (and tables therein) for typical zoning ordinance control of height (including increased standards based on increased distance from lot lines), bulk (floor area ratios), orientation or location (front, side and rear yard setbacks).

[2]Similarly, buffer and screening requirements are common in zoning ordinances. *See City of Charlotte Zoning Ordinance*, Section 12.301., setting out the rationale for buffer and screening requirements:

> It is recognized that certain land uses, because of their character and intensity, may create an adverse impact when developed adjacent to other less intensive land uses. The general purposes of this Section are to establish regulations protecting and preserving the appearance, character and value of property within the City and to recognize that the transition between certain uses requires attention to protect less intensive land uses. The objectives are to identify those land use relationships that may be incompatible and to specify an appropriate buffer or screen, the function of which is to minimize any adverse impacts.

[3]The operative term in the old subdivision (7) which was moved to subdivision (iii) is "uses of land or structures." The distinction here is between physical form (i.e., design elements) and permitted uses on a lot or within a structure that was constructed as a single- or two-family dwelling. (*See* § 160A-382(a), which provides specific statutory authority to municipalities to control through zoning the "use of buildings, structures or land.")

## VALIDITY AND ENFORCEABLITY OF PRIVATE COVENANTS

1. LEGISLATIVE HISTORY

**(i) Nothing in subsection (h) of this section shall affect the validity or enforceability of private covenants or other contractual agreements among property owners relating to building design elements.**

Language of S.L. 2015-86 carried forward verbatim from language first added in H.B. 150, Regulatory Reform Committee substitute approved on 3/14/13, 2013-2014 Session. There was no precursor provision in earlier versions of the bill in the 2013-2014 or in the 2011-2012 Sessions.

2. ANNOTATED VERSION OF FINAL LANGUAGE

**(i) Nothing in subsection (h) of this section shall affect the validity or enforceability of private covenants[1] or other contractual agreements among property owners relating to building design elements.**

[1]This is a reference to restrictive covenants as originally instituted in North Carolina under common law and now partially regulated in North Carolina under the Planned Community Act, N.C. Gen. Stat. 47F-1-101, *et seq.*, as amended (hereafter PCA).

*Webster's Real Estate Law in North Carolina*, James A. Webster, Jr., Third Ed. (1988) provides the following general descriptions of restrictive covenants:

> A restrictive covenant is a servitude commonly referred to as a negative easement. *** Damages may be recoverable for its breach or compliance with the covenant may be enforced by injunction in appropriate cases. *** The grantor may set forth the use restrictions in each deed of conveyance. Or if he is a subdivider of land, he may record a plat of the tract of land being developed, along with an indenture or a master set of restrictive covenants or conditions, perhaps in an initial deed or pursuant to statute, which restrictions carefully describe the limitations with respect to the uses to which the lots conveyed may be put. Thereafter, as subsequent deeds are given to grantees relating to separate parcels within the development, references can be made stating that each grant is subject to the recorded restrictions recorded in a specific book. *** Where the owner of a tract of land subdivides it and sells it … imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee … a subsequent purchaser who takes title to the land with notice of the restrictions … [and] a homeowners

association … as long as the covenant is applicable to all lots in a subdivision or is part of a uniform plan of development. *Id*. at 470-472 (citations omitted).

The restrictive covenants for planned communities are frequently titled "Declaration of Covenants, Conditions, Easements and Restrictions" for a specific named community. The PCA mandates that such declaration be "executed in the same manner as a deed and shall be recorded in every county in which any portion of the planned community is located." § 47F-2-101. Under many Declarations, developers and then their successor nonprofit homeowners associations enjoy extensive control over many elements of the design, construction, maintenance and modification of homes within the community.

For example, the Declaration of the Ivy Hall community in Charlotte, N.C., recorded on Oct. 30, 1991 in Book 06671, PG 3852/0873, originally provided in Article VII, Sec. 2. that "[n]o building, fence, wall, sidewalk, hedge, obstruction, driveway or other structure shall be commenced, erected or maintained upon any lot nor shall any exterior addition, change or alteration herein (including change of color) be made without the prior written approval of Declarant [later an Architectural Review Committee of homeowners]. The areas over which the Declarant shall have control shall include, but shall not be limited to, the size and plan of the residential structure, the location of the principal residential structure on the Lot, the size and plan of any attached garage, the location and manner of construction of any driveway, in-ground swimming pool, patio, mailbox or other exterior improvements, and the composition and color of all material used on the exterior of any structure." Other provisions of the Ivy Hall Declaration address residential use of structures, minimum dwelling sizes, setbacks, vehicles, parking, nuisances, unsightly conditions, tree removal, antennae, driveways, etc.

It is quite clear under Subsection (i) of S.L. 2015-86 that these private contractual arrangements are not to be impacted by the clarifying language of the act.

## EFFECTIVE DATE

1. LEGISLATIVE HISTORY

**SECTION 3. This act is effective when it becomes law. The act clarifies and restates the intent of existing law and applies to ordinances adopted before, on, and after the effective date.**

This is the wording of Section 3 as enacted in S.L. 2015-86 and carried forward verbatim from the Senate Commerce Committee Substitute for H.B. 150 adopted on 4/23/13.

**SECTION 3. This act is effective when it becomes law and applies to development approvals granted on or after that date.**

This is the language as modified by Amendment No. 1 to S.B. 731, adopted on 5/17/11. The identical language was carried forward in H.B. 150 as introduced in the House on 2/26/13, 2013-2014 Session.

**SECTION 3. This act is effective when it becomes law.**

Above is the limited wording of the Section as originally included in S.B. 731 as introduced by Senator Clodfelter on 4/19/11, 2011-1012 Session.

2. ANNOTATED VERSION OF FINAL LANGUAGE

**SECTION 3. This act is effective when it becomes law. The act clarifies and restates the intent of existing law[1] and applies to ordinances adopted before, on[2], and after the effective date.**

[1]*See* discussion above on the Short Title of the bill regarding the intent of the legislature to either modify or clarify existing law when enacting a statute, and the modification to the Short Title indicating that this bill clarifies existing law. Senator Clodfelter successfully modified the Short Title by among other things adding the "clarify" language by means of Amendment 1 to S.B. 731 adopted on 5/17/11 in the 2011-2012 Session, which was early in the evolution of the bill across three legislative sessions. Section 3 was not amended to include the "clarifies and restates the intent of existing law" clause until the Senate Commerce Committee substitute to H.R. 150 was adopted on 4/23/13, in the 2013-2014 Session. Both the Short Title and Section 3 as enacted unequivocally state that the actions by local governments to dictate design elements for one- and two-family homes, except in the circumstances enumerated in S.L. 2015-86, were not consistent with the law in North Carolina.

[2]It is also instructive that this provision references ordinances adopted "before, on, and after" the effective date of the act. This is logically and statutorily consistent with the proposition stated earlier in the sentence that the act serves only to "clarify and restate the intent of existing law." Since local governments never had the authority to mandate design elements, it follows that any such ordinance provisions in previously-adopted ordinances would be null and void, and they could not be enacted lawfully in the future.