



MEMORANDUM

Town of Nags Head

Planning & Development Department

To: Planning Board
cc: Mayor and Board of Commissioners
From: Michael Zehner, Director of Planning & Development
Kelly Wyatt, Deputy Director of Planning & Development
Date: May 15, 2020
Subject: Consideration of a text amendment to the UDO pertaining to temporary uses or temporary alteration of uses related to declared emergencies

OVERVIEW AND BACKGROUND

The proposed text amendment is intended to enact provisions within the Unified Development Ordinance allowing for temporary uses or the temporary modification of uses to address conditions during declared states of emergency or resulting from such emergencies. As the Board may be aware, Dan Lewis, President of the Outer Banks Restaurant Association, had emailed the mayors of the towns of Nags Head, Duck, Kill Devil Hills, Kitty Hawk, Manteo, and Southern Shores (attached) requesting the towns' consideration of regulatory changes that would allow for flexibility in restaurant operations in response to the COVID-19 Pandemic. This proposed text amendment is in response to that request, but has also been informed by further discussions between Staff and Mr. Lewis, Mark Ballog (owner of Lucky 12), and John Harris (owner of Kitty Hawk Kites); additionally, while in response to this immediate emergency, Staff believes that this provision will have application during other emergencies.

In short, this text amendment would allow for the issuance of a Temporary Use Permit only during an emergency declared by the Mayor (pursuant to Town and State laws) or due to impacts associated with a declared emergency. In these instances, Temporary Use Permits would be authorized to be issued jointly by the Town Manager and UDO Administrator for temporary uses or the temporary modification of uses; the drafted provisions allow for broad latitude in their application, however, there are limitations on eligible uses and modifications, and ultimately, a Permit could be rejected for any activity or accommodation, in the opinion of the Town Manager and UDO Administrator, that would be contrary to the purposes of the emergency declaration and/or the interests of the public health, safety, and welfare.

Obviously, the Town of Nags Head and the other Outer Banks' municipalities are not unique in the need to address this issue. Please find attached a blog post from the American Planning Association titled *7 Ways to Respond to Regulation Rollbacks*, intended to present perspectives and options for municipalities to address the Pandemic, while complying with applicable regulations and statutes.

POLICY CONSIDERATIONS

The most direct policy in the Comprehensive Plan pertaining to the proposed text amendment and the basis for the amendment is policy NR-11, as follows:

NR-11 Ensure that the town is a disaster resilient community that can survive, recover from, and thrive after a natural or man-made disaster event.

In Staff's opinion, the proposed amendment is consistent with the intent of this policy, despite a lack of expectation for the current circumstances.

STAFF RECOMMENDATION

Staff intends to review the provisions in more detail with the Board at their meeting on May 19, 2020. Staff is scheduled to present the proposed amendments to the Board of Commissioners on May 20, 2020, and if the Planning Board has issued a recommendation, request that the Board of Commissioners consider the scheduling of a public hearing for June 3, 2020. Planning Staff recommends adoption of the amendments as proposed, but welcomes and will take into consideration the Planning Board's questions and feedback.

With regard to the Planning Board and Board of Commissioners' review and action, Staff recommends consideration of the following UDO provisions:

3.5.3. Action by the Planning Board.

3.5.3.1. Every proposed amendment, UDO text amendment or zoning map amendment, shall be referred to the Planning Board for its recommendation and report. The Board of Commissioners is not bound by the recommendations, if any, of the Planning Board.

3.5.3.2. Prior to the consideration by the Board of Commissioners of a proposed UDO text amendment or zoning map amendment, the Planning Board shall advise and comment on whether the proposed amendment is consistent with the Comprehensive Plan. The Planning Board shall provide a written recommendation, certified by the UDO Administrator, to the Board of Commissioners that addresses plan consistency and other matters as deemed appropriate by the Planning Board, but a comment by the Planning Board that a proposed amendment is inconsistent with the Comprehensive Plan shall not preclude consideration or approval of the proposed amendment by the Board of Commissioners.

3.5.3.3. Members of the Planning Board shall not vote on recommendations regarding any UDO text amendment or zoning map amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member.

3.5.4. Action by the Board of Commissioners.

Action upon an UDO text amendment or zoning map amendment, including the scheduling of a public hearing, will be at the discretion of the Board of Commissioners.

3.5.4.1. Before an item is placed on the consent agenda to schedule a public hearing, the Planning Board's recommendation on each proposed amendment must be received by the Board of Commissioners. If no recommendation is received from the Planning Board within 30 days from the date when submitted to the Planning Board, the petitioner may take the proposal to the Board of Commissioners without a recommendation from the Planning Board. However, the Planning Board may request the Board of Commissioners to delay final action on the amendment until such time as the Planning Board can present its recommendations. No such limitations shall apply to applications or requests submitted by Town staff or any Town Board.

3.5.4.2. After receiving a recommendation from the Planning Board on a proposed amendment, the Board of Commissioners may proceed to vote on the proposed ordinance, refer it to a committee for further study, or take any other action consistent with its usual rules of procedure.

3.5.4.3. The Board of Commissioners is not required to take final action on a proposed amendment within any specific period of time. Final action on an UDO text amendment or zoning map amendment submitted by third parties will be taken within a reasonable time. Final action taken within 90 days of the public hearing before the Board of Commissioners shall be presumptively reasonable.

3.5.4.4. No member of the Board of Commissioners shall vote on any zoning map amendment or UDO text amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial and readily identifiable financial impact.

3.5.4.5. Prior to adopting or rejecting any UDO text and/or map amendment, the Board of Commissioners shall adopt one of the following statements which shall not be subject to judicial review.

3.5.4.5.1. A statement approving the amendment and describing its consistency with the adopted Comprehensive Plan and explaining why the action taken is reasonable and in the public interest.

3.5.4.5.2. A statement rejecting the amendment and describing its inconsistency with the adopted Comprehensive Plan and

explaining why the action taken is reasonable and in the public interest.

3.5.4.5.3. A statement approving the amendment and containing at least all of the following:

3.5.4.5.3.1. A declaration that the approval is also deemed an amendment to the Comprehensive Plan. The Board of Commissioners shall not require any additional request or application for amendment to the Comprehensive Plan.

3.5.4.5.3.2. An explanation of the change in conditions the Board of Commissioners took into account in amending the UDO to meet the development needs of the community.

3.5.4.5.3.3. Why the action was reasonable and in the public interest.

3.5.4.6. In deciding whether to adopt a proposed amendment to this UDO, the central issue before the Board of Commissioners is whether the proposed amendment advances the public health, safety, or welfare. When considering proposed map amendments:

3.5.4.6.1. The Board of Commissioners shall consider the entire range of permitted uses in the requested classification.

Attachments:

1. Proposed Text Amendment Ordinance;
2. Email from Dan Lewis, President, Outer Banks Restaurant Association; and
3. American Planning Association blog post *7 Ways to Respond to Regulation Rollbacks*