

**TOWN OF DUCK  
PLANNING BOARD  
REGULAR MEETING  
April 15, 2009**

The Planning Board for the Town of Duck convened at the Duck Municipal Offices at 6:30 p.m. on Wednesday, April 15, 2009.

Present were Chairman Jon Britt, Vice Chair Joe Blakaitis, Ron Forlano, John Fricker and Don Kingston.

Absent: None.

Also present were Director of Community Development Andy Garman and Permit Coordinator Sandy Cady.

Others Present: Lynette Sumner of Aqua-S Restaurant, and Lisa DiFilippo of the Coastland Times.

Absent: Council Liaison Dave Wessel.

Chairman Britt called to order the Regular Meeting of the Planning Board for April 15, 2009 at 6:35 p.m. He noted that Council Liaison Dave Wessel was unable to attend the meeting.

**PUBLIC COMMENTS**

None.

**OLD BUSINESS**

**Discussion of Ordinances Related to Quasi-Judicial Procedures**

Director Garman stated that the Board would be discussing the land disturbing activities ordinance and the special exception that the ordinance allows. He stated that there weren't any specific findings and conditions in the ordinance to give any approving body guidance in determining whether or not to grant the permit. He stated that the Board of Adjustment had dealt with a case in Osprey Ridge where the applicant applied for a special exception to exceed the fill limitation of three (3) feet along with substantial earth moving activity. He stated that in staff and most of the Board of Adjustment's opinions, the project wasn't designed to fit the unique topography of the site. In order to accomplish the development plan, the applicant had to lower the area to accommodate the building and swimming pool. He stated that the Board of Adjustment grappled with the conditions placed on the project for granting the exception as the ordinance only talked about storm water relative to that project. He thought some of the Board members could have made a stronger effort to preserve the topography on the site, especially with regard to the vegetation, if there was language in the ordinance, and if that was the original intent when the ordinance was drafted.

Director Garman stated that he wanted the Planning Board to discuss findings and conditions that could be suggested based on the intent of the ordinance to help an approving body with their decisions. He pointed out that the special exceptions will go before the Planning Board and Town Council instead of the Board of Adjustment once the review and revisions to quasi-judicial hearings are complete.

Vice Chairman Blakaitis clarified that the lot had to be leveled because the structure did not take into account the topography. Director Garman stated he was correct. Vice Chair Blakaitis clarified that there was nothing in the ordinance that would guide it as fact. Director Garman stated that there wasn't – only that the applicant should make an effort to work with the existing topography to the extent possible. He added that the Board of Adjustment granted the exception based on the only stated intent they could find in the ordinance, which was that there were no additional storm water impacts to the adjacent lots.

Member Forlano recalled that the intent of the ordinance was to try to work within the topography of the lot on new developments. He stated that he was surprised that it wasn't put into the ordinance since that was the intent. Chairman Britt agreed and thought the language was going to be included in the ordinance.

Director Garman noted that the vegetation ordinance had a strong preamble stating its purpose, but the land disturbing activities ordinance did not have the same strength. He added that the Board of Adjustment was not swayed in their determination because it was not referenced in the actual body of the ordinance.

Member Fricker pointed out that Director Garman wanted the Planning Board members to discuss the intent of the ordinance and suggest objectives that could be used for the required findings and conditions. He stated that he interpreted it to mean that the Board needed to come back with objectives and Director Garman would go back and re-draft the ordinance. Director Garman stated he was correct. Member Fricker suggested three (3) objectives: (1) to limit land disturbances to those activities deemed necessary for reasonable development and use of the land; (2) to insure that land disturbance activities do not adversely impact adjacent properties in terms of storm water runoff, erosion, line of sight and vegetative buffers; and (3) to encourage development that works with the existing topography by building into it, rather than materially changing the topography. Chairman Britt thought Member Fricker's suggestions gave Director Garman enough information for the ordinance.

Member Forlano clarified that the Board of Adjustment would not sit before cases like the one they were discussing. Director Garman stated that if Council adopts the ordinance as the Planning Board recommended it, the exception would go before the Planning Board and Council.

Director Garman suggested additional language for the ordinance. Specifically, he suggested gaining a height advantage over adjacent properties. Chairman Britt noted that it was in the Land Use Plan under line of sight.

Director Garman suggested considering existing mature vegetation with regard to vegetative buffers. He wondered what penalties would be effective for the ordinance. He thought there would have to be a civil penalty issued right when a prohibited act occurred, but noted that the

present ordinance did not allow for it. Vice Chair Blakaitis thought the ordinance should take the penalties into account. It was *consensus* of the Board to support civil penalties for the removal of large trees.

## **NEW BUSINESS**

### **Discussion/Consideration of CUP 09-001, an Amendment to the Original Conditional Use Permit, CUP 07-005, submitted by Lynette Sumner on behalf of Wine Ducks, LLC, Owner of the Aqua-S Restaurant and the Property Located at 1174 Duck Road to add 18 Additional Restaurant Seats**

Director Garman stated that Lynette Sumner was applying for more seats at her restaurant. He presented the Board with an agreement from Greenleaf Gallery showing that she would be allowed to use their parking. He added that she would only need six (6) additional parking spaces which could be achieved by using the Greenleaf Gallery parking lot. He stated that staff believed this was a reasonable request. He noted that staff typically looks at recorded parking agreements and since there wasn't one, he recommended conditions with regard to the parking agreement with Greenleaf Gallery as part of the Board's staff report.

Vice Chair Blakaitis asked if the seating would be additional tables. Lynette Sumner stated that they would be and they would be located on the deck area located on the road side. She stated it was her vision to create a quintessential coastal village environment as well as create a place to go and be entertained while enjoying food on the water. Vice Chair Blakaitis clarified that it would be outdoor seating on the deck. Ms. Sumner stated that he was correct.

Member Kingston asked if there had been any discussion with Greenleaf Gallery in regard to using their parking for overflow during other times of need. Lynette Sumner stated that she had spoken to the owner and he indicated that he could never fill the spaces at any time. She added that they would be fine with parking during mutual hours.

Chairman Britt clarified that there was nothing obscuring walking from Greenleaf's parking lot to the restaurant using the crosswalk. Lynette Sumner stated that he was correct.

Member Fricker did not think the letter from Rick Tupper of Greenleaf Gallery was an agreement. He noted that if the owner of Greenleaf changed his mind, the letter would not hold up in court. Lynette Sumner stated that she has shown Mr. Tupper that she wants an attractive building and grounds and she has been diligent in forming a relationship. Member Fricker cautioned that Lynette Sumner could be at risk based upon the conditions that staff was recommending.

Member Fricker noted that the first (1<sup>st</sup>), second (2<sup>nd</sup>), and fourth (4<sup>th</sup>) conditions each talk about having to make adjustments if certain things happened, but there wasn't a timeframe included. He asked if there should be one. Director Garman thought a time limit should be in the permit, but if the agreement was revoked, adherence to the permit would need to be immediate. Lynette Sumner asked if she sensed Greenleaf wanted to sell the property and noticed an increase in pedestrian and bicycle traffic, if an option should be added to have them provide an engineer's study to prove the seating capability without the additional parking requirements. Chairman

Britt stated that if Mr. Tupper changed his mind, the onus should be on Lynette Sumner, and added that the Board could not put something in the Conditional Use Permit now.

Vice Chair Blakaitis thought Member Fricker's comments did mean immediate but would be willing to entertain a time frame in case of a change of ownership. He stated he would be open to a time extension. Director Garman recommended thirty (30) days from occupancy of the new ownership.

Member Kingston suggested having something in there about shared parking during mutual use times. Director Garman stated it would be hard to determine what was feasible. He stated he would need a more thorough evaluation of the parking to allow such an agreement. Member Kingston pointed out that the Board was discussing a restaurant expansion. Chairman Britt agreed but thought the proposed language was adequate given the nature of the business in the Village Commercial District. Member Fricker didn't think the Board was in the business of negotiating or taking sides with regard to shared parking agreements.

Member Fricker moved that the Planning Board recommend approval of the Conditional Use Permit amendment in the Village Commercial District for additional seats at Aqua-S Restaurant and Day Spa at 1174 Duck Road with the conditions recommended by staff and amended only by the added language in the second condition after the new ownership and within thirty (30) days of occupancy by the new owner. Vice Chair Blakaitis seconded.

Motion carried 5-0.

### **Discussion/Consideration of Amendments to the Formula Business Ordinance**

Director Garman stated that a sign permit application from Kitty Hawk Kites was recently received to locate in the old Lucky Duck building at Wee Winks Square. He stated that staff realized when they received the application that Kitty Hawk Kites on its face, would constitute the definition of a formula business since the ordinance was originally adopted. He noted that they have expanded to eleven (11) locations and in order to be considered a formula business, there only needed to be eight (8) or more locations that were situated similarly.

Director Garman stated that he brought the issue before Council to see if their intent was to regulate Kitty Hawk Kites under the formula business ordinance. He stated that they felt it was reasonable for discussion and have it sent to the Planning Board for their discussion and recommendation. He went on to review an article in the zoning bulletin regarding a formula business ordinance in Isla Morada, Florida with the Board.

Chairman Britt didn't think it was the intent to bring locally owned businesses that have been in Duck for a long time into the ordinance. He stated that the ordinance could be changed to twelve (12) but wondered if it was enough.

Vice Chair Blakaitis asked if Kitty Hawk Kites was going to keep their original location. Director Garman stated that they were. He stated that the question was if they all looked alike and carried the same merchandise. He felt it was a slippery slope but there needed to be some way to distinguish it.

Member Fricker thought the ordinance would expose the Town to a lawsuit if the limit was raised just to protect Kitty Hawk Kites. He pointed out that it would be a violation of the equal protection clause of the fourteenth (14<sup>th</sup>) amendment of the Constitution. He wondered if the Town did not raise the number, Kitty Hawk Kites would take action since they already signed a lease. He stated that the Town could not protect a local establishment at the expense of the non-local one. Director Garman pointed out that the ordinance was drafted originally based on that principle. Member Fricker thought there could be a strong argument made that this was a reaction against the Food Lion debacle and was an attempt to not have it happen again. He stated that there was a healthy debate when The Fudgery wanted to put in a second location. He stated that he was very uncomfortable with the change from eight (8) to twelve (12).

Member Forlano pointed out that when Council first started discussing formula businesses, former Town Attorney Ike McRee was asked about lawsuits. He stated that he would not answer the question but then it was determined that the Town could control formula businesses with Conditional Use Permits and commercial guidelines. He noted that when he reviewed prior minutes, the discussion on the number was arbitrary. He added that the Town is allowed to control formula businesses under the Dillon Rule state.

Member Fricker stated that if the Board changed the number from eight (8) to twelve (12), they weren't being anything but arbitrary. He added that there was no rational basis behind it. Member Forlano clarified that by changing the number, it raised a red flag. Member Fricker thought it did.

Member Kingston noted that the Council stated that Kitty Hawk Kites was grandfathered. He stated that Kitty Hawk Kites was not expanding the number of stores in Duck, only the square footage of their store.

Director Garman stated that looking at the definition in the ordinance, a determination needed to be made. He stated that on the face Kitty Hawk Kites is seen as a formula business but wondered if all of the stores were the same as described in the definition. Chairman Britt stated that he had worked for Kitty Hawk Kites years ago and that every store was uniquely different.

Member Fricker stated that he was not speaking against raising the number; he was simply raising the issue. He asked if there was enough data to say that they were clearly a formula business. Chairman Britt thought they somewhat fit the criteria but didn't fit the idea of what a formula business would be. Director Garman stated that if the business had the same name, trademark and logo as all of the other stores and they don't meet all of the criteria, another business could come in, similarly situated and it could become a slippery slope.

Director Garman stated that there was a discussion at the Council level regarding other towns that regulate formula businesses based upon their appearance and signage, but several Council members did not want to go in that direction.

Chairman Britt agreed with Member Fricker's comments and noted that changing the number arbitrarily never felt right to him. He stated that he didn't know what else to do or what other changes that could be made. Vice Chair Blakaitis stated that it bothered him that Kitty Hawk

Kites was still a formula business and would now be under the formula business number as well as occupying a store with a larger amount of square footage than is allowed.

Member Kingston felt that the question was whether Kitty Hawk Kites was considered a formula business. Member Forlano thought it wasn't. Member Fricker wasn't sure there was enough information to make the determination. He felt the onus should be put on the business owner to show that they were not a formula business. Member Forlano stated that he did not have a problem even if a situation arose where a franchise business came to Town as long as they kept the building under 3,000 square feet and satisfied the architectural standards.

Chairman Britt felt if controlling the formula businesses architecturally, then why have a number. Director Garman stated that without a number the Town was left with just a definition which would become subjective. Member Forlano agreed with Member Fricker's comments regarding changing the number from eight (8) to twelve (12). He thought it would be opening a Pandora's Box. Director Garman stated that he would question the basis of the original number. He wondered if the intent was to protect small businesses over large businesses. Vice Chair Blakaitis thought the reasoning behind the number was to better define what a franchise business was.

Chairman Britt thought a number was needed as a fall back so no one could come in and argue the definition. Director Garman pointed out that the number suggested was based upon research of other businesses. Member Forlano reiterated his previous comments and thought the only way to control formula businesses was architecturally. Chairman Britt agreed.

Director Garman stated that the point he initially discussed was what would happen if the Town decided to prohibit a formula business from occupying a space or if the number was changed, it would preserve the right use the ordinance in the future. Chairman Britt thought by denying a formula business from coming in would set the Town up for a lawsuit, however if the business decided not to come in, it was then a vacant space.

Member Fricker moved to recommend an amendment to the ordinance to twelve (12). Member Forlano seconded.

Motion carried 5-0.

## **APPROVAL OF MINUTES**

### **Planning Board Meeting March 11, 2009**

Chairman Britt directed the Board to review the minutes from the March 11, 2009 meeting.

Vice Chair Blakaitis moved to approve the minutes as presented. Member Fricker seconded.

Motion carried 4-0. Chairman Britt could not vote since he was not present at the last meeting.

## **OTHER BUSINESS**

None.

**STAFF COMMENTS**

Director Garman passed out an article to the Board regarding electronic signage for their reference. He also discussed the recent Board of Adjustment hearing with the Planning Board.

**BOARD COMMENTS**

Member Forlano stated that he was still “choking” on the parking issue at the vegetable stand. He asked if vehicles would be able to turn around in the parking lot. Chairman Britt stated that they would. Member Forlano thought it would be tight if there were multiple vehicles parked there.

Chairman Britt noted that the language was changed for the C-PR district with regard to the Town Park property. He asked if the farmers market would be allowed in that district. Director Garman stated it would be considered a Town use, adding that it was only a pilot program.

**ADJOURNMENT**

Member Fricker moved to adjourn the meeting. Chairman Britt seconded.

Motion carried 5-0.

The time was 8:43 p.m.

Approved: \_\_\_\_\_  
/s/ Jon Britt, Chairman