

**TOWN OF DUCK
TOWN COUNCIL
REGULAR MID MONTH MEETING
March 18, 2009**

The Town Council for the Town of Duck convened at the Duck Municipal Offices at 1:00 p.m. on Wednesday, March 18, 2009.

COUNCIL MEMBERS PRESENT: Mayor Neil Morrison; Mayor Pro Tempore Monica Thibodeau; Councilor Nancy Caviness; Councilor Bart Smith; and Councilor Dave Wessel.

COUNCIL MEMBERS ABSENT: None.

OTHERS PRESENT: Town Manager Christopher J. Layton; Director of Community Development Andy Garman; Town Attorney Robert Hobbs; Police Chief Phillip Ferguson; Fire Chief Donna Black; Ocean Rescue Director Mirek Dabrowski; Permit Coordinator Sandy Cady; and Town Clerk Lori Kopec.

ABSENT: None.

Mayor Morrison called the meeting to order at 1:01 p.m.

Mayor Morrison recognized Police Chief Phillip Ferguson. Police Chief Ferguson recognized First Sergeant Jeff Ackerman. He stated that Sergeant Ackerman had attended the Law Enforcement Executives Program and went on to present him with a framed certificate of completion. Mayor Morrison and Council congratulated Sergeant Ackerman.

DISCUSSION OF PROPOSED BEACH AND DUNE MANAGEMENT ORDINANCE

Mayor Morrison stated that at the Council Retreat on February 18 and 19, 2009, staff had brought forward a discussion of a proposed ordinance that would consolidate existing ordinances related to the beach as well as adding additional language that would address various concerns that have been expressed over the past few months. He added that the proposed ordinance would address new issues such as climbing on the dunes, the erection of tents, holes on the beach and the protection of shipwrecks.

Director Andy Garman was recognized to speak. Director Garman gave a short overview of the proposed ordinance to Council and the audience.

Allan Beres of 146 Dune Road was recognized to speak. Mr. Beres clarified that tents, cabanas and sunshades would no longer be allowed to be left on the beach overnight. Director Garman stated he was correct.

Mayor Pro Tempore Thibodeau clarified that the draft ordinance had all new language. Director Garman stated that it did.

Michael Milan of 107 South Snow Geese Drive was recognized to speak. Mr. Milan noted that in addition to the regulations, there were new regulations regarding pets on the beach. He stated that he did not see anything in the draft ordinance regarding that. Director Garman stated that the pet regulations were not new but were incorporated into the draft ordinance. Michael Milan stated he would like to see some enforcement in the ordinance regarding dogs on the beach.

Allan Beres stated that he has noticed over the years that dogs on the beach have become worse each season. He agreed with Mr. Milan's comments. He thought it was time to address the issue and possibly limit the hours in which the animals can run unleashed on the beach. Police Chief Ferguson and Town Manager Layton both noted that there have been very few complaints regarding dogs causing a problem on the beach.

Mirek Dabrowski was recognized to speak. Mr. Dabrowski stated that he stresses to the public that if the dogs are a nuisance, his lifeguards should be advised of it so it can be taken care of. He added that he sees a lot of dogs on the beach that are not a problem. He stated that if he or his lifeguards cannot resolve the situation, he would pass it on to the Police Department for their help.

Councilor Caviness thought the language for the dogs on the beach ordinance was to keep them from being a nuisance. She wondered if the language needed to be modified to make the intent more clear. Police Chief Ferguson thought the language was very clear, but having people abide by it was more difficult. Mirek Dabrowski pointed out that the ordinance was also designed to protect people.

Barbara Barrett of 133 South Snow Geese Drive was recognized to speak. Ms. Barrett stated that she had noticed that a lot of people have been using the sand fencing in the subdivision as storage areas. She asked if the draft ordinance covered putting items such as boogie boards against sand fences for storage. Mayor Pro Tempore Thibodeau asked if it was only happening during the day. Ms. Barrett stated that it was and that they were also leaving items there overnight. Mayor Pro Tempore Thibodeau pointed out that it would be illegal to leave items overnight. Director Garman stated that staff did not envision this for the ordinance and added that he was not aware of the problem. Town Manager Layton thought 94.05(B) (2) of the draft ordinance would cover the issue.

Mayor Morrison stated that there has been talk at the County level as well as in other towns about regulating specific breeds of dogs. He asked how it was moving along and if it would be coming Council's way in the near future. Town Attorney Hobbs stated that the County attorney had drafted an initial ordinance and circulated it amongst the towns, letting them know that the issue was coming as well as encouraging the towns to consider a similar ordinance for uniformity of enforcement. He added that he had not heard any more about the issue and thought that nothing has formally been enacted yet. Town Manager Layton agreed and added that the County had adopted a dangerous dog ordinance, which he had given to the Police to review for applicability for Duck.

Barbara Barrett commended Council for dealing with the issues so quickly. Mayor Morrison noted that the citizen's concerns were also Council's concerns and that they try to deal with them as quickly as possible.

Adrienne Salm of 117 South Snow Geese Drive was recognized to speak. Ms. Salm asked if the draft ordinance included any wildlife on the beach, including sand crabs. She felt that people were disrespecting the beach by taking the sand crabs. Director Garman stated that the ordinance spoke to sea turtles, beach mammals and sharks, but did not talk about sand crabs or fishing. Mayor Pro Tempore Thibodeau stated that the ordinance listed "other wildlife or marine life". Director Garman thought the intent was for beached or stranded wildlife. He didn't think the intent was to talk about crabs or fishing. Town Manager Layton stated that the draft ordinance was designed after items that the Town was supposed to be regulating. Councilor Wessel thought

the ordinance should refer to endangered or protected species. Town Attorney Hobbs pointed out that protected species were already covered by other agencies.

Town Manager Layton, Director Garman and Council reviewed and discussed the highlighted items in the draft ordinance.

It was *consensus* of Council to accept 94.05(A)(1) and (5) in the draft ordinance as it was written.

It was *consensus* of Council to accept 94.05(B)(1)(a) with the optional language and to accept (1) (b) as written.

It was *consensus* of Council to accept 94.05(B)(2) in the draft ordinance as written.

It was *consensus* of Council to have 94.05(B)(4) with the optional language to read: "Substantially affecting the contour or shape of the flat beach area by excessive digging or mounding of sand must be attended and restored to its original condition prior to leaving the area."

It was *consensus* of Council to accept 94.05(C) and (D)(2) in the draft ordinance as written.

It was *consensus* of Council to add N.E.S.T. to 94.05(D)(5) in the draft ordinance.

It was *consensus* to add seals to 94.07 in the draft ordinance.

It was *consensus* to accept 94.08 in the draft ordinance as written.

Councilor Caviness asked if Council would need to authorize the draft ordinance for a public hearing. Mayor Morrison didn't think one was needed. Director Garman thought it would not have to go before the Planning Board. Town Manager Layton didn't believe a public hearing would be needed. Mayor Pro Tempore Thibodeau stated that she would like to have it on the agenda for a public hearing. Town Manager Layton pointed out that Council will be having four (4) public hearings at their April 8, 2009 meeting.

Mayor Morrison moved to authorize the beach and dune management ordinance as amended for a public hearing on April 8, 2009.

Motion carried 5-0.

DISCUSSION/CONSIDERATION OF DUCK TRAIL INTERSECTION STRIPING

Town Manager Layton stated that at Council's Retreat, staff had introduced a long range plan to address safety issues on the Duck Trail. He stated that the first part was a short term project to re-stripe the intersections of the side streets and the Trail. He stated that the cost for the re-stripping project was estimated at \$30,000 and was included in the amended budget as adopted. He stated he was asking for Council's authorization to move forward with the project.

Councilor Smith asked if the project would go out for bid. Town Manager Layton stated that it would be incorporated into the existing Duck Trail maintenance contract.

Mayor Pro Tempore Thibodeau move to authorize the Town Manager to proceed with the plan for the crosswalk improvements.

Motion carried 5-0.

DISCUSSION/CONSIDERATION OF REFERRING THE ISSUE OF THE NUMBER OF BUSINESSES CONSTITUTING A FORMULA BUSINESS TO THE PLANNING BOARD

Director Garman stated that an issue came up recently with a business that was relocating in Town. He stated that Kitty Hawk Kites had a store called Carolina Outdoors that closed and were moving into the old Lucky Duck store. He stated that staff received a sign permit application and looked into whether or not they would meet the definition of a formula business. He stated that they did and could not obtain a Conditional Use permit to occupy the new space because it did not meet the criteria in the ordinance. He stated that staff believed that the intent of the ordinance was not to regulate that type of business. He added that this business as well as few others had a threshold of eight (8) stores and thought the issue should be brought to Council to consider changing the threshold. He pointed out if Council wished to proceed, it would be a simple change and would allow Kitty Hawk Kites to move forward with their plans, but if the ordinance is not changed, it would become complicated.

Town Manager Layton stated that if the ordinance was not changed, Kitty Hawk Kites would not be allowed to go into their new space, which could cause a challenge to the formula business ordinance.

Councilor Smith asked where Kitty Hawk Kites had another location in Duck. Town Manager Layton stated that there was one next to the water tower. He stated that several businesses were not intended to be included in the formula business ordinance, such as Kitty Hawk Kites, Gray's and Nags Head Hammocks. He stated that staff wanted to bring the issue before Council to let them decide whether they had intended to include those businesses or not and if not, then an amendment to the ordinance would be required. He pointed out that Wings has twelve (12) locations on the Outer Banks, however, staff believed that the Wings establishments in other states were substantially close to the ones on the Outer Banks. He stated that staff was recommending that the number be changed to twelve (12) or more to be considered a formula business.

Mayor Morrison clarified that staff was asking Council to refer the issue to the Planning Board. Town Manager Layton stated he was correct.

Mayor Pro Tempore Thibodeau clarified that Kitty Hawk Kites had twelve (12) locations. Director Garman stated that with this newest one, they would have eleven (11).

Councilor Wessel asked if Kitty Hawk Kites would be closing one (1) store – Carolina Outdoors. Town Manager Layton stated that Kitty Hawk Kites presently had ten (10) locations and would have eleven (11) with the new store. Councilor Wessel clarified that Carolina Outdoors would stay where it presently was. Town Manager Layton stated that Carolina Outdoors did not exist anymore. Councilor Wessel thought there were two (2) issues that should go to the Planning Board for discussion – the number of establishments the applicant owned that were substantially the same and what density the establishment creates in a concentrated area within the Town of Duck. Town Manager Layton noted that the change staff was recommending was on the quantity and not density. Councilor Wessel stated that he would want to consider density as well.

Director Garman stated that the question was how to define overconcentration. He noted that it was somewhat subjective in the current ordinance. Councilor Wessel asked if the issue is referred

to the Planning Board, would Council want them to address both quantity and density. Mayor Morrison stated that there was the matter of timing for Kitty Hawk Kites since they want to be open before the season starts. Town Manager Layton thought Council could direct the Planning Board to do whatever they wished. He stated that staff was looking for an actual number that constitutes a formula business.

Mayor Pro Tempore Thibodeau noted that she wasn't sure what each Kitty Hawk Kites store sold. She thought there was different marketing for the stores as one was sporting goods while another was geared more towards toys. Director Garman noted that Carolina Outdoors and Kitty Hawk Kites were not substantially the same. He thought that if the suggestion to the ordinance goes through, Carolina Outdoors/Kitty Hawk Sports/Kitty Hawk Kites no longer would be considered a formula business, making the density issue irrelevant.

Mayor Pro Tempore Thibodeau moved to refer the threshold of the number of formula businesses to the Planning Board for discussion and consideration of increasing it to twelve (12) or more.

Councilor Smith stated he was not comfortable with changing the number to twelve (12). He thought the number was being changed to allow a business to come in. He thought it should require more discussion. He pointed out that Kitty Hawk Kites was a very large company, had one (1) store that existed in Duck and was now trying to put in another one almost next door to the existing one. He thought the reason that Council talked about density and formula business was to have a unique blend of retail establishments in Duck. He thought having one sitting on top of another was contrary to what the previous discussion was about. He reiterated that he was not comfortable with changing the number.

Councilor Caviness stated that she was concerned about the number as well. She wondered if the reason Council was discussing a new number was because it was a local business versus one that has locations along the East coast. She didn't know if the integrity of the ordinance would be preserved by changing the number. She stated that she didn't like chasing numbers.

Mayor Pro Tempore Thibodeau stated that it seemed that Council was treading a narrow path in that they wanted to make sure they weren't opening themselves up to a liability. She thought it was grappled with in the past with another business. She stated that if Council was considering the number of local businesses in the past, she didn't have a problem with changing the number. She stated that the intent of the ordinance was to protect the local businesses. Town Manager Layton noted that staff would be very happy to enforce the existing ordinance if Council wished, but if they believed the intent needed to be changed, it should go before the Planning Board.

Mayor Morrison asked how the stores were different but considered a formula business. Town Manager Layton stated that the number Council was given referenced the specific number of Kitty Hawk Kites stores. Director Garman noted that there were ten (10) Kitty Hawk Kites, which all had the same sign and generally sold the same type of merchandise. He explained that Carolina Outdoors was another division. Town Manager Layton pointed out that if this was for Carolina Outdoors, the issue would not be brought to Council.

Councilor Wessel stated that his understanding of the purpose of having a formula business ordinance was to keep certain businesses such as Starbucks or McDonald's from building additional stores in Town. He added that whether the number was eight (8) or twelve (12), the ordinance would prohibit these megastore locations from establishing a store in Duck when there were other smaller type stores already around. He added that he did not have a problem with eight (8) or twelve (12) as the number in the ordinance.

Mayor Morrison pointed out that Council was not trying to make the decision whether Kitty Hawk Kites could open or not. He added that the question was whether the ordinance suggestion should be referred to the Planning Board. He stated that he was inclined to go along with Mayor Pro Tempore Thibodeau's motion. Councilor Caviness agreed.

Motion carried 4-1 with Councilor Smith dissenting.

ADJOURNMENT

Mayor Morrison moved to adjourn the meeting.

Motion carried 5-0. The time was 3:49 p.m.

/s/ Lori A. Kopec, Town Clerk

Approved: April 8, 2009

/s/ Neil Morrison, Mayor