



**AGENDA**  
**Town of Nags Head Planning Board**  
**Nags Head Municipal Complex Board Room**  
**Tuesday, August 16, 2016; 2:30 pm**

A. **Call To Order**

B. **Approval of Agenda**

C. **Public Comment/Audience Response**

D. **Approval of Minutes** – July 19, 2016

E. **Action Items**

1. Consideration of zoning ordinance text amendments to permit "Cottage Courts" as an allowable use within the Town.
2. Request by Derek Hatchell on behalf of I.G. Holdings to amend the conditions associated with "Car Wash" as a Conditional Use within the C-2, General Commercial Zoning District.

F. **Report on Board of Commissioners Actions**

1. Zoning ordinance text amendment to revise conditions of Car Wash as a Conditional Use use within the C-2 District – Board of Commssioners requested Planning Board review further (ordinance included as Action Item).
2. Consideration of Preliminary Plat for Elliott Estates, Phase III, Lot 25 with request for subdivision waiver regarding access – Tabled until September 7, 2016 meeting for additional information.

G. **Town Updates – as requested**

1. Update on Focus Nags Head
2. Sea Level Rise
3. Dowdy Park

H. **Discussion Items**

1. Continued discussion of zoning ordinance text amendments establishing a table listing of permitted and prohibited uses within the Town.

I. **Planning Board Members' Agenda**

J. **Planning Board Chairman's Agenda**

K. **Adjournment**

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**Town of Nags Head  
Planning Board  
July 19, 2016  
-DRAFT -**

The Planning Board of the Town of Nags Head met in regular session on Tuesday, July 19, 2016 in the Board Room at the Nags Head Municipal Complex.

Chairman Mark Cornwell called the meeting to order at 2:30 p.m. as a quorum was present.

***Members Present***

Mark Cornwell, Ben Reilly, Clyde Futrell, Kate Murray, Mike Siers, Jim Troutman, Pogie Worsley

***Members Absent***

None

***Others Present***

Andy Garman, Kelly Wyatt, Lily Nieberding

***Approval of Agenda***

There being no changes to the agenda, Ben Reilly moved that it be approved as submitted. Jim Troutman seconded the motion and it passed by unanimous vote.

***Public Comment/Audience Response***

None

***Approval of Minutes***

Chair Cornwell asked for one revision: in page 8, paragraph 5, change the word "concerns" to "design and development features". Ben Reilly moved that the minutes be approved as revised. Jim Troutman seconded the motion and it passed by unanimous vote.

***Action Items***

***Consideration of zoning ordinance text amendments to permit "Cottage Courts" as an allowable use within the Town.***

Deputy Town Manager/Planning Director Andy Garman explained that at the last meeting, the Planning Board reviewed a draft ordinance that would reinstate cottage courts as an allowable use within the Town.

The ordinance was drafted to address the following objectives/concerns:

- Location
- Size and arrangement

- Architectural design and orientation
- Density
- Building separation and setbacks
- Minimum lot size
- Lot coverage
- Driveway access
- Off-street parking and loading facilities
- Refuse and recycling
- Cottage court properties with existing nonconformities

At their June meeting, the Board discussed the pros and cons of each of the ordinance criteria and suggested modifications to the ordinance. Additionally, staff agreed to provide an analysis of a cottage court property to determine the potential development yield based on the ordinance criteria. Mr. Garman stated that the Sea Spray cottage court was used to conduct this analysis and presented a street view photo and an aerial from Google Maps which depicts the units on this property as well as an estimate of total lot coverage. The map also included a breakdown of the number of bedrooms in each unit. Staff concluded that this development could be replicated based on the criteria in the ordinance. Mr. Garman stated that the Sea Spray property has four separate units with a total of nine bedrooms and noted they might have room for some additional units if they were substituted for some of the current site features (i.e. the rear patio and garage).

In addition, Staff tried to address some of the previous concerns and provided modified language with the following changes:

- Based on the Planning Board's suggestion that cottage courts should be designed as traditional dwelling units and not as one room units or cabins, a provision has been added that units must have separate sleeping, living and bathing quarters.
- Based on Staff's review of the square footage of existing properties, the minimum size has been reduced to five hundred square feet to allow for smaller units. Staff also discussed the possibility of reducing required parking for smaller units.
- In order to encourage unique design for individual units as well as to control the overall intensity of the site, a provision has been added that at least 1/3 of the units must not exceed a single story.
- A community pool would be allowed but individual cottages cannot have pools.
- To accommodate owner occupancy of the site or on-site management, a garage may be allowed to serve the owner or manager's place of residence.
- To limit overall paved areas, the 20 foot accessway may be reduced to 12 feet wide once the accessway is within 150' of all sides of all structures on the property. This is consistent with fire code requirements.

Mr. Garman confirmed for Chairman Cornwell that the accessway needs to be within 150' of all sides of a structure so that a fire apparatus is able to get the hose all the way around the structure.

Mr. Garman confirmed for Mr. Futrell that on that particular property (Sea Spray) there might be some non-conforming setbacks but if they wanted they could raise the structure (to put parking underneath) and maintain the non-conformity as long as they weren't increasing it.

Mr. Garman confirmed for Chairman Cornwell that Sec. 48-378 was all new language and proceeded to review the sub sections for the Board. Some of the items discussed were enlarging the location to include the area between the highways (Wrightsville East); size of units, architectural points and roof pitch (porches will not count towards size but will count towards lot coverage); allowing some type of storage for pool equipment, etc.; density – setting a minimum of three structures, keeping the maximum of 10.

Mr. Garman also led a discussion on existing cottage courts and how to treat current non-conformities. Staff will need to review the language related to non-conformities as it relates to existing cottage courts and how they would be affected by the new language.

Ms. Wyatt confirmed for Mr. Reilly that the new language will most likely make the existing cottage courts less non-conforming than they were previously.

Mr. Futrell noted that if the point is to encourage new cottage courts they also don't want to discourage the existing ones.

Mr. Garman stated that Staff will look at tying the two together as well as review the whole zoning ordinance to make sure the language is consistent throughout.

Ben Reilly moved to table the proposed ordinance to allow time for Staff to revise as discussed. Clyde Futrell seconded and the motion passed by unanimous vote.

### ***Report on Board of Commissioners Actions***

Deputy Planning Director Kelly Wyatt:

The Zoning ordinance text amendments to ensure content neutral language/regulations pertaining to signage were adopted as presented.

The Zoning ordinance text amendment to exclude municipally owned boardwalks, walkways, sidewalks and multi-use paths from lot coverage and minimum yard requirements was adopted as presented.

Public Hearings were scheduled for August 3, 2016 for the following text amendments:

- Request by Derek Hatchell on behalf of I.G. Holdings to amend the conditions associated with "Car Wash" as a Conditional Use within the C-2, General Commercial Zoning District.
- Consideration of Preliminary Plat for Elliott Estates, Phase III, Lot 25 with request for subdivision waiver regarding access.

### ***Town Updates***

#### Focus Nags Head

Mr. Garman noted that Staff is currently drafting language for the comprehensive plan; this will be ongoing for at least a few more weeks. Staff's goal is to take the draft back to the Advisory Committee once it is done.

## Flood Map Presentation – Review and Adoption Process

Mr. Garman presented an update on the new flood map review and adoption process. Mr. Garman stated it was the same presentation he gave to the BOC at their July meeting. Preliminary flood maps were released on June 30<sup>th</sup>. The information is now on the Town website. The maps were last updated in 2006. There will be a 90 day appeal/comment period followed by a compliance period which will include Map adoption and updating of the Flood Ordinance. Mr. Garman stated that the time frame for adoption is 18 to 24 months and also noted that the current flood maps will continue to be used until the new flood maps are adopted.

### ***Discussion Items***

#### *Discussion of zoning ordinance text amendments establishing a table listing of permitted and prohibited uses within the Town.*

Ms. Wyatt stated that in the next several months the Planning Board will be asked to review and approve text amendments that address a recent decision of the North Carolina Supreme Court case, *Byrd vs. Franklin County*, in which the courts found that a zoning ordinance may not regulate unlisted land uses by providing a statement such as “the ordinance prohibits all land uses that are not expressly permitted”.

Ms. Wyatt explained that Franklin County, NC was approached by an applicant (Byrd) interested in opening a shooting range. The Franklin County unified development ordinance (UDO) did not specifically address shooting ranges as a permitted, special or conditional use or as a prohibited use, however, the UDO did provide a statement indicating that uses not specifically listed are prohibited. Ms. Wyatt noted that Nags Head’s ordinance, as well as many others in North Carolina, has similar statements.

Franklin County staff originally advised the applicant (Byrd) to seek a zoning ordinance text amendment to allow this new use category. County staff later concluded that a shooting range could be considered under a use category already listed within the UDO, “Facility for open air games” which was allowed as a Special Use. When the applicants applied for the Special Use Permit, the County Board of Commissioners denied the request at which time the applicants filed an appeal.

The court of appeals found that the statement of ‘uses not listed as permitted are prohibited’ was ambiguous, however, as it was not listed as a permitted use it was deemed prohibited. On November 6, 2015 the North Carolina Supreme Court reversed the court of appeals decision “rejecting the notion that a zoning ordinance may prohibit uses not explicitly allowed” and continued on to “make it clear that the law favors uninhibited free use of private property over government restrictions”.

In moving forward the courts have not said that every use must be allowed somewhere within the community’s zoning districts but that any prohibitions of land uses need to be clearly stated. It is believed that the Town is still allowed to outright prohibit certain uses as well as permit a variety of uses either as a permitted use or a conditional use. However, if there is a use the Town specifically wishes to prohibit it needs to be clearly defined as such.

The Town’s current zoning code is inconsistent with the NC Supreme Court decision so Planning Staff is requesting that the Planning Board initiate the text amendment process to allow staff to begin working with both the Planning Board and the Town Attorney to draft the amendments necessary to

comply with North Carolina Supreme Court decision while preserving the Town's current land use standards.

While this is a project that seems fitting to be incorporated into the FOCUS Nags Head comprehensive land use code re-write, the Town's attorney feels as though this effort should be undertaken swiftly. Staff will communicate with the consultants of Code Wright throughout the process to ensure efficiency and no duplication of work.

Ms. Wyatt presented the Board with a chart (included in the agenda packet) which represents a preliminary assessment of the Town's current zoning districts and uses and asked that they begin to review the chart to determine what uses the Town may not wish to allow in any district or only in certain districts.

***Planning Board Members' Agenda***

Mr. Worsley noted that at one time the Dairy Queen wanted to increase the height of their American flag pole but the request was denied; Mr. Worsley would like Staff and the Board to revisit the idea of raising the allowable height of flag poles.

***Planning Board Chairman's Agenda***

None

***Adjournment***

There being no further business to discuss, the meeting was adjourned at 4:09 PM.

Respectfully submitted,

Lily Campos Nieberding

## STAFF REPORT

**TO:** Planning Board  
**FROM:** Andy Garman, Deputy Town Manager  
Kelly Wyatt, Deputy Planning Director  
**DATE:** August 12, 2016  
**SUBJECT:** Consideration of zoning ordinance text amendments to permit "Cottage Court" as an allowable use within the Town.

Last month the Planning Board reviewed a draft ordinance that would reinstate "cottage court" as an allowable use within the Town. The ordinance was drafted to address the following objectives/concerns:

- Location
- Size and arrangement
- Architectural design and orientation
- Density
- Building separation and setbacks
- Minimum lot size
- Lot coverage
- Driveway access
- Off-street parking and loading facilities
- Refuse and recycling
- Cottage court properties with existing nonconformities

The Planning Board discussed the pros and cons of each of the ordinance criteria and suggested modifications to the ordinance. The Planning Board requested that staff draft language to extend the area for cottage court development to Wrightsville Avenue in the northern part of town. Staff agreed to provide an analysis of land uses in this area to determine the appropriateness of this recommendation. Staff has provided a map depicting vacant properties as well as those developed as single-family dwellings and other uses. Staff has also provided a copy of the zoning map to show the extent of the C-2, R-2, and CR zones. The ordinance has been drafted to include optional language to extend the allowable area for cottage courts to Wrightsville Avenue. Based on land uses in this area as well as the location of existing cottage courts, staff recommends the original ordinance language.

The ordinance has been redrafted to allow an accessory structure (shed) to service the property. Finally, language to address remaining nonconforming cottage courts has also been revised. Staff will provide a detailed overview of the ordinance changes at the upcoming meeting.

Attachments:

- Draft Cottage Court Ordinance
- Cottage Court Map with Land Uses
- Zoning Map

Sec. 48-7. – Definitions of specific words and terms.

*Cottage court* means multiple ~~residential buildings~~ detached single-family dwellings on one lot. ~~Since August 5, 1985, no such development has been allowed in this jurisdiction. Any such development legally existing on that date became a nonconforming use. Cottage courts shall be designed and intended for transient guests on a rental basis, with the exception of living quarters for the property owner or on-site management.~~

Sec. 48-128. – Nonconforming Cottage courts.

- (a) Cottage courts which do not conform to the definition of ‘cottage court’ contained in Town Code Section 48-7 and also to the provisions of Town Code Section 48-378 ~~which were legal at the time of their placement or construction but which would not be permitted by the regulations imposed by this chapter~~ may continue, subject to the following provisions:
- (1) Existing individual dwelling units in a nonconforming cottage court may be replaced provided that replacement structures conform to the provisions of Town Code Section 48-378 shall be of the same or lesser size and the degree of structure nonconformity is not increased or do not increase the degree of structure or site nonconformity.
  - (2) All replacement cottage court units, substantially improved and substantially damaged cottage court units shall conform with the provisions of chapter 22, article II, Flood Damage Prevention.
  - (3) For the purpose of this section, structures will be considered individually when determining thresholds for repair, maintenance, and destruction.
  - (4) No existing individual dwelling unit in a nonconforming cottage court shall be enlarged, extended, moved or structurally altered; except as provided below:
    - a. For lots abutting the Atlantic Ocean or Roanoke Sound individual dwelling units in a cottage court may be moved in cases where such structures are determined to be in imminent danger of collapse, as defined by CAMA, as a result of erosion by wind or water, provided that such movement does not increase the degree of nonconformity of the structures in any way. When utilizing this provision, a minimum ten-foot separation shall be maintained between individual structures. All structures, when moved shall adhere to the minimum setback requirements prescribed ~~for single-family dwellings in the applicable zoning district if those setbacks can be met in~~ Town Code Section 48-378.
    - b. Minor modifications to a nonconforming cottage court dwelling unit or cottage court site, may be approved administratively by the planning director or his designee. Minor modifications include the addition of detached storage sheds, not to exceed 150 square feet in area, on-grade patios, decks, porches, driveway or parking modifications, or other additions not involving an increase or expansion of the habitable area of existing cottage court dwelling units.

- c. Major modifications to a nonconforming cottage court dwelling unit or cottage court site, may be approved by the Nags Head Board of Commissioners through the conditional use process as set forth in Town Code section 48-525. Major modifications include any proposal which will result in a net increase in habitable area of nonconforming cottage court units.
  - d. All improvements must meet the dimensional requirements of the district in which they are located. When a lot coverage non-conformity exists on a cottage court site, improvements may be allowed as long as there is no net increase in overall lot coverage. All other nonconformities shall be regulated in accordance with Town Code section 48-124.
- (5) On any individual dwelling unit in a nonconforming cottage court work may be done on ordinary repairs, or on repair or replacement of nonloadbearing walls, fixtures, wiring or plumbing.
  - (6) If an individual dwelling unit in a nonconforming cottage court becomes dangerous to life, destroyed or unlawful due to lack of repairs or maintenance, the building inspector shall condemn the structure in accordance with G.S. 160A-426, and the structure may thereafter be restored, repaired, rebuilt or replaced in conformity with the regulations of this chapter and any other applicable federal or state regulations.
  - (7) Nothing in this chapter shall prevent the strengthening or restoring to a safe condition of any individual dwelling unit in a nonconforming cottage court or part thereof declared to be dangerous to life by any official charged with protecting the public safety, or upon order of such official when he has determined that there is a clear and immediate danger to the public safety.

Sec. 48-378. – Cottage Courts.

Cottage Courts are permitted as a conditional use in the CR, C-2, and R-2 zoning districts, provided the following requirements and conditions are met:

- (a) Location. Cottage Courts shall only be located on properties with frontage on NC 12 or SR 1243. Optional: or on properties located east of South Wrightsville Avenue.
- (b) Size and arrangement. Individual dwelling units must be designed and arranged for occupancy by one family operating as a housekeeping unit and shall contain at least five hundred (500) but no more than two thousand (2,000) square feet of gross floor area. One structure may be larger than the maximum size if it is combined with on-site management or another complementary accessory or principal use. Each cottage court unit shall contain separate sleeping, bathing, and living areas.
- (c) Architectural design.
  - (1) Individual units must receive at least 75 architectural design points based on the criteria established in the Town of Nags Head Residential Design Guidelines (See Appendix A).

- (2) Individual cottages shall not contain more than one and one-half (1 ½) stories. At least one-third (1/3) of the cottage court units shall not exceed one story.
- (3) Dwelling units shall meet the minimum roof pitch requirements established in the Town of Nags Head Residential Design Guidelines.
- (4) Dwelling units shall not contain enclosed attached or detached garages but may contain an open parking area underneath the structure. However, an owner or on-site manager living on the property may have one garage or shed serving their individual unit or living quarters.
- (5) Cottages shall be oriented towards a common open space or shared drive aisle.
- (d) Density. Cottage courts shall contain at least three (3) but not more than ten (10) individual dwelling units.
- (e) Building separation and setbacks. Dwelling units shall be separated from one another by a minimum of ten (10) feet, including projections. Dwelling units shall have a minimum fifteen (15) foot front yard setback, eight (8) foot side yard setback, and twenty-five (25) foot rear yard setback.
- (f) Minimum lot size. Cottage court lots must be at least 20,000 square feet in area.
- (g) Lot coverage. The lot coverage shall not exceed 55 percent. When performing lot coverage calculations, the residential lot coverage calculation sheet included with the site development application, as amended, shall be completed and submitted for review and approval.

(1) Permeable pavement:

- a. For the purposes of determining lot coverage, the total square footage of permeable pavement materials is multiplied by 0.67.
- b. Permeable pavement materials include porous concrete, permeable interlocking concrete pavers, concrete grid pavers, Turfstone™, and other proven technologies available as covered in the NC Best Management Practices Manual and as approved by the town engineer for appropriateness to the site and existing conditions. Porous concrete shall be designed and installed in accordance with ACI specifications, or equivalent standard, with hydrological, operation and maintenance considerations. Installation shall be conducted by a contractor certified in the installation of the type of pavement system chosen.
- c. The town encourages use of pervious materials and new technologies that provide for safe and efficient driveway and parking areas and that appropriately address stormwater runoff issues. A minimum of 20 percent of the surface area of the parking area and drive aisles shall be constructed using permeable surface materials, unless it can be demonstrated that a topographic or hydrologic constraint exists that would limit its use and effectiveness.

- d. No porous concrete shall be used east of NC 1243 (South Old Oregon Inlet Road) or NC 12 (South Virginia Dare Trail). Compacted gravel shall not be considered permeable pavement.
- (2) In the case of an oceanfront lot, only that area landward of the first line of stable natural vegetation or static vegetation line (as defined by CAMA) shall be used for calculating lot coverage. Where an oceanfront lot has little or no stable natural vegetation, the line of such vegetation shall be a line extending between the nearest such vegetation existing north and south of the lot.
- (h) Driveway access. Each dwelling unit shall have access to a shared accessway. The shared accessway must be designed to a minimum width of 20 feet to allow firefighting apparatus to locate within 150 feet of all sides of all structures on the property. The shared accessway may be reduced to a minimum width of 12 feet where it is closer than 150 feet to all sides of all structures on the property. An accessway width less than 20 feet may be reviewed and approved by the fire marshal in conjunction with an approved alternative life safety plan.
- (i) Off-street parking and loading facilities. Individual units shall have a minimum of two (2) parking spaces. Parking spaces for each dwelling unit shall be provided so as not to interfere with the shared accessway or with the access of emergency or service vehicles to the entire property. Shared parking areas may be utilized to accommodate the total parking requirements for the development. Parking spaces and drive aisles shall not be located closer than five (5) feet to side or rear property lines. Parking spaces shall not be located with direct access from the right-of-way.
- (j) Refuse and recycling. Cottage courts shall provide a suitable location for a dumpster as determined by the Director of Public Works. Dumpster areas shall be appropriately screened and shall not be located in the required front yard of the property.
- (k) Pools. Cottage courts may have one community pool serving the units on the property.
- (l) On a site to be used for cottage court development, existing residential structures, which may become nonconforming with respect to the standards of this section, may be permitted to remain however the extent of the nonconformity shall not be increased.

Sec. 48-403. - R-2 medium-density residential district.

- (c) *Conditional uses.* The following uses are permitted in the R-2 district, subject to the requirements of this R-2 district and additional regulations and requirements imposed by the board of commissioners as provided in article XIV of this chapter:
- (12) Cottage Courts, subject to the requirements of Town Code Section 48-378.

Sec. 48-405. - CR commercial residential district.

(c) *Conditional uses.* The following uses shall be permitted in the CR district, subject to the requirements of this CR district and additional regulations and requirements imposed by the board of commissioners as provided in article XIV of this chapter:

(8) Cottage Courts, subject to the requirements of Town Code Section 48-378.

Sec. 48-407. - C-2 general commercial district.

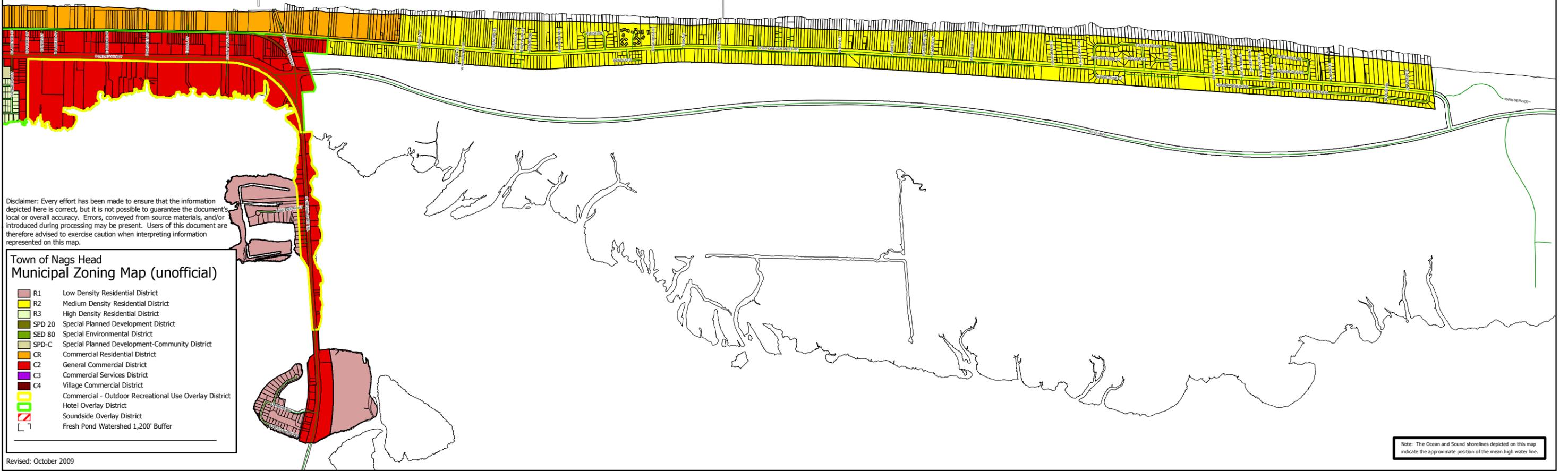
(c) *Conditional uses.* The following uses shall be permitted subject to the requirements of this C-2 district and additional regulations and requirements imposed by the board of commissioners as provided in article XIX of this chapter:

(32) Cottage Courts, subject to the requirements of Town Code Section 48-378.





The preparation of this document was financed in part through a grant provided by the North Carolina Coastal Management Program, through funds provided by the Coastal Zone Management Act of 1972, as amended, which is administered by the Office of Ocean and Coastal Resources Management, National Oceanic and Atmospheric Administration.



Disclaimer: Every effort has been made to ensure that the information depicted here is correct, but it is not possible to guarantee the document's local or overall accuracy. Errors, conveyed from source materials, and/or introduced during processing may be present. Users of this document are therefore advised to exercise caution when interpreting information represented on this map.

**Town of Nags Head  
Municipal Zoning Map (unofficial)**

R1	Low Density Residential District
R2	Medium Density Residential District
R3	High Density Residential District
SPD 20	Special Planned Development District
SED 80	Special Environmental District
SPD-C	Special Planned Development-Community District
CR	Commercial Residential District
C2	General Commercial District
C3	Commercial Services District
C4	Village Commercial District
[Yellow box]	Commercial - Outdoor Recreational Use Overlay District
[Green box]	Hotel Overlay District
[Red box]	Soundside Overlay District
[Blue box]	Fresh Pond Watershed 1,200' Buffer

Revised: October 2009

Note: The Ocean and Sound shorelines depicted on this map indicate the approximate position of the mean high water line.

## STAFF REPORT

**TO:** Planning Board

**FROM:** Kelly Wyatt, Deputy Planning Director/Zoning Administrator  
Andy Garman, Deputy Town Manager/Planning Director

**DATE:** August 16, 2016

**SUBJECT:** A proposed zoning ordinance text amendment to Town Code Section 48-407(c)(9), Conditional Uses within the C-2, General Commercial Zoning District as it relates to an "Attended Car Wash" operation.

### SUBJECT OR MOTION(S):

1. Motion to recommend adoption or denial of a text amendment to Town Code Sections 48-407(c)(9) to eliminate the requirement that a car wash have an attendant.

### BACKGROUND:

Mr. Derek Hatchell on behalf of I.G. Holdings, LLC, has submitted the attached zoning ordinance text amendment application, which, if adopted, would eliminate the need for an attendant to be present on-site during all hours of operation of a car wash.

In the zoning text amendment application, the applicant has cited the desire to no longer require an attendant be present onsite as it is not necessary given that the car wash would be fully automated.

There is significant history with the allowance of an attended car wash as a use within the Town dating back to 1988 when the discussions first arose with the Planning Board. Below is a brief summary:

- September 20, 1988 – Request presented to the Planning Board to include "Car Wash" as a Permitted or Conditional Use within the C-2 Zoning District. At this meeting the Planning Board felt there was a need to regulate the operation via Conditional Use approval with such conditions as limiting the hours of operation and requiring an attendant on-site.
- October 18, 1988 – Presentation to the Planning Board on the use of a car wash as a Conditional Use with specified conditions including that the car wash be enclosed and fully automated under the direct operation of an attendant and that the hours of operation be limited to 9:00am to 9:00pm. The applicant at this time expressed concern that the requirement the car wash be enclosed would eliminate the open bay/wand operation. The Planning Board felt this type of operation would promote noise, trash and congestion and continued with the recommendation of an enclosed building. The Planning Board recommended adoption of the ordinance with development standards as presented.

- December 20, 1988 – Planning Board tabled discussion as the applicant was present to discuss the proposal.
- January 17, 1989 – Planning staff presented the request once more to the Planning Board following the applicant’s assertion that the original request, to allow a self-service type car wash operation as well as automated, was not decided upon by the Board of Commissioners. The Planning Director presented the proposed conditions including the request for self-service car washes. Planning staff recommended against this because of the increased potential that an unattended, self-regulating business may create problems related to noise and litter control. While the Planning Board felt that a car wash might likely be needed within the Town they did not feel that this was the type that was desired. The Planning Board forwarded the request to the Board of Commissioners for the final decision with their recommendation of denial.
- March 6, 1989 – The Board of Commissioners held the Public Hearing pertaining to “Car Wash” as a Conditional Use within the C-2, General Commercial Zoning District. Commissioners felt that the Planning Board’s concern of noise could be addressed by an on-site attendant however the concerns of litter and possible after hours activities could not be addressed. The Board of Commissioners voted to deny the request as presented and directed staff to return with a version of the amendment incorporating the requirement for an on-site attendant as well as additional storm water measures.
- July 3, 2016 - The Board of Commissioners began the Public Hearing, following staff’s presentation on the revised ordinance, public comment was taken. Significant revisions were proposed requiring re-advertisement of the proposed amendment. The Public Hearing was set for the Boards August meeting.
- August 7, 1989 – The Board of Commissioners adopted the text amendment which incorporated the requirement that the car wash have on on-site attendant.
- September 6, 1989 – Parking standards for car washes was discussed and later adopted.

**June 21, 2016 Updated Information:** Following requests made by the Planning Board at its May 17, 2016 meeting, numerous revisions have been made to the proposed ordinance to include:

- A site attendant must visit the site a minimum of two times daily to ensure proper operation.
- Security cameras must be installed to record activity in vulnerable locations.
- Hours of operation have been established, this is what the Board of Commissioners recommended in the initial amendment from October, 1988.
- A minimum setback of 50 ft. has been applied to any freestanding vacuums and other service areas adjacent to a residential use or district.
- Clarification on what the word “enclosed” represents and the need to comply with Town Architectural Design criteria.

- Clarification that the required buffer must be continual and opaque. The buffer requirement on this site would not be subject to the clustering and grouping of plantings afforded in other scenarios.

Staff would note that the applicant was provided a copy of the draft ordinance prior to inclusion in the packet for review and comment. The applicant has indicated that he is in agreement with the language except for the hours of operation. The applicant would request consideration for no specific limitation on the hours of operation.

**STAFF RECOMMENDATION:**

Based upon the history of discussion surrounding the previous Board’s desires for any car wash to have an attendant on-site during all hours of operation, Planning Staff recommends denial of the proposed text amendment as presented.

**Updated Staff Recommendation (June PB):** Staff continues to recommend denial of the proposed ordinance as amended. Staff does not believe that the 50 foot setback adjacent to residential zoning districts or uses is adequate to mitigate noise concerns based on the proposed use.

**PLANNING BOARD RECOMMENDATION:**

At their June 21, 2016 meeting, the Planning Board voted 5-2 to recommend adoption of the proposed zoning ordinance text amendment omitting the condition that the car wash maintains hours of operation.

**\*\*August 16, 2016 Updated Information\*\***

At the Board of Commissioners August 3, 2016 meeting the Board held the Public Hearing and, after much discussion with both the applicant and concerned citizens, asked that this item be brought back to the Planning Board for additional discussion/clarification on the following items:

- Setbacks and buffering in consideration of nearby and adjoining residential communities. *(Is 50 ft. setback adequate? Is opaque buffering best for public safety purposes, especially along front property boundary? Can fencing be used in conjunction with landscaping to achieve opaqueness?)*
- Review of the placement of the building(s) on the site. *(Desire to have the structure built to the minimum front yard setback, eliminate potential to have structure set back on a deep lot?)*
- Review of traffic flow/access only from US 158. *(Does the Town wish to require access to any such use to be from US 158, not accessed from any side street it may be adjacent to?)*
- Define/re-word "Areas of Vulnerability". *(We do not define what an "area of vulnerability" is, difficult to regulate. Consider having all areas of the site monitored?)*
- Pro's and Con's of operating 24/7 versus 9am to 9pm.
- Review of decibel levels of vacuum cleaners.

**AN ORDINANCE AMENDING THE CODE OF ORDINANCES  
OF THE TOWN OF NAGS HEAD, NORTH CAROLINA**

**ARTICLE I. Purpose(s) and Authority.**

**WHEREAS**, pursuant to N.C.G.S. § 160A-381, the Town of Nags Head (the "Town") may enact and amend ordinances regulating the zoning and development of land within its jurisdiction and specifically the location and use of buildings, structures and land. Pursuant to this authority and the additional authority granted by N.C.G.S. Chap. 160A, Art. 19 et. seq, the Town has adopted a comprehensive zoning ordinance (the "Town's Zoning Ordinance") and has codified the same as Chapter 48 of the Town's Code of Ordinances (the "Town Code"); and

**WHEREAS**, pursuant to N.C.G.S. § 160A-174 the Town may also enact and amend ordinances that define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the Town; and

**WHEREAS**, A text amendment was initiated by an applicant to eliminate the requirement that a car wash operation have an on-site attendant during hours of operation.

**WHEREAS**, the 2010 Land Use Plan states that the Town shall continue to address the community appearance concerns through various Boards and shall work towards developing incentives designed to enhance, promote and protect the Town's architectural image and heritage;

**WHEREAS**, the Town further finds that in accordance with the findings above it is not in the interest of and contrary to the public's health, safety, morals and general welfare for the Town to amend the Town's Zoning Ordinance and Town Code of Ordinances as stated below.

**ARTICLE II. Construction.**

For purposes of this ordinance amendment, underlined words (underline) shall be considered as additions to existing Town Code language and strikethrough words (~~strikethrough~~) shall be considered deletions to existing language. Any portions of the adopted Town Code which are not repeated herein, but are instead replaced by an ellipses ("...") shall remain as they currently exist within the Town Code.

**ARTICLE III. Amendment of Zoning Ordinance.**

NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of the Town of Nags Head, North Carolina, that the Town Code shall be amended as follows:

PART I. That Section **48-407(c)(9), Conditional Uses within the C-2, General Commercial District**, be amended as follows:

(9) ~~An attended~~ eCar washes (automated and ~~self-service~~ enclosed only), subject to other requirements of this chapter and provided that the following conditions are met:

- a. ~~The attendant shall be present on site during all hours of operation;~~ An attendant shall visit and assess the site a minimum of two times daily during all hours of operation to ensure a clean, orderly operation. Security cameras shall be installed and positioned to provide visibility of the entire site.

- b. The hours of operation shall be between 9:00 a.m. and 9:00 p.m.
- c.~~b.~~ No principal or accessory building shall be located within 50 feet of an existing residential use or district. No freestanding vacuums, air compressors, or other vehicular servicing areas shall be located within 50 (?) feet of an existing residential use or district.
- d.~~e.~~ A car wash shall be constructed so as to allow vehicles to pass through the structure in order to create an orderly traffic flow. Furthermore, stacking spaces shall be provided for vehicles entering and exiting the site to minimize traffic congestion on public roads.
- e. A car wash shall be enclosed on at least two sides with open bays and a roof structure. A car wash must comply with the architectural design standards of Town Code Section 48-371.
- f.~~d.~~ The boundaries of the entire site shall be buffered from all adjacent properties and rights-of-way in accordance with subsection 48-482(1), buffer yard A. This buffer yard, when adjacent to residential uses and districts, shall be continuous and opaque. Fencing may be incorporated into the buffer to ensure opaqueness when necessary.
- g.~~e.~~ The site shall be designed to contain all stormwater from impervious surfaces ~~on-site from a ten-year, two-hour storm event, the equivalent being 4.24 inches of rainfall in a two-hour period~~ consistent with the applicable standards of Town Code Chapter 34 – Stormwater, Fill, and Runoff Management.
- h.~~f.~~ The car wash shall utilize a recyclable water type system.
- i. Car washes shall only be located on properties with frontage on US 158 and shall be accessed only from US 158.
- j. The principal structure shall be aligned with the front yard setback along US 158.

PART II. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed. This ordinance shall be in full force and effect from and after the \_\_\_ day of \_\_\_\_ 2016.

\_\_\_\_\_  
Robert C. Edwards, Mayor  
Town of Nags Head

ATTEST:

\_\_\_\_\_  
Carolyn F. Morris, Town Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Town Attorney

Date adopted: \_\_\_\_\_

Motion to adopt by Commissioner \_\_\_\_\_

Motion seconded by Commissioner \_\_\_\_\_

Vote: \_\_\_\_\_ AYES \_\_\_\_\_ NAYS

ZONING AMENDMENT APPLICATION  
TOWN OF NAGS HEAD, NORTH CAROLINA

Applicant J. G. Holdings

Mailing address P.O. Box 120, Kitty Hawk, NC 27948

Explanation of request

Zoning Ordinance - Section(s) 48-407(c)  
Attach amendment in ordinance form.

Zoning Map  
Attach copy of current Zoning Map with affected property outlined in red.  
Attach names and mailing addresses of the property owners of all parcels of land abutting the parcel in question.

Nature of request

Because is automated car wash will not be  
a person their 24 hours to attend it.  
Being car wash is total automated it is not  
necessary to have an attend on site but  
will have a contact number available 24 hours.  
Will have service techs working car wash  
after during the day.

Reason for request

Because we do not feel it's necessary  
to have an attend on site all the time  
when it is fully automated.

Leszale Iblasa, owner

Applicant

4/19/2016

Date



## Town of Nags Head

Planning and Development  
Department

Post Office Box 99  
Nags Head, North Carolina 27959  
[www.nagsheadnc.gov](http://www.nagsheadnc.gov)

Telephone 252-441-7016  
FAX 252-441-4290

### MEMORANDUM

**TO:** Planning Board  
**FROM:** Holly White, Principal Planner  
**DATE:** August 12, 2016  
**SUBJECT:** FOCUS Nags Head: Project Update

FOCUS Nags Head was initiated last July 20, 2015 with a visit by the project consultants. Staff has outlined a summary of project milestones over the past year. FOCUS is a two part project with the first portion being focused on update of the Land Use Plan and incorporation of other long range planning documents into a single comprehensive document. This past year has been dedicated to seeking community input and drafting of the comprehensive plan.

The consultant's scope and fee for the FOCUS Nags Head project was developed with the majority of the project budget being set aside for the code rewrite. In order to remain within the budget, staff has conducted the necessary advisory committee and community meetings as well as drafting of the policies and the plan. The primary role of the Advisory Committee has been to provide guidance to staff on policy issues related to the strategic direction and vision of character areas covered in Part 2: Community Character Areas. These Character Areas represent unique areas of the Town for which distinct land use policies and zoning standards will be developed. However, the Community Character Areas represent only a portion of the plan. Part 3: Comprehensive Plan Elements & Policies covers a large portion of other necessary policy. Since the Town has already established policy guidance on many of these elements from other planning efforts (i.e. Parks and Recreation, Shoreline Management, Transportation), staff felt it a better use of resources and time to work on drafting those portions of policy internally. Community involvement received from the Advisory Committee was then focused on developing a vision for future land use and community character, which was not specifically addressed in previous plans. This has involved significant staff time to provide content for these plan elements in order to provide adequate background and context for policies and stay within the project budget.

Staff has attached a revised schedule that breaks down the Comp Plan Drafting referenced on the Gantt chart. This has been done to provide the Board of Commissioners with a defined schedule to help the Comp Plan on track. Part 3: Comprehensive Plan Elements & Policies will be brought forward first. This portion of the plan discusses policy that applies town wide and is more general in nature. An Advisory Committee meeting will be held the week of September 9<sup>th</sup> to review this section. Part 1 & 2: Setting & Context/Community Character Areas will be brought forward next. This section covers the vision and character area summaries. An Advisory Committee meeting will be held the week of September 30<sup>th</sup> to review this portion of the plan. The last portion of the plan to move forward will be Part 4: Implementation. This will also include a complete draft of the Comprehensive Plan. The Implementation section includes

an action matrix and sections on updates and amendments to the plan. An Advisory Committee meeting will be held the week of November 11<sup>th</sup> to discuss this portion of the plan. Each portion of the plan will be presented to both the Planning Board and Board of Commissioners following presentation to the Advisory Committee (see attached revised schedule for specific dates). Staff recommends a final community meeting be held the week of December 16<sup>th</sup> with a public hearing being held by the Board of Commissioners the week of January 20<sup>th</sup>.

Staff will be working on a schedule with the consultant for the second portion of the plan involving the code rewrite. The first task will involve a code analysis which will be discussed with the Technical Review Committee. This task can occur simultaneously with the Comp Plan and is expected to begin several months prior to completion of the Comp Plan.

### **Project Milestones & History**

<b>Date</b>	<b>Description</b>
<b>January 2015</b>	BOC Retreat- discussion on potential project and meetings with individual BOC members
<b>February 2015</b>	Staff research and formulation of project approach
<b>March 2015</b>	
3.5.15	RFQ Released for FOCUS Project- Land Use Plan Update and Code Rewrite
3.19.16	RFQ Due
3.25.16	RFP Invitations sent to select firms
4.8.16	RFP Submissions Due
4.14.16-4.24.16	Interviews
4.24.16	Staff scoring of interview and decision on firm
<b>May 2015</b>	Consultant Recommendation to BOC and contract work
<b>June 2015</b>	Project initiated with staff. Background information gathered and given to consultant. Staff and boards survey prepared. Preparation for initial site visit.
<b>July 2015</b>	Project Kick Off- Consultant site visit to conduct stakeholder interviews with staff and board members. Research into possible appointments for Advisory and Technical Committee
<b>August 2015</b>	BOC presented with Advisory and Technical Committee purpose and structure. Staff development of committee spreadsheet. Logo development for project. Preparation for public kick off. Development of draft guiding principles.
<b>September 2015</b>	BOC Appointment of Advisory and Technical Committee . Staff preparation of upcoming meetings.
9.10.15	Community FOCUS Kick off Meeting
9.28.15	Community Visioning Meeting
9.29.15	Kick Off Advisory and Technical Committee Meeting with consultant
<b>October 2015</b>	Revision of guiding principles. Continued staff and consultant research. Development of schedule for advisory committee.
10.16.15	Pumpkin Fair- Community Input
<b>November 2015</b>	Consultant Memos- 1. Exploration Memo on Stakeholder Issue Summary 2. Revised Community Vision 3. Comprehensive Plan

	Outline & Schedule. Preparation for kick off with Advisory Committee.
<b>December 2015</b>	Presentation of Consultant Memos to BOC.
12.17.15	FOCUS Advisory Kick Off Meeting- Vision
<b>January 2016</b>	
1.12.16	Advisory Committee Meeting- Vision
1.26.16	Advisory Committee Meeting- Character Area Discussion
<b>February 2016</b>	
2.2.16	Advisory Committee Meeting- Character Area Discussion
2.23.16	Advisory Committee Meeting- Character Area Discussion
<b>March 2016</b>	
3.1.16	Advisory Committee Meeting- Accommodations
3.8.16	Community Meeting- Review of Character Area Summaries
3.14.16	Staff and Consultant meeting to discuss plan outline, content, and deadlines in Durham.
3.24.16 – 3.31.16	Staff and Board Interviews for Part 3. Development of interview summaries.
<b>April 2016</b>	
4.1.16 – 4.30.16	Staff and Board Interviews for Part 3. Development of interview summaries.
<b>May 2016</b>	
5.17.16	Staff and Board Interviews for Part 3. Development of interview summaries.
5.1.16-5.31.16	Staff research for Part 1 Introduction & Background. Staff review of draft of Part 1
<b>June 2016</b>	Staff research for Part 1 Introduction & Background. Staff draft policy for Part 3. Weekly conference calls with consultant.
6.15.16	Presentation of Vision to BOC
6.15.16-6.30.16	Revisions to Vision
<b>July 2016</b>	Staff draft policy for Part 3.
6.6.16	Presentation of revised vision to BOC.

FOCUS Nags Head - Comp Plan Schedule

Tasks/Meeting	29-Jul	5-Aug	12-Aug	19-Aug	26-Aug	2-Sep	9-Sep	16-Sep	23-Sep	30-Sep	7-Oct	14-Oct	21-Oct	28-Oct	4-Nov	11-Nov	18-Nov	25-Nov	2-Dec	9-Dec	16-Dec	23-Dec	30-Dec	6-Jan	13-Jan	20-Jan	
<b>Parts 1 &amp; 2: Setting &amp; Context/Community Character Areas</b>																											
Introduction																											
Vision																											
Background																											
Character Area Summaries																											
<b>Part 3: Comprehensive Plan Elements &amp; Policies</b>																											
Land Use																											
Natural Resources and Resiliency																											
Economic Development and Tourism																											
Cultural Resoruces																											
Parks and Recreation																											
Transporation																											
Municipal Services and Infrastructure																											
<b>Part 4: Implementation/Draft Comp Plan</b>																											

Advisory Committee Meeitng Date	
Planning Board Meeting Date	
Board of Commisioners Meeting Date	
Community Meeting	



## Town of Nags Head

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Telephone 252-441-7016  
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### MEMORANDUM

**TO:** Planning Board  
**FROM:** Holly White, Principal Planner  
**DATE:** August 12, 2016  
**SUBJECT:** Sea Level Rise Project- Update

Staff has worked with NC Sea Grant Staff to merge the 3 diagrams developed at the meetings in the winter into 1 diagram. Staff participated in a webinar with Jessica Whitehead and Lisa Schiavinato on July 18<sup>th</sup> and July 29<sup>th</sup> and June 29<sup>th</sup>-30<sup>th</sup> from 9:30- 12 pm finalize the merging of diagrams.

The Sea Level Rise Committee met on Wednesday afternoon, August 10<sup>th</sup> and Thursday morning, August 11<sup>th</sup> to review the merged diagram and prioritize actions outlined in the diagram. Valuable feedback was gained at the meetings and the committee was able to participate and complete the exercise to prioritize the actions.

The purpose of the Vulnerability, Consequences, and Adaptation Planning Scenarios Process (VCAPS) is to learn how sea level rise will impact Nags Head and gain insight through community involvement into how best to adapt in the future. The actions identified on how the Town could potentially adapt in the future can be broken out into 5 main categories: ocean management, estuarine shoreline management, stormwater management, water (ground/surface) management, and an all issues category in which the issues were identified in all 3 groups.

Town staff will be working with Sea Grant staff over the next six weeks to:

1. Revise the actions based on the voting.
2. Provide a prioritized list of action for each area as well as the top six priorities overall.
3. Update the report to incorporate the combined diagrams and action lists
4. Set up a final committee meeting to view the final draft plan.

## STAFF REPORT

**TO:** Planning Board  
**FROM:** Kelly Wyatt, Deputy Planning Director/Zoning Administrator  
Andy Garman, Deputy Town Manager/Planning Director  
**DATE:** August 16, 2016  
**SUBJECT:** Discussion of comprehensive text amendments to address recent NC Supreme Court findings related to permitted and prohibited uses.

### SUBJECT OR MOTION(S):

1. Discussion and request of Planning Board to initiate and authorize staff to develop the comprehensive zoning ordinance text amendments necessary to comply with recent North Carolina Supreme Court findings regarding permitted/prohibited land uses.

### BACKGROUND:

In a recent decision of the North Carolina Supreme Court case, *Byrd vs. Franklin County*, the courts found that a zoning ordinance may not regulate unlisted land uses by providing a statement such as "the ordinance prohibits all land uses that are not expressly permitted".

Supplemental information on the history of this case is provided in your packet via a UNC School of Government Coates' Canons article. In short, the Franklin County, NC unified development ordinance did not specifically address shooting ranges as a permitted, special or conditional use or as a prohibited use. However, the Franklin County UDO did provide a statement indicating that uses not specifically listed are prohibited. Town staff originally advised the applicant (Byrd) to seek a zoning ordinance text amendment to allow this new use category. Town staff later concluded that a shooting range could be considered under a use category already listed within the UDO, "Facility for open air games" which was allowed a Special Use. When the applicants applied for the Special Use Permit, the County Board of Commissioners denied the request at which time the applicants filed an appeal. The court of appeals found that the statement of 'uses not listed as permitted are prohibited' was ambiguous however, as it was not listed as a permitted use it was deemed prohibited. On November 6, 2015 the North Carolina Supreme Court reversed the court of appeals decision "rejecting the notion that a zoning ordinance may prohibit uses not explicitly allowed" and continued on to "make it clear that the law favors uninhibited free use of private property over government restrictions". In moving forward the courts have not said that every use must be allowed somewhere within the community's zoning districts but that any prohibitions of land uses need to be clearly stated.

It is believed that the Town is still allowed to outright prohibit certain uses as well as permit a variety of uses either as a permitted use or a conditional use. However, if there is a use the Town specifically wishes to prohibit it needs to be clearly defined as such.

Our current zoning code is inconsistent with the NC Supreme Court decision. Planning Staff is requesting that the Planning Board initiate the text amendment process to allow staff to begin working with both the Planning Board and the Town Attorney to draft the amendments necessary to comply with NC Supreme Court decision while preserving the Town's current land use standards.

While this is a project that seems fitting to be incorporated into the FOCUS Nags Head comprehensive land use code re-write, the town's attorney feels as though this effort should be undertaken swiftly. We will communicate with the consultants of Code Wright throughout the process to ensure efficiency and no duplication of work.

**August 16, 2016 Update:**

Included in your packet is the very preliminary framework for how we would anticipate moving forward within crafting this ordinance revision. A table has been included with uses listed in the column on the right-hand side and zoning districts across the top. Existing uses currently in the ordinance are listed by zoning district and the table specifies where the use is both permitted and prohibited. Staff has also added other uses to the table as an attempt to define the uses prohibited by the town. This has been developed based on ordinances that have been previously considered by the Town Board of Commissioners as well as from other similar communities who have rewritten their ordinances to address the recent NC Supreme Court decision. This is being provided to receive input and create discussion among the Board. This is in NO WAY the finished document; this will be a work in progress and updates will be provided to the board as they are available.

TYPE OF USE	ZONING DISTRICT											ADDITIONAL STANDARDS
	<u>R-1</u>	<u>R-2</u>	<u>R-3</u>	<u>CR</u>	<u>C-1</u>	<u>C-2</u>	<u>C-3</u>	<u>C-4</u>	<u>SPD-20</u>	<u>SED-80</u>	<u>SPD-C</u>	
<b><u>RESIDENTIAL Household Living</u></b>												
Detached Single-family dwellings	P	P	P	P	P	P	-	P	P	P	P	
Large Residential Dwellings	P	P	P	P	P	P	-	P				
Duplex	-	P	P	-	-	-	-	-	-	-	-	
Customary Accessory Structures	P	P	P	P	P	P	P	P	P	P	?	
Multi-family residence or townhouse development	-	-	-	C	-	C	-	-	-	-	?	
Townhouses	-	-	-	-	-	-	-	-	C	-	P	
Mobile/Manufactured Homes	-	-	-	-	-	-	-	-	-	-	-	
<b><u>RESIDENTIAL Group Living</u></b>												
Bed and Breakfast	-	-	-	-	-	P	-	-	-	-	-	
Boardinghouse or rooming house	C	C	C	C	-	C	-	-	-	-	-	

Convents & Monasteries	-	-	-	-	-	-	-	-	-	-	-	-	
Dormitories & Residence Halls	-	-	-	-	-	-	-	-	-	-	-	-	As an accessory to hotels and for staff of convalescent home.
Fraternity & Sorority Houses	-	-	-	-	-	-	-	-	-	-	-	-	
Halfway Houses (?)													
Other Residential Uses	-	-	-	-	-	-	-	-	-	-	-	-	

P = Permitted Use

C = Conditional Use



Child Day Care Center	-	C	-	-	-	C	-	-	C	-	C	-	-	-	-	Accessory use to religious complex in SPD-20
Dialysis Center	-	-	-	-	-	P	-	-	-	-	-					
Medical Offices	-	-	-	-	-	P	-	-	-	-	P					
Hospital	-	-	-	-	-	-	-	-	-	-	C					
Laboratories	-	-	-	-	-	-	-	-	-	-	P					
Nonprofit/community outreach centers	-	-	-	-	-	P	-	-	-	-	-					
Nonprofit outreach center with aquatic fitness facilities	-	-	-	-	-	P	-	-	-	-	-					
Nursing Home and Convalescent Home	-	-	-	-	-	-	-	-	-	C	-					
Religious complex	-	C	C	-	-	C	P	-	C	-	C					
Museum	-	-	-	-	-	-	-	-	P	-	-					
Funeral Home	-	-	-	-	-	P	-	-	-	-	-					
Elementary School Complex	-	-	-	-	-	C	-	-	-	-	-					
Real Estate Rental Management Facility	-	-	-	-	-	-	P	-	-	-	-					

<b><u>Offices</u></b>																	
Business						P											
Financial						P											
Governmental						P											
Professional						P											
General						P											
Building Contractors Office							P										
Trade Association Office	-	-	-	-	-	-	P	-	-	-	-						
Pool and Spa Office, Storage, Sales, Service and Installations	-	-	-	-	-	-	P	-	-	-	-						
<b><u>Retail Sales</u></b>																	
Drug Paraphernalia Sales	-	-	-	-	-	-	-	-	-	-	-						
Automobile Service Stations and Repair Garage	-	-	-	-	-	C	-	-	-	-	C						
Restaurant	-	-		P	-	P	-	-	-	-	P						
Restaurant with Multiple	-	-	-	-	-	C	-	-	-	-	-						

Principal Structures																	
Restaurant, Drive-In	-	-	-	-	-	C	-	-	-	-	C						
Restaurant, Drive-Through	-	-	-	-	-	C	-	-	-	-	C						
Restaurant, Neighborhood	-	-	-	-	-	?	-	-	-	-	?						
Restaurant, Take-Out	-	-	-	-	-	P	-	-	-	-	?						
Beach recreation equipment rentals and sales	-	-	-	-	-	P	-	-	-	-	-						
Automated Ice Vending Machines	-	-	-	-	-	-	-	-	-	-	-						
Smoke & Vapor Shops	-	-	-	-	-	??	-	-	-	-	-						
<b><u>Services</u></b>																	
Alcohol & Drug Detoxification, Rehabilitation & Treatment Facilities with overnight stays.	-	-	-	-	-	-	-	-	-	-	-						
Alcohol & Drug Outpatient Treatment facilities.																	
Bail Bond Services	-	-	-	-	-	P	-	-	-	-	-						





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## Coates' Canons Blog: Dealing with Land Uses Not Specifically Addressed in a Zoning Ordinance: The Saga Continues

By David Owens

Article: <http://canons.sog.unc.edu/dealing-with-land-uses-not-specifically-addressed-in-a-zoning-ordinance-the-saga-continues/>

This entry was posted on November 17, 2015 and is filed under General Local Government (Miscellaneous), Land Use & Code Enforcement, Zoning

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If a person is considering undertaking a particular land use, it is important that they know whether or not that would be allowed by the zoning ordinance.

It is usually a simple proposition to determine whether or not the use is allowed. The owner finds out how the property is zoned – what zoning district applies to this parcel – and then sees whether the intended use is listed as a permitted use on the property. The ordinance may provide that the use is always allowed in the applicable zoning district (often referred to as a “use by right” or “permitted use”) or only allowed with a special review (a special or conditional use permit). If the intended use is prohibited, the person must find a different site or seek to have the property rezoned to a district that allows the intended use.

But what if the zoning ordinance does not specifically address the intended use? Perhaps it is a new type of land use that was not contemplated when the ordinance was adopted. If the ordinance is more than a few years old it likely does not address solar farms, sweepstakes parlors or other “new” land uses. Perhaps it is a use the local government did not anticipate would be proposed in their community, such as a tattoo parlor, race track, or shooting range. Or perhaps the local government tried to shorten and simplify the ordinance by deleting page after page with detailed listings of specific uses in a permitted use table.

Whatever the reason, from time to time someone will propose to undertake a type of land use that is not expressly addressed by the ordinance. What happens then? In recent years our court of appeals has dealt with this question in a series of cases, with the state Supreme Court recently weighing in with some important conceptual guidance.

### Prior Cases

The first in this series of cases involved a private shooting range in Union County. Dr. Michael Land, a gun collector and enthusiast, created a private shooting range on a six acre parcel he owned in what was then a relatively rural area. The surrounding area gradually filled in as new subdivisions were created and built. The property became a part of the town of Wesley Chapel. Eventually neighbors objected to continued use of the range, particularly for the semi-automatic and fully automatic rifle fire that Dr. Land and his guests occasionally enjoyed. The town concluded the shooting range was not allowed in the applicable residential zoning district.



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The ordinance in effect at the time the range was established did not specifically list shooting ranges as a permitted use, special use, or prohibited use. The ordinance did include a provision that uses not listed were prohibited, but that since the list of permitted uses could not be all-inclusive, the ordinance stated that permitted uses should be interpreted to include uses with similar impacts. The town contended that the listed use with most nearly similar impacts was a "privately-owned outdoor recreational facility." Since that use required a special use permit and Dr. Land did not secure such a permit when he built the shooting range, the town contended the use was not a lawful nonconformity. The court noted the approach of prohibiting uses that are not expressly permitted is problematic for two reasons: (1) it fails to put the public on notice as to how an unlisted use would be classified; and (2) it is the antithesis of the axiom that zoning ambiguity is to be construed in favor of free use of property. The court of appeals thus held in **Land v. Village of Wesley Chapel**, 206 N.C. App. 123, 697 S.E.2d 458 (2010), that absent a clear provision regulating shooting ranges, Dr. Land was not required to get a special use permit for this unlisted use. Richard Ducker has a post on that decision [here](#).

The next two cases involved a training facility for military, law enforcement, and security personnel proposed to be located on a nearly 1,000-acre site in a rural portion of Cumberland County. The proposed facility included multiple outdoor firing ranges. The ordinance did not specifically list this type of land use as permitted or prohibited. The property was in an Agricultural zoning district that included as a permissible use "School, public, private, elementary or secondary." The zoning administrator approved the plan, classifying the business as a "private school." Neighbors appealed. The court of appeals in **Fort v. County of Cumberland**, 218 N.C. App. 401, 721 S.E.2d 350, *review denied*, 366 N.C. 401 (2012), held the type of facility proposed was not a permitted use. The court concluded that inclusion of the terms "elementary or secondary" in the definition of "schools" was intended to exclude other types of schools.

The proposed project was back before the court of appeals in 2014. The zoning ordinance provided that all uses of property are prohibited if not permitted or otherwise allowed. It also provide that if a use was not specifically addressed in the ordinance, the standards for the land use that is "most closely related" to that use applied. As this particular use was not specifically addressed in the ordinance, the county this time around determined the use "Recreation/Amusement, Outdoor (with mechanized vehicle operations)" had the most similar impacts. As this was a permitted use, the project was approved. The neighbors again appealed. In **Fort v. County of Cumberland II**, 761 S.E.2d 744 (2014), the court held the intent of the adopting board was critical and in that context noted the ordinance expressly stated that all uses of property are allowed as a matter of right except where the ordinance specifically provides otherwise. The court held there was sufficient evidence to support a conclusion that this use was most nearly similar in impacts to an outdoor recreation activity with mechanized vehicles and was thus properly permitted.

The court of appeals also touched on this issue in **Fairway Outdoor Advertising, LLC v. Town of Cary**, 225 N.C. App. 676, 739 S.E.2d 579 (2013). The controversy was over a nonconforming billboard. The Cary ordinance had a provision on uses not specifically listed in the ordinance as permitted. The ordinance allowed the zoning administrator to permit unlisted uses upon making specified findings (click [here](#) for the Cary ordinance provision dealing with review of unlisted uses). Without addressing the conceptual issues regarding the ambiguity of unlisted uses, the court held that since the ordinance language was permissive rather than mandatory ("may" issue as opposed to "shall" issue), the administrator's decision not to approve this use would not be overturned absent showing an abuse of discretion.

## Recent Decision

The most recent instance of the court wrestling with this issue again involved a shooting range. The ordinance in question, this time the zoning provisions in Franklin County's unified development ordinance, did not specifically address shooting ranges one way or another. The ordinance did include a provision that uses not specifically listed are prohibited. The staff first advised the owners to seek a zoning text amendment to include shooting ranges in the table of permitted uses in the applicable zoning district. The staff later concluded, however, that a shooting range could be considered as a "facility for open air games," which could be allowed as a special use. So the owners applied for a special use permit, which the county board of commissioners denied. The land owners appealed. The court of appeals in **Byrd v. Franklin County**, 765 S.E.2d 805 (2014), held it was improper to classify a shooting range as an "open air game" under the terms of the ordinance. The court construed the *Land* case narrowly, holding it applied only where the ordinance allowed unlisted uses if they had similar impacts to permitted uses. The majority on the court of appeals found the provision in this ordinance that uses not listed as permitted are prohibited was unambiguous. Since shooting ranges were not listed, they were prohibited. There was a dissenting opinion however that eventually carried the day. On November 6, 2015 the state supreme court **reversed** the court of appeals "for the reasons stated in the dissenting opinion." That dissenting opinion



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read *Land* to “reject the notion that a zoning ordinance may prohibit uses not explicitly allowed.” The dissent continued that *Land* “made it clear that the law favors uninhibited free use of private property over government restrictions.”

So, while the court of appeals has in the past been sympathetic to an ordinance provision that unlisted uses are prohibited, the supreme court is clearly considerably less inclined to sanction this approach. The court does not favor interpretations or ordinance provisions that presume an otherwise lawful use of land is prohibited. The court has not said that every use must be allowed somewhere (see this [post](#) for more on that question). But the court has said prohibitions need to be clear and any uncertainty will be resolved against a prohibition.

## Implications for Land Use Regulation

So what does this mean for zoning ordinances going forward?

As a practical matter, this issue does not arise frequently. For most types of land uses, ordinances are clear as to what is permitted and where it can be undertaken. But new land uses in unanticipated places arise from time to time. A recreational shooting range or go-cart track in a residential backyard. A sweepstakes parlor or adult cabaret in a vacant building in a small town. Some of these “disruptive uses” can be quite controversial, pitting the landowner’s right to free use of their property directly in conflict with the neighbors’ right to the peaceful use and enjoyment of their property.

While it is impossible for a local government to foresee and address all of these controversies in advance, there are several measures a local government can consider that will minimize problems with unlisted uses.

First, clarity on uses that are not permitted is critical. While an ordinance cannot specifically list all conceivable land uses, it should include as much specificity as is feasible and should have clear general “catchall” categories for unlisted uses.

Second, a local government should periodically update the ordinance to list how the local government intends to address specific controversial or emerging land uses. It is one thing if an ordinance a decade ago had not addressed telecommunication towers, but something altogether different if it still does not do so. Keeping the ordinance clear and current will minimize these difficulties.

Third, the courts clearly favor a provision that unlisted uses should be treated the same as the most nearly similar use as opposed to a blanket prohibition of unlisted uses. This makes attention to the first two points all the more important. But it also means a zoning ordinance should give some definition and guidance to staff as to how to evaluate the similarity of uses to avoid placing an impermissible degree of discretion in the hands of the zoning administrator. It would be helpful for the ordinance to specify the factors to be considered, such as the type, density and intensity of development, environmental effects, and the anticipated amount traffic, noise, light, vibration, odor, and other impacts on neighbors and the community.

Taking these steps will provide clarity for landowners, neighbors, and the staff, which in turn makes for a better, and in these situations, a more legally defensible ordinance.

## Links

- [appellate.nccourts.org/opinions/?c=2&pdf=6335](http://appellate.nccourts.org/opinions/?c=2&pdf=6335)
- [appellate.nccourts.org/opinions/?c=2&pdf=27929](http://appellate.nccourts.org/opinions/?c=2&pdf=27929)
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