

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
April 14, 2021**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, April 14, 2021.

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

Absent: None.

Also present were: Council Liaison Sandy Whitman, Director of Community Development Joe Heard, and Senior Planner Sandy Cross.

Absent: None.

Others Present: Town Manager Drew Havens; Jay Blöse; Philip Ruckle; and Public Relations Administrative Assistant Betsy Trimble.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for April 14, 2021 at 6:31 p.m. He noted that it is a virtual meeting and those watching remotely are muted. He stated that if anyone watching remotely wants to make a comment, they can indicate by raising their hand and/or submitting comments through the chat feature in Zoom.

PUBLIC COMMENTS

None.

OLD BUSINESS

None.

NEW BUSINESS

Ordinances 21-01 and 21-02: Text Amendment Proposals Comprehensively Amending the Town's Zoning Ordinance and Subdivision Ordinance to Comply with Recently Adopted State Legislation in NCGS Chapter 160D

Director Heard stated that Chapter 160D of the North Carolina General Statutes was the first major recodification and modernization of municipal and county development regulations in many decades. He explained that the process of developing the revisions was initiated by the Zoning and Land Use Section of the North Carolina Bar Association in 2013 and completed with the passage of the law on July 11, 2019. He added that during the process, drafts were reviewed, and comments received from a variety of stakeholders including the UNC School of Government, attorneys, local governments, planners, and the development fields. He stated that

consensus changes were included in the enabling legislation while debatable or controversial measures requiring further consideration were not. He added that in order to conform with the new statutory framework, all municipality and county development standards in the state are required to be updated by July 1, 2021.

Director Heard stated that in order to comply with the standards of North Carolina General Statute Chapter 160D in a timely manner, the Town contracted with Stewart Engineering to conduct a thorough review of the Town's Zoning and Subdivision ordinances. He noted that Stewart has provided a memorandum in the Board's packets outlining the proposed amendments as well as marked up copies of the ordinance amendments.

Director Heard pointed out that the proposed amendments are not intended to change the standards of the Town, adding that a majority of the recommended amendments involved the addition of definitions, wording changes, and minor updates to existing standards and processes to achieve consistency with the new State statutes. He stated that the following amendments involved necessary changes to approval processes:

1. Conditional use permits and special exceptions no longer exist as such but are consolidated into a special use permit process.
2. Subdivision review is now solely an administrative function.

Member McKeithan pointed out that under Definitions, it stated the following: "...the subdivision administrator shall be appointed by the Town Council..." He asked Director Heard if he is the subdivision administrator. Director Heard stated that he is but would need to be formally appointed by the Town Council.

Chair Blakaitis asked how adopting the official zoning map will be different from what is already in existence. Director Heard stated that the map would cover the entire Town and not just address the zoning of one property that may be under consideration.

Vice Chair Cofield asked for clarification that the Planning Board needs to review most of Chapter 160D and does not have any options regarding the recommendations, particularly with respect to special use permits. Director Heard stated that the Board does have options. He explained that Planning Board review of special use permits is not a best practice, particularly from a legal standpoint, but communities are not expressly prohibited from having the Planning Board involved in the review of special use permit applications. He added that it is an option for the Town to continue allowing the Planning Board to serve that function.

Vice Chair Cofield thought it would be helpful to the Board members to know where they have options as they are making a recommendation to the Town Council. He stated that if he had not asked the question, he would have assumed that the Planning Board did not have an option.

Chair Blakaitis clarified that it would be on a case-by-case basis. Director Heard explained that the Planning Board's role is not something that he wants to change with regard to the Town standards and how it operates. He added that this is the only instance where there is an option, which is to remove the Planning Board from that process entirely.

Vice Chair Cofield pointed out that having the Planning Board removed from the process entirely is being recommended. Director Heard disagreed. He explained that the Board is currently part of the review process and staff is recommending, even though it was suggested that it may not be a best practice, that the Planning Board continue in that role because the Council members have relied upon the Board for insights and to vet situations before they come before the Town Council.

Vice Chair Cofield thought he was misled by what the Planning Board's responsibility is in this situation. He wondered if he was misreading the information. Director Heard explained that the Planning Board would continue to review site plans that are associated with special use permits, which is what the Board presently does. Vice Chair Cofield agreed, adding that the Board does not approve special use permits. Director Heard stated he is correct, noting that the Planning Board never had that authority as the final approval is purely a Council decision. He added that the Planning Board's role is looking at site plans, how the site functions and whether it complies with Town standards. He stated that the legal advice concerning best practices is being identified because if the Board oversteps those boundaries, it could cause issues for the Town. He pointed out that there are no changes proposed to the Planning Board's powers because the community has had success with this system. It could be looked at again if the Town has any concerns.

Member Morton clarified that the Planning Board can talk about issues with regard to a special use permit as they come up, but once the recommendation is made and goes to Council, it would effectively be an administrative recommendation. The Town Council will have to hear all of the facts presented during the public hearing and make their own decision while not taking the information the Board gave them into consideration. Director Heard stated that it depends on the topic. He explained that the Planning Board may recommend appropriate amendments or conditions that fall under the parameters of the site plan and how the site functions without going into other aspects of the proposal. He stated that the way attorneys might look at things, even having those discussions may be borderline, but if the Planning Board is not making a decision, then that may be something fine going forward in a court, but it was hard for anyone to say in each individual case. Vice Chair Cofield pointed out that it has been done in the past with other proposals where the Planning Board recommended the area where employee parking should be.

Member Murray pointed out that it is a traditional role of the Planning Board because most of the applications for special uses are made by businesses and business ownership is overwhelmingly non-residents who do not get to vote for Town Council. He added that if they did, he thought the motivation would be to shorten that process. He stated that he would be open to discussing not hearing those applications. Vice Chair Cofield agreed.

Member Murray pointed out that on Page 160 under Recusal, it appears to strike the need for members of advisory boards to recuse themselves. He asked if members would still be allowed to recuse themselves. Director Heard clarified that the Planning Board is part of the process but not the quasi-judicial decision-making body. He thought it advisable from a legal standpoint for the Planning Board to comply with these recusal standards should a decision ever be challenged.

Member McKeithan pointed out that Page 171 references Planning Board conflicts of interest. He clarified that Page 160 is for the Town Council. Director Heard explained that Page 160 referred to special use permits and if the Planning Board is part of the process, they should

follow those guidelines. He added that Page 171 is referring to the legislative decisions such as text amendments and rezonings and the Planning Board is an important part of that process.

Director Heard stated that since they will ensure consistency with standard development practices and bring the Town Code into compliance with North Carolina General Statute 160D, staff is recommending approval of the proposed text amendments.

Chair Blakaitis clarified that there are no changes in regard to what the Planning Board currently does, checking that staff has pointed out to the Board any areas that may compromise. Director Heard stated he is correct, adding that, once adopted, staff will have to make changes to some of the application forms.

Vice Chair Cofield moved to recommend approval of Ordinances 21-01 and 21-02 as presented. Member Morton seconded.

Motion carried 5-0 via roll call.

Ordinance 21-03: Text Amendment Proposal to Allow the Installation of Post-And-Rope or Post-And-Rail Supports along Dune Walkovers

Director Heard stated that the draft ordinance proposes to add Subsections 156.124(C)(1)(e)4 permitting the installation of a single post-and-rail structure and 156.124(C)(1)(e)5 permitting the installation of post-and-rope supports down the eastern side of the primary dune to provide greater physical support for people with limited mobility accessing the beach nourishment project area.

Director Heard stated that the addition to Subsection 156.124(C)(1)(e)4 is proposed to have the following wording:

4. A dune walkover may include the installation of a single post-and-rail structure over the top and on the eastern side of the dune. The post-and-rail structure may extend down the eastern side of the dune from the top of the dune to the toe of the dune. If erosion, migration of the dune, or other forces cause any portion of the post-and-rail structure to extend eastward of the toe of the dune or expose the supporting posts, that section of the post-and-rail structure must be removed by the property owner.

Director Heard stated that the addition to Subsection 156.124(C)(1)(e)5 is proposed to have the following wording:

5. A dune walkover may include the installation of a post-and-rope structure over the top and on the eastern side of a dune. The post-and-rope structure may extend down the eastern side of the dune from the top of the dune to the toe of the dune. If erosion, migration of the dune, or other forces cause any posts to extend eastward of the toe of the dune or expose the supporting posts, that section of the post-and-rope structure must be removed by the property owner.

Director Heard stated that additional definitions are proposed to be worded as follows:

Post-And-Rail Structure. A single top rail mounted on imbedded posts. To minimize the impact of the structure, a post-and-rail structure shall not include additional structural or decorative elements such as cross-bracing, other horizontal railing, or balusters. For structural support, posts must be embedded at least four feet in the ground. The rails shall have a span of no less than six feet and not greater than 10 feet.

Post-And-Rope Structure. A structure consisting of a single strand of rope strung between imbedded posts typically serving to guide people to a certain location traversing a dune. The span between posts shall be no less than six feet and no greater than 10 feet.

Director Heard reminded the Board that sand added during the beach nourishment project in 2017 buried many existing dune walkover improvements and substantially changed the profile of the top and east side of the frontal dune system in the project area. He stated that in recognition of these changes, the Planning Board had considerable discussion about accessibility concerns at its meeting in June 2017 with members discussing alternatives such as allowing post and rope barriers, railings, or wooden walkways down the eastern side of the dune. He added that the Board members acknowledged that there may be individual situations requiring these alternatives but opted to recommend a less obtrusive approach with beach access matting instead of hardened ramps or stairways, which was viewed as a better initial approach until the Town could observe how the dune and beach were reshaped over time. He stated that in July 2017, the Town Council adopted the gentler approach recommended by the Planning Board as an initial step.

Director Heard stated that on several occasions during subsequent months and years, the Council requested that Community Development staff and the Planning Board evaluate options for providing better access for people with limited mobility. He added that the Planning Board discussed the issues and options relating to providing more convenient beach access for people with limited mobility for the following:

- Due to the height of the dunes, narrow width of beach accesses, and maximum slope standards for handicap ramps, it is unlikely that any community beach access will be able to accommodate complete ADA handicap access. So, the Board focused on standards to improve access for people with lesser mobility limitations.
- Beach access matting and planting vegetation will help guide people to stay on the beach access pathway, not disturbing other parts of the dune.
- While helpful for keeping people on the pathway, sand fencing and post-and-rope structures will not provide physical support for individuals with mobility limitations.
- The consensus of the Board was that an allowance for a single railing adjoining the beach access pathway will provide physical support for individuals with mobility limitations, while minimizing impacts on the dune system.
- This allowance could apply to community and individual beach accesses in the beach nourishment area (it was understood that similar improvements are already permitted elsewhere along the oceanfront).

Director Heard stated that in October 2017, the Planning Board recommended ordinance revisions allowing post-and-rope and post-and-rail structures to be constructed on the east face of

the primary dune. However, after receiving dozens of public comments and reviewing current conditions of the beach and dune in the beach nourishment project area, the Town Council opted against making any amendments to the previously adopted standards. He added that in response to several recent public comments, the Community Development staff has been asked to bring these beach access concepts back to the Planning Board for further consideration. He noted that as part of its recommendation, the Board is asked to consider if the proposed text amendment was consistent with the Town's adopted Comprehensive & Land Use Plan.

Director Heard stated that since the current text amendment is intended to help guide the construction of beach access improvements in a manner that minimizes impacts to the dune system, provides reasonable public access to the beach, and ensures public safety, staff is recommending approval of the proposed text amendment.

Chair Blakaitis remembered the Board dealing with this issue a few years ago. He stated that he is in favor of the recommendation.

Member Morton stated that he is on the beach several times a week in the beach nourishment area, and from Osprey to right past Carolina Dunes, and a system like this is a necessity to access the beach in those areas. Chair Blakaitis agreed.

Member Murray thought a single post and rail would seem onerous to people. He thought having post-and-rail on two sides would be acceptable. Chair Blakaitis thought it may be acceptable but pointed out that people coming onto the beach typically do not need to hold onto anything. He added that coming off the beach is the issue.

Member Morton thought the only concern would be if a person is coming onto the beach with a lot of beach equipment. Chair Blakaitis and Member Murray agreed. Member Murray pointed out that it is no more invasive to have two post and rails instead of one. Senior Planner Sandy Cross was recognized to speak. Senior Planner Cross noted that the Planning Board could restrict it to two rails at a community access and one at a private access. Member Morton and Chair Blakaitis thought that was a good idea.

Member Murray asked if it would be an issue to allow post-and-rope and single rail outside of the nourishment area for residential accesses but hardened structures for community accesses. He further asked how it would interfere with the grading. Senior Planner Cross stated that there are a large number of community accesses. Member Murray agreed, noting that there are not as many as there are oceanfront homes. Chair Blakaitis asked about the point of the comments. Member Murray stated that his point is that the reason the Town is not allowing hardened structures is for ease of grading. Senior Planner Cross disagreed. Member Murray understood as it seemed reasonable to protect the nourishment area when it was completed. He added that if the Town does not see grading as something that will have to happen before the renourishment starts and some of the beaches are so steep that this would help people get to the beach, he does not understand why the Board will not consider it. Chair Blakaitis asked if Member Murray is asking the Board to consider double rails. Member Murray stated that he wants the Board to consider allowing public accesses to build stairs. He noted that it could mitigate the number of permits needed to be pulled since it will be through the homeowner associations. Chair Blakaitis

stated that until the Town completes some nourishment, the Board should not discuss that concept.

Member Murray pointed out that Director Heard mentioned that post-and-rails do not gather much sand. He agreed with Member Morton that the Town wants as much sand gathered as possible. Chair Blakaitis noted that additional sand should not be around the stairs as it could cause them to sink and become impossible to fix. Member Murray stated that he does not see it as a problem in one season. Chair Blakaitis stated that he personally is not interested in discussing the issue right now as it is separate from the current discussion.

Council Liaison Sandy Whitman was recognized to speak. Council Liaison Whitman asked how far the post-and-rails would be allowed onto the beach area. Director Heard stated that they can extend to the toe of the dune. Chair Blakaitis added that people would have to walk after the toe of the dune.

Member Morton thought that allowing double post-and-rails and matting at community accesses will be less expensive to construct and easily accessible. He added that if a nor'easter comes through, the matting can be rolled up with rails being the only improvements at risk. He stated that if the Town experiences more beach erosion in that area, then the location of the rails and mat can be adjusted. Chair Blakaitis pointed out that mats are currently allowed at the accesses, adding that he does not think the Town should force people to have both matting and rails.

Vice Chair Cofield stated that when the Board discussed the issue previously, they discussed responsibilities for removing railing if grading is needed. Director Heard stated that notification requirements could put a burden on Town staff as they try to make contact with owners to find out if they can remove the improvements prior to grading. He noted that the adjoining property owners are the ones that own the structure. He stated that staff would have to contact people to let them know that the project was coming up and that it may impact their structure. Chair Blakaitis pointed out that they are easy to get rid of, adding that if someone neglects to remove a structure, the grading contractor could remove it. Member Morton added that a large nor'easter or a hurricane would probably remove the structures anyway.

Vice Chair Cofield thought that since the issue was discussed previously, the Planning Board should not ignore it now and see it as a possibility. Chair Blakaitis stated that it should be mentioned in the ordinance. Vice Chair Cofield agreed. Chair Blakaitis thought the individual homes between the community accesses were not mentioned. Director Heard agreed, adding that they would be able to do this. Chair Blakaitis understood, adding that the ordinance does not state that community accesses can put up two rails, but private accesses can only put up one. Director Heard pointed out that the draft ordinance does not mention two rails at all, adding that the Board may want to make that recommended change as part of its motion. Chair Blakaitis thought this was a good suggestion.

Director Heard stated that the current ordinance contains the following statement: "...if erosion, migration of the dune or other forces cause any portion of the post and rail structure (or post and rope structure) to extend eastward of the toe of the dune, then that section of post and rail (or post and rope) structure must be removed by the property owner..." He stated that the ordinance addresses that situation, but does not address where there is a conscious decision on

the part of the Town to complete a grading project due to erosion. He stated that if that is an issue that the Board wants to address, they will need to add it in the draft ordinance. He added that the Board needs, to the greatest degree possible, to define those circumstances, as he does not think it would be legally sound to have it left open-ended. Chair Blakaitis agreed.

Member Murray suggested the following language: "...should the structures referred to in this ordinance interfere with the Town's regular maintenance in the nourishment area, they will be removed by the Town..." Chair Blakaitis thought it was a good suggestion. Director Heard pointed out that beach nourishment should be referenced in the suggested language. Member Murray suggested that language state maintenance or nourishment. Director Heard stated that it would need to include both terms. Chair Blakaitis added that the double rails should be added as well for homeowner associations. Member Murray thought it could be added after the definition of Post-and-Rail Structure and Post-and-Rope Structure. He suggested the following language: "...association-maintained properties are allowed two..." Director Heard recommended that that standard not be added to the definitions since it was not a definition but a standard creating allowances under certain circumstances. He thought there may be a better place in the ordinance for that wording.

Vice Chair Cofield asked Director Heard if he is comfortable with the changes or if he wants to bring it back to the Board's May 12, 2021 meeting. Director Heard stated that under the current timeline, the draft ordinance would not be adopted by Town Council until its June 2, 2021 meeting. Chair Blakaitis asked why it would not go before Council at their May 5, 2021 meeting. Director Heard stated that, unless Council opts to waive the period for the first reading, text amendments for the Town have the public hearing the following month. He noted that it is not a legal requirement to have a first reading, but that is the Town's typical process.

Director Heard stated that he wants to get consensus of the Board regarding the changes they discussed. Director Heard outlined that Page 2 under e4 and e5, there will be a clarifying statement, adding it to the last sentence or adding a new sentence that clarifies that beach nourishment and maintenance activities would also be reasons why a portion of that structure would have to be removed by the owner. Member Morton asked if it should be owner or community associations. Director Heard explained that community associations are the owners in those cases. He stated that the other issue had to do with double rails.

Senior Planner Cross asked for clarification that the new language suggesting that the owner remove the structures. Member Murray and Vice Chair Cofield stated she is correct. Senior Planner Cross thought Member Murray had stated that if it is a form of maintenance or nourishment, the Town reserves the right to remove the structure. Member Murray concurred. He pointed out that nothing will need to be done except push sand over the structure. Senior Planner Cross stated that it minimizes the effort that the Town needs to make to try to have them removed in order to complete maintenance and renourishment.

Director Heard pointed out that it is a different issue as it is referring to who is liable for certain actions. He added that the Board is changing the standard if they go that route. Member Murray stated that he envisions it as being a separate issue because maintenance or nourishment are different than erosion. He added that if someone fails to take the structure down and erosion changes the location of it if the owner moves it or not would not matter if it were in the

contractor's way. Director Heard stated that it is one thing to have an easement that was a contract signed by both parties, but it was a completely different thing for the Town to adopt that in an ordinance. He added that if the Board wants to go that route, he will need to run it by the Town's attorney.

Vice Chair Cofield stated that he would prefer to have the obligation be on the owner to remove the structure as opposed to the Town. He felt the Planning Board does not have the finished ordinance at this meeting and thought it should be brought back to the Board. Chair Blakaitis pointed out that it will delay the ordinance for another month. Member Murray thought it should be adopted as written unless the Board wants to add the two rails for the homeowner associations. Chair Blakaitis thought the Board should add the two rails for the associations. Director Heard suggested that e6 be added to the draft ordinance to clarify the two rails for community association accesses.

Vice Chair Cofield moved to approve Ordinance 21-03 as presented along with the two revisions that were discussed. Member Morton seconded.

Motion carried 5-0 via roll call.

APPROVAL OF MINUTES

Minutes from the February 10, 2021, Regular Meeting

Vice Chair Cofield had a change to Page 7 of the minutes.

Member McKeithan moved to approve the minutes as amended. Vice Chair Cofield seconded.

Motion carried 5-0 via roll call.

Minutes from the March 10, 2021, Regular Meeting

Member McKeithan moved to approve the minutes as presented. Member Morton seconded.

Motion carried 5-0 via roll call.

OTHER BUSINESS

None.

STAFF COMMENTS

Summary of April 7, 2021 Town Council Meeting

Director Heard gave a short update on the April 7, 2021 Council meeting.

Project Updates

