

**TOWN OF DUCK  
TOWN COUNCIL  
REGULAR MEETING  
December 7, 2022**

The Town Council for the Town of Duck convened at the Paul F. Keller Meeting Hall at 6:00 p.m. on Wednesday, December 7, 2022.

**COUNCIL MEMBERS PRESENT:** Mayor Don Kingston; Mayor Pro Tempore Monica Thibodeau; Councilor Sandy Whitman; Councilor Rob Mooney; and Councilor Tony Schiano.

**COUNCIL MEMBERS ABSENT:** None.

**OTHERS PRESENT:** Town Manager Drew Havens; Director of Community Development Joseph Heard; Police Chief Jeffrey Ackerman; Fire Chief Donna Black; Town Attorney Robert Hobbs; Public Information and Events Assistant Betsy Trimble; Senior Planner Sandy Cross; Finance and Human Resources Administrator Jessica Barnes; and Town Clerk Lori Ackerman.

**OTHERS ABSENT:** Public Information and Events Director Kristiana Nickens.

Mayor Kingston called the meeting to order at 6:01 p.m. He noted that the Town was not broadcasting or video recording due to technical difficulties.

Mayor Kingston asked Councilor Tony Schiano to lead the Pledge of Allegiance. Mayor Kingston led the moment of silence.

**PUBLIC COMMENTS**

Mayor Kingston opened the floor for public comments. He noted that comments will be limited to three minutes as there was a timer for the time limit.

Deanna Beacham of 1444 Duck Road was recognized to speak. Ms. Beacham stated she was asked by several property owners to let Council know that the Duck property owners were not happy about the thought of people driving on the beach. She understood it was a big issue that had been brought up and would be discussed at Council's Retreat. She stated that because the property owners knew she would be attending this meeting, they had asked her to speak.

Dale Bryansmith of 137 Seabreeze Drive was recognized to speak. Mr. Bryansmith stated that he was opposed to any kind of beach driving in Duck. He thought driving on the beach stopped being fun back in 1962 and now it was just a nuisance because the beach was very fragile. He stated that beach driving is allowed in New Jersey, but they were very specific as to where one could drive on the beach and it required a permit. He

stated that the beach in his area was pretty narrow and he thought it would be hard for vehicles to maneuver the beach.

There being no one else wishing to speak, Mayor Kingston closed the time for public comments.

### **CONSENT AGENDA**

**Minutes from the October 5, 2022, Regular Meeting; Minutes from the October 19-20, 2022, 2032 Vision Retreat; Minutes from the November 2, 2022, Regular Meeting; Resolution 22-17, a Resolution of the Town Council of the Town of Duck, North Carolina, Declaring Certain Property Surplus, and Authorizing the Transfer of Said Property; Resolution 22-18, a Resolution of the Town Council of the Town of Duck, North Carolina, Declaring Certain Property Surplus, and Authorizing the Transfer of Sale of Said Property at Auction; Interlocal Agreement between the Town of Duck and Dare County for the Motorola FLEX Public Safety System**

Councilor Schiano moved to approve the consent agenda as presented.

Motion carried 5-0.

### **SPECIAL PRESENTATIONS**

#### **Presentation of the Town's Fiscal Year 2021-2022 Audit Report**

Lisa Murphy from Johnson, Mizelle, Straub and Murphy was recognized to speak. Ms. Murphy went on to give an overview of the Town's financial statements for the year ended June 30, 2022 to Council and the audience.

Mayor Pro Tempore Thibodeau moved to accept the FY 2022 Audit as presented.

Motion carried 5-0.

Mayor Kingston thanked Lisa Murphy for her presentation.

### **QUASI-JUDICIAL PUBLIC HEARING**

There were no quasi-judicial public hearings at this time.

### **LEGISLATIVE PUBLIC HEARINGS**

There were no Legislative Public Hearings at this time.

### **OLD BUSINESS/ITEMS DEFERRED FROM PREVIOUS MEETINGS**

**Discussion/Consideration of Authorizing the Town Manager to Enter into a Contract with Emerald Forest for Sand Fencing**

Town Manager Drew Havens was recognized to speak. Town Manager Havens stated that staff was recommending adding in a second row of sand fencing in the nourishment areas as well as up to two rows of sand fencing in the Southern Shores taper area. He explained that the Southern Shores taper area travels northward into Duck and, according to staff, the way it has been constructed would lend itself to getting some protection from sand fencing.

Town Manager Havens stated that he was not recommending sending it out to bid because Weeks Marine had selected Emerald Forest as their contractor. He noted that the Town uses Emerald Forest for sand fencing and recommended that Council authorize the sole source for the contract to Emerald Forest. He stated that the total cost for the fencing was \$43,702.92 and there was \$47,000 budgeted in the General Fund.

Mayor Kingston asked if the Town of Southern Shores had any responsibility for the taper area. Town Manager Havens stated that they do not.

Councilor Whitman asked if the prices were good until Weeks Marine finishes the beach nourishment project. Town Manager Havens stated that it was.

Councilor Mooney asked if the work would be completed by Southern Shores where the other business starts. Town Manager Havens stated that it would.

Mayor Kingston asked if there was currently any sand fencing where the taper came in. Town Manager Havens was not aware if there was. Mayor Kingston asked if there were one or two rows in that area. Senior Planner Sandy Cross was recognized to speak. Senior Planner Cross explained that there was currently one row that extends from south of the Town to 111 Ocean Crest. She added that easements were obtained through Tides Drive. Mayor Kingston asked if the dune was built up when they completed the taper. Senior Planner Cross stated that the taper does not build up the dune.

Mayor Pro Tempore Thibodeau moved to authorize the Town Manager to enter into a contract with Emerald Forest as presented for the sand fencing with the cap of the amount to be determined by Town staff.

Motion carried 5-0.

**NEW BUSINESS**

**Discussion/Consideration of Authorizing a Public Hearing on Ordinance 22-10, Regulatory Standards for Dune Walkover Structures**

Senior Planner Cross stated that Council and the Planning Board recently approved a zoning text amendment that clarified the elevation of dune walkover structures in all

situations and under what circumstances minimum setback exemptions can be granted. She stated that during the discussion, the Planning Board questioned the need for the minimum 18-inch elevation, as noted in Chapter 94 and Subsection 156.124 of the Town Code and suggested that one size does not fit all. She added that a request was made that Council consider this for further consideration and discussion by the Planning Board, adding that Council sent the issue back to the Board for further review concerning the issue.

Senior Planner Cross stated that the Planning Board held a special meeting on August 19, 2022 to drive on the beach and view various conditions and situations where the 18-inch elevation may or may not be ideal. She stated that at the Planning Board's September 14, 2022 meeting, staff presented several options to the Board to address concern that dune walkover elevation requirements should be unique to the area in which they are developed. She pointed out that at the conclusion of the meeting, staff offered to bring the matter back to them after an upcoming CAMA training. She added that since CAMA regulations are ambiguous, staff suggested they would see why and whether there was any consensus as to a more suitable option. She stated that when posed with the question regarding dune walkover elevations to CAMA District Manager Ron Renaldi, they were provided with the following comment: "CAMA elevation requirements of beach walkways/crossovers are meant to be vague to allow for the Local Permit Officer to make the final determination on what is permissible in their locality. This allows us to appropriately handle dynamic situations/environment."

Senior Planner Cross stated that after considering the history behind the development of the applicable code sections, the intent of the CAMA regulations as well as the Comprehensive Land Use Plan and its Tools for Managing Development, staff offered a variety of options to the Planning Board. She stated that, in keeping with the concern that different areas may require different regulations based on dune height and conditions, staff presented an option that tied the elevation of the dune walkovers to the dune elevation, distinguishing between primary and frontal dunes. She explained that if a dune is a frontal dune, its elevation is lower and therefore affords less protection, adding that the Town would encourage elevating the walkover to allow for vegetation and dune growth below it. She noted that if the dune is a primary dune, its elevation is equivalent to the base flood elevation, normally 11 or 12 plus six feet, equating to an elevation of 17 or 18 feet above sea level. She stated that at this elevation, the dune offers more protection, and perhaps a minimum elevation requirement above the dune is not needed as the owner would need to maintain a maximum elevation above the dune. She pointed out that this would potentially result in an expense to the property owner to determine the dune elevation. She stated that staff has added "dune elevations may be determined through use of current contour data or surveyed elevations" in the draft ordinance for clarification purposes.

Senior Planner Cross pointed out that one other revision staff proposed was the removal of the phrase "and shall extend east of the seaward vegetation line" at the end of Subsection 94.04. She explained that when staff meets with contractors, they try to keep the walkover terminus in line with the vegetation line and not extending east of the line.

She noted that this helps protect dune walkover structures from storm damage and reduce encroachments onto the wet sand beach.

Senior Planner Cross stated that another important question staff presented the Planning Board was how “grade” is defined. She stated that staff has discussed the challenges and interpretations when applying these standards to areas that aren’t flat. She noted that recently, staff asked Building Inspector Steven McMurray for his comments as to where he measures grade when determining whether handrails and stair kicks are needed. She added that staff discussed his comments with the Planning Board and explained how that is typically determined, noting that staff conveyed his comments to the Planning Board and explained how that was typically determined. She stated that staff stated that they would include that explanation in the draft ordinance that was being developed related to dune walkover accessways; however, the Planning Board did not feel that an ordinance amendment was needed.

Senior Planner Cross stated that staff was of the opinion that the ordinance amendment reflected the requested desire for flexibility in certain situations while still maintaining a quantifying standard, removing the potential for subjectivity from the equation. She stated that the Planning Board discussed the issue at their November 9, 2022 meeting and voted unanimously to recommend approval of the zoning text amendment.

Councilor Schiano understood the difference between the primary and frontal dune and a lot of times with the primary dune, the walkway was lower than the height of the dune. He asked if the walkway has to be replaced, it will not need to be elevated. Senior Planner Cross stated he was correct.

Mayor Pro Tempore Thibodeau clarified that, ultimately, it would be the local CAMA officer that would use the guidelines to keep a consistent policy in effect. Senior Planner Cross stated she was correct, adding that it would be addressed by her, Community Planner Jim Gould, or Building Inspector Steven McMurray.

Councilor Schiano stated that it seemed to be a reasonable solution that stops a lot of concerns and issues that come up after a storm.

Mayor Pro Tempore Thibodeau thought it was hard to perceive any issues. She asked if there were, it would come back to Council. Senior Planner Cross stated that it would.

Councilor Mooney moved to authorize a public hearing on Ordinance 22-10 as presented.

Motion carried 5-0.

### **Discussion/Consideration of 2023 Council Meeting Date Schedule**

Town Clerk Lori Ackerman was recognized to speak. Town Clerk Ackerman stated that the draft 2023 Council meeting date schedule was before Council. She pointed out that

Council has a goals planning session at their January mid-month meeting and then their annual Retreat at their February mid-month meeting.

Mayor Kingston asked if there were any conflicts to the schedule with regard to holidays. Town Clerk Ackerman stated that there were not. Mayor Kingston asked if the 4<sup>th</sup> of July parade would be held on July 4, 2023. Town Clerk Ackerman stated that it would.

Mayor Pro Tempore Thibodeau clarified that the meetings would still be at 6:00 p.m. for the regular meeting and 1:00 p.m. for the mid-month meetings. Town Clerk Ackerman stated that she was correct. Mayor Pro Tempore Thibodeau pointed out that she would be out of town for the January 18, 2023 meeting, adding that she would give her input to Town Manager Havens before that meeting.

Mayor Pro Tempore Thibodeau moved to adopt the schedule as presented.

Motion carried 5-0.

**Discussion/Consideration of an Amendment to the Contract between Weeks Marine and Dare County to Extend the Completion Date of the Beach Nourishment Contract until May 25, 2023**

Town Manager Havens stated that the Town was notified in mid-November that Weeks Marine, the contractor doing the four-town beach nourishment project, intended to delay work in Duck until mid-March. He stated that, due to equipment issues, minor weather-related delays, and a commitment to another time-sensitive job, Weeks Marine has fallen behind on the original schedule. He stated that Dare County, the coastal engineers, Weeks Marine staff members and Town staff worked on the contract modification document that attempts to ensure that the project is properly constructed in the spring while ensuring that Town is made whole in terms of any additional costs associated with the delay.

Town Manager Havens stated that the action requested from Council was to consider a request to modify the beach nourishment contract and direct him to transmit Council's recommendations to Dare County Manager Bobby Outten. He noted that the following would be stipulated in order for Weeks Marine to make the Town whole:

1. Contractor to perform additional pre-construction survey no more than 60 days before the beginning of construction.
2. Contractor to conduct interim borrow area survey as requested by BOEM.
3. Replace all lost sand in the Duck project area as determined by the initial and subsequent pre-construction survey.
4. Repair damage caused, as a result of any erosive events which occur between November 28, 2022 and the time the contractor substantially completes the project, including but not limited to, damage to oceanfront homes, pools, loss of vegetation, loss of sand fencing, and/or loss of beach access structures. The

- contractor shall repair, replace, and otherwise remedy all of the interim damage not otherwise fully covered by insurance.
5. Contractor responsible for additional engineering fees.
  6. Contractor responsible for additional legal fees.
  7. Contractor responsible for additional sea turtle monitoring costs.
  8. Contractor responsible to secure necessary permits and easements to complete the work under the contract.
  9. All provisions of the amendment are at no cost to the owner.
  10. Contractor responsible for lost FEMA revenue if Kill Devil Hills does not get their grant extension. Duck received its extension.
  11. Contractor responsible for additional interest costs for Duck's Special Obligation Bond.
  12. Liquidated damages of \$4,000 per day from January 1, 2023 until the project is substantially complete. If not done by May 25, 2023, liquidated damages will be \$8,000 per day for each day the project is not complete.
  13. Contractor to pay the greater of the total liquidated damages or the actual expenses incurred by the owner.
  14. Contractor responsible for other expenses attributable to the delay that are not yet identified or listed.

Councilor Schiano thought if Council was going to vote yes or no, they should go into closed session to discuss the issue. He added that if not, then Council would be revealing its negotiating position and strategy to the party that Duck will be negotiating with.

Town Attorney Robert Hobbs was recognized to speak. Town Attorney Hobbs stated that if Council needed to seek advice from him on privileged matters, a closed session would be appropriate. He stated that the one potential action Council could take if they agreed with the concepts that Town Manager Havens presented was that they could approve the amendment in principal and authorize the Town Manager and Town Attorney to continue negotiations through Dare County with Weeks Marine to reach a final agreement. He thought that, typically he would ask that as far as non-substantive changes, but it could get more involved. He thought if Council wanted to proceed in that direction, they would need to trust Town Manager Havens and him with making a judgement call as to whether they need to bring it back to Council for a special meeting or an emergency meeting to discuss what he considered fundamental substantive changes to what Council had been briefed on. He added that if it was a matter of non-substantive changes and possibly some wording changes, he thought it could be delegated to him and Town Manager Havens to move forward with it. He noted it was up to Council's level of comfort.

Town Manager Havens explained that the alternative was the Town could enforce the provisions of the contract. He pointed out that there was a clause in the contract regarding breach, so the Town could declare Weeks Marine of breaching the contract, contact the surety that holds the performance bond, and the surety has some obligations to try to get the project completed.

Town Manager Havens explained that the reason he was recommending that Council discuss the issue and get the terms to the point where the Town is made whole, was because the practicality of it was if the Town declares Weeks Marine in breach and then goes through the process, the likelihood of getting sand on the beach in the next 12 months was a 50/50 chance. He noted that there were very few contractors that could do this type of work and it was a small job – less than a half million cubic yards of sand.

Mayor Kingston agreed with Town Attorney Hobbs' comments, adding that he knew that Town Attorney Hobbs, Town Manager Havens, and Dare County Manager Bobby Outten had been in discussions with Weeks Marine. He asked if there was anything in the amendment that would be due to Weeks Marine. He pointed out that Weeks Marine completed the analysis and then left to go north. He asked if there was anything in the amendment that would be a surprise to Weeks Marine. Town Manager Havens stated that there wasn't, adding that Weeks Marine has the document and has been involved in the discussions. He stated that before the amendment was introduced, they had some candid conversations with Weeks Marine.

Mayor Kingston asked if anything in the way of damages over and above what the Town was covered for would go back to Dare County's beach nourishment fund. He explained that Weeks Marine could come back in and the Town has liquidated damages but the expenses have all been covered and now there was the liquidated damages. He assumed it would go back to the Dare County beach nourishment fund. Town Manager Havens stated that any funding in excess would go back to the beach nourishment fund with Dare County.

Councilor Whitman asked if Weeks Marine does not perform or fix any damages, the property owner would go to Dare County and not the Town. Town Manager Havens stated he was correct.

Councilor Schiano agreed with Mayor Kingston and Town Attorney Hobbs regarding proceeding with the issue. He thought Weeks Marine had some sophistication and completed a cost benefit analysis as to what hurts the most – continuing in Duck or going elsewhere. He noted that it was obviously less painful financially for them to go elsewhere instead of staying in Duck. He suspected that Weeks Marine may be able to deal with the Town's request. Town Manager Havens agreed. Councilor Schiano thought the Town was on the right path. Town Manager Havens didn't think the Town was in a weak negotiating position.

Mayor Pro Tempore Thibodeau agreed with the direction that Council seems to be taking, which was to allow Town Attorney Hobbs and Town Manager Havens to pursue the issue on Council's behalf. She stated that she didn't hear when the start date would be. She added that, initially Weeks Marine was going to return to Duck in March because they had some equipment that needed work done to it. She asked if there was anything preventing Weeks Marine from starting the project in January. Town Manager Havens stated that they would have the equipment then. Mayor Pro Tempore Thibodeau asked if Weeks Marine had the equipment ready, they could start whenever they wanted. Town



Manager Havens stated she was correct. Mayor Pro Tempore Thibodeau clarified that in this scenario, they would have to be finished by May 25, 2023. Town Manager Havens stated she was correct, adding that the plan was to start in mid-March. He noted that Weeks Marine has not given a definitive start date.

Mayor Pro Tempore Thibodeau stated that Coastal Planning Engineering had to add to their work the monitoring. She asked if they were completing the surveying. Town Manager Havens explained that Weeks Marine contracts with a licensed surveyor to complete the surveys and are analyzed by Coastal Planning Engineering. Mayor Pro Tempore Thibodeau clarified that Coastal Planning Engineering was the Town's engineer and they have an independent surveyor to validate it, with Weeks Marine paying for the extra work. Town Manager Havens stated she was correct, adding that it included any hours for Coastal Planning Engineering.

Mayor Kingston thought Weeks Marine's reputation was on the line and this would not be good for them if they pulled out of the project completely. He stated that the positive aspect was that the dredges were close to Duck. He stated that he was trying to stay positive with Weeks Marine coming back to Town, adding that even if the date was extended, the last time beach nourishment was completed was in June and the Town dealt with it. He stated that even if there was some slippage, he thought it was to the Town's advantage because Duck would probably get more sand on the beach. Town Manager Havens stated that there was some slippage, adding that Weeks Marine was committed to coming back.

Mayor Pro Tempore Thibodeau asked if the lead negotiator was Dare County Manager Bobby Outten. She clarified that there wasn't a separate attorney taking care of things. Town Manager Havens stated that it has been Dare County Manager Bobby Outten, Dare County Finance Officer David Claussen, Adam Priest and Ken Willson of Coastal Planning Engineering, as well as couple of executives from Weeks Marine.

Town Attorney Hobbs noted that once the terms are worked out, the draft will be sent to him for review and then sent to Weeks Marine through Dare County for review.

Mayor Kingston clarified that there was no pushback anticipated from the Town of Southern Shores regarding access to the beach. Town Manager Havens stated that he wasn't sure but it was not Duck's issue.

Mayor Kingston moved to approve in concept the terms of the proposed amendment to the contract with Weeks Marine and delegate to the Town Manager and Town Attorney the authority to negotiate the final terms of the amendment, including a determination by the Town Manager and Town Attorney whether to bring any substantive changes back to the Council to consider.

Motion carried 5-0.

## **ITEMS REFERRED TO AND PRESENTATIONS FROM THE TOWN ATTORNEY**

Town Attorney Hobbs stated that starting January 1, 2023 Lauren Womble, an attorney in Elizabeth City, would be joining his firm as a partner. He noted that Ms. Womble has completed some work in Duck with the Town's Board of Adjustment.

## **ITEMS REFERRED TO AND PRESENTATIONS FROM THE TOWN MANAGER**

### **Departmental Updates**

Police Chief Jeffrey Ackerman was recognized to speak. Police Chief Ackerman gave a brief overview of the past month's police activities to Council and the audience.

Fire Chief Donna Black was recognized to speak. Fire Chief Black gave a brief overview of the past month's fire activities to Council and the audience.

Director of Community Development Joseph Heard was recognized to speak. Director Heard gave an overview of the past month's permit activities to Council and the audience.

Public Information and Events Assistant Betsy Trimble was recognized to speak. Assistant Trimble gave a brief overview of activities to Council and the audience.

### **November FY 2023 Financial Presentation**

Finance and Human Resources Administrator Jessica Barnes was recognized to speak. Administrator Barnes gave a short presentation on the November Fiscal Year 2023 financials to Council and the audience.

### **MAYOR'S AGENDA**

Mayor Kingston stated that the mayors/chairmen meeting will be on December 20, 2022 in Kitty Hawk. He stated that he has stepped down as president for the North Carolina Local Leadership Foundation but is acting in an advisory capacity. He stated that the DCBA has their annual meeting on December 10, 2022 to which he would be presenting Town activities to them. He stated that he participated in the OBX Leadership session the week prior held by the Outer Banks Chamber of Commerce. He thanked Fire Chief Black for the Duck Volunteer Fire Department party. He thanked Assistant Trimble and Town staff for the Yuletide Celebration and wished everyone a Happy Holiday.

### **COUNCIL MEMBER'S AGENDA**

Mayor Pro Tempore Thibodeau stated that she was sorry she missed the Fire Department party and the Yuletide Celebration. She gave a short Visitors Bureau meeting update to Council and the audience.

Councilor Mooney thanked everyone for a great year and wished everyone a Merry Christmas and Happy New Year.

Councilor Whitman thanked Town staff for the Yuletide Celebration. He thanked Fire Chief Black for the Fire Department party. He wished everyone a Merry Christmas and Happy New Year.

Councilor Schiano wished everyone a Merry Christmas and Happy New Year.

### **OTHER BUSINESS**

#### **Additional Public Comments**

Mayor Kingston opened the floor for public comments. There being no one wishing to comment, Mayor Kingston closed the time for public comments.

Mayor Kingston noted that the next meeting would be the Regular meeting on Wednesday, January 4, 2023 at 6:00 p.m.

### **CLOSED SESSION**

Mayor Pro Tempore Thibodeau moved to enter closed session pursuant to §143-318.11(5) to establish or instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating the price and other material terms of a contract or proposed contract for the acquisition of real property located at 1165 Duck Road, owned by Larry Herron, Thomas Herron, Deborah Herron, Vicky Herron, and Catherine Herron, by purchase, option, exchange, or lease.

Motion carried 5-0.

The time was 7:39 p.m.

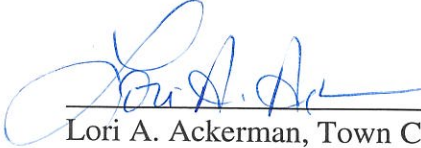
Upon return from closed session, Town Attorney Hobbs stated that the Council authorized the Town Manager to further explore the possible purchase of the property listed as 1165 Duck Road.

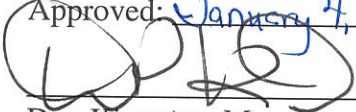
### **ADJOURNMENT**

Councilor Schiano moved to adjourn the meeting.

Motion carried 5-0.

The time was 8:12 p.m.

  
Lori A. Ackerman, Town Clerk

Approved: January 7, 2023  
  
Don Kingston, Mayor

