

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
July 14, 2010**

The Planning Board for the Town of Duck convened at the Duck Municipal Offices at 6:30 p.m. on Wednesday, July 14, 2010.

Present were Vice Chair Joe Blakaitis, Ron Forlano, John Fricker, and Randy Gilbreath.

Absent: Chairman Jon Britt.

Also present were Director of Community Development Andy Garman and Town Clerk Lori Kopec.

Others Present: None.

Absent: Council Liaison Chuck Burdick and Permit Coordinator Sandy Cady.

Chairman Blakaitis called to order the Regular Meeting of the Planning Board for July 14, 2010 at 6:30 p.m.

PUBLIC COMMENTS

None.

OLD BUSINESS

Discussion of an Ordinance to Regulate Solar Energy Systems

Director Garman stated that he and Building Inspector Tate had reviewed the suggestions that were discussed at the June 9, 2010 meeting in order to incorporate them into a revised draft ordinance. He went on to review the revised draft ordinance changes to the Board and asked for their comments.

Member Forlano thought that everything about the ordinance was the way the Board had discussed it. He clarified that roof mounted systems could not extend beyond the edge of a roof. He asked for an explanation. Director Garman stated that it meant that the system could not cantilever off the side of a roof. Member Forlano asked if he had a third floor rear deck, the system would not be allowed to be cantilevered over that deck. Member Gilbreath thought a permit would be needed to extend the roof. Director Garman stated that the way the ordinance was written, the system would not be allowed to be extended beyond the edge of the roof over the deck. Vice Chair Blakaitis clarified that if the deck was extended, it could be put up. Member Forlano pointed out that he wasn't extending the roof as he was making the solar panels a roof for shade as well as picking up more surface area for the panels. Member Fricker asked if the panels would be coming parallel off the roof. Member Forlano stated that it was possible or maybe he would raise the roof three feet. Director Garman stated that Member Forlano would

not be allowed to do it. Member Gilbreath thought the wind would come under it. Vice Chair Blakaitis thought it would be an engineering feat.

Member Fricker thought Member Forlano asked what the rationale was for the prohibition and thought it should be explored. Member Forlano stated he was correct. Member Fricker thought the issue needed to be explored. He thought the rationale for not allowing the systems to go above the ridgeline was that it might exceed the 35 foot height limit or it was impeding neighboring views. He assumed that the reason it may also apply was due safety to the public with regard to the live electrical components it would house. Vice Chair Blakaitis thought that the issue would also be an aesthetic one. Member Gilbreath thought a line needed to be drawn as to what would be acceptable. Director Garman thought the aesthetics was one of the primary reasons why the language was put in the ordinance, but wasn't sure it was something the Board discussed at length.

Member Forlano stated that he could see the panels not infringing on the side setback. Director Garman stated that there may be cases where a homeowner would want to mount a solar panel to the side of their home and that could be something the Board may wish to consider. Member Forlano stated that he was trying to think ahead in case the issue comes up in the future and how staff would address it. Director Garman stated that the way the ordinance was written, the roof issue would be easy to address as the system could not be extended beyond the edge, but the building mounted questions would be harder since the Board has not addressed the issue.

Member Fricker noted that it was addressed by exclusion. He pointed out that Page 2C(1)(a) talked of roof mounted systems and C(2) talked of ground mounted systems. He asked if there was somewhere else within the ordinances that stated that if something was not permitted, it was prohibited. Director Garman stated that it was. Member Fricker thought that since roof and ground mounted systems were mentioned as being permitted, side mounted systems would be prohibited.

Member Forlano asked if that was the way the Board wanted to go. Member Fricker didn't know since Member Forlano just brought up the issue. Vice Chair Blakaitis thought it was the way to go. He added that he couldn't imagine a situation where someone would want to put the system on the side of the building that already had a roof above it. He stated that with the situation Member Forlano brought up, he thought it would be very difficult for an engineer to do that with just the solar panels. Member Forlano agreed and stated that he would like the ordinance language to remain as is. Member Fricker agreed. Director Garman stated that if a homeowner wanted to go that route, it would be easier if they put in a pole mounted panel.

Member Gilbreath noted that the draft ordinance spoke to having a fence around a solar system. He clarified that it would be needed to keep people from accessing them and that there wasn't a height limit for the system. Director Garman stated that the Town has a height limit of 10 feet for ground-mounted systems. Member Gilbreath asked if a 10 foot fence would be needed. Vice Chair Blakaitis stated that one would not be needed as it was more for safety. Director Garman noted that the fence was a way to keep people out of that area.

Vice Chair Blakaitis asked how the Town would handle corner lots with regard to setbacks beyond the principal structure. He noted that it was not mentioned in the ordinance and wasn't

sure if the Board wanted to or needed to include it in the ordinance. He asked Director Garman if he had considered it. Director Garman stated that he did not, but understood Vice Chair Blakaitis' concern. He stated that corner lots have 2 front yards instead of a front and rear yard. Vice Chair Blakaitis thought the system should be on a diagonal behind both front yards. Director Garman thought the Board may want to think of a way to define it. He stated that he would be able to come up with language for it.

Member Fricker noted that on Page 2 with regard to the lot coverage reference, it was differently phrased from the way it was on Page 3. He thought Page 3C(3) was very clear with what the intent was – that there shall be no more than 5% over lot covered by solar energy systems. He stated that it was not how he read the similar language on Page 2. Vice Chair Blakaitis asked if Page 2 was just the definition of lot coverage in general. Member Fricker stated that it wasn't. He suggested the language should be changed to read as follows: "...; however no more than 5% of the total lot area may be covered with a solar energy system..." It was *consensus* of the Board to make the suggested change.

Member Fricker suggested new language for Page 2(a) to read: "...to allow for the installation within the Town of Duck of solar energy systems as defined by Town Code Section 156.002, while recognizing the public safety..."

Vice Chair Blakaitis stated that he did not like the language that read: "...on-site electric power generation..." as it may not be only for on-site. He thought it should be stricken from the ordinance. Director Garman stated that the language was used to the wind ordinance as supplemental on-site electrical power. Member Fricker didn't think the language was needed. Director Garman noted that it was different as there were other forms rather than electrical generation.

Member Fricker stated that he had a problem with the language on Page 3C1(a). He stated that he was having problems with the first provision; "...roof mounted shall not be more than 3 feet higher than the finished roof to which they are mounted..." Vice Chair Blakaitis asked why there was a problem with the language. Member Fricker stated that he knew that it meant that it shall not be elevated off the plane of the roof more than 3 feet. He thought it could be construed as meaning that it could go above the ridgeline of the roof. He suggested striking the phrase "more than 3 feet" and have it read: "...roof mounted solar energy systems on the principal shall not be raised more than 3 feet above the plane of the finished roof to which it is attached..." Member Forlano thought the Town allowed up to 3 feet above the ridge. Member Fricker stated that it was inconsistent with the sentence after it.

Member Gilbreath noted that anything could be above the 3 foot roof line. Member Forlano noted that it could go 5 feet above with a flat roof. He added that it was allowed with wind turbines. Member Fricker stated that the extra height was needed for the efficiency of the wind turbine. Member Gilbreath thought it was needed for the tilting of the solar panels. Vice Chair Blakaitis asked what the main reason was for Member Fricker's new language. Member Fricker stated that if there was no need for it, its function or efficacy, it was just aesthetics.

Member Fricker asked if the edge of the roof consisted of the side portions or could be considered both the top and bottom edge. Vice Chair Blakaitis thought the edge was considered

the edge and the top was just a continuation of one side. He wondered what would be wrong with limiting it so it would not go above the ridgeline visually. Member Gilbreath thought it would look like the Town would be limiting solar power as opposed to other things the Board thought were visually appealing. Director Garman noted that with regard to the sign ordinance, it stated that signs cannot be attached to a flat roof. He wasn't sure if the Board wanted to have that language in the draft ordinance. Member Fricker stated that was what he was proposing and thought the Board had agreed to a few months prior. Vice Chair Blakaitis didn't see anything wrong with it.

Member Forlano agreed with Member Gilbreath's comments as there was an inconsistency in allowing certain things to go 5 feet above the ridge and other things being prohibited. He asked what other things could go 5 feet above the ridge. Member Fricker asked Director Garman to list the specific items that could go above the ridgeline. Vice Chair Blakaitis noted that the Board discussed it at a previous meeting. Director Garman pointed out that the ordinance already stated that the height limit would not apply to solar panels. Vice Chair Blakaitis thought that the Board could not be too unreasonable when it came to solar ordinances. Director Garman asked if the Board wanted the 3 feet to remain a controlling factor and not worry about the ridgeline. Vice Chair Blakaitis felt it should be left as is.

Member Forlano suggested taking the solar panel language out of the ordinance. Vice Chair Blakaitis stated that he did not want the 5 feet in the ordinance as it would complicate the ridgeline issue. Member Fricker asked if the Board should discuss one issue at a time. Vice Chair Blakaitis thought it would be a good idea.

Member Fricker agreed that an owner needed to be able to have an installation of solar panels that can be raised off the plane of the roof by 3 feet for purposes of tilt. He thought the language, as written, suggested that one could go above the 35 feet or above the ridgeline. He stated that he had a problem with it. Member Gilbreath wondered if 3 feet was enough to get the maximum tilt. Vice Chair Blakaitis thought any roof could be accommodated. He suggested taking the solar reference out of the ordinance and address the 3 feet and the ridgeline. Member Forlano asked if it could be stricken from the ordinance. Director Garman stated that it could.

Member Fricker suggested striking the phrase "more than 3 feet higher than" and replace it with the following language: "...roof mounted solar energy systems on a principal building shall not be raised more than 3 feet above the plane of the finished roof to which they are mounted..." Vice Chair Blakaitis liked the language and noted that he had never seen a solar panel elevated 3 feet. Member Forlano clarified that the new language would prohibit the panel from going over the ridge as well as prohibiting it from going over the bottom edge. Member Fricker stated that the first sentence would deal with the ridge and the second sentence would deal with the other 3 sides of a roof plane. Vice Chair Blakaitis did not see how the edges inferred the ridge. Member Fricker thought it did not, but inferred to the other sentence.

Director Garman clarified that the panel should not be higher than 3 feet above the roof plane as well as not extended above the peak of the roof. Member Fricker stated that it would be the ridgeline of the roof to which it was attached. Vice Chair Blakaitis suggested that a statement be made about not extending above the ridgeline, then it would be covered and would be less complicated. Director Garman stated that the section in question refers to height and that it may

not be the correct place for the sentence. Member Fricker suggested moving C1(a) to C2. Vice Chair Blakaitis stated that the ordinance still did not address the ridge. Director Garman stated that it was addressed. It was *consensus* to use the suggested language.

Vice Chair Blakaitis asked what the next step would be. Director Garman stated he would put it into a text amendment and address the issue of the corner lot so he could bring it back to the next meeting.

NEW BUSINESS

Discussion/Consideration of SE 10-002, a Special Exception Permit Application submitted by Mr. and Mrs. Andy and Melissa Fones, Property Owners at 1166 Duck Road to Allow Placement of a Deck and Hot Tub in the Required Side Yard of the Property

Director Garman stated that staff received a permit application from Oceanside Pools and Spas earlier in the year on behalf of Mr. & Mrs. Fones, to replace their pool which was collapsing. He stated that the property was located on the sound at 1166 Duck Road and, unfortunately, the original builder built the bulkhead along the sound with another one adjacent to it so he could back fill for the pool. He added that it wasn't sufficient to support the load of the pool, making the pool partially collapse. He stated that the pool needed to be rebuilt in its entirety. He stated that when they submitted the plans for the project, staff looked at the site plan and noticed an encroachment in the side yard that was never permitted. He stated that staff asked Oceanside Pools to look at removing this encroachment as part of the pool project. Oceanside Pools decided to apply for the special exception to allow the hot tub (encroachment) to continue in its current location rather than trying to reconfigure the property to support the hot tub in some other location.

Director Garman stated that the house was built in 2001. The survey submitted as part of the original building permit application with Dare County showed the location of the concrete pad where the hot tub deck was currently located. He went on to review the survey with the Board. He pointed out that this survey showed exactly 30% lot coverage on the property when it was submitted to obtain the original certificate of occupancy. He stated that the survey was at 30% lot coverage when it was approved however the builder had not completed the concrete driveway which added additional coverage beyond what was allowed.

Director Garman stated that the survey received from Mr. & Mrs. Fones had the concrete there as required by the Health Department which put it over the lot coverage. He stated that the Fones weren't aware when they bought the property that there was a lot coverage issue. He stated that the hot tub pad was poured prior to the initial certificate of occupancy and noted that it was unusual to have a concrete pad poured in the side yard for no apparent reason, but later became the pad for the hot tub. He stated that after speaking with Mr. Fones and Mark Welch of Oceanside Pools and Spas, staff asked how it went from a concrete slab to a wooden deck with a hot tub as shown on the survey submitted with the recent permit application. Mr. Fones indicated that the concrete slab was collapsing in 2008 and at that time, they decided to tear it out and rebuild it as a wooden deck to support the hot tub. He added that the Town did not have any records of the permit for the deck, which would have been required. He noted that Mr. Fones later admitted that he did not obtain a permit for the work.

Director Garman stated that Mr. Fones was asking for a special exception to keep the hot tub in its current location. He stated that the request was based on the Town of Duck's ordinance that allows special exceptions for improvements to single-family dwellings in existence on July 1, 2003 or prior. He stated that staff completed an analysis and had several reasons why the project would not be recommended for approval of the special exception. He explained that when staff looks at special exception requests, they have to analyze the request based on the language in the Code. This section of the Town Code states specifically that findings must be made that the request does not negatively affect adjacent properties or result in the loss of privacy. He stated that staff reviews the issue to determine if there are unusual circumstances due to the building design, lot shape, or siting constraints of the original dwelling, which would make it difficult for the Fones to achieve what they want to in any other way.

Director Garman stated that staff believed that there was room on the property to accommodate the hot tub without having to encroach into the setbacks. He stated that, simply having a desire to have the hot tub in the present location was not a justification for a hardship to support the special exception. He added that, knowing that the side yard had the least amount of separation from the neighboring property, this was not something staff would support based on the Town's Land Use Plan or any of the other special exception cases.

Member Gilbreath asked if the concrete hadn't been removed and replaced, this would have been considered. He thought if Mr. Fones had not put in the concrete, they would have been grandfathered. Director Garman stated that if it was something in existence prior to the Town's incorporation and if it was built exactly the way it was approved, it would not be an issue. He went on to show the Planning Board photographs of the new deck. He noted that Mr. & Mrs. Fones have had a hard time dealing with the issue, especially with the money they had to spend in order to correct a lot coverage issue. He added that they took out a portion of the concrete driveway and replaced it with gravel to meet the lot coverage requirements as well as rebuilding the pool.

Vice Chair Blakaitis asked what triggered the discovery on the property. Director Garman stated that the pool project triggered it. Vice Chair Blakaitis asked why the pool was allowed to be completed. Director Garman stated that staff told the applicant to move ahead with the pool project but that the hot tub would need to be addressed prior to the issuance of the certificate of occupancy. He noted that the Fones have not received the permanent certificate of occupancy. They have been issued a temporary certificate of occupancy in order to continue to occupy the property. He stated that they would either have to obtain a special exception or take care of the hot tub prior to the expiration of the temporary certificate of occupancy, which was 120 days.

Member Fricker asked what the consequence was if the Fones did not obtain a special exception and their temporary certificate of occupancy expired. Director Garman stated staff would have to take enforcement actions such as withholding their certificate of occupancy or issuing civil citations.

Vice Chair Blakaitis asked if the cement slab remained, whether an exception would have been made. He further asked that if staff discovered in 2008 that the work was completed without a permit in any other place beside the setback, it would have been legal if they had obtained a

permit without inspections. Director Garman stated that it could be retro-actively permitted but would need to be inspected by Building Inspector Tate and would need to meet all other zoning requirements.

Member Gilbreath clarified that if the Fones came to him (Director Garman) in 2008 wanting to change the concrete pad to a deck, the answer would have been no. Director Garman stated that he was correct. He noted that the Building Code dictates what Building Inspector Tate has to inspect.

Vice Chair Blakaitis stated that he was confused with the July 1, 2003 date. He clarified that if the Fones had approved certificates of occupancy on July 1, 2003, the Board could discuss a special exception. Director Garman stated that July 1, 2003 was the date the Town was handed over zoning responsibility from Dare County.

Member Gilbreath did not think the project could be accepted the way it presently is since it was changed without obtaining a permit.

Member Fricker noted that the staff presentation read the following: "...staff believes applicant had reasonable opportunity to initially place as well as to relocate the hot tub to meet Town Code requirements..." He asked what the basis of that belief was and where the Fones could have located the hot tub. Director Garman stated that the hot tub area was 7'x7', the pool area was 24'x40' area with a 9 foot wide deck. Considering that the entire pool had to be reconstructed, it would have been easier for the Fones to build the hot tub into the project. Member Fricker asked if that was addressed, suggested, or observed by Director Garman with the Fones. Director Garman stated that it was. Member Fricker thought the Fones were trying to push the issue. Director Garman stated that when the Fones applied for the permit, they already had the project designed and had been working with the pool contractor and knew what they wanted. He added that they didn't find out about the hot tub issue until staff reviewed the permit. He stated that when the permit was reviewed, staff told the Fones that they needed to address the hot tub prior to the certificate of occupancy and that they could have thought of a different location for the hot tub placement, which they decided not to do, and applied for the special exception instead. He stated that the Fones did not want to go through the trouble of changing their plan to accommodate the hot tub since it had already been designed.

Member Forlano asked if the deck on the west side was suggested as a location to put the hot tub. Director Garman stated that staff tries not to suggest too many specific alternatives to an applicant for legal reasons.

Vice Chair Blakaitis asked the Board for their thoughts. Member Forlano thought that there were alternative choices for the location of the hot tub and felt that the path of least resistance would have been to relocate the hot tub. Vice Chair Blakaitis stated that he agreed with staff's comments. He stated that he could not find any exception or reason to continue the hearing. He stated that he would have liked to have Mr. & Mrs. Fones present for this meeting. He suggested tabling the issue since no one showed up for the meeting.

Member Fricker moved that the Planning Board recommend that Council not approve the special exception application SE10-002 on the grounds that the continued encroachment of the wooden

deck and hot tub in the south yard was inconsistent with the criteria for approval set forth in Town Code Section 156.054(c) and 156.145(e). Member Forlano seconded the motion.

Motion carried 4-0.

APPROVAL OF MINUTES

Planning Board Meeting June 9, 2010

Vice Chair Blakaitis directed the Board to review the minutes from the June 9, 2010 meeting.

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

Motion carried 4-0.

OTHER BUSINESS

None.

STAFF COMMENTS

None.

BOARD COMMENTS

None.

ADJOURNMENT

Vice Chair Blakaitis moved to adjourn the meeting. There was no second.

Motion carried 4-0.

The time was 7:39 p.m.

Approved: _____
Joe Blakaitis, Vice-Chairman