

Kitty Hawk Planning Board Meeting
April 25, 2024 – 6p.m.
Kitty Hawk Municipal Building, Smith Room

Minutes

The Town of Kitty Hawk Planning Board held its regularly scheduled meeting on Thursday, April 25, 2024. This meeting was held in the Smith Room at the Kitty Hawk Municipal Building, 101 Veterans Memorial Drive, Kitty Hawk, NC.

**1.) Call to Order/
Attendance:** 6:00 p.m.

Members Present: John Richeson, Chairman Brian Parker, Vice Chairman
Chuck Heath, Member Crail Merrill, Alternate
Blair Meads, Alternate

Members Absent: Jim Geraghty and Matt Spencer

Others Present: Rob Testerman, Planning Director Casey Varnell, Town Attorney
Jessica Everett, Administrative Zoning Tech

Voting: Due to the absence of Members Matt Spencer and Jim Geraghty, Alternates Craig Merrill and Blair Meads will vote at this meeting.

2.) Approval of Agenda:

Hearing no objections/additions/changes to the agenda, the Chairman approved it as submitted.

3.) Approval of Minutes:

MOTION

Hearing no objections/additions/changes to the minutes of the February 15, 2024, Planning Board meeting, Chairman Richeson motioned to approve the Minutes as submitted.

Vice Chairman Parker seconded the motion.

Vote: YEAS – unanimous

4.) Administrative Report:

Mr. Testerman stated that the Council approved the Special Use Permit for the EMS Building during the Town Council Meeting on April 1, 2024. They are wrapping up the Conditions of Approval this week, getting the two lots combined and re-addressed. The building permit will be issued, and activity on the lot should start soon. Text Amendment for minimum lot size on continuous wetlands was approved 4 to 1.

5.) Public Comment:

Chairman Richeson stated that this portion is dedicated to those in the audience who want to speak to the Board about any issues. Those speaking should come to the podium and state their name for the record. He also stated that the Board is an 'advisory' board to the Town Council, and the Council can approve or deny what the Board puts forward. Seeing as no one approached the Board, Mr. Richeson closed this portion of the meeting.

6.) Unfinished Business:

- a.) Sec. 42-1.- Definitions & 42-528.- Accessory Dwelling Units – Applicant proposes language regulation for ADUs used as short-term rentals in the VR-1 district. (Agenda Item 6a)

Mr. Testerman stated that the Applicant Proposed text amendment saw its first draft in the Fall/Winter of last year, was pulled back, tweaked, and is now back in front of the board this evening. A zoning map was displayed for those in attendance. The VR-1 district is the greenish/yellow section. The Applicant was on hand to answer any questions.

Discussion:

- Mr. Testerman: Do you have anything to add?
- Applicant, Ms. Wells: No further comments, but happy to answer any questions.
- Chairman Richeson: Do any board members have questions for Mr. Testerman?
- Vice Chairman Parker: Piggybacking on what Craig said in another meeting and how we got to this point with ADUs and their use, being permitted for an ADU, and changing the use to a short-term rental. We don't currently have any yea or nay of the use, and I feel because we have not had any, we are in this conundrum of, it is not a permitted use to have a short-term rental in VR-1. Through zoning and how beach districts were zoned for short-term rentals, it was kind of an understanding that short-term rentals were not in the village. This was not an issue until the last few years and I don't feel that it's been addressed well.
- Mr. Testerman: We do not currently regulate short-term rentals. Nothing says they can't be in the village and that it has to be on the beach. There was a discussion regarding development to define short-term rentals as a land use and have them in specific

districts; however, that route was not explored. The approach would be to define them as a land use and dictate where they can be without conditions, where they can't be at all, and where they can be with conditions.

- Mr. Varnell: The court of appeals case made it very clear that if you want to regulate short-term rentals, or in our case, long-term rentals, you must define them as a use. If we want to regulate, we must adopt a definition within the ordinance. If they are not defined, they are permitted.
- Chairman Richeson: If you want to regulate short-term rentals, you have to define it.
- Mr. Varnell: Correct; you must have some mechanism in your code to regulate that particular use, which is essentially defining uses. In this case, as opposed to defining short-term rentals, we are defining long-term rentals, which have the same effect of prohibiting short-term rentals.
- Chairman Richeson: I was on the board when Joe Heard was the Planning Director. We have previously discussed ADUs as a type of mother-in-law suite that has morphed into a small cottage, and that is where the STR part came into it. We have to define them before we can regulate them.
- Mr. Testerman: With the application in front of us, it is fine to put certain regulations on ADUs, but if you want to regulate short-term rentals more broadly, we will have to go further to define it. I think much of the talk with ADUs gets interchanged with short-term rentals. ADUs are the structure and short-term rentals are the use. They are two different things.
- Chairman Richeson: So, do we have to define the use at a later date?
- Mr. Testerman: Not as part of this application. This is just dealing with regulations that dictate how to permit ADUs as proposed in VR-1 if it is adopted.
- Vice Chairman Parker: VR-1 is zoned for single-family residences. What is the definition of a single-family resident? It was zoned for one house and one use and then morphed into different uses.
- Mr. Varnell: The issue is short-term rental, long-term rental, owner-occupied; it's all residential use, at the end of the day, unless you define it differently.
- Mr. Testerman: Our ordinance defines a single family as no more than 5, and we can't really enforce that.
- Chairman Richeson: What is the legality of forced compliance?
- Mr. Varnell: Nothing (no case law or statute) explicitly says you can or can't prohibit short-term rentals. So, right now, what is here and proposed would pass under NC law. I have an issue with the compliance portion. I do not know if it has been tested. I don't know of a case that has dug into that, but most have a reference to "grandfathering" of existing uses. To not allow grandfathering and to force compliance could be problematic. It could be getting into constitutional issues. They were given a permit to build an ADU

for example, there were no restrictions in our ordinance concerning how they rented or didn't rent their property. They took it as that, and to now come back and later, and through an ordinance, strip them of that right could get into state constitution issues. As far as legality, that is the only head-turner I have. There is a bill in place (Bill 667), and it has passed the first reading but has stalled. If it goes through legislation, it will affect the rights of local governments and municipalities to largely regulate short-term rentals. But that is not currently the law.

- Chairman Richeson: As an attorney, you are saying that it would be okay if we grandfathered rather than forcing compliance in 12 months.
- Mr. Varnell: The one particular provision is my only heartburn with this, but again, it is a gray area. I don't know if it has been tested in our courts, the ability to pass this and then require compliance. But it is telling that a lot of other jurisdictions that have passed items or ordinances such as this specified that grandfathering will be accommodated rather than forced compliance. I think that gives us a little warning sign. Rob, do you recall seeing anything that required compliance?
- Mr. Testerman: No, not that I recall.
- Ms. Wells: A Chapel Hill town has an ordinance that gives residents 12 or 18 months to come into compliance.
- Mr. Varnell: That is the one under attack right now, too.
- Ms. Wells: They went through the court system once and won, but I think someone has brought another suit. It was applied in Chapel Hill. Another thing I want to say about grandfathering is the gentleman used the house for personal use in the beginning it was not a rental so I don't see where the grandfathering use comes in when it was first used for his personal home and then he changes the use to both short term rentals.
- Mr. Varnell: That goes back to the fact that we don't have a use defined right now, so any residential use is a use on that property. The way they are currently using it that's where I have the heartburn to take away what they are currently doing legally and stripping that from them, that is where I have heartburn. Ms. Wells, can you come to the podium? I just want to make sure you are on the record.
- Ms. Wells: I just wanted to ask about the fact that VR-1 calls for single-family, residential single-family dwellings, which is defined further as a single-family dwelling used exclusively by one family. So that is in our code and that is used to define the use in VR1. So, I think it is there, and it is whether or not you want to apply it. And then I don't know in NC, but in PA and some other places, the Supreme Court did decide that a vacation rental does not meet the qualifications for a single-family residential home.
- Mr. Varnell: And I think that is what it would take, is putting a definition on short term rentals and having that in our ordinance based on what our current state of case law is.
- Mr. Testerman: I think the issue there is, too, if we are going to say that short-term rentals are not allowed because they are not single-family residential uses, then we are

creating a whole issue because BR-1 and BR-2 are always referred to as single-family residences in our ordinance.

- Ms. Wells: Well, I think that is true, but I think that is when it needs to be defined. We need to define it. I think the town needs to in order to make it clear for everybody and not continue to have this problem.
- Mr. Varnell: And legally to regulate it.
- Dr. Merrill: I don't see how that is a workable definition, right? It would make it illegal for people to be roommates in a house because they are not a family; they are roommates.
- Ms. Wells: I don't know. That is just the definition in the town code.
- Dr. Merrill: Right, but I mean, it's not enforceable. I think what Casey was alluding to is that it's not enforceable. If I want to rent out a bedroom, you just can't enforce it, you can't tell me I can't rent a room out for a month or two or three. You can, but how do you stop it? What are you going to do about it?
- Ms. Wells: I don't know about that. I just know it's part of the code, so that may need to change as well.
- Vice-Chairman Parker: The use is where I come in. A home and ADU, even if they are both long-term rentals can have two people living on the same property even if it's long term, but you're not permitted to put a duplex there you would have to have a different zoning for a duplex. Technically it's the same thing but yet one use is permitted, and one is not. So, I feel like the use through zoning is kind of how it could.
- Mr. Varnell: No, that is exactly right but we have to define it, meaning we have to make it a use. Which requires a definition but that doesn't have any effect on what we are talking about tonight. Again, I did not want to get into long-term vs short-term and all that because I wanted us to try and stay focused. I think the conversation around defining STRs is if you want to regulate it on a large scale. If you want to put in finite regulation on short-term rentals, that's where Rob is saying globally, we need to come up with a definition. But for tonight that term is not even on the table
- Vice-Chairman Parker: So, if approved short-term rentals are still around. This is not going to approve it as a permitted use in VR-1.
- Mr. Testerman: This would only affect properties that have or would in the future build an Accessory Dwelling Unit in the VR-1 district. So, if you have a stand-alone short-term rental, just a stand-alone house in VR-1, and use it as a short-term rental, this has nothing to do with it.
- Chairman Richeson: All new construction would have to comply to this?
- Mr. Testerman: Any new ADU built would have to have either the ADU or primary residence being used as long-term occupancy.
- Mr. Richeson: The existing ones you say should be grandfathered?
- Mr. Varnell: Correct, the concept here is you have one parcel with two dwellings being rented that's what this is aimed at. This does not decommission all short-term rentals in

any way. If there is a single-family residence out there, one dwelling on one parcel, and they rent it short-term, this will not affect that.

- Vice-Chairman Parker: I feel like every short-term that comes along takes a long-term rental off. All of the last policies you mentioned were to encourage affordable workforce housing, not doing that, and an adequate supply of housing, not doing that, and it is going against what our land use plan is trying to steer us toward.
- Dr. Merrill: I don't live in this area, but I am very empathetic in this sense. In the one paragraph that Casey was talking about, we generally don't give 12 months. We go with grandfathered. That 12-month thing seems really harsh to do to people who went into this and maybe put in hundreds of thousands of dollars, and now we're just going to cut them off. I look at it like if we changed lot coverage laws, now you're going to go back and make people tear out decks because we want smaller lot coverage. That just seems like a draconian thing to do to people who, maybe with the best intentions, built this ADU, and that was part of their financial plan. So, I find that paragraph troubling. The rest of it I get. That is why you move to that type of neighborhood because that is what you are looking for.
- Chairman Richeson: That goes back to what Casey said with the grandfathering.
- Mr. Meads: I agree with that 100%. In order to encourage affordable housing, I can get behind the long-term restrictions, but I cannot get behind stripping somebody who did something by the book a year ago. I don't think that is right. I think they should be grandfathered just like we always have done in the past.
- Chairman Richeson: Now, the way it is written, if they stop doing that for 12 months, then it has to conform, correct?
- Mr. Testerman: The way our typical non-conforming use language is written, yes.
- Mr. Richeson: Well, we have to start somewhere, not saying I am but, if someone makes a motion to approve this, does it have to have language in there to address the forced conforming or grandfathering to clarify?
- Mr. Testerman: Since this is a citizen-applied text amendment, the applicant would have to agree to the changes.
- Mr. Varnell: Correct. The proper approach would be to ask Ms. Wells and if that's the route from consensus that the council wants to go, and then Ms. Wells would have to approve any amendment, and if she agrees, then it could go forward with a recommendation based on an agreement. There is also no issue if you deny, with qualifying the denial, in other words this is why we denied it, or this is why we are recommending denial. We are fine with the entire ordinance except this provision. That would be well within your authority to do that, but you can ask Ms. Wells.
- Ms. Wells: You can put that language there if you want, but does it go to the council, and they decide? So, the language can stay?

- Mr. Varnell: The language, right, if you were not to agree to remove it voluntarily, it's going to go to council in the exact form it's in, yes ma'am and again as I have told them they can even condition any kind of denial based on that one provision and that is something council would then be made aware of also.
- Ms. Wells: The only problem I have is, it becomes where somebody comes into your neighborhood that is a residential neighborhood and they start conducting a business and that to me just seems like, so he just he can do that and there is no issue? It is a residential neighborhood it's zoned a residential neighborhood and low density and when you just willy-nilly permit him to have 4 vacation rentals, he didn't ask anybody whether or not it's permitted, he just started running it as a business. You are talking about somebody that runs all their revenue through a multi-nation corporation, it's not just a homeowner renting rooms out. He's not managing the property. He has off-site managers, and all the revenue is run through a multi-national corporation. It is a business. Just a few years ago, the National Association of Realtors put an article out to all their clients that most municipalities view short-term rental as a business. I understand you don't want to cut someone off from a use that they have, but maybe it was never a permitted use to begin with. It's like someone comes in and turns a local bar into a strip club, it's not allowed. Just because he does it does not mean it is permitted. So, you have someone that comes in and changes your neighborhood, and is allowed, and I just don't understand. He can still rent his property. I think there is a 20% to 30% difference in short-term rental and long-term rental revenue. So, it's not saying he can't rent his property long-term. It's just saying he cannot run it as a business through short-term rental revenue. But I completely understand why you may have some reservation with the grandfathering clause. But I'm saying he didn't start out using it as a short-term rental. He used it as his residential home, and he changed the use without really any permission because the town doesn't have a way to monitor use. I guess we don't even have a definition of short-term rental. So, that's my view of the situation because I live there. If any of you who lived in your nice home all of a sudden have someone come in and put two short-term rentals on one side of you and two on another, you may have a different opinion if it was somewhere, it was not the standard use. I am fine with it going forward with whatever recommendation you want to council and let it go to the council, and whatever they decide, we have to live with.
- Chairman Richeson: So, it can go ahead and we can approve it as is?
- Mr. Varnell: You can approve as it is or with a stated basis for denial.
- Chairman Richeson: Does anyone care to make a motion on this?

MOTION

Dr. Merrill made a motion to deny the text amendment, with the caveat that the text amendment looks good except for subparagraph i.

Mr. Meads seconded the motion.

Vote: Yeas- Craig Merrill, Blair Meads
Nays- Chuck Heath, John Richeson, Bryan Parker
Vote of 3-2 for denial

Mr. Varnell: So that was for denial with the stipulation. So, I don't normally ask that you do this but go now with a motion for approval as presented and then do another vote.

MOTION

Chairman Richeson made a motion to approve the proposed text amendment to Sec. 42-1 and 42-528 as related to ADUs as presented. The board has found this proposal consistent with the town's adopted land use plan.

Vice Chairman Parker seconded the motion.

Vote: Yea- Chairman Richeson, Vice Chairman Parker and Chuck Heath
Nay- Craig Merrill and Blair Meads
Vote of 3-2 for approval

Mr. Varnell: Now that is the recommendation that will go to the council. Approval as submitted.

7.) Text Amendment:

a. 42-225, 42-247 thru 251, 42-253, 42-273 thru 278, Dwelling Size Occupancy (Agenda Item 7a)

42-247. BR-1 low-density beach residential (1) Detached single-family dwellings shall not have a maximum septic capacity to serve more than 14 overnight occupants and not exceed 4,500 square feet of conditioned living space.

Mr. Testerman: When I used those two numbers, I sampled some of the larger homes in town. Most of what I found was like 3,800 – 4,000 sq. ft. Earlier this week, I got some additional tax records and found that if we adopted as it was put forward in the packet at 4,500 sq. ft., it would create eight nonconforming structures that are already larger than that. To avoid doing that, I would suggest going with 6,000 sq. ft., eliminating those non-conforming structures and not creating those issues. I also found that there are three single-family dwellings that have septic capacity for more than 14. Two of them are for 16 and one for 18; none of these were over 4,500 sq. ft.

(Agenda Item 7a), NCGS 160D-702(b)

Mr. Testerman: I have been in touch with David Owens, a retired professor from the UNC School of Government who specializes in land use law. He is confident that where it says the building design elements do not include bulk, we are clear about restricting the overall building size or capacity. There is some debate among lawyers in the state about whether regulating the capacity is allowed, but he said that he feels it is.

Discussion:

- Mr. Testerman: If there are questions, I am happy to take them.
- Dr. Merrill: Why does it tickle my brain that there was a thing a few years ago when the general assembly said we could not regulate septic field size? Am I not remembering? We were trying to use that to restrict housing size or something.
- Mr. Testerman: Based on section 160D, we cannot specifically limit the number of bedrooms, which is why Mr. Owens probably says there is some disagreement about whether you can restrict occupancy or not; it is indirectly getting at bedrooms.
- Chairman Richerson: This is a good thing. That is why when I am working up north, I always take the beach road home. When you go down the beach road, you see sand and houses. Sometimes, you get a peek at the ocean if the access is cut low enough, and it's a nice ride home. I don't want to disparage the neighbors to the south, but I don't like driving through the beach road over there with those structures.
- Mr. Testerman: Due to our oceanfront and CAMA setback regulations, we won't be seeing any houses on the oceanfront.
- Chairman Richerson: People come here because it looks beachy. Those big mini hotels distract and look like they belong in Miami Beach, not here. I think it's a good thing.
- Mr. Meads: What were you saying about the 6,000 vs the 4,500?
- Mr. Testerman: Just that when I initially put this together, I was looking at a smaller sample size of the existing dwellings, and 4,500 seemed reasonable and not in conflict with the development trends the houses we have seen built. As I dug in this week looking at tax data and information, I discovered that 4,500 sq. ft. would create more non-conforming structures than I had realized. Rather than going with the 4,500 sq. ft. that is listed here, I would recommend 6,000 sq. ft.
- Mr. Meads: In this particular change, you recommend 6,000 vs 4,500 sq. ft.
- Mr. Testerman: Yes, so if someone makes a motion, include that in it.
- Mr. Meads: What are our setback requirements as you get larger? I believe above 3,000 sq. ft. it goes to 12.5 ft. side setback. Is there another step after that?
- Mr. Testerman: Yes, 3,001-3,500 sq. ft. is 12.5 ft., 3,501- 4,000 sq. ft. is 15 ft., 4,001-5,000 sq. ft. is 17.5 ft., 5,001-6,000 sq. ft. is 20 ft. and we do have 6,001 sq. ft. and over is 25 ft. If this is approved, we will take the 6,001 sq. ft. and over out because we will not need it. The lots that we currently have between the highways would apply to all the zoning districts in town, but the houses between the highways currently have the setback take care of it on their own.
- Chairman Richerson: Does anyone else have any questions?
- Mr. Testerman: I received one comment just before the meeting about the Kitty Hawk Woods district. We have some rather large lots back there, so if you want to not apply it

You can recommend it that way. If you want to remove it from any districts and leave it in all of them, that can be done.

- Vice Chairman Parker: I don't think they can subdivide on anything anyway, right? That's the most restrictive zone.
- Mr. Testerman: It is the brighter green (Zoning Map), and most of that is state-owned already, and I think the minimum lot size is 80,000 sq. ft. of non-wetland area.
- Vice Chairman Parker: Yeah, I don't have a problem with it.
- Chairman Richeson: Does anyone care to make a motion?

MOTION

Chairman Richeson motioned to approve the proposed text amendments to the sections listed in this staff report related to maximum occupancy and maximum dwelling size. The maximum dwelling size should be changed from 4,500 sq ft to 6,000 sq. ft. and repeated in all districts that allow single-family residents.

Seconded by Vice Chairman Parker

Vote: Yeas - unanimous

Chairman Richeson: Part 2 of Text Amendments

b. 42-1.- Definitions: 42-225, 42-247 thru 249; 42-273 thru 275. Lot coverage and permeable paving materials. (Agenda Item 7b)

Mr. Testerman: With this one, before I get started, I will just say at 3:30 this afternoon, I had a meeting with an engineer who brought some concerns with some of the wording and thought it might bring up some unintended consequences. I am going to run through what we got, but some of the things he identified he made some valid points on, so I recommend maybe tabling, and I can go back and address some of this stuff. If you guys have any other things you want me to tweak in it, I can do that too and bring it back in May. So, the first part of the definitions (Agenda Item 7b) specified that lot coverage would apply to improved driveways. Currently, the way it's written and the way it has been in practice since I have been here is that anywhere you park your car is considered lot coverage. I have a hard time explaining to people why the natural yard that they park in is counting as lot coverage. The second part you can see the large section that has been struck through that was actually part of the text amendment that came through a couple of years ago that allowed permeable pavement to get some lot coverage bonus in the commercial districts. Taking that out is an effort to simplify it a little bit. It is a little wordy and hard to interpret at times. That was the point for the first part. The next section in red is the section that is proposed to be added. This is the section where the engineer I talked to had some concerns and wanted some clarification and additional language. (Agenda Item 7b) What drove this one to get it in front of you guys is whenever a new house is being built, the moment

someone puts a shovel in the ground, my phone starts ringing with people saying they are going to push all the rainwater over to me, they are going to flood me out. It is hard to convince people to be patient because 99% of the time, it's not going to happen. With the bigger and more frequent rain events we have been seeing it would be beneficial to encourage property owners to use materials that would keep some of the water on their site rather than just putting concrete down that sheds it all to the right of way puddling up on the road or sometimes getting onto adjacent properties. But by allowing some additional physical covered area, we are recognizing that it's more expensive than just standard concrete, so make it worthwhile for the property owner to use something like that.

Discussion:

- Chairman Richeson: So, would a stone driveway be considered permeable? Like river rock?
- Mr. Testerman: I think that depends on the installation method, and I think that is where it is covered in the stormwater manual. But there are some scenarios where it would be considered permeable.
- Chairman Richeson: Someone could put gravel or river stone down and get 38% and then sell the house, and the new guy comes in and doesn't want rock and decides to put concrete down, and they already have the 38%.
- Mr. Testerman: In an ideal scenario, they would come in and get a zoning permit before they do that.
- Chairman Richeson: And you would tell them no?
- Mr. Testerman: If they were at that max. Now, that does not always happen.
- Mr. Meads: That would be illegal then because, at that point, it would be over lot coverage.
- Vice Chairman Parker: Enforcement of it would be a sticking point. Who is going to be on the committee who says your stuff isn't draining right anymore?
- Mr. Testerman: If we got a complaint, our zoning official would have to go out, and they would have to demonstrate that it is still acting as it should.
- Vice Chairman Parker: I don't want that job.
- Chairman Richeson: We recommend that we table it until you have more information on the subject.
- Mr. Testerman: One other thing that has been bounced around and has not been fully thought out yet and maybe we can incorporate it before we come back in May is we currently do not require any type of stormwater management for single-family residents. Something that I talked to the Town Manager about is maybe writing in that if somebody has an engineered sealed stormwater management that they submit with their site plan and building permit application that they are going to retain "X" amount of stormwater

that we can look at some type of incentive for that too. I forgot we are at the end of April, so it might be tough to get that for May, but I can try.

- Vice Chairman Parker: Well, nobody is waiting for this, so it's not like there is a fire to put out, just some forethought.

MOTION

Chairman Richeson motioned that we table item 7, item b, definitions of Lot Coverage and Permeabilized Paving materials, for the May meeting.

Vice Chairman Parker seconded the motion.

8.) Comments:

- a. Chairman Richeson - none
- b. Planning Board Members - none
- c. Town Attorney - none
- d. Planning Director
 - Mr. Testerman: For anyone who has not met Jessica yet, she is the new Administrative Zoning Technician. She will take over the minutes, so you will see more of her.
 - Chairman Richeson: Welcome, Jessica. We are happy to have you.
 - Mrs. Everett: Thank you.

9.) Adjourn:

Hearing no further comments, Mr. Richeson adjourned the April 25, 2024, Kitty Hawk Planning Board meeting at 7:02 p.m.

Respectfully Submitted,



Jessica M. Everett
Administrative Zoning Technician