



**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, N.C.G.S. § 160A-388 governs the creation, composition, process and procedures of boards of adjustment. 2013 N.C. Sess. Law 126 makes substantial changes to the text of N.C.G.S. § 160A-388 which become effective as of October 1, 2013. The changes to N.C.G.S. § 160A-388 affect the operation and management of the Town's Board of Adjustment and require that the Town's Zoning Ordinance be updated accordingly; and

WHEREAS, The Town finds that adoption of this ordinance amendment is consistent with the Town's adopted Land Use Plan, and is reasonable and in the public interest,

NOW THEREFORE BE IT ORDAINED, by the Board of Commissioners of the Town of Nags Head, North Carolina, that Chapter 48, Article XVI be amended with the following:

PART I. That **Chapter 48, Article XVI. BOARD OF ADJUSTMENT** be replaced in its entirety with the following:

Sec. 48-591. Membership of the Board of Adjustment.

The town has previously established a board of adjustment. The term "board" when used in this article shall be construed to mean the board of adjustment. The board shall have five regular members and four alternates who shall be citizens of the town appointed by the mayor and approved by the board of commissioners.

- a) *Terms of office.* The term of office for each member and alternate member shall be for a period of three years. Members and alternates serving on the board at the time of the adoption of this section shall continue the term to which they are appointed.
- b) *Vacancies.* Vacancies shall be filled for the unexpired term only.
- c) *Removal.* Members may be removed for cause by the board of commissioners upon written charges and after public hearing.
- d) *Compensation.* The members of the board may be compensated according to a schedule adopted by the board of commissioners.
- e) *Alternate membership.* Alternate members may serve on the board in the absence or temporary disqualification of any regular member or to fill a vacancy pending appointment of a member. Each alternate member serving on behalf of any regular member has all the powers and duties of a regular member.
- f) *Extraterritorial membership.* In addition to the five regular members of the board, one member shall be appointed to represent the extraterritorial area of jurisdiction. Such additional member shall be a resident of the county and shall be appointed by the county board of

commissioners. If the county board of commissioners fails to make such appointment within 90 days after receiving a resolution from the town board of commissioners requesting that the appointment be made, the town board of commissioners shall make the appointment. The appointment shall be for a term of three years. The extraterritorial member shall function and vote only with regard to matters within the extraterritorial area and shall not be eligible for office.

Sec. 48-592. Board of Adjustment officers.

At a Board of Commissioners' regular meeting, the mayor shall designate one of the members of the board as chair and another as vice-chair who shall serve for one year. In the event, that the mayor does not make such a designation, the chair and vice-chair shall continue in their respective offices. In the absence, disqualification or vacancy of the chair and vice-chair, the most senior member seated and present shall act as chair for any meeting until a duly appointed chair or vice-chair is available.

Sec. 48-593. Meetings of the Board of Adjustment.

- a) *Generally.* All meetings of the board shall be held at a regular place and shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question or, if absent or failing to vote, an indication of that fact. Any party may appear in person or be represented by an attorney.
- b) *Notices.* Notice of hearings conducted pursuant to this article shall be mailed to: (i) the person or entity whose appeal, application, or request is the subject of the hearing; (ii) to the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; (iii) to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and (iv) to any other persons entitled to receive notice as provided by this chapter. In the absence of evidence to the contrary, the town may rely on the Dare County tax listing to determine owners of property entitled to mailed notice. The notice must be deposited in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the town shall also prominently post a notice of the hearing on the site that is the subject of the hearing or on an adjacent street or highway right-of-way.
- c) *Burdens.* The burdens of production, persuasion and proof for all quasi-judicial decisions of the board lie with the applicant or appellant seeking such a decision.
- d) *Fees.* A fee in accordance with the regularly adopted fee schedule of the town shall be paid to the town for each notice of appeal or variance application to cover the administrative expenses involved. A notice of appeal or variance application shall not be deemed complete and filed until such time as the associated fees have been paid. The time to file a completed notice of appeal or variance application and associated fee will be tolled for 15 days to receive payment of the fee upon an applicant's timely submission of a notice of appeal or application for variance that is otherwise complete. No hearing will be scheduled before the board until a completed application and fee have both been received.

Sec. 48-594. Quorum.

A quorum of three members shall be seated and present in order to open a meeting of the board and to take action on non-quasi-judicial matters. In order to take action on a quasi-judicial matter the board must have a quorum of five members seated and present unless the appellant or applicant consents to moving forward with less than five members. For calculating a quorum to take action on a quasi-judicial matter, the number of members seated and present includes members who were seated at the opening of the meeting that have been disqualified from voting on the particular matter if there are no qualified alternates available to take the place of such members. In the event that a quorum cannot be met due to vacant positions or a lack of qualified members, the board may continue its meeting in order for absent members to become available and, if necessary, for the board of commissioners to make appointments filling vacant seats and/or to make appointments of temporary alternate members who can fulfill the board's duties.

Sec. 48-595. Voting.

The concurring vote of four-fifths majority of the board shall be necessary to grant a variance. A majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered members of the board for calculation of the requisite majority if there are no qualified alternates available to take the place of such members.

Sec. 48-596. Powers and duties of the Board of Adjustment.

(a) *Hearings authorized.* The board shall hear and decide requests for variances of the provisions of this chapter and appeals of decisions of administrative officials charged with enforcement of this chapter. The board shall follow quasi-judicial procedures when deciding appeals and requests for variances. The board shall hear and decide all matters upon which it is required to pass under any statute or ordinance that regulates land use or development that provides for the board to hear such matters.

(b) *Oaths.* The chair of the board or any member acting as chair and the clerk to the board are authorized to administer oaths to witnesses in any matter coming before the board. Any person who, while under oath during a proceeding before the board, willfully swears falsely is guilty of a Class 1 misdemeanor.

(c) *Subpoenas.* The board through the chair, or in the chair's absence anyone acting as chair, may subpoena witnesses and compel the production of evidence. To request issuance of a subpoena, persons with standing under G.S. 160A-393(d) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive. The chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be appealed to the full board. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

(d) *Continuances.* The board may grant a continuance to any party for good cause shown or upon the board's own motion. Requests for continuances should be made in writing, but may be made orally at a meeting of the board. The board chair may grant a continuance request prior to a meeting if the applicant or appellant makes a written request showing good cause. The chair may always defer ruling on such a request to allow for the decision to be made by the board.

(1) Good cause. Good cause for a continuance includes, but is not limited to:

(i) The official issuing the decision subject to an appeal is unavailable;

(ii) There is insufficient membership of the board seated and present to hear a matter;
or

(ii) If any party or the town would be unduly prejudiced by the presentation of matters not presented in a notice of appeal.

(2) *Renotification fees.* If notices of hearing have already been issued, the party granted a continuance is responsible for the administrative costs of noticing an additional hearing if such costs are incurred.

(e) *Rules of Procedure.* The board may adopt from time to time such rules and regulations as it may deem necessary to carry into effect the provisions of this article. Where this article and the rules adopted by the board are in conflict, the provisions of this article prevail.

Sec. 48-597. Appeals of administrative decisions.

(a) Administrative decisions.

(1) *Defined.* An appealable "administrative decision" is any final and binding order, requirement, or determination issued in writing by an administrative official charged with enforcement of this chapter. Administrative decisions include, but are not limited to: (i) permit issuance or denial, (ii) issuance of a notice of violation, warning citation or civil citation or (iii) issuance of a formal interpretation of a provision of this chapter.

(2) *Formal interpretation.* Only formal interpretations issued in accordance with this subsection are subject to being appealed as an administrative decision. Any written or oral interpretations that do not meet the strict requirements of this subsection are merely advisory and represent only the view, opinion or belief of the administrative official issuing them. Advisory interpretations have no binding force or effect and there is no right to appeal advisory interpretations to the board.

(i) *Request.* Any person may request a formal interpretation of any provision of this chapter or of the location of zoning district boundary unassociated with a permit application or enforcement action. Such request must relate to a specific parcel of property, must be made in writing, must state all of the necessary facts to make the determination and must specifically state the ordinance provisions subject to the interpretation request. If the applicant for the formal interpretation is not the owner of the property, the applicant must certify that a copy of the request has been provided to the property owner.

(ii) *Response.* Only the director of the town's planning and zoning department is authorized to issue a formal interpretation under this subsection. The director may in their discretion decide whether or not to respond to a request for a formal interpretation. A response to a request may only be made with the approval of the Town Manager. A response to a request is not a formal interpretation unless it is made in writing and includes a notation on its face that states "This is a Formal Zoning Ordinance Interpretation."

(iii) *Notice.* Formal interpretations are not appealable under this subsection unless they include a certificate of service certifying that a copy of the formal interpretation has been provided to the Town Manager and the owner of the land subject to the interpretation if the applicant for the interpretation was not the owner of the land. The written notice shall be delivered by personal delivery, electronic mail, or by first-class mail.

(3) *Notice of decisions.* The official who made the decision shall give written notice to the owner of the property that is the subject of the decision and to the party who sought the decision, if different from the owner. The written notice shall be delivered by personal delivery, electronic mail, or by first-class mail. Landowners or applicants for a decision may provide for actual or constructive notice to persons who have standing to appeal the decision by acting in accordance with subsection (b)(3)(i).

(b) Appeals of administrative decisions. The board shall hear and decide appeals of administrative decisions of administrative officials charged with enforcement of this chapter and may hear appeals arising out of any other ordinance that regulates land use or development, pursuant to all of the following:

(1) *Who may appeal.* Any person who has standing under G.S. 160A-393(d) or the town may appeal an administrative decision to the board. Any other party who has such standing may also intervene in an existing appeal by filing a written request to do so with the town clerk prior to the expiration of that party's time to appeal under subsection (b)(3).

(2) *Form of appeal.* An appeal is taken by filing a notice of appeal with the town clerk. The notice of appeal shall state the grounds for the appeal. Each notice of appeal shall include a listing of the names and addresses of all of the persons listed in section 48-593(b) who are entitled to receive notice. The list shall be supplied by the appellant and shall be current according to the most recent tax listing abstract as filed in the office of the Dare County tax supervisor.

(3) *Time to appeal.* The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.

(i) It shall be conclusively presumed that all persons with standing to appeal have constructive notice of the decision from the date a sign containing the words "Zoning Decision" or "Subdivision Decision" in letters at least six inches high and identifying the means to contact an official for information about the decision is prominently posted on the property that is the subject of the decision, provided the sign remains on the property for at least 10 days. Posting of signs is not the only form of constructive notice. Any such posting shall be the responsibility of the landowner or applicant. Verification of the posting shall be provided to the official who made the decision. Absent an ordinance provision to the contrary, posting of signs shall not be required.

(4) *Duties of official who made decision.* No less than one week before an appeal is to be heard, the official who made the decision being appealed shall transmit to the board all documents and exhibits constituting the record upon which the action appealed from is taken. The official shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the appellant is not the owner. The official who made the decision being appealed shall be present at the hearing as a witness.

(5) *Stay pending appeal.* An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the official who made the decision certifies to the board after notice of appeal has been filed that because of the facts stated in an affidavit: (i) a stay would cause imminent peril to life or property or (ii) because the violation is transitory in nature, a stay would seriously interfere with enforcement of the ordinance. In that case, enforcement proceedings shall not be stayed except by a restraining order, which may be granted by a court. If enforcement proceedings are not stayed, the appellant may file with the official a request for an expedited hearing of the appeal, and the board shall meet to hear the appeal within 15 days after such a request is filed. Notwithstanding the foregoing, appeals of decisions granting a permit or otherwise affirming that a proposed use of property is consistent with the ordinance shall not stay the further review of an application for permits or permissions to use such property; in these situations the appellant may request and the board may grant a stay of a final decision of permit applications or building permits affected by the issue being appealed.

(6) *Timing of hearing.* Subject to the provisions of subsection (b)(5) of this section, the board shall hear and decide the appeal within a reasonable time.

(7) *Appeals in the nature of certiorari.* When hearing an appeal from an ordinance provision that requires the appeal be heard in the nature of certiorari, the hearing shall be based on the record below and the scope of review shall be as provided in G.S. 160A-393(k).

(8) *Alternative dispute resolution.* The town and other parties to an appeal may agree to mediation in accordance with the applicable rules for mediated settlement conferences in Superior Court. If the parties agree to mediation, a hearing on the merits of the matter will be delayed until the regular board meeting following the mediation.

(9) *Authority of the board.* The board may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made. The board shall have all the powers of the official who made the decision.

(10) *Hearing on appeal.* The appellant shall not be limited at the hearing to matters stated in the notice of appeal. If any party or the town would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the board shall continue the hearing.

Sec. 48-598. Variances.

(a) *Standards for granting a variance.* When unnecessary hardships would result from carrying out the strict letter of this chapter, the board shall vary any of the provisions of the ordinance upon a showing of all of the following:

(1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.

(2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.

(3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.

(4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

(b) Under no circumstances shall the board of adjustment grant a variance to allow a use either expressly or by implication not permissible under the terms of this chapter in the district involved.

(c) Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Violation of such conditions shall be deemed a violation of this chapter and punishable under article XV of this chapter.

(d) Any other ordinance that regulates land use or development may specifically provide for variances consistent with the provisions of this subsection.

(e) A variance that is granted shall be the minimum variance that will resolve the unnecessary hardship resulting from the strict application of the this chapter to the land, building or structure.

(f) No nonconforming use of neighboring lands, structures or buildings in the same district, and no permitted use of lands, structures or buildings in other districts shall be considered grounds for the issuance of a variance.

(g) *Application Requirements.* Each application for a variance must be in writing, accompanied by any associated administrative fee and shall include all of the following information:

(1) A listing of the specific section(s) and subsection(s) of this chapter that the applicant is seeking to vary.

(2) For each provision the applicant is requesting to vary, a listing of how the provision applies to the property without the requested variance and how the applicant proposes the provision should be varied.

(3) A description of how the property can be used without the requested variance compared with how it could be used with the requested variance.

(4) A description of the unnecessary hardship which results from the strict application of this chapter.

(5) A description of the conditions that are peculiar to the property, such as location, size, or topography which cause the unnecessary hardship.

(6) A certification that the hardship did not result from actions taken by the applicant or the property owner other than the act of purchasing property with knowledge that circumstances exist requiring a variance.

(6) A narrative explaining how the requested variance is consistent with the spirit, purpose, and intent of this chapter, such that public safety is secured, and substantial justice is achieved.

(7) A certification that the requested variance, if granted, will not allow an increase or extension of an existing nonconforming structure or use of land.

(8) A certification that the requested variance, if granted, will not allow a use of the land otherwise prohibited in the applicable zoning district to occur on the property.

(9) A listing of the names and addresses of all of the persons listed in section 48-593(b) who are entitled to receive notice. The list shall be supplied by the applicant and shall be current according to the most recent tax listing abstract as filed in the office of the Dare County tax supervisor.

(h) In addition to the foregoing requirements, when considering a variance from article II, chapter 22 of this Code, flood damage prevention, the board shall follow the additional provisions of such article.

(i) *Amendments.* The owner of land which has been granted a variance may apply for an amendment to the previously granted variance. All of the standards for granting a variance shall apply to the consideration of an amendment to an existing variance. An amendment may only be granted if:

(1) The circumstances on the property have substantially changed since the time of the granting of the prior variance in such a way that the use of the property in accordance with prior variance is itself an unnecessary hardship; or

(2) The amendment requested will be equal to or less of a variance than the previously granted variance.

Sec. 48-599. Appeals from decisions of the Board of Adjustment.

(a) *Decisions of the board.* The board shall determine contested facts and make its decision within a reasonable time.

(1) *Basis for decision.* Every quasi-judicial decision of the board shall be based upon competent, material, and substantial evidence in the record.

(2) *Form of decision.* Each quasi-judicial decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards. The written decision shall be signed by the chair or other duly authorized member of the board. In absence of specific board direction, the written decision will be prepared by the town via the clerk to the board after review by the town's attorney and board attorney and will be presented to the chair for execution if the chair deems it appropriate. The chair, in his discretion, may seek the approval of the board for all or any portion of a decision so prepared. Otherwise, the board may at the time of its oral decision direct any party to prepare a proposed written decision and may consider the written decision at its next regular meeting.

(3) *Reasonable time.* A reasonable time in which to issue an oral decision shall not be less than 45 days following the completion of the public hearing on the matter. A reasonable time in which to issue a final decision shall not be less than 45 days following the issuance of an oral decision. Otherwise, a reasonable time greater than those specified in this subsection shall be determined by the circumstances of the matter under consideration.

(4) *When effective.* A board decision is effective upon filing the written decision with the clerk to the board. The board decision is filed the later of the date it is received by the clerk to the board or the date it is served by the clerk to the board.

(5) *How served.* The decision of the board shall be delivered by personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision becomes effective. The person required to provide notice shall certify that proper notice has been made.

(b) *Appeal to Superior Court.* Every quasi-judicial decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393. A petition for review shall be filed with the Dare County Clerk of Superior Court by the later of 30 days after the decision is effective or after a written copy thereof is given in accordance with subsection (a)(4) of

this section. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

Sec. 48-600. Impartiality of Board of Adjustment members.

A member of the board shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible violations of due process include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

ARTICLE II. Severability.

All Town ordinances or parts of ordinances in conflict with this ordinance amendment are hereby repealed. Should a court of competent jurisdiction declare this ordinance amendment or any part thereof to be invalid, such decision shall not affect the remaining provisions of this ordinance amendment nor the Zoning Ordinance or Town Code of the Town of Nags Head, North Carolina which shall remain in full force and effect.

ARTICLE III. Effective Date.

This ordinance amendment shall be in full force and effect from and after the 6th day of November 2013.



Robert O. Oakes, Jr., Mayor

ATTEST:



Carolyn F. Morris, Town Clerk

APPROVED AS TO FORM:



John Leidy, Town Attorney



Date adopted: November 6, 2013

Motion to adopt by Commissioner _____

Motion seconded by Commissioner _____

Vote: _____ AYES _____ NAYS