

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
September 11, 2019**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, September 11, 2019.

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

Absent: Member James Cofield.

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

Absent: None.

Others Present: Robert Wetzel and Jay Blöse.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for September 11, 2019 at 6:32 p.m.

PUBLIC COMMENTS

None.

OLD BUSINESS

Ordinance 19-04: Text Amendment Proposal to Establish Review Standards for the Village Commercial Development Option as a Special Exception

Director Heard reminded the Board that at their last meeting, they reviewed a draft developed over a period of months that included a scoring system to help quantify if a proposal meets certain design and development criteria. He stated that after closer review of that concept, the Board decided to go in a different direction. He noted that the Board wanted the scoring system removed from the draft ordinance. He explained that two different approaches were discussed, thus the Board members have two draft ordinances to consider – one concerting the scoring criteria into guidelines and the other removing specific criteria entirely.

Chair Blakaitis asked if the second option gives Director Heard more latitude to look at an application. Director Heard didn't think it did. He explained that second option is not much different than what the Town is currently working under, where there are only general criteria.

Vice Chair Murray pointed out that both options have the general criteria section in them, which contains limitations. Director Heard stated that it is proposed in either option, putting limitations on what type and amount of relief an applicant can apply for. He added that it isn't criteria for

making a decision because the Board would need to make additional general findings during their decision, which are outlined in Subsection C.

Member Whitman stated that he is in favor of Option A of the two draft ordinances. Member McKeithan stated that he is also in favor of Option A as it gives some guidance to the person presenting a request to the Town Council and Planning Board. Vice Chair Murray stated that he is in favor of Option B, but would be fine if the rest of the Board members are in favor of Option A.

Chair Blakaitis asked Vice Chair Murray why he is in favor of Option B. Vice Chair Murray thought it is most similar to what the Town currently has in place but offers some limitations on what the Board can grant. He thought Option B is more of an incremental change, which is less jarring to the system. He added that guidelines in Option A will not be very jarring either. Chair Blakaitis and Member McKeithan agreed.

Chair Blakaitis understood Vice Chair Murray's preference, but stated he is more in favor of Option A as he likes the fact that the point system was eliminated but is still woven into the guidelines. He wasn't sure where the Board should go but thought Option A is the best choice.

Town Attorney Hobbs asked Director Heard how he envisions the Planning Board and Council will apply the criteria in Option A. He further asked if it is a checklist or something more vague. Director Heard stated that at the bottom of Page 3, the first sentence describes the intent of how they will be used. He added that they are things that the Planning Board and Town Council would review and consider. He explained that the Board spent a lot of time defining some of the characteristics of Duck Village that one would ideally find in a proposed project. He stated that the applicant and staff will look at the criteria and guidelines to help them design a proposal that is consistent with the ordinance.

Town Attorney Hobbs thought expanding on the intent of the guidelines may be useful for institutional knowledge purposes for future Planning Board and Council members that are not part of this process as they will be asked to apply the guidelines. He asked what happens if a particular project triggered one of them but doesn't meet the guidelines. He further asked if it is an automatic no or if there is some other consideration that would be made. He stated that he is looking at the draft ordinance from a challenge standpoint in that if an applicant is denied. He noted that it does not need to be a black and white type of definition, but it is where his thoughts are. He realized that the concept is supposed to have a lot of generalities and be fluid. He wondered if there should be more language added under the purpose of the guidelines.

Chair Blakaitis asked where it would be inserted in the draft ordinance. Director Heard stated that in Subsection (C)(3), the language read as follows: "The subject property...contains many of the characteristics outlined in the guidelines..." He explained that that was how it ties into what the Council can base their decision on with regard to the general findings.

Town Attorney Hobbs inquired that the Town is not going to require a certain number of criteria to be met. Member McKeithan stated that the Town will not. Town Attorney Hobbs noted that with certain projects, some of the guidelines will not be applied. Director Heard stated he is correct, adding that it was never the intent that all of the guidelines would be necessary for any

particular project. Chair Blakaitis thought the Board has as much latitude now as they had with the table, if not more. Vice Chair Murray stated that there is much more latitude, adding that the table had a score that an applicant had to reach in order to be approved. Director Heard stated that the concept previously developed had the guidelines in a chart with a scoring system, where an applicant had to achieve a certain number of points. Town Attorney Hobbs asked if the draft ordinance is supposed to be more subjective. Director Heard stated that it is the intent.

Jay Blose of 105 Waxwing Court was recognized to speak. Mr. Blose understood that the Planning Board is taking what was originally proposed as a standards framework and re-orienting them as guidelines which would effectively be talking points. He stated that there is nothing that outlines how the guidelines can be enforced. Director Heard pointed out that the ordinance states that it has to contain many of the characteristics outlined in the guidelines, which are subjective standards. Jay Blose stated that it didn't define when a project should be approved. Director Heard concurred with this statement.

Vice Chair Murray stated that the end result – if the applicant doesn't follow the suggestions – is disapproval of the application. He stated that the Board is taking standards and turning them into guidelines that are not just talking points, because if the Planning Board is not convinced by the applicant that they are meeting the guidelines in a real way, then the applicant can be denied. Jay Blose agreed, noting that the Planning Board has a framework to do that effectively and clearly with the previous draft ordinance as opposed to the guidelines in the draft ordinance. Vice Chair Murray agreed, but added that with the scoring system, the Board would be required by law to approve. So, the Board felt that the draft ordinance gives them more leeway.

Town Attorney Hobbs thought the draft ordinance makes sense. He stated that the driving purpose behind the ordinance is that there may be projects and applications that contain characteristics that could not have been anticipated but may still be consistent with what the Town wants to do in the Village Commercial District. He thought the guideline process bolsters that idea that the Town cannot anticipate every characteristic that someone will need an exception from, but otherwise the project meets the overall scope of what is trying to be done in the Village Commercial District.

Member McKeithan moved to submit to the Town Council approval of Ordinance 19-04 as presented in Attachment A, which establishes guidelines. Vice Chair Murray seconded.

Motion carried 4-0.

Ordinance 19-05: Text Amendment Proposal to Remove all Criminal Sanctions and Penalties from the Duck Town Code.

Chair Blakaitis reminded the Board members that at their last meeting, there was some doubt regarding what standards the Planning Board is and is responsible for and which standards they have no control over. Director Heard stated that Town Attorney Hobbs was asked to attend the Planning Board meeting to answer questions. He stated that Town Attorney Hobbs broke the original ordinance into two ordinances, noting that the Board had before them an ordinance that only deals with development-related chapters of the Town Code. He explained that the intent is to change all the references concerning criminal sanctions to civil penalties. He added that there

is a separate ordinance that does not require the Planning Board's review as it deals with chapters not under the purview of the Board. That ordinance will go directly to Town Council and be heard concurrently with the draft ordinance in front of the Board.

Town Attorney Hobbs stated that the genesis behind the issue is that municipal enforcement of criminal sanctions is rare. He stated that even if fines are levied for the pursuit of the sanctions and the Town receives penalties from it, the Town does not keep the funds as they go to the school board as required by State law. He stated that his firm has been giving advice that just having civil sanctions makes the most sense financially as the Town can spend its time and energy enforcing those instead of the criminal ones. He stated that there is earlier legislation that requires each town and city in North Carolina to provide a list of criminally enforceable ordinances to the General Assembly by December 1, 2018, which has been extended to November 1, 2019. He added that it is somewhat unclear as to what the General Assembly is trying to do with it as there is a penalty in theirs that if it is not completed by the deadline, then a municipality is not allowed to adopt any more ordinances related to criminal enforcement.

Town Attorney Hobbs stated that if the Town elects to enact the two ordinances, then effectively all criminal sanctions will be removed, and a follow up letter can be sent to the General Assembly indicating that the Town of Duck does not have any criminally enforceable sanctions in its ordinances. He stated that a comment was made by the Board at their last meeting as to why the penalty is the same throughout the ordinance. He explained that the ordinance either states one amount or refers back to Section 10.99. He added that the reason for that is that he does not have much other factual rationale to go by as far as the amount of each fine. He didn't think it is what he was charged with in that regard – to come up independently with what those penalties should be for each particular type of ordinance. His firm did it a simpler way where they rely on one section that the penalty would be at least \$50.00 and not more than \$1,000.00 per violation. He stated that in the Board's wisdom with regard to the ordinance as well as the Town Council's; it can be tweaked to make wholesale changes throughout the Town Code. He added that another option would be to come up with a table where there is one section with all the civil fines and the corresponding section numbers and whenever there is a change, the table could be changed instead of changing each individual ordinance. He thought once they were set, it is rare that the fine amounts will be changed.

Chair Blakaitis thought after reading the Planning Board minutes, Town Attorney Hobbs knew that the Board is in favor of what needs to be done but is unsure about sections of the Town Code that Council is familiar with. He stated that the Board does not have a lot of discussion on the issue. Town Attorney Hobbs stated that his initial impression was that the Board's action will only be with regard to dealing with the portion that pertains to the Planning Board. Chair Blakaitis agreed.

Member Whitman asked who would levy the penalties and the role of the Board. Director Heard stated that staff does not consult with the Planning Board or Town Council before advising someone that they are in violation. He stated that the fine depends on the type of violation and every day it was in violation was a separate offense, so it can build significantly over time. He added that as far as collecting the fines, it is ultimately the Town Council's decision as to whether they wish to proceed and how much they wish to pursue collecting. He noted that it is on a case by case basis.

Vice Chair Murray asked if such policy was laid out in the ordinance. Town Attorney Hobbs thought it is the intent but isn't sure it expressly stated that. He thought that is generally how these types of penalties are administered by any city. He added that if the governing bodies want to defer having a specific dollar amount stated and have the exercise for removing that discretion, then it is the governing body's prerogative.

Chair Blakaitis asked why the Town would want to remove that prerogative. Vice Chair Murray stated that he doesn't want to remove it; he is just wondering how someone being fined will know that it is in their best interest to not pay the fines on a daily basis while fixing the problem and then throw themselves on the mercy of the Council. He noted that it isn't expressed anywhere. Director Heard explained that before someone receives the official notification letter and fines began, they are told what the fines will be. He added that unless it is a health or safety matter that needs immediate attention, staff does not get to the point of fining someone unless they have been ignoring the issue and not dealing it with for a significant period of time. He noted that there would typically be multiple forms of communication with the last one outlining what the fines will be. He stated that the notice of violation formally starts the fine process.

Chair Blakaitis asked Vice Chair Murray if he is thinking that the fines should be put up front and made more concrete. Vice Chair Murray stated that he is confused. He realized why the Board is doing this with this particular ordinance but is curious that since it is going to be entirely civil, the violation is between the Town and the individual with no one else looking at it. He stated that he is curious where the policies are enumerated. Town Attorney Hobbs stated that they aren't. He thought it added to the flexibility for Town staff to evaluate each violation on a case by case basis in determining the best way to approach them. He thought there is a process that is used, and he isn't sure if the Town Code needs to be micromanaged. He thought it is helpful for Director Heard to have some level of discretion on timing and content of the various communications. He added that the severity or lack of severity of the violation and past history of habitual violators are all things that need to be taken into consideration. He thought the draft ordinance gives staff a fair amount of flexibility which he thinks is a good thing for this type of enforcement. Chair Blakaitis agreed.

Vice Chair Murray stated that in a commercial setting, Town Attorney Hobbs' comments made sense to him. He added that as a citizen of the Town, if he is given a stop work order or a letter of condemnation for the use or occupation of a building, it would be odd to him for all of the authority to deal with it is now between the homeowner and Director Heard. He noted that the Town presently has no incentive to pursue fines since the school board receives the money, but if they are civil penalties, there is a perverse incentive for the Town to begin fining people. He noted that he is not suggesting that the Town will do that, but it is strange for him to vote with no other guidelines in the ordinance.

Chair Blakaitis asked Vice Chair Murray if they should be tied together. Vice Chair Murray stated the he suggests some enumeration of the procedure. Town Attorney Hobbs asked if it is for each section or in general terms. Vice Chair Murray stated it would be in general terms. Town Attorney Hobbs stated that he can investigate a process to be incorporated into the ordinance that staff needs to follow. He stated that he is not administering it on Director Heard's level so the reverse of Vice Chair Murray's hypothetical situation is an individual who has a

residence and completes a very small remodel, the Town would then have to follow a specific process that may be unfair to that person or it may be a type of violation that would not warrant the heavy-handed process that may be set forth in the ordinance that would also have to be used for a major violation on a major commercial project. He thought the way it is set up allows Director Heard to have some common-sense approaches on how significant a violation it is and who the Town is dealing with, if the offender is habitual or one that doesn't know any better.

Chair Blakaitis thought what Town Attorney Hobbs stated made sense, but if the Board tries to come up with every circumstance for every different type of situation, the ordinance will need to be changed and it will be a lot longer. Vice Chair Murray understood, but wants to make sure that he is understanding clearly that, prior to adoption of the draft ordinance, there is a disincentive for the Town to pursue legal action against community members unless the offense is egregious because there is no financial gain or very little chance of it. Town Attorney Hobbs stated that there are some cases that are solely criminal offenses, but he isn't sure which ones without looking at them carefully. He thought the goal is to remove the criminal part, but in many cases, there already is a civil penalty. He thought when Director Heard's department has utilized enforcement procedures like this, they generally rely on the civil part and not necessarily the criminal part. He added that another angle is that if it is not being used, then the question becomes if it was a moot point to have it in the ordinance if it isn't a favored remedy.

Vice Chair Murray asked if the fine has a limit. Town Attorney Hobbs stated that it differs. He explained that in most instances, it refers back to Section 10.99 in the Code which was \$50.00 - \$1,000.00. He added that he found when going through the Code, there were instances where the amount is different. He stated that in Chapter 154.99, the fine is \$100.00 to \$1,000.00. He wasn't sure what the distinction is or why that is the case. Town Attorney Hobbs stated that when the ordinances were revised or initially prepared for the Town when it incorporated, they were likely pulled from a number of sources and there may be some inconsistencies. He stated that the differences may be the result of that, and the Board has the discretion to modify it to conform the range back to what the others are. Director Heard noted that the zoning ordinance has a maximum fine of \$500.00 per zoning violation. He stated that when looking at a building code violation, staff is generally putting a placard on a building that is considered unsafe, adding that they want the person to be motivated to fix the unsafe condition immediately. He stated that for a sign violation, that isn't a life or death situation that needs to be corrected immediately, but staff wants things to be fair to other businesses and consistent by complying with Town standards. He stated that there are reasons why the Board may have different amounts with regard to the fines, but it isn't needed as part of this ordinance.

Chair Blakaitis thought the fine amounts are so close that it doesn't matter. He thought that the rewrite of the ordinance meets the objectives of the Planning Board and felt that Town Attorney Hobbs' explanation also addressed the Board's concerns.

Chair Blakaitis moved to recommend Ordinance 19-05 be sent to Town Council as presented. Member McKeithan seconded.

Vice Chair Murray pointed out that there is a fine for a missed inspection which is half of the building permit cost if it generally exceeds \$1,000.00 for new construction. He asked if it needs to be changed in the draft ordinance. Director Heard stated that a reinspection fee isn't the same

thing as what was in the draft ordinance as it is a fee and not a penalty. Town Attorney Hobbs stated that the Board can eventually consider a separate section or table and list each one and make changes. Chair Blakaitis suggested that the draft ordinance be passed first.

Motion carried 3-1 with Vice Chair Murray dissenting.

NEW BUSINESS

None.

APPROVAL OF MINUTES

Minutes from August 21, 2019, Regular Meeting

Vice Chair Murray had a correction to Page 2 of the minutes.

Chair Blakaitis moved to approve the August 21, 2019 minutes as amended. Member Whitman seconded.

Motion carried 4-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Project Updates

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

October Meeting Date – October 16, 2019

Director Heard reminded the Planning Board members that their October meeting was rescheduled to be held on Wednesday, October 16, 2019.

BOARD COMMENTS

Member Whitman stated that he will not be at the October 16, 2019 meeting as he will be having surgery.

ADJOURNMENT

Member McKeithan moved to adjourn the meeting. There was no second or no vote.

The time was 7:32 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman