

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
April 10, 2019**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, April 10, 2019.

Present were: Chair Joe Blakaitis, Vice Chair Marc Murray, James Cofield, and Sandy Whitman.

Absent: Member Tim McKeithan.

Also present were: Director of Community Development Joe Heard, and Permit Coordinator Sandy Cross.

Absent: Council Liaison Jon Britt.

Others Present: Scott Kessler, Ron Forlano, and James Blöse

Chair Blakaitis called to order the Regular Meeting of the Planning Board for April 10, 2019 at 6:31 p.m.

PUBLIC COMMENTS

Scott Kessler of 1377 Duck Road was recognized to speak. Mr. Kessler stated that he has been a homeowner in Duck for approximately seven years. He stated that he has worked with several localities in Richmond, Virginia and served as chairman for Rebuilding Together Richmond, an organization that fixes up homes for low-income, elderly people in Virginia and is involved in community development. He stated that he is now a full-time resident of Duck and wants to become more involved in the community.

NEW BUSINESS

Ordinance 19-03: Adding Approval Criteria for Conditional Use Permits

Director Heard stated that the ordinance is something that Council authorized the Board to look at. He noted that it was discussed at the Council meeting on April 3, 2019 as well. He added that the proposal is a relatively simple and straightforward change.

Director Heard stated that the packet contains a memorandum from the Town attorneys covering a variety of topics and suggestions. He pointed out that one suggestion was to establish objective criteria as the Planning Board and Town Council consider conditional use requests in general. He stated that the attorneys noted that the Town's ordinance contains only one vague standard and by law, in North Carolina, the courts will find in favor of the applicant if they have met the criteria that the Town has laid out in its ordinance and tell the Town to approve it. He stated that the attorneys are suggesting that the Board put some general criteria in so that if Council should ever make a decision that is appealed, the Town's decision has a better chance of being upheld.

He noted that it will also provide the Board and Council with some guidance and things to think about as they are evaluating an application.

Director Heard stated that the criteria the attorneys proposed were as follows:

- i. The use does not materially endanger the public health or safety;
- ii. The use meets all required conditions and specifications of the ordinance;
- iii. The use will not substantially injure the value of adjoining property, unless the use is a public necessity; and
- iv. The use will be in harmony with the area in which it is located and be in general conformity with the comprehensive plan.

Director Heard stated that the attorneys are recommending these criteria be added to the Town's ordinance for consideration of conditional use permits in the future.

Chair Blakaitis pointed out that these are not specific criteria but an overall-type thing. Director Heard stated that the intent of the proposed criteria is to be general. He explained that the Board has the ability to add specific conditions during its review of applications. He added that the adoption of more specific criteria may tie the hands of the Board or Council during future decisions. He added that the Board has the ability to go back and consider other things as well in the future, but the current proposal is meant to be general and flexible enough to allow the Board to work with individual applications.

Vice Chair Murray noted that Director Heard cleaned up the language in the draft ordinance by having the language read: "...unless the use is a public necessity..." Director Heard stated he is correct. Vice Chair Murray asked which version the Board would be approving. Director Heard stated that the attorneys agreed on the wording in the draft ordinance as it clarifies the intent. Vice Chair Murray asked if the comprehensive plan is not the CAMA Land Use Plan. Director Heard stated that it is. Vice Chair Murray asked if it should be referenced as such in the ordinance. Director Heard stated that when the Land Use Plan is updated, it will have the word "comprehensive" in the title. Director Heard said that in planning circles, the terms were fairly synonymous. He added that there is no harm in having the wording clarified. Vice Chair Murray stated that if he was an applicant, he would want to know what plan it is that he has to read and comply with. Director Heard agreed, stating that he would add that clarification. He stated that one of the other benefits is to give an applicant some idea of what their application is judged on.

Chair Blakaitis thought there is no harm in taking a good hard look at it and deciding what the Board wants to do before moving on. Member Cofield stated that he doesn't mind clarifying the term but would rather not call it something different. He suggested adding parentheses and it could read as follows: "...comprehensive plan (CAMA Land Use Plan) ..." Director Heard agreed. Chair Blakaitis asked if this amendment would be a separate item. Director Heard stated that it would be part of the motion to make the change.

Chair Blakaitis asked if the Board found something that doesn't make sense when they start discussing the Village Commercial Development Option, how it will be approached with regard to this discussion. He asked if it would be changed. Director Heard stated that the discussions

involve two different things. Chair Blakaitis asked if they overlap at all. Director Heard stated that, technically, the Board may be changing the Village Commercial Development Option from a conditional use to a special exception, which means there will be no connection between the two. Vice Chair Murray asked if there is a consensus that the Board is going to change it to a special exception. Chair Blakaitis thought the Board did, but that is something that the Board will be discussing.

Member Cofield moved to recommend approval of Ordinance 19-03 as amended. Member Whitman seconded.

Motion carried 4-0.

Discussion/Consideration of the Village Commercial Development Option

Director Heard stated that the Board had an overview at their last meeting regarding some concepts they may wish to consider. He stated that now the Board will be starting the process of looking at the types of standards they want to consider for the Village Commercial Development Option. He stated that the Town is dealing with instances where an owner or developer seeks some flexibility with development standards to allow a particular proposed use to go into that area. He explained that when the VCDO was adopted the intent was that the Town has some small and odd-shaped lots in the Village and the area has not developed as a traditional, suburban shopping corridor. He added that there are a lot of unique characteristics and the intent was to allow the Planning Board and Town Council to look at those instances where someone needs some flexibility in order to design a project in a way that fits the character of the Village but may not meet all of the minimum standards that the ordinance has for things such as setbacks and parking.

Director Heard stated that the Planning Board will be looking at ways to go about this and discuss some ideas and concepts. He stated that there were several comments from the Town attorneys where they have made recommendations regarding certain aspects of the Village Commercial Development Option. He stated that the first item is using it as a special exception rather than a conditional use. He pointed out that the key point is that the Town is not dealing with uses but with development standards, which is closer to a variance than a conditional use permit. He added that the Town attorneys and staff's recommendation is to go about it by creating a new special exception subsection entitled "Special Exception: Village Commercial Development Option" that sets different criteria, standards, and an approval process.

Chair Blakaitis thought the approach is fine. He asked how the attorneys came up with the recommendations that are listed in the staff report. Vice Chair Murray understood that it isn't a use that the Board is discussing and that it was cleaner to call it a special exception. He noted that the reason the attorneys gave for their recommendation is that the Village Commercial Development Option could be defended as a use. Director Heard stated that the Town attorneys did put it in their report, but it is illegal to do it in that a board cannot grant a use variance. He added that all the uses that were permitted and not permitted are listed under the V-C district.

Vice Chair Murray clarified that if a use is not on the prohibited list and not on the permitted list, the applicant would have to apply for a text amendment no matter what. Director Heard stated

he is correct as a text amendment would be necessary to add that use as a permitted or conditional use. He added that Vice Chair Murray had expressed concern over the length of time for a text amendment process and then a special exception. He noted that the Town has traditionally allowed an applicant to do both concurrently. He pointed out that the text amendment will need to be approved first but it can even occur at the same meeting. Vice Chair Murray stated that it is interesting that the Town attorneys brought it up as a feature of changing it when it is illegal to do it anyway which is confusing to him.

Chair Blakaitis stated that the recommendations on Page 2 of the staff report are quite broad and generous. Director Heard explained that they are things that the Board can consider and are not hard and fast recommendations.

Member Cofield stated that he had a question with regard to the first two bullets of the recommendations on Page 2. He stated that since the Town has a standard that is being reduced, he would rather see them worded as follows: "Minimum structure setbacks cannot be reduced below or more than X percent." Director Heard stated that the criteria are not in ordinance form yet as staff is looking to see what concepts the Board wants included in the ordinance. Chair Blakaitis agreed. Member Cofield stated that he is referencing the first two bullets. He added that the fourth bullet's concept is imbedded in it and suggested that the first two bullets be the same way.

Vice Chair Murray noted that whenever the Board is looking at changing an ordinance for any reason other than a change in state law or housekeeping, it is often to make the ordinance more accurate and concise. He stated that he wonders what motivated the Planning Board to change it and how can they avoid a repeat of the one thing that's motivating the Board to change it. He asked if there is a list of Village Commercial Development Option permits that the Town is unhappy with. He assumed that it is a list of only one. Director Heard stated that the issue came up initially with Roadside Bar & Grill's application as far as concerns about what the Town granted and what the Town is able to grant. He noted that the conversation about limitations came up due to that application. He stated that there has been a consistent conversation with the Planning Board and some Council members regarding some other applications, particularly with regard to parking. He added that there have been at least three applications that have dealt with that issue since Roadside's application. He stated that the initial direction Town staff received from Council was that they are interested in looking at the VCDO but wanted to wait until they had a more thorough presentation at the Annual Retreat that outlined the district before authorizing the Planning Board to work on it. He added that Council decided that they want the Board to look at it and see if there are ways to make it better. He stated that one of the key things is looking at establishing some type of criteria for approval of these. In this case, the Council is seeking something more specific.

Vice Chair Murray stated that it seems that most of the heartburn over the Roadside application came from the retroactive nature and the fact that the work had already been completed. He noted that it seems to be a hard concept to get across that the Town was hearing the application as if it had not happened. He pointed out that the Village Commercial Development Option gives the Town a lot of leeway, which is a good tool. He wondered if instead of getting at individual, specific guidelines in the ordinance, the Town can just tell the applicant that they cannot apply for the Village Commercial Development Option if they have a current violation.

Vice Chair Murray added that instead of letting the Board's experience with Roadside sour them and become too limiting on some of the conditions that they develop, he feels that a lot of things that feel excessive are not empirically excessive. He noted that the Board will have to comb through the exceptions made in each application and come up with an objective measure for whatever is being granted. He asked if it is an option. Director Heard stated that it is and was the way the Division of Coastal Management deals with most of their violations. They make the property owner address the violation before considering a permit. He stated that the question is if this was something that the Planning Board and Town Council want to do. He noted that there could be a significant expense to the applicant and the argument can be made that the additional expense is deserved, but the Town has traditionally taken a more light-handed approach.

Member Cofield thought the standards are good but thought Vice Chair Murray's suggestion is a good addition to the criteria. He stated that he wants to introduce that concept that the Board will not grant more than a certain number of exceptions per application for the Board to consider. He reiterated that he liked Vice Chair Murray's suggestion as an addition but not as a substitute. Vice Chair Murray stated that he is suggesting it as a substitution.

Chair Blakaitis agreed with Vice Chair Murray's suggestion in that rather than going through each item, it was a more general approach. He stated that if an applicant violates the exception and then comes before the Board for approval, they would have to correct the violations first before the Board looks at it. He noted that it made sense; however, there are probably one or two criteria from the staff report that can fit in the draft ordinance.

Vice Chair Murray stated that he dislikes the meetings for these applications as much as anyone else as the Board doesn't feel that they have anything specific on which to base their review. He stated that the Town has a unique character and odd lots and he felt that it is hard for the Board to think of each eventuality that will come up. He pointed out that Travis Costin had come before the Board with a very small lot and he felt that the relief he received was helpful and the development looks good. He felt that the Board will run the risk of inadvertently tying its hands to do that kind of work where the Board is giving relief for certain things in exchange for concessions on the applicant's part. He stated that it is hard for him to conceptually imagine what all of the possible trade-offs would be.

Member Whitman pointed out that Travis Costin came before the Planning Board before he started his project. Vice Chair Murray agreed, adding that he doesn't have a problem with it as he likes the way the Town's approach was in the past, but everyone else seems to be unable to take the application at face value as if it had not happened, because it had happened. He stated that it made the Town look bad to have people in violation, which he understands.

Director Heard stated that the Town Council received feedback from other business owners who were rubbed the wrong way with the fact that they did things the right way rather than committing violations and coming in afterward to beg for forgiveness. Vice Chair Murray thought if there is a problem with that transaction, the obvious problem is that it was after the fact. He noted that if the Town wants to remedy that, it seems like low-hanging fruit.

Member Cofield disagreed with Vice Chair Murray's comments and thought that part of it is the after effect it had, adding that the violations were so substantial that there was a fresh look at

why the Town would approve it. Chair Blakaitis clarified that some recommendation needs to be developed. Member Cofield stated that he likes the approach. Chair Blakaitis thought the whole thing should have been shut down as soon as it happened as he felt the outcome would have been better. He added that the Town went along with it for too long due to the season. He stated that these are good points that the Board should discuss.

Ron Forlano of 1221 Duck Road was recognized to speak. Mr. Forlano asked if the Board changed the basic concept from conditional use to special exception, the Town would still have the teeth for a penalty if a violation occurs after permission has been granted. He pointed out that under a conditional use permit, the Town can revoke the permit if a violation occurs. He asked if the same can be done under a special exception. Director Heard stated that the Town could and explained that the approval is recorded over the courthouse. Chair Blakaitis asked what the effect would be by rescinding the permit. Director Heard stated that violations can also result in fines being imposed. Chair Blakaitis clarified that they will have to apply for another special exception to continue. Director Heard disagreed, adding that if they want to change what is initially approved, they have to come back through the process. Ron Forlano thought it is making things more complicated by making it a special exception. He clarified that Director Heard is only talking about violations in the future. Director Heard stated that it is the same process.

Member Cofield reiterated his suggestion of no more than a certain number of variations per application. Director Heard stated that he understood.

Chair Blakaitis asked about the recommendations on Page 3 of the staff report. He thought there was a lot in there. Director Heard stated that they are things for the Board may want to consider. Chair Blakaitis asked the Board if there is anything they want to think about. Vice Chair Murray wondered how the third bullet point – “The development proposed under the VCDO will better fit the character of Duck Village than development allowed by the based standards for the V-C district” – will be quantified. Director Heard stated that it is a relatively subjective criterion. He stated that the Board is seeking in exchange for granting flexibility is a better quality development, which is the trade-off.

Member Cofield thought the Parker House Restaurant would apply with regard to the third bullet point since the orientation is towards the back near the boardwalk. Chair Blakaitis asked why. Member Cofield explained that the orientation is more to the rear. Vice Chair Murray stated that while it is a good orientation, the bullet point about the relief they were applying for is somehow better than what they can do under the Village Commercial District’s normal ordinances. He isn’t sure how it can be evaluated without an applicant coming in with six site plans and the reason the one they want is better due to certain things. Chair Blakaitis thought it is hard to quantify. Member Cofield agreed. Director Heard explained that it is not saying that their specific request is better, it is saying that the development proposal as a whole is a better design than the Town would get if they apply everything. He stated that it got back to the point of how applying the basic standards creates a hardship for the applicant or prevents them from doing something that better fits the character of the Village.

Member Cofield stated that if he was the applicant for the Parker House Restaurant and the ordinance was in place, he would argue the third bullet point. Chair Blakaitis agreed adding that

the applicant probably wouldn't understand it. Member Cofield stated that he would understand it and argue the point. Director Heard stated that it is something that the Board can consider. He added that he is not suggesting that the Board do it or not do it.

Chair Blakaitis asked if the concepts being used by other communities is in the book in front of the Board. Director Heard stated that there are concepts from four different communities.

James Blöse of 105 Waxwing Court was recognized to speak. Mr. Blöse thought the next to the last bullet addressed the kind of things that Vice Chair Murray and Member Cofield were discussing. He thought it was the kind of direction that the Board should be considering. Chair Blakaitis asked if Mr. Blöse is referencing that more weight should be placed on certain criteria. James Blöse stated that he is referencing that the requested VCDO application cannot be used to remedy existing violations on a property. He thought it is very appropriate.

Chair Blakaitis felt that the Board should keep it as simple as possible. He stated that he likes Vice Chair Murray's original proposal with some additions mentioned by Member Cofield and not get too involved with criteria of changing everything in the ordinance. He clarified that anything that the Board changes will be modifying the existing ordinance immediately. Director Heard stated that the concepts the Board is discussing are not intended to change the base standards for the district, adding that the Board is discussing if flexibility is needed.

Vice Chair Murray pointed out that the first set of bullet points deals entirely with parking setbacks. However, the Board was going to deal with the two parking by percentage as well as structure and parking setbacks. He noted that the Board can discuss other relief they could allow and one of the most popular ones is the number of parking spaces, which relates back to the Village Commercial ordinance. He asked if the Board needs to deal with parking before they can word the relief they would potentially allow. Chair Blakaitis stated that parking standards are in the zoning ordinance, but this dealing with relief. Director Heard stated that there is a slide in the presentation that dealt specifically with that issue that offered a potential change to the base parking standards. He noted that it could be just for the Village Commercial District. He added that, if desired, the Board can amend the parking section of the ordinance. If the Board and Council want to go that route, and if the Board feels there is justification for reducing the base standards in the Village Commercial District, that will be a change in the parking standards in that district. He stated that it can be a separate, related item.

Chair Blakaitis stated that it is obvious that the Board will be looking at recommendations, if necessary, which will be debated. Vice Chair Murray agreed, adding that he is trying to think of ways to organize the conversation. Chair Blakaitis agreed, adding that he is going back to simplicity. He thought the Board knows what they want to look at. Vice Chair Murray asked if there should be a discussion outlining the discussion for the subsequent meeting. Chair Blakaitis thought it is a good idea.

Director Heard stated that if the Board wants to get to the point of having him draft something that can be the starting point for the discussion, he needs to know the Board's thoughts on some of the concepts so that he can include or exclude certain features. He added that if the Board does not want to go that route, he would like to know if there is additional information needed or if the Board wants staff to explore certain concepts in more detail. Chair Blakaitis isn't sure if he

wants to see a make-believe ordinance yet. He stated that he would like to see a list of things that the Board can discuss. He added that he knows the Board will not be doing it now because if they did, there should be a list that the Board can discuss.

Vice Chair Murray thought the Board needs to go through each of the bullet points. He added that they are in separate sections in the staff report, but the Board needs to give Director Heard some guidance as to which ones they want to consider. He noted that the Board already discussed changing the language for the first five bullet points. He stated that they need to be discussed and have the Board come to an agreement on the percentages. He pointed out that if the Board considers bullet point #5 on Page 2 of the staff report, he will be inclined to do less as far as specificity but understands that something needs to be done. He stated that he needs a sense of the non-negotiables for what the Board needs to specify.

Member Cofield thought it is a good starting point but doesn't think the Board is prepared to get into the details yet. He added that he wants to read through the package provided by other communities. He reiterated that it is a good starting point and thought what Vice Chair Murray is asking for are some specifics, but he is not at that point yet. Vice Chair Murray stated that there are sections of recommendations and he is asking if there are any that the Board does not want to see again. Chair Blakaitis asked what recommendations Vice Chair Murray is referencing. Vice Chair Murray stated that there are recommendations with five points and there are other recommendations with five more points. He added that there are things that the Town is trying to encourage which aren't bulleted but numbered in the staff report. Chair Blakaitis pointed out that they are obvious. Vice Chair Murray wondered what format they should be in to guide the discussion for a future meeting. Chair Blakaitis suggested that the Board not eliminate any recommendations on Page 2 of the staff report because they encompass everything as far as what the Board may want to discuss. He thought they should be left in the staff report for now. Vice Chair Murray agreed, adding that he is trying to organize the list. Chair Blakaitis understood. He thought all the bulleted points on Page 3 should remain. He didn't think the numbered items are obvious things that happened when the ordinance was good. He wasn't sure if the Board needs to discuss a whole lot of them except to decide whether any of them are against the CAMA Land Use Plan.

Vice Chair Murray suggested that at the next Planning Board meeting the Board receive recommendations all numbered and broken into sections that make sense so that as the members are going through the meeting, they can review and discuss items and then move on to the next item. Chair Blakaitis thought there should be something regarding a section on violations. Director Heard asked if the Board is looking to have it that an individual cannot apply until the violation is corrected or if it would allow them to apply but it cannot be used to correct the violation.

Vice Chair Murray offered his opinion that an application could be submitted to cure the violation and do some improvements, so they could be approved at once. Director Heard stated that it could not be used to cure violations if prevented by the ordinance. Vice Chair Murray noted that a special exception could be granted and one of the conditions would be that they remove the violation. Director Heard commented that it is something that the Board will need to figure out.

Director Heard stated that in looking at the numbered items on Page 3 of the staff report, the reason they are set up differently is that they deal with different things. He explained that they are a list of potential criteria that the Board can use as either guidelines, standards, or a combination of the two. He asked if the Board wants them all as standards, guidelines or a combination of the two. He pointed out that the City of Wilson gave points and if an individual receives a certain number of points, they meet the minimum criteria for approval.

Member Cofield stated that he reviewed the list and thought they are all good criteria in that they benefit the Village Commercial District. He thought it is a good list to have for any would-be applicant. He stated that it helps to achieve the objective that the Board is seeking. He added that he would not remove anything from the list as it gives an applicant something to think about.

Director Heard stated that if the Board has other ideas or concepts to add to the list, that they will be welcome. Member Cofield thought some of the towns work with the recommendations on Pages 2 and 3 of the staff report. Director Heard stated that it is the intent of this. He added that the Board doesn't have to decide at this meeting. Member Cofield asked if any towns on the Outer Banks are doing what Duck is trying to do. Director Heard stated that they are not. He added that Duck may be unique in the state as far as the concept of the Village Commercial Development Option and how the Town uses it. He stated that there were hundreds of communities that have design guidelines or standards, with most of them being guidelines and not standards. He cautioned that guidelines are not enforceable so if there are important items, they should be adopted as standards.

Director Heard stated that there are pieces of four different ordinances in the package in front of the Board. He stated that the one he found most interesting was the City of Wilson's. He pointed out that they have criteria that are standards and others that are discretionary. He stated that the City of Morgantown uses a point system to encourage people to do as many things as they can and in return they receive points. He added that if they receive 10 points or higher, the approval becomes an administrative review process instead of coming before a Planning Board or Council. He added that it is an interesting way of looking at the approval process as an incentive for better development. He noted that he also included criteria from Boone and Hillsborough, which were relatively modest-sized communities, and are intended to give the Board an idea of some of the things that the Board can think about when developing standards or guidelines as well as getting a feel of what other communities are doing.

APPROVAL OF MINUTES

Minutes from March 13, 2019 Regular Meeting

Member Whitman moved to approve the March 13, 2019 minutes as presented. Member Cofield seconded.

Motion carried 4-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Summary of April 3, 2019 Council Meeting

Director Heard gave a short update on the April 6, 2019 Town Council meeting to the Board and the audience.

Project Updates

Director Heard updated the Board and audience about several Town projects.

BOARD COMMENTS

None.

ADJOURNMENT

Member Cofield moved to adjourn the meeting. Vice Chair Murray seconded.

There was no vote.

The time was 7:58 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman