

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

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

Present were Chairman Jon Britt, Vice-Chair Joe Blakaitis, and Ron Forlano.

Absent: John Fricker and Randy Gilbreath.

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

Others Present: Dick Ash of Beach Realty and Construction and W. Michael Andrew.

Absent: None.

Chairman Britt called to order the Regular Meeting of the Planning Board for March 9, 2011 at 6:30 p.m.

PUBLIC COMMENTS

None.

Chairman Britt stated that he would like to move the Special Exception item up on the agenda. It was *consensus* of the Board to move the item up in the agenda for discussion.

NEW BUSINESS

Discussion/Consideration of SE 11-001, a Special Exception Application, submitted by Beach Realty & Construction, Agent for W. Michael Andrew, Property Owner at 124 Pelican way, to Allow an Increase in Building Height to Match the Existing Building Height of 35.31 feet where a Maximum of 35 feet is Permitted

Director Garman stated that this case involves a three-story lateral addition to an existing house in which the new roof was designed to match the height of the existing roofline. He stated that applicant had sent in building elevations with the building permit application as required which staff reviewed and did not realize that they were not to scale. He stated that when the height certification was received upon completion of the project, it was noted that the height exceeded by four inches the permissible building height allowed in the Town's zoning ordinance. He stated that staff notified Matt Shealey, the contractor for the project, that this issue would need to be resolved. Mr. Shealey then submitted the Special Exception request to have the four inches approved instead of taking the additional height off the newly constructed roof.

Director Garman stated that the zoning ordinance allowed the Planning Board and Town Council to consider Special Exception applications under Section 156.054, which dealt with special exceptions to single-family dwellings in existence as of 2003. He reviewed the findings that the Board and Council would need to consider in order to approve the application. He stated that staff believed that the Planning Board and Town Council could make findings to approve the application based on the requirements of the ordinance and included a draft order in the Board's packets that they could consider recommending to Council.

Vice Chair Blakaitis asked how it was discovered that the plans were not to scale. Director Garman stated that when the height certification came back, he looked at the plans carefully and used his scale to measure. He added that staff typically does not ask for a height certification for additions to existing structures prior to the commencement of work.

Chairman Britt asked if the applicant would still have to go through this process if staff had asked for the height certification up front. Director Garman thought they would, unless they wanted to design the addition four inches lower. He added that staff usually does not ask for height certifications up front due to the cost.

Member Forlano asked if there was anything built into the ordinance that would allow staff to determine whether a project such as this one could proceed with some sort of limitation. He thought it was making a mountain out of a molehill to approve four inches. Director Garman stated that the Town previously approved a series of ordinance changes to deal with situations involving setback encroachments that resulted prior to the Town's incorporation. He stated that height was not addressed during these amendments since it was deemed to be a very sensitive subject and therefore should not be addressed administratively. He reiterated that nothing was ever done to deal with any type of administrative height exception. He stated that Council could be asked to build something into the ordinance to deal with it. Chairman Britt stated that he remembered the discussions and it was determined that height would be left alone.

Vice Chair Blakaitis moved to recommend that Town Council approve the draft order of findings and conditions as presented. Member Forlano seconded.

Motion carried 3-0.

OLD BUSINESS

Continuation of Beach Policy/Ordinance Discussion

Director Garman stated that staff met with Town Attorney Hobbs, Attorney John Leidy and Town Manager Layton recently to discuss the issue of drafting the ordinance in some detail. He stated that it was suggested that Town Attorney Hobbs attend this meeting so the Board could have the benefit of his opinion on the ordinance. He stated that he had received some simple directives from the meeting with the two attorneys, with John Leidy of the opinion that the closer the Town tied it to specific nuisance conditions, the better.

Director Garman stated that he had come up with a purpose and intent that specifically addressed what the Town was trying to deal with. He then elaborated on the process the Town would use

to enforce the ordinance and the various thresholds that would determine when enforcement would occur. He went on to review the draft ordinance with the Board and audience.

Member Forlano noted that regarding accessory structures, the first line of vegetation would be used as the threshold to determine if the structure was encroaching on the public portion of the beach. He wondered what would happen if a structure was on that line and noted that there were some gazebos that were beyond the line. Director Garman stated that based on the outline, there would be a notification procedure well before the structure crossed that line to inform the property owner that the structure may become an enforcement issue.

Director Garman, Town Attorney Hobbs and the Board discussed the public trust area of the beach. Town Attorney Hobbs thought it was important to include both damaged and undamaged structures that were in the public trust as part of the draft ordinance. He added that the Board should strongly consider withholding or denying building permits for structures located within the wet or dry sand beach areas.

Director Garman noted that the draft ordinance would allow the Town to withhold permits if a septic system was damaged, but if the system was encroaching beyond the dune escarpment to any degree; it would have to be removed. He added that the Nags Head ordinance was a starting point and thought the Town would want to adopt the same provisions regarding the ability to repair a structure if it is located on the public portion of the beach as well as the ability to take enforcement actions against structures that were undamaged but causing a nuisance for other reasons.

Vice Chair Blakaitis noted that there were a few provisions in the existing ordinance pertaining to nuisance structures. He wondered if they should be pulled out and put into the new ordinance to provide consistency and clarification. Town Attorney Hobbs noted that there were basic general procedural conditions that could be enhanced.

Member Forlano asked if the Board was supposed to come up with a timeframe after a notification is given to a property owner. He thought the Board needed to come up with one or the Town would be dealing with the issue for five to ten years. Town Attorney Hobbs thought it was within the Town's discretion as far as giving the property owner as much notice and as much assistance as is deemed necessary. He thought it would be a good idea to build in a reasonable timeframe in order to abate the nuisance. Chairman Britt thought the Board should write an ordinance to provide regular communications to property owners so they are not blindsided with enforcement when erosion finally threatens a structure. Vice Chair Blakaitis suggested that staff come up with a reasonable schedule of notices.

Member Forlano asked what the Town could do in the case of a situation where a property was in violation but the property has been left to the estate and the children do not have the funds or interest to make the corrections. Town Attorney Hobbs thought the Town could work with the property owner to deal with the situation. He didn't think it was the Town's problem if the owner could not afford to move or correct the issue as the estate had options, such as selling the property. Member Forlano asked what the Town would do if the house was a nuisance. Town Attorney Hobbs stated that if the owner could not abate or sell the property, the Town could file a lawsuit with the court forcing the issue. He guessed that the court would issue an injunction

stating that the owner would have to comply with the ordinance or the Town would have the authority to remove it and assess the property for the cost. He added that he wasn't sure of the remedy.

Member Forlano asked what could be considered a reasonable timeframe. Town Attorney Hobbs thought the Town could choose two years but felt it was longer than necessary. He thought there could be research done on how long it would take a contractor to do the abatement and use that as the timeframe.

Director Garman, the Board and Town Attorney Hobbs discussed private property interest regulations.

Chairman Britt thought the Board could go in the direction they had originally wished to go. Vice Chair Blakaitis thought the Board needed to put numbers on items that Director Garman came up with and combine it with Section 91.01, remove Section 91.01 and replace it with the new draft ordinance and then see how to change it. Town Attorney Hobbs noted that the procedures were in Sections 91.02, 91.03 and 91.04 and suggested that the Board look at them to see how they fit in with the changes. Vice Chair Blakaitis stated that it gets confusing when things are in more than one place and thought there should be a combination. Director Garman agreed. He thought it would be better to put everything in one place. Town Attorney Hobbs stated that a good drafting would require a lot of cross referencing in all of the sections that dealt with the issue. Director Garman noted that exemptions should be included in the ordinance with regard to beach walkovers. He stated that he could come up with a new section for the Board to review.

Member Forlano asked what "lands adjoining to coastal waters" meant in Section E in Article 3 (of the North Carolina General Statutes regarding oceanfront property ownership). He thought the Town only had the authority to come up with regulations on anything to the mean high water line, but now the Board was discussing regulations in the dry sand area. Town Attorney Hobbs stated that Subsection E was limited just to a regulation that established a property line and did not speak to regulating use or structures within the dry sand area. Director Garman stated that Section E in Article 3 gave allowances for exemptions for situations that arise out of or as a result of extreme or unusual circumstances.

Vice Chair Blakaitis asked if it was always considered that there was an escarpment on the dune. He thought they were created by storms. Director Garman stated that there wasn't always an escarpment. Permit Coordinator Cady added that an escarpment was not always created from a storm. Director Garman noted that there was a definition of escarpment in the Town's beach and dune ordinance.

Member Forlano asked if the Town allowed an oceanfront property owner to establish a new first line of stable vegetation plus install the ten foot sand fencing at their cost. Permit Coordinator Cady stated that the owner would not be able to install any first line of stable vegetation because it would take several years to establish. Chairman Britt added that a homeowner could not plant a stable line of vegetation as it takes a very long time to do. Member Forlano clarified that the homeowner would not be allowed to do it even though it would take several years. Chairman

Britt stated that the owner could plant but could not claim it as the line of stable natural vegetation.

Chairman Britt thanked Director Garman, Town Attorney Hobbs and Permit Coordinator Cady for the information they gave to the Board. He thought it was a good start for the Board. Vice Chair Blakaitis asked what the Board's next step was. Chairman Britt thought that timeframes needed to be looked at. Director Garman asked the Board if they liked the ideas. The Board stated that they did.

Chairman Britt asked the Board if they were comfortable with moving forward. Vice Chair Blakaitis stated thought the Board should move forward with one more step. Director Garman stated that he added to the list of items for consideration based on the discussions. Vice Chair Blakaitis suggested looking at Section 91.01 and pulling information from there for the Board to discuss in the future. Director Garman stated that he would reorganize Section 91.01 and add no permits for storm damaged structures as well as what would happen if there was no visible dune, first line of vegetation or escarpment. He thought there should be something with regard to severe storm erosion as well.

Chairman Britt asked Director Garman if he would bring back a draft ordinance at the next meeting. Director Garman stated that he would. Member Forlano suggested that the draft ordinance be run by Town Attorney Hobbs before bringing it back to the Board. Director Garman stated that he would do so.

CONTINUED NEW BUSINESS

Discussion/Consideration of Town Ordinances Related to Segway Tours

Director Garman stated that the Board was already familiar with the Segway ordinance that the Council recently adopted, which regulated the general use of Segways throughout the Town. He added that Council adopted a restriction in the Village Commercial area using Segways adjacent to NC 12 for safety reasons. He added that throughout the rest of Town, Segways were permitted but only on certain streets with speed limits of less than 25 mph, the rider had to be of a certain age, and had to wear a helmet. He stated that the other issue that was brought up at the Council Retreat was Segway tour operators. He noted that there was a Segway tour operator in Town last year that had parked in one of the parking lots and rode around. He wasn't sure if it was a guided tour. He stated that Council decided to have the Planning Board consider an ordinance to deal with the tour operators.

Council Liaison Burdick stated that he wanted to add the question as to whether the Town wanted Segways in Town during the summer if there was a safety issue. Vice Chair Blakaitis asked if Council Liaison Burdick wanted the Board to look at the issue from an individual basis. Chairman Britt stated that the Board needed to stay on the subject of Segway tours only and whether they should be allowed or not. He added that by looking at what Council Liaison Burdick was asking, it would be opening another can of worms and didn't think that was the direction the Board wanted to go. Council Liaison Burdick stated that he wasn't sure and added that he had asked at the Council level that the Board look at the whole issue and not just tour operators. He again asked if they should be allowed anywhere in Town from a safety standpoint.

Town Attorney Hobbs noted that they could not be banned outright by General Statute. He stated that General Statute 20-175.6(d) read as follows: "The Town can regulate the time, place, manner of operation, but shall not prohibit their use." Council Liaison Burdick noted that the time, place and manner of operation could be during the summer. Town Attorney Hobbs stated that there was a fine distinction and were no cases that have interpreted the statute. He advised not having a universal ban at certain times of the year, but to regulate and allow the use at all times of the year. He added that it would be an easier ordinance to defend if it was challenged.

Member Forlano asked Council Liaison Burdick if his safety concerns were perceived or actual. Council Liaison Burdick referenced the Sanibel Island ordinance and added that it looked at Segways as a safety issue in populated areas. Vice Chair Blakaitis noted that the City of Sanibel was doing the same thing the Town was trying to do. Town Attorney Hobbs noted that Sanibel Island was in Florida and operated under a different statute that allowed them a bit more restriction.

Member Forlano stated that, from a safety standpoint, he had a problem with bicyclists as they were just as dangerous, if not more, than Segways on the bike path. Council Liaison Burdick agreed. He felt that the side streets were more of a safety hazard than the bike path because of the amount of people walking on the street. Vice Chair Blakaitis asked why a Segway would be more of a problem on the side streets than bicycles or skateboards. Council Liaison Burdick stated that it would be difficult to maneuver past people on one. Director Garman understood the concerns with the Segways. He added that from his research, the major concern was that people were not experienced in operating them. He stated that he had read that Segways should be regulated like a motor vehicle due to stopping distance and their turning radius. He noted that it was not a natural experience to operate one. He stated that it was not like walking since one has to learn how to operate it.

Director Garman stated that in addition to Segway tours, he added Segway rentals to the list of items that the Board may want to discuss. He thought one of the big questions was whether or not a private citizen that owns a Segway has the right to use it. He wondered if it was something the Town wanted to regulate. Chairman Britt didn't think it was. Member Forlano noted that the Town had the right to pick a location where the Segways could be operated. He asked what was wrong with limiting them to the west side of Duck Road and on the side streets. Vice Chair Blakaitis thought the Board could discuss it at some point. Chairman Britt directed the Board to get back to discussing Segway tours. Vice Chair Blakaitis agreed and noted that banning Segways during the summer months would not work.

Director Garman stated that the Board needed to define what a Segway tour was and where it would be allowed. He added that they weren't allowed in the Village Commercial District so he didn't think the Board would want to allow it in that district as either a permitted or conditional use. He stated that it would leave the C-1 or C-2 districts or residential. He didn't think the Board would want to allow them in the S-1 district as it would encourage people to operate them in the Village Commercial District. He noted that the C-1 and C-2 districts only covered a handful of properties. He explained that if they were allowed in the C-1 or C-2 districts, the Segway tour operator would have to have a base in those districts and it would be unlikely the

tour operator would be able to establish such a base because there were already uses established for those properties.

Vice Chair Blakaitis clarified that the current Segway ordinance prohibits their operation in the Village Commercial District. Director Garman stated that he was correct. Vice Chair Blakaitis clarified that a Segway tour operator could not base their operation in the Village Commercial District. Chairman Britt didn't think that was the case, but noted that they could not be operated in the Village Commercial District.

Director Garman thought the Board would not want Segway tours allowed in the Village Commercial District because of the current ordinance. Chairman Britt agreed but thought the Board should go further. Director Garman suggested establishing a use in either the C-1 or C-2 district. He thought the tours should be made specific to those districts and have language that would require the Segway tour operators to have a base in those areas and would have to come before the Town for a Conditional Use Permit as well as having something established with a property owner. Chairman Britt clarified that if it was established as a Conditional Use in the C-1 or C-2 district, parking and site requirements would need to be created. Director Garman stated that he was correct.

Vice Chair Blakaitis clarified that the Segway tour operators could only operate in the Sanderling district and at Nor'Banks Drive. Chairman Britt stated he was correct. He added that the Town could not outright ban Segway tours.

Director Garman suggested that the Board define where the base of the tour operation could be as well as where they could operate the Segway tours. Town Attorney Hobbs noted that there was nothing in the General Statutes that says that a town cannot prohibit tours. He added that the use of Segways could not be prohibited but the tours could. He thought that a tour would be a commercial use with multiple Segways. He stated that the Statute did not require an allowance for tours. Chairman Britt stated that he picked up from the Council Retreat that no one wanted to allow tours. Council Liaison Burdick stated he was correct. Chairman Britt didn't think there was a safe place for the tours, thought it was a safety hazard, and felt that preventing tours would be a good idea. Vice Chair Blakaitis asked if the ordinance could state that no tours were allowed. Director Garman stated that it could.

Chairman Britt asked if Segway rentals and tours would be defined in the same way. Director Garman thought they would have to be defined separately. Town Attorney Hobbs stated that the statute did not speak of ownership versus renting or commercial use versus personal use, but spoke only of use. Vice Chair Blakaitis didn't think a Segway could be rented without having a lot of education on them. He asked Chairman Britt if the Town should allow rentals. Chairman Britt did not think so. He thought there was a difference between individual use and rental use. Town Attorney Hobbs explained that a court may draw a distinction, but there wasn't much guidance.

Director Garman understood that the Segway company established legislation in a variety of states when they first came out so that when they were offered for sale, they would be less likely to be banned from sidewalks and such because they were trying to mass produce them as the

next mode of urban transport. He stated that it was an intentional attempt from the company to establish regulations that would exempt their products.

Chairman Britt stated that he was inclined to say no to Segway rentals and tours. Member Forlano disagreed. He felt the Town was becoming too draconian with too many different policies. He stated that he could see the possible safety hazard, but could also see that with bicycles and skateboards. He thought the Town was getting too uptight about too many different things. Chairman Britt agreed and felt he was wrong in his original opinion.

Vice Chair Blakaitis asked Member Forlano what he was objecting to. Member Forlano stated that he didn't see a difference between a rental company or tour or the kids riding a Segway on a private street. Chairman Britt agreed. Member Forlano thought the Board was getting hung up on too many things. Chairman Britt stated that the Board could discuss the option of allowing the tours in the C-1 or C-2 district, but felt they should not be allowed in the Village Commercial District since they wouldn't be able to go anywhere.

Director Garman stated that the idea for the C-1 and C-2 districts was to establish a use and location for the business. He added that the Board could define other places the business could go. Chairman Britt stated that the business could go anywhere the current statute allowed. He thought that allowing them in the C-1 district made the most sense as it was the only area where the Segways could be ridden. He suggested coming up with some requirements for parking or a Conditional Use Permit for them.

Director Garman asked the Board how they felt about Segway tours versus rentals. Chairman Britt and Member Forlano felt they were the same thing. Chairman Britt felt it should be a requirement to have insurance for Segway rentals. Town Attorney Hobbs suggested that the lessor would be required to provide a map to renters showing where the Segways can and cannot be operated in Town.

Member Forlano stated that the Town could not cover all of the safety issues that may come up. He noted that the statutes stated that the Town could not prohibit Segways except for locality and certain times. He thought the Board was grabbing at straws with trying to figure out how to prohibit them. Chairman Britt disagreed and thought that was the way the Conditional Use Permit would have to be written. Member Forlano stated that he wasn't sure if he agreed with Town Council's decision to prohibit Segways in the Village Commercial District. He thought the Town was getting too restrictive with the issue, especially since there were so many other safety issues that have not been addressed. Council Liaison Burdick thought the message from Council was that they wanted to see something that would further minimize the potential risk. Chairman Britt stated that he could see Member Forlano's point, but noted that one could justify that a risk existed on multiple different things that were rented in addition to Segways. Member Forlano agreed and wondered where the line was drawn. Council Liaison Burdick agreed but thought Segways posed a different level of risk.

Vice Chair Blakaitis agreed with the reasoning behind Council wanting to keep Segways out of the Village Commercial District. He thought it was a very dangerous, congested area in the summer. Member Forlano noted that the area from the Duck Research Pier to the Village Commercial District was also very congested in the summer. Chairman Britt pointed out that the

Duck Trail was attached to the road in the Village Commercial District. Vice Chair Blakaitis pointed out that the Duck Trail was separate from the road in the northern end of Town. Chairman Britt stated that he wasn't disagreeing with Member Forlano but felt it was more dangerous in the Village Commercial District. Director Garman showed the Board the area that comprised of the Village Commercial District where Segways were prohibited; pointing out how narrow the Duck Trail was in that area.

Chairman Britt agreed with Member Forlano's concerns. He thought it was getting to be a little too much and if the Town started regulating Segway rentals and tours, it would obligate the Town to look at bicycles and skateboards. He stated that he did not want to do anything with regard to the tours and rentals. Director Garman noted that the question was whether they should or should not be allowed. He added that the Board would still have to come up with something to deal with them. Member Forlano suggested that Director Garman come up with an ordinance that the Board could vote on and then pass on to Council. Director Garman stated that he was trying to get some direction from the Board on whether the Town should be restrictive or allow Segway tours and rentals. He stated that either way, the Board would need to come up with something that would address them.

Member Forlano felt that the Segway tours and rentals should be allowed, but only with a permit as well as the location of the business. Vice Chair Blakaitis thought the Board had come full circle in their discussion and were back where they started. He stated that he would like the full Board available to discuss the issue at their meeting next month. He suggested that Director Garman bring back an ordinance for discussion. Chairman Britt suggested that the draft ordinance allow the Segway tours in the C-1 and C-2 districts with some reasonable rules. Director Garman asked if the draft ordinance should also deal with Segway rentals. It was *consensus* of the Board to have tours and rentals in the draft ordinance.

APPROVAL OF MINUTES

Planning Board Meeting February 9, 2011

Chairman Britt directed the Board to review the minutes from the February 9, 2011 meeting.

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

Motion carried 3-0.

OTHER BUSINESS

None.

STAFF COMMENTS

None.

BOARD COMMENTS

None.

ADJOURNMENT

Vice Chair Blakaitis moved to adjourn the meeting.

There was no second or vote to adjourn.

The time was 8:52 p.m.

Approved: _____
/s/ Jon Britt, Chairman