

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
May 10, 2017**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, May 10, 2017.

Present were: Chair Joe Blakaitis, Vice Chair Marc Murray, Tim McKeithan, James Cofield, and Sandy Whitman.

Absent: None.

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

Others Present: None.

Others Absent: None.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for May 10, 2017 at 6:36 p.m.

WELCOME TO NEW BOARD MEMBER SANDY WHITMAN

Chair Blakaitis welcomed Sandy Whitman as the newest member of the Planning Board.

ELECTION OF PLANNING BOARD OFFICERS

Chair Blakaitis stated that every May, the Planning Board elects officers for the Chair and Vice Chair positions. He stated that any Planning Board member could make a motion and then a vote would be held.

Chairman

Member McKeithan moved to nominate Joe Blakaitis to the Chairman position. Member Cofield seconded.

Motion carried 5-0.

Vice Chairman

Chair Blakaitis moved to nominate Marc Murray to the Vice Chairman position. Member McKeithan seconded.

Motion carried 5-0.

PUBLIC COMMENTS

None.

OLD BUSINESS

None.

NEW BUSINESS

Text Amendment Ordinance 17-05: Proposal to Amend the Town Code with Necessary Text Amendments to Address Changes and Issues Associated with the Town's Upcoming Beach Nourishment Project

Director Heard stated that as a result of the beach nourishment project, there were a few things that will change with regard to how the Town does business. He stated that he and Permit Coordinator Sandy Cross sat down and looked through the standards in the Town's ordinance related to beaches and dunes. He stated that they took a comprehensive look at the Town Code to make sure there aren't any loose ends or additional standards that will need to be changed. He stated that they identified a couple of items that the Board needs to focus on and, as part of that, some definitions that need to be added to clarify the changes.

Director Heard stated that the draft ordinance the Board had in front of them contains the proposed changes. He explained that the Town currently has a natural dune and with all dunes, there is vegetation that extends to a certain point. He added that the Division of Coastal Management (DCM) views this line of natural vegetation as the area of the dune that is stabilizing and measures building setbacks from that point. This first line of stable natural vegetation (FLSNV) is established on a case by case, property by property basis. He stated that Permit Coordinator Cross will typically establish this line, but a DCM representative from Elizabeth City is sometimes involved if there is a question or dispute.

Director Heard stated that the beach nourishment project will effectively establish an artificial dune, extending the natural dune eastward and putting a large amount of sand on the beach. He stated that there is potential for vegetation to grow in that easterly direction. The perspective that the DCM has taken over the years is that property owners should not benefit by extending the vegetation line eastward as it is not the natural location of the dune. He explained that under DCM rules, there will be a static vegetation line that replaces the first line of stable natural vegetation in the project area.

Director Heard stated that surveys of the existing FLSNV have been completed. Those lines will be established and that will be where future measurements will be taken from in most cases. He stated that when defining the term "lot area" in the draft ordinance, there is currently a definition that references measurement from the FLSNV. He added that because a third of the Town will have a static vegetation line in the beach nourishment project area, staff saw a need to add it for clarification that the lot size will be measured from whichever of the lines applies to the property. He noted that every property will have either static vegetation or first line of stable natural vegetation.

Member Cofield stated that he can envision a question arising from a property owner in looking at the static vegetation line as opposed to the FLSNV. He asked if they are different in some instances. He further asked if there is a static and natural line for the same property. Director Heard stated that there is a situation that could develop where there would be both types of lines on a single property. He stated that the static vegetation line is a snapshot of the FLSNV in the weeks preceding the project. He stated that it is based on the FLSNV taken at a specific date and specific point in time and then it will carry forward. Member Cofield asked if it is permanent. Director Heard stated that the static vegetation line will not change unless replaced through some future project or change in the rules.

Vice Chair Murray clarified that there is no time period/sunset on the location of the static vegetation line. Director Heard stated that that is the way it is set up. Chair Blakaitis asked if the static line will change if the property develops a FLSNV further toward the ocean. Director Heard stated that the static vegetation line will not change in an easterly direction. He added that it can change in a westerly direction to be consistent with the CAMA rules. Vice Chair Murray clarified that the definition as written for lot area is an either/or, whichever is greater, not either/or for whichever is smaller. He added that for lot coverage purposes, an owner can still use the tax record until it's reassessed to take the static line into account. Director Heard stated that he isn't sure when or how the Dare County changes occur, but if it is different, then it is an option that a property owner has when determining the lot area. Vice Chair Murray noted that it is determined by the deed and in the event the property is sold and surveyed and the square footage has changed, then it has changed. He clarified that the way the draft ordinance is written, the static line or the tax assessment record will determine the area for coverage purposes only. Director Heard stated he is correct. He explained that the intent is to try to minimize the changes and focus on the issue.

Member McKeithan noted that there are cases when the reference point can become the natural vegetation line if the natural vegetation line shifts to the west. Director Heard stated he is correct. He noted the draft ordinance has a definition of "static vegetation line". He stated that the definition used in the draft ordinance was pulled almost verbatim from definition in the CAMA regulations. He added that he amended the definition so that it reads: "...landward of the first line of stable natural vegetation..." as a point of clarification for consistency.

Director Heard noted that the last two lines of the definition for "static vegetation line" address the comments of the Board. He explained that once the static vegetation line is established, it will be used as a reference point for measuring setbacks. He pointed out that the very last line reads: "In all locations where the first line of stable natural vegetation is landward..." He explained that if the vegetation line moves westward, then that FLSNV will be used for the reference point for measuring the setbacks, not the static vegetation line.

Chair Blakaitis pointed out that it will be used for measuring the setbacks, which is the ruling the Board had put into place in 2016. He asked if it will also be used for lot area or just setbacks. Director Heard stated staff is not proposing it to apply to lot area, adding that the owner will still be able to use the lot area. Chair Blakaitis clarified that the definition of lot area will remain consistent, but the setback could be subject to change. Director Heard stated he is correct. He

stated that this definition was pulled directly from the CAMA definition. Staff feels it is important to be consistent. Chair Blakaitis noted that it is confusing.

Vice Chair Murray echoed that it is confusing. He asked if it is simpler or more accurate to have it read: "...in all cases regarding setbacks, the most limiting interpretation will be used. In all cases regarding lot area, the least limiting interpretation will be used." Chair Blakaitis asked if it is true. Director Heard stated that the way that these standards are proposed to be written, vice Chair Murray's summary is correct. Chair Blakaitis thought it makes sense.

Member Cofield stated that, based upon the beach nourishment project, he agrees with the assumption that the natural vegetation line will likely move. He added that outside of the beach nourishment project, he sees it likely that the vegetation line will move westward. Director Heard noted that the ordinance does not change the standards along other areas of the beach, it will only apply in the beach nourishment areas. He explained that there is a FLSNV everywhere, but the new static vegetation line and how it is applied will only apply in the project area. He added that the other properties will be treated just like they have always have been treated.

Chair Blakaitis suggested that the Board review Vice Chair Murray's suggested wording and if it makes sense, it can be added to the draft ordinance. Vice Chair Murray thought the concepts are already in the draft ordinance and questioned if the Board needs to add his suggested wording. Chair Blakaitis stated that it will not be added, but asked if there is a way to clear it up because the way Vice Chair Murray stated it makes more sense than the draft ordinance.

Vice Chair Murray stated that in Subsection 156.124(C)(2)(b), the last sentence states: "In cases where the FLSNV is not evident on the subject property, this line shall be determined by interpolating a straight line between the nearest identifiable FLSNV on the adjacent properties directly to the north and south of the subject property." He asked how a homeowner, who is being told that his/her FLSNV is moving west, would say the FLSNV is not evident and use the lines to the north and south, which will be the static lines. He asked how the static line will not become an interpolation of the whole Town. Permit Coordinator Cross stated that the static line is the static line unless there is a clearly evident FLSNV that is west of the static line. Vice Chair Murray asked what will happen if the line is not evident. Permit Coordinator Cross stated that the owner would have to defer to the CAMA LPO that goes out and stakes the FLSNV.

Vice Chair Murray felt that it being in the ordinance creates a major opportunity for arguing with the CAMA LPO. Permit Coordinator Cross agreed, adding that the LPO's attend annual training on these topics and establishing FLSNV. She stated that there is some backing as to what is done. Vice Chair Murray agreed, but thought it seems that if there is wording in the ordinance to allow interpolation from the adjacent lots, then a large section of the FLSNV will have to move west before any individual property owner will accept it without extreme protest. Permit Coordinator Cross pointed out that that section of the ordinance has not changed from its current wording.

Chair Blakaitis asked if it has caused any problems in the ordinance to date. Director Heard stated that it has been something that has been applied in the past. Vice Chair Murray agreed, adding that it was applied before the beach nourishment project and the survey of the entire nourishment area has established a line. He explained that on a 100-foot-wide lot, only one in a

series of lots, it seems like an individual homeowner could say that if everywhere else the Town is allowed to interpolate between adjacent properties. So, why is the Town not interpolating on the homeowner's property. He added that in an area where a FLSNV moves west for several properties, he thinks the two-line scenario the Board is discussing makes sense. He stated that if, for some reason, one individual property does not grow or the vegetation dies and moves west, it seems like the interpolation between adjacent properties clause will become more of a problem than it has been in the past.

Chair Blakaitis asked if it is part of the Town's ordinance now, why it should cause more of a problem when the beach is nourished. Vice Chair Murray thought that people who pay thousands of dollars in taxes to nourish the beach will accept not being able to develop east of the static vegetation line, because it is the nourishment area. He thought if the vegetation dies on a lot and the setback keeps growing to the west is a much tougher pill to swallow after paying thousands of dollars in taxes to pump sand. Chair Blakaitis thought the Town can apply the rule in the beach nourishment area. Vice Chair Murray stated that it is unclear how it will apply because there is an established static vegetation line.

Director Heard stated that a simple solution could be a matter of adding a statement in parentheses at the end of this section reading, "(this clause does not apply to properties subject to static vegetation lines)", which will make it clear that it is not intended to apply to that scenario. Chair Blakaitis noted that it will take care of Vice Chair Murray's objection. Vice Chair Murray stated that it will take care of his objection in the sense of clarification, but will not take care of it in the sense of unfairness, but that is for the Board to determine. Director Heard pointed out that this standard is already in the CAMA Act and not an additional burden that the Town is placing upon homeowners. These standards are already enforced under a CAMA permit.

Chair Blakaitis asked if there is any problem in clarifying the ordinance the way Vice Chair Murray had suggested. Director Heard stated that there isn't. Chair Blakaitis asked if it will hurt anything. Director Heard responded that it will not. Chair Blakaitis proposed that the wording change suggested by Director Heard be made. Vice Chair Murray didn't think there is a problem with the language or with the language that is currently in the ordinance. He stated that the problem for him is that they are both in the ordinance together and it doesn't say when it should be applied.

Director Heard explained an additional proposed change which consolidates new and old standards regarding beach bulldozing into a new subsection. Chair Blakaitis noted that the Town does not prohibit beach pushes. He asked if the ordinance changes these provisions. Director Heard replied that staff had moved that subsection into the new subsection that deals with beach pushes. He stated that a definition was added for beach bulldozing so it is consistent with the definition from the CAMA rules. Staff also proposed a definition for "beach fill project area", where the limitations on beach bulldozing apply.

Chair Blakaitis clarified that beach bulldozing is prohibited throughout the beach nourishment area. Director Heard stated that he is correct. Chair Blakaitis clarified that a homeowner not in the fill area can perform beach bulldozing. Director Heard stated he was correct, adding that there are still standards and limitations on when they can conduct a beach push. Chair Blakaitis asked if there are limitations on whether an owner can pull a permit based on the criteria listed in

the draft ordinance. Director Heard stated that it are limitations in the project area, but noted that if it is a Town-sponsored project, such as re-nourishment, then bulldozing is allowed. He added that a beach maintenance project authorized or performed by the Town would also be allowed. He stated that if there is significant erosion after a natural disaster, the Town Council will have the ability to issue a general waiver if it is determined that bulldozing is needed to help protect improvements or preserve the beach. Chair Blakaitis asked if such permits can be issued to a homeowner. Director Heard stated that they can, once the Council approves the concept. Council Liaison Burdick asked if it is consistent with the Town of Nags Head's ordinance. Director Heard stated that it very similar to Nags Head's standards.

Director Heard stated that bulldozing can be authorized by the issuance of a general waiver by Town Council in instances where there is documented beach or dune erosion that results in an imminently threatened structure. Council Liaison Burdick pointed out that Council has the authority to allow beach pushes and bulldozing whether or not it is in the ordinance. Vice Chair Murray asked if that is somewhere else in the Town's ordinances. Council Liaison Burdick stated that Council has the authority to make that decision. Member McKeithan agreed, but thinks the draft ordinance reads that someone cannot conduct beach bulldozing in the beach nourishment area. He thought the statement is important for clarification. Council Liaison Burdick didn't think it is needed and reiterated that Town Council has the authority to make those decisions at any time without it being in the ordinance. Chair Blakaitis thought it is fine to leave it in the ordinance for clarification. Vice Chair Murray stated that he is comfortable with leaving it in the ordinance.

Member McKeithan stated that Director Heard had put in the staff report a reference to what the Town of Nags Head has done and contains two other sections that aren't in the draft ordinance – the operator must have a copy of the CAMA permit and each day that the property is not restored to its pre-bulldozed condition will be a separate violation. He asked if Director Heard decided that these standards do not apply to the Town of Duck. Director Heard stated that these standards are already addressed in Duck's ordinances, so he didn't feel a need to add them in the draft ordinance.

Member Whitman asked if the beach bulldozing limitations are only for the beach nourishment project area. Director Heard stated he is correct.

Chair Blakaitis stated that Section 156.124(C)(2)(b) will apply for all oceanfront properties. Director Heard stated he is correct. Chair Blakaitis clarified that the new wording for the ordinance is in red ink. Director Heard stated he is correct.

Vice Chair Murray asked if these rules are permanent. Director Heard stated that they are, and that it is written in a manner that, should the Town have a need to conduct a beach nourishment project in another area of Town in the future, it will apply to that area without having to write another ordinance. Vice Chair Murray clarified that the homeowners in the nourishment area will never see an advantage of sand or vegetation accretion. Director Heard stated that he is correct in regard to the setback lines remaining the same. He added that the ordinance is set up to be consistent with current CAMA regulations. He noted that there has been some conversation with the Coastal Resource Commission regarding the possibility of amending

CAMA rules in the future to allow some encroachment in that area if it does stabilize over time, but that is not something that has been adopted at this point in time.

Vice Chair Murray asked if, in the event the sand stabilizes and the FLSNV line moves east, the Town will wait for the CAMA requirements to change. Director Heard stated that it is not being applied to a specific situation and is not what he was suggesting. He added that he was commenting that there are conversations that an owner should benefit from a stabilized, vegetated dune by moving the setback line eastward. He stated that such change be made, it will be in general in nature and not as it applied to an individual property. Council Liaison Burdick noted that the Town can make the regulations stricter than CAMA, but not looser.

Chair Blakaitis moved to approve draft Ordinance 17-05 with the noted changes made. Member McKeithan seconded.

Motion carried 5-0.

APPROVAL OF MINUTES

Minutes from the April 12, 2017, Regular Meeting

Member Cofield moved to approve the April 12, 2017 minutes as presented. Chair Blakaitis seconded.

Motion carried 5-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Summary of May 3, 2017 Town Council Meeting

Director Heard gave an update on the May 3, 2017 Council meeting to the Board and audience.

Project Updates

Director Heard updated the Board and audience about several Town projects.

BOARD COMMENTS

Member McKeithan stated that there was a fence recently constructed along the bike trail near the Bias Shores subdivision where the path is at an incline and someone could fall off the trail and roll into the road. He stated that it was a concern of his and thought it was a great improvement. Permit Coordinator Sandy Cross noted that the fence was erected by the Oceancrest subdivision, as that stretch of the bike path is on their property.

ADJOURNMENT

Member Cofield moved to adjourn the meeting. Chair Blakaitis seconded.

There was no vote.

The time was 7:41 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman