

**TOWN OF DUCK  
PLANNING BOARD  
REGULAR MEETING  
December 13, 2017**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, December 13, 2017

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

Absent: James Cofield and Sandy Whitman.

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

Others Present: Chuck Straub.

Others Absent: None.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for December 13, 2017 at 6:33 p.m. He welcomed new Council Liaison Jon Britt and added that the Board was looking forward to working with him.

Chair Blakaitis thanked former Council Liaison Chuck Burdick for all of the work he did as the liaison for the Planning Board for the past six years. He asked that Councilor Burdick be recognized on behalf of the Planning Board at Council's January 3, 2018 meeting.

**PUBLIC COMMENTS**

None.

**OLD BUSINESS**

None.

**NEW BUSINESS**

**Text Amendment Ordinance 17-16: Proposal to Amend Section 155.02 of the Subdivision Ordinance by Updating Standards for Exempt Plats and Expedited Review of Other Types of Subdivisions in Compliance with the N.C. Session Law 2017-10**

Director Heard stated that this proposal and the next one are intended to address new standards adopted by the State legislature. The Town is amending in its ordinances to be consistent with State law in both cases. He stated that Ordinance 17-16 will add an additional type of exempt plat for subdivisions required by probate court. The ordinance also adds a streamlined, administrative approval process for certain types of small subdivisions that are very unlikely to ever occur in Duck. As it involves the division of five acre parcels into three or fewer lots, these

subdivisions are more likely to happen in a rural community. He stated that the ordinance is drafted based on the State's language and staff is recommending it for the Board's consideration.

Chair Blakaitis moved to recommend the change in the ordinance as presented. Member McKeithan seconded.

Motion carried 3-0.

**Text Amendment Ordinance 17-17: Proposal to Add an Informal Appeal Process from a Building Inspector's Decision in the Buildings & Structures Ordinance (Chapter 151) Consistent with the Recently Adopted N.C. Session Law 2017-130**

Director Heard stated that this text amendment is in response to a provision that requires local communities to add an informal appeal process from a building inspector's decision. He added that such decisions can include the results of an inspection. He noted that it is an internal process with regard to how it is set up. He added that it will create an additional step with the local government before an appeal is presented to the Department of Insurance at the state level.

Chair Blakaitis asked why the Department of Insurance would be involved. Director Heard stated that they are involved in the interpretation and enforcement of building codes.

Member McKeithan clarified that the ordinance will be adding a local level of appeal before it goes to the Department of Insurance. Director Heard stated he is correct. He added that it is not a bad thing. He stated that staff would often have the conversation about a potentially controversial situation before on the decision is made in the first place.

Vice Chair Murray stated that, in a lot of cases, when a contractor knows that there is something that will be an issue, it will be discussed with the building inspector and the Department of Insurance before a home is physically built. Director Heard stated that the change does not preclude a contractor or property owner from pursuing any other options, it is just a requirement that a local community has for an additional review process.

Chair Blakaitis noted that the staff report references the issue as an informal appeal process, but it was also referred to as an informal review process. He asked if the inconsistent wording will cause any problems. He felt it should be one or the other. Director Heard stated that the review process involves reviewing the appeal. Chair Blakaitis pointed out that the proposal noted that it is an informal appeal process with the two criteria as establishing an internal appeal. He added that in the staff analysis, it has the following language: "...each inspection department shall implement a process for an informal, internal review..." He wasn't sure if it will be confusing or if it should be corrected. Director Heard stated that, technically, it is an appeal application, but the wording in the draft ordinance is verbatim from State law. He added that he will correct the wording in the staff report to use consistent terminology.

Member McKeithan moved to recommend Ordinance 17-17 be sent to Council as presented. Vice Chair Murray seconded.

Motion carried 3-0.

**Text Amendment Ordinance 17-18: Proposal to Amend Section 156.126 of the Town Code by Revising Standards for Residential Construction Based on Lot Size to Include Maximum Standards for the Size of Residences**

Director Heard stated that this is an item that came up subsequent to the Board's last meeting. He noted that it is not something that the Board was aware of previously. He stated that at the Town Council's mid-month meeting, Council held a closed session and when they came out, they authorized the Planning Board to work with staff and the Town Attorney on potential revisions to the Town's limitations on the scale of residential development in the Town of Duck.

Director Heard stated that a few years ago, there was a law passed by the State legislature that eliminated a local government's right to set standards or limitations on the number and types of rooms. He added that both Town Attorney Robert Hobbs and the UNC School of Government interpret the law to mean that the Town can no longer limit the number of bedrooms. He noted that the Town had a tiered system that limited the number of bedrooms based on the size of a lot, with a maximum of eight bedrooms. He stated that the Board was presented with two options - limiting the size based on the density of the property (the occupancy permitted under the health department permit). For example, a four-bedroom home can have an occupancy of 10 – two per bedroom plus an extra allowance to accommodate an additional occupancy. He added that it was proposed all the way up to the maximum of 18 occupants for the largest lots.

Director Heard stated that the other option presented was a tiered system based on the maximum square footage for the house. He noted that these options were given consideration with a lot of discussion, but ultimately the Board recommended the option based on the occupancy approach and Council approved that option. He added that it has been in the Town's ordinance for a few years and there have not been any issues with it to date. However, staff has recently faced a significant issue with it with a situation where building plans were drawn up for a 12 bedroom, 28 occupant house and submitted to the Town. The application was denied and the individual went back and revised the building plans, with the only difference being that three of the bedrooms were relabeled as a media room, library and billiard room. He stated that the Dare County Environmental Health Department took the plans at face value and issued a permit for a nine bedroom, 18 occupant house. Under the standards of the Town's ordinance, staff had no choice but to issue the permit. The house is presently under construction.

Director Heard stated that the reason it became an issue is that subsequently, a neighboring property owner forwarded to staff an advertisement of the property for rent as a 12 bedroom, 28 occupant residence. He added that the Town had some choices on how to deal with the situation, and Council recognized that there are some issues with the way in which the current ordinance can be enforced. He thought Town Attorney Hobbs and Attorney Ben Gallop did a good job of summarizing that the Town has tied its existing standards for residential density and occupancy to a permit issued by another agency (the Dare County Health Department) with the expectation that the health department will enforce its standards in a fair, reasonable and appropriate manner. He added that it has become apparent that the Town cannot rely on that expectation in that the health department will issue permits that, even though, by law, they were required to review the building plans and should have determined that the plans were for a 12-bedroom house, with greater than 18 occupants. He stated that they chose not to do that and it put the Town in a

situation where it is difficult to enforce some type of limitation on the maximum size or density of a residence. At this point in time, the Town may be better served by creating a different standard over which it has full control.

Director Heard stated that Council has authorized the Planning Board to look at the issue again and staff has gone ahead and completed some research from a couple other towns on the Outer Banks – Southern Shores and Nags Head – who both adopted ordinances shortly after Duck’s in 2015. He added that both were based on the maximum square footage approach. He stated that he put out the question to the statewide Planners Listserv and received four additional responses, all of which involve square footage standards in one form or another.

Vice Chair Murray asked for confirmation that an applicant turned in an application to the health department for nine bedrooms, sleeping 18 people. Director Heard stated he is correct. Vice Chair Murray asked if the applicant went back and obtained another permit from the health department that they have not given to the Town. Director Heard stated that they have not. Vice Chair Murray asked if the applicant has septic approval to put in the field that would accommodate 28 people. Director Heard stated that staff was told that the health department approved construction of a system sized to accommodate 28 occupants. Vice Chair Murray inquired if it was the first application that was approved by the health department. He noted that the system that is on the permit on file with the Town has the same amount of drain field. Director Heard stated he is correct. He added that the health department issued the permit for a nine bedroom, 18 occupant home, even though it is designed and presumably being constructed to accommodate 12 bedrooms and 28 occupants. Vice Chair Murray thought a 12-bedroom home will accommodate only 24 occupants. Director Heard stated that occupancy is not always two occupants per bedroom. Vice Chair Murray asked if staff communicated with the health department and they said that there is nothing that could be done about the 28 occupants. Director Heard stated that staff communicated with the health department before they made a decision to approve the application, but within a week it was issued for a 9 bedroom, 18 occupant residence.

Vice Chair Murray asked if it has been suggested to the health department that they enforce the issue with the rental advertisement. He added that it seemed like the applicant only had a permit for a nine bedroom, 18 occupant home. Member McKeithan agreed. Permit Coordinator Cross stated that she asked that question and was told that they can advertise it as a 28-occupant home. Vice Chair Murray asked if that was in writing. Permit Coordinator Cross stated that it is.

Member McKeithan stated that it did not make any sense if it was issued by the health department. He asked if the applicant is only authorized to construct a 9-bedroom home. If they are advertising for 12 bedrooms, why can the Town not take legal action based on that. Director Heard stated that the Town’s rule reads that the occupancy limitation is based on the septic permit issued by the health department. He added that the septic permit states that it is approved for 18 occupants, so the only way the Town can do anything is if the health department changes the permit back to a 12 bedroom, 28 occupancy home. He stated that if they choose to enforce the standards and change the permit, then the Town can tell the applicant they are out of compliance.

Vice Chair Murray asked how many parking spaces were shown on the site plan. Director Heard stated that 14 are shown. Vice Chair Murray clarified that it is currently allowed under the Town's ordinance. Director Heard stated he is correct. The town regulates the minimum, but not maximum, number of parking spaces. Vice Chair Murray thought if the Town is going to write an ordinance that deals with density, the Board needed to look at parking instead of density. Director Heard thought the result of that approach might exacerbate the problem. He added that if the applicant is twisting things to make it work in their favor, he doesn't think they would hesitate to build the home with nine parking spaces, which would leave them under-parked. Then, they would have five other vehicles trying to find a place to park elsewhere on the property or in the neighborhood. Vice Chair Murray pointed out that the house would never be occupied because the Certificate of Occupancy would not be issued. Director Heard pointed out that it would, because they would be compliant with the permit for nine parking spaces and 18 occupants. Vice Chair Murray stated that he isn't sure how they could do that. Director Heard stated that if the health department issues a permit for 18 occupants, they would simply build nine parking spaces in order to meet the requirement. Vice Chair Murray agreed. Director Heard added that if they are trying to get around the rules, the owner would rent out the house with only nine parking spaces to serve the 14 vehicles that would potentially be coming to the home. Vice Chair Murray disagreed, adding that the Town would be able to engage the owner and rental company and let them know that they cannot advertise for 24 as they only have a permit for nine bedrooms. Director Heard thought that the Town can potentially regulate density, but enforcement would be an overwhelming task. Vice Chair Murray pointed out that it is the status quo and the Town seems to have an interest in the number of bedrooms. He thought the Board's task is to find a way to limit the number of bedrooms through a different approach. He added that the tables in the draft ordinance show that there is a vast difference in the square footage of a three-bedroom house versus another three-bedroom house. He felt that the previous issue was that the square footage is a very blunt instrument to handle density and density is what the Town wants to deal with, which was why he considered parking.

Vice Chair Murray thought that the Town is in a position where it can deny the Certificate of Occupancy for not making the health department permit on file compliant with the site. He added that by limiting parking, it will limit density and some of the lot coverage issues. Director Heard stated that parking limitations are ultimately based on the health department permit for the number of occupants, which is where the issue lies. He added that the parking approach is a more indirect way of regulating density than what the Town currently does.

Chair Blakaitis asked if at the Council mid-month meeting, that Council was advised of this situation and if that was why it was referred to the Planning Board. Council Liaison Britt stated that he is correct. Chair Blakaitis clarified that Council is concerned about the issue. Council Liaison Britt stated that Council is concerned. He noted that it was closed session, so he is limited as to what he can tell the Planning Board, but Council did come out of the meeting wanting the Planning Board to look at the issue.

Director Heard stated that after gathering information on what other communities are doing, it appears that other communities have addressed the issue by using a couple of different approaches, but it all ties back to regulating the maximum square footage. He stated that there are three options in front of the Board with the simplest being similar to the Town of Southern Shores in that it has an overall maximum size for residences and is not be a tiered approach.

Director Heard stated that if the Board is not as concerned about what happens on smaller lots and the main point is to not see extremely large houses, then establishing an overall cap will work.

He added that an approach that is more consistent with the way Duck is currently doing things is setting a maximum size by tiers. He noted that he updated the chart with more current information. He explained that in regard to maximum size of residences in each tier, staff is proposing that the suggested size will accommodate almost every single house that has been built in Duck since incorporation in the tiers. He stated that it seems that the proposal of the tiers is reasonable as it will accommodate almost everything that has been built in Duck. He reminded the Board that it is one approach by using the tiers, broken up by 5,000 square foot increments.

Director Heard stated that another option is using a floor area ratio, which is a direct percentage of the lot size. A house can be built to a certain square footage based on the size of the lot. He noted that there are concerns with using a pure form of floor area ratio with no caps as a 50,000-square foot lot could accommodate a 20,000-square foot house. He added that without some adjustments, this option may not work as well in Duck. Director Heard offered a tiered approach that reduces the floor area ratio as the size of the lot increases. He stated that he is attempting to get the allowances more in line with the Town's current standards. He pointed out that the Board may opt to change the numbers, but he is attempting to propose reasonable standards for property owners, but still put effective caps on each tier.

Vice Chair Murray asked if there is any information about the number of houses of the existing houses in Duck that comply with current standards. He asked if there was a sense of the non-compliant properties and which are residential or second homes versus rentals. Director Heard stated he does not have that information. He added that he originally had a spreadsheet with all homes listed on it, but it would not tell him everything. Vice Chair Murray clarified that the Dupont house is really big, but is a residential property. Chuck Straub of 101 Station Bay Drive was recognized to speak. Mr. Straub provided information about the Dupont property. Vice Chair Murray stated that there is no monetary incentive to build a large rental home, only a monetary incentive to put the elements in a rental house that make it more valuable as a rental, which are bedrooms, pools and theater rooms. He cautioned the Board that, as a Town without a lot of year-round residents, Duck wants to keep itself in a position to draw in year-round residents. If one or two out of 800 have been drawn here by the opportunity to live in a large oceanfront house, the Town may lose one or two if standards won't allow it.

Chair Blakaitis stated that, from a distance, the Town used to control the bedrooms in a house, but cannot do it anymore. He added that he does not see a lot of problems when the Town controlled the bedrooms. He stated that Town Attorney Hobbs already stated that regulating square footage is a more defensible solution to the problem than what is currently being done. He asked what the harm would be in picking one of the options. He asked if it would be worse than controlling bedrooms, the same or better. Vice Chair Murray didn't think it will accomplish anything. He added that it is lowering property values for no reason. Chair Blakaitis asked if the Town does nothing, what will happen. Vice Chair Murray opined that nothing will happen. He added that a big house will be built and everyone else on normal size lots will be limited by lot coverage. He thought if the Board pursues parking or some other creative way to get it into the Town's purview, then he is willing to be more aggressive. He added that the Board may not

accomplishing what it set out to do. He stated that density is the issue. Chair Blakaitis didn't think either option will be any worse than what the Town currently has in place.

Vice Chair Murray asked if the Town should keep the tiered bedrooms and the new information be added to the ordinance, or if it is replacing the current standards. Director Heard stated that it can be done either way. He stated that he doesn't see how it will hurt to add a new approach while maintaining the current standards. He noted that it may not be as defensible if both are in the ordinance as one may hold over the other. Vice Chair Murray clarified that it will have to be left in if the Board goes with one blanket, total square footage. Director Heard stated that Duck would not have to. He noted that the Town of Southern Shores does not as they have one sentence in the description of every zoning district in the town that states that it maxes out at 6,000 square feet.

Vice Chair Murray stated that if the Board wants to do it through square footage, he is fine with it. He added that people will still be building eight bedroom homes on 15,000 square foot lots. He stated that that bedrooms make money. Council Liaison Britt didn't think Vice Chair Murray is wrong with his comments. He isn't sure if the square footage option is what the Town is trying to accomplish.

Chair Blakaitis asked what was done before bedrooms were controlled. Vice Chair Murray stated that they went to a maximum allowed by lot size. He added that if the size is changed, it will allow homeowners to build lower quality, smaller houses with a lot of bedrooms. Chair Blakaitis asked if it was done previously. Vice Chair Murray stated that they couldn't as the bedrooms were limited by the square footage of the lot. Chair Blakaitis thought the homeowner can designate bedrooms as other things, such as a library or billiard room. Vice Chair Murray agreed, adding that no one seemed to have an issue with it. He added that an owner can have gotten one or two rooms past the Town. Chair Blakaitis agreed. He stated that it cannot be done anymore. He asked what would be the next best thing. He wasn't sure doing nothing will make anyone happy.

Vice Chair Murray stated that he saw the value because he saw what happened in the other municipalities, which he thought Duck wants to avoid to a degree. He stated that he is interested in another approach to put this back under the Town's control. He added that he is not clear on how the parking won't help, because he thought limiting the amount of parking installed to the amount of bedrooms on a septic permit will help. He wondered how it will not allow the Town to deny a Certificate of Occupancy. Director Heard responded that only nine parking spaces would be built. Vice Chair Murray asked what the Town would normally do when an eight-bedroom house rents to 16 families. Director Heard stated that the Town does not seek out or enforce occupancy violations. Vice Chair Murray asked if there was an issue, aside from being irritated with the health department. Director Heard stated that neighboring property owners are upset about the large house situation. Vice Chair Murray asked if the Town instituted the tiered system, would the 6,000-square foot minimum keep 28 people out of the house. Director Heard stated that it might. He wasn't saying that the owner couldn't possibly squeeze that in, but a 9,893-square foot house would not be built with all of the amenities included.

Vice Chair Murray isn't sure what the issue is. He asked if the neighboring property owner's issue is the grandeur or the parking and occupancy. Permit Coordinator Cross stated it is the

parking and occupancy. Vice Chair Murray thought it is odd that the Town has not been enforcing the ordinance as it was written years ago, even though it went to the trouble to amend it and now it's worried that it may not be able to be enforced. Director Heard stated that the Town does not regulate density. Vice Chair Murray pointed out that the Town did previously when it regulated the number of bedrooms. Director Heard stated that the Town did not regulate occupancy at all. Chair Blakaitis stated that it does not look good if the Town didn't say it is trying.

Director Heard stated that maximum size is an indirect way of regulating density and is not a perfect way. He added that the points made are valid and that is why the Board decided to recommend the approach it did last time. He stated that, legally, the Town does not have many options to prevent some of the worst-case scenarios. Chair Blakaitis agreed that the Town does not have many options at all. He thought the question is where the Board should go next – do nothing, try to do something that either bolsters what is currently in place, or replace what is currently in place. He didn't think the Board can leave what is currently in place on the books, adding that he thinks it needs to be replaced. Director Heard stated that if there is additional information that the Board would like to see, they can let staff know.

Council Liaison Britt thought it may be worth challenging the Council as to what the primary concerns are. He pointed out that the issue came from the big houses that were being built before the Town incorporated. He thought letting Council know that the rules will allow eight-bedroom houses on 15,000 square foot lots will be good.

Vice Chair Murray asked if the house in question is an oceanfront one. Director Heard stated it is. Vice Chair Murray clarified that it has 120-foot setback and CAMA's 5,000 square foot rule will not help. Director Heard stated he is correct.

Council Liaison Britt asked how many residences were built and became non-conforming when the new rules went into effect. Chair Blakaitis didn't think the home in question could be built on most of the lots in Duck. Council Liaison Britt pointed out that there are rules in that an owner can build back what they have.

Chair Blakaitis thought the Board can do two things – move on something now or wait until there was a full board and try to get more guidance from Council. Vice Chair Murray asked if the discussion Council had on the issue was in closed session. He asked if there will be additional discussion by Council in open session. Council Liaison Britt stated that Council will discuss whatever changes the Planning Board recommends. He added that if Council cannot decide, it will be discussed. Vice Chair Murray stated that the Board knew the sentiments of some members of Council. He asked if the Board can continue to think about the issue and then resolve to ask specific questions to Council. Chair Blakaitis stated that he didn't think it is out of line, but how the questions are asked had to be carefully crafted. He suggested after discussing it with the full board and receiving information from Council, the Board can tell Council that they needed some guidance and see where it goes. He stated that he is willing to send something forward at this meeting, but isn't hearing anything concrete coming forward from the Board. Director Heard stated that, rather than sending forward a recommendation, the Board could write a memorandum to Council outlining their concerns and asking for direction.

Chair Blakaitis recommended that the Board send a letter to Council. Council Liaison Britt suggested that the Board give specifics as to what the Board is looking for and what the problem is. Chair Blakaitis agreed, adding that the Board needs to develop some specifics as to why the Board is taking this position. Director Heard asked if the Board wants him to draft a letter. Chair Blakaitis thought Director Heard can take from this meeting that there is some uncertainty that the concepts the Board has on the table will do any good. Council Liaison Britt thought that it may not address the issue. Chair Blakaitis agreed. Vice Chair Murray thought Town Attorney Hobbs can be asked if there are other options. Director Heard stated that he will run it by him.

Vice Chair Murray noted that two options were discussed – the tiered option and the blanket maximum size option. He asked if Council had a preference and if they felt one was more effective over another. He stated that staff inquire with the Town of Nags Head as they have the closest thing to a tiered lot size and house size. Have they seen a lot of bedrooms crammed into smaller houses or are there other mitigating factors in their standards. Chair Blakaitis thought it is information that Director Heard can find out for the Board. He thought it should be sent to Council with reasons why the Board is concerned.

Member McKeithan stated that he is interested as to why the Town of Nags Head's maximum square footage was 5,000 and in the two proposals that Director Heard presented, it had a maximum square footage of 6,000 and 6,500, which is considerably more than the Town of Nags Head. Director Heard concurred that the current proposal for Duck is more generous. He explained that it came from staff's analysis of lot sizes and what has been built over the last 15 years in Duck, then trying to establish standards that accommodate the type of development the town has seen. Member McKeithan noted that there are some extremely large homes in Nags Head that would far exceed the 5,000-square foot rule. Director Heard stated that they have a district on the oceanfront with different standards. Council Liaison Britt also noted that it was only recently established in 2015.

Vice Chair Murray stated that the Town of Nags Head enacted an ordinance like this and then had a different zoning district that allows larger homes. He added that the Town of Nags Head's housing portfolio is much broader than the Town of Duck's. The reason he is adamant about his concern is that he feels that Duck needs to be more careful. He stated that the guidelines and breakdowns that Director Heard provided the Board are thorough and make good sense. He added that he likes how the floor area ratio was changed as it is a creative approach. He thought that with some adjustment, it may be effective. Chair Blakaitis stated that he likes it better than the other option. Vice Chair Murray stated that he does on principle, but feels that in practice, it will be tricky to get the ratios right.

Chair Blakaitis stated that, pending anything that is received from Council, they will take that into consideration and develop a good solution. Director Heard stated that he will draft a memo for the Planning Board to review to make sure it addresses all of their concerns. Chair Blakaitis stated it is a good idea.

## **OTHER BUSINESS**

None.

**STAFF COMMENTS**

**Summary of December 6, 2017 Town Council Meeting**

Director Heard gave an update on the December 6, 2017 Council meeting to the Board and audience.

**Project Updates**

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

**BOARD COMMENTS**

None.

**ADJOURNMENT**

The meeting was adjourned.

There was no vote.

The time was 8:07 p.m.

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