

**TOWN OF DUCK  
PLANNING BOARD  
REGULAR MEETING  
April 8, 2015**

The Planning Board for the Town of Duck convened at the Duck Meeting Hall on Wednesday, April 8, 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 Town Clerk Lori Kopec.

Others Present: None.

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

Chair Blakaitis called to order the Regular Meeting of the Planning Board for April 8, 2015 at 6:33 p.m.

**PUBLIC COMMENTS**

None.

**OLD BUSINESS**

**Text Amendment: Proposal to Amend the Definition of “Building Height” in Section 156.002 by Clarifying how Height is Measured in Different Flood Zones**

Chair Blakaitis noted that the proposal was the result of the submission to the Council due to a suggestion by one of the Council members to clarify some wording. Director Heard added that the proposal was part of the amendments that were proposed to Council several months ago. He added that it was one of the original ones. Chair Blakaitis clarified that a question on it was brought up at the last Council meeting regarding the V flood zone. Director Heard stated that Council had adopted a similar amendment to the flood ordinance. He added that these proposed changes mirror that amendment.

Director Heard stated that at the last meeting, Member Murray had asked a few questions about how the proposal would be applied in certain circumstances. He stated that he and Building Inspector Cory Tate contacted Member Murray to discuss how it would address his concerns. He stated that the main concern was an oceanfront house on a dune that decreases in elevation from east to west, because the house would look taller on the western side. They discussed how that would be factored into the building height measurement, particularly in a case where the area underneath had an enclosure such as an elevator or dry entry. He stated that they talked about how the proposed definition would apply. He added that the definition stated that it would

be measured from the bottom of the first habitable floor, not from the slab below the elevator shaft or enclosure.

Member Forlano asked if the scenario that was discussed did not include the lowest level of a dry entry. He clarified that it was only because there was nothing in that area except an elevator shaft. He further clarified that the height was being measured from the lowest horizontal member. Director Heard stated he was correct and added that it was the key to answering the question as to how staff would define it in the proposal as being measured from the bottom of the lowest horizontal member, not a slab or something at the bottom level.

Member Forlano asked what would happen if the bottom area was completely enclosed as living space. Director Heard stated that it could not be as that is not permitted in a VE flood zone. Member Murray noted that his question only pertained to homes in the V zone. Director Heard explained that the V zone would be the only zone in which this standard would apply. Member Forlano asked if the home was in an AE or X zone, the bottom level would be included. He asked if it was built on a sand dune in the middle of an island in an X zone if the height would be measured from the entry point. Director Heard stated that it would be from the average finished grade by taking the four corners and averaging them out and measured from that point. Member Forlano asked if the entry point was in the bottom of the dune and the lower level was another living space. Director Heard stated that it would be included in an A or X zone. Member Forlano clarified that the height would be measured from the basement level. Director Heard stated that it could be potentially, depending on the type of construction.

Member Murray noted that there wasn't a distinction between structural and non-structural members in an A or X zone, only in the V zone. He stated that Building Inspector Tate felt that the lowest horizontal member was sufficient and that it didn't need to state "...excluding exempt ground floor of structures..."

Chair Blakaitis asked Member Murray how he would interpret the finished grade versus the average finished grade. Member Murray stated that because it doesn't say "...whichever is more limiting..." bothered him. He stated that average finished grade was tricky because there was a part in the ordinance that talked of measuring from the top of the slab and also that the elevation under the slab was determined by taking pre-disturbance elevations at the four corners of the building. He stated that for cutting and filling, one is allowed to add material up to three feet above the lowest corner, which was the fill pad. He stated that he's had several permits where the concrete slab took over four inches, so he would have to take the fill pad elevation plus four inches and that would be the benchmark to start measuring the height.

Member Murray thought the Town of Kitty Hawk determined the height at the time of the permit if one takes the elevations and there was a height above sea level that was agreed upon at the permitting stage. He stated that the way Duck's ordinance was written, it has "average grade around the structure" or "average finished grade". He added that if the building was too tall, theoretically, sand could be added around the building to change the point where height is measured. He stated that in Kitty Hawk, it was on the application that it was a certain height above sea level, which was determined by the pre-disturbance elevations. Director Heard stated that it was the difference with the Town of Kitty Hawk in that the pre-development took the measurement of the elevations of the four corners before any grading is initiated.

Member Murray stated that Duck's ordinance is more confusing. He added that under Building Height, it read "...vertical distance measured from the tallest roof line of a building, not counting chimneys or similar features subject to exception, to the top of the slab at the approximate center of the structure or finished grade where there is no slab present..." He stated that Subsection A read: "...in cases where the regulatory flood protection elevation is higher than the finished or average grade, the height measurement shall be at the top of the slab at grade with non-habitable space or from a regulatory flood protection elevation where no portion of the structure is located at grade, whichever is applicable..." He noted that it seemed even more of a problematic portion of the ordinance because it states from the top of the slab at grade with non-habitable space; however, the flood ordinance states that it can't be finished space. He suggested following the Town of Kitty Hawk's regulations and measuring the height from the regulatory flood elevation so there would be no question.

Member Forlano thought the Town of Kitty Hawk's determination was better and eliminated all possible loopholes. Member Murray agreed. Director Heard stated that, in conversations with contractors over the years, there may be certain instances where Duck's ordinance is more complicated in how building height is calculated, but in general a contractor would gain more of an advantage from Duck's standards than Kitty Hawk's. He added that Duck and Kitty Hawk both have a 35 foot height limit in most zoning districts, but Kitty Hawk measures from pre-fill elevations and Duck measures post-grading, which is typically to the benefit of the homeowner or developer.

Member Murray pointed out that Duck's ordinance currently permits three feet of fill, even in an X zone, and permitted to start measuring from there. Director Heard stated he was correct. Member Murray stated if that portion was kept in the ordinance, the height would not be limited to 35 feet because of the pre-fill elevations and adding three feet of fill. He stated that finished grade or average finished grade leaves the ordinance open to wide interpretation.

Vice Chair Fricker stated that if Member Murray wasn't sure about the regulations, he wasn't sure how the rest of the Board would know. He stated that it wasn't making things clearer or more easily enforceable. He asked how the Board got to this point. He thought about a year ago, there was a conversation with Olin Finch, who was beside himself with the height of building and the Town's regulations. Member Murray stated that the issue was, in a flood prone area, the impulse was to get the buildings up as high as possible, but whenever there's a penalty for doing so, it makes an ordinance unworkable. He added that the Board was now trying to fix the ordinance in the V zone, but the discussion was pointing out deficiencies in the A zone in the ordinance. He noted that flood events in the V zones were more dramatic and it seemed clear that a building should be elevated two feet above the adjacent grade. He stated that it was good building practice on the ocean side because it's safer and would improve the Town's community flood rating.

Vice Chair Fricker asked why the Board was not looking at the Town's ordinances more broadly and globally as opposed to tweaking the ordinances in various spots and realizing they were in conflict or not equitable. Director Heard stated that staff identified an issue that needed to be looked at, but did not identify the section regarding A zones as something that was problematic. Vice Chair Fricker suggested that the Board address the issue and decide if it wanted to pass it,

modify it or table it and then come back at the end of the meeting, discuss whether there was a consensus to recommend to Town Council that they charge the Board with looking at how height was measured globally.

Member Murray felt that the change portion was fine with him. Vice Chair Fricker clarified that Member Murray was fine with recommending the Board pass what they've been discussing. Member Murray stated that it was a partial fix and felt the Board could continue discussions. Chair Blakaitis noted that Member Murray felt that the other items pertaining to building height were confusing and that the Board should look at them. He thought it was a good idea. Member Murray agreed, adding that it would be good if it was the procedurally correct way to do it. Chair Blakaitis wondered if the Board should approve the existing text amendment. Vice Chair Fricker pointed out that Member Murray was recommending that it be approved. Member Murray clarified that Building Inspector Tate was forced to interpret the ordinance this way, because the existing ordinance is in conflict with the building. Chair Blakaitis thought it could be recommended for approval and then the Board could work out the bigger picture at another time.

Member McKeithan stated that the final amendment recommendation left out "supporting the living area above..." He asked if it made it clear or unclear if that sentence was left out. He noted that in earlier discussions the lowest horizontal member was listed but was being left out in the amendment. He asked if it should be put back in. Director Heard stated that it was what he, Member Murray and Building Inspector Tate had discussed and didn't find a need for further clarification. Member Murray thought, in technical terms, using the lowest horizontal member was fine.

Vice Chair Fricker moved to recommend to Town Council the approval of the proposed text amendment set forth in staff's report. Member Murray seconded.

Motion carried 5-0.

## **NEW BUSINESS**

### **Text Amendment: Proposal to Amend Section 156.058 of the Town Code by Updating Standards for Wireless Telecommunications Systems Consistent with Recent Changes in State and Federal Laws**

Chair Blakaitis noted that the text amendment proposal was confusing to read. He added that Town Attorney Robert Hobbs noted that most of it was consistent with the state and federal laws. He asked if there was anything in the Town Attorney report that stated that it wasn't consistent. Director Heard stated that there were several items that needed to be changed to address some of the comments.

Director Heard stated that the reason he held off on bringing this before the Board was because it is a complex issue. He stated that there aren't things that the Town is doing that are illegal or improper, but with regard to this ordinance, almost all of the proposed amendments are simply to address changes that were made in the federal and state law. He stated that the intent was not to develop new standards or change existing standards, but to bring the Town's ordinance into

compliance with federal and state law. He stated that these are things the Town has to do and doesn't have a choice in order to be consistent with the laws.

Director Heard stated that he outlined in the staff report the intent of the text amendment. He added that prior to receiving the Town Attorney's comments; he wasn't anticipating that the Board would get through the entire amendment at this meeting. He stated that he wanted to focus on the changes of his initial review of the laws and the Town's ordinance as well as additional, potential changes that were suggested by the Town Attorney. He stated that he received written comments earlier in the day from the Town Attorney, a copy of which were provided to the Board at the beginning of the meeting. He stated that he reviewed the comments and added that there was nothing on the first page from the Town Attorney that led him to see any need for changes. He stated that on the second page, the Town Attorney was stating that there was a new category that federal law created for substantial modifications which also needs to be referenced. He noted that at the bottom of the third page under Application Process, substantial modifications would be added in two places.

Director Heard stated that at the top of the fourth page, the Town Attorney noted that co-locations were now a subset of an eligible facility request. He added that "eligible facility request" was a new term that was added by the legislation. He stated that the Town Attorney indicated that he didn't see a need to have both of those as separate categories. He stated that after reviewing the Town Attorney's comment, he agreed with it.

Vice Chair Fricker suggested that since this issue was not a matter of what the Planning Board may think or what Council wanted, but was a matter of compliance with state and federal law, that Director Heard and Town Attorney Hobbs come up with a document that does that and bring it back to the Board. He didn't think he was competent to discuss the issue.

Chair Blakaitis asked Director Heard if what he wrote was what Vice Chair Fricker just said. Director Heard stated that he was commenting on the changes that the Board would make as a result of the Town Attorney's memo. Member Murray pointed out that the Board just received the memo before the meeting started.

Vice Chair Fricker moved to table the issue until the Board's May 13, 2015 meeting, at which time to ask staff to come back with a document that it and counsel would recommend that the Planning Board review.

Chair Blakaitis clarified that Director Heard wrote a draft of the final text amendment. Director Heard stated that the original document the Board received in their packets was a draft without the Town Attorney's comments. He added that the draft was presented to the Town Attorney and he sent back his comments, which Director Heard presented to the Board at the beginning of the meeting. Chair Blakaitis clarified that the draft amendment in front of the Board did not include the Town Attorney's comments. Director Heard stated he was correct. Chair Blakaitis clarified that Director Heard agreed with the Town Attorney's comments. Director Heard stated that he did. Chair Blakaitis clarified that Director Heard was suggesting that the original draft be changed to match the one with the Town Attorney's comments. Director Heard stated he was correct. He added that he felt that there were changes to the draft that he would make based on the Town Attorney's comments.

Member Murray asked Director Heard if there were any comments from the Town Attorney that he disagreed with. Director Heard stated that at the bottom of Page 2, he felt the Town Attorney misinterpreted the intent of what he called “potential amendments”. He added that the Town Attorney thought those were things that were to be added into the ordinance. He noted that the “potential amendments” were actually items that would be removed from the existing ordinance. Chair Blakaitis agreed with Vice Chair Fricker wanting to table the issue.

Member Forlano didn’t think the Board had a right or privilege to argue with the state or federal system. He added that the amendment was what they required. He didn’t understand what the problem was. Chair Blakaitis thought the problem was that Vice Chair Fricker felt that the Town Attorney’s comments needed to be blended into the draft ordinance before the Board’s decision. Member Forlano asked if the Town Attorney’s comments were substantial. Director Heard stated that some have to be added to the ordinance and others require more discussion. Member Forlano agreed that the issue needed to be tabled.

Chair Blakaitis asked Vice Chair Fricker to restate the motion.

Vice Chair Fricker moved to table the issue until the Board’s May 13, 2015 meeting, at which time to ask staff to come back with a document that it and counsel would recommend that the Planning Board review. Member Forlano seconded.

Motion carried 5-0.

## **APPROVAL OF MINUTES**

### **Minutes from the March 11, 2015, Regular Meeting**

Chair Blakaitis moved to approve the March 11, 2015 minutes as presented. Member McKeithan seconded.

Motion carried 5-0.

## **OTHER BUSINESS**

None.

## **STAFF COMMENTS**

Director Heard stated that the other document that was before the Board was something that came in earlier in the day from the UNC School of Government. He explained that it outlined a new bill that has been put before the state legislature. He added that it was something that the NC Bar Association has been working on for a long time, updating and consolidating all of the different laws related to planning, zoning, building and development. He stated that the document in front of the Board was just for their information and added that the changes would not impact the Town directly. He stated that the proposed changes were not substantive, but re-organizing the statutes to make things consistent, as the laws have been passed over the better

part of a century. He thought the UNC School of Government summary did a good job in explaining it.

Chair Blakaitis asked if there items in the document that proposed on how towns do business with planning and development. Director Heard stated that it did and added that there were things that already existed and would not change the way a town does it, but reorganizing it so that it was all in one section and things related better with each other within the document so it made more sense. He thought it was possible that there would be a few minor changes coming out of it, but nothing that would change the way Duck does business.

## **BOARD COMMENTS**

Chair Blakaitis asked Vice Chair Fricker what he wished to send to Council with regard to the earlier discussions.

Vice Chair Fricker thought it would be helpful if the Board could reach a consensus and recommend to Council that it task the Board with looking at all elements of the Town's ordinances that deal with building height in the various flood zones. He added that the Board could say that they are asking for direction because it was perceived at the Board level that it was far too complicated, and sometimes inconsistent and unfair. He thought there may be an easier or better way to approach the issue, drawing on what other jurisdictions on the Outer Banks and other towns do and why. He suggested asking contractors to attend the meeting to give their views and input as well.

Member Forlano stated that when Vice Chair Fricker suggested the issue, he mentioned doing it globally. He asked if he was indicating that each home in each individual district had a unique problem. Vice Chair Fricker stated that he wasn't sure what the issues were. Member Forlano noted that something on the west side of Duck Road was different than one on the east side. He added that elevations could not be measured the same way across the board. Vice Chair Fricker stated that he wasn't familiar with some of the issues as those that are closer to the construction industry. He stated that he wants to understand the issues better.

Chair Blakaitis suggested that Director Heard give the Board a zone by zone analysis as to what the Town could gather from other towns that could be helpful and what the benefits were of what Duck already has in place. He thought the Board may go through it and come up with very few changes. Vice Chair Fricker agreed.

Member Forlano noted that the Planning Board went round and round with the issue in the beginning. He added that Olin Finch was very active in the discussions then. Chair Blakaitis thought Mr. Finch was instrumental with regard to the ordinance. Member Forlano agreed, adding that Mr. Finch was instrumental in getting the ordinance to where it currently stood, but thought it could be looked at again and refined more, depending on the zone. He added that each zone has its own unique issues. Chair Blakaitis agreed, adding that there may be a zone that won't have any changes needed.

Vice Chair Fricker asked Member Murray if he thought the request was useful. Member Murray stated that it was. Director Heard agreed to draft a memo to be reviewed by Chair Blakaitis and forwarded to Council.

**ADJOURNMENT**

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

The time was 7:28 p.m.

Approved: \_\_\_\_\_  
/s/ Joe Blakaitis, Chairman