

Kitty Hawk Planning Board Meeting
October 13, 2016 – 6:00pm
Kitty Hawk Municipal Building

1. Call to Order/Attendance
2. Approval of Agenda
3. Approval of Minutes:
 - a. July 14, 2016
4. Administrative Report:
 - a. Town Council Action from 8/1, 9/6 and 10/3 Meetings
5. Subdivision:
 - a. 1206 W. Kitty Hawk Road, 3 Lots
6. Text Amendments:
 - a. Sec. 42-504 – Yards Generally
 - b. Sec. 42-41 – Unlisted Uses
7. Comments:
 - a. Chairman Richeson
 - b. Planning Board Members
 - c. Town Attorney
 - d. Planning Director
8. Public Comment
9. Adjourn

1. **Call to Order/Attendance:** Chairman Richeson called the meeting of the Kitty Hawk Planning Board to order on Thursday, October 13, 2016 at 6:00pm.

Planning Board Members Present: John Richeson, Chairman; Chuck Heath, Member; Jim Geraghty, Member; Dusty Rhoads, Member; Gary Muir, Alternate; Jan Collins, Alternate

Planning Board Member(s) Absent: Bryan Parker, Vice-Chairman. Due to Mr. Parker's absence, one alternate will vote in his absence.

Staff Present: Rob Testerman, Planning Director; Casey Varnell, Town Attorney; Patricia Merski, Recording Secretary.

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2. **Approval of Agenda:** Hearing no comments/corrections/additions to the evening's Agendas, the Agenda was approved unanimously.

3. **Approval of Minutes:** Hearing no comments/corrections/additions to the July 14, 2016 Minutes, the minutes were approved unanimously.

4. Administrative Report:

a. Town Council Action from the August 1, 2016 Meeting: The Council approved the site plan for Beachwoods Phases 2B and 2C.

b. Town Council Action from the September 6, 2016 Meeting: The Council disapproved the Text Amendment and Conditional Use Application for the Therapeutic Residential Facility.

c. Town Council Action From the October 3, 2016 Meeting: There were no recommendations to the Council at this meeting.

5. Subdivision: 1206 W. Kitty Hawk Road, 3 Lots

Mr. Testerman stated that this Application is for a preliminary plat for the subdivision of the parcel at 1206 W. Kitty Hawk Road. The plat outlines a proposal to subdivide one (1) existing parcel totaling 2.75 acres on the western side of W. Kitty Hawk Road into three (3) lots. There would be no new roads or road expansions proposed as part of this subdivision.

The three(3) lots would be 15,000 sq. ft. (lot 1), 45,672 sq. ft. (lot 2) and 58,910 sq. ft. (lot 3). This subdivision proposal is being presented to the Board and the Town Council because of the size of the parcel and in the subdivision ordinance, Kitty Hawk lists criteria that have exempt subdivisions that were reviewed and approved administratively.

One of the requirements is that it creates no more than three (3) lots and is not over two (2) acres and because this is 2.75 acres, it is necessary to go over the entire preliminary plat review.

Zoning: The zoning is Village Residential (VR-1) and it appears to allow the density of single-family residential development for the proposed properties which indicates that this proposal is compliant with the permitted density requirements.

Lot Size: The minimum lot size in the VR-1 district is 15,000 sq. ft and the lots shown on the preliminary plat proposal appear to comply.

NOTE: Section 38-1 of the Town Subdivision Regulations states that marsh and wetland areas, as determined by CAMA and/or CRC regulations, should not be used when calculating lot size. "Section 404" wetlands can be counted towards lot sizes.

Mr. Testerman stated that he had a conversation with the Code Enforcement Officer and the Building Official who have been familiar with the Town of Kitty Hawk and their regulations, indicated that there may be some wetlands toward the back end of lot 3 and as of right now and is not shown on the plan but will be addressed when reviewing the final plat.

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Mr. Testerman also stated that other requirements concerning lot width and building setbacks a shown meet all requirements.

Road Frontage: The lots must have a minimum road frontage of fifty (50) feet and it appears that all three (3) lots are in compliance. As Mr. Testerman previously stated, no new roads are proposed as part of the subdivision and according to the Fire Department no new fire hydrants would be required.

Mr. Testerman stated that he had spoken with the Applicant regarding the single driveway shown is access to lot 1 and goes into lot 2 and the Applicant indicated that the plan is to have three (3) separate driveways so that there will be no need for an access easement which is not currently shown on the preliminary plat.

Suggested Conditions: Before the final plat is completed the following will need to be considered:

- a. Wetlands – that each lot will have 15,000 sq. ft of uplands area.
- b. Driveways – show the proposed driveway areas for lots 2 and 3 and how the driveway area for lot 1 will be changed.

Nonconformities: Per the Code Enforcement Officer, there are a number of nonconforming structures on the site. There are four (4) sheds on lot 2 are per the legal requirements and all are grandfathered in. The shed on lot 1, however, was built without a permit; is not anchored and sits within the setback. The shed would have to be brought into compliance with the building and setback requirements.

Addresses: The Fire Department will be responsible for assigning addresses to the three properties.

LAND USE PLAN: The Town of Kitty Hawk's adopted CAMA Land Use Plan designates the subject parcels as a "Low Density Residential Area" on the future land use map. A "Low Density Residential Area" is defined as a density averaging two (2) units per acre with lots of 15,000 square feet of greater.

Chairman Richeson asked if any Members of the Board had any questions and then Mr. Richeson asked about the statements under the "Comments/Conditions" heading if a request to #2 regarding the driveway area; that instead of the easement indicate a condition that there be three (3) separate driveways and Mr. Varnell stated that the Board could do so if it so desires.

Mr. Geraghty then stated that it is not up to the Town to determine whether another property has an easement and that anyone could do that and should not be a condition of the subdivision If they are legally able to do that at any time and with that Mr. Richeson agreed and withdrew his question.

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Mr. Geraghty then asked if the wetlands under CAMA is what had to be determined and Mr. Testerman responded, 'yes.' And, Mr. Geraghty then asked if the driveways were put on the lots and there is no CAMA and Mr. Testerman stated that if there is no CAMA wetlands, the lot configurations as they currently stand are fine but if there are CAMA wetlands there would have to be at least 15,000 square feet of upland area on each lot.

Mr. Rhoads then asked if one lot had the CAMA wetlands on it, could it be built on or would it need to be restructured and Mr. Testerman stated that, depending on the number of uplands area on lot #2, it would seem they would be able to reconfigure the lines to make it work, if needed, and Mr. Geraghty stated that the only reason that would come into play would be because of lot #1.

Ms. Collins said that it is the highest and lot #3 goes into the wetlands and Mr. Rhoads then asked if the plat counted as wetlands and Mr. Testerman stated that he would need to check with the CAMA officer to see if that area is CAMA wetlands and if it was CAMA wetlands, it would count against the square footage.

Mr. Testerman stated that asking for a revision or putting conditions on the subdivision would not necessarily delay the process and as it stands, the preliminary plat would go to the Town Council with the same conditions recommended assuming that the Board approves and then if the Town Council approves it, then the Applicant would have to submit the final subdivision plat where it would have to indicate what the Board is requiring and would then come back to the Board to make the recommendation and then the final plat would go to the Town Council for their approval.

Mr. Richeson then asked if there were any further questions and hearing none, asked for a Member of the Board to make a recommendation and Mr. Geraghty made the following: ***"I move to recommend approval of the preliminary plat for Eastern NC Remodel LLC that divides one existing parcel off of W. Kitty Hawk Road into three (3) lots, subject to the listed conditions."***

Mr. Richeson seconded and the Recommendation was approved unanimously.

6. Text Amendment:

a. Sec. 42-504, Yards Generally

Mr. Testerman began by stating that the Applicant has proposed a Text Amendment that would add the following provision to Sec. 42-405, Yards Generally.

42-504(j) states that in instances where a remodel or addition to a single-family home would result in an increased side yard setback, the outermost edge of uncovered porches and steps may encroach up to two (2) feet into the required side yard setback. This provision does not apply to new construction.

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Background

Currently, our side yard setbacks are determined based on dwelling size. Dwellings 0-3000 sq. ft. in size are required to have a 10 foot side yard setback; 3001-3500 sq. ft. requires a 12.5 foot side yard setback; 3501-4000 sq. ft. requires a 15 foot side yard setback; 4001-5000 sq. ft. requires a 17.5 foot setback; 5001-6000 requires a 20 foot setback and 6000 sq. ft. and over requires a 25 foot side yard setback.

Kitty Hawk's current ordinance has a provision that allows the outermost edge of any uncovered porches, steps, eaves, gutters and similar fixtures to encroach up to four (4) feet into the required 25 foot front yard setback. No such exceptions are made for side yard setbacks, and under the proposed language, would only apply to remodels and additions and not to new construction.

This amendment would not apply to new construction, no side yard setbacks and would go less than 10 feet which is the current minimum. Mr. Testerman included a case example in the Staff Report:

If a home was originally constructed at 2900 sq. ft. and would have a 10 foot side yard Setback. This home has a side access and uncovered steps that measure 11 feet from The property line and as originally built, it is compliant with the 10 foot setback and The steps are outside the 10 feet, but the homeowner wanted to build an addition, Regardless of whether they expanded the foot print of the house, even to the front, Back or even if it was just enclosed in the ground level, it would likely bump the dwelling Over the 3100 sq. ft. and would require a 12.5 foot setback.

Under the current language, the homeowner would have three options: a) do not build The addition; b) build the addition, but lose the side access or c) build the addition And attempt to obtain a variance from the Board of Adjustment. The variance would Be difficult to obtain because one of the criteria that the Board of Adjustment must Find in order to grant a variance is that the hardship cannot be self-created and in This example, that is what is being proposed.

This would only apply to the outermost edges of uncovered porches and stairs so the Actual building structure itself would not be able to extend the back of the setback; i.e., the edge of the porch or steps that were a little too far it would be ok instead of tearing down part of the porch or steps.

Mr. Richeson then asked the Board if anyone had any questions and Ms. Collins asked if this structure was already built, as she had driven past the structure in order to understand and it appears that the stair case is already built and when looking at the property, it is to the left and that it appears that it is becoming multi-family structure and Mr. Testerman indicated that the structure is already built, but it is not becoming a multi-family dwelling.

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Mr. Rhoads then asked if a permit was procured to do the work and Mr. Testerman stated 'yes' and he clarified that when the process for obtaining the permit began there was a bit of a miscommunication between Staff and the Contractor being the deck was about 1.5 feet over and the Contractor the Staff had a discussion regarding the best options and it was decided that this proposal was the best one.

Mr. Testerman stated that the Text Amendment that was brought forward was not intended to serve just one house but it made sense, per the example, that if someone were able to enclose the lower level it wouldn't expand the footprint of the building at all.

Mr. Geraghty stated to put in wording that if it already exists and not to add more steps or a side deck and if the existing structure is already at 11 feet and because of the addition is making it and Mr. Testerman stated that such wording could be included and that this is no exemption for the front yard setbacks and up to 4 feet is allowed.

Mr. Geraghty stated that a lot of houses use side entrances and sometimes the side entrance is their front yard and Mr. Testerman stated that such wording could be added in to minimize the amount but does not see this particular circumstance coming up very often and Mr. Testerman also stated that he has seen other localities and not necessarily the Outer Banks, that allow that certain elements of a building into the side yard setback as well.

Mr. Testerman stated that with the current side yard setbacks, the minimum is, up to a 3000 sq. ft. dwelling, a 10 foot setback that would not change. If a structure went over 3000 sq ft, requiring a 12.5 foot setback, this amendment would allow uncovered stairs and porches to encroach to a 10.5 foot setback.

He also stated that the main reason the Town created the side yard setback increases was so that giant houses would not be on top of each other and would provide a separation. So, going from a 10 foot setback to a 12.5 foot setback, the buildings are not any closer and not allowing the deck to go any closer than 10 feet and would have been originally allowed and from an aesthetic appearance, would not change anything.

Mr. Rhoads then stated that heat pumps are allowed in the setbacks and that they are sturdy and firmly planted in the ground and as long as it is within 4 feet regarding heat pumps that is ok and Mr. Richeson stated the Southern Shores allows heat pumps and pool heaters in the side yard setbacks but they cannot be any closer than 5 feet from the property line and Mr. Rhoads stated that that was created after the last Council and Mr. Geraghty stated that he was on various committees back then and it was agreed and that we are the only Town that does this and agreed that this is a good way to go and it would be good to adjust the Text Amendment to reflect that.

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Mr. Richeson had a comment regarding the statement on the top of page 2, "As noted, this amendment would only apply to outermost edged of uncovered porches and stairs, and would not allow home owners to build an addition that encroaches into the setbacks, which would defeat the purpose of the increased setbacks", and by the addition it would include not putting a new set of stairs that would encroach and Mr. Testerman stated that as it is intended now, one could put in a new set of stairs if the addition would bump the setbacks to 12.5 feet and new steps could be built or an outermost edge of a deck could go to the 10.5 feet because you could encroach 2 feet and there currently is no wording that states that it has to be 'existing.'

Mr. Rhoads stated that the steps would come down thru the deck and not passed the deck and Mr. Testerman stated that it wouldn't spill out into the side yard but would go along side of it as long as it didn't go any more than 2 feet into the setback; but, if they wanted to, they could bring it towards the side yard setback, but the bottom steps could only go 2 feet in and would take up a lot of space.

Mr. Richeson then asked if any Members of the Board had any questions for the Applicant present and they did not, but the Applicant stated that Mr. Testerman had presented the Application well and Mr. Richeson then asked for a Member of the Board to make a recommendation and Mr. Richeson made the following: ***"I recommend approval of the proposed Text Amendment to add Section 42-504(j) regarding side yard setbacks. The Board has found this proposal to be consistent with the Town's adopted land use plan."*** Mr. Rhoads seconded and the motion was passed unanimously.

6. b. Text Amendment: 42-41 – Unlisted Uses (Proposed) and 42-226 – Uses Not Specifically Identified as Permitted or Conditional Uses.

Mr. Testerman stated that this is a Staff initiated Text Amendment which came up at some recent meetings. The State Supreme Court, within the past 1-1/2 to 2 years began making rulings that go against some language in the Town of Kitty Hawks ordinance and is in the wrong section and needs to be removed.

Mr. Testerman stated under the current language under Sec. 42-226, Kitty Hawk Woods, Uses not specifically identified as permitted or conditional use, read as follows: ***"Unless otherwise authorized by an amendment to this chapter, any use not specifically identified as a permitted use or conditional use is not allowed."***

Mr. Testerman referenced the attached article to the Staff Report that there have been a few current court cases where the court is leaning more towards, unless specifically prohibited, then it's permitted. A lot of localities are beginning to create long 'prohibited use lists' via a table that shows any use one can think of and what districts they can or cannot be permitted in.

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Recent court findings in North Carolina have leaned away from the notion that 'unless a use is specifically listed as permitted, it is prohibited.' As a result, some localities have created 'prohibited use table', listing every use that is to be prohibited in each zoning district. Staff feels that, in addition to being burdensome, it would be inefficient, as it is impossible to think of and foresee every use that would be prohibited from a given zoning district. Instead, Staff refers to language that the Town of Cary uses in their ordinance and has held up in court due to its permissive, rather than mandatory nature."

Mr. Testerman stated, that, essentially, the ordinance gives the Planning Department the authority to assess all relevant characteristics of the proposed use, including but not limited to the following:

- The volume and type of sales, retail, wholesale; size and type of items sold and nature of inventory on the premises;
- Any processing done on the premises, including assembly, manufacturing, warehousing, shipping, distribution; any dangerous, hazardous, toxic or explosive materials used in the processing; and
- The nature and location of storage and outdoor display of merchandise; enclosed, open, inside or outside the principal building; and predominant types of items stored (such as business vehicles, work-in-process, inventory, and merchandise, construction materials, scrap and junk, and raw materials including liquids and powders); and
- The type, size and nature of buildings and structures; and
- The number and density of employees and customers per unit area of site in relation to business hours and employment shifts; and
- Transportation requirements, including the modal split for people and freight, by volume type and characteristic of traffic generation to and from the site, trip purposes and whether trip purposes can be shared by other uses and site; and
- Parking requirements, turnover and generation, ratio of the number of spaces required per unit area or activity, and the potential for shared parking with other uses; and
- The amount and nature of any nuisances generated on the premises, including but not limited to noise, smoke, odor, glare, vibration, radiation and fumes; and
- Any special public utility requirements for serving the proposed use, including but not limited to water supply, waste water output, pre-treatment of wastes and emissions required or recommended, and any significant power structures and communication towers or facilities; and
- The impact on adjacent properties created by the proposed use will not be greater than that of other uses in the zoning district.

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Therefore, Mr. Testerman stated that if someone came in with a proposal that is not specific to the ordinance and then looking at the ordinance and then comparing it to a use that is listed as permitted, it can then be determined that it is close enough to the use that is currently allowed.

Mr. Testerman and Mr. Varnell have reviewed the Staff recommendation and what other localities are doing, should the Board wish to develop a 'prohibited list' it could turn out to be pages and pages long, but still may not cover any unforeseen uses that had not been thought of. But, if there are some specific uses that the Board wants to prohibit in different districts the Board can add notations or add a few prohibited uses that will leave nothing to chance now or in the future but can be added in now if so desired or in the future.

Mr. Testerman stated that, at this moment, there is no 'rush' to pass this now and could be tabled for later to figure out if there are any specific prohibited uses or the Board can include what they so desire at this time.

Mr. Varnell stated that, essentially, the Court gave the State the power and now they are taking it away. All the decisions are crucial because they could land us in a predicament where something could come in and doesn't belong in a particular zoning district, it could be taken to Court and could be allowed just because our ordinance was not worded correctly.

He also clarified, that what the Courts are saying is that they do not want a form of a blanket change and rather that the municipality ordinance be more permissive as opposed to 'prohibited' and if not listed and not allowed. Again, try to be more permissive rather than prohibitive and to be as particular as possible in the ordinance in defining what uses are allowed or now allowed.

Ms. Collins then stated that the State wants more specific about what is allowed and not allowed and Mr. Varnell agreed. He stated that the Courts have stated that it is pretty much impossible to list every use and it is just as hard to list every prohibited use.

The Town of Cary put forward a standard that is for the Town and Council to use when making decisions for the Court to review and compare to the most similar use that is allowed in a district and then make a determination of does it fall near that or too far away.

Mr. Geraghty stated that there is always/should be a process to go through with the Board of Adjustment but would still be covered by what is listed which would protect the Town and keep things as fair as possible.

Mr. Testerman also stated that the Town has been doing that in practice but this will give the Town more standards and not an arbitrary decision but what was reviewed against the ordinance.

Mr. Varnell stated that, essentially, the way its worded is a loophole and any candidate that does not belong in the zoning district would be a potential to get in based on a technicality due to the wording.

Mr. Richeson stated that the Staff has been proactive in this and asked if anything that comes up during the year that the Town would like to prohibit could always go in as a Text Amendment and Mr. Varnell and Mr. Testerman agreed.

Mr. Richeson then asked a Member of the Board to make a recommendation and Ms. Collins made the following: ***"I recommend approval of the proposed Text Amendment to remove 42-226 and adding the proposed Section 42-41. The Board has found this proposal to be consistent with the Town's adopted land use plan."***

Mr. Geraghty seconded and the recommendation was passed unanimously.

7. Comments:

a. Chairman Richeson complimented the Board and Staff from the July meeting and stated that only one of the items presented at that meeting never made it to the Board and was resolved without having to go to Town Council. Mr. Richeson also brought up that Mr. Heath proposed, because of the many comments at the July meeting, could the Public Comment(s) be brought forth before the Board makes their recommendation that after the fact does not really make sense and Mr. Richeson asked Mr. Varnell if a motion had to be made and Mr. Varnell stated 'no', that the Board could proceed with that and it was agreed that the "Public Comment" would be placed on future Agendas after the "Administrative Report."

b. Planning Board Members – Mr. Heath agreed and stated that this would also project a sense of transparency in doing the correct thing.

Mr. Rhoads also commented on the time frame for the Public Comment and (c) Mr. Varnell stated that an individual has three (3) minutes for their comments and a representative of group would have five (5) minutes for their comments.

c. Planning Director – no comments

8. Public Comment – None

9. Adjourn – meeting was adjourned by Chairman Richeson at 6:45pm.

Respectfully submitted by Patricia Merski, Recording Secretary