

**TOWN OF DUCK  
PLANNING BOARD  
REGULAR MEETING  
August 21, 2019**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, August 21, 2019.

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

Absent: Tim McKeithan.

Also present were: Director of Community Development Joe Heard, Council Liaison Jon Britt, and Permit Technician Kay Nickens.

Absent: Permit Coordinator Sandy Cross.

Others Present: Philip Ruckle, Jay Blose, and Karen Blose.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for August 21, 2019 at 6:34 p.m.

**PUBLIC COMMENTS**

None.

**OLD BUSINESS**

**Ordinance 19-04: Text Amendment Proposal to Establish Review Standards for the Village Commercial Development Option as a Special Exception**

Director Heard stated that the Board had in front of them the final ordinance format highlighted with several changes from the July 10, 2019 meeting, noting that there were not a lot of substantive changes from the last meeting. He pointed out that Member McKeithan had requested to include criteria dealing with dual orientation for properties that have a soundfront location. He stated that wording was added to clarify criteria for public infrastructure. He noted that the intent is to give examples of the types of infrastructure that could be provided while allowing other options as well.

Director Heard stated that he suggested one change in the ordinance by adding the word “permanently” in the public amenities section. He explained that it was something that has come up in some communities that he has visited where applicants have provided amenities initially, then a few years later restricted access or changed it. He stated that if the intent is to provide a public amenity of some sort, then it needs to be permanent. He added that if an applicant wants to change a required amenity, they should have to come back before the Planning Board and Town Council to do so.

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Director Heard stated there was a change to Page 3 of the draft ordinance in that the Board decided on a cumulative score of nine points instead of eight. He reminded the Board that they added a large number of extra potential points in the scoring system so the nine is to break even with the potential extra points that can be earned.

Director Heard stated that the changes to Page 2 relate to comments from Town Engineer Mike Robinson. He noted that they are both items that Town Engineer Robinson suggested adding to the draft ordinance. He added that they have to do with standards in order to allow for up to 10% additional lot coverage. He stated that he and Town Engineer Robinson had considered a variety of different engineering options that can be used, but it made things more complicated. We agreed that it would be best to give an engineer the opportunity to design something that will work (which Town Engineer Robinson would be reviewing as part of the process). He stated that the Board would have a chance to review the solution and if they felt that it works, then there is no reason to dictate a certain solution when there are other potential solutions available. He stated that it was kept fairly generic in the draft ordinance so as to give the applicant some flexibility of design in order to come up with a good solution.

Director Heard reiterated that the draft ordinance is in final ordinance format with no changes to the content or organization of it. He stated that the Board could take a look at the draft ordinance before moving it forward to the Town Council with a recommendation from the Planning Board.

Vice Chair Murray asked how Director Heard and Town Engineer Robinson came to up with the 4.3-inch rainfall event over two hours. Director Heard stated that it is a higher standard than the State has for state stormwater permits. He noted that many of the lots in Duck Village are smaller than the size that would trigger a State permit. He wanted a standard that is higher than what someone typically has to achieve in order to give the applicant a reward of an additional 10%. He added that the 4.3 inch stormwater management calculation includes interstitial soil storage, what can be held in the soil itself through infiltration. So, the standard is higher than what the Town would typically require but less than what the State would require for a larger project.

Member Whitman clarified that the soil would hold 4.3 inches of rainwater. Director Heard stated that it would be included in the calculation. He stated that in sandy soils there is space in between that can hold a certain amount of water that soaks directly into the ground. He stated that it will allow an engineer to include that in their calculations.

Member Cofield asked what the Board is hoping to accomplish at this meeting. He noted that Member McKeithan is not present and he doesn't think the Board is going to forward the draft ordinance to Council. Chair Blakaitis thought the intention is that if the Board is satisfied, the ordinance will be forwarded simply as Director Heard had completed everything the Board had asked him to do. He added that it is not necessary to forward the draft ordinance at this meeting. Director Heard noted that Member McKeithan was sent the draft ordinance electronically in order to give him the opportunity to review it. He added that he had not received any comments back from him. Chair Blakaitis stated that originally there would have only been three members present on the original meeting date, which would not be enough to forward the draft. Since four members are present, it is appropriate to send it forward if the Board wishes.

Member Cofield stated that he reviewed the penalties in the draft ordinance, which he thought were changing from criminal to civil. He asked why it is in front of the Board. Director Heard stated that it is a separate ordinance that the Board will be considering later. Member Cofield understood but wondered why it is in front of the Board. He noted that at the Board's last meeting, he felt they rushed through the points. He stated that he has a problem with awarding of points in some of the categories beginning with the mixture of office/commercial/institutional uses. He stated that the Board had discussed accessory residential for long-term lease and that the Town does not have the ability to enforce it. He wondered why the Town would award a point when the Town cannot enforce it. Chair Blakaitis asked what the Town cannot enforce. Member Cofield stated that it cannot enforce the long-term lease of an accessory residential. He added that the Board discussed it somewhat at the last meeting. He reiterated that if the Town cannot enforce that, he isn't sure why a point should be awarded for it.

Member Cofield stated that he does not see a sufficient reason to award a point for connection of sufficient width to a public sidewalk and/or boardwalk. He thought it seems natural that any builder/developer/owner would already do that. Member Cofield suggested offering 1-2 points for Public Infrastructure instead of 1-3 points.

Chair Blakaitis stated that after seeing the ordinance put together in its final form and looking at what the Board was trying to accomplish, he thought that on Page 1 there are two statements that sum things up – the Town wants to offer relief from certain development standards for the Village Commercial District and explains how to do it. In the second statement explains that the Town wants to do something and how it will be achieved. He clarified that everything on Pages 1 and 2 as well as part of Page 3 explain how staff will approach the submissions by applicants. Director Heard stated that the section identifies that the applicant can apply for relief only under the circumstances. Chair Blakaitis agreed.

Vice Chair Murray stated that they serve as guidelines for the applicant. Chair Blakaitis agreed. He wasn't sure why the draft ordinance needs to be complicated by point system and the chart. He wasn't sure why the Board needs to assign certain points from the chart that make it almost a concrete go-ahead for the applicant if they receive 9 points. He thought that it should be evaluated just like any other application except that there are exceptions being made to help the applicant. He thought the chart is non-essential and the items after the chart can be woven into the beginning of the ordinance in order to make the ordinance a lot shorter and less complicated.

Vice Chair Murray clarified that Chair Blakaitis is also in favor of striking Subsection (C)(3) because it is the first reference to the scoring system later in the ordinance. Chair Blakaitis stated that he did not specify what should be stricken, but if the chart is removed, the Board will have to remove some additional wording from the draft ordinance.

Vice Chair Murray clarified that subscripts 1 through 4 are clarifications for items in the chart. Chair Blakaitis thought they could be. Vice Chair Murray stated that if the Board likes those, they would have to be incorporated as numbers under the *General Findings* section. Director Heard stated that there were previous discussions as to whether or not the Board wants to see these criteria as guidelines or a firm scoring system. He added that at the time, the Board asked that it be set up as a chart with the scoring system. He stated that if the Board is not comfortable with that approach, it can be changed. Chair Blakaitis thought that removing the scoring system

will give staff more freedom. Director Heard stated that it also makes it trickier for staff because with just guidelines, staff does not know what the Board or Council will consider, so it made it harder for staff to advise something whether they meet them or not.

Chair Blakaitis pointed out that there had to be a valid reason why the Town allows a reduction in setbacks as well as the other items. He added that when staff is reviewing an application, that reason should be given so staff is able to evaluate it. Vice Chair Murray understands Chair Blakaitis' point with regard to the criteria being less clear in the ordinance as it is written. He asked if the draft is clearer than the ordinance that currently existed. Director Heard stated that the way he envisions it, parts of the ordinance will be changed from a point-based chart system to guidelines. He added that some of the items can still be listed to help the applicant understand the kind of things that the Planning Board and Town Council want to see. Chair Blakaitis commended Director Heard for his hard work on the ordinance but isn't sure that the ordinance is the right thing for Duck.

Member Whitman asked how the ordinance would work for a developer. Director Heard stated that the way the scoring system is set up, it describes the specific things they can do to get points. He added that if the Board shifts the ordinance to guidelines, then they can still look at it and staff will encourage them to do those things, but there is nothing that states if they do certain things that they will be approved. Chair Blakaitis asked if the developer meets his point criteria under the current draft, what happens. Director Heard stated that it is one criterion that will be met, but there are still be other things they have to address for approval by Town Council.

Member Cofield agreed with Chair Blakaitis, but for different reasons. He stated that as the Board is closing in on the final draft of the ordinance, he forced himself to look at what the Board is actually saying to an owner/applicant. He stated that he has a problem with why the Board is giving points for certain items. He noted that it is a subjective judgment as to why an applicant receives a certain number of points for things. He added that if he receives enough points, it takes an important element of the Planning Board and Town Council away from them reaching a decision, which is similar to what Chair Blakaitis just discussed. He thought he would rather have guidelines in front of an applicant and the applicant will have to justify why it makes sense to the Town.

Chair Blakaitis thought if the applicant meets all of the points in the chart, it makes it easy for the applicant. He thought it also makes it hard for the applicant at the same time. Member Whitman thought it helps to give an applicant the blueprint of what the Board is looking at before they come to a meeting.

Vice Chair Murray stated that he is inclined to agree with Member Cofield as he articulated what he was trying to say several meetings ago in that he felt it takes the Board's discretion away, which makes him uncomfortable. He added that Member Cofield's position is that once an applicant checks all the boxes, they should receive their permit, but he is not comfortable with asking if the boxes work for each case. He noted that, although for different reasons, he and Member Cofield agreed.

Chair Blakaitis suggested that the Board leave the boxes alone and look at the first two pages of the draft ordinance. He asked if it gives the Town enough to work with. Director Heard stated

that it is better than what is currently in place. Chair Blakaitis asked why it is better. Director Heard stated that even if they are changed to guidelines, the guidelines will be more descriptive than what is in place presently. Chair Blakaitis asked if it only applies in the Village Commercial District. Director Heard stated he is correct.

Vice Chair Murray pointed out that if the list is eliminated entirely, there are some limits under (B) *Applicability* on the concessions that the Town can make, and he believes that Subsection (7) is the only one that needs to be added as it is the most important. He thought dealing with heavier rainfall events is important because it is something the Town is dealing with. He asked why the heading of *Applicability* is titled as such because they are the actual requirements. Director Heard explained that they are only limitations on what an applicant can apply for. Vice Chair Murray stated that when he sees the word “applicability”, he wonders which properties it applies to. He knew it is about the Village Commercial District because it is a special exception application for it. Director Heard stated that it defines the circumstances when offering relief is applicable. He stated that if the Board wishes to reword it, he will make it clearer. He suggested calling it Limitations. Vice Chair Murray stated that it makes more sense to him but isn’t sure if it will work from a language perspective that’s typical in zoning ordinances. Director Heard stated that he will look at it and offer some changes.

Chair Blakaitis thought the Board set out to make the changes without making it overly burdensome. He added that when Council handed it down to the Planning Board, he believed that the reason was to see what the Board can do to the Village Commercial Development Option to make it more amenable. Council Liaison Britt explained that there is a current ordinance that has been used frequently, but it is time to bring it back to look at it. He didn’t think the intent is to make it overly restrictive, but to bring it back to look at it and make some changes. Chair Blakaitis clarified that the Board should look at it and make it more amenable. Council Liaison Britt stated he is correct.

Director Heard stated that Subsection (B) applies specific gateway standards to the Village Commercial Development Option. He stated that it shows limitations so that approval isn’t necessarily carte blanche. He added that there are some good reasons to put some logical and reasonable restrictions on it. Chair Blakaitis thought Director Heard can make a determination and the Planning Board can make a follow-up determination. Director Heard stated that the draft ordinance also establishes more objective criteria, another recommendation from the Town Attorney’s memorandum. The Board and Town Council would be making more defensible decisions that are not subjective.

Member Cofield thought the Board started off with the same purpose in that they want there to be some baseline standards, but now as the discussion is finishing, he is taking a second look. He thought another word that can be used is Standards as opposed to Applicability. Vice Chair Murray agreed.

Chair Blakaitis noted that three Board members have expressed some objection to the chart, but for differing reasons. He wondered what the ordinance will look like if it is drawn up without the chart so the Board can see what it looks like. Director Heard stated that he can eliminate the entire criteria-based system. He stated that another option that was discussed previously is keeping them in as guidelines. He asked if the Board wants to keep something in the ordinance

that gives applicants some idea of what the Planning Board will be considering. He noted that without a point-based system, it will be a more subjective type of decision, which is not a problem. He asked if the Board members want to have something in the ordinance that gives applicants some idea of what to expect. Chair Blakaitis asked what applicants expect currently. Director Heard stated that there is almost nothing specific in the ordinance. He added that there are some general statements about consistency with the character of the Village and a few items that related to pedestrian/bicycle aspects. Chair Blakaitis stated that he can see the Board pulling things out of the ordinance and not assigning points to them.

Vice Chair Murray pointed out that there are many regulations in the ordinance for development that are not related to a special exception. Director Heard agreed. Vice Chair Murray stated that any applicant can be sent to those requirements and if they cannot meet them, they can ask for a special exception, which limits the relief that is granted. He asked if the Board wants to say that the applicant is more likely to be granted relief if they incorporate some of the ideas. Member Cofield stated that he would say that the “Town encourages” and then list the various items.

Member Whitman thought the Town Attorney had stated that there needs to be some type of list for applicants to look at instead of them coming back to the Board saying that they did everything they could and that they weren’t told that there were other things they had to do. Director Heard noted that the Town Attorney wasn’t that specific, adding that the recommendation involved making more defensible decisions. If there is a criterion that has to be met, the Board can point to it and state what items the applicant meets and then approve or deny the application. He stated that it gives the Board something firm to stand on, adding that the more subjective the decision is, the more open it is to be challenged.

Chair Blakaitis stated that there have been several instances where the Planning Board had a recommendation from the Town Attorney and they wanted to go in a different direction, and it worked. He felt that the Board should not tie itself to an attorney or their recommendations. He added that the attorney is looking out for the Town, but it is not necessary sometimes.

Member Whitman asked what would happen if someone comes in and can meet only one of the criteria for constructing an office above a store. He asked if that will qualify for a special use. Vice Chair Murray stated that it will qualify them to apply for a 10-foot setback reduced to five feet. He wondered why the applicant needs nine points. Director Heard thought the intent of the point-based system is to try to quantify whether a project meets a lot of the characteristics of the Village. He pointed out that no project will have all of the characteristics, but it defines at what point someone has enough of the characteristics that the Board wants to see. He stated that it can be laid out as a guideline to give people an idea or leave it with the general criteria that is listed under B, which is in the existing ordinance. Chair Blakaitis pointed out that there are a lot of areas where one can move freely in the draft ordinance but cannot in the existing ordinance. Vice Chair Murray noted that there are limitations in the draft ordinance. Member Cofield stated that he likes that the limitations are set out clearly.

It was *consensus* of the Board to have Director Heard revise the ordinance with the changes discussed and bring it back to the next meeting.

**Ordinance 19-05: Text Amendment Proposal to Remove all Criminal Sanctions and Penalties from the Duck Town Code.**

Director Heard stated that the proposed amendments were discussed previously with the Board being asked to look at the removal of criminal charges for zoning violations. He stated that staff reviewed the current ordinance and drafted amendments along with a memorandum and then met with the Town's attorneys. He stated that he asked the attorneys if the same rationale existed as other penalty sections are located all throughout the Town Code, well beyond just zoning. He stated that the Town attorneys wanted to take a look and see what else needs to be changed because their opinion is that they want the changes made.

Chair Blakaitis thought some of the changes would be due to a State regulation. Director Heard stated that there is State legislation requiring that communities make this change. He noted that Duck would be ahead of the curve by a few months. He stated that the Town attorneys reviewed the entire Town Code and pulled out all the instances in which criminal penalties are noted. He added that while a majority of the amendments deal with ordinances that do not have to come before the Planning Board, there are several ordinances that come before the Board for consideration.

Member Cofield stated that he was struck with some items that are beyond the Planning Board's authority and are questionable. He stated that firearms, explosives, etc. are ones that strike him as being beyond the Board's authority. Director Heard explained that the Board does not need to worry about those as they are only recommending the changes on which the Board has authority. He added that it is proposed as a single ordinance because there is no particular reason for Council to have two separate ordinances – one for just the Planning Board and one for everything else. He stated that the attorneys put it all together for consideration by the Council, adding that it would not have come to the Planning Board if it was just those other items, but because it did include some of the ordinances that the Board deals with, the Planning Board is being asked to look at it.

Member Cofield stated that false alarms and disturbing the peace should not be excluded. Chair Blakaitis stated that they will be taken care of, but not by the Planning Board. He asked if this is something that should be postponed or should be done now.

Karen Blose of 105 Waxwing Court was recognized to speak. Ms. Blose noted that every violation carries the same penalty. She asked if it is for the same intent. Director Heard stated that it is how it was set up. He stated that that aspect of the Town Code does not change as the only thing the draft ordinance is intended to do is shift the criminal penalties to civil penalties. The main reason for this is so that the Town can collect the civil penalties directly as criminal penalties by state law are given to the school board.

Karen Blose stated that in other jurisdictions, different types of violations carry different gradations of penalties. She thought the Board may want to think about whether or not enacting one penalty that hits all of the violations is in the best interest of the Town. Director Heard pointed out that the penalty amounts are already in existence and are not being changed as a result of enacting the new ordinance. Chair Blakaitis stated that it is a point to consider and thought the penalties should be left in while telling Council that there are questions about it.

Karen Blöse stated that she understood the change from civil to criminal. She suggested that the Board do a study to see what other towns are doing as it is not in accordance to other towns.

Vice Chair Murray noted that all of it struck the term “misdemeanor” since it was no longer criminal, but civil. He inquired if a person would still be charged by Dare County for criminal activity. He asked if a firearms violation is not a criminal offense. He further questioned if the Town is only making them criminal in order to collect a fee. Member Cofield stated that it is the same problem he has with the draft ordinance. Vice Chair Murray clarified that there is no record recorded for civil penalties.

Member Cofield suggested that Director Heard review each of the subheadings of the draft ordinance and flag which ones were under the Planning Board’s authority as it will help the Board members. Director Heard stated that Pages 6 through 9 note what is under the Planning Board’s authority.

Chair Blakaitis asked how the Board will be passing judgment on it. Director Heard stated that the Board will give a recommendation to the Town Council. He stated that the Board has been given a draft ordinance from the Town attorneys. He added that it is a required part of the process that the Planning Board review and make a recommendation on any text amendment to the ordinances that they develop. Chair Blakaitis asked if the Board is supposed to read the draft ordinance and change what they do not like. Director Heard stated that these are specific recommendations from the Town attorneys. He stated that if the Board sees something they do not like, staff will send the comments back to the Town attorneys.

Vice Chair Murray clarified that there is no option for separating them. He asked why zoning code violations and Town Code violations are not separated. Member Cofield thought firearms, explosives, etc. should be a criminal penalty. Chair Blakaitis noted that it is not up to the Board. Member Cofield agreed, adding that it will be helpful if Director Heard flags what is under the Board’s authority.

Vice Chair Murray stated that he is uncomfortable voting on something that is not up to him. Council Liaison Britt stated that he has a lot of the same questions the Board members have. He thought that it will be figured out at the Council level. Vice Chair Murray felt that an explanation from the Town attorney at a Planning Board meeting before it is voted on will be a good idea. Member Cofield agreed with Vice Chair Murray, adding that he is not in favor of changing some items from a criminal violation to a civil violation, which is what the Board is being asked to do.

Chair Blakaitis noted that the way the draft ordinance is set up, the Board cannot approve part of it. He stated that it is appropriate to see if it can be separated. Vice Chair Murray asked if this is an urgent matter or not. Chair Blakaitis stated that the Town is ahead of things by a few months. Director Heard stated that it is not urgent. Chair Blakaitis noted that the issue of firearms refers to something that is not in front of the Board.

Vice Chair Murray asked what it does for police enforcement for the Town. Council Liaison Britt stated that when Council made the recommendation to send to the Planning Board, he thought it was more along the lines of what is done with regard to planning and zoning. He



doesn't think Council totally understood what will come out of it with regard to the ordinance. Director Heard stated that Council approved sending the recommendation to the Planning Board to look at the whole Town Code instead of just the Zoning Ordinance.

Member Cofield asked if the Board is being asked to set the dollar amount for the fines. Director Heard stated that the Board is not. Chair Blakaitis stated that the Board is being asked to eliminate the criminal citations in the ordinance, which will satisfy the new State Legislature actions. Council Liaison Britt stated that when the Board is finished, if they want to look at fees it can be done. Chair Blakaitis agreed. Director Heard stated that with regard to Member Cofield's comments, it is certainly something that the Town could look at in the future, but it didn't need to be a part of the draft ordinance in front of the Board. He stated that there are limitations in State law that outline what the Town can and cannot do.

### **NEW BUSINESS**

None.

### **APPROVAL OF MINUTES**

#### **Minutes from July 10, 2019 Regular Meeting**

Member Cofield moved to approve the July 10, 2019 minutes as presented. Member Whitman seconded.

Motion carried 4-0.

### **OTHER BUSINESS**

None.

### **STAFF COMMENTS**

#### **Summary of August 7, 2019, Town Council Meeting**

Director Heard gave a short update on the August 7, 2019 Town Council meeting to the Board and the audience.

#### **Project Updates**

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

#### **October Meeting Date**

Director Heard stated that the scheduled October Planning Board meeting date conflicted with the State Planning Association meeting he will be attending in Wilmington, North Carolina. He asked the Board if they will consider moving the meeting to another date. Chair Blakaitis

suggested it be held on Wednesday, October 16, 2019. Member Whitman stated that he would not be able to attend that meeting as he would be out of town.

After further discussion, Chair Blakaitis suggested that the meeting be scheduled for October 16, 2019. It was *consensus* of the Board to change the date.

**BOARD COMMENTS**

Member Whitman commended Director Heard on the new walkway by Osprey Landing. Director Heard stated that it is a retrofit after the fact due to damage to the grass and bank by pedestrian traffic. He stated that it will be re-seeded in the fall, adding that a small walkway was constructed at Osprey Landing.

Chair Blakaitis thanked Director Heard for the detail he put into the draft ordinance. Member Cofield thanked Director Heard as well.

**ADJOURNMENT**

Member Cofield moved to adjourn the meeting. Vice Chair Murray seconded. There was no vote.

The time was 7:44 p.m.

Approved: \_\_\_\_\_  
                                /s/ Joe Blakaitis, Chairman