



MEMORANDUM

Town of Nags Head

Planning & Development Department

To: Planning Board

From: Michael Zehner, Director of Planning & Development
Kelly Wyatt, Deputy Director of Planning & Development

Date: August 14, 2020

Subject: Consideration of text amendments to the UDO pertaining to nonconforming hotels and accessory uses in association with preexisting fishing piers

OVERVIEW AND BACKGROUND

As noted in my Director's Report to the Board of Commissioners and Planning Board, dated January 30, 2019, given previously expressed interest in the future of the Blue Heron Motel at 6811 S. Virginia Dare Trail and the limitations imposed by Town Code requirements on the evolution of the current nonconforming hotel use of the property, Staff began considering text amendments to the UDO to advance Comprehensive Plan policies valuing the preservation of legacy business, establishments, and structures.

This item was initially discussed at the Planning Board's meeting on February 18, 2020, with the Planning Board wishing to consider and discuss options further. The Planning Board discussed this item further at their meeting on May 19, where the Board requested that Staff explore options that did not require the creation of an overlay zoning district, and to present those options to the Board for consideration. Staff presented additional information to the Planning Board on June 16; at that time, the Board was supportive of the option presented by Staff that would make amendments to Article 5, *Nonconformities*, of the UDO, by providing nonconforming restaurants, hotels, or retail uses that commenced on or before December 31, 1980 with the option of seeking a conditional use permit to modify the use, including enlarging or altering the use, in a manner that would otherwise be precluded by the provisions of Sections 5.5. and/or 5.6. of the Article. At the meeting, the Board requested that Staff review and determine the specific instances where such a provision would be applicable.

Following the meeting, Staff conducted the review requested by the Board and determined that the following hotels were all nonconforming uses, all located with the CR, Commercial Residential Zoning District, and which may benefit from the provision under consideration:

1. Comfort Inn South, 8031 S. Old Oregon Inlet Road, constructed in 1974
2. Dolphin Motel, 8017 S. Old Oregon Inlet Road, constructed in 1960
3. Owens Motel, 7115 S. Virginia Dare Trail, constructed in 1966
4. Seafoam Hotel, 7111 S. Virginia Dare Trail, constructed in 1961
5. Islander Motel, 7011 S. Virginia Dare Trail, constructed in 1973
6. Blue Heron Motel, 6811 S. Virginia Dare Trail, constructed in 1975
7. Surf Side Hotel, 6701 S. Virginia Dare Trail, constructed in 1984

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8. Holiday Inn Express (former Nags Head Inn), 4701 S. Virginia Dare Trail, constructed in 1987
9. Colonial Inn, 3329 S. Virginia Dare Trail, constructed in 1947

Additionally, Staff determined that there were no restaurants or retail establishments that were considered to be a nonconforming use. However, related, Staff did determine that the presence of residential units in conjunction with the Nags Head Fishing Pier constituted a nonconforming use of the site, which may be something that the Board wished to address.

Staff presented the above information to the Board at their meeting on July 21. The Board agreed, given that the necessary scope of any treatment would only apply to nonconforming hotels, that it may be more appropriate to focus any amendments within Section 7.12, *Hotels*, of Article 7, *Supplemental Regulations*, similar to the treatment of nonconforming cottage courts. Additionally, the Board requested that Staff also address the residential dwelling units accessory to the Nags Head Fishing Pier.

As noted above, Staff's was initially broadly focused on legacy establishments and structures which may have been rendered nonconforming over time, either with respect to the use no longer being allowed in the zoning district in which the property is located or because of standards or requirements changing, or due to both circumstances. Upon further consideration, it became clear that nonconforming hotels were potentially impacted most, if not solely.

It is helpful to consider that the general principle with respect to nonconformities is that, over time, the nonconforming uses or conditions cease, evolving to conforming uses or conditions. This effect, at least with respect to the identified nonconforming hotels and the Nags Head Fishing Pier, would therefore seem to be inconsistent with the intent of the goals, objectives, policies, and actions contained in the Comprehensive Plan which support the retention of legacy establishments and structures and warrants consideration. Specifically, Sections 5.5, *Nonconforming Use of Land*, and 5.6, *Nonconforming Use of a Structure*, are limiting and jeopardize the preservation of these nonconforming uses in that these sections preclude:

- Nonconforming uses from being enlarged or altered in a way which increases the degree of nonconformity, or the extension of the use to occupy a greater area of land than was occupied at the effective date of adoption or amendment of the UDO;
- Nonconforming uses from being moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of the UDO;
- The erection of new structures on land occupied by a nonconforming use, until such use is eliminated;
- Otherwise conforming structures occupied by a nonconforming use from being expanded, enlarged, extended, constructed, reconstructed, moved or structurally altered;
- Repairs to otherwise conforming structures that may increase the cubic content or intensity of a nonconforming use; and

- Nonconforming structures occupied by nonconforming uses from performing repairs within any 12 month period that exceeded 50% of the assessed or appraised value.

The impacts referenced above, **specifically those contained in Sections 5.5 and 5.6,** were the basis for the adoption of provisions in 2015 contained in Section 7.2.14 pertaining to nonconforming cottage courts. Similarly, the proposed text amendments, attached, would add a Section 7.12.3. pertaining to existing nonconforming hotels, allowing a conditional use permit to be sought to modify the use and/or structure, including enlarging or altering the use and/or structure, in a manner that would otherwise be precluded by the provisions of Sections 5.5, *Nonconforming Use of Land*, or 5.6, *Nonconforming Use of a Structure*. Additionally, and related, Section 7.50.1. pertaining to fishing piers is proposed to be amended to reference that dwelling units existing as of July 1, 2020 are an allowable use in conjunction with fishing piers, which would serve to remove the nonconforming use designation for the Nags Head Fishing Pier for this condition.

POLICY CONSIDERATIONS

While not specific to the nonconforming hotels noted above, or the Nags Head Fishing Pier, Staff is of the opinion that the following policies and considerations included within the Town's Comprehensive Plan are applicable to the consideration of the proposed text amendments:

- One of the Town's principal goals, as established in the Comprehensive Plan, is to "Plan for orderly and sustainable growth and redevelopment," and an identified objective to attain this goal is the "Preservation and maintenance of legacy commercial businesses."
- As used in the Comprehensive Plan, at least within the context of *Character Areas*, legacy establishments, structures, or locations are those which "contribute to the overall sense of place or tell the story of Nags Head's past. These establishments, structures, or locations often remind you of the past and are nostalgic."
- Legacy establishments are particularly noted as adding to the character of the Whalebone Junction Character Area, and specifically the Whalebone Junction Core, where it is noted that "flexibility should be given to legacy type establishments for renovations as a way to retain the character of area while allowing the establishment to remain viable in the market."
- Legacy businesses are also referenced with respect to the Corridors Character Area, and specifically for the NC 12 and SR 1243 corridors, where it is noted that one of the future desires is to "provide flexibility for existing legacy businesses to renovate to help keep the character of Beach Road."

- The Land Use Element of the Comprehensive Plan, and the discussion of Incentives/Design Flexibility with respect to Site Development Characteristics, provides an overview of the issue and general solution, as follows:

The town has taken recent steps to preserve older legacy businesses and encourage the retention of these structures. There has been a regulatory shift with regards to nonconforming properties (properties which met zoning regulations at the time they were developed but are not consistent with regularity changes that have occurred). Essentially, non-conformity regulations have been modified to allow continued improvements to these older properties. The regulations are primarily designed to restrict additional development of unwanted land uses. The town's position is to allow continued use and improvement to nonconforming properties.

- The section on Legacy Businesses under Local Business Development, as contained within the Economic Development and Tourism Element of the Comprehensive Plan, is attached. Specific policies and actions are as follows:

EC-7 Recognize the role and importance of the look and feel of legacy development in creating the distinctive heritage, unique lifestyle, and family beach character that is central to the town's vision.

EC-7a: Develop more specific criteria for legacy businesses, based on research and data of existing legacy type buildings.

EC-7b: Inventory, research, and map businesses that fit within the legacy business criteria.

EC-7c: Develop incentives to encourage the preservation of commercial floor space.

EC-7d: Explore ways to aid in the development of cottage courts.

STAFF RECOMMENDATION

Staff recommends that the amendments be adopted as proposed.

With regard to the Planning Board's 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 mater being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member.

It may also be helpful to the Planning Board to review the following provisions regarding action by the Board of Commissioners:

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 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.*

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. Draft Ordinance Amending the Code of Ordinances of the Town of Nags Head, North Carolina Pertaining to Nonconforming Hotels and Accessory Uses to Preexisting Fishing Piers, August 14, 2020 Draft

(DRAFT)
**AN ORDINANCE AMENDING THE CODE OF ORDINANCES
OF THE TOWN OF NAGS HEAD, NORTH CAROLINA PERTAINING TO
NONCONFORMING HOTELS AND ACCESSORY USES TO PREEXISTING
FISHING PIERS**

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 comprehensive zoning regulations and has codified the same within the Unified Development Ordinance, Part II of the Town Code, adopted pursuant to N.C.G.S. § 160A-363, which allows the Town to combine certain land development ordinances into a unified ordinance; and

WHEREAS, the Board of Commissioners find that the Town of Nags Head 2017 Comprehensive Plan includes an objective supporting the preservation and maintenance of legacy commercial businesses, and advocates for flexibility with respect to legacy type establishments for renovations as a way to retain the character of the Town, specifically of the Beach Road and the Whalebone Junction Character Area; and

WHEREAS, the Board of Commissioners finds that these text amendments are consistent with the goals, objectives and policies of the Town’s adopted Comprehensive Plan, and that this action is reasonable and in the public interest, and is in the interest of and not contrary to the public’s health, safety, morals and general welfare for the Town to amend the Town’s Unified Development Ordinance as stated below.

ARTICLE II. Construction.

For purposes of this ordinance amendment, underlined words (underline) shall be considered as additions to existing Town Code language and strikethrough words (~~strikethrough~~) shall be considered deletions to existing language. Any portions of the adopted Town Code which are not repeated herein, but are instead replaced by an ellipsis (“...”) shall remain as they currently exist within the Town Code.

ARTICLE III. Amendment of the Unified Development Ordinance.

NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of the Town of Nags Head, North Carolina, that the Unified Development Ordinance of the Town Code shall be amended as follows:

PART I. That **Section 7.12, Hotels, of Article 7., Supplemental Regulations, of the UDO**, be amended by the addition of Section 7.12.3., as follows:

7.12.3. Nonconforming Hotels.

Where an existing hotel is considered to be a legally nonconforming use of land and/or legally nonconforming use of a structure, pursuant to Sections 5.5 and/or 5.6 of the UDO, a conditional use permit may be sought in accordance with Section 3.8, Conditional Use Permits, to modify the use and/or structure, including enlarging or altering the use and/or structure, in a manner that would otherwise be precluded by the provisions of Sections 5.5 or 5.6, or subsections thereof. Such hotels shall be subject to the provisions of Section 7.12.1., Dimensional Requirements, and Table 7-2, Dimensional Requirements for Hotels, applicable to hotels located in the C-2 zoning district.

PART II. That **Section 70.5.1. of Section 7.50, Fishing Piers, of Article 7., Supplemental Regulations, of the UDO**, be amended as follows:

Site plan means a plan provided that reflects existing and proposed conditions on a site that is intended for construction. This may include but is not limited to topography, structures or additions, grading, drainage, erosion control measures, trees to be saved or planted to comply with the applicable standards of this UDO as well as other requirements of the Town Code of Ordinances.

7.50.1. Fishing piers, which may include accessory restaurant or retail uses, or dwelling units existing as of July 1, 2020, are permitted in the R-2 and CR districts in accordance with Section 6.6, Table of Uses and Activities, subject to other requirements of this UDO and provided the following conditions are met:

PART XI. That the **Table of Contents to Article 7 updated to reflect Part I of this Ordinance**.

ARTICLE IV. 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 Unified Development Ordinance or Town Code of the Town of Nags Head, North Carolina which shall remain in full force and effect.

ARTICLE V. Effective Date.

This ordinance amendment shall be in full force and effect upon the date of adoption by the Board of Commissioners.

Benjamin Cahoon, Mayor
Town of Nags Head

ATTEST:

Carolyn F. Morris, Town Clerk

APPROVED AS TO FORM:
Town Attorney
Date adopted: _____
Motion to adopt by Commissioner _____
Motion seconded by Commissioner _____
Vote: _____ AYES _____ NAYS