



# MEMORANDUM

## Town of Nags Head

### Planning & Development Department

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To: Planning Board

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

Date: August 14, 2020

Subject: Consideration of a text amendment to the Unified Development Ordinance as it pertains to fill regulations for properties west of NC 12 and/or SR 1243 subject to a Base Flood Elevation.

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### OVERVIEW

Following the adoption of the Flood Damage Prevention Ordinance by the Board of Commissioners on June 3, 2020, Staff identified two necessary amendments to the text related to fill regulations applicable to properties west of NC 12 and SR 1243 and subject to a Base Flood Elevation. The first, a simple re-numbering to correct a typographical area. The second, a more substantive change to the regulations to address an unintended consequence associated with significant reduction of the Base Flood Elevation, whereby fill is currently limited to not exceed the Base Flood Elevation but it may be necessary for the Dare County Health Department to require fill in excess of the Base Flood Elevation. Base Flood Elevation

### BACKGROUND

Section 11.5.3 of the Unified Development Ordinance addresses limitations on the utilization of fill based upon a property's location being either east or west of NC 12 and SR 1243. For properties west of NC 12 and SR 1243 for which the Flood Insurance Rate Map (FIRM) provides a Base Flood Elevation, fill shall not be permitted to exceed the Base Flood Elevation. It has been brought to our attention for one property currently under development, and will likely affect other westside properties, that the Dare County Health Department requirements for fill placement for the wastewater facilities requires fill to exceed the newly established Base Flood Elevation. The situation that Staff is aware of is as follows:

- The parcel was in an AE-11 (Base Flood Elevation of 11') flood zone and is now in an AE-4 flood zone.
- The average ground elevation on this lot is approximately 2.5'.
- The ordinance allows fill to be placed to the Base Flood Elevation, therefore, pursuant to current regulations, fill could not exceed 4'.
- The Dare County Health Department evaluation for wastewater improvement requires the septic field to be elevated 30 inches, bringing the lot elevation up to 5 feet, 1 foot greater than what the UDO would permit.

As written, this section of the Unified Development Ordinance does not adequately address the scenario where fill required for the wastewater permit would exceed the established Base Flood Elevation. Generally, this is the result of the significant change in the Base Flood Elevation and did not present issues previously. The proposed amendment would remedy this situation by specifically allowing lots to fill to the Base Flood Elevation or the minimum amount of fill required by the Dare County Health Department, whichever is greater. Additionally, this will be consistent with fill requirements in areas where the FIRM provides no Base Flood Elevation.

## **STAFF RECOMMENDATION**

Staff recommends that the amendments be adopted as proposed.

With regard to the Planning Board's review, Staff recommends consideration of the following UDO provisions:

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

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

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

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

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 pertaining to fill located west of NC 12 and SR 1243 where subject to a Base Flood Elevation.

**(DRAFT)**  
**AN ORDINANCE AMENDING THE CODE OF ORDINANCES  
OF THE TOWN OF NAGS HEAD, NORTH CAROLINA TO AMEND THE UDO AS IT  
PERTAINS TO FILL REGULATIONS WEST OF NC 12 AND/OR SR 1243 SUBJECT  
TO A BASE FLOOD ELEVATION.**

**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**, following adoption of the Flood Damage Prevention Ordinance, Planning Staff has identified an area in need to clarification with regard to fill limits west of NC 12 and/or 1243 subject to a Base Flood Elevation; and

**WHEREAS**, the Town of Nags Head 2017 Comprehensive Plan includes goals and policies aimed at maintaining a well-run and efficient government that provides high quality and cost-effective services through good governance in order to advance the Town’s vision; 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 Towns 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 ellipses (“...”) 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 11.5.3.2, Standard for Depth or Elevation of Fill, Properties West of NC 12 and SR 1243, of the Unified Development Ordinance**, be amended as follows:

**11.5.3.2.1.** In areas where the most recent Flood Insurance Rate Map (FIRM) provides a base flood elevation for a subject property, fill shall not be permitted to exceed the amount required for wastewater permits required by the Dare County

Health Department, or the base flood elevation, whichever is greater. However, when fill is proposed to be ~~except in cases where it is placed directly beneath a slab that is designed to meet the base flood elevation depicted on the FIRM. In these instances,~~ fill may exceed the base flood elevation by up to twelve inches (12") to support a turn-down or thickened edge slab or beneath a slab that is supported by a ring-wall style foundation; when designed in this manner, fill. ~~Fill placed above the base flood elevation shall not extend beyond the outside edge of the slab.~~

**11.5.3.2.42.** In areas where the most recent Flood Insurance Rate Map (FIRM) provides no base flood elevation, fill shall not exceed the amount required for wastewater permits required by the Dare County Health Department, or two feet (2') above pre-development surface elevation, whichever is greater.

PART II. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed. This ordinance amendment shall be in full force and effect upon the date of adoption by the Board of Commissioners.

\_\_\_\_\_  
Benjamin Cahoon, Mayor

ATTEST:

\_\_\_\_\_  
Town Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Town Attorney

Date adopted: \_\_\_\_\_

Motion to adopt by Commissioner \_\_\_\_\_

Motion seconded by Commissioner \_\_\_\_\_

Vote: \_\_\_\_\_ AYES \_\_\_\_\_ NAYS