



TOWN OF KILL DEVIL HILLS
Land Where Flight Began

MEMORANDUM

February 12, 2020

TO: Mayor and Board of Commissioners

FROM: Debora P. Díaz, Town Manager

REF: Public Hearing

1. Recommended Amendment to Chapter 153, Zoning

A. Chapter 153, Zoning, § 153.071 Soil Erosion and Sedimentation Control – to update the ordinance to meet state requirements (Attached PH-1A)

The Planning Board reviewed this recommended amendment to Chapter 153, Zoning, at its December 17, 2019, meeting, and voted to forward it to the Board of Commissioners, with a favorable recommendation. The Board of Commissioners scheduled the public hearing for tonight's meeting at the January 13, 2020, meeting. The Town Attorney has reviewed the recommended amendment and has found it to be in compliance with applicable North Carolina law.

If approved, this amendment will update the Town's current ordinance to meet state requirements, including those listed on the attached Summary of Changes. At the conclusion of the public hearing, a motion will be in order to approve, disapprove, or table the amendment for further consideration. Additionally, a finding must be established by the Board with respect to the change; therefore, in the motion to approve or disapprove the amendment, the following language is to be included:

“The Board of Commissioners finds that the amendment to § 153.071 Soil Erosion and Sedimentation Control – to update the ordinance to meet state requirements – is (consistent) (inconsistent) with all comprehensive plans or other officially adopted plans of the Town of Kill Devil Hills that are applicable and that the amendment is (reasonable) (unreasonable) in the public interest because _____.”

**Recommended Amendment to Chapter 153, Zoning,
§153.071 Soil Erosion and Sedimentation Control**

§ 153.071 Soil Erosion and Sedimentation Control – to update the ordinance to meet state requirements. Chapter 153, § 153.071 provides rules and regulations that allow development within Kill Devil Hills while preventing pollution by sedimentation. The Town participates as a local program to implement the Sedimentation Pollution Control Act and in order to continue to qualify for this program, Kill Devil Hills must be in compliance with North Carolina’s requirements, which includes updating the ordinance to meet the state model.

Summary of Changes

Some changes under the recommended amendment include:

(B) Scope and exclusions.

(2)(f) & (g): [page 2]

- Clarify exclusions to land-disturbing activities, including:
 - Impact mitigation under Section 404 of the Clean Water Act
 - Restoration of converted wetlands pursuant to the Natural Resource Conservation Service

(D) Mandatory standards for land-disturbing activity.

(3): [page 3]

- Clarify some fill materials in land-disturbing activities exceeding certain sizes or types that would require a permit from the Division of Waste Management and regulation as a landfill.

(E) Erosion and sedimentation control plans.

(9 & 10): [page 5]

- The Town may disprove a plan based on its content, or if the plan will violate Environmental Management Commission rules.

(18): [page 6]

- Financial responsibility for inspections is required for the landowner, financially responsible party, or their agent.

(H) Storm Water Outlet Protection. [retitled]

(2)(b): [page 8]

- Increase in the Maximum Permissible Velocities Table.
 - Graded, silt to cobbles (colloidal) from 1.5 to 1.7

Additional minor changes include several format revisions to parallel State regulations, including renaming of some sections and reorganization of others within the body of the existing ordinance.

AN ORDINANCE AMENDING THE KILL DEVIL HILLS TOWN CODE,
CHAPTER 153, ZONING

BE IT HEREBY ORDAINED BY THE Kill Devil Hills Board of Commissioners that
Chapter 153, Zoning, of the Kill Devil Hills Town Code, shall be amended by:

1. Deleting Section 153.071 Soil Erosion and Sedimentation Control, in its entirety; and,
2. Adopting a new Section 153.071 Soil Erosion and Sedimentation Control, as follows:

§ 153.071 SOIL EROSION AND SEDIMENTATION CONTROL.

(A) Purpose.

(1) Regulate certain land-disturbing activity to control accelerated erosion and sedimentation in order to prevent the pollution of water and other damage to lakes, watercourses and other public and private property by sedimentation.

(2) Reduce damage to storm drainage facilities.

(3) Cooperate in the coordination of the related goals expressed by state and federal regulations and that require certain actions with regard to stormwater management, soil erosion and sedimentation control, floodplain management and the like.

(4) Establish procedures through which this regulation can be fulfilled.

(B) Scope and exclusions.

(1) Geographical Scope of Regulated Land-Disturbing Activity. This section shall apply to land-disturbing activity within the territorial jurisdiction of the town and to the extraterritorial jurisdiction of the town as allowed by agreement between local governments, the extent of annexation or other appropriate legal instrument or law.

(2) Exclusions from regulated land-disturbing activity. Notwithstanding the general applicability of this section to all land-disturbing activity, this section shall not apply to the following types of land-disturbing activity:

(a) An activity, including breeding and grazing of livestock, undertaken on agricultural land for the production of plants and animals useful to man, including, but not limited to:

1. Forage and sod crops, grain and feed crops, tobacco, cotton, and peanuts.
2. Dairy animals and dairy products.
3. Poultry and poultry products.

4. Livestock, including beef cattle, sheep swine, horses, ponies, mules, and goats.
5. Bees and apiary products.
6. Fur producing animals.

(b) An activity undertaken on forestland for the production and harvesting of timber and timber products and conducted in accordance with best management practices set out in Forest Practice Guidelines Related to Water Quality, as adopted by the Department. If land-disturbing activity undertaken on forestland for the production and harvesting of timber and timber products is not conducted in accordance with Forest Practice Guidelines Related to Water Quality, the provisions of this section shall apply to such activity and any related land-disturbing activity on the tract.

(c) An activity for which a permit is required under the Mining Act of 1971, G.S. Ch. 75, Art. 7.

(d) A land-disturbing activity over which the state has exclusive regulatory jurisdiction as provided in G.S. § 113A-56(a).

(e) An activity which is essential to protect human life during an emergency.

(f) Activities undertaken to restore the wetland functions of converted wetlands to provide compensatory mitigation to offset impacts permitted under Section 404 of the Clean Water Act.

(g) Activities undertaken pursuant to Natural Resources Conservation Service standards to restore the wetlands functions of converted wetlands as defined in Title 7 Code of Federal Regulations § 12.2.

(3) Plan approval exceptions. Notwithstanding the general requirement to obtain a plan approval prior to undertaking land-disturbing activity, a plan approval shall not be required for land-disturbing activity that does not exceed 1/2 acre in surface area. In determining the area, lands under one or diverse ownership being developed as a unit will be aggregated.

(C) *General requirements.*

(1) No person shall initiate any land-disturbing activity which uncovers more than 1/2 acre without having an erosion control plan approved by the town.

(2) Persons conducting land-disturbing activity shall take all reasonable measures to protect all public and private property from damage caused by such activity.

(3) Whenever conflicts exist between federal, state or local laws, ordinances or rules, the more restrictive provision shall apply.

(D) *Mandatory standards for land-disturbing activity.* No land-disturbing activity subject to the control of this section shall be undertaken except in accordance with the following mandatory standards:

(1) No land-disturbing activity shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the 25% of the buffer zone nearer the land-disturbing activity, provided that this subsection shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over or under a lake or natural watercourse.

(2) The angle for graded slopes and fills shall be no greater than the angle which can be retained by vegetative cover or other adequate erosion control devices or structures. In any event, slopes left exposed will, within 21 days of any phase of grading, be planted or otherwise provided with ground cover, devices or structures sufficient to restrain erosion. The angle for the graded slopes and gills must be demonstrated to be stable. Stable is the condition where the soil remains in its original configuration, with or without mechanical constraints.

(3) Unless a permit from the Department's Division of Waste Management to operate a landfill is on file for the official site, acceptable fill material shall be free of organic or other degradable materials, masonry, concrete and brick in sizes exceeding twelve (12) inches, and any materials which would cause the site to be regulated as a landfill by the State of North Carolina.

(4) Whenever land-disturbing activity is undertaken on a tract comprising more than 1/2 acre, the person conducting the land-disturbing activity shall install such sedimentation and erosion control devices and practices as are sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of said tract and shall plant or otherwise provide a permanent ground cover sufficient to restrain erosion after completion of construction or development within 15 working days or 90 calendar days, whichever is shorter.

(5) No person shall initiate any land-disturbing activity if more than 1/2 acre is to be uncovered, unless 30 or more days prior to initiating the activity an erosion and sedimentation control plan for such activity is filed with and approved by the town.

(6) Buffer measurement. Unless otherwise provided, the width of a buffer zone is measured horizontally from the edge of the water to the nearest edge of the disturbed area, with the 25% of the strip nearer the land-disturbing activity containing natural or artificial means of confining visible siltation.

(7) The land disturbing activity shall be conducted in accordance with the approved erosion and sedimentation control plan.

(E) *Erosion and sedimentation control plans.*

(1) An erosion control plan shall be prepared for all land-disturbing activities subject to this section whenever the proposed activity is to be undertaken on a tract comprising more than 1/2 acre, if more than 1/2 acre is to be uncovered. The plan shall be filed with the town and the Dare County Soil and Water Conservation District 30 days prior to the commencement of the proposed activity.

(2) The town shall forward to the Director of the Division of Water Quality a copy of each erosion and sedimentation control plan for a land-disturbing activity that involves the utilization of ditches for the purpose of de-watering to lowering the water table of the tract.

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(3) Prior plan approval. No persons shall initiate land-disturbing activity if more than 1/2 acre is to be uncovered unless, 30 or more days prior to initiating the activity, a plan for such activity is filed with and approved by the town. The town shall forward to the Director of the Division of Water Quality a copy of each plan for a land-disturbing activity that involves utilization of ditches for the purpose of de-watering or lowering the water table of the tract.

(4) Financial Responsibility and ownership. Plans shall be disapproved unless accompanied by an authorized statement of financial responsibility and ownership. This statement shall be signed by the person financially responsible for the land-disturbing activity or his attorney in fact. The statement shall include the mailing and street addresses of the principal place of business of the person financially responsible, the owner of the land, and any registered agents. If the person financially responsible is not a resident of North Carolina, a North Carolina agent must be designated in the statement for the purpose of receiving notice of compliance or noncompliance with the plan, the Act, this section, or rules or orders issued pursuant to this section. If the applicant is not the owner of the land to be disturbed, the draft erosion and sedimentation control plan must include the owner's written consent for the applicant to submit a draft erosion and sedimentation control plan and to conduct the anticipated land-disturbing activity.

(5) Environmental Policy Act Document. Any plan submitted for a land-disturbing activity for which an environmental document is required by the North Carolina Environment Policy Act (G.S. § 113A-1, *et seq.*) shall be deemed incomplete until a complete environmental document is available for review. The town shall promptly notify the person submitting the plan that the 30-day time limit for review of the plan pursuant to this section shall not begin until a complete environmental document is available for review.

(6) Soil and Water Conservation District comments. The District shall review the plan and submit any comments and the District and the town may agree upon recommendations to the town within 20 days after the District received the plan, or within any shorter period of time. Failure of the District to submit its comments within 20 days or within any agreed upon shorter period of time shall not delay final action on the plan.

(7) The Town Department of Planning and Inspections will review each plan submitted to them and within 30 days of receipt thereof will notify the person submitting the plan that it has been approved, approved with modifications, approved with performance reservations or disapproved. Failure to approve or disapprove a complete erosion and sedimentation control plan within 30 days of receipt shall be deemed approval. Denial of a plan will specifically state in writing the reasons for denial. The town will approve or deny a revised plan within 15 days of receipt or it is deemed to be approved. If, following commencement of a land-disturbing activity pursuant to an approved plan, the town determines that the plan is inadequate to meet the requirements of this section, it require such revisions as are necessary to comply with this section.

(8) The town shall only approve a Plan upon determining that it complies with all applicable State and local regulations for erosion and sedimentation control. The town shall condition approval of Plans upon the applicant's compliance with federal and state water quality laws,

regulations and rules. The town shall establish an expiration date, not to exceed three (3) years, for Plans approved under this ordinance.

(9) The town may disapprove a Plan or draft Plan based on its content. A disapproval based upon a Plan's content must specifically state in writing the reasons for disapproval.

(10) Other disapprovals. The town shall disapprove a plan or draft plans if implementation of the plan would result in a violation of the rules adopted by the Environmental Management Commission to protect riparian buffers along surface waters. A local government shall disapprove a plan upon finding that an applicant, or a parent, subsidiary, or other affiliate of the applicant:

(a) Is conducting or has conducted land-disturbing activity without an approved plan, or has received notice of violation of a plan previously approved by the Commission or a local government pursuant to the Act and has not complied with the notice within the time specified in the notice;

(b) Has failed to pay a civil penalty assessed pursuant to the Act or a local ordinance adopted pursuant to the Act by the time the payment is due;

(c) Has been convicted of a misdemeanor pursuant to G.S. § 113A-64(b) or any criminal provision of a local ordinance adopted pursuant to the Act or;

(d) Has failed to substantially comply with state rules or local ordinances and regulations adopted pursuant to the Act.

For purposes of this subsection, an applicant's record shall be considered for only the two years prior to the application date.

In the event that a plan is disapproved pursuant to this subsection, the town shall notify the Director of such disapproval within ten days. The town shall advise the applicant and the Director in writing as to the specific reasons that the plan was disapproved.

(11) Notice of activity initiation. No person may initiate a land-disturbing activity before notifying the agency that issued the plan approval of the date that land-disturbing activity will begin.

(12) The plan required by this section shall contain architectural and engineering drawings, maps, assumptions, calculations and narrative statements as needed to adequately describe the proposed development of the tract and the measures planned to comply with the requirements of this section. Plan content may vary to meet the needs of specific site requirements. Detailed guidelines for plan preparation will be provided on request.

(13) Preconstruction conference. When deemed necessary by the approving authority a preconstruction conference may be required.

(14) Display of plan approval. A plan approval issued under this article shall be prominently displayed until all construction is complete, all permanent sedimentation and erosion control measures are installed and the site has been stabilized. A copy of the approved plan shall be kept on file at the job site.

(15) Required revisions. After approving a plan, if the town either upon review of such plan or on inspection of the job site, determines that a significant risk of accelerated erosion or off-site sedimentation exists, the town shall require a revised plan. Pending the preparation of the revised plan, work shall cease or shall continue under conditions outlined by the appropriate authority. If following commencement of a land-disturbing activity pursuant to an approved plan, the town determines that the plan is inadequate to meet the requirements of this section, the town shall require any revision of the plan that is necessary to comply with this section.

(16) Applications for amendment of an erosion control plan in written and/or graphic form may be made at any time under the same conditions as the original application. Until such time as an amendment is approved, the land-disturbing activity shall not proceed except in accordance with the erosion control plan as originally approved.

(17) Any person engaged in land-disturbing activity who fails to file a plan in accordance with this section or who conducts a land-disturbing activity, except in accordance with provisions of an approved plan, shall be deemed in violation of this section.

(18) The landowner, the financially responsible party, or the landowner's or the financially responsible party's agent shall perform an inspection of the area covered by the plan after each phase of the plan has been completed and after establishment of temporary ground cover in accordance with G.S. 113A-57(2). The person who performs the inspection shall maintain and make available a record of the inspection at the site of the land-disturbing activity. The record shall set out any significant deviation from the approved erosion control plan, identify any measures that may be required to correct the deviation, and document the completion of those measures. The record shall be maintained until permanent ground cover has been established as required by the approved erosion and sedimentation control plan. The inspections required by this subsection shall be in addition to inspections required by G.S. 113A-61.1.

(F) *Basic control objectives.* An erosion and sedimentation control plan ~~may~~ shall be disapproved if the plan fails to address the following objectives:

(1) *Identify critical areas.* On-site areas which are subject to severe erosion and off-site areas which are especially vulnerable to damage from erosion and/or sedimentation are to be identified and receive special attention.

(2) *Limit time of exposure.* All land-disturbing activity is to be planned and conducted to limit exposure to the shortest feasible time.

(3) *Limit exposed areas.* All land-disturbing activity is to be planned and conducted to minimize the size of the area to be exposed at any one time.

(4) *Control surface water.* Surface water runoff originating upgrade of exposed areas should be controlled to reduce erosion and sediment loss during the period of exposure.

(5) *Control sedimentation.* All land-disturbing activity is to be planned and conducted so as to prevent off-site sedimentation damage.

(6) *Manage stormwater runoff.* When the increase in the velocity of stormwater runoff resulting from a land-disturbing activity is sufficient to cause accelerated erosion of the receiving

watercourse, plans are to include the measures to control the velocity at the point of discharge so as to minimize accelerated erosion of the site and increased sedimentation of the stream.

(G) *Design and performance standards.*

(1) Except as provided in this section, erosion and sedimentation control measures, structures, and devices shall be planned, designed, and constructed to provide protection from the calculated maximum peak rate of runoff from the ten-year storm. Runoff rates shall be calculated using the procedures in the USDA, Soil Conservation Service's *National Engineering Field Manual for Conservation Practices*, or other acceptable procedures.

(2) HQW zones. In high quality water (HQW) zones the following design standards shall apply:

(a) Limit on uncovered area. Uncovered areas in HQW zones shall be limited at any time to a maximum total area of 20 acres within the boundaries of the tract. Only the portion of the land-disturbing activity within a HQW zone shall be governed by this section. Larger areas may be uncovered within the boundaries of the tract with the written approval of the Director.

(b) Maximum peak rate of runoff protection. Erosion and sedimentation control measures, structures, and devices within HQW zones shall be planned, designed and constructed to provide protection from the runoff of the 25-year storm which produces the maximum peak rate of runoff as calculated according to procedures in the USDA, Soil Conservation Service's *National Engineering Field Manual for Conservation Practices* or according to procedures adopted by any other agency of this state or the United States or any generally recognized organization or association.

(c) Settling efficiency. Sediment basins within HQW zones shall be designed and constructed such that the basin will have a settling efficiency of at least 70% for the 40 micron (0.04 millimeter) size soil particle transported into the basin by the runoff of that two-year storm which produces the maximum peak rate of runoff as calculated according to procedures in the USDA, Soil Conservation Service's *National Engineering Field Manual for Conservation Practices* or according to procedures adopted by any other agency of this state or the United States or any generally recognized organization or association.

(d) Grade. Newly constructed open channels in HQW zones shall be designed and constructed with side slopes no steeper than two horizontal to one vertical if a vegetative cover is used for stabilization unless soil conditions permit a steeper slope or where the slopes are stabilized by using mechanical devices, structural devices or other acceptable ditch liners. In any event, the angle for side slopes shall be sufficient to restrain accelerated erosion.

(e) Ground cover. Ground cover sufficient to restrain erosion must be provided for any portion of a land-disturbing activity in a HQW zone within 15 working days or 60 calendar days following completion of construction or development., whichever period is shorter.

(H) *Storm Water Outlet Protection.*

(1) Intent. Stream banks and channels downstream from any land-disturbing activity shall be protected from increased degradation by accelerated erosion caused by increased velocity of runoff from the land-disturbing activity.

(2) Persons shall conduct land-disturbing activity such that the post-construction velocity of the ten-year storm runoff in the receiving watercourse to the point of discharge shall not exceed the greater of:

(a) The velocity established by the Maximum Permissible Velocities Table set out within this subsection; or

(b) The velocity of the ten-year storm runoff in the receiving watercourse prior to development. If conditions (a) and (b) of this paragraph cannot be met then the receiving watercourse to and including the discharge point shall be designed and constructed to withstand the expected velocity anywhere the velocity exceeds the "prior to development" velocity by 10%.

Maximum Permissible Velocities Table

The following is a table for maximum permissible velocity for stormwater discharges in feet per second (F.P.S.) and meters per second (M.P.S.):

<i>MATERIAL</i>	<i>F.P.S.</i>	<i>M.P.S.</i>
Fine sand (noncolloidal)	2.5	.8
Sandy loam (noncolloidal)	2.5	.8
Silt loam (noncolloidal)	3.0	.9
Ordinary firm loam	3.5	1.1
Fine gravel	5.0	1.5

<i>MATERIAL</i>	<i>F.P.S.</i>	<i>M.P.S.</i>
Stiff clay (very colloidal)	5.0	1.5
Graded, loam to cobbles (noncolloidal)	5.0	1.5
Graded, silt to cobbles (colloidal)	5.5	1.7
Alluvial silts (noncolloidal)	3.5	1.1
Alluvial silts (colloidal)	5.0	1.5
Coarse gravel (noncolloidal)	6.0	1.8

Cobbles and shingles	5.5	1.7
Shales and hard pans	6.0	1.8

Source – Adapted from recommendations by Special Committee on Irrigation Research, American Society of Civil Engineers, 1926, for channels with straight alignment. For sinuous channels, multiply allowable velocity by 0.95 for slightly sinuous, by 0.9 for moderately sinuous channels, and by 0.8 for highly sinuous channels.

(3) Measures applied alone or in combination to satisfy the intent of this section are acceptable if there are no objectionable secondary consequences. It is recognized that the management of stormwater runoff to minimize or control downstream channel and bank erosion is a developing technology. Innovative techniques and ideas will be considered and may be used when shown to have the potential to produce successful results. Some alternatives are to:

(a) Avoid increases in surface runoff volume and velocity by including measures to promote infiltration to compensate for increased runoff from areas rendered impervious;

(b) Avoid increases in stormwater discharge velocities by using vegetated or roughened swales and waterways in lieu of closed drains and high velocity paved sections;

(c) Provide energy dissipaters at outlets of storm drainage facilities to reduce flow velocities at the point of discharge. These may range from simple rip-rapped sections to complex structures;

(d) Protect watercourses subject to accelerated erosion by improving cross section and/or providing erosion-resistant lining; and

(e) Upgrade or replace the receiving device structure, or watercourse such that it will receive and conduct the flow to a point where it is no longer subject to degradation from the increased rate of flow or increased velocity.

(4) This rule shall not apply where it can be demonstrated that stormwater discharge velocities will not create an erosion problem in the receiving watercourse.

(I) *Borrow and waste areas.* When the person conducting the land-disturbing activity is also the person conducting the borrow or waste disposal activity, areas from which borrow is obtained and which are not regulated by the provisions of the Mining Act of 1971, and any waste areas for surplus materials other than landfills regulated by the Department of Human Resources, Division of Health Services, shall be considered as part of the land-disturbing activity where the borrow material is being used or from which the waste material originated. When the person conducting the land-disturbing activity is not the person obtaining the borrow and/or disposing of the waste, these areas shall be considered a separate land-disturbing activity.

(J) *Access and haul roads.* Temporary access and haul roads, other than public roads, constructed or used in connection with any land-disturbing activity shall be considered a part of such activity.

(K) *Operations in lakes or natural watercourses.* Land-disturbing activity in connection with construction in, on, over or under a lake or natural watercourse shall be planned and conducted in such a manner as to minimize the extent and duration of disturbance of the stream channel. The relocation of a stream, where relocation is an essential part of the proposed activity, shall be planned and executed so as to minimize changes in the stream flow of characteristics, except when justification for significant alteration to flow characteristic is provided.

(L) *Responsibility for maintenance.* During the development of a site, the person conducting the land-disturbing activity shall install and maintain all temporary and permanent erosion and sedimentation control measures as required by the approved plan or any provision of this section, the North Carolina Sedimentation Pollution Control Act of 1973 or any order adopted pursuant thereto. After site development, the landowner or person in possession or control of the land shall install and/or maintain all necessary permanent erosion and sedimentation control measures, except those measures installed within a road or street right-of-way or easement accepted for maintenance by a governmental agency.

(M) *Additional measures.* Whenever the town determines that significant sedimentation is occurring as a result of land-disturbing activity, despite application and maintenance of protective practices, the person conducting the land-disturbing activity will be required to and shall take additional protective action or cease the activity.

(N) *Existing uncovered areas.*

(1) All uncovered areas existing on the effective date of this section which resulted from land-disturbing activity, exceed $\frac{1}{2}$ contiguous acre, are subject to continued accelerated erosion and are causing off-site damage from sedimentation shall be provided with a ground cover or other protective measures, structures or devices sufficient to restrain accelerated erosion and control off-site sedimentation.

(2) The town shall serve upon the landowner or other person in possession or control of the land a written notice to comply with the Act, this section, a rule or order adopted or issued pursuant to the Act by the Commission or by the town. The notice to comply shall be sent by registered or certified mail, return receipt requested or other means provided in G.S. § 1A-1, Rule 4. The notice will set forth the measures needed to comply and will state the time within which such measures must be completed. In determining the measures required and the time allowed for compliance, the authority serving notice shall take into consideration the economic feasibility, technology and quantity of work required and shall set reasonable and attainable time limits of compliance.

(3) The town reserves the right to require preparation and approval of an erosion control plan in any instance where extensive control measures are required.

(4) This rule shall not require ground cover on cleared land forming the future basin of a planned reservoir.

(O) *Permits.*

(1) No person shall undertake any land-disturbing activity subject to this section without first obtaining a permit from the town, except that no permit shall be required for any land-

disturbing activity that does not exceed 5,500 square feet in surface area. In determining the area, lands under one or diverse ownership being developed as a unit will be aggregated.

(2) The town shall establish a fee on a general or individual basis as may be considered necessary.

(P) *Appeals.*

(1) The disapproval or modification of any proposed erosion control plan by the Director of Planning and Inspections shall entitle the person submitting the plan to a public hearing if such person submits written demand for a hearing within 15 days after receipt of a written notice of disapproval or modifications.

(2) Hearings held pursuant to this section shall be conducted by the Board of Commissioners within 20 days after the date of the appeal or request for a hearing.

(3) The Board of Commissioners shall render its final decision within ten days after the date of the hearing.

(4) If the town upholds the disapproval or modification of a proposed soil erosion and sedimentation control plan following the hearing, the applicant shall then be entitled to appeal that decision to the North Carolina Sedimentation Control Commission as provided in G.S. § 113A-61(c) and Title 15 NCAC 4B.0018(b).

(Q) *Inspections and investigations.*

(1) Agents and officials of the town will periodically inspect the sites of land-disturbing activity for which permits have been issued to determine whether the activity is being conducted in accordance with the plan and to determine whether the measures required in the plan are effective in controlling erosion and sediment resulting from land-disturbing activity.

(2) Willful resistance, delay, or obstruction. No person shall willfully resist, delay, or obstruct an authorized representative, employee, or agent of the town, while that person is inspecting or attempting to inspect a land-disturbing activity under this section.

(3) Notice of violation. If the town determines that a person engaged in land-disturbing activity has failed to comply with the Act, this section, or rules, or orders adopted or issued pursuant to this section, a notice of violation shall be served upon that person. The notice shall be served by any means authorized under G.S. § 1A-1, Rule 4. The notice shall specify a date by which the person must comply with the Act, this section, or rules or orders adopted pursuant to this section, and inform the person of the actions that need to be taken to comply with the Act, this section, or rules or orders adopted pursuant to this section. Any person who fails to comply within the time specified is subject to additional civil and criminal penalties for a continuing violation as provided in G.S. § 113A-64 and this section.

(4) The town shall have the power to conduct such investigation as it deems necessary to carry out its duties as prescribed in this section and for this purpose to enter at reasonable times upon any property, public or private, for the purpose of investigating and inspecting the sites of any land-disturbing activity. No person shall refuse entry or access to any authorized representative or agent of the town who requests entry for purposes of inspection, nor shall any

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person obstruct, hamper or interfere with any such representative while in the process of carrying out his official duties.

(5) The town shall also have the power to require written statements, or the filing of reports under oath, with respect to pertinent questions relating to land-disturbing activity.

(6) The landowner, the financially responsible party, or the landowner's or the financially responsible party's agent shall perform an inspection of the area covered by the plan after each phase of the plan has been completed and after establishment of temporary ground cover in accordance with G.S. § 113A-57(2). The person who performs the inspection shall maintain and make available a record of the inspection at the site of the land-disturbing activity. The record shall set out any significant deviation from the approved erosion control plan, identify any measures that will be required to correct the deviation, and document the completion of those matters. The record shall be maintained until permanent ground cover has been established as required by the approved erosion and sedimentation control plan. The inspections required by this subsection shall be in addition to inspections required by G.S. § 113A-61.1.

(R) *Penalties.*

(1) *Civil penalties.*

(a) Civil penalty for a violation. Any person who violates any of the provisions of this section, or rule or order adopted or issued pursuant to this section, or who initiates or continues a land-disturbing activity for which a plan is required except in accordance with the terms conditions and provisions of an approved plan, is subject to a civil penalty. The maximum civil penalty that the town may assess is \$5,000. A civil penalty may be assessed from the date the violation. Each day of a continuing violation shall constitute a separate violation.

(b) Civil penalty assessment factors. The governing body of the town shall determine the amount of the civil penalty based on the following factors:

1. The degree and extent of harm caused by the violation,
2. The cost of rectifying the damage,
3. The amount of money the violator saved by noncompliance,
4. Whether the violation was committed willfully, and the prior record of the violator in failing to comply with this section.

(c) Any person who fails to submit an erosion control plan for approval as required by this section shall be subject to a single, non-continuing civil penalty of not more than \$5,000. Any person who is subject to a civil penalty under this subsection may be subject to additional civil penalties for violation of any other provision of this section or rules or orders adopted or issued pursuant to this section.

(d) Hearing. A hearing on a civil penalty shall be conducted by the town within 15 days after the date of the written demand for the hearing. The agency conducting the hearing shall make its recommendation to the governing body of the town within 21 days after the date of the hearing.

(e) Final decision. The governing body shall render its final decision on the civil penalty within ten days of the receipt of the recommendation from the agency.

(f) Appeal of final decision. Appeal from the final decision of the governing body shall be to the Superior Court of the county where the violation occurred, or the location of the violator's residence or principal place of business.

(g) Credit of civil penalties. Civil penalties collected pursuant to this section shall be credited to the Civil Penalty and Forfeiture Fund. [Note: Case law on an air quality delegated program determined that civil penalties assessed by local governments pursuant to a state delegation had to be remitted to the Civil Penalty and Forfeiture Fund for the benefit of the local school boards pursuant to the State Constitution's provision on state penalties, fines and forfeitures.]

(2) *Criminal penalties.* Any person who knowingly or willfully violates any provision of this section, or rule or order adopted or issued pursuant to this section, or who knowingly or willfully initiates or continues a land-disturbing activity for which an erosion control plan is required, except in accordance with the terms, conditions and provisions of an approved plan, shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed \$5,000 as provided in G.S. § 113A-64.

(S) *Injunctive relief.*

(1) Whenever the governing body has reasonable cause to believe that any person is violating or threatening to violate this section or any rule or order adopted or issued pursuant to this section, or any term, condition or provision of an approved erosion control plan, it may, either before or after the institution of any other action or proceeding authorized by this section, institute a civil action in the name of the town for injunctive relief to restrain the violation or threatened violation. The action shall be brought in the Superior Court of Dare County.

(2) Upon determination by a court that an alleged violation is occurring or is threatened, it shall enter such orders or judgments as are necessary to abate the violation or to prevent the threatened violation. The institution of an action for injunctive relief under this section shall not relieve any party to such proceedings from any civil or criminal penalty prescribed for violation of this section.

(T) *Restoration after non-compliance.* The town shall require a person who engaged in a land-disturbing activity and failed to retain sediment generated by the activity, as required by G.S. § 113A-57(3), to restore the waters and land affected by the failure so as to minimize the detrimental effects of the resulting pollution by sedimentation. This authority is in addition to any other civil or criminal penalty or injunctive relief authorized under this section.

(U) *Severability.* If any section or sections of this section is/are held to be invalid or unenforceable, all other sections shall nevertheless continue in full force and effect.

(V) *Effective date.* This section shall take effect on the date of adoption by the Board of Commissioners.

This amendment to Chapter 153, Zoning, shall be in full force and effect from and after the ____ day of _____, 2020. Adopted and approved by the Board of Commissioners of the Town of Kill Devil Hills at a regular meeting held on the ____ day of _____, 2020, by a vote of ____ in favor and ____ opposed.

SEAL

Ben Sproul
Mayor

ATTEST:

James Michael O'Dell
Deputy Town Clerk

APPROVED AS TO FORM:

Casey C. Varnell
Town Attorney

The undersigned hereby certifies that the foregoing official amendment, designated AN ORDINANCE AMENDING CHAPTER 153, ZONING, was placed in the Kill Devil Hills Town Code Book on the ____ day of _____, 2020 at ____ .m.

James Michael O'Dell
Deputy Town Clerk

PLANNING BOARD REPORT

Per NCGS 160A-387, all proposed amendments to the zoning ordinance or zoning map shall have a written report provided from the Planning Board to the Town Council within 30 days of referral of the amendment to the Planning Board, or the Town Council may proceed in its consideration of the amendment without the Planning Board report. Furthermore, in no case is the Town Council bound by the recommendations, if any, of the Planning Board.

Per NCGS 160A-383, the Planning Board shall advise and comment on whether the proposed zoning amendment is consistent with all applicable officially adopted plans, and provide a written recommendation to the Town Council that addresses plan consistency and other matters as deemed appropriate by the Planning Board, but a comment by the Planning Board that a proposed amendment is inconsistent with the officially adopted plans shall not preclude consideration or approval of the proposed amendment by the Town Council.

PLANNING BOARD RECOMMENDATIONS

Proposed Amendment Title: Proposed Zoning Amendment—§ 153.071 Soil Erosion and Sedimentation Control—Modification to meet State requirements

Approval: Planning Board finds that the Proposed Zoning Amendment §153.071 Soil Erosion and Sedimentation Control—Modification to meet State requirements is consistent with the adopted Land Use Plan.

Therefore, the Planning Board finds the proposed amendment is consistent with the objectives and policies contained in the Kill Devil Hills Land Use Plan and/ or other officially adopted plans of the Town that are applicable.

This report reflects the recommendation of the Planning Board with a vote of 6 to 0, this the seventeenth day of December, 2019.

Attest:



Planning Board Chairman



Secretary of Planning Board