

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
February 9, 2011**

The Planning Board for the Town of Duck convened at the Duck Municipal Offices on Wednesday, February 9, 2011.

Present were Chairman Jon Britt, Vice-Chair Joe Blakaitis, Ron Forlano, John Fricker, and Randy Gilbreath.

Absent: None.

Also present were Director of Community Development Andy Garman, Council Liaison Chuck Burdick, and Permit Coordinator Sandy Cady.

Others Present: Ed and Lorraine Sadler, Tom Yates, and Willo Kelly.

Absent: None.

Chairman Britt called to order the Regular Meeting of the Planning Board for February 9, 2011 at 6:32 p.m.

PUBLIC COMMENTS

None.

OLD BUSINESS

Continuation of Beach Policy/Ordinance Discussion

Director Garman stated that the Board would be discussing what the Town's ordinances or policies would be if a situation arose where privately owned structures started to encroach onto the beach due to erosion and what the Town would do to keep the beach open and free of obstructions and debris. He stated that the Board had a preliminary discussion at their January 12, 2011 meeting regarding what they would like to do and decided that more research needed to be completed. He stated that the Town of Nags Head ordinance was reviewed with regard to how they deal with this issue.

Director Garman stated that he had been doing research on the issue and had a list of questions he was analyzing to help him look into the ordinance further. He gave a short presentation to the Board and the audience regarding the research he completed, touching on the first line of stable natural vegetation, mean high water marks, public trusts and rolling easements.

Member Fricker thought a rolling easement was academic and moot as it had no efficacy for anyone that currently owns a property. He thought the efficacy was only for those who have yet to buy an oceanfront property. He noted that the whole law review article was premised on a

situation where the oceanfront property had not been developed. He didn't understand how a rolling easement would help the Town solve any problem. He thought the Board should be focusing on what the Council is doing, or look at practical items that the Board could address. Director Garman agreed and thought one of the questions was if a structure is on the dry beach and has to be moved, what the legal implications would be. He added that this is why he included the information on rolling easements. Member Fricker thought that the potential solution was in the hands of the State. He added that there was very little that Duck as a municipality could do.

Council Liaison Burdick wondered how the Town could effectively deal with a situation like South Nags Head. He added that the Town needed a regulation to deal with it. He thought Director Garman was trying to educate the Board in a meaningful fashion as well as helping oceanfront owners in assisting them with their ability to move homes. He stated that a rolling easement just recognizes that the beach moves and as it moves; the homeowner would be facing a higher risk of encroachment. He stated that the real problem was that flood insurance could not be collected until a house falls into the ocean. He asked how far the Town would be willing to go to make a homeowner move the house.

Member Fricker stated that with a rolling easement, a house could be allowed to exist in the dry sand and the State could charge the homeowner rent to be used to pay for the clean up once the house has fallen into the ocean. He added that Duck as a municipality could not do that and wondered what could be done. Chairman Britt stated that Director Garman was trying to give the Board an overview and asked that discussions be held off until the overview was finished. Director Garman continued his presentation.

Director Garman thought the Planning Board should focus on when a structure begins to create problems for the beach and not worry about how close it was to an arbitrary line. He suggested that the Board focus on when the structure gets beyond the vegetation line, frontal toe of the dune, or adjacent walkover structures. He stated that the Board could decide that once they get to that point, owners would need to move the structures out of those areas. He thought that the last thing the Board wanted to do was to create a rule that would set up a program where a violation letter would be sent after structures are sitting on the wet sand beach. He suggested that the Town send several rounds of notifications throughout the last third of the structure's life in order to be proactive. He went on to discuss threshold features that could be defined.

Director Garman wondered if an owner continued to protect their property with beach fill, it would continue to grandfather their ability to keep it at a certain distance from the dune escarpment. He thought that the Town did not want to limit an owner's ability to do a beach fill, but at some point, the relationship between the structure and the adjacent vegetation lines would need to be looked at. Chairman Britt noted that there was no language that addressed that. Vice Chair Blakaitis agreed. Director Garman stated that adding fill under a structure that was sticking out too far on the beach would be fruitless as the normal high tide would take the sand away.

Chairman Britt stated that the Board needed to find out what they could do with regard to the Town's rules and regulations and what would be allowed. He wondered how the AEC form

could be required to be recorded. He felt there needed to be some clarifications made. He added that until the Board knew what they could do, it would be a difficult issue.

Willo Kelly asked if the Board was trying to determine a threshold for nuisance structures. Director Garman stated that it depended on when the structure was declared a nuisance and the reasons associated with it. He added that they could make the argument that the structure would be considered a nuisance when it impedes the public's ability to use the dry sand portion of the beach.

Vice Chair Blakaitis noted that the Board was trying to define when a house becomes threatened as well as trying to do something after that point. He added that the document only helped the Board define where the bad spots were and where the public trust was. He stated that the Board had to decide as a group when a house in Duck became a problem. He felt that Council's opinions should be considered to be sure the Board was doing the correct thing.

Chairman Britt liked Director Garman's proactive approach to the issue. Vice Chair Blakaitis agreed. Member Gilbreath thought the Board was looking for a recommendation from Council as to what the threshold was. Vice Chair Blakaitis agreed. Member Gilbreath asked what could be done if the dune on a property was impeding access to the beach. Director Garman stated that nothing could be done.

Vice Chair Blakaitis asked Director Garman if he had an idea of a good framework to deal with when it came to putting some numbers to the issue. Director Garman stated that he had a range of thoughts as to where the threshold should be, but there were a lot of little details that have to be considered. He stated that he would be discussing the issue with Town Attorney Robert Hobbs and John Leidy. He wasn't sure the Board needed to come to any conclusions at this meeting and asked the Board to give him some questions that they would want him to ask Town Attorney Hobbs.

Chairman Britt stated that he wanted an ordinance written that could be enforced. Vice Chair Blakaitis stated that he would like to know what the enforceability would be. Director Garman reviewed the list of questions that he had for Town Attorney Hobbs and John Leidy to the Board.

Member Forlano stated that he could see where a town or state could condemn a property if it was in the wet sand or public trust area, but could not see how anyone could dictate the removal of a property if it was in the dry sand area. Director Garman stated that the rule would not say that the structure would have to be moved off the property, it would just have to be moved out of that area. Member Forlano asked why the property would have to be moved out of that area. Director Garman stated that that was the hard question. Member Fricker stated that the fact that someone owns the dry sand on their property did not mean that they owned it without obligations to the public areas. He added that the ownership rights would be trumped by the health, safety and welfare of the community as a whole.

Member Fricker thought it would be easy for the Board to draft an ordinance that could be simplistic and heavy-handed, but thought the Board had to take a lot of questions into consideration. He added that by not taking those questions into consideration, they would be increasing the likelihood of their action being considered a "taking". He stated that it would

come down to a decision from a court of law as well as someone that was an expert in property and municipal law. He wondered if Town Attorney Hobbs specialized in those areas. Director Garman stated that Town Attorney Hobbs did not specialize in both but his firm had John Leidy; who was a specialist in property and municipal law. He added that they would tell the Board what they were comfortable with and what they would be comfortable defending in a court of law. Chairman Britt thought they would look into it further at the meeting. Director Garman stated that the values and the clear objectives would go a long way towards creating that link needed between the problems the Town was trying to correct and the legal implications it could cause.

Director Garman thought the issue when dealing with public safety was not just structures limiting the ability of emergency vehicles being able to drive on the beach – it was also the safety of beachgoers who have access to buildings sitting on the beach and the damage and debris that would be present beneath or adjacent to these structures. He thought the Board would want to state those objectives in the draft ordinance.

Member Fricker thought if the ordinance involved a process of written notices and timelines, the timelines should be as brief as reasonably possible. He added that he would like the attorney to state what that parameter was.

Vice Chair Blakaitis asked Director Garman who would be meeting with the two attorneys. Director Garman stated that it would be him and Town Manager Layton. Vice Chair Blakaitis asked if it would be beneficial to have a Planning Board member there. Director Garman stated that he would check to see if this is possible. Chairman Britt asked Director Garman to give him the date of the meeting and he would provide this information to Member Fricker.

Director Garman thought the closer the ordinance came to regulating a nuisance, the easier it will be to justify. Council Liaison Burdick felt there should be a good definition for the term “nuisance”. Vice Chair Blakaitis thought the draft ordinance should be a flexible one. Chairman Britt thought the focus should be to get the questions answered. He added that the Board should work on the definition of nuisance at their next meeting. Director Garman stated that he would expound on the framework based on the comments from Town Attorney Hobbs and John Leidy.

Member Forlano asked how beach stairs would be handled where there is no room for emergency vehicles to drive during high tide. Director Garman thought the Board should come up with something to address stairs.

NEW BUSINESS

Review of 2011 Planning Board Work Program

Director Garman stated that he re-prioritized the outline that the Board had in their packets. He added that Council asked that the Board send back a list of things that they wanted to address and in what order of priority. He stated that oceanfront erosion was a top priority since the Board was already working on the issue. He went on to review the priority items with the Board, touching on porous pavement; gravel in commercial applications; Segway tours; lighting

amortization; buildings greater than 5,000 square feet; and take out restaurants with informal or no seating.

APPROVAL OF MINUTES

Planning Board Meeting January 12, 2011

Chairman Britt directed the Board to review the minutes from the January 12, 2011 meeting.

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

Motion carried 5-0.

OTHER BUSINESS

Director Garman stated that a Special Exception request would be coming forward in the near future.

STAFF COMMENTS

None.

BOARD COMMENTS

None.

ADJOURNMENT

There was no vote to adjourn the meeting.

The time was 8:25 p.m.

Approved: _____
/s/ Jon Britt, Chairman