

**TOWN OF DUCK  
TOWN COUNCIL  
REGULAR MEETING  
October 4, 2023**

The Town Council for the Town of Duck convened at the Paul F. Keller Meeting Hall at 6:00 p.m. on Wednesday, October 4, 2023.

**COUNCIL MEMBERS PRESENT:** Mayor Don Kingston; Mayor Pro Tempore Monica Thibodeau; Councilor Sandy Whitman; Councilor Rob Mooney; and Councilor-elect Randy Morton.

**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 Deputy Town Clerk Melissa Felthousen.

**OTHERS ABSENT:** Town Clerk Lori Ackerman

Mayor Kingston called the meeting to order at 6:03 p.m.

Mayor Kingston asked Deputy Town Clerk Melissa Felthousen to lead the Pledge of Allegiance. Mayor Kingston led the moment of silence.

**SWEARING IN OF TOWN COUNCIL MEMBER**

Mayor Kingston stated that on September 20, 2023, Council chose a replacement for Tony Schiano. He stated that it was necessary to swear in the new Council member. He turned the meeting over to Deputy Town Clerk Melissa Felthousen.

Deputy Town Clerk Melissa Felthousen was recognized to speak. Deputy Town Clerk Felthousen went on to swear in Councilor Randy Morton.

**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 September 6, 2023, Regular Meeting; Contract for Landscaping and Duck Trail Maintenance between the Town of Duck and Coinjock Lawn Care, LLC; Contract for the Village Sidewalk Landscaping between the Town of Duck and Caribbean Landscaping; Submittal of Notice of Intent to Extend Series 2021B Bond related to the Most Recent Beach Nourishment Project; and Budget Amendment**

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 23-008, a Special Use Permit Application by Doug and Laura Davis to Allow a Retaining Wall to Support New Fill at 124 Brandon Court (The Applicant has submitted a written request to defer this hearing until the November 1, 2023 meeting of the Town Council)**

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

Town Attorney Robert Hobbs was recognized to speak. Town Attorney Hobbs opened the public hearing. He stated that he was contacted by the applicant through their attorney who was retained by the applicant in the last week. He stated that he had a conflict with this meeting and could not be present and is asking Council to consider a continuance of the public hearing to the November 1, 2023 Council meeting.

Mayor Pro Tempore Thibodeau moved to continue the public hearing on SUP 23-008 until Council's November 1, 2023 meeting at 6:00 p.m.

Motion carried 5-0.

**LEGISLATIVE PUBLIC HEARINGS**

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

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 of Community Development Joseph Heard was recognized to speak. Director Heard stated that the ordinance 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 stated that staff have documented several recent instances where a property owner or contractor has installed a subsurface base of crush and run 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 impervious.

Director Heard stated that the Town’s parking standards were originally adopted in 2004 and underwent a thorough review and overhaul by the Planning Board in 2007. He stated that over the course of several meetings, the Board and staff made it clear that their intent was to require parking spaces to be permeable in most cases, thereby exempting them from lot coverage calculations. He added that in 2014, the NC Department of Environmental and Natural Resources (NCDENR) discussed the issue concerning the permeability of “crush and run” as part of a rule-making procedure and made the following findings during their consideration: “Crushed stone often does not allow water to infiltrate due to either clogging of the material at the surface or compaction of the underlying soil (at the time of installation or as a result of ongoing vehicular or foot traffic). Stormwater runoff from aggregate crushed stone surfaces typically has higher velocities, volumes, and pollutant loadings than stormwater runoff from typical A-3 pervious surfaces. If a development site’s stormwater control measures are designed based on the assumption that crushed stone surfaces are pervious, then these measures may be overwhelmed or bypassed, possibly causing gradual or catastrophic release of stormwater runoff and associated pollutants into the environment.”

Director Heard stated that during consideration of the criteria, the NC League of Municipalities presented the following comment: “Although we do understand some gravel acts as pervious surface, other gravel or stone, such as crush and run, could and should be considered impervious.”

Director Heard added that after fully deliberating the issue, the NCDENR made the following conclusion: “Division of Energy, Mineral, and Land Resources (DEMLR) will not consider any areas within the new development projects that are covered with gravel (as defined in the temporary rule) to be built upon areas. For new development projects, this will reduce the overall percentage of built upon areas for the purposes of determining the overall site density as well as for sizing for any needed stormwater control measures. Any areas within new development projects that are covered by aggregate materials that do not meet the definition of gravel will typically be considered as built upon areas. All applicants, however, have the opportunity to design an aggregate surface that allows a portion of the stormwater to infiltrate through the surface and into the subsoil and present

this design to DEMLR staff for consideration and review. The permeable pavement chapter of the NC Stormwater BMP Manual can be used as guidance when proposing a partially impervious surface to DEMLR.”

Director Heard stated that the proposed amendment classifying “crush and run” or similar materials as impervious is consistent with this determination by State permitting agencies. He added that Town engineer Mike Robinson advised that crush and run should be considered as an impervious surface material.

Director Heard stated that at the Planning Board’s August 9, 2023 meeting, they considered the proposed amendment in Ordinance 23-12 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. He pointed out that there was substantial discussion about how these standards would be implemented as there may be many existing, nonconforming situations. He stated that staff explained how the Town’s Zoning Ordinance deals with nonconformities as the parking areas are changed or upgraded.

Director Heard stated that the Planning Board voted 3-1 to recommend approval of the proposed text amendment as it updates and clarifies the Town’s standards for parking materials on single-family residential properties consistent with the intent of the Town’s lot coverage standards.

Mayor Pro Tempore Thibodeau stated that by Council approving the ordinance, it would clarify specifically that crush and run was not a pervious material and would have to be counted toward lot coverage going forward. She stated that Director Heard touched on the fact on how the Town would go about dealing with the issue for anyone that may have missed something and used crush and run. She clarified that it would not have any bearing on what Council did at this meeting. Director Heard stated that staff will not be going out to find violations. He stated that if someone has to redo their parking area, it would potentially come up then. He pointed out that it has never been allowed and every time staff has been made aware of it, they have addressed it. He added that there have been some situations where contractors have done this as a practice and hidden it or did not have it noted on a survey. He stated that staff took it at face value and did not question it previously. He noted that staff would only address those if additional parking had to be added.

Mayor Kingston asked if a homeowner was going to add surface to it, the Town would not make them take out the entire parking area and redo it. Director Heard explained that as long as they were compliant, staff would treat it as lot coverage. He added that they still may be under 30%, but each situation was unique in terms of how it will need to be addressed. Mayor Kingston stated that there were a few parking spaces in Town that have stone with crush and run underneath it and stone added to the top. He clarified that staff would not make the owner take out those parking spots or redo the entire parking lot. Director Heard stated that it would be an instance where staff would make the owner

redo that parking lot if it was keeping them under 30% lot coverage. He added that staff would make them redo anything that was nonconforming because there has never been a time where it was permitted. He stated that this is not a situation where something could be grandfathered or be legally nonconforming since it was never allowed in the first place. He reiterated that staff would make the owner go back and remove it.

Councilor Whitman clarified that if an owner currently had crush and run underneath with stone on top and had less than the permitted lot coverage, it could remain as it would still count as concrete. Director Heard stated that it would only come up if the owner wanted to do something to that parking area such as expanding it. He stated that the ordinance requires all parking spaces be pervious except in instances where there were topographical features. He explained that if there was a steep slope, gravel would not be the best material to use, adding that the owner may have to use concrete. He stated that the ordinance would give him the ability to make that determination, otherwise it would require residential parking spaces outside of the drive aisle to be pervious.

Councilor Morton clarified that it would be if the owner wanted to make any changes or if it was a situation where they wanted to maintain more than 50% of it, then they would have to redo the driveway. Director Heard stated that any changes would trigger it.

Mayor Pro Tempore Thibodeau asked if a permit was needed for maintenance of the parking area. Director Heard stated that it would not be necessary, adding that staff would not be aware of it because maintenance would not trigger a review. Mayor Pro Tempore Thibodeau asked when an ordinance amends another ordinance, they get tied together more than this. She pointed out that the draft ordinance was to tell everyone that they are not to use crush and run. She asked if it was tied back to the regular ordinance so that it was easy to find and clear in the normal, original ordinance. Director Heard stated that the draft ordinance was changing the original ordinance.

Town Manager Drew Havens was recognized to speak. Town Manager Havens explained that ordinance changes are submitted to American Legal Publishing to be recodified, adding that it would be in the printed book as well as online next week. Mayor Pro Tempore Thibodeau asked what it would be part of. Town Manager Havens stated that it would be part of the Town Code. Mayor Pro Tempore Thibodeau clarified that Part 1(C) would look different. Director Heard stated she was correct. Mayor Pro Tempore Thibodeau clarified that the ordinance was documenting the fact that it was being changed. Town Manager Havens stated she was correct.

Town Attorney Hobbs asked if any members of the Planning Board wished to make a presentation. There were none.

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.

Councilor Whitman moved to approve Ordinance 23-12 as presented.

Motion carried 5-0.

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

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, 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 advertising vacancies and appointing members to Town boards and committees.

Director Heard stated that during its initial review of the draft text amendments and discussion of authorizing a public hearing for Ordinance 23-13 the Council expressed an interest in setting parameters for advertising vacant board/committee positions. He added that, per Council's direction, Town Attorney Hobbs incorporated the requested amendment as a new Subsection 31.30(A) in the draft ordinance.

Town Attorney Hobbs explained that the ordinance was one that would clarify the provisions added with the exception of the addition of the advertisement subsection under Appointments that Council had asked to be added.

Councilor Mooney stated that under Section 31.30 with regard to the sentence regarding filling vacancies, he thought a definition of "vacancy" needed to be added so there won't be an issue when someone's term expires as it would be considered a vacancy not to be reappointed with process. Town Attorney Hobbs clarified that Councilor Mooney wanted to add a provision to clarify that when a term expires it was a considered a vacancy. Councilor Mooney stated he was correct.

Town Manager Havens asked if it could be added to the paragraph after the word "vacancy" so it would have the following language: "...including the expiration of term..." Councilor Mooney stated that it could. Town Attorney Hobbs clarified that it would be in the introductory sentence. Town Manager Havens stated he was correct. Councilor Mooney pointed out that there was a loophole that may be exploited at some time in the future. Town Attorney Hobbs clarified that a clause would be added after the following language: "...Mayor Pro Tempore, including the expiration of term..." He asked Councilor Mooney if he would prefer it closer to the word vacancy. Councilor Mooney stated he preferred it closer to the word vacancy. Town Attorney Hobbs suggested the following language: "...procedure to make appointments to fill vacancies (including the expiration of the term)..." Councilor Mooney stated he was fine with it.

Town Attorney Hobbs asked the rest of Council if they were fine with the change. The other Council members were fine with it.

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 23-13 as amended.

Motion carried 5-0.

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

There was no Old Business to discuss.

### **NEW BUSINESS**

#### **Discussion/Consideration of Authorizing Staff to Work with the Planning Board on a Zoning Text Amendment**

Director Heard stated that, concurrent with the adoption of comprehensive amendments to the Town's Flood Damage Prevention Ordinance (FDPO) in May 2020, the Planning Board and Council considered and adopted amendments concerning how building height is measured in different flood zones. He noted that the intent of these changes was to be fair and reasonable to property owners while updating the standards to be consistent with new standards in the FDPO. He stated that following extensive discussion by the Planning Board at the March 11, 2020 meeting, the members reached consensus to add the following wording: "...provided that the top part of the lowest floor does not exceed

two feet above the regulatory flood protection elevation...” as part of their approval of the text amendment.

Director Heard stated that while the intent of the Planning Board and Council was clear, the intent did not get transferred fully and accurately to the draft ordinance that was adopted by Council in May 2020. He explained that the change was made to the section dealing with properties in the AE, AO and X flood zones but should have also been made in the CHHA section. He added that during an evaluation of an oceanfront development proposal, staff noticed the omission of the maximum elevation limit in CHHA flood zones. He noted that, interpreted literally, this section would potentially have no maximum height in certain situations. He stated that since the loophole has been identified, staff and the Planning Board were seeking authorization from Council to correct the oversight through adoption of another text amendment.

Director Heard stated that at the Planning Board’s September 13, 2023 meeting, the Board reviewed the records relating to the issue and concurred with staff’s recommendation to request authorization from Council to consider the proposed text amendment.

Director Heard noted that he was not asking for a public hearing at this point, adding that it would go back to the Planning Board.

Mayor Pro Tempore Thibodeau asked if staff had any trouble with this since 2020. Director Heard stated that there has not been any trouble with it, but if someone was to call staff out on it, the literal ordinance does not cover this situation.

Mayor Pro Tempore Thibodeau moved to authorize staff to work with the Planning Board on a zoning text amendment as presented.

Motion carried 5-0.

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

Town Attorney Hobbs stated he had nothing to report.

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

**Departmental Updates**

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



Senior Planner Sandy Cross was recognized to speak. Senior Planner Cross gave a brief overview of the past month's permit activities to Council and the audience. She referenced the recent storms and how some beach stairs and decks have been damaged by them. She explained that in the past, Council has waived permit fees for repairs and wanted to know if Council wanted to do that again, especially for dune decks since they take more time.

Mayor Pro Tempore Thibodeau moved to waive permit fees in the aftermath of the nor'easters that have been encountered, specifically for beach accesses that have been affected, for six months.

Motion carried 5-0.

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.

### **September FY 2024 Financial Presentation**

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

Town Manager Havens stated that the Town will be completing some clean up on the beach with regard to the sand fencing and other debris that was the result of the recent storm. He stated that Surf Rescue Director Mirek Dabrowski will be working with Ben Vorndran of Ben's Backyard to take care of the debris the week of October 9, 2023.

Senior Planner Cross stated that they were working on getting a dumpster and once it was in place, she hoped the Field Research Facility would give permission to put a dumpster on their property so Surf Rescue Director Dabrowski could get started on the clean-up. She noted that, currently, the conditions were not favorable and hoped that work could start next week. She stated that she wasn't sure how long the clean up would take as it would depend on the manpower available. She stated that, with regard to the large items on the beach such as the steps and decks, the Town does not anticipate removing them as homeowners may wish to reuse them. She added that if a homeowner contacts her to let her know they will not be reusing the items, then they will be cut up and disposed of.

Councilor Mooney asked Senior Planner Cross if she would let the public know when the clean up will be occurring. Senior Planner Cross expected that something would be put out in the Town's e-news on Monday, October 9, 2023, if not sooner.

### **MAYOR'S AGENDA**

Mayor Kingston stated that the mayors/chairmen meeting will be on October 17, 2023 hosted by the Town of Manteo. He reminded the public that there was a Candidate Forum that will be hosted by the Dare County League of Women Voters on Thursday, October

12, 2023 at 7:00 p.m. in the Paul F. Keller Meeting Hall. He noted that it will last an hour and a half and would also be broadcast.

Mayor Kingston stated that over the last two weeks, in the local newspaper was an article of interest. He stated that when the State passed the budget this year, they included in it provisions for Dare County on workforce or affordable housing, where Dare County could build and overrule all of the municipalities' codes and ordinances. He explained that someone could come into Duck, find a piece of property, and build a six-story building with no regulation on setbacks or height. He stated that it became a big issue between Dare County and the six towns with all of the towns responding to their state legislators. He pointed out that Dare County has stated publicly that they were unaware of it but it was put in the budget, which has been an issue. He added that it was still an issue because it was part of the budget which the State approved. He stated that Dare County has decided to form a task force to look at workforce housing and asked the six towns for support. He explained that they were putting together the taskforce to deal with the issue, adding that Duck signed on and Dare County wanted the mayors and managers to participate, so he and Town Manager Havens will participate once the task force is formed. He stated that the task force would include some associations such as realtors, homebuilders, restaurants, and non-resident groups. He stated that he would have more to report in the future on this.

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

Mayor Pro Tempore Thibodeau stated that she was encouraged that there will be a task force and looked forward to hearing what comes out of it. She gave a short update on the Outer Banks Tourism Board meeting to Council and the audience. She thanked everyone that was involved in the upcoming Jazz Festival, adding that she was looking forward to it.

Councilor Mooney stated he had nothing to report.

Councilor Whitman thanked staff that will be working on the Jazz Festival. He reminded everyone of the trash pick up on Friday, October 6, 2023, and the upcoming beach planting. He noted that he has volunteered for both over the years and that it was a great way to help the community.

Councilor Morton thanked Council for their vote of confidence regarding him serving for the next few months. He thanked staff for the upcoming Jazz Festival, adding that it has been a while since he has been able to attend the festival, but was looking forward to it.

### **OTHER BUSINESS**

#### **Additional Public Comments**

Mayor Kingston opened the floor for public comments.

Peter Gussick of 166 Ocean Way was recognized to speak. Mr. Gussick stated that he and his wife were concerned about the condition of the beach, erosion and what might happen in terms of beach nourishment. He stated that their beach staircase that was built in April was now sitting on the beach. He stated that he was curious if there were any plans for beach nourishment south of the pier, adding that he wanted to get educated as to what he could do in this kind of situation because they lost a significant amount of dune. He pointed out that they could rebuild the stairs but he was concerned about the dune.

Mayor Kingston explained that Council normally does not respond to public comments. He added that Council was aware of what has happened to the beach and beach nourishment was always near the top of their list. He added that it was a long process with nothing immediately happening. He stated that because the beach is managed, it will be measured and looked at in the future between now and the Council Retreat with a lot of discussion at the Retreat.

There being no one else 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)(3) to consult with the Town Attorney on a matter preserving the attorney-client privilege, specifically relating to the pending litigation of *Pinto vs. Town of Duck and Keith Hardwick and wife, Charlie Hardwick*; and also relating to another potential litigation matter.

Motion carried 5-0.

The time was 7:44 p.m.

Upon return from closed session Town Attorney Hobbs stated that he gave legal advice to the Council and the Council provided guidance with regard to both items.

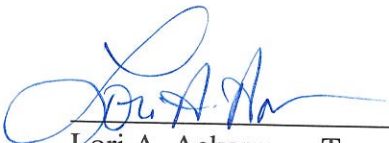
Mayor Kingston noted that the next meeting would be the Regular meeting on Wednesday, November 1, 2023 at 6:00 p.m.

### **ADJOURNMENT**

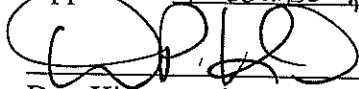
Councilor Whitman moved to adjourn the meeting.

Motion carried 5-0.

The time was 8:17 p.m.

  
Lori A. Ackerman, Town Clerk

Approved: November 1, 2023



Don Kingston, Mayor

