

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
May 13, 2015**

The Planning Board for the Town of Duck convened at the Duck Meeting Hall on Wednesday, May 13, 2015.

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

Absent: Ron Forlano.

Also present were: Director of Community Development Joe Heard, Council Liaison Chuck Burdick and Permit Coordinator Sandy Cross.

Others Present: None.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for May 13, 2015 at 6:33 p.m.

PUBLIC COMMENTS

None.

OLD 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

Director Heard stated that the Board had a more complete document in front of them that had been reviewed twice by the Town Attorney as well as another member of the Town Attorney's legal team. He stated that the Board was attempting to bring the Town code up to date with standards from recent federal and state laws that have been passed regarding wireless telecommunication systems. He explained that the laws that were passed were ones that were largely proposed by lobbyists from that industry, so the intent of the laws adopted was to either provide greater flexibility or speed up the approval process to the benefit of the companies involved. He added that the changes also limit what a community can regulate and require the companies to submit.

Director Heard stated that, in the staff report, he tried to summarize the variety of amendments that were in the draft ordinance. He stated that they could be broken down into several different categories with the first dealing with terminology. He added that there were several new terms that were created as a result of the laws and for the Town's ordinance to clearly reflect those laws, staff needed to create definitions consistent with the laws for the ordinance. He stated that there were a few new terms that weren't in the original ordinance, with one being a definition for an "eligible facilities request". He explained that if the owner of a tower was modifying an

existing tower and it was a project that could involve co-location or replacement of existing equipment, it would be considered to be an eligible facilities request.

Director Heard stated that another term was “substantial modification”. He added that it came directly from the federal law as well as the FCC interpretations that were made after it. He explained that it refers to projects involving minor changes or modifications to an existing tower or antenna array. He added that if a cellular company is not increasing the vertical height by more than ten percent, or not exceeding twenty feet, whichever was greater; increasing antenna support structure by more than twenty feet; or increasing the square footage of the building where equipment would be stored related to the tower by more than 2,500 square feet, it now has to be given special consideration by the Town. He noted that it was a different process than a traditional approval process. He stated that the new terminology matches up with the federal and state terms in the laws.

Director Heard stated that another amendment was to administratively permit modifications to existing wireless communications facilities that did not substantially change the physical dimensions of the facility. He stated that several sections had the proposed changes where new guidelines were listed for the process on how the Town needed to go about approving them.

Director Heard stated that the third amendment would remove certain types of locational, technical, and business information that could no longer be required of an applicant. He added that the laws tell the local communities that they no longer have the right to require companies to prove where they would be proposing to locate the structure, which would be the best location or that they have no other alternatives. He noted that in the past, this was a key component of a lot of ordinances that dealt with telecommunication towers. He stated that the Town could no longer challenge them on these points. He added that the Town could no longer require them to submit business related information or things that may be proprietary. He noted that these changes are mostly found in Subsection E of the ordinance.

Director Heard stated that the fourth amendment would limit the time periods for review. He stated that it would be found in Subsection D of the ordinance. He stated that there were criteria on how quickly the Town has to process applications. For example, an eligible facilities request must now be processed within 45 days and is an administrative process. He stated that there were other standards that were adopted where Town staff could take longer than 45 days after submittal of an application to review it and be sure it contains all of the required information. He stated that there was another change in Subsection D(1) in that the Town had 150 calendar days to review an application and issue a written decision.

Vice Chair Fricker asked if the language in red in the draft ordinance was new language that wasn't in the ordinance before. Director Heard stated that it was. Vice Chair Fricker asked if the structure, language and organization came from Director Heard or was listed in whole from the federal statute. Director Heard stated that it was a combination. He added that he tried to minimize the changes to the ordinance with regard to the organization of it.

Director Heard stated that the fifth amendment involves setting parameters for use of technical consultants. He wasn't sure if it was something that the Town had ever had to avail itself of in the past, but it wasn't an uncommon practice. There were people and companies that make a

living by advising communities whenever they receive an application for a new wireless communication facility. He added that these people are well versed in the technical aspects of the proposal and most communities probably do not have this technical expertise. He pointed out that the state law placed very strict limitations on how a community could use these types of consultants, how much they could pay, and what they could pay them for. He noted that they were found in Section 156.058(D)(3) of the ordinance.

Director Heard stated that the sixth amendment involves improving the standards for abandoned wireless telecommunication facilities. He stated that this amendment was not one that was a result of the state or federal law, but a recommendation by the Town Attorney to staff. He added that if the Town ever came across such a situation, the ordinance prescribes a fair and reasonable way to address it. He noted that it was added as Subsection I in the ordinance.

Vice Chair Fricker asked if the first three paragraphs of Subsection I were authored by Director Heard, Council, and Town Attorney Hobbs or verbatim from the federal statute. Director Heard stated that it was authored by him with input from Town Attorney Hobbs. He added that the first subsection was pulled from another section of the existing ordinance and moved to the new section.

Director Heard noted that in the middle of Page 3 of the staff report, he had asked the Board to think about how the ordinance should be applied in looking at the districts where items were allowed and not allowed. He stated that in the table of the ordinance, all of the zoning districts in Town were listed and notated whether it was a Conditional Use Permit or something that was presently not allowed. He stated that there would be a new category for eligible facilities requests where they would have to be approved administratively and not through a Conditional Use Permit. He pointed out that under the C-PR District, the only properties in that district are the Town Hall/park and Army Corps of Engineers property. He stated that if the Town ever received a proposal for a tower, it might be worth considering the properties in the C-PR Districts as an option that may be less visible than a tower location in other areas. He noted that he didn't have any preference but wanted to bring it up for the Board to think about.

Chair Blakaitis asked who came up with the table in the draft ordinance. Director Heard stated that it was in the existing ordinance. Chair Blakaitis asked why it was in red ink if it was existing. Director Heard stated that they were changes to the existing ordinance. Chair Blakaitis clarified that everything in red were changes to the ordinance. Director Heard stated that the wording was changed, but most of the standards were identical.

Member Murray stated that even if telecommunication towers were allowed on Town property or the Corps of Engineers property, the most frustrating part was that the company could tell the Town where the tower would be located and that the Town did not have the option of telling them to put it elsewhere. Director Heard confirmed that the company could say that it doesn't fit within their search of where it would be needed.

Chair Blakaitis asked what recourse the Town had to turn down an application for a wireless tower. Director Heard stated that the way the ordinance was set up, in almost every instance where the Town would potentially allow a tower; it would be through a Conditional Use Permit. He added that the Planning Board and Town Council would have the opportunity to review an

application and determine other impacts besides the location. He noted that there may be instances where the Town could justify placing conditions on a permit. He stated that if it was to be approved, there would be ways to help mitigate some of the impacts. Chair Blakaitis clarified that the Town still had the option to do some of that. Director Heard stated he was correct. He stated that there were instances where a town could deny a Conditional Use Permit if it did not appear to comply with a standard of the Conditional Use Permit process.

Chair Blakaitis noted that it looked like the federal guidelines have been rewritten to favor the wireless community. He wondered how hard it would be for an applicant to comply with the regulations while telling the Town where they wanted the tower placed. He thought the Town would have to come up with good reasons to deny it or else it would have to be allowed. He added that there could be an uproar in the community over a tower being placed in Town.

Vice Chair Fricker noted that Director Heard was referencing two parcels of land. He asked if they were federal land. Director Heard stated that the Corps of Engineers' property is federal. Vice Chair Fricker asked if the Town or any municipality have the authority to dictate the uses of federal land. He didn't think it did and thought it was off the table for consideration. He clarified that if they wanted to install a tower, the Town couldn't require them to obtain a permit.

Vice Chair Fricker clarified that the only applicant for a tower on the Town's property would be the Town itself. He asked if it could be a third party. Chair Blakaitis didn't think so. He added that someone could come in and want to put a tower up on the Town property. Director Heard explained that the applicant would be the Town since it was the property owner. He added that, typically, the company would be the one that would do all the legwork.

Member Murray outlined a hypothetical scenario where Scarborough Faire Shops decided to subdivide its property with someone building a different shopping center. The new owner wanted to get away from a large oak tree, so they have it carved out as a small portion of the property. He stated that later on, a wireless telecommunications company finds the vacant lot in the V-C District and wants to put up a tower there, but would have to obtain a permit with the tower being constructed on top of the oak tree, since the Town's ordinance would permit them to cut the tree down as part of the development. He stated that the Town could point out that the back corner of the Town Park property could be used for the telecommunication company to construct their tower instead of cutting down the tree by leasing the property from the Town. He noted that the way the ordinance was written, the Town would have a hard time rejecting the Conditional Use Permit for removing the oak tree and constructing the tower. He thought the Town could offer the parcel of Town property as an option. Chair Blakaitis thought Member Murray's scenario was one that could happen and the Town could charge for the lease of property.

Vice Chair Fricker thought Member Murray's scenario was ridiculous. Director Heard stated that the Town of Nags Head has a tower that was constructed on its municipal property. Vice Chair Fricker noted that Duck was not Nags Head. Director Heard understood, adding that there were hundreds of communities that have entered into arrangements like Member Murray's scenario. He noted that it could be a significant revenue source for a municipality. He pointed out that Dare County makes a small fortune by leasing space for wireless communication antennas on its water tower in Duck.

Council Liaison Burdick asked if the water tower was part of the same zoning district. Chair Blakaitis stated that he wasn't sure. Director Heard stated that it wasn't, it was zoned V-C.

Member Murray clarified that all of the language in the draft ordinance came from the Town Attorney and Director Heard working together with regard to the interpretation of compliance with state and federal law. He added that it could be discussed, but there weren't any options. He stated that what Director Heard proposed was an ordinance where the Town has no other control, could throw a company a bone and avert what the Town's residents may deem as more disastrous than a tower tucked away on a corner of the Town's property. Chair Blakaitis thought Member Murray was correct, but for the most part, the Board was discussing altering two items for one piece of property. He added that if Member Murray's statement was correct, then the Board should discuss whether or not it should be allowed.

Council Liaison Burdick thought there was no incentive for the Town to make the change. He added that Council could always change the ordinance if there was a scenario like Member Murray described, in the future, that could benefit the Town. Member Murray pointed out that the Town would not know about the scenario until an application was received. He wondered if an ordinance could be changed after the date of application. Vice Chair Fricker thought it could be changed, but it wouldn't apply. Chair Blakaitis thought the applicant could re-apply for the permit after the ordinance was changed. Director Heard stated that the applicant could not submit a permit application on property for a use that isn't allowed under the current zoning regulations. Chair Blakaitis stated that he agreed with Council Liaison Burdick's comments.

Chair Blakaitis asked the Board if they felt the table should be amended for the C-PR district. Member Murray thought it should be amended. He asked if the change would allow towers administratively or through a Conditional Use Permit. Director Heard stated it would be allowed with a Conditional Use Permit. Vice Chair Fricker asked if the draft ordinance would remain as it was presented. Director Heard stated that the designation in the C-PR district row in the table would be changed from "Not Allowed" to "CUP". Chair Blakaitis thought it was fine to make the change.

Council Liaison Burdick thought if it was changed to a CUP, the Town would lose the protection of the Corps of Engineers property if it was ever sold. Member Murray pointed out that the Town did not have that protection currently and a sale would not mean an application would come in.

Vice Chair Fricker stated that he felt good about the draft ordinance in most respects. He stated that his main concern was on Page 5. He stated that Subsection E(4), with new Subsection a(4) should have the following introductory language: "...the following is a list of things that should be submitted with the application..." He further suggested that the introductory language for Subsection E(4) read: "...the following documentation must be submitted as part of any application for the approval of the siting of new towers..." He stated that he had an issue on Page 10 regarding the section concerning abandonment and removal. He noted that the definition of abandonment included, "...a cessation of use of a structure for a period of time specified elsewhere in the ordinance..." He stated that this was not a reasonable or rational definition of abandonment. He added that abandonment was an act that can occur

instantaneously. He stated that Page 11 seeks to define abandonment but only in terms of a period of time which on Page 10(I), Subparagraph 2, was twelve months. He pointed out that twelve months did not define abandonment; but when the Town could do anything about it. He felt that the entire section was poorly written and didn't do what the Town wanted it to do, which was to have a clear, single, rational definition for abandonment and not confuse it or Section (1), Subparagraph 2 with a period of time after which the Town could take action.

Director Heard noted that the definition of abandonment came verbatim from the state's model ordinance. Vice Chair Fricker understood but felt the language was terrible and didn't make sense. He was surprised that the Town Attorney didn't pick up on it. Director Heard stated that the section was reviewed more thoroughly than the rest by the Town Attorney. Vice Chair Fricker felt the whole section was fuzzy and thought the Board could edit it but also thought that the Board could forward the draft ordinance to Council with their comments and let them deal with it.

Chair Blakaitis asked if the Town had a right to change the definition of abandonment since it was coming from the federal document. Director Heard stated that it wasn't in the federal document, but was in a model ordinance that was prepared for the State of North Carolina. He added that the School of Government was involved in drafting the model ordinance. Chair Blakaitis agreed with Vice Chair Fricker's theory that the Town didn't need to follow the model ordinance if it wasn't in the federal law. Vice Chair Fricker thought it would be simpler to do so.

Council Liaison Burdick thought Item 1 did not pertain to abandonment and should be stricken from the draft ordinance. He added that the tower could be taken out of service for maintenance or a storm could knock it out of service. He noted that it had nothing to do with abandonment. He felt that the rest of the section seemed to move along better. Vice Chair Fricker pointed out if the term abandonment was defined and clarified with what was in Subparagraph 2, it did not purport to be a definition, but a timeframe after which the Town could take action.

Vice Chair Fricker thought the problem was that the definition of abandonment did not set forth what it actually meant and only referred people elsewhere for a timeframe. He added that it had nothing to do with the act of abandoning something. He reiterated that that was the problem with the definition. Council Liaison Burdick pointed out that the definition was exactly the same wording with what came from the state's model ordinance. He added that Director Heard and Town Attorney Hobbs took the definition, verbatim, and added it to the draft ordinance. Vice Chair Fricker stated that that happens a lot when drafting legislation.

Chair Blakaitis didn't think the Board was bound by the word "abandonment" as it was written in the draft ordinance. He suggested that the language read: "...cessation of the wireless support structure, antenna or equipment or wireless communication..." He wasn't sure if the word "permanently" or a closer definition of what abandonment was in the dictionary should be put in after the sentence. He suggested striking Item 1 on Page 10 and clean up Item 2 as it refers to a time period.

Member McKeithan noted that the section that stated: "...notifying the Town Manager if the tower is placed out of service..." He thought it may be helpful or necessary but didn't feel it belonged in that section. He asked if it could be put somewhere else in the ordinance. Chair

Blakaitis thought it could be left there if Item I was changed to “Abandonment, Removal or Temporary Cessation of Service”. He thought there needed to be a distinction between a temporary cessation of service and a permanent one.

Member Murray asked how the Town would know whether a tower was transmitting or not. He thought the ordinance was written for the telecommunications industry so they would have exactly 12-14 months to decide what to do with a tower that wasn't useful to them anymore. He pointed out that one would not know if the tower were abandoned or not until someone stopped maintaining the tower's warning lights. Vice Chair Fricker stated that the process began with a finding by the Town regarding abandonment. Chair Blakaitis added that the finding that the Town was never notified that service ceased for a certain time period. He thought it would mean something if it came down to litigation. Director Heard stated that if it came to litigation or to the Board of Adjustment, the Board of Adjustment had subpoena power. He added that it would be up to the Board of Adjustment to determine when the date of abandonment was. Vice Chair Fricker thought it would also help if abandonment was better defined. Member Murray wondered if the Board knew enough about telecommunications to know when a tower was abandoned. He thought the Board was getting hung up on the terminology of abandonment. He wasn't sure what the definition should be.

Council Liaison Burdick asked if other areas of the ordinance had abandonment defined with regard to properties. Vice Chair Fricker thought it was defined with regard to houses. Chair Blakaitis thought the term abandonment could be kept in the ordinance with a definition and then put forward what the intended use would be. He thought the definition should read as follows: “...the cessation of use of a wireless support structure for its intended use and any associated equipment used for wireless telecommunications activity...” Vice Chair Fricker suggested adding: “...with the intention to give up the use, maintenance and control of the equipment...”

Director Heard quickly reviewed the Town Code and did not find any definitions for the term “abandonment”. Council Liaison Burdick stated that he was surprised there wasn't a definition since the term was used for other things in the Town's ordinances. He thought it may be good to look at it from that standpoint. Chair Blakaitis noted that it wasn't defined in other areas. He thought it could be defined better so it could be used in other areas.

Director Heard clarified that the new definition should read: “...cessation of the use of wireless support structure, antenna or equipment for wireless telecommunications activity with the intent to give up the use, maintenance and control of the facilities...”

Chair Blakaitis directed the Board to look at the table in the draft ordinance to decide if they were happy with the changes. He noted that zoning district C-PR has been recommended to be via CUP. Member Murray thought it should be allowed under a CUP for the entire C-PR zoning district. Member McKeithan stated that he was in favor of it. Chair Blakaitis stated he was also in favor of the change. Vice Chair Fricker noted that existing wireless facilities – eligible facilities request – would still be done administratively. Vice Chair Fricker suggested taking out the word “and” after the semi-colon in Item A(2)(e) on Page 1 of the draft ordinance.

Vice Chair Fricker moved to approve text amendment Section 156.058 of the Town Code as amended with the rewording of the definition of the term “abandonment” and the inclusion of

counsel recommended language on Page 11 of the draft ordinance, subparagraph I(5), and the amendment to the table to include CUP approval for the C-PR zoning district on Page 2. Member Murray seconded.

Motion carried 4-0.

NEW BUSINESS

None.

APPROVAL OF MINUTES

Minutes from the April 8, 2015, Regular Meeting

Vice Chair Fricker had corrections on Pages 5 and 6. Member Murray had corrections on Pages 1, 2, 3 and 4.

Member McKeithan moved to approve the April 8, 2015 minutes as amended. Member Murray seconded.

Motion carried 4-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Director Heard gave an update on the projects going on in Town to the Board. He stated that the Hazard Mitigation Plan has been approved by FEMA. He added that Council will be looking to consider a resolution to adopt the Hazard Mitigation Plan at their June 3, 2015 meeting. He stated that at Council's May 6, 2015 meeting, they reviewed the request regarding the Town's building height standards and authorized the Planning Board to proceed with it. He anticipated that the Conditional Use Permit that was originally scheduled for this meeting will be presented at the next meeting for three small wireless communications antennas that would be mounted on top of the Kimball's Kitchen Restaurant at the Sanderling Resort.

Director Heard stated that Council will be considering a resolution at their May 20, 2015 meeting in opposition to a bill that's in the State House and Senate presently, an act to eliminate a county or municipality's ability to enact or enforce zoning ordinances related to residential building design, including the number of bedrooms in a residence. He noted that similar legislation has been discussed for a few years, but this is the first time it's come to fruition as far as reaching a point when the full legislators can vote on it. He stated that the original bills resulted from concerns about some communities have fairly strict design standards for residences. He stated that other provisions were added to limit the ability of a community to limit the number of rooms to a residence, which would negate the Town's current standards limiting the size of a house to eight bedrooms.

BOARD COMMENTS

Member Murray asked if Council was looking at a resolution related to off-shore drilling. Council Liaison Burdick thought Council had passed a resolution on it.

ADJOURNMENT

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

The time was 7:59 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman