

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
March 13, 2019**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, March 13, 2019.

Present were: Chair Joe Blakaitis, Vice Chair Marc Murray, Tim McKeithan, James Cofield, and Sandy Whitman.

Absent: None.

Also present were: Director of Community Development Joe Heard, Permit Coordinator Sandy Cross, and Council Liaison Jon Britt.

Absent: None.

Others Present: James Blose.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for March 13, 2019 at 6:35 p.m.

PUBLIC COMMENTS

None.

NEW BUSINESS

Presentation and Discussion about the Village Commercial Development Option and Related Text Amendments

Director Heard stated that his intent is to give an overview of what Council authorized the Board to look at and develop an action plan for how the Board wants to move forward with its review.

Director Heard stated that the focus is the Village Commercial Development Option. He reminded the Board that within the last year, the Town has had some circumstances come up where there were things brought up about how the Town may want to take a look at making this a better tool that works better for the Town as well as property and business owners within the Village Commercial district.

Director Heard stated that at the Town Council Retreat, he provided a presentation that covered several aspects of the Village Commercial Development Option. He stated that he wants to discuss similar concepts to get the Board thinking about what they may need and how proposed amendments will be forwarded to Council.

Director Heard stated that he pulled five ideas from the memorandum from Town Attorney Robert Hobbs and Attorney Ben Gallop regarding the Village Commercial Development Option:

1. Special exception rather than conditional use permit
2. Objective criteria for Village Commercial Development Option approval
3. Consider limitations on amount of reductions
4. Civil penalties for violations rather than criminal penalties
5. Objective criteria for approval of all conditional use permits

Director Heard stated that with regard to special exceptions, the key point is that the Village Commercial Development Option isn't a use but something that deals with development standards such as setbacks, building height, parking, etc. He noted that since it isn't a use, it seems that a special exception is more appropriate. He reminded the Board that any VCDO request would still go through the same process with consideration by the Planning Board and Town Council and is still a quasi-judicial process.

Member Cofield asked if a restaurant would come before the Board, just because it is restaurant, even if it meets all other criteria. He further asked if this change suggests that a restaurant that meets all other criteria would not come before the Planning Board. Director Heard responded that the change would only be applied to proposals seeking the Village Commercial Development Option. He explained that there is a list of allowed uses in the zoning ordinance that are permitted do not come before the Planning Board. He added that there is a list of conditional uses that come before the Board, including an eating establishment. Those lists will remain the same. He clarified that, as a use, a restaurant would still come before the Planning Board as a conditional use. He added that all the Town is considering is looking at the Village Commercial Development Option and not revising which uses are allowed or not allowed. He stated that the Town attorneys are suggesting that it will be more appropriate as a special exception rather than a conditional use.

Member Cofield asked for an example of one that has been before the Planning Board. Director Heard stated that in Loblolly Pines, there was a new use for the post office, which is a conditional use. He added that there was a significant change in the operation of an eating establishment at Tullio's Bakery that had additional seating, which is a conditional use. He stated that the third conditional use at Loblolly Pines was the Village Commercial Development Option for parking, which is listed as a use because that was how it is presently set up. He noted that the only difference would be that the request for a parking reduction will be listed separately as a special exception. He added that there would still be a conditional use permit for the uses that require it, but there would be a special exception application for reduced standards for some aspect of the development, whether it be parking or setbacks. He explained that the Village Commercial Development Option is more similar to a variance or special exception than a conditional use.

Vice Chair Murray asked if it will preclude someone from applying for a use that is not listed if the Town isn't opposed to it. He further asked if someone will have to get a text amendment first to add that use. Director Heard responded that the applicant would have to seek a text amendment. Vice Chair Murray stated that it seemed to him that when the ordinance was written, the thinking was if the Town thought of a use that someone may want, then the Village

Commercial Development Option would potentially allow them to do that. Council Liaison Britt disagreed, adding that it was never intended for uses, but for flexible development standards because there are a lot of small and oddly shaped lots in Town that would not be able to fit the “letter of the law” that was inherited from Dare County. He stated that this gives the Town the flexibility to address the design and layout, but it never addressed use.

Vice Chair Murray asked if the Board were to make this change, an applicant who wishes to apply for a use that is not currently listed, will have 30 or 90 more days to their application process. Director Heard stated that it depends on how they want to work it. He explained that the first step will be a text amendment similar to the gentleman that came before the Board at their February 13, 2019 meeting to apply for beach buggy rentals. He stated that if and when the Council approves the request, they can then follow up and obtain approval for a conditional use. He noted that staff has permitted applicants to submit applications concurrently, so it isn’t necessarily a delay if they have time constraints, but it is at their risk and they are made aware of that up front.

Director Heard stated that even if there is a use of right that does not require a conditional use, but development is challenging due to the way the site was designed, it may need some flexibility. The applicant would still have to apply to come before the Planning Board and Town Council for the special exception. He noted that while the use approval would not be part of the application, the applicant would still need approval for the design part of the project.

Council Liaison Britt asked if a restaurant will have to ask for a conditional use permit for the restaurant and then a special exception permit. Director Heard stated that it can be combined into a single application. He explained that staff will present it to the Planning Board and review it as a single application with the understanding that the Board will need to make a recommendation on both the conditional use and special exception. He noted that it is possible that the Board could find that the use is okay but does not support some aspect of the proposal regarding the Village Commercial Development Option. He stated that it would be two separate things, but it makes sense to review them concurrently.

Member Cofield asked for another example other than the dune buggy use. Director Heard reiterated that the proposed change to the Village Commercial Development Option is nothing more than nomenclature. He stated that it isn’t changing anything at all about the process, it is just called something different that is more appropriate. He stated that anything the Board has reviewed many projects that have undergone approval of the Village Commercial Development Option – Roadside Bar & Grill and Scarborough Faire are two recent examples. Any of those projects would still have to come before the Board, but it would be a special exception instead of a conditional use. He added that the Board will still review it for similar things and it will come to the Board in the same packet to be reviewed with the use itself. Council Liaison Britt pointed out that the Town’s legal counsel wants the Town to call it this, which is what the Town is going to do. Chair Blakaitis noted that he would prefer to stay with what the suggestions by the Town’s legal counsel.

Director Heard stated that the main focus for the Planning Board’s discussion is the current ordinance containing review standards for the Village Commercial Development Option. He noted the following general criteria mentioned in the Town’s current ordinance:

1. Consider CAMA Land Use Plan
2. Consider architectural review guidelines
3. Comply with conditional use permit requirements
4. Encourage shared parking
5. Accommodate pedestrians
6. Promote mixed land uses
7. Scale and architectural character complementing Duck Village

Director Heard noted that the criteria are in the Town's existing ordinance and the recommendation the attorneys made is for the Planning Board to develop criteria that the Board and Council can use to determine if the proposal complies with the factors. He stated that staff came up with draft criteria for approval. Applicants would be encouraged to consider all the listed measures, but Town Council must find a certain number of these criteria are provided for approval of a special exception for flexible development standards under the Village Commercial Development Option. He noted that the criteria can be guidelines and not standards that have to be met. He explained that it will take out the capricious, arbitrary-type of argument that people sometimes offer make when a decision is made. He reiterated that the criteria do not have to be firm things but can be guidelines that advise people what the Board is looking for.

Director Heard reviewed examples of his suggested guidelines with the Board and audience. He noted that there could be many other things that the Board may think of. He added that he included all the concepts from the existing Village Commercial Development Option ordinance.

Director Heard stated that some of the key questions the Board will want to answer during the process as the standards are developed for the special exception are if they should be formal standards or guidelines; how the standards should be applied to existing situations; if more weight should be placed on certain criteria; if some criteria should be required while others are optional; and how much compliance is necessary for approval. He noted that no project will meet all of the criteria, so the Board needs to figure out what they want when looking at the standards.

Director Heard stated that another item in the attorneys' memorandum has to do with potentially adopting at limitations on the amount of reductions. He stated that currently, there are no parameters on the amount of flexibility that can be granted. He stated that the Town can use the Village Commercial standards as the baseline and determine limitations on how much flexibility is appropriate for different types of development standards.

Director Heard stated that with regard to parking reductions, the concept could be a potential 20% reduction in minimum parking requirements within Duck Village due to the close proximity of businesses and amenities; the availability of public parking; shared parking opportunities; and the use of other transportation alternatives, such as the boardwalk, sidewalks, and bicycle lanes.

Director Heard stated that with regard to civil penalties, zoning violations are presently enforced as a criminal violation in many instances with the fines/penalties going to the Dare County School Board. He noted that using only the civil penalties can provide the Town with some revenue to offset litigation costs of enforcement. He stated that it is not necessarily related to the

Village Commercial Development Option, but a suggestion that was made by the Town Attorney during his review. He added that this concept is something he can bring back to the Board at their April 10, 2019 meeting as he would only need to identify the sections to be tweaked as well as the references in the statutes. He stated that if the Board is okay with it, he suggested that he be given permission to develop an amendment for the next meeting for discussion.

Chair Blakaitis stated that with regard to the changes being recommended by Town Council, he thought it would be good. He suggested that Director Heard bring it back for the Board to review and see if they agree with it. He asked what the best way would be for moving forward. Director Heard stated that he had some other information to review with the Board before they move forward.

Director Heard stated that the next item that the attorneys had in their memorandum had to do with the general conditional use permit criteria. He pointed out that the attorneys have made a specific suggestion for the wording to make it consistent with the State statutes, but it will still be fairly general, with a few other things to help the Planning Board and Town Council direct the review for consistency. He stated that the attorneys made specific recommendations on it and he proposed to bring it to the Board at their April meeting for consideration. He noted that these changes would apply to not only the Village Commercial District, but to any conditional use in any district. He thought it will help the Board with their decision-making process.

Director Heard stated that the Town Council has authorized the Planning Board and staff to work on the following items:

1. Review the Village Commercial Development Option as a special exception rather than a conditional use permit.
2. Establish objective criteria for Village Commercial Development Option approval.
3. Look at the limitations on the amount of Village Commercial Development Option reductions.
4. Civil penalties for violations rather than criminal penalties.
5. Look at additional criteria for approval of all conditional use permits.

Director Heard proposed that civil penalties for violations rather than criminal penalties and additional criteria for approval of all conditional use permits be discussed and considered in the short-term. Chair Blakaitis thought it is a good idea.

Director Heard proposed that the Village Commercial Development Option as a special exception rather than a conditional use permit; establishing objective criteria for Village Commercial Development approval; and limitations on the amount of Village Commercial Development Option reductions be a long-term discussion for the Board. He thought it will be a multi-month process to determine what the Board members are comfortable with as they think about what they want to see in Duck Village and what kind of development they prefer. He stated that if the Board is going to grant a special exception for relief for flexibility on design standards, the Board needs to think about what they want to see in return.

Chair Blakaitis thought the last two items – establishing objective criteria for Village Commercial Development Option approval and limitations on the amount of Village

Commercial Development Option reductions – will be the most difficult to accomplish. He noted that the Board cannot do the limitations until they figure out the objectives. He thought the Board should come up with a list of objective criteria but isn't sure how it will work. He stated that he looked at the current Village Commercial Development Option as a flexible thing. Council Liaison Britt thought it is almost too flexible. He added that the concept is good, but there isn't anything that outlines what Council wants to see in return. He thought mixing it together is difficult and suggested taking the 12 things listed and determine which are applicable to the proposal being presented. He explained that if a customer is asking for a special exception for parking, then a bicycle path or bicycle rack would be considered as they are things relating to parking.

Chair Blakaitis stated that the Board could go along with the legal items and make some changes to other items, but for the Board to sit and decide if they want criteria to begin with, which he thought the Board wants, is important. He thought the Board needs to decide where they want the criteria and what it should be. Council Liaison Britt clarified that the most common exceptions for the Village Commercial Development Option are parking and setbacks. Director Heard confirmed that is correct. Council Liaison Britt suggested that the Board focus on those two items. Chair Blakaitis thought it is a good start.

Member Cofield stated that he would like Director Heard to send the Board members the PowerPoint presentation. Director Heard stated that he would. Member Cofield asked the members of the audience to weigh in on the discussion.

James Blose of 105 Waxwing Court was recognized to speak. Mr. Blose thought there are a lot of important things and he encouraged the Board to consider certain things when they are discussed. He thought the Board needs to look at a combination of standards and guidelines. He added that the Board could not do either all of one or all of the other as there should be standards which provide a table or baseline. He thought the Board should consider a standards and guidelines approach. He thought some of the commentary regarding low hanging fruit was a good point. He added that the criteria need to come first.

Chair Blakaitis thought the Board knows where they are headed, and he thought that the Board members need to be thinking about criteria for the next meeting. He agreed with Member Cofield about sending the PowerPoint presentation to the Board members for their review.

Vice Chair Murray asked if the Board wants to move the Village Commercial Development Option as a special exception rather than a conditional use permit. He thought the Board is just calling it something different if it is called a special exception. He added that the Board has historically had an issue when people ask for two things at once. He thought if it is changed to a special exception, the Board needs to remember the moment it is changed and make it acceptable for people to ask for a text amendment if they are proposing a use that is not listed. He thought it will be a 180-day approval period if an applicant has to ask for a text amendment first, then a special exception. He noted that it seems like an unreasonable burden. Director Heard stated that right now, the same request would involve a text amendment and a conditional use. He explained that the Village Commercial Development Option is not an option for a proposed use that isn't permitted. Vice Chair Murray stated that he sees it as a non-issue for debate by the Board. Chair Blakaitis agreed. Regarding the format of the change, Director Heard explained

that a new special exception section would need to be created. It makes sense to incorporate this change into the overall Village Commercial Development Option amendments as the Board will be revising the VCDO criteria anyway.

Vice Chair Murray stated that he is going by the wording the attorney used in the memorandum in that he stated: "...in its current state, someone could apply for a use, even one not otherwise listed..." He asked if the attorney is incorrect. Director Heard stated that he was, but added that added that the VCDO was created to address development standards.

Chair Blakaitis thought the Board should discuss the important points first. Vice Chair Murray asked Director Heard how much of a framework will be needed. Director Heard stated that it can be as formal as drafting a new section and including things as well as laying it out. He stated that he is not comfortable drafting an ordinance as he isn't sure where the Board stands on some of the issues. He would prefer to have a discussion before getting to that point. Chair Blakaitis agreed.

Director Heard asked the Board what information they want to help them work through the process. Chair Blakaitis suggested that Director Heard look through what the other towns are doing for their objective criteria. Vice Chair Murray stated that he agreed that it could be helpful but felt that Duck is drastically different from many other towns. He suggested that data may be helpful such as a percentage of applicants who have asked for setback and/or parking relief based on lot size. He added that a lot of other information in that format would be helpful because it sounds like the Board will be creating a lot of nonconformities by doing this since people that make more than 50% repairs for improvement will not be able to continue what they are currently doing. He felt like there are some 5,000 square foot lots and oddly shaped lots which the Board may need to carve out special exceptions. Director Heard stated that he can put together a list of all properties or projects where the Village Commercial Development Option has been requested to provide relief and what the request was related to such as setbacks, parking, etc.

Chair Blakaitis noted that he isn't trying to overburden staff but is asking them to come back with suggestions. He thought the Board can start pinning down criteria and then move to some limitations on things that the Board is concerned with. Director Heard thought one of the key questions is whether the criteria should be guidelines or standards. He stated that the Village Commercial Development Option is a guideline. Chair Blakaitis didn't think the Board will be creating a new concept.

Vice Chair Murray asked if the guidelines can be phased into regulations if they prove to be enforceable. Director Heard didn't think it can be done that way in a single ordinance but could be achieved by phasing the adoption. Vice Chair Murray agreed, adding that it can be arranged. Director Heard noted that it can be set up as guidelines and see how it works, then shift some of those into more permanent standards. Chair Blakaitis thought it can be considered as the Board discussed each concept. Director Heard agreed.

Vice Chair Murray felt that they can be presented in a staff report as a list of guidelines or regulations and as the Board deliberates, they can be moved into each section. Chair Blakaitis

stated that he does not recommend having a draft for the next meeting. Council Liaison Britt stated that Director Heard will need input from the Board first. Chair Blakaitis agreed.

Member Cofield thought Chair Blakaitis' suggestion about checking with what other municipalities are doing will be helpful and is a good idea. Chair Blakaitis added that Vice Chair Murray brought up a good point in that the other towns are not like Duck, but he would still like to see what they do. Vice Chair Murray stated that the reason he wants the data is because of the size.

APPROVAL OF MINUTES

Minutes from February 13, 2019 Regular Meeting

Member Cofield moved to approve the February 13, 2019 minutes as presented. Member Whitman seconded.

Motion carried 5-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Summary of March 6, 2019 Council Meeting

Director Heard gave a short update on the March 6, 2019 Town Council meeting to the Board and the audience.

Project Updates

Director Heard updated the Board and audience about several Town projects.

BOARD COMMENTS

Member Cofield stated that he wanted Director Heard to verbalize his objectives during presentations to the Board. He stated that he was bothered by Director Heard's presentation regarding Loblolly Pines Shopping Center as there were two instances where he didn't think the Board received complete information. He stated that he would like to have a staff report that is complete and accurate as it puts him in the best position to make an informed decision. He noted that this was the third time that he's felt uncomfortable in that regard. He pointed out that Wampum Drive was another example that he commented about. He stated that he felt with respect to Tullio's Bakery and Pizzazz Pizza, that the staff report did not give a complete picture to the Planning Board and even though it was a parking discussion, it was more than that with respect to Tullio's Bakery and Pizzazz Pizza as Pizzazz Pizza was in violation of the conditional use permit. He reminded Director Heard that he had called him over the summer and indicated that the two seats were not removed. He didn't feel that Director Heard had given a complete

presentation and he felt hamstrung with not being presented with a complete and accurate presentation, which is what he needs to make an informed decision. He didn't feel that had happened at the presentation regarding Loblolly Pines Shopping Center.

Director Heard stated that within the first week or two after he was hired he had an opportunity to meet with different Planning Board members, including Chair Blakaitis as well as former Vice Chair John Fricker. He stated that both members emphasized that there be as much information as possible in the staff reports, which is what he attempts to do when he composes them. He noted that they are very thorough reports, more thorough than what the Planning Board received for a long time. He understood that there is a difference in the sense of how Member Cofield saw information that he had not included. He pointed out that the information was included in the parking calculations but he did not specifically call out the two seats. He added that the attempt was made to provide the Planning Board with whatever information may be relevant to their decision.

Chair Blakaitis stated that he was confused. He asked if it was the two seats that bothered Member Cofield. Member Cofield stated that it wasn't. He stated that two aspects of the proposal bothered him – one was Tullio's Bakery, as the Board was in essence approving their seating, but it only related to parking. He added that because of that, the Board was in essence approving the seating at Tullio's Bakery, which was raised by another Board member several months ago. He stated the other was Pizzazz Pizza in that when the Board approved the ice cream shop, their presentation was that they would reduce the seating in Pizzazz Pizza from 14 seats to 12 seats. He noted that they did not do that, and he specifically called Director Heard to raise the question during the summer and nothing happened. He stated that there wasn't a discussion about it until he had raised the issue in the meeting and the presentation was to approve 14 seats for Pizzazz Pizza. He pointed out that the owner was in violation of the conditional use permit for the ice cream shop since the Board approved it for 12 seats and not 14. He added that it only came out during questions as opposed to a presentation of those facts.

Director Heard stated that he did not understand the comment about Tullio's Bakery as the addition of seating was listed on the conditional use permit application. He stated that he isn't sure what else Member Cofield would want regarding that issue. He stated that Tullio's seating was listed on the public hearing and advertised. He explained that in working with the owner, staff identified that they were looking at bringing the entire site into compliance with the newest proposal, which was included in the staff report. He noted that he did not call out Pizzazz Pizza seating as a specific conditional use, but it was incorporated into the proposal bringing the site into compliance.

Chair Blakaitis noted that the owner bent over backwards to the Planning Board to improve a lot of things – he submitted an updated survey among other things. He didn't think this issue should be discussed at all.

Vice Chair Murray clarified that Member Cofield is stating that Director Heard should have presented that the applicant had applied to make their parking compliant, per the request of the application in front of the Board. He asked if they were previously in violation. He asked how noting previous violations was relevant as the Planning Board is not a punitive board and doesn't slap someone on the wrist because they violated in the past.

Member Cofield stated that Vice Chair Murray was twisting what he was saying. He stated that the application included an increase in seating for Pizzazz Pizza from 12 seats to 14. He stated that it was not what it said, but it was incorporated with 14 seats in the overall plan. He added that if he didn't ask the question, the Board would not have come to that understanding and would not have that appreciation for the presentation. He stated that he knew about it because he called it to Director Heard's attention over the summer.

Director Heard stated that staff had been working with the applicant since that timeframe in the summer. He stated that the applicant refused to make the change at that time and they started working in the fall on the new application. As they were trying to bring the whole site into compliance, staff rolled the seating issue into the larger application.

Vice Chair Murray agreed that the Planning Board should have the most complete information as possible, but he felt that the Board has taken a turn of being combative and accusatory with applicants, which makes him uncomfortable. He felt that it happened at the Board's last meeting and that it's been happening too often. He felt that if the Board has an issue with something in the staff report, he isn't sure why that isn't handled via email prior to the meeting. He stated that it is unclear to him why such a small detail had to be part of the public record. He understood what Member Cofield was saying as well as the desire to have the most precise information, but as far as objective information, he is not hearing that any of the number of seats or number of parking places applied for had any inconsistency in that portion of the staff report. He felt that it was background information that would color the Board's debate or discussion of the issue and if Director Heard is in conversations with the applicant, he felt that the applicant is dealing with it, as is the Town. He wasn't sure how it can be presented without prejudice in the debate against the applicant. He pointed out that if the applicant is trying to hide something, then he can see the point, but he was struggling to understand.

Member Cofield stated that he wants to see that as part of the presentation because that operation was only approved for 12 seats. He stated that during the ice cream shop application, the Pizzazz Pizza operation was approved for 12 seats and it should have been clear before he raised the question that the Board was approving that and that it was implicit in the approval that they are increasing their seating from 12 to 14 seats. He noted that it was not the case. Director Heard stated that his point was understood.

Chair Blakaitis agreed with Vice Chair Murray's comments in that the Board goes too far sometimes.

Member McKeithan stated that he recalled from the meeting with Pizzazz Pizza that the owner proposed that he would remove two seats in exchange for the ice cream shop and that he dragged his feet on doing so. He added that Director Heard had given the applicant permission to go through the entire summer before doing anything. He noted that if Director Heard had allowed the applicant to go the entire summer without doing anything, then he should have come back to the Board to let them know about the exception with keeping the two seats in the restaurant. Chair Blakaitis thought that was what had happened.

Member McKeithan stated that he doesn't follow what Vice Chair Murray had stated about thinking that the Board's discussion with the applicant is combative. He stated that he does not

get that sense and thinks the Board is very courteous with applicants and tries to gather information. He stated that he isn't sure what the Board's role was if they can't question the applicant to obtain certain information. Vice Chair Murray pointed out that Member McKeithan has not been combative. Member McKeithan didn't think that anyone on the Board was combative.

Council Liaison Britt felt like there was an over-aggressiveness towards Gunnell Rupert at the Board's last meeting. He thought the comments were more intended for Director Heard than Mr. Rupert and noted the people that submit these applications are the Town's customers and the Board is present to serve them. He thought that occasionally, the Planning Board can get a little aggressive and stuck on small details with people that are trying to do the right thing. He added that not everyone is trying to pull the wool over the Board's eyes.

Chair Blakaitis agreed with Council Liaison Britt's comments.

ADJOURNMENT

Vice Chair Murray moved to adjourn the meeting. Member Cofield seconded.

Motion carried 5-0.

The time was 8:01 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman