



AGENDA
Town of Nags Head Planning Board
Nags Head Municipal Complex Board Room
Tuesday, July 19th, 2016; 2:30 pm

A. **Call To Order**

B. **Approval of Agenda**

C. **Public Comment/Audience Response**

D. **Approval of Minutes** – June 21, 2016

E. **Action Items**

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

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

1. Zoning ordinance text amendments to ensure content neutral language/regulations pertaining to signage – Adopted as presented.
2. Zoning ordinance text amendment to exclude municipally owned boardwalks, walkways, sidewalks and multi-use paths from lot coverage and minimum yard requirements – Adopted as presented.
3. Public Hearing scheduled for August 3, 2016 for following text amendments:
 - Request by Derek Hatchell on behalf of I.G. Holdings to amend the conditions associated with "Car Wash" as an 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.

G. **Town Updates – as requested**

1. Update on Focus Nags Head
2. Flood Map Presentation – Review and Adoption Process.

H. **Discussion Items**

1. 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**

**Town of Nags Head
Planning Board
June 21, 2016
-DRAFT -**

The Planning Board of the Town of Nags Head met in regular session on Tuesday, June 21, 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, David Ryan, Holly White, Lily Nieberding

Approval of Agenda

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

Public Comment/Audience Response

None

Approval of Minutes

There being no changes, Ben Reilly moved that the minutes be approved as presented. Mike Siers seconded the motion and it passed by unanimous vote.

Action Items

Consideration of a text amendment request submitted by Derek Hatchell on behalf of IG Holdings, LLC to amend Town Code Section 48-407 (c)(9) to remove the requirement for an attendant at car wash facilities.

Deputy Planning Director Kelly Wyatt stated that Mr. Derek Hatchell on behalf of I.G. Holdings, LLC, had submitted a 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.

This item was first presented at the Board's May Meeting. At that time, Ms. Wyatt noted that there was significant history with the allowance of an attended car wash as a use within the Town dating back to September 20, 1988 when the discussions first arose with the Planning Board through September 6, 1989 when parking standards for car washes was discussed and later adopted.

In the zoning text amendment application, the applicant 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. 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 recommended denial of the proposed text amendment as presented.

After some discussion, the Board moved to table the item until the June meeting to give Staff a chance to research and incorporate the suggested conditions into a revised amendment. Based on this request, Planning Staff made numerous revisions to the proposed ordinance which Ms. Wyatt reviewed for the Board and 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
- 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 on buffering requirements.

Ms. Wyatt noted that the applicant was provided a copy of the draft ordinance prior to the meeting. The applicant indicated that he was 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 and will speak more about it following Staff's presentation.

Ms. Wyatt also noted that 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. Ms. Wyatt stated that she, as well as John DeLucia and Derek Hatchell, were available to answer any questions for the Board.

Chairman Cornwell asked Ms. Wyatt to clarify the opaque buffering requirement. Ms. Wyatt explained that it would need to be a buffer yard that is linear and continual, as opposed to clustered, so that it will create a screening that you can't see through. The recently adopted clustered buffering would not work in this case. In the case of the go kart tracks the owner installed fencing as there was not enough vegetation to create appropriate screening.

John DeLucia with Albemarle & Associates introduced applicant Derek Hatchell. Mr. DeLucia stated they agree in concept with most of the proposed changes. Mr. DeLucia noted that typically these type of self-service businesses are open 24 hours and their desire is not to have any established hours of operation and do not support that. Mr. DeLucia also stated that they would prefer the cluster type of buffering rather than linear on sides of the property that are not adjacent to residential uses.

Mr. Hatchell confirmed for Mr. Worsley that he currently operates five car washes including one in Columbia which Mr. DeLucia noted is adjacent to a residential area. Mr. Hatchell noted that car wash is buffered by a six foot high fence and have not had issues related to noise levels.

Mr. Hatchell confirmed for Ms. Murray that they are all open 24 hours a day.

Mr. Hatchell noted that all use credit cards and that they would prefer to keep the lights on for safety reasons stating "If you shut them down and cut the lights off, you are asking for trouble, you are not

visible." Mr. Hatchell also noted that the vacuum cleaners are well under the decibel readings for the noise ordinance and reiterated that they have never had an issue.

Deputy Town Manager Andy Garman confirmed for Chair Cornwell that he had spoken with the Kill Devil Hills Assistant Planning Director about the car wash that is located in that town and she confirmed that they have never had any problems as far as complaints or concerns.

Mr. Troutman asked if the applicant had a specific site in mind. Mr. Hatchell noted that they are looking at a parcel by the Shell Station south of the Links Golf Course property near Lakeside Drive.

Mr. Hatchell confirmed for Ms. Murray that the car washes are used at all hours of the day or night by early travelers, people coming off the beach late, cab drivers, etc.

Mr. Troutman noted that the Shell Station leaves their light on all night so that people with credit cards can fill up at any time.

Mr. Futrell noted that vandalism is more likely to occur if it's shut down and dark than if it's lit up and being used.

Mr. Hatchell confirmed for Mr. Worsley that all his locations have security cameras. Mr. Hatchell also noted that his location in Kill Devil Hills is open 24 hours and that the businesses on either side are also lit up 24/7.

Mr. Reilly noted that the reason the Board had discussed setting hours of operation was due to concerns about noise pollution especially late at night, if open after hours, and especially if the site is close to a residential area.

Mr. Worsley stated that he did not think noise will be that much of an issue and felt that it was better for safety reasons to keep it lit up 24/7.

Mr. Troutman agreed stating that the Shell station is currently open 24/7 and cars could blast radios and be loud there as well.

Ms. Murray expressed concern about buffering and asked if a 50 ft. buffer was sufficient. Ms. Murray suggested they consider a minimum 75 ft. buffer.

Clyde Futrell moved to amend the proposed text amendment to omit the hours of operation and allow it to be open 24 hrs. Jim Troutman seconded the motion and it carried 5 to 2 with Ben Reilly and Kate Murray casting the Nay votes.

Mr. Reilly stated he was for keeping the hours of operation between 9 AM and 9 PM; keeping the hours limited decreases noise concerns around residential areas.

Chairman Cornwell disagreed stating he did not think the noise concerns outweighed the security benefits of keeping it open 24 hrs.

Ms. Murray moved to further amend the proposed text amendment to have minimum 75 foot buffer adjacent to residential areas. The motion died for lack of second.

Pogie Worsley moved to recommend approval of the amended text amendment omitting the hours of operation. Clyde Futrell seconded the motion and the motion carried 5 to 2 with Ben Reilly and Kate Murray casting the Nay votes.

Consideration of a major subdivision request submitted by Ray Meekins of Seaboard Surveying on behalf of the property owner under contract, Bradford Alexander for creation of a two-lot subdivision with associated subdivision variance requests. The property is zoned Village at Nags Head SPD-C, Commercial-2 District and is the vacant lot located just east of Cotton Gin, Lot 25 Elliott Estates and Parcel Number 027839079.

Ms. Wyatt presented a Preliminary Subdivision Plat submitted by applicants Ray Meekins, Surveyor, and Mike Robinson, Engineer, on behalf of the current property owner, Forrest Bartlett, and the contract purchaser, Bradford and Sharon Alexander, for the creation of two (2) single family residential lots. The lots would be created from a 20,823 square foot lot located on the east side of US Highway 158, the west side of NC 12 and directly east of Cotton Gin retail store.

Ms. Wyatt noted that although they are only proposing two (2) lots, the proposal is being considered a "Major Subdivision" by definition since it does not have a compliant street access.

The lot widths and setbacks shown for each lot comply with the dimensional standards set forth in the Village SF-2, Detached Single Family Residential District. Proposed Lot 25-A is 11,968 square feet in area, proposed Lot 25-B is 8,855 square feet in area. Each proposed lot substantially exceeds the minimum lot requirements for single family in this district, which is 3,000 square feet.

Ms. Wyatt explained that in terms of access, the subdivision ordinance requires that any subdivision must have access to a public street or highway improved to the standards of the Town or the NC Department of Transportation, whichever is applicable, and in which the right-of-way width is in accordance with Town Code Section 38-151, Streets. This development is located on an un-named access road which serves multiple properties facing US 158 along the block south of Mall Drive including The Cotton Gin and Vitamin Sea.

With this and with previous requests, Staff has had guidance from the Town Attorney, and completed research on the easement. Ms. Wyatt noted that Ray Meekins had provided a narrative which provides further detail on how these lots and the easement were created including the original plan for maintenance. Mr. Meekins will be available to speak to this in more detail.

In conjunction with the subdivision approval, the applicant is requesting consideration of two subdivision variances:

Town Code Section 38-153(c) Lots. (c) Minimum amount of frontage.

All lots shall be designed so that they shall front on a public street for a distance of not less than 50 feet which shall be measured along the right-of-way of such street; provided, further, that in the case of lots fronting on a cul-de-sac or street curve, the frontage may be reduced to not less than 30 feet upon approval of the planning board.

Ms. Wyatt noted that Lots 25-A and 25-B do not front on a public street, rather they front on an "access easement"; therefore, a waiver from this requirement is being requested.

Town Code Section Sec. 38-7. Access to Public Street or highway required.

There shall be no subdivision of any tract of land which does not have access to a public street or highway which is improved to the standards of the town or the state department of transportation,

whichever is applicable, which access is of a right-of-way width and is improved in accordance with section 38-151.

Ms. Wyatt noted that Lots 25-A and 25-B do not have access to a public street which meets the standards of the Town or NC DOT, in accordance with Town Code Section 18-151; therefore, a waiver from this requirement is being requested.

Ms. Wyatt also noted Town Code Section 48-77, Lot access requirements, which states that no building permit shall be granted for any lot which does not abut either an improved public right-of-way as shown on the most recent Powell Bill Map or an access approved by the Board of Commissioners. By virtue of granting the requested variances to Town Code Section 38-7 and 38-153(c), this requirement would be met.

Ms. Wyatt stated that the criterion for granting the variances was included in the agenda packet and specifies what findings are necessary in order to consider granting a subdivision variance/waiver.

For Stormwater drainage and utilities, Ms. Wyatt referred the Board to an updated memo from Town Engineer and Project Manager, David Ryan dated June 16, 2016.

The Fire Department has reviewed and approved the proposed Preliminary Plat. These lots would be served by the Village wastewater system and will require Carolina Water approval for connection prior to issuance of building permits. All construction plans will have to be reviewed by the Village Architectural Committee prior to permitting.

Ms. Wyatt explained that approval of this plan will convert commercially zoned property to residential use. According to the 2010 Land Use Plan, once a property is residential, it cannot be rezoned to a commercial use. The property in question is a transitional area between the commercial lots along US 158 and the residential properties in existence along NC 12 as part of Elliot Estates. As such, the proposed development area could lend itself to either a commercial or residential use, but has remained empty for many years. Ms. Wyatt stated that Staff feels that this area is unlikely to be developed commercially.

Ms. Wyatt reviewed Staff's suggested findings for the Board and stated that based on their review Staff would recommend approval of the Preliminary Plat as long as the variance and waivers are granted and compliance with the recommendations of the Town Engineer is demonstrated.

Per Chairman Cornwell's request, Ms. Wyatt clarified the difference between a variance and a waiver. Ms. Wyatt confirmed that in this case the applicants are requesting a waiver from the requirements of access to a public street.

Ray Meekins with Seaboard Surveying spoke on behalf of the applicants. Mr. Meekins reminded the Board that while the request is being called a Major Subdivision it is only one lot. Mr. Meekins noted that the waivers that are being requested are the same ones that were granted to a previous developer when Lot 25 was originally created therefore there is no precedent being set should the Board grant the waivers. Mr. Meekins stated that the 24 foot access easement that abuts the west side of the lot is not part of the development; there is Stormwater curbing along that side and it's not proposed to be used as an access. Mr. Meekins reiterated that it is very unlikely that the property would ever be used commercially. Finally Mr. Meekins referenced an email received today from David Ryan who, after speaking with the project engineer Mike Robinson, revised conditions to the Stormwater requirements.

Mr. Meekins reviewed Mr. Ryan's email for the Board and stated that once the Stormwater infrastructure has been built it will meet the Town's standards and the Town Engineer agrees.

Mr. Meekins confirmed that each lot will have a driveway and would have access from the 30 foot easement along the right edge which leads to Epstein Drive.

Mr. Meekins confirmed for Ms. Murray that all the property owners that are along that easement are responsible for its maintenance through covenants recorded with their deeds; maintenance is based upon their footage along the easement.

Mr. Worsley noted that all the businesses along that area were encouraged to use the access easements rather than be allowed curb cuts on US 158. The commercial area was part of the Village Master Plan but Mr. Worsley noted that commercial building in that area has come to a standstill.

Mr. Meekins confirmed for Mr. Troutman that the 8" sewer line originally ran through the middle of the property but has now been rerouted to the proposed 15 foot utility easement along the east and north side of the property. Mr. Meekins reminded the Board that the proposed lots will be part of the Village central sewer system.

Mr. Reilly inquired as to who would be responsible for buffering between commercial and residential. Ms. Wyatt said typically it would be the responsibility of the commercial property but since it is already existing commercial she would need to research it further. Ms. Wyatt later noted that she was unable to find any buffering requirements as it was a re-designation to a lower intensity use, they are not changing the District.

Ms. Murray noted the importance of getting Stormwater right from the get-go especially since that area has a high water table.

Mr. Worsley noted that he rode through the site and could see that it is a challenge to develop. It would be difficult to develop commercially because it is "locked"; it has no curb appeal and can't be seen from the street.

Chairman Cornwell agreed stating that although they haven't been developed, the two lots to the north are now residential.

Mr. Reilly expressed his concern about the continuous loss of commercial property in the Town. Mr. Reilly is worried that eventually the Town will be 100% residential and they need to hold on to whatever commercial property that exists. He realizes that nothing commercial has been developed there but residential has not been developed there either.

Ms. Murray agreed with Mr. Reilly but acknowledged that the property is not the best place for commercial because it lacks frontage to a main road; this case warrants transition into a residential use.

Pogie Worsley moved to recommend approval of the Preliminary Plat and granting of the requested waivers with Staff recommendations as they relate to Stormwater. Clyde Futrell seconded the motion and the motion carried 5 to 2 with Ben Reilly and Jim Troutman casting the Nay votes.

Report on Board of Commissioners Actions

Ms. Wyatt reported on recent Board Actions:

The Site Plan for Phase I improvements to Dowdy (Town) Park located at 3005 S. Croatan Highway was approved as presented.

The Vested Right/Conditional Use/Site Plan Amendment submitted by VHB Engineering on behalf of the Dare County Tourism Board for modifications to the previously approved site plan for the Outer Banks Event Site was approved with modification to parking requirements and contingent upon compliance with conditions cited by the Town Engineer and Deputy Fire Chief.

The Board held a Public Hearing to consider amendments to the Town's sign ordinance to ensure content neutral language and regulations pertaining to residential freestanding signage; the Commissioners tabled consideration until their July 6, 2016 meeting so that Staff can address language for outdoor advertising and yard sale signs.

Town Updates

Focus Nags Head

Town Planner Holly White stated that at the last Board meeting the Commissioners reviewed the Vision Statement and asked for modifications. Staff continues to work with the Consultant on drafting policy. They are taking all the public input, the Advisory Committee feedback and moving everything from existing plan documents forward as appropriate. Discussing how best to move it forward in sections; Staff is hoping to get the first Draft sections over to the advisory committee for review later in the summer.

Ms. White confirmed for Chairman Cornwell that the Commissioners will approve the Vision statement once it is revised and will formally approve it once the plan is adopted. Ms. White stated that the Planning Board will also get a chance to review it.

Sea Level Rise

Ms. White gave a brief update stating that Staff had a follow up meeting with the small group who attended the initial meeting back in December. They were given a chance to review the draft report and the diagrams that were produced. At that meeting they also discussed how best to move forward when thinking about climate change and adaptation. Based on feedback they were given they decided to combine the diagrams into one and there will be another meeting with this group to prioritize actions that were discussed and another meeting with NC Sea Grant.

Discussion Items

Continued Discussion of Cottage Courts as permissible uses within the Town.

Deputy Town Manager Andy led a continued discussion of Cottage Courts.

Last month the Planning Board held its initial discussion regarding the expansion of cottage court uses within the Town. For the past 30 years, cottage courts have been considered a nonconforming

use by the Town's ordinance; therefore, no expansions to these properties have been allowed except for general maintenance and repairs. The Planning Board is now reviewing ordinances that would reinstate cottage courts as an allowable use based on recent discussions regarding diversity of accommodations within the town.

At last month's meeting Staff provided the Planning Board with some background information on developing a cottage court ordinance. This included a map and photographs of existing cottage courts, sample ordinances from other communities, and the town's ordinance for residential group developments.

After some discussion, Staff suggested selecting five cottage court properties within the town and analyzing the existing development features and characteristics to develop standards for an ordinance. The five properties included for the analysis were: 2 Fish Cay, Sea Spray Cottages, Sandspur Cottages, Oceanside Court, and Cahoon's Cottages.

Mr. Garman stated that these were picked because they reflect the older character of cottage courts in the Town and are used as traditional cottage courts – they function as rentals for transient guests and are managed similar to hotel uses. Mr. Garman noted that photos of these five properties were included in the agenda packet as well as a table showing the building square footages of the individual cottages at each property. In addition Staff included the map from last month since this depicts the location of each cottage court and the total lot size of each property.

Mr. Garman explained that Staff took all this information and developed a framework for an ordinance. A draft ordinance has been provided for the Planning Board's review which includes regulations to address the following 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

In addition to examining the characteristics of the five cottage court sites, Staff also utilized some of the standards from the residential group development ordinance as well as other existing ordinances to develop the draft ordinance.

Mr. Garman proceeded to review in more detail the draft ordinance for the Board. Some of the items discussed included requiring frontage on the beach road and at least 75 architectural design points, individual cottages should be no more than one and half stories, no enclosed or detached garages, a minimum lot size of 20,000 square feet and keeping heated living area of each cottage between 800 and 2000 square feet. Mr. Garman did note that the Board may want to look at revising the minimum size of the cottages as there are several that are between 500 and 700 square feet. Tiny houses are becoming increasingly popular so it's something they maybe want to think more about.

Mr. Garman confirmed for Chairman Cornwell that the one and a half story cottage with no garage seems to fit with the more traditional lower to the ground cottage courts of the past. The five properties analyzed all provide a great example of the look they may want to achieve. Staff did discuss allowing parking underneath the cottage because in some cases the cottages will need to be elevated on pilings due to FEMA requirements.

Mr. Futrell inquired how pools fit in to the ordinance. Mr. Garman stated he did not address pools in the ordinance but that it was certainly something they can discuss. They would probably allow them to have pools. Mr. Garman asked the board if pools for each unit should be allowed or only a community pool.

Ms. Murray suggested looking into removing the minimum square footage requirement in case someone does want to build tiny houses; in that case the Board may also want look at the density requirements, if someone is building tiny houses is the 10 unit maximum a reasonable requirement?

Mr. Garman stated that Staff will take a look at reducing square footage, look at cabins, cabanas, tiny houses, etc.

Mr. Worsley noted that cabanas are basically motel rooms on pilings and stated they might lose the Sea Spray appeal of the traditional cottage court.

Chairman Cornwell asked how they would be able to keep the traditional feel if they lower or remove the minimum square footage requirement.

Mr. Garman stated that he will try to do a rough rendering of a 20,000 SF lot to see what could be placed on the lot and bring this back for the July meeting.

Planning Board Members' Agenda

Ben Reilly stated that Dare County is starting an initiative/campaign to get people to know where they are staying, what the address is of their rental house – "Know Where You Are".

Planning Board Chairman's Agenda

Chairman Cornwell asked Staff to take a look at the voting requirements for a Subdivision Variance/Waiver.

Adjournment

There being no further business to discuss, the meeting was adjourned at 4:20 PM.

Respectfully submitted,

Lily Campos Nieberding

STAFF REPORT

TO: Planning Board
FROM: Andy Garman, Deputy Town Manager
Kelly Wyatt, Deputy Planning Director
DATE: July 15, 2016
SUBJECT: Consideration of zoning ordinance text amendments to permit "Cottage Courts" as an allowable use within the Town.

Last month 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

The Planning 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. Staff has used the Sea Spray cottage court to conduct this analysis. Attached is a map which depicts the units on this property as well as an estimate of total coverage. The map also includes a breakdown of the number bedrooms in each unit. Staff concludes that this development could be replicated based on the criteria in the ordinance with some additional units if some of the site features were substituted for additional units (i.e. the rear patio and garage). The Sea Spray property has four separate units with a total of nine bedrooms.

Staff has provided modified language with the following changes:

- That Planning Board suggested 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.

- The minimum size has been reduced to five hundred square feet to allow for smaller units. Some existing properties have units this size.
- 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 will 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.

For your reference, the aforementioned changes are highlighted in the draft ordinance. Staff will provide a detailed overview of the ordinance changes at the upcoming meeting.

Attachments:

- Draft Cottage Court Ordinance.
- Cottage Court Site Analysis with Street View Photos.

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. 48-378. – 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.
- (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 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 not contain 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.

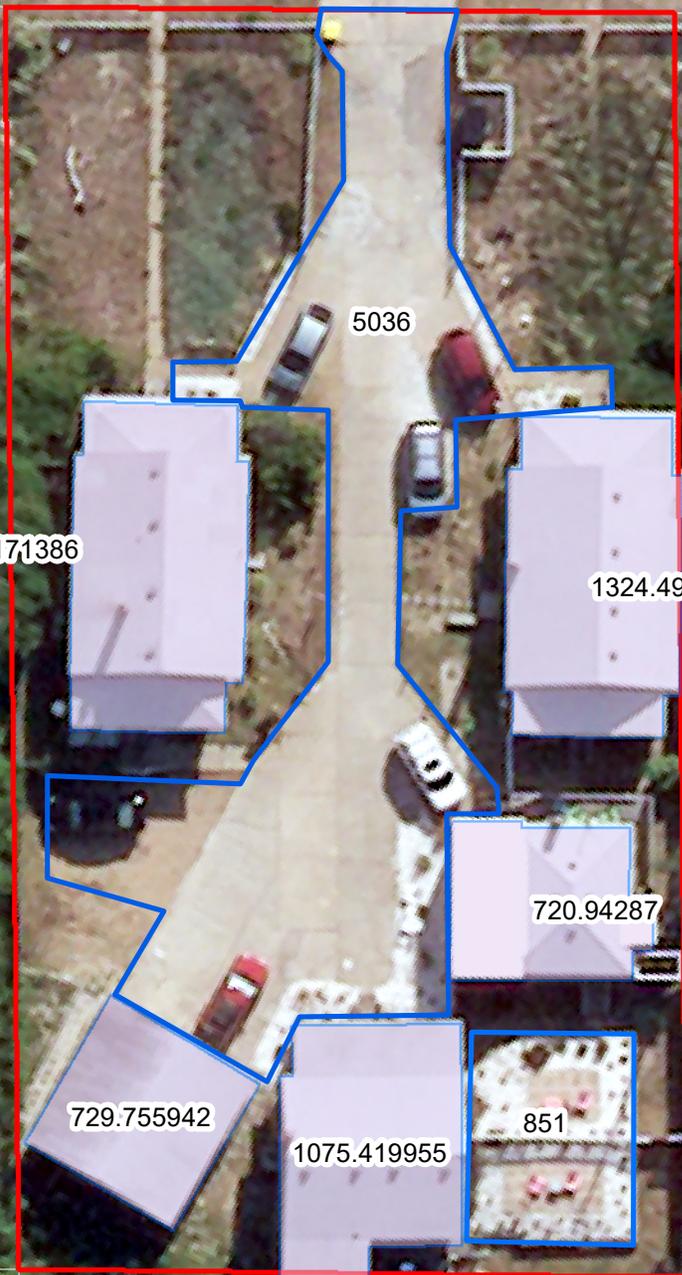
(h) *Driveway access.* Each dwelling unit shall have access to a shared accessway. The shared accessway must be designed to a minimum width of 20 feet to allow firefighting apparatus to locate within 150 feet of all sides of all structures on the property. The shared accessway may be reduced to a minimum 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.

Sea Spray Cottages
Four Units + One Garage
Two three bedroom, one two bedroom,
and one one bedroom
Lot Area - 20,842
Lot Coverage Allowance @ 55% - 11,463
Estimated Coverage - 11,092



Town of Nags Head, NC
Cottage Court Analysis

Last Updated July 15, 2016

1"=30'



Sea Spray Cottages

STAFF REPORT

TO: Planning Board
FROM: Kelly Wyatt, Deputy Planning Director/Zoning Administrator
Andy Garman, Deputy Town Manager/Planning Director
DATE: July 19, 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.

Included in the packet is a preliminary assessment of our current zoning districts and uses. Staff would anticipate working from this framework as we move forward.

Staff will be available to discuss this request in more depth at the July 19, 2016 meeting.



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

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.



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



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
- appellate.nccourts.org/opinions/?c=2&pdf=27929
- appellate.nccourts.org/opinions/?c=2&pdf=31658
- appellate.nccourts.org/opinions/?c=2&pdf=29485
- library.amlegal.com/nxt/gateway.dll/North%20Carolina/cary_nc/appendixalanddevelopmentordinance*?f=templates%24fn=default.htm%243.0%24vid=amlegal:cary_nc%24anc=JD_LandDevelopmentOrdinance
- appellate.nccourts.org/opinions/?c=2&pdf=31807
- appellate.nccourts.org/opinions/?c=1&pdf=33680

Use (not incl sub-para lists)	x	R-1	R-2	R-3	CR	C-1	C-2	C-3	C-4	SPD-20	SED-80	SPD-C	O & SW	C Rec	Ov
Private docks, subject to other requirements of this chapter and		48-402. (c) (5)													
Private parks and playgrounds, subject to other requirements of		48-402. (c) (2)	48-403. (c) (4)	48-404. (c) (2)											
Professions and associated retail uses as follows:									48-409. (b) (4)						
Public utility facilities, subject to other requirements of this		48-402. (c) (4)	48-403. (c) (5)	48-404. (c) (6)		48-406. (c) (1)	48-407. (c) (2)								
Real estate rental management facility.									48-408. (b) (13)						
Religious complex.									48-408. (b) (19)						
Religious complexes, subject to other requirements of this chap			48-403. (c) (1)	48-404. (c) (7)			48-407. (c) (8)								
Residential cluster housing, subject to other requirements of th		48-403. (b) (7)													
Residential group development subject to other requirements of 1				48-404. (c) (10)											
Restaurant with detached single-family dwelling. Subject to othe							48-407. (c) (30)								
Restaurant, drive-in, subject to other requirements of this chap							48-407. (c) (27)								
Restaurant, drive-through, subject to other requirements of this							48-407. (c) (11)								
Restaurants.					48-405. (b) (3)		48-407. (c) (12)								
Retail establishments, including:															
Retail shopping center, provided that the following additional r							48-407. (b) (2)								
Screen printing production facility subject to other requirement							48-407. (c) (5)								
Service establishments including:									48-408. (c) (9)						
Service establishments, including:													48-409. (b) (5)		
Sexually oriented businesses, only those businesses defined and		12-IV, 48-87	12-IV, 48-87	12-IV, 48-87	12-IV, 48-87	12-IV, 48-87	12-IV, 48-87	48-408. (c) (8)	12-IV, 48-87						
Single-family dwelling units and duplexes, subject to dimension					48-405. (b) (1)	48-406. (b) (1)	48-407. (b) (4)								
Single-family dwellings and duplexes (not to include trailers ar													48-409. (b) (1)		
Single-family dwellings and duplexes in combination with commerc													48-409. (b) (2)		
Skate park facility, subject to other requirements of this chap															
Small fishing skiff rental establishments, subject to other req							48-407. (c) (20)								
Stone fabrication and sales and service.							48-407. (c) (16)								
Taxi and limousine service.									48-408. (b) (15)						
Telecommunications sales and service.									48-408. (b) (16)						
Trade association office.									48-408. (b) (7)						
Trade centers or multiple-use buildings, subject to other requir									48-408. (b) (12)						
Unattended telephone switching stations and electric substations									48-408. (c) (5)						
Wallpaper sales and installation.									48-408. (c) (4)						
Water well drillers office, storage, sales and installation.									48-408. (b) (8)						
Wholesale food and beverage storage and distribution.									48-408. (b) (9)						
									48-408. (b) (10)						

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