



TOWN OF OAK ISLAND  
PLANNING BOARD  
PROPOSED AGENDA  
February 19, 2014 – 10:00 a.m.  
OAK ISLAND TOWN HALL

- I. **Call to Order** – Chairman Randy Moffitt
- II. **Agenda Amendments**
- III. **Approval of the Agenda**
- IV. **Approval of Minutes:** November 20, 2014
- V. **Public Comment:** Please state your name and address for the record.
- VI. **Old Business**
  1. Proposed Agenda Item submitted by Planning Board Member Campbell
- VII. **New Business**
  1. Fill on developing lots
  2. Amendments to Division 8 Sec. 18-222, Division 13 Sec. 18-335, and Division 2 Sec. 18-413
- VIII. **Adjourn**

MINUTES  
OAK ISLAND PLANNING BOARD  
November 20, 2014 – 10:00 a.m.  
OAK ISLAND TOWN HALL

Present for the Planning Board: Chairman Randy Moffitt, Vice-Chairman Ted Manos, Members Art Skipper, Helen Cashwell, Virginia Campbell. Also present were Kathleen Snider and Josh Crook.

Chairman Moffitt called the meeting to order at 10:02 a.m.

Ms. Cashwell added to New Business Item 1, the letters of correspondence from (a) Marty Wright and (b) Bob and Kelly Germaine; and New Business Item 2, Beach Erosion. New Business Item 3, Proposed Agenda Item for Planning Meeting on November 20, 2014 submitted by Ms. Campbell. **Vice-Chairman Manos made a motion to accept the agenda as amended. Ms. Campbell seconded and the motion passed unanimously.**

**Vice-Chairman Manos made a motion to approve the minutes of September 18, 2014. Mr. Skipper seconded and the motion passed unanimously.**

Vice-Chairman Manos said that he was not present at the October 9 training session. The minutes state that Mr. Surkin said personal liability of the board members is limited unless there is negligence. He said his reading of law tells him that is an incorrect statement; it should say grossly negligent. Mr. Crook said that's what Mr. Surkin said, but what he explained was actually gross negligence. **Ms. Campbell made a motion to approve the minutes of the October 9, 2014 training session. Mr. Skipper seconded the motion and it passed unanimously.**

**Vice-Chairman Manos made a motion to approve the October 16, 2014 minutes. Ms. Campbell seconded and the motion passed unanimously.**

Public Comments: None.

Mr. Manos said under quasi-judicial procedures attached to the minutes, it makes a statement that evidence that is used in a quasi-judicial procedure, it makes a blanket statement he doesn't think is correct and the Board needs to understand this. It says hearsay and non-expert testimony cannot be the basis for a decision or establishing fact. Whenever someone is called to testify as an expert, that individual must be qualified as an expert, but any question of fact can be determined by lay testimony. If a board has to make a decision, under those circumstances you call testimony and a decision can be made based on the evidence presented. This training does not mean the Board always has to have expert testimony.

OLD BUSINESS ITEM NO. 1: Recommendation of consulting firm to develop a Comprehensive Land Use Plan and Unified Development Ordinance. Chairman Moffitt clarified that the Town Council asked the Board to make a recommendation on which firm best meets the needs of the Town, not to consider the cost. Ms. Cashwell said it was the charge from Councilor Winecoff to implement a comprehensive plan and not to piecemeal it. Chairman Moffitt said the Planning Board isn't equipped to create a comprehensive plan on its own. Town Council will ultimately decide what group to hire. Vice-Chairman Manos reviewed his notes on each of the presentations previously made to the Board. He said his opinion is that on a scale of 1 to 10, Holland Consulting is a 9 based on professionalism and the ability to handle the project. The COG had never undertaken a UDO in the past, but Mr. Surkin had done one for Shallotte which he amended 20 or more times. He rated the Council of Governments (COG) a 7. Financially, Holland Consulting he rated at a 7 and COG an 8 based on the difference in cost. Overall, he said Holland Consulting is an 8 and the COG a 7.5. He said he was inclined to vote for Holland Consulting. Chairman Moffitt said the cost was a factor, but after further consideration, he understood Holland's proposal included the cost of everything; pieces could be removed and the cost reduced. The COG's proposal included Town staff doing some of the work, which is why the cost was lower. Chairman Moffitt also said he was in favor of Holland. Mr. Skipper asked for Mr. Crook's input. Mr. Crook said his opinion was similar to Chairman Moffitt and Vice-Chairman Manos. He said both firms are amenable to discussing cost. If he had to choose based on experience and level of service, he would choose Holland. Ms. Campbell said she called some of each of the group's references; she reviewed the information she gathered. She said Sunset Beach would not recommend Holland. Ms. Campbell said it is important that the Town's plan be reflected in the ordinances and that the Board needs to start working on the ordinances before the plan is completed because the plan isn't going to change much, if at all. Ms. Cashwell said Holland is the Cadillac group, and better organized in what they intend to do. She would recommend Holland although she is concerned about the cost. **Mr. Skipper made a motion to recommend Holland Consulting with the condition they sit down with staff and negotiate the cost and the services provided. Ms. Cashwell seconded the motion and Ms. Campbell abstained. The motion passed with four in favor and one abstention (which counts as a vote in favor).**

OLD BUSINESS ITEM NO. 2: Revisions to Chapter 32 Vegetation. Mr. Crook said that there had previously been a lot of discussion on Section 32-76. Mr. Crook said he drafted what he believes is what the Board asked him to do. The Town is in jeopardy of losing its growth award from Tree City USA if this ordinance is not adopted; this would be the 15<sup>th</sup> consecutive year the Town received the award. Jane Kulesza, co-chair of the Environmental Advisory Board and Tree City USA working group. The growth award is achieved by points for different educational opportunities and expansion of ordinances and good tree policies within the Town. The arboretum was created for this purpose. This year they don't have enough points for the growth award because the group spent so much time working with staff on changes to the ordinance. It is the major group of points they need for the growth award. Council appoints the Tree City USA Advisory Board.

The Environmental Advisory Committee has working groups, which the Tree City Advisory Board falls under.

Vice Chairman Manos suggested adding to Article 2, Section 32-32 before Tree City “Oak Island’s Tree City USA Advisory Board” because from a lawyer’s standpoint, it needs to be more specific. Mr. Crook said all of the ordinances are Town of Oak Island’s ordinances and therefore all apply to the Town of Oak Island.

Vice-Chairman Manos then reviewed his other suggested changes. Section 32-72, Definitions. Vice-Chairman Manos said it should say “but leaving trees not small enough to be cut with a bush hog.” Section 32-76, Paragraph E, take Development Services out of the second page, as it is duplicative. Secondly, Vice-Chairman Manos asked why Development Services is authorized to clear something in a preserved area. He asked why you would want to open the door to make it an arbitrary decision of Development Services. Michael Hicks, former member of the Oak Island Environmental Advisory Board, said stormwater control is a reason to leave some of this area. The applicant makes the decision as to what is preserved area. An agreement between staff and the applicant is what is required in terms of meeting the ordinances. Chairman Moffitt, Mr. Crook and Mr. Skipper said they did not have a problem with how it is worded. Mr. Crook said that after the land is developed, the landowner can go back out and strip the land, however, the cost to remove a tree is limiting to most people. Mr. Hicks said the Town is trying to strike a balance between saving trees and property rights and encouraging people to do the right thing. Mr. Skipper said he was not for infringing on people’s property rights. Vice-Chairman Manos said that under 32-76.1, Paragraph B is unclear. Mr. Crook said the intent was to get the 8 percent vegetation around the outside of the parking facility. Consensus was to remove the last sentence under this section. Vice-Chairman Manos said that under b(1)(a), evenly means one every four feet or six feet, etc. He suggested “reasonably” instead of “evenly.” Under Section 32-76(a)(1), Ms. Campbell made a recommendation to make it a requirement for the oceanfront to have 50 feet of vegetation versus encouraged.

Answering a question from Ms. Cashwell, Mr. Crook said these revisions would make the ordinance easier to enforce.

**Vice-Chairman Manos made a motion that Article 2 of the tree management program as presented by staff be adopted in its entirety with the following deletions and amendments: Section 32-32, add “Oak Island” to Tree City USA Advisory Board Responsibility; Section 32-76, Paragraph E, take Development Services out of the second page, as it is duplicative; Section 32-72, under definitions, the definition of bush hogging, in the second line change the word “large” to “small”; Section 32-76(a)(2)(e), delete the word “completely”; 32-76.1(b)(1)(a), delete the word “evenly” and add “reasonably”; 32-76(a)(1), on the fifth line from the bottom where it says “oceanfront properties are excluded from these,” change the word “these” to “the above,” delete the words “when the vegetation is deemed inadequate by Development Services,” and add the word “however, for oceanfront lots.” Ms. Campbell seconded the motion. Chairman Moffitt asked Mr. Edwards if this last change**

on oceanfront lots is enforceable. Mr. Edwards stated that it would be and would be determined by the square footage of the heated living area. **Vice-Chairman Manos amended his motion to add the word “continuous” be deleted from the second to the last line of 32-76(a)(1) and add “to provide an area of 50 square feet for each 700 square feet of heated area.” The amended motion passed unanimously.**

The Planning Board took a break from 11:24 a.m. until 11:53 a.m.

Mr. Skipper left the meeting.

New Business Item No. 1: (a) Letter from Martin J. Wright. Ms. Cashwell said she read the correspondence from the charter boat captain about increasing the sign sizes in a residential area. She said there was an ordinance at one time that read a business was excluded in a residential area, especially if it proved to be obvious in an area. Mr. Crook explained the rules regarding businesses in the Town. Mr. Wright is allowed one one-square foot sign up to 10 feet in the air. Ms. Cashwell said she doesn't want to see a lot of signs on the island and that it needs to be enforced when businesses park trucks in front of residential areas. Mr. Crook said he will continue enforcement efforts. There was no action taken.

New Business Item 1: (b) Letter from Bob and Kelly Germaine, also sent to Council. Ms. Cashwell said this letter raises issues of conflicts of interest. She asked that the Board members be queried on their backgrounds and occupations. Ms. Campbell is a retired financial analyst for the Security Exchange Commission and has no business interests. She also worked for the Small Business Administration. Ms. Cashwell is retired from IBM, has been in electronics all her life and has no association with building or rentals. Mr. Crook said Art Skipper sells real estate. Clay Jenkins was a timber manager, and is now a broker and sells large tracts of timber to paper and lumber companies. Vice-chairman Manos is a former attorney from Las Vegas, primarily trial law with a very minor real estate practice. He's been actively and passively involved in real estate all his life. He said he has a rental property on Oak Island and some lots. Chairman Moffitt owns Moffitt Builders and he builds custom houses on Oak Island from clients from all over. Ms. Cashwell asked the Germaines for their thoughts after hearing this. Ms. Germaine said there are some planning boards that are not allowed to have people who have advantages if certain things are voted one way versus another, and that would be builders, rental agencies and real estate companies. Larger homes generate more money. She said this is a concern. She declined to comment on the diversity of the current board. Ms. Cashwell hoped that Council will consider these comments in choosing the next Planning Board Members.

New Business Item No. 2: Beach Erosion. Ms. Cashwell wanted to know what the responsibility of the Town is if those houses in danger on the west end collapse. Chairman Moffitt said this doesn't fall under the prevue of the Planning Board. Steve Foster, Town Manager, said that as long as those houses are standing up, the Town has no real responsibility. If the structure is enclosed it can stay there for years. If it is endangering the sewer system, it can be disconnected. One of the problems the Town has

is protecting the rest of the tax base on the island. With falling down houses and an eroding beach, property values across the island will drop. It also affects people coming here for their vacations.

New Business item No. 3: Ms. Campbell's proposed Agenda item. Ms. Campbell asked the Board if it would consider a working committee to start working on the Oak Island ordinances contained in Chapter 18. Ms. Cashwell said the consultant would address these first and that we should put this off until we see where the Council takes it. Chairman Moffitt agreed that the consulting group would work through these more important items and the Board could discuss those issues with them at the appropriate time. Vice-chairman Manos said setting up a subcommittee to advise the Planning Board and the consulting firm would create more issues that we do not need to create. Mr. Crook said the Board still has to address the parking issue. There has been a push to separate the beach strand from the rest of the island in terms of required parking. Ms. Campbell said the Board needed to at least start working on these items with a subcommittee before the consultant gets hired. Chairman Moffitt explained to Ms. Campbell that all these issues in her agenda item have been done before and recommendations have been made to Council prior to her coming on the Planning Board. There were numerous Board meetings, Council meetings and joint meetings to address every issue they could. He said that in April the Planning Board addressed the parking, density, impervious coverage, polycarts, etc. There were numerous hours spent on these issues. At the May Council meeting, their recommendation was presented to Town Council. Ms. Campbell asked what the recommendation was. Chairman Moffitt said the ordinance in place now is what was passed. Council did not consider the work the Planning Board had done accommodating all these issues. Chairman Moffitt said the Board had already fixed it. The Board simplified the parking ordinance by reducing it by one parking space. Ms. Campbell said they never did address the size of the lot in relation to the size of the house. Mr. Crook said it was addressed; it is required that larger houses require larger pieces of property. Ms. Campbell still recommends forming a subcommittee to work on these issues.

**Mr. Cashwell made a motion to adjourn, seconded by Vice-chairman Manos. The motion carried unanimously.**

The Planning Board adjourned at 12:37 p.m.

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Randy Moffitt, Chairman

Attested: \_\_\_\_\_  
Kathleen Snider, Clerk to the Board

**TOWN OF OAK ISLAND  
PLANNING BOARD  
AGENDA ITEM MEMO**

Agenda Item: Old Business Item No. 1

Date: February 5, 2015

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**Issue:** Determine appropriate action to begin the review and revision, if necessary, of the Oak Island ordinances contained in the Code of Ordinances, Chapter 18, and Land Use Development. The initial review would focus on residential ordinances contained in Sections 18-32-33; 18-102-109; 18-116-118; 18-142-151; and 18-171-195. The results of such a review could then be forwarded to the Town Council for consideration/adoption/revision. Upon completion, review of the commercial property ordinances would follow.

**Department:** Development Services

**Presented by:** Josh Crook/Ginny Campbell

**Presentation:** None

**Estimated Time for Discussion:** TBD

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**Subject Summary:** On November 20, 2014 and January 31, 2015 Board Member Campbell requested this item be placed on the Planning Board agenda. During the November 2014 meeting the Board chose not to hear this requested item and await a decision from the Council on which firm would be providing management services for the comprehensive land use plan revisions and unified development ordinance creation. During the January 2015 Council meeting, Holland Consulting Planners (HCP) was selected to perform this task based on the recommendation from the Planning Board's and Council member research. A scoping meeting was held by HCP with Mayor Wallace, Councilors Painter and Winecoff, Board Members Moffitt and Manos, the Town Manager, the Town Clerk, the Planning and Zoning Administrator, and other staff members on February 6, 2015 to determine what the Town's short term, midterm and long term planning goals are. Additionally, we discussed how the plan development process would move forward over the next few months. I have also attached the Guidelines for Communications For Council, Board and Committee Members for the Town of Oak Island (adopted 1-13-2015) and the UNC School of Government Coats' Cannons Blog: What's A Public Body for your review to address Member Campbell's request for a working committee.

**Attachments:** Member Campbell's written request, Guidelines for Communication, and Coats' Canons Blog: What's A Public Body, and Guidelines for Communications For Council, Board and Committee Members for the Town of Oak Island (adopted 1-13-2015)

**Recommendation/Action Needed:** N/A

**Suggested Motion:** N/A

**Funds Needed:** \$0.00

**Follow Up Action Needed:**

Jan 31, 2015

To: Josh Crook & Steve Edwards  
CC: Lisa Stites

**Subject: Proposed Agenda Item for Planning Board Meeting on Feb 19, 2015**

At the November 20, 2014 I submitted the same agenda item stated below. Action was denied on the basis that the Board should wait until the Town Council decides on a vendor for a proposed new Land Use Plan. A vendor has now been selected by Town Council, and it is time to establish the ground work for ordinance review. Again, I request that the following Proposed Planning Board Agenda Item be submitted for consideration for the following reasons: (1) to comply with Town Council's request that the Planning Board and town staff prepare new comprehensive ordinances to address existing issues and to replace the existing ordinance regarding residential construction which was intended to be temporary, (2) to provide ordinances as soon as possible because of the accelerated pace of new building occurring on Oak Island and its beachfront.

Kelly Germaine has requested by e-mail dated 1/29/15 that the issue of lot elevation be addressed at this meeting as well. I concur with her request that it be placed on the agenda. However, this is another example of piecemeal regulation which is an inefficient way to proceed.

**Proposed Planning Board Agenda Item**

Determine appropriate action to begin the review and revision, if necessary, of the Oak Island ordinances contained in the Code of Ordinances, Chapter 18, and Land Use Development. The initial review would focus on residential ordinances contained in Sections 18-32-33; 18-102-109; 18-116-118; 18-142-151; and 18-171-195. The results of such a review could then be forwarded to the Town Council for consideration/adoption/ revision. Upon completion, review of the commercial property ordinances would follow.

**A Recommendation**

In order to accomplish the above task, I suggest that a working committee be established comprised of: (1) two planning board members (with diverging views), (2) Town staff and/or a consultant, and perhaps (3) two community members. Such a committee would be advisory only, however, it may have to be open to the public. Such a committee would : (1) formulate a consensus as to what would be appropriate for residential construction on Oak Island within the parameters of the existing CAMA Land Use Plan of 2009 (LUP), and (2) draft proposed ordinances to meet the intention of the existing LUP. It is doubtful that any new LUP will be significantly different from the existing one. Resulting proposed ordinances would be presented to the Planning Board for its consideration, revision, and/or adoption for further recommendation to Town Council. Such new ordinances would be subject to change if they are incompatible with a new LUP.

It would be logical for new ordinances to consider:

- (1) An appropriate relationship between house size and lot size, and artificial elevation of lots;
- (2) Type of neighborhood;

- (3) Number of occupants (a factor not addressed by density),
- (4) Number of bedrooms/bathrooms;
- (5) Adequate off street parking;
- (6) Maximum impervious lot coverage required by Policy 5.A.3, p 97, Oak Island Land Use Plan LUP);
- (7) Storm water policies that favor low impact development solutions as opposed to highly engineered and mechanical techniques to address runoff (see Policy 5.A.5, p 98, LUP);
- (8) Vegetation considerations (Policy 5.A.8 p 89 LUP and Article III, Section 32);
- (9) The regulation of both density and size of structures in hazard areas to minimize unreasonable risk to people and property (Policy 4.a.6, p 95 of LUP);
- (10) Ordinance provisions and development that would preserve views to the water from adjoining streets, roads, walkways and other public spaces (Policy 1.A.7, p 86 LUP);
- (11) Encouragement of single-family residences, parks and natural areas (Policy 2.A.1, p 86 LUP);
- (12) And most importantly “adopt and apply policies that support land uses which enhance, protect, maintain and preserve natural resources, fragile areas and small town character” as stated on p 109 of the LUP.

Naturally, I would volunteer to be part of this process.

I request that Lisa Stites circulate this memo among both the Planning Board and Town Council members for their information.

Respectively,

Virginia Campbell  
Planning Board Member

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## Coates' Canons Blog: What's a Public Body?

By Frayda Bluestein

Article: <http://canons.sog.unc.edu/?p=7990>

This entry was posted on February 03, 2015 and is filed under Board Member Powers & Authority, Board Structure & Procedures, Board Structures, Open Government, Open Meetings

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North Carolina's Open Meetings Law requires all *official meetings of public bodies* to be open to the public (unless the public body has specific statutory authority to meet in closed session).

Think about whether the groups described in the following scenarios constitute public bodies:

1) For the past two years, a group of local officials has met quarterly for lunch. The group comprises the city manager, the mayor, the county manager, the chair of the board county commissioners, the superintendent of the local school district, and the chair of the local school board. They talk about issues that face their respective jurisdictions and share information about local issues. The officials share information from these meetings with the boards and staffs of their respective units.

2) For the past two years, every third Thursday of the month, the planning directors of the county and all the municipalities within the county meet for lunch. They talk about planning issues within the county, and they share other professional information and advice. Some of the units reimburse the attendees for the lunch expense because it is considered to be primarily a working lunch.

3) a) The mayor has created a 2020 Visioning Task Force consisting of community leaders and volunteers from various civic groups. The task force meets at the chamber of commerce and the mayor leads the discussions and organizes the agendas for each meeting. The mayor reports back to the city council about the group's progress but the board has never formally or informally commissioned or approved the task force, and no public funds or other city resources have been used for their work.

b) After a year of working on a vision for the future of the city, the 2020 Task Force has come up with a set of strategic initiatives. The task force presented the list to the city council and the council members provided feedback by individually putting green sticky dots next to the ones they liked best. The task force is now moving forward to implement the top three initiatives and the city is providing staff support and other resources for their work. No formal vote has ever been taken to appoint or approve the task force or its work.

The open meetings law defines public bodies as follows:

"[A]ny elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function..." G.S. 143-318.10

All of the scenarios described above involve groups of two or more people who meet to talk about matters involving local governments. But are they public bodies?

Of course I've carefully crafted these scenarios to raise one particular issue: None of these groups was actually "elected or appointed" by any governmental body. In the first two examples, the groups came together on their own initiative. In the other two, the 2020 Task Force starts out as the mayor's creation but later deals directly, but not formally, with members of the city council. In all but the last scenario, I think this means they are not public bodies.

North Carolina court cases have held that to create a public body, there needs to be some formal action and it must be



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done by some person or entity with authority to do it. Courts have emphasized the importance of the specific language in the statute, delineating how public bodies are created and may be identified.

In *DTH Pub. Corp. v. Univ. of N. Carolina at Chapel Hill*, 128 N.C. App. 534 (1998), the court analyzed whether the Undergraduate Court at UNC Chapel Hill was public body. The court noted that, “[i]n 1994, the General Assembly amended the N.C.G.S. § 143–318.10 definition of ‘public body’ adding the phrase ‘elected or appointed’ and deleting previous requirements that the public body be established in certain enumerated ways.” The court observed that although the statute does not specifically delineate *who or what entity* must do the appointing, dictionary definitions of “appoint” and “appointment” suggest that “that the person or body doing the appointing must be one *authorized* to do so.” *DTH*, at 539. See also, *Chatfield v. Wilmington Hous. Fin. & Dev., Inc.*, 166 N.C. App. 703, 710 (2004).

The court in *DTH* concluded that the Undergraduate Court was a public body, reasoning that “the Undergraduate Court members are clearly appointed and confirmed by those who are authorized to do so under the laws of this State and pursuant to the policies and regulations of UNC–CH and UNC.” The court traced the authority as follows: “[T]he Student Body President and the Student Congress derive their authority to appoint and confirm Undergraduate Court members from the Chancellor, who in turn derives his authority on this matter from the UNC–CH Board of Trustees. The Chancellor and the UNC–CH Board of Trustees derive their authority from the Board of Governors of the University of North Carolina (UNC) which, in turn, derives its authority from N.C. Gen.Stat. § 116–11(2) (1994) and Article IX, Section 8 of our North Carolina Constitution.” This case demonstrates that the authority need not necessarily be direct.

So let's look at the groups in the scenarios.

**Self-Created Groups.** The first two groups were not appointed or elected by any person or entity. Therefore they are not public bodies under the statute. Even though the officials in the first group talk about the work of the units they represent, and even though they share that information with the governing body, the statute simply does not require public access to these types of meetings.

**Mayor/Chair-Appointed groups.** The third scenario involves two phases. In the first part, the mayor appointed the task force. The issue is whether the mayor was authorized to make this appointment. If she was not, it's not a public body under the statute.

Mayors have very few specifically delegated powers in North Carolina, as described in my [blog post here](#). The same is true of chairs of boards of county commissioners and local school boards. (Mayors do have specific authority for some types of appointments, such as housing authorities, and some local charters may augment the mayor's authority to make appointments.) Mayors and board chairs are assumed to have various ceremonial powers, and local governing boards may implicitly or explicitly authorize many things that these leaders do beyond the scope of their statutorily delegated authority. If the facts and history indicate that the board in the past approved of the mayor's appointing task forces, perhaps a case can be made that the council has delegated that authority to the mayor. If no such history or facts exist, however, there is no basis for concluding that she was authorized to appoint the task force as a public body of the city. Furthermore, the fact that the city did nothing else to signal its approval of the task force, and that it operated apart from the city suggests that it is not a public body of the city.

In the second part of the scenario, the council appears to recognize and approve the task force in a way that, in my view makes it a public body. Clearly, the council never took a formal vote to appoint or approve the task force and its work. But it seems too restrictive, and it would be inconsistent with the intent of the statute, to shield the work of a public body from public access merely because no formal vote was taken. If the city council treats a task force or other group in the same way it treats other appointed public bodies, it seems likely that a court would find the task force to be a public body under the statute. Key facts would be whether the council directs the work of the task force, and whether it allocates staff time, funding, and other resources to the group. Countervailing evidence would be a contractual relationship, which would indicate a private service for pay, rather than intentional creation of an agency or arm of the governmental entity.

## Conclusion

The definition of public body may be more narrow than some would have thought or preferred. Conversations that may affect significant actions and decisions of state and local government entities may occur out of the public eye. On the other hand the statutory framework allows some flexibility for informal collaboration and allows the unit of government some



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control over the bodies and structures through which it will govern.

## Links

- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-318.10](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-318.10)

**Guidelines for Communications**  
**For Council, Board and Committee Members**  
**For the Town of Oak Island**  
**(adopted 1-13-2015)**

North Carolina General Statute § 143-318.9. Public policy, provides the following:

**Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.**

The Town of Oak Island abides by this state law and desires to establish the following guidelines for communications between council members as defined herein:

These guidelines apply to all members of the Town Council and all members of Council and Town committees, Commissions, Sub-committees, Boards, etc. in the Town of Oak Island.

For purposes of these guidelines, reference to council members includes members of all other Town committees, boards and groups subject to the Open Meeting Law. Reference to the council shall include all such groups and meetings.

For purposes of these guidelines, "electronic means" means email, instant messaging, chatrooms, social media, microblogs and related electronic conversation.

For purposes of these guidelines, "Town Clerk" means the Town Clerk, manager, or his / her designee.

These guidelines apply regardless of whether the council member is using a Town-provided email address and account, his/her personal email address or account, or one provided by his/her employer; and to all social media accounts to which a council member posts.

### **Meeting materials**

Electronic communication of meeting materials should generally be conducted in a one-way communication from the Town Clerk to the council.

- Council members may receive agenda materials, background information, and other meeting materials via email attachment or other electronic means (such as file sharing) from the Town Clerk.
- If a council member has questions or comments about materials received,

he/she should inquire via electronic means directly back to the Town Clerk. A council member should not copy other council members on his/her inquiry.

- If the clarification is one of value to other council members, the Town Clerk may send follow-up materials or information to the council.

Materials relating to agenda items of a meeting must also be made available to the public at the meeting.

## **Communication during council meetings**

- Council members should not communicate with one another via electronic means during a public meeting.
- Council members should not communicate with any member of Town staff via electronic means during a public meeting.
- Council members should not communicate with the public via electronic means during a public meeting.

## **Communication outside of council meetings**

- Council members should generally act with caution when using electronic means to communicate with one another, being mindful of the Open Meeting Law.
- If a council member wishes to share information with all other members, he /she should do so through the Town Clerk. The council member may request the Town clerk distribute materials to others. The communication should not invite response to or discussion between any council members, including replies to the person making the distribution request. This should be considered a method for providing one-way information to other members of the council. Again, remember that materials relating to agenda items for Town business must be provided to the public at the meeting.
- If a council member wishes to address only one other member through electronic means on any topic related to Town business, he/she can do so directly, but should be mindful of the following:
  - One-to-one communication is ideal.
  - The recipient of an electronic message or inquiry should reply only to the sender, should not copy others on the reply and should not forward the original communication to other council members.
  - The sender of an electronic message should not forward or copy the recipient's reply to any other council member.
- If a council member receives an electronic communication from any source related to Town business which is distributed to multiple council members (i.e. an email sent to the entire council from a member of the public; or an email sent to three council members from a local business), he/she should reply only to the sender. The reply should not be copied to all on the original distribution or forwarded to

- any other council member.
- If a council member receives listserv distributions, electronic newsletters, or participates in electronic discussion forums, chatrooms, or on Facebook, Twitter, blogs or other social media where other council members are also likely to participate, the council member should not reply to any distribution or comment so that the reply is copied to the entire distribution group, or any part of the group that might include other council members. The council member should instead respond only to the sender of any message or inquiry.

## **Retention of electronic communications**

- Council members should retain electronic communications in keeping with Town policies and procedures, whether such communication takes place on a Town-provided computer, home computer or other computer system.

**TOWN OF OAK ISLAND  
PLANNING BOARD  
AGENDA ITEM MEMO**

Agenda Item: New Business No. 1

Date: February 9, 2015

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**Issue:** Fill on developing lots.

**Department:** Planning & Zoning Administrator

**Presented by:** Josh Crook

**Presentation:** Staff

**Estimated Time for Discussion:** 20 Minutes

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**Subject Summary:** On January 29, 2015 staff received an email with photos from Bob and Kelley Germaine requesting the Planning Board consider recommending to Council that it will no longer allow builders/developers to increase or raise the sand or dirt levels from the existing street level if it's not necessary. The major challenge with enforcing an ordinance like this is answering the question "what's necessary". Is it the property owner's right to make that decision or is at the discretion of a Town staff, board, or Council member being conveyed this right through the general statutes of North Carolina? Staff has provided the FEMA technical Bulletin that allows for filling in coastal v-zones, the General Statute on Broad Construction that limits the powers of local governments, a Coates' Canons blog from the UNC School of Government that further tries to explain how municipalities are conveyed their governance powers, and the General Statute that governs storm water rules and procedures that does not disallow the use of fill. Staff has been unable to locate any General Statute that prohibits the filling of land within flood or non-flood zones with the exception of environmentally sensitive coastal area and has only been able to find regulatory statutes. Staff believes that it will be very difficult to impose an ordinance that limits builders/developers from filling land when the Federal Government and the State commonly allow and utilize the activity. Staff has also provided the Town's Code of Ordinance definition showing how height is currently measured. The photos provided show the filled areas within the footprint of the structures to be constructed and not the entire lot area. When the FEMA allowed fill was placed on the lot and if the height measurement would be taken from the average finished grade at the four corners and to structures highest point, there would exist no manipulation of height. Additionally, since FEMA and the State allow for filling of land the builder/developer would also be allowed to add fill as necessary to the area

surrounding the structure. Please note that our definition clearly states “finished grade” as to not overstep our regulatory authority granted by the General Assembly of North Carolina.

**Attachments:** Email sent from Bob and Kelley Germaine, photos provided by Bob and Kelley Germaine, FEMA Fill in Coastal V Zones, NCGS 160A-4 Broad Construction, UNC School of Government Coates’ Canons “Is NC a Dillon’s Rule State,” NCGS 143-214.7 storm water rules and procedures, TOOI Code of Ordinance definition of height.

**Recommendation/Action Needed:** None at this time.

**Suggested Motion:** N/A

**Funds Needed:** \$0.00

**Follow Up Action Needed:**

Josh Crook and Planning Board Members,

January 29, 2015 email

We would like to request that you review and consider not allowing builders and/or developers to add dirt or sand to the existing street level of a lot if it is not necessary. That is, the lot is already flat enough and buildable. Adding ground to the lot, like the 3 photos of the lot on West Beach Drive between 10<sup>th</sup> and 13<sup>th</sup> Places actually increases the height of the completed house. The 41 ft. is now higher with the ground also being higher. This could also cause problems with storm water runoff for the neighboring houses.

Thank you in advance for adding this item to the February agenda.

Bob and Kelley Germaine

6610 Kings Lynn Drive

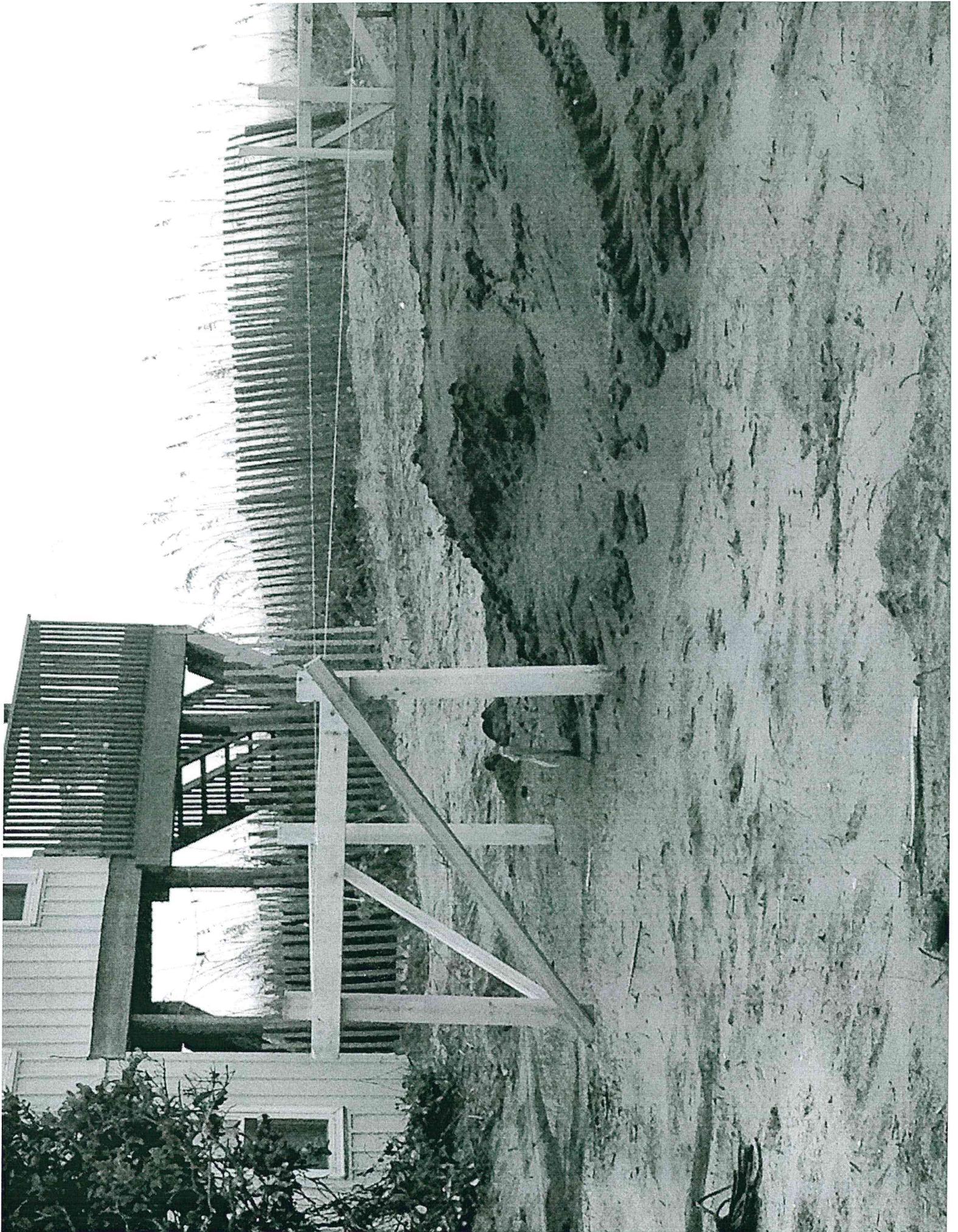
P. O. Box 476

Oak Island, NC 28465

910.278.4582 OI home

910.448.0279/0281 cells

919.932.9232 CH home





Built By  
**STIER**  
CONSTRUCTION CO.  
• CUSTOM BUILT HOMES  
• BUILT TO LAST  
• CONCRETE  
791-9666





# Free-of-Obstruction Requirements

for Buildings Located in Coastal High Hazard Areas  
in accordance with the National Flood Insurance Program

Technical Bulletin 5 / August 2008



**FEMA**

## Fill

NFIP regulations prohibit the use of fill for structural support of buildings in V zones. However, minor grading, and the placement of minor quantities of fill, is allowed, but only

Non-structural fill described in this Technical Bulletin must be ignored for load calculation and foundation design purposes.

for landscaping, drainage under and around buildings, and support of parking slabs, pool decks, patios, walkways, and similar site elements. Fill must not prevent the free passage of floodwaters and waves beneath elevated buildings. Fill must not divert floodwaters or deflect waves such that increased damage is sustained by adjacent or nearby buildings.

Given the difficulty that many communities and designers have had in determining whether the placement and shaping of non-structural fill will be detrimental, some State and local regulations essentially prohibit placement of any non-structural fill in V zones. This approach may itself lead to problems, such as ponding of rainfall around or under buildings. Other States and communities may accept some (unspecified) amount of non-structural fill, provided an engineering analysis is performed and an engineer will certify that the fill will not lead to damaging flow diversion or wave ramping and deflection. Given the state of engineering methods and models, credible and defensible analyses are almost impossible to perform for small quantities of fill.

The following evaluation criteria are recommended for determining acceptable placement of non-structural fill in V zones. Note that there are several criteria listed, and it is possible that some may be in conflict, depending on specific circumstances. The local official is expected to use discretion in such cases to achieve the desired performance while giving deference to the general intent of these criteria.

- **Type of fill.** Fill placed on V zone sites should be similar to natural soils in the area. In many coastal areas, this will be clean sand or sandy soils, free of large quantities of clay, silt, and organic material. Non-structural fill should not contain large rocks and debris. If the fill is similar to and compatible with natural soils, there is no need for communities to require designers to investigate or certify whether the fill has a tendency for “excessive natural compaction” (a common requirement in many floodplain regulations). If the fill material is truly similar to natural soils, its behavior under flood conditions should be similar to the behavior of natural soils, and should not be a subject of debate.
- **Height or elevation of fill at building.** Generally, it is unreasonable to expect that the addition of 1 to 2 feet of site-compatible, non-structural fill in a V zone will lead to adverse effects on buildings. Thus, placement of up to 2 feet of fill under or around an elevated building can be assumed to be acceptable (without engineering analysis or certification) provided basic site drainage principles and vertical clearance limitations are not violated (see below); and provided there are no site-specific conditions or characteristics that would render the placement of the fill as damaging to NFIP-compliant construction (e.g., if local officials have observed the placement of similar quantities of suitable fill has led to building damage during coastal storm events). If additional fill height is proposed for a site, the proposed final grade should be compared to local topography. If the proposed

For floodplain management purposes, this Technical Bulletin describes acceptable placements of non-structural fill in V zones, which can be assumed not to lead to damaging flood and wave conditions on a site or adjacent sites.

“Minor grading” shall be that required or allowed by community regulations, subject to the limitations described herein.

“Minor quantities of fill” shall mean the minimum quantity required for: adequate drainage of areas below and around elevated buildings; support of parking slabs, in-ground pool decks, patios, walkways, etc.; and for site landscaping, subject to the limitations described herein.

final fill configuration is similar to grades and slopes in the immediate vicinity, a detailed analysis of the effects on flood flow and waves need not be required. If more than 2 feet of fill is proposed and the proposed fill configuration exceeds local grade heights and variations, an analysis must be performed.

- **Grading to prevent ponding.** In addition to requirements to elevate buildings to or above the BFE, most communities have established minimum floor elevations to ensure that water does not collect at or under buildings. The floor elevation requirements frequently are tied to nearby road elevations and, on low-lying or level parcels, the quantity of fill required to raise building footprint areas typically will fall within the 2-foot fill height allowance mentioned above. Even though these floor elevation requirements are implemented across entire jurisdictions, there is no reason to automatically assume that application in a V zone will be detrimental. Even if habitable portions of a building are elevated to satisfy floodplain management requirements (usually several feet above grade in most V zones), there is no compelling reason to restrict the placement of site-compatible non-structural fill beneath those buildings if it will prevent ponding and/or saturated soil conditions, and as long as other drainage requirements for grades and slopes can be satisfied.
- **Site drainage requirements.** Most communities have established minimum slopes for building sites to facilitate drainage away from buildings (typically 5 percent [one unit vertical to 20 units horizontal]). Shallow slopes such as these will not lead to wave ramping, runoff, or deflection. Indeed, much steeper slopes (generally one unit vertical to three units horizontal, or steeper) are required to enhance wave runoff. For floodplain management purposes, site slopes shallower than one unit vertical to five units horizontal (regardless of fill height) are assumed not to cause or worsen wave runoff, or reflection capable of damaging adjacent buildings. Figure 17 shows an example of fill placement that is considered acceptable; the fill height is modest and the side slopes are gentle. Although an adjacent pre-FIRM building is lower, the pre-FIRM building would likely sustain structural damage during a coastal flood, even if the fill was not present. Swales and conventional site drainage practices should be used to mitigate potential effects of runoff from the fill area.



Figure 17. Post-hurricane photo showing elevated building surrounded by gently sloping fill, with adjacent damaged pre-FIRM building (the presence and configuration of the fill were judged by the damage inspection team not to have led to flood or wave damage to the elevated building or the nearby pre-FIRM building).

- **Vertical clearance between top of fill and the elevated lowest floor.** Regardless of whether fill is used for drainage or landscaping purposes, it should not be placed to an elevation that buries any portion of the lowest floor system (i.e., beams, girders, trusses, or joists supporting the walking surface of the floor). While the likelihood of such fill leading to structural damage is deemed to be small, it is considered good practice to provide some vertical clearance between the top of the fill and the bottom of the lowest floor system. This clearance will allow for sheet flow (such as that caused by waves overtopping a dune or barrier) to pass beneath the building. There are no established rules as to what constitutes acceptable vertical clearance but, for floodplain management purposes, a vertical clearance of 2 feet is considered adequate in most cases.
- Under the NFIP, the “lowest floor” is the floor of the lowest enclosed area of a building. An unfinished or flood-resistant enclosure that is used solely for parking of vehicles, building access, or storage is not the lowest floor, provided the enclosure is built in compliance with applicable requirements.
- **Compaction of fill.** The NFIP regulations are very explicit – fill shall not be used for structural support of buildings in V zones. However, for floodplain management purposes, compaction of fill below and around elevated buildings in order to support parking slabs, in-ground pool decks, patios, sidewalks, and similar site amenities is consistent with the intent of the regulations.
  - **Dune construction, repair, or reconstruction.** Dunes are natural features in many coastal areas, and they can erode during storms and recover naturally over time. The natural recovery process can be accelerated by replacing the eroded dune with compatible sand, planting dune grasses, and installing sand fences (see Chapter 5 of Rogers and Nash, 2003). In general, these activities should not be considered as detrimental, even if part of the dune lies under a building’s footprint. The addition of sand to restore a site to its pre-storm grades and stabilization with dune vegetation will likely do more good than potential harm in terms of flood damage reduction. Concerns about placement of non-structural, clean sand under and around beachfront buildings should not be the basis for prohibiting dune maintenance and construction, beach nourishment, or similar activities. Dune construction, repair, and reconstruction under or around an elevated building may be assumed to be acceptable (without engineering analysis or certification) as long as: 1) the scale and location of the dune work is consistent with local beach-dune morphology, and 2) vertical clearance is maintained between the top of the dune and the building’s floor system. Note, however, this guidance is not intended to give license to violate the other limitations on use of fill where buildings are distant from the shoreline and where dunes would not otherwise occur naturally.

## Ground Elevations At or Above the BFE

In some V zones, it is not uncommon to have ground elevations at or above the BFE, particularly along shorelines with well-developed dune fields. Having a mapped V zone with a BFE at or below grade seems counterintuitive, but it is possible because of two V zone mapping considerations:

North Carolina General Statute

§ 160A-4. Broad construction.

It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State. (1971, c. 698, s. 1.)

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## Coates' Canons Blog: Is North Carolina a Dillon's Rule State?

By Frayda Bluestein

Article: <http://canons.sog.unc.edu/?p=6894>

This entry was posted on October 24, 2012 and is filed under Constitutional Issues, Ordinances & Police Powers, Statutory Authority & Construction

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North Carolina is often described as a "Dillon's Rule" state. What does that mean? Is it the opposite of home rule? Does it mean our courts apply Dillon's Rule in interpreting the scope of local government authority? Or does it simply reflect the fact that local governments in North Carolina have no inherent authority and derive all of their authority from the state?

The answer is "none of the above." North Carolina cases no longer apply Dillon's Rule and we're not a home rule state. Recent cases analyzing the scope of local government authority apply the "plain meaning" rule of statutory interpretation, which allows application of the legislative "broad construction" rule only in cases where the enabling legislation is ambiguous. The most recent North Carolina Supreme Court case addressing this subject, however, gives me pause. For while the court cites with approval the line of cases rejecting Dillon's Rule, it applies a rule that appears to be as strict, or perhaps even more strict, than Dillon's Rule.

Confused? You're not alone. This blog post summarizes the evolving case law in attempt to answer the question: What rule or standard should North Carolina courts use in determining whether a particular action by a local government is authorized under state law?

Home Rule vs. Dillon's Rule?

If this were a sporting event, it would be like comparing the 49ers vs. the Yankees. These two "rules" are usually described as if they are opposites, or alternatives within a common framework. In fact they are distinct legal concepts, which relate to each other only in the sense that they affect the scope of local authority: Dillon's rule, through court interpretation; home rule through state legislative delegation.

*Dillon's rule* is a legal standard sometimes used by courts when reviewing the legality of specific local government actions. The "rule" refers to a standard for judicial interpretation – a guide for judges suggesting that municipal powers should be narrowly construed. It was developed by [John Forest Dillon](#), a judge and scholar who wrote a famous treatise in 1872 about local government law. The rule says:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable."

*Home rule* describes the scope of authority that some states delegate to local governments. In our country's system of government, each state creates local governments, which derive all of their authority from the state. The form of the delegation of authority varies from state to state. In a home rule state, cities are granted broad powers over matters of local concern. So the "rule" in home rule isn't a rule of interpretation. It refers to the power the local government has to make its own rules.

North Carolina is not a home rule state. Here, authority is not granted through a broad delegation, but through numerous subject-specific general statutes and local acts. (In my article [Do North Carolina Local Governments Need Home Rule?](#) I compare North Carolina's structure to the structure in home rule states.) The granting of home rule authority in a particular state eliminates the need for individual subject-by-subject statutory authority. The local unit has general authority over matters of local concern. (For an insight to some of the challenges of determining what constitute matters of local as



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opposed statewide concerns, see my earlier blog post "[Postcards from Home Rule States](#)".)

Dillon's rule becomes a short hand for non-home-rule states like North Carolina because the lack of broad home rule delegation requires courts to analyze the scope of individual enabling statutes, often using the narrow Dillon's rule standard of review. But courts in home rule states sometimes apply Dillon's rule, and some non-home rule states don't apply Dillon's rule. So the notion that you're either a home rule state or a Dillon's rule state is simply wrong.

#### The Rule in North Carolina

More to the point, North Carolina is neither a Dillon's rule state nor a home rule state. Instead of a broad delegation of authority, North Carolina local governments operate under authority granted by individual statutes, including specific statutes directing courts to interpret the grants of authority broadly ([G.S. 160A-4](#); [153A-4](#)). Notwithstanding that legislative directive, our courts have, I think it's fair to say, meandered among various standards in the course of our state's history, struggling to adopt a consistent standard for analyzing the scope of local authority.

School of Government faculty members have written about this in several contexts. In addition to [my article on home rule](#), David Owens provides a detailed history of this issue in *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform and the Current State of Affairs in North Carolina*, 35 Wake Forest Law Review 671 (2000). The title of an earlier article by Fleming Bell captures the challenge of keeping up with the changing judicial approach; *Dillon's Rule is Dead: Long Live Dillon's Rule!* Local Government Law Bulletin no. 66 (1995).

#### The Latest Chapter: [Lanvale Properties, LLC v. Cabarrus County and the City of Locust](#)

The North Carolina Supreme Court recently ruled that Cabarrus County lacked authority to adopt an adequate public facilities ordinance [APFO]. David Owens describes the main holding in his [blog post here](#). In describing the standard of judicial review that applies to this type of question, the Court acknowledges: "This Court's general approach to construing the legislative authority of local governments has evolved over time." Slip op. at 16. The Court goes on to summarize the history (citing the Owens law review article), from broad construction in the mid-1800's to the use of Dillon's rule, later in that century, and the enactment in the 1970's of the legislative directive for broad construction. Slip op. at 16-18.

#### The broad-construction statutes provide:

It is the policy of the General Assembly that the counties and cities of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.

The Court notes that its initial application of the broad-construction statutes in the zoning cases "was inconsistent." Slip op. at 18. The court rejected the county's assertion, however, that the court should always apply the broad construction standard.

"The principal flaw in the County's argument is that section 153A-4 is a rule of statutory construction rather than a general directive to give our general zoning statutes the broadest construction possible... If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." Slip op. at 19.

The Court went on to conclude, as outlined in Owens' blog post, that the zoning statutes are not ambiguous, and that they do not explicitly or implicitly authorize the APFO. While the main concern in the decision seems to be that the ordinance had the effect of imposing an unauthorized fee on applicants, the court invalidated the entire ordinance, and the potential impact of the decision is quite broad. As noted in a recently filed [petition for rehearing](#), the decision's narrow reading of powers that might be implicit in the zoning laws may call into question numerous regulations that are not explicitly outlined in the laws themselves, but are commonly recognized as being within the legislative intent for land use regulation by local governments.

The application of the "plain meaning" rule in this context starts to look a lot like Dillon's rule, which allows only those powers "granted in express words." Of course, even Dillon's rule includes those powers necessarily or fairly implied in or



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incident to the power expressly granted. The ruling in *Lanvale* seems to create a rule for North Carolina that is even narrower than Dillon's rule. Indeed, there is something about the result that appears not to be fully consistent with the legislative directive to provide "adequate authority" and to construe explicit powers as including those "reasonably expedient" to the exercise of the powers granted.

#### The Plain Meaning of the Broad-Construction Statutes

Courts understandably must exercise restraint to avoid rewriting legislation and supplanting the role of the legislature. The threshold need for ambiguity in the statutory construction plain language rule gives permission, if you will, for the court to move beyond the words of a statute and consider alternative meanings. I suggest that there may be a difference between the question of whether a statute is "ambiguous" (defined as doubtful or uncertain; capable of being understood in two or more possible senses or ways) under the plain meaning standard, and the question of what powers should be construed to be included in and reasonably expedient to the explicit authority conferred by statute, under the broad-construction statutes. The broad-construction statutes recognize that the authority granted includes certain implied powers. In effect, the legislature has, in plain words, given the court permission, indeed arguably a mandate, to interpret the statutes broadly, and to include in that interpretation any powers that are reasonably expedient to the exercise of the power authorized in the statute. Perhaps it's not too much of a stretch to suggest that the whole purpose of the broad-construction statutes was to recognize that the many subject-specific enabling statutes could not reasonably be expected to (and perhaps were not intended to) include and delineate every permissible activity.

The Court interprets the statute, however, to apply only in the case of an ambiguity, despite the fact that there is no legislative intent reflecting such a limitation in the statute itself. As stated in the opinion, "section 153-4 applies only when our zoning statutes are ambiguous, or when its application is necessary to give effect to 'any powers that are reasonably expedient to [a county's] exercise of the power'" Slip op. at 19-20. While the adherence to the plain meaning of statutes is appropriate in the absence of any contrary legislative intent, the broad-construction statutes appear to be plain and explicit in their directive to construe enabling legislation to include implied powers, perhaps even if the language of an enabling statute is not "ambiguous" in the commonly understood meaning of that word.

## Links

- [en.wikipedia.org/wiki/John\\_Forrest\\_Dillon#Dillon.27s\\_Rule](http://en.wikipedia.org/wiki/John_Forrest_Dillon#Dillon.27s_Rule)
- [en.wikipedia.org/wiki/Home\\_Rule\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Home_Rule_in_the_United_States)
- [sogpubs.unc.edu/electronicversions/pg/pgfal06/article2.pdf](http://sogpubs.unc.edu/electronicversions/pg/pgfal06/article2.pdf)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-4](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-4)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-4](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-4)
- [appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTFEucGRm](http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTFEucGRm)
- [www.ncappellatecourts.org/show-file.php?document\\_id=129729](http://www.ncappellatecourts.org/show-file.php?document_id=129729)
- [www.merriam-webster.com/dictionary/ambiguous](http://www.merriam-webster.com/dictionary/ambiguous)

§ 143-214.7. Stormwater runoff rules and programs.

(a) Policy, Purpose and Intent. - The Commission shall undertake a continuing planning process to develop and adopt a statewide plan with regard to establishing and enforcing stormwater rules for the purpose of protecting the surface waters of the State. It is the purpose and intent of this section that, in developing stormwater runoff rules and programs, the Commission may utilize stormwater rules established by the Commission to protect classified shellfish waters, water supply watersheds, and outstanding resource waters; and to control stormwater runoff disposal in coastal counties and other nonpoint sources. Further, it is the intent of this section that the Commission phase in the stormwater rules on a priority basis for all sources of pollution to the water. The plan shall be applied evenhandedly throughout the State to address the State's water quality needs. The Commission shall continually monitor water quality in the State and shall revise stormwater runoff rules as necessary to protect water quality. As necessary, the stormwater rules shall be modified to comply with federal regulations.

(a1) Definitions. - The following definitions apply in this section:

(1) Development. - Any land-disturbing activity that increases the amount of built-upon area or that otherwise decreases the infiltration of precipitation into the subsoil. When additional development occurs at a site that has existing development, the built-upon area of the existing development shall not be included in the density calculations for additional stormwater control requirements, and stormwater control requirements cannot be applied retroactively to existing development, unless otherwise required by federal law.

(2) Redevelopment. - Any land-disturbing activity that does not result in a net increase in built-upon area and that provides greater or equal stormwater control to that of the previous development.

(b) The Commission shall implement stormwater runoff rules and programs for point and nonpoint sources on a phased-in statewide basis. The Commission shall consider standards and best management practices for the protection of the State's water resources in the following order of priority:

(1) Classified shellfish waters.

(2) Water supply watersheds.

(3) Outstanding resource waters.

(4) High quality waters.

(5) All other waters of the State to the extent that the Commission finds control of stormwater is needed to meet the purposes of this Article.

(b1) The Commission shall develop model practices for incorporation of stormwater capture and reuse into stormwater management programs and shall make information on those model practices available to State agencies and local governments.

(b2) For purposes of implementing stormwater programs, "built-upon area" means impervious surface and partially impervious surface to the extent that the partially impervious surface does not allow water to infiltrate through the surface and into the subsoil. "Built-upon area" does not include a slatted deck or the water area of a swimming pool.

(b3) Stormwater runoff rules and programs shall not require private property owners to install new or increased stormwater controls for (i) preexisting development or (ii) redevelopment activities that do not remove or decrease existing stormwater controls.

(c) The Commission shall develop model stormwater management programs that may be implemented by State agencies and units of local government. Model stormwater management programs shall be developed to protect existing water uses and assure compliance with water quality standards and classifications. A State agency or unit of local government may submit to the Commission for its approval a stormwater control program for implementation within its jurisdiction. To this end, State agencies may adopt rules, and units of local government are authorized to adopt ordinances and regulations necessary to establish and enforce stormwater control programs. Units of local government are authorized to create or designate agencies or subdivisions to administer and enforce the programs. Two or more units of local government are authorized to establish a joint program and to enter into any agreements that are necessary for the proper administration and enforcement of the program.

(c1) Any land-use restriction providing for the maintenance of stormwater best management practices or site consistency with approved stormwater project plans filed pursuant to a rule of the Commission, local ordinance, or permit approved by the Commission shall be enforced by any owner of the land on which the best management practice or project is located, any adjacent property owners, any downstream property owners who would be injured by failure to enforce the land-use restriction, any local government having jurisdiction over any part of the land on which the best management practice or project is located, or the Department through the remedies provided by any provision of law that is implemented or enforced by the Department or by means of a civil action, without first having exhausted any available administrative remedies. A land-use restriction providing for the maintenance of stormwater best management practices or site consistency with approved stormwater project plans filed pursuant to a rule of the Commission, local ordinance, or permit approved by the Commission shall not be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of any property interest in particular land. Any person who owns or leases a property subject to a land-use restriction under this section shall abide by the land-use restriction.

(c2) The Department shall transfer a permit issued under this section for a stormwater management system from the declarant of a condominium or a planned community to the unit owners association, owners association, or other management entity identified in the condominium or planned community's declaration upon request of a permit fee if the Department finds that (i) common areas related to the operation and maintenance of the stormwater management system have been conveyed to the unit owners association or owners association in accordance with the declaration; (ii) the declarant has conveyed at least fifty percent (50%) of the units or lots to owners other than a declarant; and (iii) the stormwater management system is in substantial compliance with the stormwater permit issued to the permit fee by the Department. In support of a request made pursuant to this subsection, a permit fee shall submit documentation to the Department sufficient to demonstrate that ownership of the common area related to the operation and maintenance of the stormwater management system has been conveyed from the declarant to the association and that the declarant has conveyed at least fifty percent (50%) of the units or lots to owners other than a declarant. For purposes of this subsection, declarant of a condominium shall have the same meaning as provided in Chapter 47C of the General Statutes, and declarant of a planned community shall have the same meaning as provided in Chapter 47F of the General Statutes.

(c3) In accordance with the Federal Aviation Administration August 28, 2007, Advisory Circular No. 150/5200-33B (Hazardous Wildlife Attractants on or Near Airports), the Department shall not require the use of stormwater retention ponds, stormwater detention ponds, or any other stormwater control measure that promotes standing water in order to comply with this section at public airports that support commercial air carriers or general aviation services. Development projects located within five statute miles from the farthest edge of an airport air operations area, as that term is defined in 14 C.F.R. § 153.3 (July 2011 Edition), shall not be required to use stormwater retention ponds, stormwater detention ponds, or any other stormwater control measure that promotes standing water in order to comply with this section. Existing stormwater retention ponds, stormwater detention ponds, or any other stormwater control measure that promotes standing water in order to comply with this section located at public airports or that are within five statute miles from the farthest edge of an airport operations area may be replaced with alternative measures included in the Division of Water Resources' Best Management Practice Manual chapter on airports. In order to be approved by the Department, alternative measures or management designs that are not expressly included in the Division of Water Resources' Best Management Practice Manual shall provide for equal or better stormwater control based on the pre- and post-development hydrograph. Any replacement of existing stormwater retention ponds, stormwater detention ponds, or any other stormwater control measure that promotes standing water shall be considered a minor modification to the State general stormwater permit.

(c4) The Department shall deem runways, taxiways, and any other areas that provide for overland stormwater flow that promote infiltration and treatment of stormwater into grassed buffers, shoulders, and grass swales permitted pursuant to the State post-construction stormwater requirements.

(c5) The Department may transfer a permit issued pursuant to this section without the consent of the permit holder to a successor-owner of the property on which the permitted activity is occurring or will occur as provided in this subsection:

(1) The Department may transfer a permit if all of the following conditions are met:

a. The successor-owner of the property submits to the Department a written request for the transfer of the permit.

b. The Department finds all of the following:

1. The permit holder is one of the following:

I. A natural person who is deceased.

II. A partnership, Limited Liability Corporation, corporation, or any other business association that has been dissolved.

III. A person who has been lawfully and finally divested of title to the property on which the permitted activity is occurring or will occur.

IV. A person who has sold the property on which the permitted activity is occurring or will occur.

2. The successor-owner holds title to the property on which the permitted activity is occurring or will occur.

3. The successor-owner is the sole claimant of the right to engage in the permitted activity.

4. There will be no substantial change in the permitted activity.
- (2) The permit holder shall comply with all terms and conditions of the permit until such time as the permit is transferred.
- (3) The successor-owner shall comply with all terms and conditions of the permit once the permit has been transferred.
- (4) Notwithstanding changes to law made after the original issuance of the permit, the Department may not impose new or different terms and conditions in the permit without the prior express consent of the successor-owner.
- (d) The Commission shall review each stormwater management program submitted by a State agency or unit of local government and shall notify the State agency or unit of local government that submitted the program that the program has been approved, approved with modifications, or disapproved. The Commission shall approve a program only if it finds that the standards of the program equal or exceed those of the model program adopted by the Commission pursuant to this section.
- (d1) Repealed by Session Laws 2013-265, s. 19, effective July 17, 2013.
- (d2) Repealed by Session Laws 2008-198, s. 8(a), effective August 8, 2008.
- (e) On or before October 1 of each year, the Commission shall report to the Environmental Review Commission on the implementation of this section, including the status of any stormwater control programs administered by State agencies and units of local government. The status report shall include information on any integration of stormwater capture and reuse into stormwater control programs administered by State agencies and units of local government. (1989, c. 447, s. 2; 1995, c. 507, s. 27.8(q); 1997-458, s. 7.1; 2004-124, s. 6.29(a); 2006-246, s. 16(b); 2007-323, s. 6.22(a); 2008-198, s. 8(a); 2011-256, s. 1; 2011-394, s. 6; 2012-200, ss. 1, 6; 2013-121, s. 1; 2013-265, s. 19; 2013-413, ss. 51(a), 57(h); 2014-90, s. 2; 2014-115, s. 17; 2014-120, s. 45(a).)

*Code of Ordinance Chapter 18 Land Use Development*

*Article II. Zoning Division 1. Generally*

*Sec. 18-32 Definitions.*

*Building, height of,* means the vertical distance from the average finished grade at the four corners of the structure four corners to the highest point of the structure.

**TOWN OF OAK ISLAND  
PLANNING BOARD  
AGENDA ITEM MEMO**

Agenda Item: New Business Item No. 2

Date: February 12, 2015

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**Issue:** Amendments to Division 8 Sec. 18-222, Division 13 Sec. 18-335, and Division 2 Sec. 18-413

**Department:** Planning & Zoning Administrator

**Presented by:** Josh Crook

**Presentation:** Staff

**Estimated Time for Discussion:** 30 Minutes

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**Subject Summary:** During the February 10, 2015 Town Council meeting Councilor Winecoff suggested having some sort of informational meeting provided to the public by developers whenever a major subdivision or land use change was being proposed. The proposed new development between NE 61<sup>st</sup> & NE 62<sup>nd</sup> on Yacht Drive is a prime example of a new development that could benefit from such type planning meeting. These planning meetings, known as “Neighborhood Meetings” are common within many recently created UDOs and will most certainly be something that staff suggest as a requirement within our new UDO. Staff has provided an excerpt from the Brunswick County UDO and proposed amendments to our current Code of Ordinance as to implement this requirement prior to the creation of our new UDO and to allow developers time to become accustomed to the new process.

**Attachments:** Excerpts from Brunswick County UDO, Amended Code of Ordinances 18-222, 18-335, & 18-413.

**Recommendation/Action Needed:** Recommend to Council that they approve the amendments to Division 8 Sec. 18-222, Division 13 Sec. 18-335, and Division 2 Sec. 18-413.

**Suggested Motion:** **Motion to recommend approval to the amendments to Division 8 Sec. 18-222, Division 13 Sec. 18-335, and Division 2 Sec. 18-413 and further find that the Planning Board of the (Town of Oak Island) hereby finds that the proposed ordinance amendments are consistent with the (CAMA) Land Use Plan adopted (April 13, 2010)**

because (Policy 2.A.1: Types of development encouraged: The Town will encourage single-family residences, parks, and natural areas.). Further, the Board finds that the ordinance is reasonable and in the public interest because (the amendments require developers to hear public input and concerns prior to any major developments approval).

Funds Needed: \$0.00

Follow Up Action Needed: Forward recommendation to Town Council for approval or denial.

## Excerpts from Brunswick County UDO

### ARTICLE 3. - REVIEW PROCEDURES

#### 3.1 - COMMON REVIEW PROCEDURES

##### 3.1.1.

##### **Pre-Application Conference**

A. Before submitting an application for development approval, each applicant may schedule a pre-application conference with the Planning Director to discuss the procedures, standards and regulations required for development approval in accordance with this Ordinance.

B. The pre-application conference does not necessarily have to be a face-to-face meeting. Phone calls and e-mail exchanges may be used.

C. A pre-application conference with the Planning Director shall be required for the following approvals:

1. Rezoning (Section 3.12);
2. Subdivision review (Section 8.2);
3. Site plan review (Section 3.2);
4. Planned Unit Development review (Section 4.8.5.L);
5. Special exception permit (Section 3.3); and
6. Any application requiring a Traffic Impact Analysis (Section 3.5).

##### 3.1.2. Neighborhood Meeting

**Commentary:** The neighborhood meeting is an opportunity for an applicant to inform the community on the proposed project and hear comments. At these meetings, the community has an opportunity to review the proposal and may offer suggestions. Community suggestions are not binding but the meeting can result in a better final project.

While the meeting is not a requirement for new projects, it is good planning practice and it is our experience that most in the development community are already holding meetings like this. These guidelines are intended to provide a framework for applicants who are not familiar with the process. A neighborhood meeting is required for all modifications to an approved or existing Planned Unit Development or Major Subdivision.

An example of the benefit of these meetings is the preservation of a pedestrian trail to a nearby school. Although children had been using the path for years, it didn't show up on any property maps or aerial photos and the developer wasn't aware of it. The developer agreed to preserve the trail and the community actually advocated for the project at the public hearing because the project improved child safety. Other examples of when a neighborhood meeting would be required are when open space is

proposed to be converted to another land use such as single family residential or when a single family residential use is proposed to be converted to a multi-family residential use.

A. After the pre-application conference, the applicant is encouraged to hold a neighborhood meeting prior to submitting an application for any of the following approvals:

1. Rezoning (Section 3.12);
2. Planned Unit Development review (Section 4.8.5.L); and
3. Special Exception Permit (Section 3.3).

B. A neighborhood meeting is required (**MANDATORY**) for all modifications to an existing Planned Unit Development (Section 4.8.5.L) or an existing Major Subdivision (Section 8.2), except in situations where the Planning Director is authorized to approve the modification administratively.

**Commentary:** Examples of situations where a neighborhood meeting is required include a change in land use from open space to single-family or single-family to multi-family.

C. The purpose of the neighborhood meeting is to inform the neighborhood of the nature of the proposed land use and development features, explain the plan (if any), and receive comments. Comments from the neighborhood are not binding on the applicant. However, the applicant may elect to revise elements of the project to incorporate suggestions.

D. When a neighborhood meeting is required, a neighborhood meeting verification form shall be obtained from the Planning Department prior to holding said meeting.

E. At the meeting, the applicant should present a concept plan and provide a narrative description of the proposed project. This meeting may be conducted in multiple formats, including:

1. A single presentation or workshop before the attendees;
2. An open house where individuals may receive information on the proposal and offer comments. If this option is used, the open house should be available multiple days including at least one weekend day; or
3. Other format deemed appropriate with consultation of the Planning Director.

F. When a neighborhood meeting is held, the meeting must occur at least ten (10) days prior to the first public hearing where the application is to be considered.

G. When a neighborhood meeting is held, the applicant should provide notice in conformance with the following:

**1. Mailed;**

- i. Notice shall be delivered by first class mail to owners of all adjoining properties; and

ii. Notice shall be delivered by first class mail to the president and/or secretary of the property owner's association.

**2. Posted;**

Notice shall be provided by posting a sign on the site at least ten (10) days prior to the date of the neighborhood meeting. When posted, signs shall satisfy the following criteria:

i. The sign must be six (6) square feet in size and the bottom of sign must be at least four (4) feet off the ground.

ii. The sign must include the title 'PRE-APPLICATION NEIGHBORHOOD MEETING' at the top of the sign.

iii. The sign should include a brief narrative of the project proposal/ request.

iv. The sign should include the time, date, and place of the neighborhood meeting (if applicable).

v. The sign should include a statement on where concerned citizens can contact the applicant for more information, including phone number and/or e-mail address.

vi. The applicant must remove the sign within twenty-four (24) hours after the neighborhood meeting.

vii. No sign may be placed within the right-of-way or within fifty (50) feet of any street intersection.

viii. No sign may be placed or mounted on utility, traffic or other similar structures.

H. When a neighborhood meeting is required, a completed neighborhood meeting verification form must be submitted along with all other required application materials.

## DIVISION 8. - CONDITIONAL USES

Sec. 18-222. - Application of division regulations.

Application for granting a conditional use shall be filed with the Planning Administrator and Planning Board by the owner or by the owner's authorized representative. The applicant shall also submit the following:

(1) An accurate map or plat that shows the property for which the conditional use is sought. The map shall contain the following information:

- a. The names of owners of record of adjoining properties.
- b. The location and names of all adjacent street rights-of-way.
- c. The total area of the property.
- d. The location of all existing buildings on the property.

(2) Plans and specifications showing the methods by which the property owner will comply with the conditions specified for the conditional use, as well as with all other mandatory regulations for the district in which the proposed development is located. The plans shall contain the following information, if applicable:

- a. The location, size, designation, and directional features of all parking spaces (including handicapped), driveways, and curb cuts.
- b. An accurate depiction of the project to scale, including a layout design for any proposed buildings that includes length, width, height, placement of building on lot, and building envelope indicating the setbacks required in this article.
- c. Any required or proposed buffering or landscaping plans.
- d. If the property is to be developed in phases, a proposed phasing schedule; proposed phases are to be noted on the plans.
- e. Any other information deemed necessary by the development services department.

(3) The application which shall be accompanied by a filing fee in accordance with a schedule of fees adopted by the town council.

(4) Neighborhood Meeting required in accordance with the provisions of Sec. 18-413(a)(1).

(Ord. of 6-12-2001, ch. 1, § 9.1(B); Ord. of 8-14-2001, § 3; Ord. of 9-11-2001(1), § 3; Ord. of 5-13-2003, § 3)

## DIVISION 13. - ADMINISTRATION AND ENFORCEMENT

Sec. 18-335. - Changes or amendments.

The town council may amend, repeal, supplement or change the text regulations and zoning district lines according to the following procedures:

(1) *Action by the applicant.*

a. *Initiation of amendment.* Proposed changes or amendments may be initiated by the town council, planning board, board of adjustment, town officials or by one or more owners or lessees of property within the area proposed to be changed or affected.

b. *Fee.* The fee established in the town's fee schedule shall be paid to the town for each application for an amendment to cover the costs of advertising and other administrative expenses involved.

(2) *Application procedures.* Any application for an amendment to the text of this article or the zoning map shall be filed with the department of development services at least 45 days prior to the date on which it is to be introduced to the planning board. The town clerk shall be responsible for presenting the recommendations of the planning board to the town council. Each application shall be signed by the property owner or the property owner's agent, be in triplicate and shall contain at least the following information:

a. The applicant's name in full, the applicant's address and a description of the property proposed for rezoning.

b. The applicant's interest in the property and the existing and proposed zoning district classification.

c. If the proposed change would require a change in the zoning map, an accurate diagram of the property proposed for rezoning showing:

1. All property lines with dimensions and north arrow.

2. Adjoining streets with rights-of-way and paving widths.

3. The location of all existing structures on the property.

4. The existing land uses associated with the property.

5. The zoning classification of all abutting zoning districts.

6. A list of all abutting property owners.

d. A statement of justification regarding the changing conditions in the area or in the town generally that makes the proposed amendment necessary to the promotion of the public health, safety and general welfare, or that identifies an obvious error in the zoning map based upon the zoning classification or current land use of surrounding properties.

e. A statement of justification that substantiates that the proposed amendment would support one or more of the stated objectives of the town land use plan.

f. Neighborhood Meeting required in accordance with the provisions of Sec. 18-413(a)(1).

DIVISION 2. - PROCEDURE FOR REVIEW AND APPROVAL OF SUBDIVISION PLATS

Sec. 18-413. - Procedure for approval of major subdivisions.

- (a) *Step one—sketch plan review.* An applicant for major subdivision approval ~~may~~shall submit a Major Subdivisions- Preliminary Subdivision Review application and a simple sketch of the proposed subdivision to the ~~planning administrator and planning~~ Planning Board for review and comment prior to preparation of the required preliminary plat. The sketch plan should show the approximate size of the subdivision, the number of lots, the tentative street layout, drainage, and utilities. The sketch plan ~~should~~shall be submitted to the ~~subdivision~~ planning administrator at least 45 days prior to the planning board meeting at which it will be reviewed. The purpose of sketch plan review is early identification of any proposed improvements, lot sizes and layouts, and other factors that may not meet the requirements of the town's ordinances and regulations. The suggested contents for the sketch plan are provided in section 18-472. The application fee can be found in the published current fiscal year fee schedule.

**(1) Neighborhood Meeting**

Commentary: The neighborhood meeting is an opportunity for an applicant to inform the community on the proposed project and hear comments. At these meetings, the community has an opportunity to review the proposal and may offer suggestions. Community suggestions are not binding but the meeting can result in a better final project.

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A. After the pre-application conference with the Planning Administrator, the applicant is encouraged to hold a neighborhood meeting prior to submitting an application for any of the following approvals:

1. Rezoning;

2. Planned Unit Development review; and

3. Conditional Use Permit.

4. Major Subdivision

B. A neighborhood meeting is required (MANDATORY) for all major subdivision, modifications to an existing Planned Unit Development or an existing Major Subdivision, except in situations where the ~~Planning Director~~ Administrator is authorized to approve the modification administratively.

**Commentary:** Examples of situations where a neighborhood meeting is required include a change in land use from open space to single family or single family to multi family.

C. The purpose of the neighborhood meeting is to inform the neighborhood of the nature of the proposed land use and development features, explain the plan (if any), and receive comments. Comments from the neighborhood are not binding on the applicant. However, the applicant may elect to revise elements of the project to incorporate suggestions.

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