

**TOWN OF DUCK
TOWN COUNCIL
REGULAR MEETING
September 6, 2023**

The Town Council for the Town of Duck convened at the Paul F. Keller Meeting Hall at 6:00 p.m. on Wednesday, September 6, 2023.

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; Finance and Human Resources Administrator Jessica Barnes; Public Information and Events Director Kristiana Nickens; Senior Planner Sandy Cross; and Town Clerk Lori Ackerman.

OTHERS ABSENT: None

Mayor Kingston called the meeting to order at 6:01 p.m.

Mayor Kingston asked Senior Planner Sandy Cross to introduce the Town's newest intern.

Senior Planner Sandy Cross was recognized to speak. Senior Planner Cross went on to introduce Ashlynn Basnight to Council and the audience as the Town's newest intern for the next few months. Mayor Kingston and Council welcomed Ms. Basnight to the Town.

Mayor Kingston asked Senior Planner Cross 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. He asked that any comments related to the public hearings be held off. There being no one wishing to speak, Mayor Kingston closed the time for public comments.

CONSENT AGENDA

Minutes from the August 2, 2023, Regular Meeting; Minutes from the August 21, 2023, Mid-Month Meeting; Contract with Gregory Bourne to Perform Appraisal Work related to Estimating the Value of Property for a New Public Safety Facility

and Estimating the Value of the Current Public Safety Building; Approval of Designation of Applicant's Agent Resolution for the NC Division of Emergency Management

Mayor Pro Tempore Thibodeau moved to approve the consent agenda as presented.

Motion carried 5-0.

SPECIAL PRESENTATIONS

There were no Special Presentations at this time.

QUASI-JUDICIAL PUBLIC HEARING

Public Hearing/Discussion/Consideration of SUP 23-005, a Special Use Permit Application by Owners Un Yong Karl and Eva Chin for Three Allowances relating to Fill and Grading Activities Associated with the Construction of a Soundfront Bulkhead and Retaining Wall at 1156 Duck Road

Mayor Kingston turned the meeting over to Town Attorney Robert Hobbs.

Town Attorney Robert Hobbs was recognized to speak. Town Attorney Hobbs stated that the Council would be sitting as a quasi-judicial body for the public hearing, meaning that they will sit as a court and must make its decision based upon competent material and substantive evidence that will be presented during the course of the hearing. He stated that anyone wishing to give testimony would have to give it while under oath with the applicant afforded due process rights including the right to present evidence, examine, and cross-examine witnesses. He asked if any member of Council needed to disclose any communications about the subject of the hearing that they may have had with the applicant or any person prior to the hearing.

Councilor Whitman stated that he was the Council Liaison for the Planning Board and had sat through the approval, but it would not have any effect on his vote for this public hearing.

Town Attorney Hobbs stated that anyone that would be presenting evidence in connection with the hearing would need to take an oath. He asked that anyone wishing to testify come forward to be sworn in.

Town Clerk Lori Ackerman was recognized to speak. Town Clerk Ackerman went on to swear in the applicants and staff for the public hearing.

The following persons were sworn to provide testimony during the hearing: Joseph Heard, Sandy Cross, and Eli Barrett.

Town Attorney Hobbs opened the evidentiary portion of the hearing. He stated that Director Heard would give an overview.

Director of Community Development Joe Heard was recognized to speak. Director Heard noted that the public hearing was properly advertised. He stated that the proposed project involved the addition of fill and grading to accommodate the construction of a soundfront bulkhead and retaining wall along the rear of the property to support the existing swimming pool and pool decks. He stated that the retaining walls and associated fill will require approval of the following allowances requested in the special use permit:

1. Allow the bulkhead and retaining wall to support and contain fill, which is not permitted under Subsection 156.128(A)(6).
2. Allow up to five feet of fill behind the soundfront bulkhead where a maximum of three feet is permitted in Subsection 156.128(A)(12)(a).
3. Allow up to four feet of fill behind the upper retaining wall where a maximum of three feet is permitted in Subsection 156.128(A)(12)(a).

Director Heard stated that the property at 1156 Duck Road was approximately 23,000 square feet in size and zoned Single-Family Residential with the lot approximately 90 feet in width and over 300 feet in depth along the Currituck Sound shoreline at the rear of the property. He pointed out that the property contains a five-bedroom, 3,256 square foot single-family residence that was constructed in 2002 with a swimming pool and surrounding concrete patio at the rear of the residence. He noted that the improvements were sited on a bluff at an elevation of 23 feet above mean sea level with no bulkhead along the shoreline of the property. He added that the property was part of the Four Seasons subdivision.

Director Heard stated that the subject property features a tall bluff adjoining the Currituck Sound that has been subject to erosion over the years. He pointed out that the erosion was now threatening the stability of the swimming pool and its surrounding concrete patio located at the top of the bluff. He stated that the applicant was proposing to protect the existing improvements by stabilizing the bluff by constructing a soundfront bulkhead and separate retaining wall higher up on the bluff.

Director Heard stated that Subsection 156.128(C) of the Duck Town Code establishes criteria for special use permit applications involving fill and grading activities. He stated that the Planning Board's review resulted in the following findings supporting their recommendation:

1. The site for the proposed fill is otherwise adequate in size, shape and other characteristics to accommodate the proposed project.
2. The applicant has demonstrated that the requirements of this chapter are unreasonable or impracticable due to the necessity for the fill, lot shape, topographical features, location of mature vegetation, or location and characteristics of existing improvements on the lot.

3. The amount of fill proposed is the minimum necessary to accommodate the proposed project, especially for soundfront properties.
4. The proposed fill will not negatively impact adjacent properties or the surrounding area, especially for soundfront properties.
5. The special exception will be consistent with any applicable goals, policies and objectives specified in the Town's adopted Comprehensive & Land Use Plan and Vision Statement. This review includes the Town of Duck's evaluation of the proposal's consistency with its adopted Comprehensive & Land Use Plan, which may be more flexible or more stringent than interpretations by others.
6. The applicant has submitted a drainage plan consistent with the requirements described in Subsection 156.128(A)(4)(c).

Director Heard stated that the Planning Board determined that that all six required findings were met by the proposal, therefore, they voted unanimously to recommend approval at their June 14, 2023 meeting, subject to the following conditions:

1. The applicant must submit required application materials and obtain necessary land disturbance and building permits prior to commencing work.
2. All areas of land disturbance must be stabilized prior to issuance of a Certificate of Completion for the project.
3. The applicant must submit a stormwater drainage plan prepared by a North Carolina licensed design professional for consideration prior to the public hearing with the Duck Town Council.

Director Heard noted that the applicant submitted an embankment improvement plan prepared by Coastal Engineering on August 29, 2023 and provided a stormwater drainage impact analysis as requested in Condition 3, adding that this condition has been met and does not need to be part of the Council's final conditions.

Town Attorney Hobbs asked Council if they had questions for Director Heard.

Councilor Whitman pointed out that the photographs in Council's packets showed vegetation on the hill with trees. He asked if it all would be removed. Director Heard stated that a good amount of the vegetation was at the base that should not be impacted by the construction. He added that the applicant could speak specifically as to what vegetation would be removed as well as what will remain on the site.

Councilor Schiano asked for an explanation for the vinyl bulkhead. Director Heard explained that it would have wooden posts driven in but the actual bulkhead was made of a vinyl material instead of wood. Councilor Schiano asked if it would be more durable. Director Heard stated that it was. Councilor Schiano asked if the people on either side of the applicant would tie into the bulkhead. Director Heard stated that the applicant could

answer that question, adding that the bulkhead tied into their property. He did not think it would be tied into any existing improvements.

Mayor Kingston noticed that a rock wall and some concrete would be removed. He asked if the mid-level wall would be sloped up to the pool. Director Heard stated that the concrete was at the base. Mayor Kingston pointed out that he was referencing the concrete around the pool as the drawing indicated the following language: "remove concrete and also some rock structure". Director Heard stated that there were some areas that have concrete that have begun to fail, which was the language Mayor Kingston mentioned. He stated that the applicant would remove that, adding that the walls would be built below that to stabilize the area above. Mayor Kingston thought it was the concrete to the left of the pool that looked like it sloped down. Director Heard stated that the applicant provided a good photograph that shows the concrete that will be removed. He stated that the applicant could explain it in more detail, adding that it was at the edge of the pool patio.

Mayor Pro Tempore Thibodeau clarified that it was down at the sound level. Director Heard stated she was correct, adding that the applicant would be removing the existing debris in that area that had fallen down the slope.

Mayor Kingston asked if the concrete would be draining into a rock pile. He pointed out that to the left of the pool was concrete that looked like it drained into a rock pile. He asked if it was there for drainage. Senior Planner Cross explained that at the top was a fire pit which was part of an expansion of the pool deck and had fallen down. She asked Mayor Kingston what concrete he was referencing. Mayor Kingston stated that it was to the left of the pool, adding that it was a white blob that goes down and looks like it drains into a rock pile next to the pool. Director Heard pointed out that it was a white line in the photograph that runs perpendicular to the pool down the slope. Senior Planner Cross stated that the white line in the photograph measured distance. Mayor Kingston asked if it was put there for drainage. Director Heard explained that it was not a physical feature but a line that staff added to show the distance of 35 feet from the top of the slope down to the area where the retaining wall was. He reiterated that the line was not a physical feature of the property.

Councilor Whitman thought Mayor Kingston was referencing the survey from July 29, 2023 where it had the following language: "...rock structure to be removed, remove concrete, remove rock landing..." Senior Planner Cross asked if the question was whether the concrete would be removed. Councilor Whitman thought it was Mayor Kingston's question. Senior Planner Cross asked what the question was. Mayor Kingston asked if it was there for drainage and what impact it will have on the wall. Senior Planner Cross thought it was previously part of the patio along with a fire pit that is currently at the bottom of the hill.

Mayor Pro Tempore Thibodeau appreciated the rationale for what the homeowners were trying to do in keeping the walls smaller and tiered. She asked if someone came to the Town with new construction, they would be permitted to put up a 15-foot wall. She

further asked what would be a normal, permitted use. Director Heard explained that it would require a special use permit. Mayor Pro Tempore Thibodeau clarified that it would be needed anytime a bulkhead was built or if it was over a certain height. Director Heard stated that it would be for over a certain height.

Town Attorney Hobbs asked if the applicant had any questions for Director Heard. There were none.

Town Attorney Hobbs asked the applicant to make a presentation.

Eli Barrett of Emanuelson & Dad was recognized to speak. Mr. Barrett stated that he was the contractor that will be performing the work. He stated that Eva Chin contacted him last winter after a storm came through causing a lot of erosion. He stated that he put the plan together for her which was exactly like what the properties to the north and south have in place. He noted that it was pretty common throughout this area, adding that he cautioned people away from the big walls because they become a problem over time.

Eli Barrett stated that they were proposing smaller walls than the properties to the north and south. He pointed out that the debris at the bottom of the hill was a stone fireplace structure that collapsed and fell down the hill. He stated that he and Ms. Chin talked of saving as many trees as possible but the problem was that the embankment was very unstable, adding that they would do their best to save the trees. Councilor Mooney asked if all of the debris would be removed. Eli Barrett stated that it would.

Town Attorney Hobbs asked if any of the sworn witnesses wished to make a presentation. There were none.

Town Attorney Hobbs asked Council if they had any final questions. There were none.

Town Attorney Hobbs closed the evidentiary portion of the public hearing and turned the meeting back over to Mayor Kingston. He noted that a vote of the majority of Council would be required to approve the application. He added that as part of Council's deliberation and if there was a motion to approve the application, there were various findings that would need to be made and it would be helpful if the motion referenced the findings as well as the two proposed conditions.

Mayor Pro Tempore Thibodeau moved to approve SUP23-005 as presented, with the findings of fact as well as the two proposed conditions listed.

Motion carried 5-0.

LEGISLATIVE PUBLIC HEARINGS

Public Hearing/Discussion/Consideration of Ordinance 23-07, an Ordinance of the Town Council of the Town of Duck, North Carolina, Amending Sections 30.35

through 30.40 of the Town Code. Providing a Description and Duties of the Planning Board

Mayor Kingston turned the meeting over to Town Attorney Hobbs.

Town Attorney Hobbs opened the public hearing, noting that the Council would be sitting as a legislative body. He stated that Director Heard would give a presentation.

Director Heard stated that the ordinance proposes to update and amend Town Code Sections 30-35 through 30-40 in the following ways:

- Add the general purposes of the Planning Board
- Update the list of officers
- Establish duties for each of the Board's officers
- Generally outline meeting schedules, cancellation, and notice requirements
- Update duties and expectations for the Board members.

Director Heard pointed out that most of the amendments were items moved from the former Planning Board by-laws to the Town Code. He added that the proposed amendments were intended to serve a significant public purpose by providing a more comprehensive description of the Planning Board and its duties in the Town Code instead of the by-laws, making this knowledge more publicly accessible to potential Planning Board applicants, persons submitting development applications, and the general public. He noted that the draft Rules of Procedure in Council's packets were intended to streamline the former by-laws to an outline concerning how the Board conducts its internal decision-making procedures.

Director Heard stated that as part of updating the ordinance and establishing Rules of Procedure, it was noted that the following duties were previously outlined in the Planning Board by-laws but were not actually under the Board's authority or involvement. He added that these items were proposed to be corrected or removed as part of the amendments:

- The Board was authorized to review the Town's Capital Improvement Projects. This duty is conducted annually by the Town Council as part of its budget review and adoption.
- Meetings were required to be held on the second Friday of each month. The Planning Board has met on the second Wednesday for well over a decade. There is no benefit to tying the Board members' hands by specifying a date for meetings.
- A specific requirement for an annual report from the Planning Board was required. This report and information on Board activities has been typically given during the Town Council Retreat in February. The amendment proposes more general wording to keep the Town Council and general public advised about matters considered by the Board.

Director Heard stated that at Council's April 5, 2023 meeting, they heard presentations from candidates and selected/appointed two new members to the Planning Board. He noted that during Council's consideration, the contents of the Planning Board by-laws were discussed and as the by-laws were adopted in 2004 and have not been updated since, the Community Development Department was asked to coordinate a review of the by-laws, which resulted in the recommended amendments. He stated that after reviewing the current by-laws, staff determined that a majority of the contents should be located in the Town Code outlining the appointment, description, and duties of the Planning Board. He pointed out that Ordinance 23-07 proposes to add those standards to the Town Code with the remaining by-laws streamlined to the Rules of Procedure that were recently adopted by the Planning Board. He added that Town Attorney Hobbs had advised staff that the Rules of Procedure were only guidelines and should be adopted by the Planning Board members.

Director Heard stated that over a period of three meetings on May 10, June 14, and July 12, 2023, the Planning Board members reached consensus on the following changes to the ordinance and its own Rules of Procedure:

For Ordinance 23-07:

- Subsection 30.37(A) was amended with the Board's recommendation to require full-time residency for Board member eligibility.
- Subsection 30.37(B) was amended to specify Board member eligibility for reappointment for additional terms.
- Subsection 30.37(D) was added outlining a requirement to complete an oath of office prior to service on the Planning Board.

For Rules of Procedure:

- The guidelines for meeting attendance were amended to missing two consecutive or three regular meetings within a year (defined as May 1 to May 1) before a recommendation of removal from the Board is forwarded to Town Council.

Director Heard stated that since it updates and clarifies Town standards relating to the Planning Board's duties and procedures, the Planning Board voted unanimously to recommend approval of the proposed text amendments.

Mayor Kingston clarified that regular meetings were for monthly meetings. Director Heard stated he was correct. Mayor Kingston clarified that if it was a special meeting and a member could not attend, they would not be penalized. Director Heard stated he was correct.

Mayor Pro Tempore Thibodeau clarified that annually appointing a new Planning Board Chair and Vice Chair would be achieved in January. She noted that it was not specified what annually was. Director Heard thought that was when it was done but it was not specified in the ordinance. Mayor Pro Tempore Thibodeau clarified that it was the same with the meetings in that the Planning Board has to have a meeting each month but it does not specify when in order to keep things fluid. Director Heard stated she was

correct, adding that the original by-laws stated that the Planning Board should meet on a certain date, but it changed years ago. He added that the ordinance would give the Board some flexibility. He noted that Council may want the Board to meet at a certain time and on a certain date depending on meetings and input Council receives from the Planning Board. He added that the Town of Kitty Hawk Planning Board met a week prior to the Council meeting, which worked for them. He stated that Council would have that flexibility to change it with this ordinance.

Councilor Mooney pointed out that Section 30.37(B) was amended to specify Board member eligibility for reappointment for additional terms. He assumed that it clearly described when a Board member's term was concluding that they were eligible to apply for reappointment. He stated that he did not see any language regarding advertisement and opening up the process to other people. He thought it was discussed at a previous Council meeting. Director Heard stated that Council will be considering another ordinance at this meeting that addressed that issue.

Mayor Kingston asked if the Planning Board member terms were staggered. Director Heard stated that they were and it was in May. Mayor Kingston clarified that the Planning Board's organizational meeting was held in May of each year. He thought there was a schedule with each May being an organizational meeting. Director Heard stated that in May the Planning Board completes appointments. He added that the votes for the Chair and Vice Chair are completed in January and then in May was when new members are appointed. Mayor Kingston thought the Chair served for one year. Director Heard stated he was correct, adding that the new members were appointed in May.

Mayor Kingston wondered if the appointment should be specified with a January 1 date. Director Heard stated that staff tried to stay away from dates to give more flexibility in terms of when things could happen. Mayor Kingston asked when the terms expire. He further asked if there was a particular date when the terms expired. Director Heard stated that it was in the ordinance. Member Whitman stated that it was May 1. Mayor Pro Tempore Thibodeau thought it would be after members are appointed as opposed to January. She pointed out that the ordinance did not specify any dates.

Councilor Schiano wasn't sure that putting dates in would not be a good idea rather than leaving it open so Council knows what the rhythm was. He pointed out that it looked like the terms expire on May 1. He thought the organizational meeting should be the next meeting. He thought it should be established to get a cadence so Council knows rather than asking when a new Chair and Vice Chair would be appointed. Mayor Pro Tempore Thibodeau suggested the following language: "...annually after the newly appointed members..."

Town Attorney Hobbs stated that Council could add the suggested language as part of their deliberation. He thought it would be under the Election of Officers. Mayor Pro Tempore Thibodeau clarified that it would be in Section 30.38(B). Town Attorney Hobbs stated she was correct.

Mayor Kingston thought the Planning Board member's terms expired on April 30 and May 1 would be new appointments with the first organizational meeting to appoint a Chair and Vice Chair. Mayor Pro Tempore Thibodeau asked where the May 1 date was as it was not in the draft ordinance. Councilor Whitman stated that it was in the letter from the Planning Board Chair. Mayor Pro Tempore Thibodeau pointed out that it was not in the draft ordinance and thought it was in the by-laws. Councilor Whitman stated it was part of the Planning Board duties. Mayor Pro Tempore Thibodeau clarified that the draft ordinance was different from the redlined by-laws. Director Heard stated that the by-laws were not redlined. He explained that Attachment A in the agenda packet was a clean copy of what Council was being asked to adopt; Attachment B was a redlined version showing the changes that were made to the draft ordinance; and Attachment C was the by-laws that were adopted by the Planning Board.

Mayor Pro Tempore Thibodeau pointed out that the May 1 date was not in the ordinance. Director Heard stated that it was not in the ordinance but was in the Rules of Procedure. He added that if Council wanted to put a date in the ordinance, they could do so per Town Attorney Hobbs. He stated that it was intended to be flexible by not having a date. Mayor Pro Tempore Thibodeau suggested the following language: "...annually following new appointments..." be put in the ordinance as it would tie them together.

Mayor Kingston thought it needed to be defined when the terms expire and when new appointments are effective. He thought every time someone leaves, there would need to be a redo of who the officers would be. He didn't think that was the way Council wanted to word it. Town Attorney Hobbs thought when Council completes the appointment or reappointment, they would know what the term would be. He stated that Council could add the following language to the beginning of Section 30.38(B): "On the first regular meeting after May 1 of each year, nominations of officers (Chair and Vice Chair) shall be made..."

Mayor Pro Tempore Thibodeau clarified that it would help in the circumstance where there was a special appointment. She thought that Mayor Kingston was concerned that every time someone is appointed there may have to be an election. She thought tying it to the calendar would be advisable. Town Attorney Hobbs suggested removing the word "annually" in the first sentence of Section 30.38(B).

Mayor Kingston asked if all of the appointees are on three-year terms effective May 1 when they are appointed. He pointed out that there were two resignations and the Planning Board appointed replacements effective May 1. Councilor Schiano thought a date needed to be picked so that when the officers were selected and if six months later a member resigns, another member would need to be appointed to fulfill the rest of the term. He thought there needed to be a fixed period. Mayor Kingston agreed.

Councilor Mooney pointed out that Council did not really play a role in that other than appointing individuals. He stated that it was the Planning Board members' decision regarding who would be Chair and Vice Chair. Mayor Kingston, Mayor Pro Tempore Thibodeau and Councilor Schiano agreed. Councilor Mooney stated he wasn't sure what

the issue was, adding that Council should let the Planning Board do their job the way they have been doing it and amend the other language. Mayor Kingston thought the appointments and the annual meeting needed to be on a cycle. Councilor Mooney pointed out that they already were. Mayor Kingston disagreed, adding that that was why Council was discussing it.

Mayor Pro Tempore Thibodeau noted that there wasn't an ordinance previously so now Council was creating one. She asked Councilor Mooney if he thought it was important to put a date in it. Councilor Mooney stated that he did not as he thought it was the Planning Board's business to make a decision. Mayor Pro Tempore Thibodeau clarified that the Planning Board would get together to decide on the appointments. Councilor Mooney stated she was correct, adding that whoever the individuals were, they would be elected by the Board for one year and at the end of the one year, they would either get re-elected or they leave the Board and someone else would get elected. Mayor Kingston stated that Council was not disputing that. Councilor Schiano stated that Council agreed, asking what date the Board would do that. He added that the Board could not do it in one month, one year and then a different month the next year. Councilor Mooney hoped that they would assume some continuity so that it doesn't happen every six months. He clarified that the Chair and Vice Chair terms were one-year appointments. Mayor Kingston stated that he wasn't disputing that. Councilor Mooney reiterated that it did not matter what the date was as long as the Board makes that decision. Mayor Kingston stated that that process cannot continue every time someone is reappointed to the Planning Board, adding that there needed to be a cycle. He pointed out that Council gets elected every two years. Mayor Pro Tempore Thibodeau pointed out that it did say it was annually in the ordinance. Mayor Kingston asked what the date was.

Mayor Pro Tempore Thibodeau thought in Councilor Schiano's example with someone leaving the Planning Board and someone getting reappointed by the Council, it would not trigger a new determination of who the Chair and Vice Chair would be. Councilor Schiano agreed, adding that Council needed to know how long that person would serve until they get officially elected again. Mayor Pro Tempore Thibodeau agreed. Councilor Schiano noted that it would not be a year from that date because the individual would be filling an unexpired term.

Mayor Kingston asked what would happen if the Chair left the Planning Board. Mayor Pro Tempore Thibodeau explained that if Council appointed someone in July, they would serve out the term of the person they replaced. Mayor Kingston agreed. Mayor Pro Tempore Thibodeau pointed out that it would always be on the May 1 cycle. She thought Councilor Mooney was asking why Council would want to hamstring the Planning Board to a particular cycle because they could do whatever they want. Councilor Mooney stated that his point was, unless the Chair or Vice Chair leaves before their term is completed, there was no reason to address it at all for Council because it was the Planning Board's business.

Councilor Whitman asked when the term started and finished. Councilor Mooney asked what term Councilor Whitman was referencing. Councilor Whitman stated he was asking

about the Chair and Vice Chair. Director Heard stated that it was the Planning Board's first meeting in May. Senior Planner Cross stated that it was at the Planning Board's May meeting and was typically held at that meeting.

Councilor Schiano stated that Council wanted to codify the May 1 date. Mayor Kingston agreed, adding that the terms run May 1 to May 1. Councilor Schiano pointed out that the Planning Board would be keeping track of attendance, adding that it should be codified that every May the Planning Board would meet and decide on the officers with a three-year term.

Town Attorney Hobbs explained that it was up to the Council to decide when they complete the appointment, that they specify the term and the start date. He stated that the election of officers was up to the Planning Board. He added that the question was if Council wanted the Town Code to specify that the Planning Board is to elect the new officers at their first meeting after May 1 or leave it as it is and allow the Planning Board to decide when they would do that. He noted that, more than likely, they would do that anyway.

Mayor Kingston pointed out that Council was discussing an ordinance and it needed to be specified that it would happen at the first organizational meeting after May 1 of each year. He thought it may have to be completed under special circumstances if during the year the Chair resigns and the Planning Board has another organizational meeting where Council will need to appoint someone to the unexpired term. He stated that there needed to be a cycle that Council can look at and not have it floating from year to year. He reiterated that the new Council is set every two years at their December meeting and if someone resigns, they have to appoint a replacement. He thought it needed to be more well defined in the ordinance than leaving it loose. He liked Town Attorney Hobbs' suggestion of May 1.

Town Attorney Hobbs suggested the following language under Section 30.38(B): "On the first regular meeting after May 1 of each year, nominations of officers (Chair and Vice Chair) shall be made from the floor..." It was *consensus* of Council to keep the suggested language in mind for their deliberation.

Town Attorney Hobbs asked if any members of the public wished to address the proposal. There were none.

Town Attorney Hobbs asked if Council had any remaining questions. There being no one wishing to speak, Town Attorney Hobbs closed the public hearing and reminded Council that they were sitting as a legislative body and in order to adopt the ordinance on the first read, it would require a two-thirds vote of all members, which was four members. He turned the meeting over to Mayor Kingston for deliberation.

Mayor Kingston thought Town Attorney Hobbs' suggested language was pertinent with regard to dates and cycles. He thought there needed to be a date in the ordinance so people can be appointed from that date out three years even if there would be changes

during that time period. He added that there needed to be some structure overriding that. He stated that there may have to be votes for the Chair if the Chair resigns within their term. He thought the ordinance needed to be amended to reflect that. Councilor Mooney suggested inserting a date in paragraph B specifying that the election would take place at the first meeting following May 1. Mayor Kingston agreed.

Mayor Pro Tempore Thibodeau pointed out that Council would know when it would be time to appoint someone. She asked if the Rules of Procedure were the same as the by-laws. Director Heard stated that it wasn't but that they were similar, explaining that it dealt with things that were internal to the Board that do not need to be in ordinance form. Mayor Pro Tempore Thibodeau clarified that the Planning Board could amend the rules themselves. Director Heard stated that they could.

Mayor Pro Tempore Thibodeau moved to approve Ordinance 23-07 as amended by the Town Attorney, including the language specified regarding the election of the Chair and Vice Chair.

Motion carried 5-0.

Public Hearing/Discussion/Consideration of Ordinance 23-09, an Ordinance of the Town Council of the Town of Duck, North Carolina, Amending Section 156.162 of the Zoning Ordinance, Authorizing the Board of Adjustment to Grant Continuances and Adopt Rules of Procedure

Mayor Kingston turned the meeting over to Town Attorney Hobbs.

Town Attorney Hobbs opened the public hearing, noting that the Council would be sitting as a legislative body. He stated that Director Heard would give a presentation.

Director Heard stated that the ordinance was drafted by Town Attorney Hobbs which proposes to amend Section 156.162 of the Zoning Ordinance with Subsections (D) and (E) authorizing the Board of Adjustment to grant continuances and adopt its own internal Rules of Procedure.

Director Heard explained that from time to time, an applicant or other party to a Board of Adjustment decision may have the need to request a continuance if they feel that a fair hearing or their due process rights will be negatively impacted by the unavailability of a key witness or full slate of voting Board members. He stated that Section 160D-406 of the North Carolina State statutes allows a continuance to be granted in certain situations for boards engaging in quasi-judicial decisions; however, the Town standards creating the Board of Adjustment and assigning its powers and duties do not specifically state that the Board of Adjustment has the authority to grant continuances or adopt its own internal Rules of Procedure. He noted that to prevent any questions or legal challenges about this authority in the future, Town Attorney Hobbs proposed to clearly spell out this authority.

Director Heard stated that the Planning Board discussed the proposal at their July 12, 2023 meeting and as it clarifies the authority of the Board of Adjustment to grant continuances and adopt internal Rules of Procedure, the Planning Board voted unanimously to recommend approval of the proposed text amendment.

Town Attorney Hobbs stated that there may be a time where an applicant may not have an expert available and, in this procedure, the Board of Adjustment Chair could approve a continuance prior to the meeting.

Town Attorney Hobbs asked if any members of the public wished to address the proposal. There were none.

Town Attorney Hobbs asked if Council had any remaining questions. There being no one wishing to speak, Town Attorney Hobbs closed the public hearing and reminded Council that they were sitting as a legislative body and in order to adopt the ordinance on the first read, it would require a two-thirds vote of all members, which was four members. He turned the meeting over to Mayor Kingston for deliberation.

Mayor Pro Tempore Thibodeau moved to approve Ordinance 23-09 as presented.

Motion carried 5-0.

Public Hearing/Discussion/Consideration of Ordinance 23-10, an Ordinance of the Town Council of the Town of Duck, North Carolina, Amending Sections 156.040 and 156.058 of the Zoning Ordinance, Clarifying Where and Under What Criteria Wireless Telecommunication Facilities are Permitted

Mayor Kingston turned the meeting over to Town Attorney Hobbs.

Town Attorney Hobbs opened the public hearing, noting that the Council would be sitting as a legislative body. He stated that Director Heard would give a presentation.

Director Heard stated that the ordinance proposes to resolve two issues related to the establishment of wireless telecommunication facilities in the Town:

1. The Permitted and Prohibited Use Table in Section 156.040 of the Duck Town Code would be amended to include “stealth antennas” and “wireless telecommunication facilities”. Both of these uses are permitted by administrative approval in most zoning districts but require a special use permit in Single-Family Residential (RS-1 and RS-2) districts.
2. Subsection 156.058(J)(1)(b) of the Duck Town Code would be amended to clarify that new utility poles supporting wireless telecommunication facilities can be as tall as 50 feet in height outside of single-family residential zoning districts.

Director Heard stated that when evaluating a recent inquiry, staff noticed a discrepancy between the Permitted and Prohibited Use Table in Section 156.040 and standards

dealing with Wireless Telecommunication Systems in Section 156.058. He stated that to avoid any confusion in the future, staff were proposing to resolve the discrepancy by adding the standards currently outlined in Section 156.058 to the use table. He added that when evaluating another recent inquiry, staff became aware that the Town's standards for the height of new utility poles accommodating small wireless facilities were presently specified and limited on residential properties and public rights-of-way, but no standards were prescribed for commercial or other nonresidential properties. He noted that to clarify the intended standard, staff was proposing to close the loophole by establishing specific standards for the height of new utility poles accommodating small wireless facilities on commercially and other non-residentially zoned properties. He stated that the proposed maximum height of 50 feet was consistent with State standards for utility poles within public rights-of-way.

Director Heard stated that the Planning Board discussed the proposal at their July 12, 2023 meeting and as it clarifies Town standards and provides guidance for staff and other parties relating to wireless telecommunication facilities, the Planning Board voted unanimously to recommend approval of the proposed text amendment.

Councilor Schiano clarified that; in the commercial area of Town the wireless facility could be 50 feet but in the residential area it was 40 feet. Director Heard stated he was correct, adding that it would require a special use permit for residential.

Mayor Pro Tempore Thibodeau clarified that the utility poles in the right-of-way were allowed to be 50 feet. Director Heard stated she was correct, adding that a new pole can be installed if it was in the State right-of-way, which was State law since the Town does not have anything to do with those allowances. Mayor Pro Tempore Thibodeau asked for an explanation on the rule for the water tower in Duck. She further asked if it was Dare County's jurisdiction. Director Heard stated the ordinance in front of Council referenced the small wireless facilities with little boxes. He added that the larger antennas and towers were permitted but had to go through a special use permit. He noted that it was a very narrow definition under State law for the smaller poles and facilities that most companies were using as they were getting away from the taller towers.

Mayor Kingston clarified that small wireless facilities can be installed on a public or State road. Director Heard stated that they could and could go up to 50 feet in height. Mayor Kingston clarified that a special use permit would be required for a private road. Director Heard stated he was correct. Mayor Kingston clarified that the homeowner associations would not have any control over them. Director Heard stated that they would have control and would be the one requesting the special use permit.

Mayor Pro Tempore Thibodeau clarified that the State roads would not be subject to a special use permit and could be done by right. Director Heard stated she was correct. Councilor Mooney clarified that it included facilities along Duck Road. Director Heard stated he was correct. Mayor Pro Tempore Thibodeau clarified that it would apply to all of the State roads in Duck. Director Heard stated that it was how he understood the ordinance and the exemptions that the State has in their State statutes. Councilor Schiano

wasn't sure if they have it as a right to put the facilities on State roads. Director Heard stated that they did. Councilor Schiano clarified that they could decide to put in a wireless facility and the State would approve it. Director Heard stated he was correct. Councilor Schiano clarified that they were not like a regular utility and do not have the same rights as a regular utility had. Director Heard stated that there was a variety of different private companies, but he wasn't sure how it worked.

Councilor Whitman pointed out that the draft ordinance had the following language in Part II(b): "Each new or modified utility pole installed in public street rights-of-way or other zoning districts shall not exceed the greater of (i) 10 feet above an existing utility pole; or (ii) 50 feet above ground level." He asked if it counted just the pole or the utility item on top of the pole. Director Heard stated that it would include the item on top of the pole. He added that the language mirrored the State law's. He stated that if there was an existing pole that was 45 feet, it could go up to 55 feet under the ordinance. Councilor Whitman thought the individual that had come before the Planning Board previously had indicated that they would be using existing poles and then a month later came into Town and installed new poles and put the towers on top of them in the existing rights-of-way. He stated that the individual stated that that was how they were getting power to them. He asked Director Heard if he was correct. Director Heard stated that there is only one utility pole in Town and an application has not come in recently. Councilor Whitman pointed out that that was what was happening in the area.

Town Attorney Hobbs asked if any members of the public wished to address the proposal. There were none.

Town Attorney Hobbs asked if Council had any remaining questions. There being no one wishing to speak, Town Attorney Hobbs closed the public hearing and reminded Council that they were sitting as a legislative body and in order to adopt the ordinance on the first read, it would require a two-thirds vote of all members, which was four members. He turned the meeting over to Mayor Kingston for deliberation.

Mayor Pro Tempore Thibodeau moved to approve Ordinance 23-10 as presented.

Motion carried 5-0.

Public Hearing/Discussion/Consideration of Ordinance 23-11, an Ordinance of the Town Council of the Town of Duck, North Carolina, Amending Applicable Sections of the Town Code, Removing the Planning Board from the Review and Approval Process for Special Use Permits

Mayor Kingston turned the meeting over to Town Attorney Hobbs.

Town Attorney Hobbs opened the public hearing, noting that the Council would be sitting as a legislative body. He stated that Director Heard would give a presentation.

Director Heard stated that the ordinance proposes to amend several Town Code sections to remove Planning Board review from the special use permit review process. He stated that, specifically, the following sections would be amended:

- Section 30.40 – Removes review of development proposals (which only occurs during the special use permit process) from Planning Board duties.
- Section 156.117 – Specifies that site plan review under the special use permit process is the sole purview of the Town Council.
- Section 156.093 – Removes references to administrative and Planning Board review of access and buffer layouts during the special use permit process.
- Section 156.155 – Removes all references to Planning Board review during the special use permit review process.

Director Heard stated that the Planning Board discussed the proposed amendments with staff and Town Attorney Lauren Womble at their July 12, 2023 meeting and inquired about the current review process as well as discussed what would be lost by removing the Planning Board from the process. He stated that it was noted that the Planning Board's review adds value to the process as the Board focuses on development issues on behalf of Council. He added that it was mentioned that Planning Board review offers an advantage for applicants to have a "trial run" as they go through the review process before the application proceeds to Council. He stated that the Planning Board noted several applications over the years that didn't proceed directly to Council because of questions that came up at a Planning Board meeting. He noted that others were able to address certain issues raised at the Planning Board meeting and improve the proposal prior to consideration by the Council.

Director Heard stated that Attorney Womble had stated that the purpose in reviewing and making changes to the ordinance was to head off any issues that may arise in the future. He noted that she had explained why the Board's involvement raises potential legal questions about the Town's quasi-judicial process. He added that it was noted by several Planning Board members that removing the Board review would result in a more timely, streamlined review process for applicants. He stated that the Planning Board voted 3-1 to recommend approval of the ordinance. He pointed out that at Council's August 2, 2023 meeting, the Council had inquired about how other communities involved their Planning Boards in the special use permit review process.

Mayor Kingston clarified that the current process, disregarding the Planning Board, the Town Council looks at every special use permit at least two times. He explained that Director Heard brings it before Council the first time and sets a public hearing 30 days later. Director Heard disagreed, adding that Council only hears it once, which is at the actual public hearing. Mayor Kingston stated that Council discussed the special use permit application that was heard at this meeting at their August 2, 2023 meeting. Director Heard stated that it was not on the Council's August 2, 2023 agenda. Mayor Kingston pointed out that Millstone Marine was at the meeting and discussed the multiple bulkheads. He added that Council had a discussion on it before it was set for a public hearing. Director Heard explained that it was a different special use permit application at

Council's July meeting. Councilor Schiano stated that it was a different public hearing but was similar to the one Council heard at this meeting. Director Heard stated that Council only hears special use permit applications once since it automatically goes to a public hearing.

Councilor Mooney asked with regard to the process being more streamlined, what the responsibility of the Planning Board/staff was when someone applies for a special use permit and if they do not have everything ready. He asked what advice or alternatives are given to them by the Planning Board or staff. Director Heard explained that oftentimes staff will have met with them, sometimes months in advance, to discuss the options they have. He noted that every special use permit application Council sees, there were probably six, eight or ten that find after meeting with staff and discussing the different options, another way to accomplish what they want to accomplish that may not require them to go through that process. He added that for those that do, staff usually meets with them in advance and advises them of what needs to be submitted with their application and if they submit everything, staff schedules a meeting with the Planning Board.

Councilor Mooney stated that, similar to the application that Council discussed earlier in the meeting, there were conditions attached to the approval, most of which were already met. Mayor Pro Tempore Thibodeau pointed out that one out of three conditions were met. Councilor Mooney asked how staff discovers what items need to be addressed. Director Heard explained that the applicant submits everything to staff so staff knows what the applicant has and doesn't have. Councilor Mooney asked if the items were submitted to staff, the Planning Board, or both. Director Heard stated that it was submitted to staff and then the applicant presents it to the Planning Board. He added that they may have additional information that is presented at the meeting, but generally staff tries to receive everything up front.

Councilor Mooney thought that in terms of streamlining the process, the applicant may be better served by waiting one month and being advised of items that need to be remedied before they come before a public hearing. He pointed out that at the last meeting when he asked about this, Director Heard had thought that 50% of what the Planning Board did were special use permits. He found it very helpful when he looks at the work the Planning Board has completed. He understood the risks that Attorney Womble was referencing, but he did not see the risk involved in that. He thought the applicant coming back a second time would allow them to complete what their request was, which was a good thing. He didn't see people getting upset about not streamlining the process if they get what they want and it was all within the guidelines. He stated that he did not see any risk with an applicant going before the Planning Board first and letting the Planning Board render an opinion. He added that if there was going to be a public hearing and Council felt that the Planning Board's report to the Council was significant enough, then a member of the Planning Board should be present at the Council meeting and be sworn in to testify at the hearing, which would remove the risk by offering direct testimony rather than an opinion. He stated that he was not in favor of removing the Planning Board's responsibility from special use permits. He thought it was an important function that Council relies on.

Councilor Schiano clarified that when Council reviews a special use permit, a Town representative was telling Council what the applicant was asking for and how it fits with the rules and regulations. Director Heard stated he was correct. Councilor Schiano clarified that it was sworn testimony at that point in time. Town Attorney Hobbs stated that it was. Councilor Schiano stated that he recognized that it does add a step and would not be streamlined if the Planning Board was kept in there. He assumed that without the Planning Board in there, the Town staff would be doing the work anyway. Director Heard stated he was correct, adding that staff provides that information to the Planning Board and they were able to supplement that in their recommendation to Council. He pointed out that staff were already completing the work and background information.

Councilor Schiano thought that special use permits that he has been a part of, especially the one for the Resort Realty property, that the process was very good because they had to work with staff and the Planning Board and got it to the point where it was almost correct, but when they came before Council, they were told it wasn't and they went back to make the corrections. He stated that it seemed to work well, adding that it felt like a good process to go through.

Councilor Whitman pointed out that there were a lot of people with emotions and at the Planning Board meetings, they tried to sway what they would like to see, even if it was not part of what was in the Town rules or codes. He stated that with the new ordinance, if they wanted to testify, they would have to have some kind of standing in order to testify in front of Council. He added that at Planning Board meetings, they come to the meetings and throw their emotions out.

Mayor Pro Tempore Thibodeau thought Councilor Mooney brought up a good point about streamlining. She stated that it was an extra step for the applicant to go through where they meet in front of one board and then another with one board having no authority to grant them what they were looking for. She stated that it seemed to be a vetting process, adding that she has been struck by the fact that every time Council has a special use permit hearing, they have to listen to what they hear at the actual hearing.

Town Attorney Hobbs asked if any members of the public wished to address the proposal.

Jay Blose of 105 Waxwing Court was recognized to speak. Mr. Blose stated that he strongly supported Councilors' Mooney and Schiano's positions in that there is very real value with keeping the Planning Board. He thought it would be a problem to remove the Board from that process as he felt they provided very valuable input to the Town Council in their deliberations with the applications. He thought it was important to continue obtaining that value in the process. He thought it was a mistake to take the Planning Board out of the process, adding that there has to be a better way to deal with the issue from a legal basis.

Town Attorney Hobbs asked if Council had any remaining questions. There being no one wishing to speak, Town Attorney Hobbs closed the public hearing and reminded Council that they were sitting as a legislative body and in order to adopt the ordinance on the first read, it would require a two-thirds vote of all members, which was four members. He turned the meeting over to Mayor Kingston for deliberation.

Mayor Pro Tempore Thibodeau knew it was time-consuming for applicants to go through the Planning Board. She knew staff did an extreme amount of work, adding that she was looking at the idea of what Council just went through with the application for a special use permit earlier in the meeting. She thought Council would have been at the meeting a lot longer. She stated that streamlining the process would elongate Council's meeting because they were able to feel that the issue was vetted by the Planning Board. She added that Council may need to have more mid-month meetings to accommodate special use permits.

Mayor Pro Tempore Thibodeau agreed that the stakes were continually getting higher for applicants that may feel that Council was swayed outside of the quasi-judicial process, which weighs on her when she sits in a quasi-judicial capacity. She added that she tries to listen to what is heard at the hearing as well as listening to the expert testimony. She thought a compromise was to have the Planning Board serve as a vetting body, but not vote. She explained that the Planning Board would ask questions, listen to the applicant, give them feedback, but not vote because the vote was ultimately Council's. She added that the evidence Council hears from the Planning Board's vote was not admissible.

Town Attorney Hobbs stated that it would be similar to what Dare County does according to the staff report. Councilor Mooney agreed, adding that every other municipality on the beach does it too. Town Attorney Hobbs thought there was a vote taken by the other municipalities at the Planning Board level. Councilor Mooney stated that he pointed out that the other municipalities' Planning Boards still play a role in the special use permit process. Town Attorney Hobbs agreed, adding that he thought the distinction was whether they take a vote or not.

Councilor Mooney thought that the applicant would rather have something take a little longer if they were on the receiving end of accurate, good advice on how to solve the problems that may exist in their project. He thought it was something Council needed to help people with as he thought Council had a responsibility to do that. He stated that in the past at 1369 Duck Road, there was an application for a special use permit that was similar to some of the fill applications Council has seen, adding that this one the applicant was asking to fill into the sound to extend their land, which was not permitted. He wasn't sure if that applicant was offered advice on how to solve that problem, which he thought the Planning Board does do. Mayor Pro Tempore Thibodeau thought the Planning Board was part of that process. Councilor Mooney stated that they were, but it was Council's vote at the end. He added that if the Planning Board had supplied alternative ideas to that applicant, they may have been able to adjust their plan and come back to Council with something acceptable rather than Council denying the application. Mayor Pro Tempore Thibodeau thought that staff served that function. Director Heard stated that staff met

with that applicant and their representative on numerous occasions to discuss many different options that they had for compliance. He added that if Council heard differently, it was incorrect.

Mayor Kingston appreciated Councilor Mooney's comments regarding keeping the Planning Board in the process, but he wanted to follow the lead of the Town's legal advice with two attorneys making a recommendation. He stated that Council discussed other towns, adding that Currituck County has eliminated the Planning Board review and the Town of Southern Shores appeared to be taking the same course of eliminating the Planning Board for that process. He thought, at times, Council needed to take the advice of its legal counsel with respect to potential legal risk. He stated that it would streamline the timing for applicants and thought many times in the past, the Council has always been qualified and made good decisions but has been at odds with the Planning Board recommendations.

Mayor Kingston stated that Council made a lot of changes over the years to the special use permit. He pointed out that the Parker House Restaurant was a good example in that Council had them move the facility so they would have additional parking. He thought Council had the ability to ask the questions and review the situations with staff completing the majority of the work from the standpoint of preparing Council for the public hearing. He thought the Planning Board meeting was a public forum with opinions, the public speaking out, the evidence is not good, adding that the meetings were broadcast to the public with the public weighing in. He stated that Council hears the public comments many times and sees them contacting members of Council or trying to influence decisions.

Mayor Kingston stated that with regard to the Resort Realty project, there were complaints, but Council's job was to look at parking and setbacks. He stated that a lot of emotions came out of the Planning Board meeting, adding that they did make some changes, but he thought staff had a lot of influence on the changes to the project. He pointed out that it came before Council and Council denied the application in order to send it back for further work. He thought Council was very qualified to hear special use permits, adding that he was in favor of following the legal counsel. He thought there will be more Planning Boards being removed from the process of special use permit applications.

Mayor Pro Tempore Thibodeau thought the Planning Board themselves were in the majority of voting to eliminate this step on the special use process. She thought it will take more time for Town Council to get involved, but Council has also witnessed fatigue from the applicants in the past with having to go before a lengthy process with the Planning Board and then another meeting with Council. She agreed with Mayor Kingston that the input Council receives from the Planning Board was not admissible in the process.

Councilor Mooney reiterated that if the Council felt they needed to rely on information supplied by the Planning Board and their report regarding a special use permit, there was

no impediment to Council to require the Chair, Vice Chair, or any member of the Board to come before Council to testify under oath. He pointed out that it eliminates the hearsay aspect of that information.

Mayor Pro Tempore Thibodeau thought that the Planning Board process and the meeting itself were creating information that may not be expert or relevant. She added that the applicant basically goes through a pre-application process at that point. Councilor Mooney stated that if Council had a problem with experts, it was Council's fault because if Council did not appoint people to boards that they think are capable, that have experience, that have an education to discern what's right and wrong, what's applicable and what isn't, was on Council. Mayor Pro Tempore Thibodeau stated that she was not referencing people on the Planning Board but was talking about people who come in to discuss the application, and the public and emotional aspects of an application. Councilor Mooney asked for clarification regarding the emotional point. Mayor Pro Tempore Thibodeau explained that when Council hears expert testimony, they were not experts but lay people who are relying on experts. She added that it was much like the Planning Board, who were no more qualified than Council. Councilor Mooney argued that some were. Mayor Pro Tempore Thibodeau pointed out that Councilor Mooney's statement was subjective, adding that it ebbs and flows with the Council. Councilor Mooney agreed. Mayor Pro Tempore Thibodeau stated that she wasn't trying to say that the Planning Board was less of an expert than the Council, pointing out that the Council is elected and the Planning Board is not. She thought the responsibility lies with the Council to make the decision and they were putting undue layers on the Planning Board to do that in advance of what Council was ultimately responsible to do.

Mayor Kingston thought Council and the Planning Board were made up of members with diverse backgrounds and the members bring different things to the meetings. He noted that not everything the Planning Board does has to do with special use permits or development. He pointed out that at this meeting, there were many public hearings that were basically ordinances with a lot of information, procedures, and policies. He added that there was a role for the Planning Board, but he thought when weighing the legal risk of moving forward, especially in today's environment with social media and the recording of the Town's meetings, the availability online of people having opinions, the Planning Board members that come before Council were not experts in some of the fields. He stated that engineers and homeowners were. He saw the Council as being very capable of digging deep into special use permits if required, adding that they have done so in the past. He stated that Council has made a lot of changes from what has come from the Planning Board over the years. He thought Council should move forward and streamline the process, adding that if it doesn't work, Council could revisit the issue. He reiterated that, based upon the legal opinions, Council should move forward and eliminate the Planning Board from the special use permit process.

Councilor Mooney asked Town Attorney Hobbs for an abbreviated explanation of the perception of risk. Town Attorney Hobbs stated that Council had in their packets a memorandum from him as well as an article from the School of Government. He explained that the School of Government, while they say that it can be done, they

recommend that it not be done because the evidence that Council hears is under oath and the technical evidence would have to be provided by experts. He stated that at the Planning Board level, there were no limitations on who could speak and whether the evidence is presented or the public opinion that is presented is relevant or not does not meet the same standards that Council has. He stated that, with regard to a Planning Board member coming to the Council meeting and speaking while under oath, they would be under oath and reporting what was said at the Planning Board level. He noted that at the Planning Board level, there were not the same safeguards that Council has during a quasi-judicial hearing. He stated that for those reasons, the School of Government issued the recommendation and certain bodies have decided to forgo the Planning Board in the process as referenced in the staff report. He stated that Currituck County eliminated the Planning Board in 2016. He reiterated that this was Council's decision.

Councilor Mooney stated that Currituck County could do whatever they wanted because in his opinion, they have abandoned reasonableness when it comes to what goes on in Corolla and Carova. He stated that approximately 78,000 vehicles pass through Duck to go to Corolla each week, adding that there was no government other than Currituck County to control what was going on. He stated that, as a result, they are building houses in every spot they can find, which creates bigger problems for Duck. He didn't necessarily find citing Currituck County's decision to be particularly helpful. He stated that every other town on the Outer Banks has not eliminated the Planning Board, adding that there had to be a reason for that. He understood what was going on and it seemed that the notion of the removal of this step would create a more streamlined process for the applicant was disingenuous. He thought there were people who need the help and advice that they receive from the Planning Board. He added that in all three public hearings heard at this meeting, all had a document from the Planning Board explaining what they listened to as well as their recommendations. He did not foresee that as a problem and if there was an issue that Council felt would be a problem, then they should bring someone from the Planning Board in to testify. He noted that they would testify about facts, what they saw at the site and how it adheres to the Town's ordinances. He added that if they thought it was not so egregious, that was good information for Council. He stated that if Council thought it was something that needed to be presented as sworn testimony, then it should be.

Councilor Schiano agreed with Councilor Mooney's comments. He agreed that Council was capable of reviewing the information and making informed decisions. He added that everyone on Council has had enough experience to be able to do that and understands the rule of evidence. He thought that since the Town has a Planning Board they need to be used for things and special use permit applications was one of them. He thought it was important for the Planning Board to complete the vetting and pre-screening as it added to the project when it gets to Council. He pointed out that there were people at the beginning of a Council meeting that spoke about the project during the Public Comment period, adding that the special use permit applications get charged up at the Council level with emotions. He noted that if someone had standing, they could be very emotional. He thought the Planning Board played an important role in this process and if it needed to be more structured or disciplined in the way an applicant goes through the process to avoid

legal issues, then that would be fine. He reiterated that he thought the Planning Board should remain as part of the process.

Mayor Pro Tempore Thibodeau asked Councilor Schiano how he felt about the Planning Board listening to the project but not weighing in. Councilor Mooney asked what the point would be in them doing that. Mayor Pro Tempore Thiobdeau stated that it would help them out or help them come up with ideas that they did not have before as Councilor Mooney had pointed out. Councilor Mooney asked how Council would know. Mayor Pro Tempore Thibodeau stated that Council would not know, adding that Council would hear what they may find in a report from the Planning Board that states what they discussed, but they would not vote on an approval or denial. She thought it came down to what the Planning Board was approving was not essentially relevant to what Council has to do. She added that if Councilor Mooney liked the idea of the Planning Board vetting, listening, and filtering in addition to staff, then if they do not weigh in on it, Council would not have to worry about being swayed. She was in favor of obtaining more Council and Planning Board ideas on an application as well as concepts that the applicant may have not considered, but she felt weighing in on it was where there was an issue.

Councilor Mooney clarified that Mayor Pro Tempore Thibodeau's suggestion was to let the Planning Board do the job that they have been doing but there was no need for them to vote, adding that they could still send reports to Council based on the facts that they have encountered, but they do not have to vote on it. Mayor Pro Tempore Thibodeau thought it would be a compromise because of concerns, strengths, and weaknesses. She stated that they would have to report it at the time of the meeting so it could be entered into evidence. She added that, besides the extra time and extra opinions from the Planning Board meeting, it was on everyone's radar. She stated that there was extra time for the applicant since they would attend two separate hearings, but it does get out to the public and gives time for the public to catch up. She noted that Council was not supposed to be listening to anything other than what they hear at the meeting. She thought, with a compromise, the Planning Board Chair or a representative from the Planning Board could come in, testify, and state what their conversations were.

Councilor Schiano clarified that when someone comes for a special use permit, they were not coming for Council to approve something they were doing that was within the law, but asking for approval for something they wanted to do that was outside the law. He noted that if it wasn't outside the norm they would not be coming to Council as the Planning Board and staff would let them know everything was in order and they could move forward with their project. Director Heard stated that there were certain uses that were not necessarily outside of the law but may be uses that require more detail. He added that it was still within the law. Councilor Schiano stated that it was outside of the rules or guidelines and needs some special consideration.

Councilor Schiano stated that, with regard to the Resort Realty public hearing, they went before the Planning Board and Council and after several iterations got it to the point where they were down to two minor issues – setback and parking spaces. He stated that

Council heard the evidence and sent it back, asking the applicant to revise things, adding that they redrew the plan which removed the parking issue. He pointed out that they went into almost an as of right to build that because everything was completed except the setback. He thought the existing building was already in the setback. Director Heard stated he was correct.

Councilor Schiano stated that he did not see how the Planning Board did not help. He didn't think Council relied on anything the Planning Board specifically said, but relied on what came before Council as evidence, which was what the applicant wanted to do, this was how it matched against the zoning, and this is where it did not work. He added that people discussed it as part of their sworn testimony and Council then made their decision. He thought it was a process that worked pretty well. Mayor Kingston asked if the Planning Board did that or staff. He stated that the Planning Board moved it on to Council, but he believed it was mostly staff that identified the issues. Councilor Schiano understood, adding that staff does that for all of the things that are part of the Planning Board meetings.

Mayor Pro Tempore Thibodeau clarified that if Council had a special use hearing and the hearing had to be continued because Council wasn't ready to make a decision, the applicant would not be able to come back before Council if the application was denied. Town Attorney Hobbs stated that, unless the applicant made major substantive changes to the proposal, then they can restart that process. Mayor Pro Tempore Thibodeau recalled that Council had a continuance one time in order to receive more information or to have more time. Town Attorney Hobbs stated that Council has the authority to do that.

Councilor Schiano asked if every special use permit automatically gets forwarded to Council for a decision. Director Heard stated that they do. Councilor Schiano clarified that the Planning Board does not say to the applicant that they do not find enough to grant the special use permit and the applicant decides to take it to Council. He clarified that that was not how it worked. Mayor Pro Tempore Thibodeau stated that they could. Director Heard stated that if there are major issues and objections at the Planning Board level, the applicant may choose not to move forward, otherwise they have that right to move forward. Mayor Pro Tempore Thibodeau pointed out that Council has heard special use permits in the past where the Planning Board had recommended denial. Councilor Schiano clarified that the Planning Board has no authority to stop the applicant, but make recommendations, and the applicant could take it before Council. Mayor Pro Tempore Thibodeau stated he was correct. Mayor Kingston pointed out that the recommendation had no bearing on the law.

Town Attorney Hobbs stated that with regard to having the Planning Board involved but not taking a vote, the question was how important their vote was. He noted that it could not be the deciding factor, as Council could not make a decision on the application with the sole basis of the decision being what the Planning Board had voted, but that it could supplement what Council was considering. He stated that the question was, with regard to supplementary evidence, if the vote the Planning Board takes is important to Council or if

an exploratory process and discussion at that level was more important that would come before Council to consider as a part of that.

Councilor Mooney thought the process was the important part. Councilor Schiano agreed. Mayor Kingston pointed out that the exploratory process would be the same with Council whether it comes through the Planning Board or not. He noted that earlier in tonight's meeting, there were a lot of questions asked on the special use permit application. He stated that exploratory by Council would be the same whether a recommendation or vote is received from the Planning Board. He added that many times, Council is at odds with respect to what the Planning Board has put forward, either pro or con.

Councilor Schiano asked if the Planning Board saw the same information Council would see that is presented by staff. Director Heard stated that occasionally there was additional information submitted. He explained that, with regard to the public hearing earlier in the meeting, the Planning Board recommended that the applicant needed to submit a plan from a licensed engineer. He stated that Council saw that but the Planning Board did not. He stated that it was an example of how something changed as a result of the Planning Board's conversation or recommendation where an applicant may change something on their site plan. He stated that staff would identify that for Council if it happened, but it only happens occasionally. He added that what Council sees was not necessarily 100% of what the Planning Board saw. He stated that the Planning Board brings up issues for the applicant. He added that the applicant may provide additional information to Council that they did not present to the Planning Board to address. He stated that over 90% of what Council sees is the same as what the Planning Board sees, but there were changes in some applications. Councilor Mooney clarified that the changes were based on the reaction of the Planning Board and staff. Director Heard stated he was correct.

Mayor Pro Tempore Thibodeau pointed out that at the public hearing earlier in the meeting, one of the requirements was the CAMA permit, which was not available at the Planning Board stage, but was for the Council meeting. She thought some of the items may have come from staff or common knowledge from the engineer. Councilor Mooney thought it came from the Planning Board. Mayor Pro Tempore Thibodeau agreed.

Mayor Kingston clarified that with the Resort Realty project, the Planning Board sent it forward with a recommendation of approval. He further clarified that it came before Council and Council denied the application and sent it back. Director Heard stated that he was not at that hearing. Senior Planner Cross stated that she was not sure, adding that she thought it went before the Planning Board twice. Councilor Mooney noted that Council sent the application back to the Planning Board. Mayor Kingston stated that the Planning Board recommended approval the first time. Senior Planner Cross disagreed. Mayor Pro Tempore Thibodeau asked how Council could send it back. Senior Planner Cross stated that she would need to research it.

Councilor Mooney recalled that the applicant, despite the Planning Board's recommendation of denial, still wanted to come before Council. He stated that Council

knew that the Planning Board did not recommend approval and based on the evidence that was presented at the hearing, Council had opinions about whether the plan was proper or not. He added that it was sent back to the Planning Board to try again. He stated that, rather than an outright no, they were given a second opportunity. He thought that was what was important because applicants were not just denied on the first try but given the opportunity to go back and achieve what needed to be done. He thought it was important. Mayor Pro Tempore Thibodeau remembered the applicant had one chance unless the project was substantially altered. She thought that may have been the case. Councilor Mooney thought the project was substantially altered. Senior Planner Cross stated that she would research it.

Town Attorney Hobbs reiterated the advice from the School of Government, which was not, in all circumstances, to remove, it was if Council felt that it was a large enough legal risk and they recommended removal but stated that if Council decided to keep the Planning Board in the process, then Council would need to have special precautions when making their decision and they consider the relevant, competent evidence presented. Councilor Whitman pointed out that Council had two attorneys state the same thing that the Planning Board should be eliminated, adding that he was in favor of what they recommended. Mayor Pro Tempore Thibodeau pointed out that the Planning Board themselves voted in the majority.

Mayor Kingston moved to approve Ordinance 23-11 as presented.

Mayor Pro Tempore Thibodeau noted that if the motion carried, there would be more Council meetings as it would take more time. She added that, based on the attorneys' input, she would be supporting the motion. Mayor Kingston asked what the Planning Board added tonight on the special use permit that would have saved time. He stated that they recommended approval but beyond that, he wondered what information they put forward. Mayor Pro Tempore Thibodeau stated that it was a good point.

Motion carried 3-2 with Councilors Mooney and Schiano dissenting.

OLD BUSINESS/ITEMS DEFERRED FROM PREVIOUS MEETINGS

Discussion/Consideration of Authorizing a Public Hearing on Ordinance 23-12, an Ordinance of the Town Council of the Town of Duck, Amending Residential Parking Standards in Section 156.092 of the Zoning Ordinance, Clarifying that Crush and Run and Similar Materials are Impervious Materials

Director Heard stated that Ordinance 23-12 proposes to amend Subsection 156.092(C) of the Zoning Ordinance to clarify that crush and run and similar materials are impervious surfaces and cannot be used as a surface or subsurface material to satisfy the requirement for semi-permeable parking for single-family residential properties.

Director Heard explained that Town staff has documented several recent instances where a property owner or contractor has installed a subsurface base of crush and run, which is

an impervious material, beneath a gravel or stone surface in contradiction to the intent of the ordinance that residential parking areas remain semi-pervious. He stated that after researching the issue, staff were seeking to further clarify the Town's standards to specify that these types of materials are imperious.

Director Heard stated that the Planning Board considered the proposed amendment at their August 9, 2023 meeting and following questions and discussion, the Board members reached a consensus that the proposed amendment defining crush and run and similar materials as impervious materials was a necessary improvement to the existing standards; however, there was substantial discussion about how the standards would be implemented as there may be many existing, nonconforming situations. He stated that staff explained how the Zoning Ordinance dealt with nonconformities as the parking areas are changed or upgraded.

Director Heard stated that after thorough consideration of the proposal, the Planning Board voted 3-1 to recommend approval and to authorize a public hearing for October 4, 2023 for Ordinance 23-12.

Mayor Pro Tempore Thibodeau moved to authorize a public hearing on Ordinance 23-12 for Council's October 4, 2023 meeting.

Motion carried 5-0.

NEW BUSINESS

Discussion/Consideration of Authorizing a Public Hearing on Ordinance 23-13, an Ordinance of the Town Council of the Town of Duck, North Carolina, Amending Chapter 31 of the Town Code, Updating Standards for Scheduling Council Meetings, Electing Officers, and Appointing Board Members

Director Heard stated that, as drafted by Town Attorney Hobbs, Ordinance 23-13 proposes to amend the following sections of Chapter 31, Town Council, of the Town Code:

- Section 31.06 would be amended to authorize the Town Council to set and amend its meeting schedule.
- Sections 31.11, 31.13, and 31.30 would be amended to establish a process for the election of the Mayor and Mayor Pro Tempore.
- Section 31.30 would be amended to establish a process for the appointment of members to Town boards and committees.

Director Heard pointed out that to prevent any legal challenges about the Council's procedures in the future, Town Attorney Hobbs proposed to clearly spell out these authorities and procedures consistent with the direction provided by Town Council.

Director Heard stated that since the ordinance does not involve amendments to any development standards under the purview of the Planning Board, the Board did not take any formal action; however, with the understanding that one of the proposed amendments addressed the procedure for appointing Board members, staff made the Planning Board aware of this proposal. He noted that the Planning Board did not have any comments on the proposal. He added that staff was recommending approval of the ordinance.

Town Attorney Hobbs clarified that there would be a stated requirement dealing with advertising for applicants to other boards. He wasn't sure if it was in the draft ordinance. He asked if that was something that should be in the ordinance for any kind of appointments that Council have an affirmative provision in the code that states that in addition to considering someone who is available for reappointment, that there was a process set out in the ordinance with regard to soliciting nominees. Town Manager Havens did not believe it was in the draft ordinance, but he believed it was the intent. Councilor Mooney agreed. Town Attorney Hobbs stated that he could work with staff to come up with an additional provision to be added at Council's discretion at the next meeting and public hearing if Council wished to have it added. It was *consensus* of Council to add the language.

Councilor Whitman moved to authorize a public hearing on Ordinance 23-13 for Council's October 4, 2023 meeting.

Motion carried 5-0.

Discussion/Consideration of the Resignation of Council Member Tony Schiano and the Process to be Used to Fill the Unexpired Term

Mayor Kingston read Councilor Schiano's letter of resignation to Council and the audience, as follows:

"Mr. Mayor, It is with mixed emotions that I submit my resignation as Councilman for the Town of Duck, effective Thursday, September 7, 2023. My decision was difficult and was motivated solely by personal and family considerations. It has been my honor and pleasure to serve as a Councilman, and work with my dedicated fellow Councilors and the very competent Town Manager and staff. I will miss you all and hope to see you all when we return on vacation, or when you are in the Charlotte area."

Mayor Kingston moved to accept Councilor Schiano's letter of resignation as presented.

Motion carried 5-0.

Mayor Kingston stated that he had sent Council a note on a proposed process to replace Councilor Schiano. He noted that Council, by law, needed to fill the vacancy. He proposed having Town staff send out an application on September 7, 2023, receiving the applications prior to Council's September 20, 2023 mid-month meeting, where they would make the appointment so that the new member could serve in October, November

and the first part of the meeting in December. He added that the proposed application was in Council's packets. He thought if this was done by appointing someone at Council's mid-month meeting, the person could come to the candidate session that Town Manager Havens planned for the candidates running for office.

Mayor Kingston moved to direct staff to send out an application on Thursday, September 7, 2023 with a due date of Friday, September 15, 2023.

Councilor Mooney asked if the position would be advertised with the application available. Town Manager Havens stated he was correct, adding that it would also be on the Town's website and in social media posts.

Motion carried 5-0.

ITEMS REFERRED TO AND PRESENTATIONS FROM THE TOWN ATTORNEY

Town Attorney Hobbs stated he had nothing to report. He wished Councilor Schiano well, adding that he enjoyed working with him.

Mayor Kingston called for a five-minute recess. The time was 8:37 p.m.

Mayor Kingston reconvened the meeting.

ITEMS REFERRED TO AND PRESENTATIONS FROM THE TOWN MANAGER

Departmental Updates

Senior Planner Cross gave a brief overview of the past month's permit 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.

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.

Public Information and Events Director Kristiana Nickens was recognized to speak. Director Nickens gave a brief overview of activities to Council and the audience.

August FY 2024 Financial Presentation

Finance and Human Resources Administrator Jessica Barnes was recognized to speak. Administrator Barnes gave a short presentation on the August Fiscal Year 2024 financials to Council and the audience.

MAYOR'S AGENDA

Mayor Kingston stated that the mayors/chairmen meeting will be on September 19, 2023 hosted by the Town of Nags Head. He thanked Councilor Schiano for his term on the Council.

Town Clerk Ackerman read Resolution 23-11 – a Resolution of the Town Council of the Town of Duck, North Carolina, Honoring and Thanking Anthony Schiano for his Service to the Town of Duck. Afterward, Town Clerk Ackerman presented Councilor Schiano with a framed resolution.

Councilor Schiano stated that it was with mixed emotions that he tendered his resignation and made his decision to leave the area. He stated that it was personal and the time for him to be closer to his grandchildren and family, as well as downsizing. He stated that that drove his decision and had nothing to do with the Outer Banks or the Town of Duck. He stated that Duck was the best town to live in on the Outer Banks. He stated that it has been a wonderful experience, an honor and a privilege to serve as a member of the Council, adding that he learned a lot and hoped he contributed with his skills and background. He stated that the Council was wonderful, dedicated and committed and Town staff was unbelievable under Town Manager Havens, who Duck was lucky to have. He thanked everyone for the opportunity to serve on the Town Council.

Mayor Kingston moved to adopt Resolution 23-11 as presented.

Motion carried 5-0.

COUNCIL MEMBER'S AGENDA

Mayor Pro Tempore Thibodeau gave a Visitors Bureau update to Council and the audience. She stated that the cameras have been a big hit. She reminded everyone to check them out. She stated that Councilor Schiano will be missed.

Councilor Mooney thanked Councilor Schiano for his service to the Town.

Councilor Whitman thanked Councilor Schiano for his service to the Town.

Councilor Schiano thanked everyone, adding that he enjoyed working with everyone the past two years.

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.

CLOSED SESSION

Mayor Pro Tempore Thibodeau moved to enter closed session pursuant to Section 143-318.11(a)(5) to establish or instruct the public body's staff or negotiating the price and other material terms of a contact or proposed contract for the lease of real property.

Motion carried 5-0.

The time was 9:38 p.m.

Upon return from closed session Town Attorney Hobbs stated that Council gave direction to the negotiating agent, which was the Town Manager, on the property that was discussed.

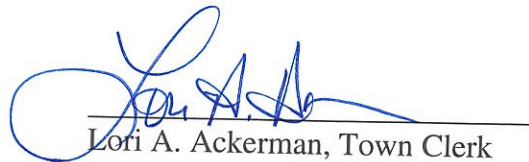
Mayor Kingston noted that the next meeting would be the Mid-Month meeting on Wednesday, September 20, 2023 at 1:00 p.m.

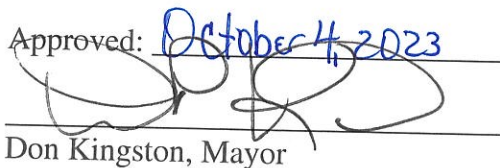
ADJOURNMENT

Councilor Whitman moved to adjourn the meeting.

Motion carried 5-0.

The time was 10:11 p.m.


Lofi A. Ackerman, Town Clerk

Approved: October 4, 2023

Don Kingston, Mayor

