



MEMORANDUM

Town of Nags Head

Planning & Development Department

To: Board of Commissioners

From: Michael Zehner, Director of Planning & Development
Kelly Wyatt, Deputy Director of Planning & Development

Date: January 27, 2021

Subject: Consider text amendments to the UDO pertaining to nonconforming hotels and accessory uses in association with preexisting fishing piers (F-1)

OVERVIEW AND BACKGROUND

As noted in my Director's Report to the Board of Commissioners and Planning Board, dated January 30, 2020, given previously expressed interest in the future of the Blue Heron Motel at 6811 S. Virginia Dare Trail and the limitations imposed by Town Code requirements on the evolution of the current nonconforming hotel use of the property, Staff began considering text amendments to the UDO to advance Comprehensive Plan policies valuing the preservation of legacy business, establishments, and structures.

This item was initially discussed at the Planning Board's meeting on February 18, 2020, with the Planning Board wishing to consider and discuss options further. The Planning Board discussed this item further at their meeting on May 19, where the Board requested that Staff explore options that did not require the creation of an overlay zoning district, and to present those options to the Board for consideration. Staff presented additional information to the Planning Board on June 16; at that time, the Board was supportive of the option presented by Staff that would make amendments to Article 5, *Nonconformities*, of the UDO, by providing nonconforming restaurants, hotels, or retail uses that commenced on or before December 31, 1980 with the option of seeking a conditional use permit to modify the use, including enlarging or altering the use, in a manner that would otherwise be precluded by the provisions of Sections 5.5. and/or 5.6. of the Article. At the meeting, the Planning Board requested that Staff review and determine the specific instances where such a provision would be applicable.

Following the meeting, Staff conducted the review requested by the Planning Board and determined that the following hotels were all nonconforming uses, all located with the CR, Commercial Residential Zoning District, and which may benefit from the provision under consideration:

1. Comfort Inn South, 8031 S. Old Oregon Inlet Road, constructed in 1974
2. Dolphin Motel, 8017 S. Old Oregon Inlet Road, constructed in 1960
3. Owens Motel, 7115 S. Virginia Dare Trail, constructed in 1966
4. Seafoam Hotel, 7111 S. Virginia Dare Trail, constructed in 1961
5. Islander Motel, 7011 S. Virginia Dare Trail, constructed in 1973
6. Blue Heron Motel, 6811 S. Virginia Dare Trail, constructed in 1975
7. Surf Side Hotel, 6701 S. Virginia Dare Trail, constructed in 1984

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8. Holiday Inn Express (former Nags Head Inn), 4701 S. Virginia Dare Trail, constructed in 1987
9. Colonial Inn, 3329 S. Virginia Dare Trail, constructed in 1947

Additionally, Staff determined that there were no restaurants or retail establishments that were considered to be a nonconforming use. However, related, Staff did determine that the presence of residential units in conjunction with the Nags Head Fishing Pier constituted a nonconforming use of the site, which may be something that the Board wished to address.

Staff presented the above information to the Planning Board at their meeting on July 21. The Planning Board agreed, given that the necessary scope of any treatment would only apply to nonconforming hotels, that it may be more appropriate to focus any amendments within Section 7.12, *Hotels*, of Article 7, *Supplemental Regulations*, similar to the treatment of nonconforming cottage courts. Additionally, the Planning Board requested that Staff also address the residential dwelling units accessory to the Nags Head Fishing Pier.

Staff returned to the Planning Board at their August 18, 2020 meeting with proposed amendments to add a Section 7.12.3. pertaining to existing nonconforming hotels, allowing a conditional use permit to be sought to modify the use and/or structure, including enlarging or altering the use and/or structure, in a manner that would otherwise be precluded by existing UDO provisions pertaining to nonconforming uses. Additionally, amendment of Section 7.50.1. pertaining to fishing piers was proposed to reference that dwelling units existing as of July 1, 2020 are an allowable use in conjunction with fishing piers; it was noted by the Planning Board and confirmed by Staff that this would be applicable to both the Nags Head Fishing Pier and the Outer Banks Fishing Pier.

Following further discussion, the Planning Board recommended approval of the proposed amendments 6-1, with Gary Ferguson dissenting. Mr. Ferguson's objections were generally that 1) it may not be fair to other property owners in the same district that cannot build a new hotel if one did not previously exist, and 2) the amendment essentially provides the right for this nonconforming use to be perpetually extended.

The Planning Board briefly revisited their recommendation at their meeting on September 16, 2020, considering whether the amendments would allow, with a conditional use permit, a nonconforming hotel to be demolished entirely and constructed anew, which would be precluded under the current provisions. The Planning Board was unanimously in favor of prohibiting a conditional use permit from being sought or issued to allow the demolition of a significant percentage of existing floor area, if such floor area was to be reconstructed.

As the Board may recall, a request to consider the scheduling of a public hearing on the text amendments was on the Board of Commissioners' consent agenda for September 2, 2020; however, at that time, the Board voted to remove that item from the consent agenda, and to not consider further until a future meeting. At the Board's meeting on December 2, 2020, the Board requested that Staff return to the meeting on January 3,

2021 and present additional information along with the request to consider scheduling the public hearing.

At the January 3, 2021 meeting, the Board voted to schedule the public hearing for the meeting on February 3, 2021. Two points of discussion concerned uncertainty as to what could be constructed under this provision, and a sense that it would be beneficial to have additional evaluation criteria by which to consider conditional use permits sought under this provision; at least with regard to the former, the draft amendments allow these nonconforming hotels to be subject to the dimensional requirements for hotels located in the C-2 district, which do have some distinctive differences from the requirements that applied to hotels in the CR district (where this would apply) prior to the UDO; with regard to the latter, findings in addition to those commonly applied to conditional use permits could be adopted as part of these amendments.

As noted above, Staff was initially broadly focused on legacy establishments and structures which may have been rendered nonconforming over time, either with respect to the use no longer being allowed in the zoning district in which the property is located or because of standards or requirements changing, or due to both circumstances. Upon further consideration, it became clear that nonconforming hotels were potentially impacted most, if not solely.

It is helpful to consider that the general principle with respect to nonconformities is that, over time, the nonconforming uses or conditions cease, evolving to conforming uses or conditions. This effect, at least with respect to the identified nonconforming hotels and piers, would therefore seem to be inconsistent with the intent of relevant goals, objectives, policies, and actions contained in the Comprehensive Plan (discussed further below). Specifically, Section 5.6, *Nonconforming Use of a Structure*, is limiting and jeopardizes the preservation of these nonconforming uses in that this Section precludes:

- Existing structures devoted to a nonconforming use from being “enlarged, extended, constructed, reconstructed, moved or structurally altered except in changing the use of the structure to a use permitted by the regulations of the district in which it is located.” (Section 5.6.1.1.);
- Extension of a nonconforming use “to occupy any land outside such building. A conforming structure cannot be expanded to allow expansion of a nonconforming use.” (Section 5.6.1.2.);
- Recommencement of a nonconforming use if “the nonconforming use...ceases for any reason for a period of more than 12 consecutive months.” (Section 5.6.1.4.);
- Work that may increase the “cubic content or intensity” of the existing nonconforming use. (Section 5.6.2.1. and 5.6.2.2.);
- If the structure is also nonconforming, work in any 12 consecutive month period that exceeds “50 percent of either the annually adjusted Dare County assessed

tax value or independent appraisal value of the nonconforming structure as determined by a North Carolina Licensed Appraiser.” (Section 5.6.3.1.); and

- If the structure is also nonconforming, restoration, repair, or rebuilding if the structure “becomes dangerous to life, destroyed or unlawful due to lack of repairs and maintenance, where such destruction or lack of repairs and maintenance exceeds 50 percent of either the annually adjusted Dare County assessed tax value or independent appraisal value as determined by a North Carolina Licensed Appraiser” and where the building has been condemned. (Section 5.6.3.2.)

Generally, the impacts referenced above were the basis for the adoption of provisions in 2015 contained in Section 7.2.14 pertaining to nonconforming cottage courts. The proposed text amendments would operate in a similar fashion, allowing a conditional use permit to be sought to modify the use and/or structure, including enlarging or altering the use and/or structure, in a manner that would otherwise be precluded by the provisions of Section 5.6, *Nonconforming Use of a Structure*.

Staff previously presented the proposed amendments to the Town Attorney for review. Generally, no legal issues or concerns were raised. Staff additionally requested the Town Attorney to review draft language addressing the Planning Board’s revised recommendation, and such language has been included as part of the proposed text amendments. Additionally, as previously noted for the Board, references to Section 5.5 in the original version of the proposed text amendments are not likely relevant given the scope of the amendments; Section 5.5 is only applicable “Where use of land exists..., and where such use involves no individual structure or combinations of structures with a cumulative assessed tax value not exceeding \$5,000.00...,” whereas, Section 5.6 applies to “a use involving individual structures or combinations of structures with a cumulative replacement cost of \$5,000.00 or more...” Therefore, references to Section 5.5 have been omitted from the proposed amendments.

POLICY CONSIDERATIONS

While not specific to the nonconforming hotels noted above, or the Nags Head Fishing Pier or Outer Banks Fishing Pier, Staff is of the opinion that the following policies and considerations included within the Town’s Comprehensive Plan are applicable to the consideration of the proposed text amendments:

- One of the Town’s principal goals, as established in the Comprehensive Plan, is to “Plan for orderly and sustainable growth and redevelopment,” and an identified objective to attain this goal is the “Preservation and maintenance of legacy commercial businesses.”
- As used in the Comprehensive Plan, at least within the context of *Character Areas*, legacy establishments, structures, or locations are those which “contribute to the overall sense of place or tell the story of Nags Head’s past. These establishments, structures, or locations often remind you of the past and are nostalgic.”

- Legacy establishments are particularly noted as adding to the character of the Whalebone Junction Character Area, and specifically the Whalebone Junction Core, where it is noted that “flexibility should be given to legacy type establishments for renovations as a way to retain the character of area while allowing the establishment to remain viable in the market.”
- Legacy businesses are also referenced with respect to the Corridors Character Area, and specifically for the NC 12 and SR 1243 corridors, where it is noted that one of the future desires is to “provide flexibility for existing legacy businesses to renovate to help keep the character of Beach Road.”
- The Land Use Element of the Comprehensive Plan, and the discussion of Incentives/Design Flexibility with respect to Site Development Characteristics, provides an overview of the issue and general solution, as follows:

The town has taken recent steps to preserve older legacy businesses and encourage the retention of these structures. There has been a regulatory shift with regards to nonconforming properties (properties which met zoning regulations at the time they were developed but are not consistent with regularity changes that have occurred). Essentially, non-conformity regulations have been modified to allow continued improvements to these older properties. The regulations are primarily designed to restrict additional development of unwanted land uses. The town’s position is to allow continued use and improvement to nonconforming properties.

- The section on Legacy Businesses under Local Business Development, as contained within the Economic Development and Tourism Element of the Comprehensive Plan, is attached. Specific policies and actions are as follows:

EC-7 Recognize the role and importance of the look and feel of legacy development in creating the distinctive heritage, unique lifestyle, and family beach character that is central to the town’s vision.

EC-7a: Develop more specific criteria for legacy businesses, based on research and data of existing legacy type buildings.

EC-7b: Inventory, research, and map businesses that fit within the legacy business criteria.

EC-7c: Develop incentives to encourage the preservation of commercial floor space.

EC-7d: Explore ways to aid in the development of cottage courts.

As previously reviewed with the Board, when further consideration of these amendments was discussed at the Board’s December 2 meeting, the Board indicated that they understood that they were awaiting a definition of “legacy” as it may pertain to

the amendments. While Staff believes this expectation was clarified, Staff did provide a relevant email from Interim Town Manager Greg Sparks, responding to questions concerning the meaning of the word “legacy” within the context of the Strategic Plan. Staff has indicated that the overview provided by Mr. Sparks was comprehensive and relevant, and was generally the same policy information referred to above.

Staff further noted, with respect to the term “legacy,” while the identified Comprehensive Plan policies valuing the preservation of legacy business, establishments, and structures served as support and general direction for pursuing the proposed text amendments, the term “legacy” is not proposed to be defined as a regulatory term, and the proposed regulations do not attempt to directly regulate physical conditions (i.e. structures or sites) that may or may not be considered to be “legacy.” Rather, the proposed amendments focus on uses that are now nonconforming, which may be considered legacy businesses or establishments (specifically, or in more general terms), and perhaps then warrant some mechanism to allow the uses to continue to be maintained and evolve.

Additionally, at least with respect to older hotels and motels, there are references in the Comprehensive Plan to the loss of these structures and uses, replaced with large single-family homes, and, at least as it pertains to the South Nags Head Character Area, references to providing “existing hotels/motels and cottage courts” with “flexibility to repair and renovate, in order to remain relevant in the market;” to be sure, the Comprehensive Plan also discusses the that the Town “has experienced the loss of hotels, particularly along the oceanfront. Many of the small hotels and commercial establishments are being converted to single-family dwellings. Cottage courts, which involve multiple detached single-family dwellings on one lot, may be an alternative to hotel development and are more compatible for the oceanfront. The town desires to offer a diversity of accommodations and should consider incentives to encourage cottage court development along the oceanfront as an alternative to single-family vacation rentals.”

PLANNING BOARD RECOMMENDATION

As previously noted, the Planning Board voted 6-1 at their meeting on August 18, 2020 to recommend approval of the proposed text amendments as presented; subsequently, at their meeting on September 16, 2020, the Planning Board indicated their unanimous support for additional provisions prohibiting a conditional use permit from being sought or issued to allow the demolition of a significant percentage of existing floor area, if such floor area was to be reconstructed.

STAFF RECOMMENDATION

While Staff is generally of the opinion that the proposed amendments are a furtherance of established and relevant policies contained in the Town’s Comprehensive Plan, Staff recommends that further consideration should be given to establishing dimensional requirements more consistent with those formerly applicable in the CR district, as opposed to those applicable in the C-2 district, as well as specific additional findings applicable to these types of conditional use permits; Staff believes that modification along these lines is substantive enough to require additional review by the Planning

Board, and recommends that the public hearing remain open, to be continued to the Board's March 3, 2021 meeting, and that the proposed amendments and modifications be referred to the Planning Board.

With regard to the 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. Draft Ordinance Amending the Code of Ordinances of the Town of Nags Head, North Carolina Pertaining to Nonconforming Hotels and Accessory Uses to Preexisting Fishing Piers, January 27, 2021 Draft