



AGENDA
Town of Nags Head Planning Board
Nags Head Municipal Complex Board Room
Tuesday, November 15th, 2016; 2:30 pm

A. **Call To Order**

B. **Approval of Agenda**

C. **Public Comment/Audience Response**

D. **Approval of Minutes** – October 18, 2016

E. **Action Items**

1. Consideration of zoning ordinance text amendment to require any commercial structure within the C-2, General Commercial Zoning District with a total habitable area that is 15,000 square feet or greater to obtain site plan approval via the Conditional Use process.

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

1. Consideration of text amendments to permit "cottage courts" as an allowable use – Adopted as presented with one modification to subsection (m): Cottage courts shall operate under a single, unified management operation which arranges for reservations and attends to guest needs".
2. Consideration of zoning ordinance text amendment from Outer Banks Hospital to establishment requirements for accessory detached medical office on the same grounds as the principal hospital use – Adopted as presented.

G. **Town Updates – as requested**

1. Update on Focus Nags Head – Joint workshop with Planning Board, Board of Commissioners and Advisory Committee scheduled for January 12th, 2017 at 9am.
2. Dowdy Park

H. **Discussion Items**

1. Continued discussion of zoning ordinance text amendmetns 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
October 18, 2016
-DRAFT -**

The Planning Board of the Town of Nags Head met in regular session on Tuesday, October 18, 2016 in the 2nd Floor Conference 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, Holly White

Approval of Agenda

Chairman Cornwell asked that the order of Action Items 1 and 2 be reversed. Ben Reilly moved to approve the agenda as amended. Jim Troutman seconded the motion and it passed by unanimous vote.

Public Comment/Audience Response

None

Approval of Minutes

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

Action Items

Consideration of zoning ordinance text amendment to require any commercial structure within the C-2, General Commercial Zoning District with a ground floor heated area that is 15,000 square feet or greater to obtain site plan approval via the Conditional Use process.

Deputy Planning Director Kelly Wyatt explained that at their September 29, 2016 retreat, the Board of Commissioners requested that the Planning Board and Planning Staff review a zoning ordinance amendment which would require new commercial structures with an area of 15,000 square feet or greater within the Town's C-2 General Commercial Zoning District be approved via the Conditional Use review process.

Currently, there are various commercial uses allowed in the C-2, General Commercial Zoning District that are permitted by right and therefore approved simply through the site plan review process. The site plan review process does not provide a mechanism for the Planning Board and governing body to place site specific conditions upon a development based on the circumstances of the property and surrounding land uses. Also, the site plan review process does not require affirmative findings of fact to demonstrate that the proposed development is consistent with the Town's ordinances, land use plan, and overall community development goals. These findings of fact often include:

1. The applicant has met the requirements of the Town of Nags Head Zoning Ordinance, Subdivision Ordinance and other applicable ordinances.
2. The use will not materially endanger the public health and safety if located where proposed and developed according to the plan as submitted.
3. The use as proposed will not overburden the firefighting capabilities and the municipal water supply capacity of the Town.

Ms. Wyatt noted that larger buildings tend to generate more intense uses of property which can create land use and neighborhood compatibility issues as well as greater community impacts if not carefully planned. The conditional use permit process is designed to allow the community to consider a broad range of land use issues and place conditions on development projects to ensure they meet community goals. The purpose of this amendment is to provide the Planning Board and Board of Commissioners flexibility and discretion when reviewing large commercial projects to mitigate the intensity of the proposed development and any associated negative community impacts.

Ms. Wyatt gave the Board some examples including the recently approved text amendment regarding Car Washes and hours of operation, Shoppes @ 10.5 - had that been a conditional use there might have been consideration given to the sidewalk, TW's which had issues with some of the vegetation that was removed. PetSmart was a site plan review but there are some issues that might have been mitigated if it had been a conditional use instead.

Deputy Town Manager Andy Garman asked Ms. Wyatt to state what other types of uses are conditional; Ms. Wyatt listed automobile service stations, fishing piers, animal boarding and vet clinics, retail shopping centers, hotels, churches, drive in/drive through restaurants, child care centers as examples.

Mr. Garman noted that often, impacts from a large development are the same or even greater than some of these uses that are conditional. With a site plan/permitted use there are certain requirements that the applicant must meet and if they meet those requirements they are issued a permit. The conditional use process provides Boards with some more discretion to address issues. For example a use may not be the most appropriate for a certain area but with careful planning the Board and Staff can make the use fit; there are things that the Town may want to do to make a use more feasible.

Mr. Worsley inquired where the 15000 SF had come from. Ms. Wyatt explained that under the commercial architectural standards, buildings under 15K SF must meet the residential design standards but buildings that are 15K SF and greater have the option to meet the residential design or the alternative design standards. Mr. Garman confirmed that the 15K would apply to the lowest habitable floor.

Ms. Wyatt confirmed for Ms. Murray that the wording was intentionally left vague to allow the Board to impose the conditions site specific, it gives the Board more discretion.

Chairman Cornwell asked about the Wings buildings and how they fit into the proposed change. Ms. Wyatt explained that some of the Wings buildings have been greater than 15K SF and all were approved by the site plan process not conditional use. Ms. Wyatt noted that they almost always use the alternative design guidelines.

Mr. Reilly inquired about the vacant lot adjacent to the YMCA and how development might impact traffic patterns.

Mr. Siers inquired about the new 7-11. Ms. Wyatt confirmed that it was approved as a conditional use. Mr. Garman noted that because of this the Town was able to get them to move the proposed driveways.

Property/restaurant owner Mike Kelly addressed the Board. Mr. Kelly has a piece of property that he has for sale that may be impacted by this ordinance change. Mr. Kelly expressed concern that the review process could become subjective because it's very vague. Mr. Kelly feels that many of the issues brought up by this ordinance are already being addressed and can be discussed during the pre-review process. Mr. Kelly noted that developments fair better when the developer knows what the rules are ahead of time rather than to be halfway through a projects and then there are new speed bumps.

Mr. Garman confirmed for Mr. Kelly and the Board that once a site plan has been approved by the BOC, Staff does not put in any more conditions or make any changes.

Mr. Kelly confirmed for Mr. Siers the current Kelly's Restaurant building is between 12 and 15,000 SF.

Chairman Cornwell explained for Mr. Kelly that the conditional use process is a way to address and take care of speed bumps ahead of time so that when a site plan goes through to the BOC it is done. Chair Cornwell gave the new ABC store as an example where the Planning Board used the process to ensure that it met the Town's design guidelines.

Chair Cornwell questioned how they (the Board) can ensure that the applicants will build to Nags Head's vision and not just build a big box that doesn't meet the Town's requirements. The conditional use process helps address these issues.

Mr. Garman stated that Staff tries to address issues at Tech review but can't always predict what the Planning Board and Board of Commissioners will request. One of the suggestions that have come up during the Focus process is a pre-application conference with the Boards to address Staff and the Boards' concerns.

Ms. Murray agreed noting that the hope is that it would end up saving the applicant time and money.

Ms. Wyatt noted that in a site plan approval process Staff can ask the applicant to make changes but there is no mechanism in place to make approval conditional on certain requirements.

Mr. Kelly confirmed for Chairman Cornwell that he saw the proposed change not as an impediment but more as a concern especially as it relates to subjectivity.

Mr. Garman agreed with Mr. Kelly that the approval process involves discretion, noting that different people have different opinions; seven people on the Planning Board have to agree on standards, then five more people on the BOC before a plan is approved. This is why discretionary approvals such as conditional use permits are decided by boards and not by individuals.

Mr. Worsley asked what was driving the proposed change and noted that the timing seemed a little convenient.

Mr. Reilly inquired if the Town has rules for buildings under 15 K why can't they add more design guidelines on a graduated plan, add these conditions from 15K to 20K, add these conditions if it's 20 to 30 K, etc.

Mr. Garman thought that this might be possible and they may be look at that during the code rewrite process, but that is going to take more time.

Mr. Garman reiterated that there are already uses that must go through the conditional use process and the thinking is that currently there are permitted uses that, due their size, might impact the community more than some of the current conditional uses.

Mr. Garman suggested that if there are specific things that are too subjective or vague, Staff could remove them from the conditions.

Chairman Cornwell asked Staff to rework the conditions to make them less vague. Chair Cornwell suggested maybe referencing other specific Town ordinances where applicable and also noted that what Mr. Reilly proposed might be worth looking into, a phased or scaled approach.

Chair Cornwell stated that he was unsure if anyone on the Planning Board was comfortable with the proposed ordinance moving forward as is.

The Board agreed that Staff should especially look at and rework conditions a, e and f.

Mr. Futrell noted that just by removing certain words that seem arbitrary can make a difference.

Mr. Troutman agreed stating that Staff needs to remove some of the subjectivity.

Mr. Siers asked that Staff remove the words ground floor and change it to total habitable area.

Ben Reilly moved to table the item to give time for Staff to make revisions and bring back at their November meeting. Jim Troutman seconded the motion and the motion passed unanimously.

Mr. Kelly requested that Staff email him the revisions and the agenda once it was finalized.

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

Mr. Garman explained that at their October regular meeting, the Board of Commissioners held a public hearing on the proposed ordinance. Based on their discussions and some issues brought up by the Town Attorney, the Commissioners requested that the Planning Board review the ordinance again to address the following items:

- Consider additional language to ensure that cottage courts operate commercially similar to hotels under a unified management scheme.

- Create a maximum size for structures in section 48-378 (b). As the Planning Board will recall, the ordinance establishes a maximum size for cottage court units. It allows one structure to be larger than the maximum size if combined with another use. The ordinance did not include a specific size limitation for this structure.

- Clarify that pools are not allowed as accessory uses to individual cottage court units.

Mr. Garman stated that Staff had drafted language to address the aforementioned concerns and presented the changes to the Board.

Mr. Garman noted that some of the issues are fairly simple to address while one thing in particular is a more complex.

With regards to creating a maximum size limit for one of the structures, Staff reviewed the table which had the square footage of existing cottage court buildings and came up with a 5000 SF maximum.

Mr. Garman confirmed for Mr. Troutman that Cahoon's market is part of same property as the cottage court. The same goes for the larger structure at the Sandspur.

Mr. Garman stated they also tightened up the language relating to swimming pools to make it clear that individual units may not have pools.

Finally with regards to the last item – considering additional language to ensure that cottage courts operate commercially similar to hotels – the Town attorney is doing some additional research and reviewing whether Town can prohibit the ability of the units to be turned into condos.

There is some language to try ensure cottage courts don't become individual condominiums but they did not add language as it relates to 24/7 onsite management because this might be problematic as there are existing cottage courts that do not have this in place.

Mr. Garman requested that the Planning Board allow Staff to add that language if given the ok by the attorney without having to come back to them prior to sending the ordinance back to the BOC.

Finally, Mr. Garman noted that the attorney advised that the R2 be removed from consideration all together – the attorney stated that they could not allow cottage courts in the R2 in South Nags Head but not allow it in the R2 in other parts of town. Mr. Garman requested that the Board strike the language with regards to the R2.

Chairman Cornwell moved to recommend approval of the ordinance with Staff's recommended changes. Ben Reilly seconded the motion and it passed by unanimous vote.

Report on Board of Commissioners Actions

Deputy Planning Director Kelly Wyatt stated that the request to amend conditions associated with "Car Wash as a conditional use within the C-2 General Commercial Zoning District was adopted as presented

with Planning Board revisions and additional language stating: "Car washes may have specified hours of operation as necessary to minimize the impacts on any adjacent residential uses".

Town Updates

Focus Nags Head

Principal Planner Holly White gave a brief update on Focus Nags Head stating that at their last meeting the BOC had scheduled a joint workshop with the Planning Board, Board of Commissioners and Advisory Committee; the tentative date is Thursday January 12th, 2017 at 9am.

Ms. White asked the Planning Board to submit comments and questions to her as soon as they are able to.

Mr. Garman suggested doing a more in-depth presentation to the Board at their December meeting in advance of the workshop.

After some further discussion Pogie Worsley moved to change the meeting from the third Tuesday to the second Tuesday in December. Mike Siers seconded the motion and it passed by unanimous vote.

Dowdy Park

Mr. Garman noted that they have delivered all the playground equipment. There is a lot of interesting equipment, for example, the age 5-12 structure has a tree with realistic animals. The contractor will do the playground installation in the next few weeks. Mr. Garman stated that the site held up well during storm and that a lot of the concrete work and stepping pylons have been completed.

Discussion Item

Planning Board Members' Agenda

None

Planning Board Chairman's Agenda

None

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: Kelly Wyatt, Deputy Planning Director and Zoning Administrator
Andy Garman, Deputy Town Manager

DATE: November 15, 2016

SUBJECT: Consideration of a zoning ordinance text amendment to require that any new commercial structures within the C-2, General Commercial Zoning District with a ground floor habitable area 15,000 square feet or greater be permitted via the Conditional Use review process.

At its September 29, 2016 retreat, the Board of Commissioners requested that the Planning Board and Planning Staff review a zoning ordinance amendment which would require new commercial structures with an area of 15,000 square feet or greater within the Town's C-2 General Commercial Zoning District be approved via the Conditional Use review process.

Currently, there are various commercial uses allowed in the C-2, General Commercial Zoning District that are permitted by right and therefore approved simply through the site plan review process. The site plan review process does not provide a mechanism for the Planning Board and governing body to place site specific conditions upon a development based on the circumstances of the property and surrounding land uses. Also, the site plan review process does not require affirmative findings of fact to demonstrate that the proposed development is consistent with the town's ordinances, land use plan, and overall community development goals. These findings of fact often include:

- 1. The applicant has met the requirements of the Town of Nags Head Zoning Ordinance, Subdivision Ordinance and other applicable ordinances.*
- 2. The use will not materially endanger the public health and safety if located where proposed and developed according to the plan as submitted.*
- 3. The use as proposed will not overburden the fire fighting capabilities and the municipal water supply capacity of the Town.*

Larger buildings, by their nature, tend to generate more intense uses of property which can create land use and neighborhood compatibility issues as well as greater community impacts if not carefully planned. The conditional use permit process is designed to allow the community to consider a broad range of land use issues and place conditions on development projects to ensure they meet community goals. The purpose of this amendment is to provide the Planning Board and Board of Commissioners flexibility and discretion when reviewing large commercial projects to mitigate the intensity of the proposed development and any associated negative community impacts.

November 15, 2016 Meeting Update: Staff has attempted remove the areas of subjectivity as noted by the Planning Board at their October, 2016 meeting.

Attachment(s): Draft ordinance

**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 the Planning Board at the request of the Board of Commissioners to require newly constructed commercial buildings with a ground floor habitable area of 15,000 square feet or greater be reviewed and approved via the Conditional Use process.

WHEREAS, larger buildings, by their nature, tend to generate more intense uses of property which can create land use and neighborhood compatibility issues as well as greater community impacts if not carefully planned. The conditional use permit process is designed to allow the town to consider a broad range of land use issues and place conditions on large development projects to ensure they meet community goals.

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), Conditional Uses within the C-2, General Commercial District**, be amended as follows:

(29) Commercial structures with a total habitable area of 15,000 square feet or greater. Approval of the conditional use permit may be granted in whole or in part, and including appropriate conditions of approval if, from evidence presented at the public hearing, the following findings can be made:

- a. That the site plan and proposed use is substantially compatible with the existing land uses and character of the surrounding area, including factors related to the location and orientation of buildings, site design, and operation.
- b. That the retention of the site's existing topography, vegetation, and natural features has been given priority consideration in the overall project design.
- c. That traffic generated by the proposed development shall not create additional traffic safety hazards related to the proximity of driveway and curb cut access to adjacent driveways and intersections and that traffic is directed onto more heavily traveled roadways and away from residential neighborhoods.
- d. That the architectural design and aesthetic features of the proposed building(s) are compatible with the town's architectural design standards.
- e. That the proposed use does not generate intense activity or other environmental conditions that would negatively affect the surrounding properties.

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

STAFF REPORT

TO: Planning Board
FROM: Kelly Wyatt, Deputy Planning Director/Zoning Administrator
Andy Garman, Deputy Town Manager/Planning Director
DATE: November 15, 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.

November 15, 2016 Update:

Staff has made several revisions to the previously viewed document including the addition of numerous new use categories and providing an introduction to how the chart is intended to be read and administered. Again, this is a work in progress and updates will continue to be provided.

Permitted and Prohibited Use Table.

- (a) The following Permitted/Prohibited Use Table lists use classifications, categories, and types and indicates whether each is allowed with an administrative permit, is allowed with a conditional use permit, or is prohibited.
- (b) Zoning district descriptions. The use table lists allowable and prohibited uses for each zoning district in the Town of Nags Head. A general description outlining the intent of each district is provided below.
- (1) R-1 Low-Density Residential District. The R-1 low-density residential district is intended to encourage the development of permanent low-density residential neighborhoods.
 - (2) R-2 Medium-Density Residential District. The R-2 medium-density residential district is intended to encourage the development of moderate-density residential neighborhoods with a mix of permanent and short-term seasonal residents, and to serve as a transition zone between the low-density area and more intensely developed areas.
 - (3) R-3 High Density Residential District. The R-3 high-density residential district is established as an area in which the principal use of the land is for high-density single-family and duplex residential development. The R-3 district also provides for the development of less intensive residential uses as well as compatible supporting uses.
 - (4) CR Commercial Residential District. The CR commercial residential district is established as an area in which the principal use of the land is for intensive recreational purposes and for those types of development which, by their nature, are best located in close proximity to the town's beach area. The CR district also provides for the less intensive residential uses as well as compatible supporting uses.
 - (5) C-1 Neighborhood Commercial District. The C-1 neighborhood commercial district is established primarily to encourage the concentration of commercial facilities in clusters and to provide readily accessible shopping facilities for the town's permanent and seasonal residents.
 - (6) C-2 General Commercial District. The C-2 general commercial district is established to provide for the proper grouping and development of commercial facilities to serve the entire community.
 - (7) C-3 Commercial Services District. The C-3 commercial services district is established to provide standards for the location of commercial services which are required for the development of the town; such facilities as wholesale food and beverage storage and distribution, building contractor office and storage facilities, and other similar uses which are required elements of a self-sufficient community. Allowed uses shall not be detrimental to adjacent uses, the environment, and the sources of potable water, i.e., fresh pond and groundwater.
 - (8) C-4 Village Commercial District. The C-4 village commercial district is intended to permit the development of residential areas of low to moderate density with a mixture of professional commercial activities of limited size. It is also the intent of this C-4 district to attract permanent residents and to allow the conduct of small-scale business operations normally expected to produce a low volume of traffic. The C-4 district is further intended to provide an area in which small but similar businesses will be allowed to take advantage of the steady flow of low-volume vehicular and pedestrian traffic by locating within close proximity of each other.
 - (9) SPD-20 Special Planned Development District. The SPD-20 special planned development district is created to permit development, primarily residential in nature, that is compatible with the environmentally sensitive nature of the unique coastal land forms contained in this district. The largest portion of this district contains Jockey's Ridge State Park which has been designated by the state coastal resources commission as a unique coastal geologic formation area of environmental concern and as a National Natural Landmark by the United States Department of the Interior. The northwestern portion of the district borders on Nags Head Woods, a maritime forest. This SPD-20 district is characterized by unique topographical and vegetative features including vegetated and unvegetated dunes, migrating sand dunes, as well as a pine forest.
 - (10) SED-80. Special Environmental District. This SED-80 district is created to permit low-density residential development that is compatible with the environmentally sensitive nature of Nags Head Woods and to

preserve land in a natural state where such land is considered to be a vital link in the groundwater replenishment cycle of the outer banks and where the destruction of natural vegetation would have a harmful effect on the stability of the soil and its resistance to erosion.

- (11) SPD-C Special Planned Development-Community. The SPD-C district is established to create regulations adapted to unified planning and development that are intended to accomplish the purposes of zoning and other applicable regulations to the same degree as in districts in which conventional regulations are intended to control development on a lot-by-lot basis. This is intended to promote economical and efficient land use, a higher level of amenities, appropriate and harmonious variety in physical development, design, and an improved living and working environment.
- (12) Ocean and Sound Waters District. The Ocean and Sound Waters District is established to provide for the proper use of the ocean and sound waters, including islands, that adjoin the town to ensure the continued scenic, conservation and recreational value that these waters provide to the town, its residents, visitors and the surrounding area. Regulations shall not prohibit or regulate commercial fishing and navigation.
- (13) Commercial-Outdoor Recreational Uses Overlay District. The Commercial-Outdoor Recreational Uses Overlay District is established to provide a set of comprehensive land use regulations for the operation of commercial-outdoor recreational uses while protecting the residentially zoned areas of the town. This shall be the only area within the town where these uses are allowed.
- (14) Hotel Overlay District. The purpose of the Hotel Overlay District is to allow for the location of larger-scale hotels in commercial areas where the increase in height does not significantly affect the viewshed from Jockey's Ridge and does not diminish the low density character of the historic district and the neighborhoods within the R-2 medium density residential zoning district.
- (15) Soundside Residential Dwelling Overlay District. The purpose of the Soundside Overlay District is to establish regulations that will preserve the unique character and historical significance of the residential enclave located in the vicinity of the unimproved portion of Soundside Road and Chowan Avenue.

(C) Organization of uses. The use table organizes allowable uses by use classifications, use categories, and use types, together providing a systematic basis for identifying and consolidating or distinguishing unidentified land uses to determine whether a particular land use is allowable in a particular zoning district and in addressing future land uses.

- (1) Use classifications. Use classifications identify broad general classification of uses and include residential uses, institutional uses, agricultural uses, commercial uses, and industrial uses. Use classifications are further broken down into a series of general use categories and more specific use types.
- (2) Use categories. Use categories describe the major sub-groups of the respective use classifications and are based on common functional, product, or physical characteristics, such as the type and amount of activity, the type of customers or residents, how goods or services are sold or delivered, and site conditions. For example, the residential use classification is divided into the household living and group living use categories. Use categories are further broken down into a series of individual use types.
- (3) Use types. The specific use types are included in the respective use category. They identify the specific principal uses that are considered to fall within characteristics identified in the use category. For example, duplex dwellings, live/work dwellings, manufactured homes, single-family detached dwellings, and townhouse dwellings are use types in the household living use category.

(D) Prioritization. Certain use categories and use types are addressed specifically in the zoning ordinance and/or permitted/prohibited use table.

- (1) The allowance for any specifically listed use type in the permitted/prohibited use table takes precedence over requirements for a broader use category.
- (2) Likewise, the allowance for any use category in the permitted/prohibited use table takes precedence over a broader use classification.

(E) Permit types.

- (1) Permitted uses. A “P” in a cell of the use table indicates that the corresponding use classification, category or type is permitted in the corresponding zoning district. Permitted uses are subject to compliance with all use-specific standards and applicable development regulations of the zoning ordinance.
- (2) Uses requiring a conditional use permit. A “C” in a cell of the use table indicates that the corresponding use classification, category or type is permitted in the corresponding zoning district, subject to approval of a conditional use permit for the proposed use. Uses requiring a conditional use permit are subject to compliance with all use-specific standards and applicable development regulations of the zoning ordinance, as well as the conditional use approval process and criteria found in 48-525 of the zoning ordinance.
- (3) Prohibited uses. An “X” in a cell of the use table indicates that the corresponding use classification, category or type is prohibited in the corresponding zoning district

(F) Classification of unlisted uses. The Zoning Administrator shall determine whether or not an unlisted use is substantially similar to an already defined use category or use type. Unlisted uses which are found to be dissimilar to an already defined use category or use type are prohibited. The Zoning Administration shall use the following factors as a guideline when classifying a new or unlisted use to determine if such use is classified in a manner consistent with other similar uses in the applicable zoning district.

- (1) Consistency with the stated intent of the zoning district;
- (2) Consistency with the adopted vision statement and land use plan;
- (3) Density of development (number of units, square footage, etc.);
- (4) Intensity of use;
- (5) Type of activity associated with the use;
- (6) Number of customers and length of stay;
- (7) Generation of pedestrian and vehicular traffic;
- (8) Potential impacts such as noise, light, odor, etc.; and
- (9) Public safety.

TYPE OF USE	ZONING DISTRICT															ADD. STANDARDS
	Zoning Districts											Overlay Districts				
	R-1	R-2	R-3	CR	C-1	C-2	C-3	C-4	SPD-20	SED-80	SPD-C	CO	Hotel	O&S	SRO	
Nightclubs	X	X	X	X	X	X	X	X	X	X	X					
Theater	X	X	X	X	X	P	X	X	X	X	C					
Indoor Entertainment/Recreation Facilities	X	X	X	X	X	C	X	X	X	X	X					
Institutional and Medical Uses/Offices																
Adult Day Service Center	X	X	X	X	X	C	X	X	X	X	X					
Child Day Care Center	X	C	X	X	X	C	X	X	C	X	C				Accessory use to religious complex in SPD-20	
Dialysis Center	X	X	X	X	X	P	X	X	X	X	X					
Medical Offices	X	X	X	X	X	P	X	X	X	X	P					
Hospital	X	X	X	X	X	X	X	X	X	X	C					
Laboratories	X	X	X	X	X	X	X	X	X	X	P					
Nonprofit/community outreach centers	X	X	X	X	X	P	X	X	X	X	X					
Nonprofit outreach center with aquatic fitness facilities	X	X	X	X	X	P	X	X	X	X	X					
Nursing Home and Convalescent Home	X	X	X	X	X	X	X	X	X	C	X					

TYPE OF USE	ZONING DISTRICT															ADD. STANDARDS
	Zoning Districts											Overlay Districts				
	R-1	R-2	R-3	CR	C-1	C-2	C-3	C-4	SPD-20	SED-80	SPD-C	CO	Hotel	O&S	SRO	
Retail Sales																
Drug Paraphernalia Sales	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	
Automobile Service Stations and Repair Garage	X	X	X	X	X	C	X	X	X	X	C	X	X	X	X	
Restaurant	X	X		P	X	P	X	X	X	X	P					
Restaurant with Multiple Principal Structures	X	X	X	X	X	C	X	X	X	X	X					
Restaurant, Drive-In	X	X	X	X	X	C	X	X	X	X	C					
Restaurant, Drive-Through	X	X	X	X	X	C	X	X	X	X	C					
Restaurant, Neighborhood	X	X	X	X	X	?	X	X	X	X	?					
Restaurant, Take-Out	X	X	X	X	X	P	X	X	X	X	?					
Beach recreation equipment rentals and sales	X	X	X	X	X	P	X	X	X	X	X					
Automated Ice Vending Machines	X	X	X	X	X	X	X	X	X	X	X					
Smoke & Vapor Shops	X	X	X	X	X	??	X	X	X	X	X					
Services																
Alcohol & Drug	X	X	X	X	X	X	X	X	X	X	X					

Bed and Breakfast	-	-	-	-	-	P	-	-	-	-	-	-	-	P	P	-	48-445(a)
Boardinghouse or rooming house	C	C	C	C	-	C	-	-	-	-	-	-	-	C	C	-	48-445(a)
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

** = Separate Section



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
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