

**KITTY HAWK PLANNING BOARD  
MINUTES  
Regular Meeting, April 11, 2013 – 6:00 p.m.  
Kitty Hawk Municipal Building**

**AGENDA**

1. Call to Order / Attendance
2. Approval of Agenda
3. Approval of Minutes:
  - a. March 14, 2013 - Regular Meeting
4. Administrative Report:
  - a. Town Council Action from April 2, 2013 Meeting
5. Rezoning:
  - a. 103 E. Tateway Road – BR-1 to BC-1
6. Comments:
  - a. Chairman Northen
  - b. Planning Board Members
  - c. Town Attorney
  - d. Planning Director
7. Public Comment
8. Adjourn

**1. CALL TO ORDER / ATTENDANCE**

Chairman Northen called the meeting to order at approximately 6:00 p.m., followed with roll call by Planner Heard.

**PLANNING BOARD MEMBERS PRESENT:** Oscar Northen, Chairman / Craig Garriss, Vice Chair  
Richard Fagan / Jeff Pruitt / Don Stallman / Lynn McClean, Alternate / John Richeson, Alternate

**STAFF PRESENT:** Joe Heard, Director of Planning & Inspections / Steve Michael, Town Attorney

**2. APPROVAL OF AGENDA**

Hearing no changes, **the Chair declared the agenda approved as presented.**

**3. APPROVAL OF MINUTES:**

**a. March 14, 2013 - Regular Meeting.** With hearing no changes or corrections to the minutes, **Chairman Northen declared the draft minutes for March 14, 2013 approved as submitted.**

#### 4. ADMINISTRATIVE REPORT:

a. Town Council Action from April 2, 2013 Meeting. As a brief summary of action taken by Council at its last meeting, Planner Heard brought forward the following items of interest:

- Council set a public hearing date on the text amendment dealing with neon "open" and "closed" signs. The hearing will be held May 6, 2013.
- Council also set a public hearing date for the conditional use permit for the Dominion Power wind turbine project. The hearing will be held May 6, 2013.
- Council approved two contracts for construction of new beach walkovers, one at the end of the new E. Kitty Hawk Road sidewalk and the other at E. Lillian Street. These improvements should be completed within the next few months.

#### 5. REZONING:

a. 103 E. Tateway Road – BR-1 to BC-1. Planner Heard gave a summary to the Planning Board of the rezoning request for the property located at 103 E. Tateway Road. A memorandum dated April 11, 2013 detailing the staff's review is entered into this record:

**Property Owner:** Bruce Shepard  
**Property Address:** 103 E. Tateway Road  
**Parcel ID Number:** 987512951946  
**Current Zoning:** Beach Residential (BR-1)  
**Proposed Zoning:** Beach Commercial (BC-1)

##### Proposal

The subject property is proposed to be rezoned from Beach Residential (BR-1) to Beach Commercial (BC-1). The applicant's cover letter states the reason for this request is to accommodate the conversion of the existing residence to professional offices.

##### Background Information

The subject property is approximately 12,000 square feet (0.28 acres) in size and presently zoned Beach Residential (BR-1). The property contains a one-story, 1,300 square foot, single-family residence constructed in 1983. A 1,000 square foot garage (20' x 50') was also constructed at this time. In 1989, the carport on the northern side of the residence was converted into a living room, adding another 264 square feet of heated space. A concrete driveway and parking area are located on the northern side of the property. Rather than having a traditional grassed lawn, the front yard of the property is completely covered with landscape stone and some vegetation planted around the edges. The septic system is located in the front yard. A wooden fence runs along the southern property line.

The adjoining parcels to the east and south are zoned Beach Residential (BR-1) and each contains a single-family residence (the residence to the east is under construction, but nearing completion). Most of the surrounding residential neighborhood is also zoned BR-1. Across Tateway Road to the north is a neighborhood of single-family residences also zoned BR-1. The two (2) properties located across N. Croatan Highway to the west are zoned Beach Commercial (BC-1). The property at the southwest corner of the intersection with Tateway Road contains a large, multi-tenant office building including Albemarle Eye Center. The property at the northwest corner of this intersection contains Gateway Bank.

##### Staff Analysis

Current Zoning: Beach Residential (BR-1). The BR-1 district allows mainly single-family residential uses, with a handful of other related uses also allowed. The intent of the BR-1 district is "to encourage the development of low density residential neighborhoods in Kitty Hawk Beach." The attached section of the Zoning Ordinance outlines the permitted uses and development standards for this district.

Proposed Zoning: Beach Commercial (BC-1). The BC-1 district allows a variety of residential, institutional, office, and commercial uses. The intent of the BC-1 district is "to provide for the commercial needs of the neighborhood and immediate surrounding geographical area. The commercial development will be characterized by small to medium size land parcels with commercial development of

low intensity. The BC-1 district is not intended to be developed for shopping centers, shopping malls, or big box retail/wholesale businesses." The attached section of the Zoning Ordinance outlines the permitted uses and development standards for this district.

**Proposed Development:** In his attached cover letter, the applicant outlines a proposal to establish two professional counseling offices in the existing residence on the property. It is important to recognize that, if the property is rezoned, the property owner will not be limited to this proposed use, but will be permitted to establish any business or other use allowed in the BC-1 district.

**Lot Size:** The standards for the Beach Commercial (BC-1) district require a minimum lot size of 15,000 square feet for new commercial parcels. At approximately 12,000 square feet, the subject property is a nonconforming lot that does not comply with the minimum lot size standard for the BC-1 district or its current BR-1 zoning district. As an existing lot, the property doesn't necessarily have to comply with this standard, but it is an issue to consider.

**Suitability for Commercial Use:** If the subject property is rezoned, any proposed change from residential to commercial use or new development of the property would have to undergo a separate site plan review process through the Planning Board and Town Council. There are a number of potential issues that would have to be addressed at that time, but should be considered when determining the suitability of the subject property for commercial use:

- As presently developed, the subject property cannot comply with the requirement for a fifty foot (50') buffer from adjoining residential districts. The garage is only ten feet (10') from the rear property line and twelve feet (12') from the southern side property line. The residence is forty feet (40') from the rear property line and twelve feet (12') from the southern side property line. Even if the property is completely redeveloped, it will be nearly impossible to locate a building that could comply with the buffer standard.
- If the existing residence is converted to an office, it is likely that seven (7) parking spaces would be required on site. Due to the relatively small size of the property, size and location of the existing buildings, and location of the septic system, it is unclear if and where the required parking can be provided.
- If the existing residence is converted to office use, there are a number of improvements that would have to be made in order to bring the building into compliance with commercial building and fire codes.
- A variety of other issues including nonconforming building setbacks, additional lot coverage, and traffic circulation would also have to be dealt with during the site plan review process.
- Some of these issues would require evaluation and approval of variances by the Board of Adjustment, which may or may not be granted.

### **Spot Zoning**

North Carolina courts have defined **spot zoning** as "a zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the smaller tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected". Unless other strong justification is provided, the practice of spot zoning has generally not been permitted by courts in the State of North Carolina.

In this case, the proposed rezoning would probably not constitute spot zoning as the properties located directly across N. Croatan Highway are already zoned Beach Commercial (BC-1). Therefore, rezoning the subject property could be considered a small expansion of the existing commercial zoning district.

### **Land Use Plan**

The Town's adopted CAMA Land Use Plan is an important document to consider as it is intended to help guide the pattern of development in the Town. Approval of a rezoning request is not legally required to be consistent with the Town's adopted land use plan. However, if the Planning Board chooses to make a recommendation inconsistent with the recommendations of the land use plan, justification needs to be provided about why the recommendation was made.

The Town of Kitty Hawk's adopted CAMA Land Use Plan designates the subject property as a **Lower Density Residential Area** and provides the following description for this classification:

"Residential areas should provide for the low-density development of single-family detached dwellings in an environment which preserves natural features to the extent possible and promotes stable, permanent neighborhoods."

The following goal and policy may also be considered when reviewing the application's consistency with the adopted land use plan:

**"GOAL #4: Ensure continued commercial development in commercially zoned areas of Kitty Hawk and the continued vitality of existing businesses."**

**"POLICY #4a: Kitty Hawk, through its zoning ordinance, will continue to direct the placement of commercial development in areas zoned for such activities."**

As part of its review, the Planning Board is asked to determine the consistency of this zoning amendment proposal with the adopted CAMA land use plan.

#### **Planning Board Action**

The Planning Board has been asked to provide the Town Council with a recommendation regarding the proposed zoning amendment for the subject property at 103 E. Tateway Drive.

Should the Board decide to recommend **APPROVAL** of the proposed rezoning, the motion could be worded in the following manner:

**"I recommend approval of the application to rezone the property at 103 E. Tateway Road to Beach Commercial (BC-1). Although inconsistent with the Town's adopted land use plan, the Board has found [...INSERT JUSTIFICATION HERE...]."**

Should the Board decide to recommend **DENIAL** of the proposed rezoning, the motion could be worded in the following manner:

**"I recommend denial of the application to rezone the property at 103 E. Tateway Road to Beach Commercial (BC-1). The Board has found this proposal to be inconsistent with the Town's adopted land use plan. [...ADDITIONAL JUSTIFICATION HERE...]"**

#### **Directions to the Subject Property**

From Kitty Hawk Post Office - N. Croatan Highway & Kitty Hawk Road, drive approximately 0.8 miles south on N. Croatan Highway. Turn left onto E. Tateway Road. The subject property at 103 E. Tateway Road is located immediately on the right and can be accessed from a driveway off of E. Tateway Road.

Present for this review was the applicant, Dr. Bruce Shepard.

During his presentation and summary of the application's request, Planner Heard referred to a copy of the Town's zoning map, with the subject property highlighted, and then he switched to using an aerial photograph showing the subject property and surrounding area. Four different photographs of the property were also displayed. [In that the property was developed in 1983, and without a current survey or site plan, the aerial photo from Dare County's tax records served as the best source for reference.]

After the Planner's summary, the Chair opened the floor for Board questions, and with hearing none, the applicant was given the opportunity to add any further information. To begin, Dr. Shepard stated Planner Heard has been extremely helpful in explaining the rezoning and application process, then apologizing for the absence of his wife (co-applicant), also a doctor, who was called away to attend to a "mission of mercy".

Dr. Shepard explained he has recently retired, having worked at Kitty Hawk Elementary School for a number of years, and he noted he and his wife are both certified PhD counselors. The subject property is being considered because it was his mother's residence (she recently passed), and the Shepards desire to open a community counseling practice at the location.

In addition to information and reasons addressed in the application's cover letter, Dr. Shepard offered these comments about what is being proposed:

A counseling practice is different than other professional offices, in that sessions are conducted by appointment only, which means that parking issues and noise problems should not be a problem. The owners' vehicles would be parked in the two-car garage, and there would be the need for only two other parking spaces for use by clients. Noise would not occur, and the counseling activity would only take place between 9:00 a.m. and 5:00 p.m.

There are no changes proposed to the exterior of the location. If the rezoning request would be granted, internal changes would be made as required to comply with applicable standards.

Area property and business owners have been helpful in weighing the proposal and what it would take to make application to the Town, considering the proposal and the low impact of what could occur with a counseling service versus turning the property into a residential rental, or even those other uses permitted in the BC-1 district (some of those uses were cited). Input by the police department had indicated rentals tend to have noise and parking issues.

Chairman Northen asked if further employees or staff would be necessary, such as a receptionist or secretary, and Dr. Shepard indicated there would be no other employees. The structure currently has three bedrooms and two bathrooms, and the proposal is to have: the front room (living room) serve as a waiting room, the dining room be a family conference area (for when involving extended family), and each bedroom with a bathroom would be the practice/counseling rooms. As to family therapy, the Chair pointed out, there could be the need for more than two client parking spaces, to which Dr. Shepard concurred.

VC Garriss noted he visited the subject location, giving a nod to the landscape features. However, concerns about limited parking and the narrow road still weigh, in addition to the change of zoning. In expressing a bit of a quandary, VC Garriss explained the Board must not decide just what is best for the applicant but also for the Town of Kitty Hawk and future applications should the subject location have a change of use.

Stallman offered that the applicant's use for the subject property is immaterial to this discussion, pointing out the discussion at this time should focus upon the rezoning request. If the property were to be changed to a commercial property, Stallman said as his opinion, it would be somewhat betraying the trust of those surrounding residential property owners who most likely purchased their property because of the area's residential zoning. A change to commercial zoning opens the subject property to many commercial BC-1 approved uses, and many of those uses do not fit the adjacent properties.

Fagan explained to Dr. Shepard how the Board uses the Town's adopted zoning ordinances and CAMA Land Use Plan to arrive at rationale for supporting the reasons as to why a decision is made. The LUP's Goal #4 reads, *"Ensure continued commercial development in commercially zoned areas of Kitty Hawk and the continued vitality of existing businesses."* Also read into the record was the LUP's Policy #4a: *"Kitty Hawk, through its zoning ordinance, will continue to direct the placement of commercial development in areas zoned for such activities."* In light of both statements, Fagan offered that he concludes a commercial enterprise must go into a commercial zone, and commercial zones exist across the street from the subject property as well as other areas of Kitty Hawk, and the subject property is clearly located in a residential zone – the rationale which he said he would use to vote to deny the application.

Pruitt commented how different interpretations could be made that the existing commercial property across the bypass lifts the "spot zoning" label, but from the view of a map, it would appear to be a "spot" zoned property if the change were made. Though there is the need for the specific type of use proposed for the subject location, it does not prevent other commercial uses from being considered. Pruitt stated it is difficult for him to support the rezoning request in this situation.

McClellan thanked the Board members for expressing everything she has had on her mind to ask or comment upon, and with going back and forth on weighing the issue, she gave a nod that



it would be a more pleasant use to have a counseling office than a rental house potentially consisting of many residents. However, with regard to the residential zoning, *"that's the way it is."*

Richeson indicated he cannot add to anything which has already been said.

Chairman Northen first commented he would like to see Dr. Shepard set up a counseling business as described; however, with regard to the zoning issues, the Board has faced many requests for rezoning in "transitional" areas, and the need for considering future rezoning has been addressed.

The Chair then posed if there would be any way to add to residential areas an approved use such as "counseling services" or "consulting services" with restrictions and standards. Indicating there could be some possible solutions, Planner Heard said if the Town would not want to consider rezoning the subject property (upon determining the rezoning would not be appropriate), a text amendment could be considered to allow a particular type of low-impact office use. The Board would need to carefully think about the types of uses and conditions, however, because it would apply to any property zoned BR-1.

Presently, the Planner explained, N.C. law does not allow for a "use variance." In other words, if a use is not permitted in a district, one cannot get a variance to allow an unpermitted use in that specific situation. If a community so chooses, there is conditional zoning (first allowed by the State legislature in 2006) that could be made a part of a town's ordinance. Conditional zoning combines rezoning and a conditional use permit – limiting the use of the property for only the use proposed (or for a very few approved uses), limiting the number of employees, or imposing any standard desired. Such flexibility could be used when a proposal is favored but with fear of the other uses which could be permitted with a certain zoning. Should someone else later want to convert the use to another approved restricted use, the change of conditional zoning use would be done under review and approval by the town's planning board and governing body.

In response to the Chair inquiring if the Planning Board could recommend that the Council consider what the Planner described (a conditional zoning use approval) as a solution to this applicant's request, Planner Heard offered he would personally be more comfortable providing a more thorough description of conditional zoning at a future meeting to give the Board a better understanding of the concept before the Board forwards the matter to Council. Chairman Northen concurred.

Immediately, Fagan said he feels very strongly about the Board's discussion of conditional tools raising hopes to the applicant that are not presently available – the applicant cannot make any plans on the basis of the Board's discussion just held: the Town Code and LUP do not arrive at the rationale to consider the applicant's proposal.

Following comments being interjected by the Chair which were inaudible, Fagan continued, *"we do not have any other tools before us, or did I know of such tools, and I do not, for one, want to consider this until we have further information about these tools and how it's going to affect the development of the zoning process throughout this town."*

Chairman: *"That's what I was trying to get at ... I'm not suggesting that we ..., that tonight, he could withdraw, we could deny, but we could also recommend that we start looking at these alternate proposals ...."*

Stallman: *"... [inaudible] ...."*

Pruitt: "... but it's not ..., before us is just the zoning issue, tonight, that's just it, our discussion ...."

Chairman: "... [inaudible] ... what the future might hold for that type ...."

Pruitt: "... just, if I could add one question real quick, the reason that this can't be considered as a conditional use is because the applicant is not living at this address, correct? ... or would it still be a gray area?"

Planner Heard: "First of all, the office use is not listed as a conditional use in the BR-1 district. You do have a provision for a home occupation, which is maybe what you're thinking – that is limited, and first of all, it has to be the residence where the business owner is staying, and it is limited to 25% of the square footage, so in other words, in this case, it would limit them to 375 sq. ft., something in that range."

Pruitt: "So, that avenue is not available at all?"

Heard: "Correct, unless they were planning on to move to this place."

The Chair called for further Board questions, and Dr. Shepard asked to speak to the Board again, saying, "with the gist of what I hear, I'd like to at this stage, if it's possible, withdraw this application, and if something does come along in the future, such as what you're discussing, if the Planning Director could make me aware of this, I could reapply under those circumstances rather than being denied tonight, unless you need to do this in order to finalize your evening's meeting ... I, as the candidate or applicant, could choose to withdraw this, 'cause I see where this is going."

"It doesn't make any sense for either you or me, and I would not build up any hopes because some other alternative was presented ... I just wanted to let you know that. I don't feel awkward about the decision you've made. I've been lead by Mr. Heard clearly through this. We wanted to see which way this would fall ... this is something we proposed to do at one stage or another, and I thank, particularly, the Chairman for even looking at the possibilities because citizens of this Town deserve the consideration you've given tonight looking at this."

"You've got guidelines and you must go by those, but if the State of North Carolina, the wonderful state that it is, has another option, then as a citizen in the Town of Kitty Hawk, I would suggest that you examine this – not whether you take it or not – and this is not probably what most of your candidates would say, but I'm part of this town, and this kind of consideration may be something that can work in some cases, mine may be one, there may be other people, that it could help us, because anything we can do to help make this more of a community and offer services here with small businesses, that's the essence of our country and our county and our town, is that this is how we make success and come out of this quagmire we're in financially by creating small businesses if it's possible."

Chairman: "Sir, I thank you for your ... [inaudible, Fagan interjects to get the Chair's attention] ... sir, I understand you, you do wish to withdraw this application tonight?"

Dr. Shepard: "Yes, sir, it appears wise ... [inaudible] ...."

The Chair's comments overlay: "... he has the right to do that ...."

Attorney Michael: "That's correct."

Fagan asked the Chair for permission to speak:

"Dr. Shepard, it was not my intent to deny you on the basis of any tools available to us that could hear your case with all its priments?? It was my intent in my remarks that I was getting the feeling you were told, or you had heard, as I just heard, that there is another tool out there. Well, there's no such tool out there that I know of, and I didn't want you to be working under guidelines of a false hope – that's why I addressed it the way I did.

"And, certainly, the Chairman is right, we have been investigating as many tools as we can find in the past two years, trying to get more open views on the zoning issues that we have found, but we have not been successful – that the State of North Carolina, as you have indicated, is now going to come forth, then we're going to be in better shape to address yours, and I think you have made a wise decision tonight ... but please, I do not want you to think that, in any way, that my remarks were directed at you for the purpose of denying you, only on the grounds that are stated in our Town Code and LUP, that's it."

Dr. Shepard: "And, I fully appreciate it ... that's the reason, as I heard what was happening, I didn't personalize any of this."

Fagan interjected: "Ok."

Dr. Shepard: "I've worked in schools for 25 years ...."

Fagan: "... I know, so have I ...."

Dr. Shepard: "... [inaudible] ... this was just really an educational point to make, because I've never done this before, or have gone through this process ... people have always come to me for problem solving. I've seldom gone to anybody else, so this has been an education to me, and I don't particularly like being unsuccessful either, so I thought this would maybe relieve both of us, and if something does come up in the future, to just repeat myself, I don't feel awkward about any comments made ... this opportunity, in your position, and various times. That's not it at all – I do not walk out of here tonight feeling like I was ill-treated or a second class citizen or something. In fact, everybody's bent over backwards to make me aware of the circumstances that I was not aware of."

Chairman: "Thank you, sir."

Dr. Shepard: "Thank you all."

At this point, and in concluding this agenda item, the Chair asked the Planner if it would be possible to schedule on the Board's next agenda an opportunity to explore in depth the State's alternative for conditional zoning, and Heard stated he would be glad to put together a report with greater detail and a thorough description of the concept in order to see if it may be something the Board may want to recommend to Council.

## **6. COMMENTS:**

- a. Chairman Northen.** The Chair had no planning issues to bring forward.
- b. Planning Board Members.** No other comments were made by the Board members.
- c. Town Attorney.** Nothing was addressed by the Attorney.



**d. Planning Director.** The Planner provided a PowerPoint presentation about some award winning communities in the "Great Places of North Carolina" program. This program was instituted last year by the North Carolina Chapter of the American Planning Association. A distinguished committee including the editor of *Our State* magazine, leading planning and design professionals in the public and private sectors, and participants from the University of NC at Chapel Hill, chose to highlight these great main streets as examples of what makes communities special.

An aspect of the award program involved online voting by the public to choose their favorite community, and with very active campaigns for soliciting votes, it truly came down to the last hour of voting as to who won between the Town of Southport and the Town of Mount Airy. The People's Choice Award went to Mt. Airy, and with being just two votes shy, South Port was also given special acknowledgement. Winners were chosen from each area of North Carolina, and other communities which have made great progress were also recognized.

The PowerPoint presentation took about five minutes. In summary, Planner Heard indicated some of what makes these places great is that they:

- create destinations and places where people want to be
- create an attractive appearance where people feel comfortable
- highlight the unique history or story of the community
- through design and programs, create active places for the community to gather
- have active local businesses and cultural centers that provide essential goods and services, not just attractive spaces and touristy shops
- develop partnerships between public and private interests including the local government, businesses, nonprofit organizations, etc.
- have a sound planning process to guide decisions on future investment and improvements
- in general, create places that are worth celebrating!

## **7. PUBLIC COMMENT**

There was no public comment.

## **8. ADJOURN**

With no other items, **the Chair declared the meeting adjourned at approximately 6:55 p.m.**



Oscar Northen, Chairman

Attachments: None

Minutes Transcribed and Respectfully Submitted By: Betty Moore Williams