

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
February 11, 2015**

The Planning Board for the Town of Duck convened at the Duck Meeting Hall on Wednesday, February 11, 2015.

Present were: Chair Joe Blakaitis, Vice Chair John Fricker, Ron Forlano, Tim McKeithan and Marc Murray.

Absent: None.

Also present were: Director of Community Development Joe Heard and Permit Coordinator Sandy Cross.

Others Present: John Chenoweth, Dick McAuliffe, and Ken Green.

Absent: Council Liaison Chuck Burdick.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for February 11, 2015 at 6:32 p.m.

PUBLIC COMMENTS

None.

NEW BUSINESS

Special Exception 15-001: Application for a Special Exception to Allow the Height of an Addition to the Existing Single-Family Residence at 111 Bunting Lane, to Exceed the Maximum Building Height of 35 Feet in the Single-Family Residential Zoning District

Director Heard stated that the Board had before them an application seeking a special exception permit to allow the highest point of an addition to the existing residence at 111 Bunting Lane to encroach 0.3 feet above the maximum building height of 35 feet; making the total height of the building 35.3 feet. He reviewed a visual shot of the building elevation drawings, which showed the extent of the addition. He noted that the bottom right of the elevation showed that all the builder did in their proposal was extend the existing roofline further to the rear of the property. He pointed out that there was another addition that was one story lower, which has no impact on the special exception.

Director Heard stated that the Town was asked to make findings on certain criteria in order to grant a special exception. He presented a variety of staff findings – the scope of the exception requested was very minor in nature; the project did not increase the density or intensity of use on the property; the property is no larger than a typical property in Duck and complies with the maximum lot coverage and minimum building setback standards after the addition; the residence

has 41 feet of separation from 109 Bunting Lane and over 34 feet from 113 Bunting Lane – both distances are well beyond the minimum setback requirement and minimum separation required by the North Carolina Fire Code; and the addition to the rear of the building did not appear to block any significant views on any surrounding properties.

Director Heard stated that the second criteria to be met was that the special exception would not be inconsistent with the objectives specified in the CAMA Land Use Plan. He stated that it seems that the addition is in conformance with the development density recommendations in Policy 12C. He added that Policy 19C dealt with the character and consistency of the proposal as it relates to the ordinance and development of the Town. It was noted that the residence appeared to be in character with the surrounding neighborhood and complied with all other applicable development standards.

Director Heard stated that the applicant has demonstrated that the requirements of the chapter were unreasonable or impractical due to an unusual building design that made reasonable improvements difficult to meet existing requirements. Staff felt there was a special circumstance that existed as the residence was originally constructed in 1981 under Dare County at a height of 35.3 feet. He added that the recent addition was designed and constructed to match the building height of the original structure. He stated that when the owners got to the end of their project and had the height certification, it was discovered that the addition was above the Town's maximum standard.

Director Heard stated that the requested special exception was only for 0.3 feet and did not exceed the maximum special exception of five feet. He added that the slight difference in height was not discernable to staff. He stated that the addition in question did not appear to have any significant impact on the privacy of the adjoining properties. He stated that a portion of the addition on the eastern side was designed to match the character of the existing residence and the addition to the rear of the structure were consistent with the existing roofline did not impact the appearance of the residence from the street. He finished by stating that staff was recommending approval of the special exception application.

Chair Blakaitis noted that contractor Ken Green was present on behalf of the homeowners. Ken Green stated that Town staff has been very helpful with the process. Green stated that he was surprised when he received the survey and found that they were over the height limit. He added that at no time did they think the project would exceed the height limitation. He asked for consideration of the special exception.

Vice Chair Fricker asked if there was any requirement on the part of the Town to give notice to the neighboring properties. Permit Coordinator Cross stated that it wasn't technically required. However, she added that letters were sent on January 29, 2015 to the adjacent property owners, the Town's website had a notice posted on it, and an ad was posted in the local newspaper. She stated that surrounding property owners would also receive another notice before the Town Council hearing.

Chair Blakaitis asked if any comments had been received. Permit Coordinator Cross stated that she received no comments.

Member McKeithan asked if the names listed on the letter of notification are that of the neighbors. Permit Coordinator Cross stated that they are.

Vice Chair Fricker moved that the Planning Board recommend to Town Council that the special exception be approved and in making this motion, that the Planning Board adopts the findings of staff as set forth in the analysis and recommendation sections of the staff report. Member McKeithan seconded.

Motion carried 5-0.

Text Amendment: Proposal to Amend Section 156.026, Interpretation of District Boundaries, by Eliminating or Correcting Unnecessary Wording

Director Heard stated that the text amendment was one of a handful that Council asked staff and the Planning Board to review. He stated that this one was fairly simple as it would correct some unnecessary wording in Town Code Section 156.026. He stated that there were some items that seem to have been cut and pasted from another community's zoning ordinance. He noted that the two suggestions in this case don't appear relevant to the Town of Duck, so he's asking that one be removed and the second be changed.

Director Heard explained that the first item was Section 156.026(D), which referenced how the Town would interpret zoning boundaries along railroad lines. He added that since the Town does not have any existing railroad lines and is very unlikely to have any in the future, it seemed like it should be taken out of the ordinance. He outlined the second item in Section 156.026(C); which would amend a couple of references to the word "City" to "Town" to make it more relevant to the Town of Duck.

Member Murray moved that the Planning Board recommend approval of the suggested changes from Town staff. Chair Blakaitis seconded.

Motion carried 5-0.

OLD BUSINESS

Text Amendment: Proposal to Amend Tree Preservation Standards in the Town's Zoning Ordinance, Section 156.115, Design Standards for Landscaping and Open Space, and Section 156.137, Tree and Vegetation Preservation and Planning

Director Heard stated that the Board spent a lot of time at their last meeting bouncing around ideas to see where they wanted to go and what things they wanted to look at more closely. He reminded the Board that there were several items that the Board decided needed further consideration and asked staff to put it in the form of an ordinance. He noted that it wasn't an urgent issue that needed to be resolved at this meeting, but staff wanted to get the draft ordinance in front of the Board to see if it's headed in the right direction or if the Board wanted to further tweak items.

Director Heard stated that he emailed comments from Town Attorney Robert Hobbs earlier in the day to the Board and hard copies were presented for their review as well. He also noted that Vice Chair Fricker pointed out that some of the proposed changes in the penalty section referenced only vegetation, not trees, and this was not consistent with the definitions of these terms.

Director Heard stated that one of the changes the Board had looked at was how to deal with multi-trunk trees. He stated that multi-trunk trees were now referenced on the second page of the draft ordinance. He stated that some of the factors the Board discussed were not trying to penalize people that have multi-trunk trees and to develop a standard that could be easily measured and applied consistently without a lot of interpretation on the staff's part; as well as providing staff with a strong legal justification for what they were doing.

Director Heard explained that staff researched how others measure multi-trunk trees. He added that one of the options the Board discussed at their last meeting was taking a measurement of the diameter of all of the trunks, but there was a flaw in that option: if the angle of the trunks is broader, the measurement around will be larger, but that does not make the tree any more significant. Director Heard noted that it would be more consistent to measure each trunk and then add them up, which also seems to be more legally justifiable.

Director Heard stated that there was discussion regarding measuring multiple trunks at the ground level or lower on the tree before it begins to branch. However, there were a couple of flaws with this method that led him in a different direction for the proposal. He pointed out that some of the multi-trunk trees had multiple trunks that were occurring below the ground level. He added that even if they were measured from the ground, it would not capture those scenarios. He stated that measuring at "diameter at breast height" is an internationally accepted form of measurement and the most commonly used. He stated that if the Town strayed from that standard, there would have to be some type justification as to why and what the circumstances were in Duck that would lead the Town in a different direction. He proposed continuing to measure at the diameter at breast height (dbh) and measure each trunk at that height.

Chair Blakaitis noted that Director Heard used 4.5 feet as the measurement for dbh. He asked if it was the accepted standard for average breast height. Director Heard stated that it was defined that way in most ordinances. Chair Blakaitis stated he wasn't aware of the measurement but had no objection to it.

Director Heard stated that the proposal for measuring the diameter of trees was to take the measurement of each trunk, square the diameter of each trunk, add the squares together, and then take the square root of the total. He proposed that if this was something the Board wished to pursue, the example provided to the Board in the staff report could be put in the ordinance for explanation purposes. He offered that this calculation seemed to work and was pretty fair, even though it was a complicated set of equations.

Vice Chair Fricker clarified that Director Heard was saying that the formula was taken from the National Forest Service. Director Heard confirmed that was correct. Vice Chair Fricker suggested referencing where the formula was adopted from in the draft ordinance.

Chair Blakaitis stated that when he originally saw the formula, he thought it wouldn't work, but realized that it could. He added that it would not work if the Town kept the standard for a 24 inch diameter tree. He stated that he could think of a lot of examples that would escape the 24 inches. He added that if the Town used the formula as Director Heard suggested by reducing the diameter, it would have a greater chance of working successfully throughout the Town. He thought using a smaller diameter would work better. Vice Chair Fricker asked if Chair Blakaitis' suggestion was relevant to the formula for measuring multi-trunk trees. Chair Blakaitis stated it would apply to multi-trunk trees. He added that the Town would still look at single trunk trees and if they were greater than a certain diameter, the applicant would need to obtain a permit.

Member Murray clarified that it was the owner's discretion to remove one trunk from a multi-trunk tree. Chair Blakaitis thought he was correct. Director Heard stated that staff would prefer to have a standard set rather than it be per the review of the Director of Community Development. Member Murray noted that the entire point of the ordinance was to keep people from cutting down trees without notifying the Town or applying for a permit. He stated that the requirements to cut down a tree when applying for a permit are reasonable. Chair Blakaitis agreed, adding that trees should not be cut down to clear a property in order to have a water view. Member Murray stated that if installing a pool was a suitable reason to cut down a tree, a water view should be as well. Chair Blakaitis didn't think so, adding that there was no guarantees on a right to a water view.

Director Heard stated that he would not interpret the ordinance as allowing large tree removal to get a better view. He added that the stated intent of the ordinance was to encourage the protection of trees when possible. He stated that it was flexible enough to allow the removal of trees to accommodate the development of property. However, he would not be inclined to interpret that it was intended to allow tree removal for something such as a view.

Member Forlano asked where property rights came into the picture. Member Murray asked how a pool would be approved. He stated that if the point of the ordinance was to document removal of trees and mitigate the unauthorized removal of trees. No matter what the reason was for removing the tree, the ordinance should be as limiting as possible. He didn't feel that the purpose of the current ordinance was limiting tree removal, but more to keep track of the trees removed. He stated that if this was not the case, then property rights take on greater importance.

Chair Blakaitis thought the Board had a conversation with the Town Attorney when the first ordinance was being crafted. Permit Coordinator Cross agreed. Chair Blakaitis thought that the end result was that a municipality had the right to do certain things. Member Forlano stated he did not remember that aspect of the discussion. Member Murray stated that he was curious if the Board was trying to document and discourage or whether they were trying to prohibit tree removal. He added that if the Board was trying to prohibit, he felt their level of care had to be higher. Chair Blakaitis stated that the Town Attorney never mentioned anything about property rights in the original discussion. He added that the attorney's recent comments only addressed two points – whether the Town has the right to fine a contractor and whether the Town has the right to plant on public property.

Member Murray pointed out that the tree and vegetation ordinance is worded in such a way that if the vegetation is taken away, it could be put back somewhere else. Director Heard stated that

the first line of the ordinance states that the purpose was to "...preserve, protect and replace trees and vegetation within the Town..." He added that it went on to list the reasons why the Town thought it was a good idea to preserve trees and vegetation. Member Murray said he understood and agreed with the sentiment, but it seemed a little ridiculous if the goal was to preserve and protect – to prevent one thing and not another thing.

Member McKeithan noted that if a tree was over six inches, it could not be cut down when developing a lot. Member Murray disagreed. Director Heard stated that they could be cut down. Member McKeithan thought they could be cut down if they were in the footprint. Member Murray stated that they could if they were in the way of something. Chair Blakaitis noted that under the present ordinance, a homeowner would have to apply for a permit. Member Murray agreed, adding that he was looking for consistency in the ordinance. He stated that it seemed easier if there wasn't a legal property rights issue.

Chair Blakaitis thought the Board became sidetracked in the past by trying to make the ordinance more pleasing and not so restrictive. Vice Chair Fricker stated that the Board got to this point by Chair Blakaitis' suggestion that the way of measuring multi-trunk trees would be fair or balanced if the size of the single trunk trees were reduced with regard to the threshold for someone to obtain a permit. He stated that the discussion has gone from that to how many trees were on a lot and if every tree on a given lot would be subject to obtaining a permit if it was to be removed.

Member Murray stated that if the Town wanted people to apply for a permit and document which trees were cut down, he would want the diameter of the tree to be small since cutting down a tree would not be prohibited. He added that if there would be a prohibition for certain reasons, he would feel a responsibility to the community to keep the diameter large and limit the number of trees that could not be cut down. Vice Chair Fricker agreed with Member Murray's thoughts. Chair Blakaitis commented that in order to preserve trees, there had to be some type of balance. He noted that the Town's existing ordinance gave some balance, but wasn't restrictive enough in certain areas. He stated that he brought up the multi-trunk tree issue because there were so many of these trees in Duck.

Member Murray agreed that multi-trunk trees should be included, but he was trying to determine how small they should be. He added that if it went down to 10 inches in diameter, the Board would be writing an ordinance that would only limit people that live from the southern town line to the Village and from Carolina Dunes to the north. He stated that encouraging maintenance and preservation of all vegetation was what the Board should do, but he didn't want to do it at the cost of seeming arbitrary. He stated that it was fine to cut down a 36 inch in diameter at breast height tree in order to install a pool, but it wasn't fine to cut down a 16 inch in diameter at breast height tree because it was interrupting the view. Chair Blakaitis stated that if that was permitted, then the Town would be ignoring all the reasons for preserving trees. He added that a 36 inch tree could be cut down because the Town allows pools in Duck, and since some of the lots are small, the ordinance makes it easier for staff to approve it. He stated that if staff went out to a lot and the tree was in the way, it would have to go because by not allowing it would mean more pushback from the owner and the builder. He stated that the smaller tree that wasn't blocking anything still had viable uses. He felt that the smaller trees needed protecting as well.

Director Heard stated that Member Murray used the term arbitrary a few times in the discussion and he personally did not view it that way. He stated that there is a clear distinction between a physical improvement, such as installing a house, pool, or driveway. Whereas there isn't a physical improvement if you are simply removing the tree to obtain a view. Member Forlano disagreed.

Member Murray noted that a pool did not absorb stormwater, filter the air or do anything that a tree did. He added that a pool and view were the same – they were each an amenity. Director Heard pointed out that one took up space and the other doesn't; one needed to be in a physical space that is proposed while the other had no physical space. Member Murray stated that a view to a client with a feature window that created a line of sight was important. Member Forlano stated that a view was a valuable asset to a property owner. Director Heard agreed, but noted that one could clearly differentiate the need to put something in the physical space versus the need for a view as there wouldn't be space needed for one.

Vice Chair Fricker thought the question was the limit on the governing body's authority to dictate whether an individual property owner was entitled to maintain views that he had when he bought the property. He stated that he was fine with the 24 inch threshold for trees and thought it was a noble thing to preserve. He noted that he has a large tree in his driveway that he preserved. He thought it was one thing to recognize that trees were good and served multiple purposes, but it was another thing to reduce the size down to 16 or 10 inches and a person would have to come in for a permit each time they wanted to take one down.

Member Murray agreed the term arbitrary was not the correct term. He added that he would change the word arbitrary to absurd with regard to the following scenario – a homeowner who owned their home for 20 years and had a sound view and a tree grew up from the sound so they couldn't see. He stated that they wanted to cut the tree down and came to Town staff to obtain a permit to remove it. He stated that the way the ordinance was written, the tree could not be removed, but if they wanted to put a pool in, they could. He felt it was absurd. He stated that he supported the preservation of trees, but felt the Board needed to think things through for fear of the Town losing credibility.

Chair Blakaitis asked the Board for their thoughts on the multi-trunk tree formula. Member Forlano and Member Murray felt the formula was fine. Chair Blakaitis suggested that the Board move forward with a discussion on the diameter of the trees. He noted that staff suggested that the diameter be reduced from 24 inches to 16 inches. He asked if the size should be left as is or reduced. Member Murray reviewed what the Town of Southern Shores has in place with regard to trees to the Board.

Director Heard stated that he had discussed at the Board's last meeting a situation he and Member Murray worked through where there was a site plan and tree plan that showed significant existing trees. He stated that there was one large tree in the front of the property and his question was where the driveway would be installed. He stated that if Member Murray had said that the driveway would go through the tree, he would discuss moving the driveway in such a way as to preserve the tree.

Chair Blakaitis stated that he was surprised to see such small diameter trees in certain towns in North Carolina. Director Heard advised the Board that different communities had different levels of enforcement. So, it may not be comparing apples to apples. As an example, he stated that the Town of Duck presently has two levels of enforcement – one for undeveloped lots with a six inch tree criteria and the other was for developed lots with a 24 inch tree criteria.

Member Forlano asked if information is available from communities in the Charleston area, who the controlling body was that determined what could and could not be cut down. He asked if it was the Planning Director or another body. Director Heard stated that Charleston had an arborist on staff. He added that he did not recall how they handled such situations and wasn't sure if they had an historic board that handled it or a separate tree board.

Member Forlano asked how many permits for tree removal came in for a year. Permit Coordinator Cross stated that it was rare that Town staff would receive one. She noted that tree removal permits are issued when a tree is greater than 24 inches. She stated that one was done recently where the tree wasn't within 10 feet of the house, but the limbs were close enough that it was causing the house to become occupied by animals. She stated that the owner submitted an application, indicating that they were taking the tree down and noted that they had a lot of vegetation on the lot, so there was no justification for staff to deny the permit. Chair Blakaitis asked if the owner could have pruned the branches. Permit Coordinator Cross stated that it was 15-20 feet from the house and was fairly sizeable. She stated that pruning it would have made the tree look awkward. Chair Blakaitis clarified that the owner could have pruned the tree instead of taking it down. Permit Coordinator Cross stated he was correct.

Vice Chair Fricker stated that his impression was that Council wanted the Planning Board to re-examine the ordinance because of a perception that people were taking advantage or ignoring the existing ordinance with potentially insufficient or inadequate consequences for doing so. He stated that it was more about the fines and not about reducing the size of the tree. Chair Blakaitis stated that Vice Chair Fricker was correct. He added that Council had brought up three things for the Board to discuss with one being to look to see if the fines could be made more stringent. He noted that Director Heard's research seemed to indicate that the fines were not excessive. He added that Council did not specifically ask the Board to look at the size of the trees. However, it didn't mean that the Board could not since they were looking at the vegetation ordinance.

Member Murray did not think a fine could be too high, especially if someone totally disregarded the ordinance by not applying for a permit. Chair Blakaitis stated that it was common for a contractor to consider the fines as the cost of doing business. Member Murray disagreed. He added that it may be a cost of doing business for commercial development. He thought that tree removal contractors did not see the fines as the cost of doing business. Chair Blakaitis reminded the Board that they needed to look at the remediation for trees, which was a big deterrent. Member Murray thought that concentrating on fines and remediation for disregarding the ordinance was a good thing. He stated that if multi-trunk trees were added to the ordinance and didn't change the diameter, it would mean that the Board only added that option. He stated that he would prefer coming up with a way to encourage more tree retention without putting Town staff in an awkward position as to which types of development or needs of a property owner were legitimate or not. Chair Blakaitis agreed. Director Heard stated that the Town's attorney

would likely agree, in almost any circumstance, it would be better to have a standard than an interpretation. Vice Chair Fricker agreed.

Member McKeithan thought the Board was tasked with looking at the size of the tree in order to protect them and thought it was an issue. Chair Blakaitis stated he wasn't sure it was an issue; he only recalled that Council wanted the Board to look at three things, with one being fines. Member Forlano stated that the Board was not asked to look at the size of trees for the ordinance the way it was written; but tasked with looking at the fines and penalties that would be imposed on individuals. He thought adding multi-trunk trees was a good addition to the ordinance, but felt the Board should concentrate on the fines and penalties as well as who would be assessed such. He stated that he was not personally in favor of assessing fines against homeowners unless the homeowner was complicit upon directing a contractor to take a tree down. He added that he completed some research on contractors and in some states; a licensed tree removal expert is required to take down a tree. He noted that out of 20 tree contractors on the Outer Banks, only two were licensed. He thought the Board should look into the issue while discussing penalties.

Member McKeithan stated that the January 14, 2015 Planning Board minutes indicated that..."the ordinance had not been evaluated in recent years, the Town Council expressed interest in reviewing the Town's tree and vegetation ordinance to ensure that its standards meet the current needs and expectations of the Duck community..." He stated that it further read: "...several Town Council members were interested in reviewing fines..." Chair Blakaitis stated that rather than get hung up on the size of the trunk, as long as the Board agreed that multi-trunk trees were fine for now, that the Board discuss penalties and fines.

Director Heard stated that there were minor changes that the Board discussed at their last meeting. He stated that Page 4 talks of documentation for an emergency tree removal. He noted that it gave people ideas to document why a tree needed to be taken down. He stated that at the bottom of Page 3, he changed "house" to "structure". He stated that there was a new Subsection 5 dealing with fines and penalties on Page 10 and reviewed it with the Board. Staff included new language regarding payment in lieu of planting.

Member Murray asked if the Town would allow a multitude of shrubs to replace a 24 inch tree that was removed as the ordinance was currently written. Chair Blakaitis stated that it was currently allowed. Member Murray thought it should be changed. Chair Blakaitis agreed. He stated that it should be indicated in the ordinance that shrubs be removed as an option to mitigate a violation. He thought there should be "tree only" in the ordinance.

Vice Chair Fricker stated that Page 10, Subparagraph 7, stated if the number of trees that staff feels should be planted as a remediation of a loss of a 24 inch tree could not be planted on the property, then it should be converted to a fee or fine for the removal of the tree. Member Murray noted that the last sentence in Subparagraph 6 was ruled out by the Town Attorney with regard to replanting on public property. Chair Blakaitis suggested combining Subparagraph 6 and 7. Member Murray stated that the Town Attorney said that planting could not be on public space. Chair Blakaitis disagreed, adding that a lot of the open spaces were controlled by the various homeowner associations. Director Heard stated that the Town Attorney liked the Board's thinking with regard to the hierarchy with the exception of the homeowner association part.

Chair Blakaitis agreed with the Town Attorney, but didn't see what was wrong with including it in the ordinance. Member Murray agreed. Director Heard stated that the Town Attorney had significant concerns with planting on a private association property if an easement with the association was not obtained in order for the Town to maintain the property.

Chair Blakaitis clarified that the Board was in consensus for Page 10 on everything but wanted to remove the option to replace a tree with bushes and edit Paragraph 6 and 7. He thought Paragraph 7 could be removed. Director Heard stated that he would have Town Attorney Hobbs review it. A majority of the Board members stated a preference not to change the size of trees at this point. Chair Blakaitis asked to keep this issue open for further discussion.

Chair Blakaitis stated that in the ordinance, topping is prohibited only in the section regarding developed lots. Permit Coordinator Cross noted that there were some subdivisions that require tree topping. She added that staff has discussed the issue in the past and it was problematic because if an owner in these subdivisions was penalized for topping, they would inevitably just take the tree down. She stated that the issue was topping the tree and leaving it or taking the tree down completely. Member Murray thought tree topping could be eliminated from the ordinance. Director Heard noted that it would include the statement that it would not allow improper pruning.

Chair Blakaitis asked Director Heard if he had enough information to rewrite the ordinance and bring it back to the Board. Director Heard stated that he did.

APPROVAL OF MINUTES

Minutes from the January 14, 2015, Regular Meeting

Vice Chair Fricker had corrections to Pages 1, 2, 3, 5, and 7 of the minutes.

Member Forlano had a correction to Page 8 of the minutes.

Chair Blakaitis moved to approve the January 14, 2015 minutes as amended. Vice Chair Fricker seconded.

Motion carried 5-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Director Heard reminded the Board that the annual Council Retreat would be held on February 18-19, 2015 beginning at 9:00 a.m.

BOARD COMMENTS

The Board had a short discussion regarding Special Exception 15-001 and whether or not it could have been approved administratively.

ADJOURNMENT

There being no further business to discuss, Chair Blakaitis adjourned the meeting. There was no vote.

The time was 8:41 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman