

**FINAL**



## Town of Southern Shores

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**Planning Board Meeting**

**May 21, 2018**

**5:30 p.m., Pitts Center**

**MEETING MINUTES BASED ON  
TRANSCRIPTION BY  
PATRICIA MERSKI, RECORDING SECRETARY**

**I. CALL TO ORDER:**

Chairperson Sam Williams called the meeting to order at 5:30 pm. Planning Board Members Elizabeth Morey, David Neal, Sam Williams, Glenn Wyder, Joe McGraw and Town Planner Wes Haskett were present.

**II. PLEDGE OF ALLEGIANCE:**

Chairperson Sam Williams led the Pledge of Allegiance.

**III. APPROVAL OF AGENDA:**

Glenn Wyder motioned to approve the agenda. Elizabeth Morey seconded the motion. The motion passed unanimously (5-0).

**IV. APPROVAL OF MINUTES:**

Chairperson Williams tabled a vote on the minutes from the March 19, 2018 Planning Board meeting.

Joe McGraw motioned to approve the minutes from the April 9, 2018 Special Planning Board meeting. David Neal seconded the motion. The motion passed unanimously.

Glenn Wyder motioned to approve the minutes from the April 16, 2018 Planning Board meeting. Joe McGraw seconded the motion. The motion passed unanimously.

Joe McGraw motioned to approve the minutes from the May 7, 2018 Special Planning Board meeting. David Neal seconded the motion. The motion passed unanimously.

**V. PUBLIC COMMENT:**

None.

**VI. OLD BUSINESS:**

None.

**VII. NEW BUSINESS:**

A. **VA-18-04:** Variance application submitted by House Engineering, P.C. for a Variance from Section 36-202, (d), of the Southern Shores Town Code for the property located at 85A Ocean Blvd.

Chairman Williams stated that, because this is a Variance application, the Planning Board will now sit as the Board of Adjustment. Consideration of a Variance is a quasi-judicial hearing procedure. Chairman Williams asked if any Board Member has a Conflict of Interest with any of the following conditions:

1. Undisclosed exparte' communication by Members of the Board. Chairman Williams asked if any Board Member had communicated through email, conversations, or phone with other Board Members, Attorneys or Town Staff?: Ms. Morey – No; Mr. McGraw – No; Mr. Neal – No; Mr. Wyder – No; Chairman Williams – No.
2. Does any Board Member have a fixed opinion that is not susceptible to change: Ms. Morey – No; Mr. McGraw – No; Mr. Neal – No; Mr. Wyder – No; Chairman Williams – No.
3. Does any Board Member have a close familial, business or other social associational relationship with the Applicant: Ms. Morey – No; M. McGraw – No; Mr. Neal – No; Mr. Wyder – No; Chairman Williams – No.
4. Does any Board Member have any financial interest in the outcome of the matter?: Ms. Morey – No; Mr. McGraw – No; Mr. Neal – No; Mr. Wyder – No; Chairman Williams – No.

Chairman Williams then determined that no Board Members have a Conflict of Interest.

Chairman Williams stated that anyone giving testimony had to be sworn in and asked Mr. Wheless to swear in those giving testimony. Mr. Wheless then swore in Mr. House and Mr. Haskett. The attorneys stated that they would be making arguments only and thus need not be sworn in.

Chairman Williams then opened the Evidentiary Portion of the hearing and gave a brief description on the proceedings: 1) Staff presentation followed by interested public cross examination, followed by Board cross examination, 2) Applicant presentation followed by interested public cross examination, followed by Board cross examination, and 3) Interested public presentation followed by Staff cross examination, followed by Board cross examination.

Mr. Haskett presented his Staff Report (attached).

Chairman Williams asked if the Applicant had any questions for Staff. There were none.

Chairman Williams asked if anyone from the public had any questions for Staff. Ms. Ann Sjoerdsma, 69 Hickory Trail, Southern Shores came forward. Ms. Sjoerdsma asked, when was the first Variance changed from a request from a 12' setback to a 10' setback and Mr. Haskett stated May 11, 2018. She then asked if that was a result of the proposed Zoning Text Amendment (ZTA) that would change the nonconforming lots requirements and Mr. Haskett stated that he couldn't speak for the property owner but, the property owner did call Mr. Haskett and asked about the ZTA concerning the 10' part of the language and if his variance could reflect the 10' and Mr. Haskett stated 'yes.'

Ms. Sjoerdsma then asked, 'what are the circumstances of the purchase of the lot in 2014. She stated that she found online that the lot was purchased for a mere \$25k in 2014 from Bodie Noel Enterprises which she understood was the parent company for the Kitty Hawk Land Company. Mr. Haskett stated 'yes' and that formally it was a 'paper

street'. She then asked Mr. Haskett to explain what a 'paper street' was and Mr. Gallop objected to the question. Ms. Sjoerdsma stated that she just wanted a simple explanation of a 'paper street.'

Mr. Gallop stated that the public doesn't have the authority to ask questions of the Applicant or Staff unless they have formal standing. Ms. Sjoerdsma stated that her question is coming from her as a member of the media in wanting to find factual material in particular, the change from 12' to a 10' setback and again Mr. Gallop stated his objection. Chairman Williams overruled Mr. Gallop's objection.

Ms. Sjoerdsma then asked if she was correct in assuming that if it was a 'paper street' before the purchase, that it was Town owned and Mr. Haskett stated that he did not believe that that parcel was ever owned by the Town. Ms. Sjoerdsma asked it was privately owned before it was sold in 2014 and Mr. Haskett stated that this was researched but he did not know who the actual owner was at first and eventually it was determined that Bodie Noel, formerly Kitty Hawk Land Company, was the owner and, therefore, they were the people who sold it and at that time there were a lot of questions as to who the owner is or was and ultimately, it was Bodie Noel since they received the payment.

Ms. Sjoerdsma then asked that at no time prior to 2014 did Mr. White have any interest in this property and Mr. Haskett stated that he did not know.

Chairman Williams asked if there were any questions from the Board and asked Mr. Haskett if the side yard setback requirements had changed since the Town was incorporated. Mr. Haskett stated that, when the Zoning Ordinance was adopted, there was a 10 ft. side setback requirement and in 2000 the setback was expanded to 15 ft.

Chairman Williams then entered the Staff Report into the record (attached).

Chairman Williams then asked the Applicant to come forward for the Applicant's Presentation. Mr. House of House Engineering stated that similar Variance requests had come before the Board before which requested a 12 ft. side yard setback requirement. The Owner wanted to change his request from 12 ft. to 10 ft. The Owner owns the neighboring property which is already built upon and his concerns are, if the ZTA is approved in the Town to have 50' wide lots to have 10' setbacks, Mr. White wants his Variance to reflect that and that is why the change came about on May 11, 2018. The paperwork was sent to Mr. Haskett asking for the 10' setback in lieu of the 12 ft. setback. Mr. House also stated that on May 21, 2018, he spoke with Mr. Haskett regarding his request and if the Board would not be amenable to granting the 10 ft. Variance, will the Board approve the 12 ft. request.

Mr. Wyder asked the Applicant what the owner plans for the property. Mr. House stated that Mr. White had not indicated what the plans for the property are, but, it will probably be a residential structure.

Mr. Wyder asked if the property was an investment property. Mr. House stated he did not know if Mr. White was going to build on the lot and then sell it or rent it. He apologized for not having a definitive answer.

Chairman Williams then asked for Staff and Interested Public cross-examination and there were none. Chairman Williams then closed the Evidentiary portion of the meeting.

Mr. Wheless then asked Chairman Williams if he would accept the Applicant's Application of VA-18-04, 8 pages in length as submitted to the Board as part of the package and Chairman Williams stated 'yes.'

Chairman Williams apologized to those in attendance for not introducing people earlier and because this is a quasi-judicial hearing, both the Town and the Board of Adjustment have representation from Attorneys: Mr. Gallop, Town Attorney and Mr. Wheless, Board Attorney.

Chairman Williams opened the Argument Portion of the hearing and asked if the Town had any argument.

Mr. Gallop stated that the arguments that go against the Variance for the 50' wide lots have been heard on multiple occasions in the past and, essentially, it is not an unnecessary hardship. They can build a usable house which is a 20 ft. wide house which is unfortunate, but it is not really an unnecessary hardship and there is no need for the 10 ft. wide setback rather than the 12' ft. setback that has been granted in the past. He stated that if he recalls correctly from Mr. House, in the past the 12 ft. setback was enough and the 10 ft. setback was not asked for prior. This property is not significantly different than the prior 50 ft. lots that had come before the Board and again. This is not an unnecessary hardship and the Variance should not be granted.

Mr. Wheless asked if the Board were to grant the 12 ft. Variance and then the Town Board approved a 10 ft. setback for lots of 50 ft. in width, would the Applicant still be bound by a 12 ft. setback and then, essentially, the Variance would become nonexistent and would the property would be subject to a 10 ft. setback requirement. Mr. Gallop stated that it would depend on what was adopted. Under the current provisions that are proposed, the total ownership by one party would make it that the Applicant would then have to recombine and it would then not be a single lot subject to the 10 ft. setback because of the ownership issue. But, assuming it was a single lot with no adjacent lot under the same ownership, then a single lot would have a 10 ft. setback and that part of the lot was granted a 12 ft. setback, then the owner could use the 10 ft. setback that's approved, which may or may not happen.

Chairman Williams then closed the Argument portion of the hearing.

Next is the Consideration and Deliberation by the Board to discuss the facts presented and if appropriate, the Board can apply conditions to any Variance, provided that the conditions are reasonable and related to the Variance.

Ms. Morey addressed the unnecessary hardship. In the past, the Board compared the 15 ft. side yard setback to the 12 ft. side yard setback. When both 15 ft. side yard setbacks are subtracted from a 50 ft. wide lot, the maximum width house that can be built is 20 ft. That is to say, there is more footage in the setbacks than in the house. The same calculation with 12 ft. wide setbacks results in a maximum width house of 26 ft. By going to a 12 ft. wide side yard setback the hardship is reduced. Going from 15 ft. to 10 ft. is not necessary, 12 ft. reduces the hardship.

Mr. Wyder stated that he does not see a hardship and referred to Item #7 on the Applicant's Application. "Note that personal inconvenience or financial burden standing alone will not be considered as evidence in determining unnecessary hardship." He went on to say that having a 20 ft. house, to him, does not become a hardship.

Mr. Neal stated that he always struggles with these Variance issues. When presented, each have been unique because either of two owners; or there was for a hardship for a family and this is why it is so confusing. A hardship is where you had to buy a lot for a "million dollars" because, otherwise, a big event house would be built on it. Another consideration was when the Board sent it back to be retitled and the last 50 ft. issue was the most uncomfortable for him and he struggled with that because there would be two (2) owners on two (2) individual lots and that's the reason we are looking at the ZTA. Mr. Neal also stated that the Land Use Plan for Southern Shores is looking for larger lots with space and based on that, are we being true to what our interpretation of the Land Use Plan, which is a low density residential community which provides single-family dwellings on large lots that is served by a small commercial district located at the southern end of the Town. The subject property is a gorgeous property when it's combined because of the fact that that would probably be put together as one parcel.

Chairman Williams stated, that in looking at previous Variances, they were all for 12 ft. setbacks. This request for a 10 ft. setback is because of a ZTA that is going to be considered by the Board later in the meeting and then by the Town Council at either their next meeting or the meeting after. There is no guarantee that the Town Council will follow what the Board recommends and this could end up having the same setbacks that are in the Code currently. He also stated that he didn't know at this time, if the Board will grant a 10 ft. wide side yard setback Variance. Concerning hardships, he believed that building a 20 ft. wide house on a 50 ft. wide lot is a hardship and that a 20 ft. wide house is about the width of a single-wide trailer. The house that may eventually be built on this lot could end up being on pilings with two stories above. In visualizing what a tall skinny house may look like, not only is it ugly but there could be safety concerns that may go along with that type of design. The additional 4 ft. in a side yard setback's total width would help that considerably. There have been Variance requests similar to tonight's request and he feels that the Board knows what the pros and cons are.

Chairman Williams stated that there are four standards for granting Variances which are set by the State. All standards must be approved for a Variance to be granted and each standard is voted on separately. This means that if one of the standards is voted for denial, then, the Variance is not granted. A four-fifths vote is required to approve a Standard.

Standard #1: Does strict application of the Ordinance result in an unnecessary hardship to the Applicant. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property and neither pure economic losses nor a required abatement of a violation rise to a level of unnecessary hardship. Vote: Ms. Morey – No; Mr. McGraw – No; Mr. Neal asked for clarification on what a "no" vote means and Chairman Williams stated that a "no" vote is against the Variance and Chairman Williams reread the question and retook the vote: Ms. Morey - No; Mr. McGraw – No; Mr. Neal – No; Mr. Wyder – No; Chairman Williams – Yes.

Standard #2: Does the hardship result from conditions that are peculiar to the property as to location, size or topography? Vote: Ms. Morey – No; Mr. McGraw – No; Mr. Neal – No; Mr. Wyder – No; Chairman Williams – Yes. Mr. McGraw asked for the question to be read again and Chairman Williams did so and Mr. McGraw maintained his No vote.

Standard #3: Does the hardship result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship. A "Yes" vote is for denial; a "No" vote is for approval.

Vote: Ms. Morey – No; Mr. McGraw – No; Mr. Neal – No; Chairman Williams – Yes. Mr. Wyder stated that he fundamentally believes an unnecessary hardship does not exist; so, Standard #3 is assuming that there is a hardship and Mr. Wheless stated that if voting consistently with the first vote, here you would be voting “yes” and Mr. Wyder voted “Yes.” Mr. Neal then asked Mr. Wheless to explain again and the question according to Mr. Wheless is: he didn’t believe that there was an unnecessary hardship and therefore; for the vote to be consistent, Mr. Wyder would vote “yes”. Mr. Wheless went on to say that the question is, did the Applicant do anything that caused a hardship and even though Mr. Wyder found no hardship, actually the vote should be “no” based on these facts. The question becomes, do you believe that the Applicant did anything to put themselves in this position and Mr. Neal and Mr. Wyder changed their votes to “No” based on Mr. Wheless’ clarification. Mr. Wheless went further and stated that if the question had there been a hardship did the Applicant to anything to cause the hardship: Ms. Morey – No; Mr. McGraw – No; Mr. Neal – No; Mr. Wyder – No; Chairman Williams – No.

Standard #4: Is the requested Variance consistent with the spirit, purpose and intent of the Ordinance such that public safety is secured and substantial justice is achieved? Vote: Ms. Morey – No; Mr. McGraw – No; Chairman Williams – Yes. Mr. Neal asked about the word ‘substantial’ and Mr. Wheless stated that the State does not clearly define what constitutes ‘substantial’ and whether this is a weighing out of equity both for the public and the Applicant and the key is – is this consistent with public safety, health and welfare. Mr. Neal – Yes; Mr. Wyder – No.

Chairman Williams then noted that the votes were as follows:

- Standard #1: 1 – Approve; 4 – Deny
- Standard #2: 1 – Approve; 4 – Deny
- Standard #3: 0 – Approve; 5 – Deny
- Standard #4: 2 – Approve; 3 Deny

Chairman Williams stated that the Variance is denied and asked for a motion confirming the vote. An example of such a motion would be “on an x-y vote the Board denied the Appeal of VA-18-04?”

Ms. Morey then made the following motion: “Based on 3 of the 4 standards being denied on Variance 18-04, the Board denies Variance 18-04. Mr. Wyder seconded the motion and the motion passed unanimously.

Chairman Williams stated that since the Variance was denied, the Board’s decision can be appealed to Superior Court and procedures to Appeal can be found in the Town’s Ordinance, Article XII, Section 36-368 – Appeals from Decision by the Board of Adjustment. He also thanked the Staff, Applicant and Public for participating in the hearing and closed the hearing on Variance 18-04.

**B. ZTA-18-06:** Zoning Text Amendment application submitted by the Town of Southern Shores to amend the Southern Shores Town Code by amending Section 36-175, Wireless Telecommunications Sites, Facilities and Towers.

Chairperson Williams introduced the application and called on Wes Haskett to present the Staff Report (attached).

Mr. Haskett stated that, originally, the Town's Ordinance was amended to allow for small cell wireless facilities. This was the result of State legislation which required the Town to be in compliance. Following that change to the Ordinance, Town Council asked Staff to research additional regulations that may be added to give the Town, within the State mandated legislation, more control over small wireless facilities. There are certain areas where the Town can have additional regulations, such as public safety, design standards for decorative utility poles and historic preservation standards. The focus of this ZTA is on public safety.

Mr. Neal asked what was the rationale for the 20 ft. separation of utility poles? Mr. Haskett stated that that was the number Staff went with based on the language used by the Town of Matthews.

Mr. Neal asked if the distance could be further and Mr. Haskett stated that the Board could recommend a larger distance.

Mr. Wyder stated that he thought Staff did a great job in developing this draft ZTA. When the Town Attorney came before the Board, he informed the Board of what could and could not be done, a lot of issues were raised. Mr. Wyder felt that Staff has addressed the majority of the issues that were brought forth; whether it's 20 ft., 50 ft., or 100 ft., the bottom line is that Staff has addressed every single issue that the Board brought forward even though the Board had their hands tied by the State regulations.

Ms. Morey asked Mr. Haskett what was his degree of confidence that the ZTA would comply with the legislative statutes. She also stated, that it was her understanding that this could not be done. Mr. Haskett stated that there are four sections where the Town can impose additional regulations for public safety and this could address the public safety issue. He also stated, as to whether or not it could be challenged, it absolutely could be challenged and the proposed language came from a Planner in the western part of NC. The Planner indicated that they had received pushback from the wireless companies but had not been challenged.

Mr. Haskett then read the four areas in which the Town has authority to adopt additional regulations. He stated that the Town does have the authority to adopt the additional regulations but the State does not tell us what the Town could or could not do.

Chairman Williams stated that his recollection is that the maximum pole height in a residential area is 40 ft. plus as much as a 10 ft. for the antenna on top of the pole, but, the part of the paragraph that was of specific interest to Chairman Williams was "shall not be located directly in front of any residential structure located in a residential zoning district." His question then was, how does this pertain to unimproved lots? He pointed out that this issue was not addressed in the draft ZTA. He also asked if a wireless provider could come in and put a pole in front of an unimproved lot and Mr. Haskett stated that if the ZTA is adopted as is currently written, the answer would be 'yes'.

Mr. Wyder asked if there was a dwelling on that lot, would the pole have to be moved and Mr. Haskett stated 'probably not' because the pole was already there.

Mr. Wyder stated that someone could be looking out of their window and see a pole and a wireless device on top of it.

Mr. Haskett stated that if the pole was there prior to the development of the lot, 'yes'.

Chairman Williams referenced Item #1: No new utility pole may be installed for the principle use of wireless facilities if a pole exists within twenty (20) feet of a desired location and he stated that he is not sure that both are directly related and if there is an 'undeveloped lot' that the pole is on, would it have to be relocated at the lot line. If so, if it's a 100 ft. lot, that would put it off by 50' and he is not sure if this is critical to these facilities but a case of aesthetics could be made.

Ms. Morey asked if the Board is only able to write, based on the concern for public safety, how would the ZTA be worded concerning aesthetics.

Chairman Williams asked if one of these conditions has to do with aesthetics. Ms. Morey then asked if objective design standards defines decorative utility pole?

Chairman Williams stated that the aesthetic condition should be put in and that there will probably be pushback but he would rather put it in and have it be challenged. Ms. Morey stated that she didn't disagree and wondered if there could be future lawsuits at a cost to the Town. Chairman Williams stated that, should that happen, the Town would then make the decision to say that they would fight this or not and that Southern Shores would probably not be the only Town in North Carolina that may have similar issues.

Chairman Williams stated that under subsection d.2. Installation of new poles in residential zoning districts he recommended that an amendment be added that prohibits the poles from being directly in front of any residential dwelling or in the middle of an 'undeveloped piece of property. Then the discussion focused on what the appropriate language would be to address an Amendment for 'undeveloped lots' which may also be related to #1 and if the desired location is the lot line and there a lot of 100' wide lots in the Town, that no utility pole be installed for the physical use of a wireless facility if a pole exists within 20' of the desired location which may not be a bad distance, but, under #1, no new utility pole may be installed for the principle use of a wireless facility if the pole exists.

Chairman Williams asked how multiple carriers are handled; i.e., if there are two competing companies, is there anything concerning collocation in the Ordinance. Mr. Haskett asked Chairman Williams what he defines as collocation and Chairman Williams stated, putting two or more carriers on one pole. Mr. Haskett stated that this was not specifically addressed and the Ordinance only addresses collocation of a facility or facilities on a pole. Chairman Williams asked if the collocation can be done and he feels then that would cut down the number of poles that would be installed. Mr. Haskett stated that this is what is being requested and said that if there are existing poles, they do have to collocate on the existing pole and if there are none and meet the criteria, then a new pole could be erected and all the criteria would have to be met.

Mr. Haskett went on to state that the intent is to first, collocate on existing poles, if there are any, and second to space the poles apart based on the criteria. With respect to #2, if the Board wants to amend #2 to incorporate undeveloped lots, it could say that poles shall not be located directly in front of any residential structure or vacant lot in a residential zoning district.

Mr. Wyder asked if the Board has any leeway on addressing the aesthetics of the pole location and referred to a photo of a pole with multiple collocations in Oakland, CA. He also showed a photo of one in San Francisco, CA.

Mr. Haskett stated that the Southern Shores Ordinance, in accordance with the legislation, included general statements on screening or landscaping for ground

mounted equipment which relates to aesthetics, and the objective design standards for decorative utility pole requirements, including landscaping and ground mounted equipment. He also stated that examples that he has seen of ground mounted equipment, which were attached to the poles, includes a panel, a cabinet where the equipment is located and a pole with the antenna on top.

Chairman Williams asked Mr. Wyder if further discussion was needed concerning the decorative aspect of the pole. Mr. Wyder stated that he thought Mr. Haskett had provided information indicating the Board has the leeway to address preventing a lot of wires hanging down low, which would be a public safety concern, and leeway to also dictate what the aesthetics of the pole location would be.

Chairman Williams asked if there is a screening requirement for small cell facilities, and if not, for that to be included. Specific language would need to be crafted to address the aesthetics of poles with small cell wireless facilities.

Chairman Williams then asked, if there is a single carrier on a pole, would the equipment be required to be screened. Mr. Haskett stated that he did not know how the equipment would be screened because the equipment could be 20 or 30 feet up the pole. Chairman Williams asked how high the equipment would be mounted in a residential area and how close to the ground the equipment is mounted.

Mr. Wyder stated that there needs to be language put into the ZTA now concerning the aesthetics. Chairman Williams added that something should also be put in concerning the screening.

Ms. Morey stated that we don't know what the equipment of the future will look like.

Chairman Williams stated that years ago when the wireless tower information was put into the Town Code the Board talked about small cell wireless facilities which were not yet functional.

Ms. Morey asked that what is put into the Ordinance would have to be approved by the Town Council and that she feels that aesthetics have nothing to do with public safety.

Mr. Haskett stated that currently there are no standards that apply and that the criteria has to be in the Ordinance.

Ms. Morey asked, could it read, 'as approved by the Town?' and Mr. Haskett referred to Mr. Gallop for a reply.

Mr. Gallop stated no and this is what is called an 'improper delegation of legislative authority where you have to tell the Town what the people want and that would give Staff total and complete discretion on whether or not to allow something. In general, the Ordinances should be drafted to have as many objective standards as possible.

Ms. Morey then asked, 'can other objective standards be researched. Mr. Haskett indicated that other objective standards related to aesthetics, screening and decorations could be researched. Ms. Morey stated that that would be her preference instead of the Board trying to put something together at this meeting.

Mr. Wyder stated that he thinks the Board has one shot at defining the language and that the aesthetics and pole locations definitely need to be addressed. Mr. Haskett stated that those items would need to be included in a recommendation.

Mr. Haskett stated that Staff can come back to the Board and/or Town Council with suggested changes to reflect the aesthetics, screening, etc. and Staff felt it is important to proceed with what is in front of the Board at this meeting.

Chairman Williams stated that this needs to be done judiciously because his understanding is that the Town has already been approached concerning some of these issues and asked Mr. Haskett if that was correct. Mr. Haskett stated that Staff had received Applications for 8-10 small cell facilities on existing utility poles in a right-of-way.

Chairman Williams asked what type of motion Staff requires from the Board and Mr. Haskett stated that the Board had suggested an amendment on Page 3 related to the location of poles in front of vacant lots. Chairman Williams stated that that was correct. Mr. Haskett also stated that the Board had also discussed a second amendment to develop language on the aesthetics. Mr. Haskett stated that if the Board is so inclined the Board could recommend approval of the ZTA as amended, with one of the amendments being that the Staff research additional regulations addressing the aesthetics, screening and objective design standards. Chairman Williams asked for a motion to be made to that effect.

Mr. Wyder made a motion for the Board to approve ZTA as amended with regard to vacant lots and also with the recommendation that language be formulated by Staff and Mr. Gallop, if necessary, to address the aesthetics of the small cell wireless facilities to include screening or other issues that may be pertinent to Mr. Haskett's research.

Chairman Williams asked for a second and Mr. McGraw seconded the motion. Chairman Williams recommended that the ZTA go to Town Council as soon as possible. Mr. McGraw seconded the recommendation and it was passed unanimously.

C. **ZTA-18-07:** Zoning Text Amendment application submitted by the Town of Southern Shores to amend the Southern Shores Town Code by amending Section 36-132, Regulation of Structures and Uses Nonconforming.

Chairperson Williams introduced the application and called on Wes Haskett to present the Staff Report (attached).

Mr. Gallop came forward for his presentation. He stated that this is the second most confusing area of the Town Code. The concept is simple: If there is a nonconforming lot and no other lots are adjacent, an individual can build on it. This is in the existing Code. The only difference between the existing Code and this proposal is the setback for those nonconforming lots is proposed at 10 ft. The side yard setback could be 12 ft., or could be taken out completely. The 50 ft. wide lots were created at a time when there were no setbacks. When the Town was formed, side yard setbacks were established at 10 ft. This may or may not be more conducive for a 50 ft. lot. Later, the Town established 15 ft. wide side yard setbacks, which are currently in effect.

The other scenario, is when someone owns several adjacent lots and treats them as one property with one structure or otherwise, the Town wants those lots recombined. Those are the two basic concepts.

What the Ordinance tries to do is assure that adjacent lots, one of which is nonconforming, are combined into one lot.

Part of the problem with the existing Code language is that it combination only gets triggered, with a few exceptions, based on whether someone owns a conforming lot next to a nonconforming lot or if someone is building across property lines. However, even these situations don't always trigger a combination and in this ZTA it always triggers the requirement for a formal combination plat to be filed to make them one lot, or if there is enough space to make them multiple lots that all meet the standards of the Ordinance.

So, if someone has six adjacent 50 ft. wide lots, instead of making them one lot, they could make it three 100 ft. wide lots or, if they had seven 50 ft. wide lots, they could make it two 100 ft. lots and one 150 ft. lot. All the lots have to meet all of the Code requirements or the choice is to make it one lot. These are the two choices if any of the triggering provisions occur. The easier triggering provisions are A, B, and C which is where there is development or demolition proposed. When an applicant who wants to develop a nonconforming lot next to a conforming or nonconforming lot under the same ownership, the applicant cannot obtain a building permit until proof of combination of these lots is provided.

The proposed Subsection "a" is development of lots under the same ownership, which includes one or more nonconforming lots adjacent to one or more other lots under the same ownership. The current Code states that only a nonconforming lot or lots adjacent to a lot under the same ownership, instead of a nonconforming lot next to a nonconforming lot, under the same ownership, and in any same ownership, the lots have to be put together.

Subsection "b" is a situation where there is an existing residential structure and its associated use is where someone has treated multiple lots as one property and someone is seeking to demolish or change that structure by more than 50%; the lots would have to be recombined.

Subsection "c" is not necessarily related to nonconforming lots but, whenever there is a proposed structure that is to be located on two or more lots; i.e., if there are two vacant lots that happen to be 100' wide and conforming, lots the lots must be combined. Currently, the Ordinance would allow someone to do that and, in some cases, not combine the lots.

Subsections "d" and "e" are trickier to address from a practicality perspective because they apply to prior various sales or transfers, but they are important due to situations that the Town has had recently where there were transfers. With "b", if someone demolishes a house that is sitting across two lot lines, they would have to combine the two lots before a building permit could be issued. But, if they sold the lots and the two individuals buying them knew that later, they would do the demolition then there is no longer the same ownership and that is why the five-year period of ownership for "b" and "d" is in the proposed language. If there happens to be vacant land that was done the same way, they would be multiple nonconforming lots because, if the lots were sold, the lots would be back in the individual category of the section that could be built on separately.

Subsection "e" is the same situation, whether they are nonconforming lots or not. Sections 3 and 4 relate to how to determine whether or not lots are under the same ownership. There is really no easy way to determine that. This is language that was developed based on other language that was used in leases and other real property documents that try to deal with the same type of situation where someone is trying to keep another party from doing something.

Mr. Wyder referred back to Subsection B, demolition of redevelopment exceeding 50% of an existing structure or associated use that is currently or has been within the previous five years located on two or more lots under the same ownership. Mr. Wyder asked what criteria is being used for the existing structure's value. He also referenced the Dare County map in which someone could print out a sheet that describes a particular property that has a structure on it, it and gives the value of the structure, the value of the land and sometimes the value of miscellaneous. When indicating 50%, is that only of the structure or is that of the structure, the land and the miscellaneous combined.

Mr. Gallop stated that it would be only of the structure and that it is commonly done that way. It's usually in the Applicant's responsibility to explain how they met or did not meet the 50% rule. Often, they use the tax valuation but, on occasion, they will bring in an Appraiser, but, if the tax valuation doesn't work, they use which one works the best. Usually Planning Departments take whichever they bring in as long as there are no glaring or obvious cheating happening. Sometimes Planning Departments hire someone on the other side to confirm consistency and this is quite rare. This is a determination that the Health Department and CAMA uses and some define what can be brought and some don't. The way it works here, it would allow the Applicant to show that they meet or exceed the 50% in whatever way they determine in doing that.

Chairman Williams asked if the size of the structure is considered in determining the 50% rather than the value of the structure. Mr. Gallop stated 'no'.

Mr. Wyder referenced Subsection "d" and if that language was putting a stop to the teardowns. Mr. Gallop stated that it's a combination of "b" and "d". Subsection "d" is attempting to solve the problem for someone who has already done the demolition prior to having this done. Subsection "b" is solving it where someone is doing the demolition and they still own the property.

Mr. Wyder then stated that if someone has a large budget, they could be building houses on 50 ft. wide lots one after the other, which is not in keeping with Policy #2 of the Town's Land Use Plan.

Mr. Wyder addressed the LLC issue and if #3, Subsection "b" pertains and Mr. Gallop stated that it covers the same ownership and that portion doesn't cover any timeframe in which the lots had been in the same ownership. Mr. Gallop said the question is from what point are you measuring the 5 years from and "b" is measuring the 5 years from the time that someone comes in for a development or redevelopment application.

Mr. Neal asked if he was an investor and bought adjacent lots for investment, would the investor have to wait 5 years to divide the land and then request 50 ft. lots. Mr. Gallop gave an example: one developer putting the lots in one LLC with the same ownership and then wait 5 years and it is vacant land or not vacant, actually, "e" would be the provision that would apply and wouldn't have a 5 year provision. The 5 years is actually where you have to have a structure to be defined on a single lot. The 5 years only applies to "b", "d", and "e" saying that if you're selling any nonconforming lots and then they would have to be combined at the time of sale with the other lots owned. Subsection "d" is dealing with a structure being there and what has been looked at for most of what has come up. If you didn't have "d" prior to the sale, "b" would fail because someone could come in after it was completely transferred with different ownership. Also, the 5 year time period could have been longer or shorter, but, it was unlikely that someone was going to hold them for 5 years. It is 5 years from the application time

when someone comes in and could have been in the same ownership during that 5 year period where the structure crossed the lot lines.

Mr. Gallop went on to say that some of this will take some crafting of the Town's application where the application will have to change to add some different check boxes; i.e., do you own or control any property adjacent to you? And if someone checks that box 'yes', that would trigger some of the aforementioned considerations.

Ms. Morey asked if "d" and "e" would take effect prior to the sale and Mr. Gallop stated yes. Ms. Morey asked how is the Town going to know about land transactions and that there is nothing that is triggering notification. Mr. Gallop stated that when someone comes in to apply for a permit and they own the land at the time of application, and if the 50 ft. lot was owned by the same people two years ago, it couldn't be done and they should have combined. Ms. Morey confirmed that it's a buyer beware and they would have to know before they bought and Mr. Gallop stated that the provision is tricky to deal with from a practical perspective but it has to be there; otherwise, it leaves a gaping hole for the ability to transfer the lot(s) before any demolition can be done and in order to do any development that would trigger anything. The Town is never involved in any sale other than if someone has questions and the Town doesn't approve the sale or do anything like that; so, it's going to be a situation where someone is probably going to apply for a permit and be unhappy that they bought a piece of property where they potentially triggered the zoning provision that doesn't work well with their plan.

Mr. Gallop went on to say what the Town has to go on is their knowing what the law is in the General Statute. He also stated that a Real Estate Agent knows that this is there and the reason is to stop this from happening and as word gets out, it's less likely the provision will come into play.

Ms. Morey asked Mr. Gallop if, in his experience with other localities concerning nonconforming lots, if this has come up before their Boards. Mr. Gallop stated that this is not something he has dealt with and that other localities have slightly different nonconforming provisions.

Ms. Morey asked if he was confident that this will be comprehensive enough to do what Southern Shores wants to do. Mr. Gallop stated that it is better than what currently exists. It will cover the situations that the Town has dealt with and the typical situations that will come forth. The other thing to be aware of is, if spelled out wrong, it could force someone to subdivide and recombine if they subdivided it legally.

Ms. Morey stated that she is not comfortable with the setback in #1 based on the discussions. Mr. Gallop stated that there is no real purpose for any particular setback and 10 ft. was chosen because there was a long period of time when 50 ft. lots were subject to 10 ft. setbacks and there hasn't been a time where the setbacks were 12 ft. If the setback is left at 15 ft. on some lots, people will probably come in for a Variance.

Mr. Wyder asked why did the setback go from 10 ft. to 15 ft. Ms. Morey called on Council member Jim Connors who stated that it was to address the large house issue. Mr. Gallop stated that technically with setbacks there will always be some form of safety issues because as buildings become larger, lesser setbacks will become more dangerous. At the time there weren't any 50 ft. lots being developed. People were targeting bigger houses on bigger lots and that perspective has taken into account people trying to maximize the lot rather than being able to use a smaller lot.

Ms. Morey asked how this affected the Variance that was denied before the Board of Adjustment at this meeting where the applicant had owned 2 lots for a period of time and

purchased the 50 ft. lot in 2014. Mr. Gallop stated that if Mr. House comes in to get a permit for the 50 ft. lot then he would be required to recombine, and if he sells the lot he won't be able to sell it because he will have to recombine. It has to be treated as his lot or do something with it before this passes. Ms. Morey asked if Mr. House could sell the lot to have a house built on it and Mr. Gallop stated no.

Mr. Wyder asked if a utility structure could be built on it and Mr. Gallop stated he would have to recombine because he would be treating it as one use.

Chairman Williams referenced #2, page 3 of 4; (i) and (ii). (i) is a single lot and read #2 and asked if both statements needed to be in #2 and maybe it could be read as 'a single lot or multiple lots which all meet the minimum requirements. Mr. Gallop stated that he and Mr. Haskett had disagreed to some degree on that language but Mr. Haskett is correct and if just using the term 'single lot without explaining that it may or may not meet minimum requirements', someone, will want to know exactly what that means and whether or not meeting minimum requirements applies to the single lot or not; so, at a minimum in that way it's spelled out with the (i) and (ii) and in the long term it makes it clearer and the desire is to make it as big a piece of land that one can make it.

Chairman Williams referenced and read subsection "a" and asked if it could be interpreted that the first time same ownership is mentioned as person, "A" and the second time mentioned, it could be person "A" or "B" and Mr. Gallop stated that, under the same ownership that the first one should not be there and it should be development is proposed upon land which includes one or more nonconforming lots adjacent to one or more other lots under the same ownership.

Chairman Williams asked about takings; i.e., can someone have a house built on a lot or a couple of lots and there is an adjacent 50 ft. wide lot, and the lots have to be combined; is that a 'taking'? Mr. Gallop referenced a recent case that the Supreme Court ruled on and it is 'not'.

Chairman Williams referenced Page 3 of 4, line 30, 4a (i) which Chairman Williams read and then asked what if it were a child or brother, step sibling/parent, is the term 'spouse' to confining/narrow. Mr. Gallop stated that it could be and the term does not encompass the other possibilities that Chairman Williams mentioned. Chairman Williams stated that if the change is made to the phrase 'family member' is there a legal definition of how extended that 'family' can be? Mr. Gallop stated that sometimes they are described in terms of degrees; a certain degree family member and he would need to defer to Robert Hobbs who handles Wills and possibly draft some language that could change that to family members of a certain degree. He also stated that this could possibly expanded to 2nd and 3rd cousins, kids, etc. and defining it as 'family' at some point and that would probably be too broad and some limitations would have to be put in as to how far the 'family' would be defined.

Chairman Williams asked if it would be better putting in some form of limitation rather than just stating 'spouse' and Mr. Gallop stated that 'spouse' is enough for potential ownership. Mr. Haskett interjected by referencing the existing code which read: Family means one or more persons occupying a single-family dwelling unit unless all members are related either by blood or marriage or that the dwelling is being used as a vacation rental and asked if it would suffice to state 'related by blood or marriage? Mr. Gallop stated no, not without the degree language and at some point, 'family related by blood' and very distant; language could be expanded and the easy expansion could be 'spouse' or 'children of the owner'; 'spouse, children or parents of the owner.'

Chairman Williams stated to use 'family' and then modify the definition of 'family' to reflect the degree or 'family' by blood marriage and parents and children' and Mr. Gallop told the Board to tell him how they wanted to define 'family' and Chairman Williams stated that he would be happy with 'parents and children or step parents/children'. Mr. Gallop asked about siblings and Chairman Williams stated 'siblings' could be included and Mr. Gallop stated that he could prepare some language for the Board to review for when it goes to Council. Mr. Haskett stated to include in the recommendation that Staff should address 'family' in the language.

Chairman Williams asked for public comments.

Ann Sjoerdsma stated that she had written a blog article about the ZTA asked when the proposed language had been revised. Glenn Wyder stated that ZTA's are subject to change during the review process and the Town had posted the revised language on the Town website for public review. The public is welcome to come to any of the meetings and that he has heard from some people that there is a lack of transparency and he doesn't know what is more transparent than a public meeting. Sometimes things change and if people are that interested, they need to check the website on a regular basis.

Chairman Williams then asked about #1: The lot 50 ft. wide or less may use a side yard setback of 10 ft. and Mr. Neal stated he would prefer a 12 ft. setback requirement and Chairman Williams stated that he preferred 10 ft. because a 30 ft. wide house on pilings that is 2 two stories, aesthetically look better for a narrow house that is that tall. Also, the Town used to have a 10 ft. setback requirement and he had spoken to the Fire Chief and the Fire Chief has no problem with 12 ft., 15 ft., or 10 ft.

Mr. Wyder made the motion to change the side yard setbacks from 10 ft. to 12 ft. Ms. Morey seconded the motion. The motion passed (4-1) with Chairman Williams voting no.

David Neal made a motion to amend the 5 year requirement in subsection "b" and "d" to 7 years. Glenn Wyder seconded the motion. The motion passed unanimously.

Joe McGraw motioned to recommend that family be expanded once Mr. Gallop has made a determination. Elizabeth Morey seconded the motion. The motion passed unanimously.

Joe McGraw made a motion to recommend approval of the ZTA to the Town Council as amended. Glenn Wyder seconded the motion. The motion passed unanimously.

**VIII. PUBLIC COMMENT:**  
None.

**IX. PLANNING BOARD MEMBER COMMENTS:**  
None.

**X. ANNOUNCEMENTS:**  
Chairperson Williams stated that the next meeting would be held on June 18, 2018.

**XI. ADJOURNMENT:**  
David Neal motioned to adjourn. Joe McGraw seconded the motion. The motioned passed unanimously and the meeting adjourned at 8:00 p.m.

ATTEST:

  
\_\_\_\_\_  
Glenn Wyder, Chairperson

RESPECTFULLY SUBMITTED:

  
\_\_\_\_\_  
Wes Haskett, Town Planner

## STAFF REPORT

**To:** Southern Shores Planning Board  
**Date:** May 17, 2018  
**Case:** VA-18-04  
**Prepared By:** Wes Haskett, Town Planner/Code Enforcement Officer

### GENERAL INFORMATION

**Applicant:** House Engineering, P.C.  
 P.O. Box 466  
 Kitty Hawk, NC 27949

**Requested Action:** Variance from Section 36-202, (d), Dimensional Requirements for the RS-1 Single-family Residential District

**PIN #:** 986712857986  
**Location:** 85A Ocean Blvd.  
**Zoning:** RS-1, Single-Family Residential District

**Existing Land Use:** "Residential"

**Surrounding Land Use & Zoning:**

North- Residential; RS-1, Single-Family Residential District  
 South- Residential; RS-1, Single-Family Residential District  
 East- Residential; RS-1, Single-Family Residential District  
 West- Conservation; RS-1, Single-Family Residential District

**Physical Characteristics:** Vacant

**Applicable Regulations:** Chapter 36, Zoning Ordinance: Article III, Interpretation and Definition of Terms; Article V, Nonconformities; Article VII, Schedule of District Regulations, Article XII, Board of Adjustment.

### ANALYSIS

The applicant is requesting a variance of five feet on both (north and south) side yard setback requirements by reducing the requirements from fifteen feet to ten feet. The width of the subject property is 50 ft. which would result in a single-family dwelling that could not exceed 20 ft. in width if the applicable side yard setback requirements are met. The property owner, Richard M. White, also owns the adjacent parcel which consists of a single-family dwelling sitting on two 50 ft. wide lots.

Section 36-367 of the Town Zoning Ordinance establishes that the Planning Board, when performing the duties of the Town Board of Adjustment, shall vary any of the provisions of the Zoning Ordinance upon a showing of all of the following:

- (1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
  - The subject property is 50 ft. wide with 15 ft. side yard setback requirements which leaves a width of 20 ft. for development. To the best of Town Staff's knowledge, there are no existing 20 ft. wide single-family dwellings in the Town.
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
  - There are several other 50 ft. wide vacant lots of record that are oceanfront and non-oceanfront. There are also existing single-family dwellings that are built on multiple 50 ft. lots that encroach the currently applicable 15 ft. side yard setback requirement.
- (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
  - The subject property is a lot of record that was established prior to the Town's incorporation with a width of 50 ft. and subsequently purchased by the current owner.
- (4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
  - The Town's Zoning Ordinance allows for development on nonconforming lots of record. Section 36-132, (a), (1) states that in any district in which single-family dwellings are permitted, a single-family dwelling and customary accessory buildings may be erected on any single lot of record on the effective date of adoption of the ordinance from which the chapter is derived, notwithstanding limitations imposed by other provisions of the chapter. These provisions shall apply even though such lot fails to meet the requirements for area or width, that are generally applicable in the district provided that yard dimensions and requirements other than these applying to area or width, or both, of the lot shall conform to the regulations for the district in which such lot is located. Variance of yard requirements shall be obtained only through action of the Board of Adjustment as established in article XII of the chapter.

## STAFF REPORT

**To:** Southern Shores Planning Board  
**Date:** May 17, 2018  
**Case:** ZTA-18-06  
**Prepared By:** Wes Haskett, Town Planner/Code Enforcement Officer

### GENERAL INFORMATION

**Applicant:** Town of Southern Shores

**Requested Action:** Amendment of the Town Zoning Ordinance by amending Section 36-175, Wireless Telecommunications Sites, Facilities and Towers

### ANALYSIS

Town Staff is proposing to amend the Town Zoning Ordinance by amending Section 36-175, Wireless Telecommunications Sites, Facilities and Towers by adding additional regulations to address the placement of new utility poles used for attaching small cell wireless facilities. The proposed amendments include the following additional regulations:

1. No new utility pole may be installed for the principal use of wireless facilities if a pole exists within twenty (20) feet of a desired location.
2. The minimum distance of a new pole from any residential structure shall be at least 150% of the pole height and shall not be located directly in front of any residential structure located in a residential zoning district.
3. Along streets and within subdivisions where there are no existing utility poles (all underground utilities), wireless facilities may be attached to street lights in the public right-of-way.
4. New poles may not be erected in a residential area solely for wireless communication equipment attachment unless the applicant has demonstrated it cannot reasonably provide service by:
  - Installing poles outside of the residential area;
  - Attaching equipment to existing poles within the right-of-way; or
  - Installing poles in rights-of-way not contiguous to parcels used for single family residential purposes.

The Town's currently adopted Land Use Plan contains the following Policy that is applicable to the proposed ZTA:

- **Policy 2:** The community values and the Town will continue to comply with the founder's original vision for Southern Shores: a low density residential community comprised of single family dwellings on large lots (served by a small commercial district for convenience shopping and services located at the southern end of the Town. This blueprint for land use naturally protects environmental resources and fragile areas by limiting development and growth.

**RECOMMENDATION**

Town Staff has determined that the proposed amendment is consistent with the Town's currently adopted Land Use Plan and Town Staff recommends that the Board consider this when making its recommendation to the Town Council. Please note that prior to adopting or rejecting any zoning amendment, the Planning Board shall adopt a statement describing whether its action is consistent with the adopted Town Comprehensive Land Use Plan and explaining why the Planning Board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.

**STAFF REPORT**

**To:** Southern Shores Planning Board  
**Date:** May 17, 2018  
**Case:** ZTA-18-07  
**Prepared By:** Wes Haskett, Town Planner/Code Enforcement Officer

**GENERAL INFORMATION**

**Applicant:** Town of Southern Shores

**Requested Action:** Amendment of the Town Zoning Ordinance by amending Section 36-132, Regulation of Structures and Uses Nonconforming

**ANALYSIS**

Town Staff is proposing to amend the Town Zoning Ordinance by amending Section 36-132, Regulation of Structures and Uses Nonconforming to address the development of legally nonconforming lots. Since 2016, the Town has received and the Town Planning Board, performing the duties of the Town Board of Adjustment, has approved several requests for variances to reduce the side yard setback requirements for nonconforming lots from 15 feet to 12 feet. The proposed language addresses scenarios that would require the recombination of previously platted lots in order to preclude the development of individual nonconforming lots that would be contrary to the Town’s currently adopted Land Use Plan. The proposed language also includes a reduction in the side yard setback requirements from 15 feet to 10 feet which would apply in certain instances when the development of an individual nonconforming lot may be allowed.

The Town’s currently adopted Land Use Plan contains the following Policy that is applicable to the proposed ZTA:

- **Policy 2:** The community values and the Town will continue to comply with the founder’s original vision for Southern Shores: a low density residential community comprised of single family dwellings on large lots (served by a small commercial district for convenience shopping and services located at the southern end of the Town. This blueprint for land use naturally protects environmental resources and fragile areas by limiting development and growth.

**RECOMMENDATION**

Town Staff has determined that the proposed amendment is consistent with the Town’s currently adopted Land Use Plan and Town Staff recommends that the Board consider this when making its recommendation to the Town Council. Please note that prior to adopting or rejecting any zoning amendment, the Planning Board shall adopt a statement describing whether its action is consistent with the adopted Town Comprehensive Land Use Plan and explaining why the Planning Board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.

