



# MEMORANDUM

## Town of Nags Head

### Planning & Development Department

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To: Board of Commissioners

From: Holly White, Principal Planner  
Michael Zehner, Director of Planning & Development

Date: April 27, 2020

Subject: Public Hearing to consider numerous text amendments to the Unified Development Ordinance as it pertains to the updated flood maps and update of the Flood Damage Prevention Ordinance

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### OVERVIEW

As the Board of Commissioners is aware, the Town received the Letter of Final Determination concerning the updated FEMA Flood Insurance Rate Map (F.I.R.M.) as of December 19, 2019. As previously relayed, the updated F.I.R.M. becomes effective no later than 6 months after receipt of the letter (June 19, 2020), requiring local adoption by the Town prior to this date.

The schedule for adoption is as follows:

- ~~Early March 2020 – Community Information Meeting; information materials made available online~~
- ~~April 1, 2020 – Planning Board Meeting; consider recommendation~~
- ~~April 15, 2020 – Board of Commissioners Consent Agenda; request to schedule public hearing~~
- May 6, 2020 - Board of Commissions Public Hearing; Final Action (or continued consideration to June 3, 2020 meeting)
- June 19, 2020 - Effective Date (no later than)

### BACKGROUND

The Board of Commissioners and Planning Board met jointly at the Planning Board's meeting on February 18, 2020 to review and discuss an initial draft of the updated Flood Damage Prevention Ordinance, along with updated building height measurement and fill provisions, to be considered in concert with the updated F.I.R.M. covering the Town. Additionally, a Community Informational Meeting was held on Monday, March 9, 2020. The Planning Board considered the proposed text amendments at a meeting on April 1, 2020; the Planning Board recommended unanimous approval of the draft flood maps and flood damage prevention ordinance with the incorporation of requested changes from the State's NFIP Office (which have been incorporated in the version of the ordinance before the Board). Meeting materials presented to the Planning Board and a draft of the ordinance are available at [www.nagsheadnc.gov/floodmaps](http://www.nagsheadnc.gov/floodmaps).

## **SUMMARY OF MAP CHANGES**

The preliminary F.I.R.M., released in June of 2016, revealed that many areas of the Town will be removed from the Special Flood Hazard Area. There is an overall reduction of properties located in flood zones in the Town on the preliminary F.I.R.M. This includes fewer properties in AE and VE flood zones and an overall increase in properties located in X flood zones, even on the oceanfront. Further, mapped base flood elevations (BFE's) are being reduced from a current BFE of 8-10' in the AE flood zone to 4-5' on the preliminary F.I.R.M. In addition, a new AO flood zone has been added to the area west of the primary frontal dune. Staff does not believe that the F.I.R.M. accurately represents the overall risk of flooding in the Town.

## **SUMMARY OF ORDINANCE CHANGES**

In conjunction with the updated F.I.R.M. and flood insurance study, the Town is required to update its Flood Damage Prevention Ordinance consistent with the most recent version of the State Model Ordinance for Coastal Areas. There are changes in the State Model Ordinance that the Town must adopt in order to remain in the National Flood Insurance Program (NFIP). These changes are reflected in the attached Adoption Ordinance for the Flood Damage Prevention Ordinance. In conjunction with amendment of the Flood Damage Prevention Ordinance, it will also be necessary to update relevant portions of Article 4. *Development Review Process*, concerning Floodplain Development Permits; Article 8. *District Development Standards*, concerning the measurement of height; and Article 11. *Environmental Provisions, Part 1 Stormwater, Fill, and Runoff Management*, concerning the regulation of fill. These changes are also represented in the Attached Adoption Ordinance for the Flood Damage Prevention Ordinance.

Due to a significant number of properties with known flooding histories becoming X or Shaded X on the preliminary maps, a local elevation standard ("LES") is proposed as part of the Flood Damage Prevention Ordinance adoption. The development of the local elevation standard has been a joint effort between Dare County and the Towns of Manteo, Nags Head, Kill Devil Hills, Kitty Hawk, Southern Shores, and Duck. The LES is a locally adopted elevation level used as the Regulatory Flood Protection Elevation (RFPE) to mitigate flood hazards in the Shaded X, X, AE, AO, VE, as depicted on the FIRMs for Nags Head. For properties east of NC 12 and SR 1243, the LES is 12' and development in this coastal high hazard area would have to comply with the standards for VE construction. For properties west of NC 12 or SR 1243, the LES is 10' and the standards that apply to development in this area would be like those that apply in the AE flood zone now.

Since currently there are no regulations that apply to properties in X flood zones, a key part of the ordinance development and new LES language had to be written that applies to properties in Shaded X and X flood zones. There are a set of new, additional standards developed to specifically apply to areas mapped as Shaded X or X. In these areas:

- Substantial improvement/damage definitions (the 50% rule) does not apply;

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- Remodeling/renovations of existing habitable area are allowed as long as footprint of the structure does not increase;
- Areas within existing structures cannot be converted for use as conditioned, temperature-controlled space unless the reference level is located to or above the RFPE; and
- Lateral additions - structures located west of NC 12 and SR 1243 (where the reference level of existing conditioned, temperature-controlled space is located below the RFPE)-may be increased by 25% at the same level, without having to be elevated to or above the RFPE.

These standards would apply in addition to other specific standards.

### **ADDITIONAL CONSIDERATIONS**

The Outer Banks Home Builders Association submitted a letter to the Planning Board, dated April 1, 2020, which has been provided to the Board of Commissioners. The Association raised the following points, with Staff responses for consideration:

A. OBHA:

*OBHBA members began working in early 2017 with the surveying and engineering community to assist local planning staff in designing new flood prevention measures to address an anticipated reduction in the 2006 FIRM's flood zone elevations in Dare County. Extensive consideration of historical flooding, previous FIRMs, and topographical data informed a consensus among county and municipal planning staff that administration of eight-foot standards to a revised reference level, the bottom of the lowest floor or utility, would ensure adequate flood protection in X and Shaded X zones.*

Staff Response:

Town Staff participated in meetings beginning in 2017 with Dare County, other municipalities, and OBHBA representatives. However, during this process, Nags Head Staff did not commit that administration of an eight-foot standard would ensure adequate flood protection in X and Shaded X zones within the Town.

The Town has been documenting rainfall-based flood occurrences for the past 20-years. Staff has observed an increase in the frequency and intensity of rainfall events, whether it be a series of events or a single event. Significant rainfall-based flood events have been documented in the Town 11 out of the past 20 years and more importantly, every year for the last 4 years.

In addition to documenting areas of flooding throughout Town, we have also documented flood depths, relative to mean sea level (msl). Hurricane Matthew was documented at a maximum flood elevation of 10' msl. Areas of flooding in the Vista Colony Subdivision were measured as much as 11.25' msl in 2012 from a series of rainfall events. Other smaller scale rainfall-based events have resulted in flood depths exceeding 8' msl.

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Noting Commissioners' previous concerns that the maps are flawed, Staff has attempted to address this concern by proposing an LES of 10' west of NC 12 and SR 1234. In Staff's opinion, an LES of 8' would not be responsive to these concerns; based upon analysis, an LES of 8' would result in approximately 36% (1,916) of the properties in Town being regulated to a lesser standard than they are presently. In contrast, an LES of 10' west of NC 12 and SR 1234, would result in approximately 2% (133) of the properties being regulated less stringently than under current regulations

B. OBHA:

*Section 11.42.3.1.2. of Nags Head's draft ordinance proposes a 10 foot RFPE for properties west of NC HWY 12. While we recognize that each jurisdiction must determine RFPEs and other important planning objectives on localized bases, the OBHBA urges planning board members' attention to the potential consequences Nags Head's proposed ten foot RFPE poses in light of additional proposed restrictions on lateral additions. Section 11.44.2.7.9.2. would require that lateral additions to nonconforming structures in X and Shaded X zones be elevated to the proposed ten foot RFPE if they would increase the square footage of the adjacent floor by 25% or more. This presents a problem for homeowners interested both in useably enlarging a floor that falls below the proposed RFPE and in maintaining a level floor.*

Staff Response:

Based upon analysis completed by Staff, there are currently an estimated 1,004 (19%) structures that are FEMA non-compliant with respect to elevation. If a proposed LES of 10' is adopted, the number of FEMA non-compliant structures would increase by 174 (3%). Of the proposed FEMA non-compliant structures with an LES of 10', seventy-eight percent (78%) will be located in a flood zone X, all having ground elevations of less than 11'. In contrast, Staff's analysis indicates that 4,514 (85%) of the 5,277 structures in Nags Head have estimated first floor elevations of 10' or greater.

Given the significant number of existing FEMA non-compliant structures that will now be located within an X flood zone, coupled with the effect of establishing an LES of 8' versus 10' (and vice versa), staff believes that a 10' LES results in better protection of existing and proposed development, and is more consistent with current regulation.

C. OBHA:

*The OBHBA respectfully requests that you allow existing maximum lot coverage restrictions to regulate additions and remove the arbitrary 25% threshold.*

Staff Response:

Staff believes that allowing maximum lot coverage restrictions to regulate additions will not comprehensively address additions below RFPE in the town. Based upon analysis by staff, there are existing structures with floor area below the current RFPE, but which would now be in an X flood zone, where as much as 1,800 square feet (16%) of lot coverage is still available. The 25% percent

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threshold was intended to allow small additions at the same level for homes that have heated area below the RFPE in the X flood zone.

D. OBHA:

*We believe that the category of possible lateral additions that would expand properties with a demonstrated flood history, that would conform to maximum lot coverage, and that would be large enough to constitute a compelling regulatory interest is almost vanishingly narrow.*

Staff Response:

Assuming an LES of 10' (areas west of NC 12 and SR 1243), and without a limit on lateral additions, approximately 622 of existing non-compliant structures would be eligible to maximize lot coverage, where they are currently precluded from doing so under current regulations.

E. OBHA:

*We believe that the size of lateral additions to the many moderately sized homes in Nags Head should not be rigorously constrained by a regulation with such a limited intended function.*

Staff Response:

The goal of the National Flood Insurance Program and the Flood Damage Prevention Ordinance is to protect human life, safety, and health as well as to minimize damage to private and public property due to flooding. The regulations proposed are consistent with these goals. The proposed regulations do not preclude lateral additions, rather, they would limit additions below the 10' LES in a shaded X or X flood zone to 25% of the existing floor area below the LES; lateral additions in excess of this limit could maximize allowable lot coverage if elevated to meet the LES.

## **POLICY CONSIDERATIONS**

The most direct policies and actions in the Comprehensive Plan pertaining to floodplain management are contained in Section 3.3.2 Hazard Mitigation as follows:

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

NR-11i: Explore resilient construction techniques and higher regulatory standards to protect existing and future development from frequent localized flooding events.

NR-13 Support the town's continued participation in the National Flood Insurance Program (NFIP) and Community Rating System (CRS). Participation in the NFIP is key in making federally backed flood insurance available within the town and to improve the town's CRS rating.

## **PLANNING BOARD RECOMMENDATION**

At their meeting on April 1, 2020, the Planning Board recommended unanimous approval of the text amendments as proposed, with incorporation of changes recommended by Staff as requested by the State's NFIP Office.

## **STAFF RECOMMENDATION**

Staff recommends adoption of the text amendments as proposed.

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

### *3.5.3. Action by the Planning Board.*

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

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

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

### *3.5.4. Action by the Board of Commissioners.*

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

*3.5.4.1. Before an item is placed on the consent agenda to schedule a public hearing, the Planning Board's recommendation on each proposed amendment must be received by the Board of Commissioners. If no recommendation is received from the Planning Board within 30 days from the date when submitted to the Planning Board, the petitioner may take the proposal to the Board of*

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*Commissioners without a recommendation from the Planning Board. However, the Planning Board may request the Board of Commissioners to delay final action on the amendment until such time as the Planning Board can present its recommendations. No such limitations shall apply to applications or requests submitted by Town staff or any Town Board.*

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

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

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

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

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

*3.5.4.5.2. A statement rejecting the amendment and describing its inconsistency with the adopted Comprehensive Plan and explaining why the action taken is reasonable and in the public interest.*

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

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

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

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

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

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

**Attachments:**

1. Adoption Ordinance
2. Powerpoint for Planning Board Meeting- April 1, 2020