

**TOWN OF DUCK
TOWN COUNCIL
REGULAR MEETING
March 6, 2024**

The Town Council for the Town of Duck convened at the Paul F. Keller Meeting Hall at 1:00 p.m. on Wednesday, March 6, 2024.

COUNCIL MEMBERS PRESENT: Mayor Don Kingston; Mayor Pro Tempore Monica Thibodeau; Councilor Sandy Whitman; and Councilor Kevin Lingard.

COUNCIL MEMBERS ABSENT: Councilor Brenda Chasen.

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; and Town Clerk Lori Ackerman.

OTHERS ABSENT: None.

Mayor Kingston called the meeting to order at 1:00 p.m. He noted that Councilor Chasen was excused from the meeting.

Mayor Kingston asked Fire Chief Donna Black and the members of the Duck Fire Department in attendance 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 hearing be held off.

Miriam Rollin of 149 Plover Drive was recognized to speak. Ms. Rollin stated that she wished to address the agenda item regarding a potential ordinance on helium balloon releases. She stated that NOAA had an article about balloon releases, which were often used for special occasions, which when released into the air end up making their way back to Earth, causing many problems. She pointed out that many of the balloons that were not properly disposed of end up in the ocean or along a shoreline, becoming marine debris. She added that once the balloons land in the ocean, they become a hazard for marine wildlife and can be mistaken for food which leads to loss of nutrition, internal injuries, starvation, and death. She stated that the string or ribbon attached to a balloon can cause entanglement or asphyxiation to marine wildlife.

Miriam Rollin noted that there was also a human and economic impact in that no one likes to be on a beach full of trash, adding that balloon debris contributes to dirty beaches which keeps residents and visitors from enjoying the beach. She pointed out that it was a problem on the Outer Banks and was getting worse. She stated that balloon debris was completely preventable with many alternatives. She added that ten states, including Virginia, have laws banning helium balloon releases; however, North Carolina does not. She urged Council to ban helium balloon releases in Town as a new aspect to the ordinance banning littering. She noted that she knew this would be hard to enforce, but pointed out that the littering ordinance was also hard to enforce, but it was on the books. She thought it would help the public awareness with a new ordinance.

Kathryn Clemans of 116 Sunflower Court was recognized to speak. Ms. Clemans stated that she wanted to speak to the public hearing for SUP 24-002. She stated that she has owned her property for 27 years and has been through many storms. She stated that her and her neighbor had written a letter to the Council about their concerns with SUP 24-002, adding that their main concern was that the owners of 121 East Sea Hawk Drive do not divert their stormwater onto the back of her and her neighbor's properties. She stated that they currently have a small catchment area that overflows from the allowed elevation of 121 East Sea Hawk Drive's land by three feet. She noted that adding stormwater to that area would potentially result in severe flooding on her and her neighbor's properties if the stormwater catchment area overflowed. She asked that a proviso be made in the special use permit that the water be confined to 121 East Sea Hawk Drive's property and does not flow to the backs of her and her neighbor's properties. She added that their septic fields were at the rear of the properties and they have seen significant water come over those fields and had engineering consideration of that matter.

Debbie Swick of 59 Deer Path Lane, Southern Shores, was recognized to speak. Ms. Swick stated that she was the creator of Ban Balloon Releases in North Carolina. She stated that she has sent out proposals to Council as well as all of the municipalities, all 100 counties in North Carolina, and that she was currently working with a state senator to obtain legislation for the entire State of North Carolina. She noted that the State of Florida passed a ban earlier in the day, adding that it needed a signature from the governor there. She pointed out that it was a movement that was taking place all over the coastal United States and is moving forward.

Debbie Swick knew the issue had been discussed by Council and that their concern was enforcing it, just like anything that was litter related. She pointed out that if someone litters from their vehicle, the litter is retrieved and a fine is assessed. She added that when a balloon is let go, it cannot be retrieved. She noted that balloons take 100 years to break down and never decompose and the ribbons attached to them take 150 years to break down. She added that she is a member of N.E.S.T., Marine Mammal Stranding and Seal and they are taught how to assess if balloons have been active in marine life. She stated that if a balloon is released on the Outer Banks, it will go out to sea and the marine wildlife will end up being hurt by them. She urged Council to pass an ordinance specific to balloons, adding that she was aware there were no current businesses in Duck selling balloons, but it didn't mean it wouldn't happen.

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

CONSENT AGENDA

Minutes from the February 7, 2024, Regular Meeting; Government & Education Access Channel 2024-2025 Proposed Budget; Budget Amendment

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

Motion carried 4-0.

SPECIAL PRESENTATIONS

Introduction of Firefighter Caroline Clissold

Fire Chief Donna Black was recognized to speak. Fire Chief Black went on to introduce Caroline Clissold as the newest firefighter for the Duck Volunteer Fire Department to Council and the audience. Mayor Kingston and Council welcomed Firefighter Clissold to the Town.

QUASI-JUDICIAL PUBLIC HEARING

Public Hearing/Discussion/Consideration of SUP 24-001, a Special Use Permit Application by Verizon Wireless, with the Authorization of the Northpoint Association, Inc., to Establish a Small Wireless Facility on Northpoint Neighborhood Common Property at 100 Dianne Street in the Single-Family Residential (RS-1) Zoning District (The applicant for this Special Use Permit has withdrawn the application, so the Public Hearing is no longer needed)

Mayor Kingston noted that public hearing would not be held due to the applicant withdrawing their application.

Public Hearing/Discussion/Consideration of SUP 24-002, a Special Use Permit Application by Property Owner Jerry Tatum, Requesting the Following Allowances for Fill and Grading Activities Related to Stabilization of Fill and Construction of a Single-Family Residence at 121 East Sea Hawk Drive: (1) to Allow a Bulkhead to Support and Contain Fill and (2) to Allow Land Disturbance Activities and Fill within Five Feet of the Property Line to the East

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. Mayor Kingston noted that Council had heard comments during the Public Comment period.

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, witnesses, and staff for the public hearing.

The following persons were sworn to provide testimony during the hearing: Joseph Heard, Sandy Cross, Jerry Tatum, Jeffrey Ballard, Ralph Calfee, and Kathryn Clemans.

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 applicant was requesting a special use permit to allow the retaining wall to support and contain fill, which is not permitted under Subsection 156.128(A)(6) and allow land disturbance activities and fill within five feet of the property to the east at 121 East Sea Hawk Drive, which is not permitted under Subsection 156.128(A)(2).

Director Heard stated that the property is part of the Sea Hawk subdivision and is 17,619 square feet in size and zoned Single-Family Residential (RS-1). He stated that the lot was 75 feet in width and 235 feet in depth, containing a four-bedroom, 4,025 square foot single-family residence that was constructed in 2023. He noted that the residence has been occupied under at Temporary Certificate of Occupancy pending resolution of the grading and fill issues. He stated that a swimming pool and surrounding concrete patio was located to the rear of the residence. He pointed out that two properties that were zoned RS-1 abut the rear of the subject property and have frontage on cul-de-sacs in the Tuckahoe subdivision, each containing a single-family residence.

Director Heard explained that when approved for development in December 2020, the residence proposed on the site plan had a setback of 17.5 feet from the eastern side of the property and as part of the permit, a land disturbance plan was approved to add up to three feet of fill in the area where the residence was to be constructed. He noted that the proposed fill tapered down to the existing lot elevation before the required minimum setback of five feet for fill and grading activities. He added that upon completion of the construction project in 2023, the as-built survey showed that the residence was

constructed only 12 feet from the eastern property line. He stated that this difference in location has created issues with compliance with the fill and grading while maintaining the required minimum setback for land disturbing activities from the eastern property line.

Director Heard stated that the applicant has worked with Calfee Engineering to develop a resolution to the issue that involves constructing a low retaining wall for stability and tapering a lesser amount of fill toward the adjoining property to the east. He noted that in order to be constructed as proposed, the retaining wall and associated fill will require approval of the following allowances requested in the special use permit:

1. Allow the retaining wall to support and contain fill, which is not permitted under Subsection 156.128(A)(6).
2. Allow land disturbance activities and fill within five feet of the property to the east, which is not permitted under Subsection 156.128(A)(2).

Director Heard stated that Subsection 156.128(C) of the Duck Town Code establishes review criteria for special use permit applications involving fill and grading activities. He noted that the following standards should be considered as part of the Council's review:

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 impractical 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.

Director Heard stated that staff determined that all five required findings were met by the proposal and, therefore, staff was recommending approval of SUP 24-002 subject to the following conditions:

1. The applicant must submit the 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 final Certificate of Completion/Occupancy for the project.

Director Heard stated that he wished to address comments that were made earlier in the meeting regarding stormwater management in general. He stated that he wanted Council to understand that the Town does not have stormwater management requirements for individual residential developments. He stated that there was no requirement that any property retain all of the stormwater on the property. He stated that as far as the elevation and fill that was added to the applicant's lot were otherwise in compliance with Town standards to raise the area that was being developed. He pointed out that there was an area at the rear of the property that was lower and served as a collection area for stormwater for the applicant's property as well as some of the adjoining properties both in the Sea Hawk subdivision and the one that backs up to the Tuckahoe subdivision. He noted that it was not a requirement, but he wanted to point out that there was no fill proposed in the area toward the rear that would impact any of the stormwater management that is in the rear of the property.

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

Mayor Pro Tempore Thibodeau clarified that best practices were for homeowners to try to hold their own stormwater, but the Town does not have anything that requires it. Director Heard stated she was correct.

Councilor Lingard thought the stormwater issue may be something that Council should look into investigating whether it should be a requirement to contain stormwater.

Councilor Whitman clarified that the lot was raised by three feet. Director Heard stated he was correct. Councilor Whitman pointed out that according to the applicant's drawings, they had an even setback on either side. He asked how the house moved over by five feet. He stated that on the applicant's as-built drawing, it was overbuilt and they had to remove some concrete to get the lot coverage down to 29.97. He noted that somewhere in the process, the applicant knew they had a problem but kept building. Director Heard stated that the applicant could speak to Councilor Whitman's questions. He noted that staff reviews the as-built at the end for compliance and as long as it meets the standards, staff would approve it.

Councilor Whitman pointed out that Director Heard had many meetings with the applicant. He asked if this was the only option that came up. Director Heard stated that it wasn't, adding that there were numerous proposals that were looked at. He stated that with the cross-section, there were numerous different cross-sections that were developed and the one in front of Council was determined to be the one that had the least impacts that the applicant was able to move forward with. He stated that there were also several meetings with the contractor on how to best resolve the issue.

Mayor Pro Tempore Thibodeau clarified that the cross-section in front of Council was the best one because it had the least amount of impact on the neighboring property to the east. Director Heard stated that it was determined to be the best alternative, adding that the other options that were looked at were taller retaining walls or higher fill going in. He stated that this was the best proposal as far as minimizing the height of the wall and the impact on the adjoining properties while still providing the support that was needed for that side of the house.

Councilor Lingard stated that the way he saw special use permits was that they were for unforeseen circumstances or something that would benefit the Town or community or something to make good on something that occurred naturally. He asked if that was the broad scope for special use permits. Director Heard stated that that it was, adding that they could be used for other reasons and not limited to that type. He stated that they were all good reasons in considering them, but they were not the only reasons why they could be considered.

Mayor Kingston clarified the primary function of installing the retaining wall was to stabilize the foundation of the house that was rebuilt up three feet. He asked if that was the primary function of the retaining wall. He pointed out that it has now created other flooding which has not been addressed. He asked if that was correct. Director Heard stated that it has not created any flooding issues. Mayor Kingston clarified that there was no drainage into the lots in the Tuckahoe subdivision or on the west side. Director Heard explained that the lot was filled three feet, which the applicant was allowed to do. He stated that before this project, it was the lowest lot in the area so a lot of water collected on it. He added that the owner has a right to elevate the lot and by doing that it had nothing to do with the applicant's proposal. He stated that by elevating the lot three feet, it took out some of the area that used to collect water, but other properties had water flowing off theirs onto the applicant's property. He stated that the applicant elevated their property so that their home and pool were not sitting in a puddle. He pointed out that it happened before any of the issues occurred and the applicant was allowed to do that. He added that staff typically sees fill added to new developments and the issue was the applicant moved their house over; if they had not done that, a special use permit would not have been necessary. He reiterated that what the applicant was doing was not proposing any new fill or bulkhead in the back area toward the Tuckahoe subdivision or the rear of their property. He stated that the property still holds a good amount of water for the surrounding properties and was serving that purpose. He added that, according to the engineering analysis studies staff received, it would not increase the stormwater runoff to the adjoining properties. He thought the applicant would have additional comments about it.

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.

Jerry Tatum of 121 East Sea Hawk Drive was recognized to speak. Mr. Tatum stated that he tried very hard to comply with the rules and this seemed to be the best option. He agreed with Director Heard that the project did not create any more stormwater but was solving the problem at hand. He added that they looked into it very thoroughly and had their engineer present for this meeting who addressed the problem. He stated that he appreciated Council's consideration and approval of the application.

Town Attorney Hobbs asked Council if they had questions for the applicant. He reminded Council that the applicant was not an engineer and could not provide competent evidence relating to engineering matters. He stated that if Council had questions that should be addressed by a professional licensed engineer, then the engineer could provide testimony and answer technical questions.

Councilor Lingard asked why the house was built in the wrong place. Jerry Tatum stated that the builder could address that question. He added that he has been a property owner in the Sea Hawk subdivision since 1980. Councilor Whitman stated that he had the same question that Councilor Lingard had asked about the location of the home.

Town Attorney Hobbs asked the applicant's representative to make a presentation.

Jeffrey Ballard of Ballard Custom Designs was recognized to speak. Mr. Ballard stated that he had constructed the home for Jerry Tatum. He stated that with regard to the question Councilor Lingard and Councilor Whitman had, he moved the house to the left five feet in hopes of having more clearance on the west side. He stated that he did not consider the slope and it was a mistake on his part with regard to the 3:1 slope in keeping the five-foot clearance. He thought the issue was not having fill within five feet of the property line and a 3:1 slope, adding that he could not do both. He stated that he could have kept the slope but not the five-foot setback. He reiterated that it was his mistake of moving the house and not considering the slope. He further reiterated that it was moved for clearance in the future.

Councilor Whitman asked why 400 square feet of concrete was removed from the driveway. Jeff Ballard explained that he did not continue building knowing there was an issue. He stated that the reason for the concrete removal was because at the end of the project, a sidewalk was installed which was a little wider than it should have been and put the project over lot coverage. He added that it was a sidewalk issue on the west side and happened toward the end of the project. He noted that the ordinance required a foundation survey along the way, before they moved forward, which was completed and everything was completed according to the ordinance and the codes. He stated that when he got to the end of the project, he realized that the math did not work out and there was too much sidewalk so he had it removed.

Councilor Whitman stated that in looking at the original site plan as well as the as-built plan, they were different. He noted that somewhere along the line either the property owner or Jeff Ballard had to make a decision as to how everything was moved around. Jeff Ballard agreed, adding that it was a custom home. He explained that custom homes

develop as they are constructed and typically if there was going to be a code issue or an ordinance issue, one goes back to the Town with it, but he did not see that and moved forward with changing some shapes and positions of things. He reiterated that it was a custom project and was not a track home that is built all the time, but something that advances as it moves along.

Councilor Whitman pointed out that five feet was a significant amount. Jeff Ballard agreed, adding that he addressed that with Council. He stated that they moved it and did not consider the slope, adding that there was a large depression on that side that was not on the other side. He noted that if he had moved the house five feet the other way, there would not have been an issue. He reiterated that he made a mistake and did not catch it sooner.

Mayor Pro Tempore Thibodeau clarified that the five-foot move that was done on purpose was so that there was a better access to the back yard. Jeff Ballard stated she was correct, adding that what he found in the past with a swimming pool and septic systems, they tend to have issues and if one could not get behind the house, it becomes a process to try to get equipment behind a house, especially on tighter lots. He stated that it could be done but it's difficult. He stated that in trying to avoid that, he made the call to move the house for better access.

Mayor Kingston clarified that the swimming pool was new, adding that there was no pool before. Jeff Ballard stated that there was no home or pool previously. Mayor Kingston asked if the construction of the swimming pool created elevation at the back of the lot which would cause runoff. Mr. Ballard stated that it did not, adding that the back lot was still at original grade and had most of the original trees. He stated that it was a pretty deep lot.

Councilor Whitman pointed out that Jeff Ballard had stated that he moved the house so he could get around the back, but the septic system is located on the side that was shortened by five feet, according to the site plan. Jeff Ballard explained that the septic system was behind the swimming pool to the left side of the back side of the property. Councilor Whitman pointed out that the house was moved over to the left side. Mr. Ballard agreed. Councilor Whitman stated that Mr. Ballard had stated that he did it so he could get to the septic system. Mr. Ballard agreed, adding that the septic tank was placed in the position by the Dare County Health Department and was on the back side of the property. Councilor Whitman clarified that it was closer to the property at 123 East Sea Hawk Drive. Jeff Ballard stated he was correct, adding that the drainage field was not because it is not located where the septic tank is.

Mayor Pro Tempore Thibodeau asked Jeff Ballard if he was involved in the options. Jeff Ballard stated that he was and worked directly with the engineer to come up with a solution. He thought what was trying to be accomplished was to meet the no fill within the five feet. He noted that the plan had "regrade" which would put it back to the original grade and the retaining wall would be two feet out of the ground and would give the 3:1

slope at the back of the house. He noted that they would be removing fill and not adding it.

Town Attorney Hobbs asked if the applicant wished to present any other evidence. There was none. Town Attorney Hobbs asked if the applicant's engineer wished to make a presentation.

Ralph Calfee of Calfee Engineering was recognized to speak. Mr. Calfee stated that he was a registered professional engineer in the State of North Carolina. He stated that he prepared the engineering documentation that Council had in their packets. He believed that Director Heard did a good job of characterizing what the engineering proposal was and how it has worked as well as how it accomplishes the goals.

Town Attorney Hobbs asked Council if they had questions for Ralph Calfee. There were none.

Town Attorney Hobbs asked if there was any other evidence to be presented during the hearing.

Kathryn Clemans of 116 Sunflower Court was recognized to speak. Town Attorney Hobbs stated that it seemed that Ms. Clemans wished to present evidence during the hearing. He asked where her property was located in comparison with the subject property. Ms. Clemans stated that it was at the rear of the applicant's property, not immediately adjacent, but to the south of John Roderick's property, which was completely adjacent to the applicant's property. Town Attorney Hobbs clarified that Ms. Clemans' property did not directly adjoin the applicant's property. Kathryn Clemans stated he was correct, adding that it did if one looked at the catchment area. Town Attorney Hobbs asked Ms. Clemans if she planned to present testimony on how the proposal will cause damages to her property that will be different from what other properties may suffer or what the general public may suffer. Kathryn Clemans stated that she was trying to ensure that her back yard does not get flooded from additional earth works and people digging and moving things around.

Town Attorney Hobbs pointed out that it seemed that Kathryn Clemans wished to provide testimony on the effect of the special use permit on her property which was not adjacent to the applicant's property. Kathryn Clemans stated he was correct, adding that there was a catchment area that was common to the three properties – 116 Sunflower Court, 118 Sunflower Court, and 121 East Sea Hawk Drive. She stated that she did not want the catchment area filling up and flooding onto her and Mr. Roderick's properties.

Town Attorney Hobbs stated that it was Council's decision regarding allowing a party to intervene and he was interpreting it as a request for someone to intervene as a party to the hearing to provide evidence. He stated that it seemed to him that Kathryn Clemans met the requirements of being a party to intervene in the case. He added that after the testimony and during deliberations, Council could evaluate that along with all of the other

evidence presented. It was *consensus* of Council to allow Kathryn Clemans to intervene and provide evidence.

Town Attorney Hobbs told Kathryn Clemans that she has been admitted as an intervening party and may present evidence, which would be subject to questions from Council as well as the applicant.

Kathryn Clemans stated that she and her neighbor have low-lying property and expect runoff. Town Attorney Hobbs pointed out to Ms. Clemans that she should only discuss her property and not her neighbor's. Ms. Clemans stated that since the property at 121 East Sea Hawk Drive has been elevated by three feet and because her property is low-lying, she gets runoff which increases each time someone completes earthwork to the back of the property. She stated that she was asking if the special use permit was granted, that the engineering that is completed does not result in any diversion of stormwater from the applicant's property onto hers because she cannot take it and was almost at the limit. She noted that at the last sustained rain, just from a three-foot elevation, the catchment area filled up, overflowed, and flooded the rear of her property. She stated that she did not want this to continue to happen and wanted to make sure that something could be done to ensure that there was no diversion.

Town Attorney Hobbs clarified that Kathryn Clemans was not an engineer. Kathryn Clemans stated that she was not. Town Attorney Hobbs clarified that her evidence was just making a request and not stating that the project would cause runoff, but making a statement that she had concerns. Ms. Clemans stated that she was concerned about the potential for flooding her property.

Town Attorney Hobbs asked Council if they had questions for Kathryn Clemans.

Mayor Kingston pointed out that Kathryn Clemans had mentioned a catch basin between the three lots. He stated that it was the first Council had heard about a catch basin. He asked if that should be on the site plan, further asking if it was not associated with the applicant's property. Town Manager Drew Havens was recognized to speak. Town Manager Havens stated that Kathryn Clemans was referring to a catchment area, which was a depression where water flows into it. He stated that it was not a structure, but an area where water flows into it naturally. Mayor Pro Tempore Thibodeau noted that it was part of the topography, adding that the lots are adjoined and there was no special structure. Councilor Whitman stated that it was similar to a swale. Kathryn Clemans stated that it was a ditch.

Councilor Lingard thought the topic with properties containing their runoff was something that needed to be addressed. He didn't think it could be addressed at this public hearing but could be addressed in the future. He stated that he sympathized with Kathryn Clemans but didn't think this was the right environment to speak. He thanked Ms. Clemans for bringing it to Council's attention.

Town Attorney Hobbs asked if the applicant had questions for Kathryn Clemans. Jerry Tatum stated that he did not have any questions but thought the evidence showed that his property was not creating further stormwater runoff. He added that his engineer could speak to that. Mayor Pro Tempore Thibodeau stated that she would like the applicant's engineer to clarify that the new engineering on the proposed bulkhead would not create any additional stormwater runoff.

Ralph Calfee explained that the stormwater management for this project as identified in the evaluation he completed shows that the stormwater infiltrates along the eastern roof overhang and the eastern edge of the decks, flowing directly into the soil without runoff. He pointed out that the house was behaving the way one wants it to behave when it was built and was under the regulations for residential development where the stormwater stayed local to the house and did not go anywhere else. He stated that he did not complete a stormwater management plan that conveys the water from the vicinity of the house to the rear yard. He stated that he kept it local, adding that the development has the landscaping stones under the eaves which aid in the stormwater coming off the roof, going into the catchment areas, and directly into the soil. He stated that the applicant's house does not have any more runoff coming off of the property going to the south than what would occur for any other house that would be built in accordance with the Town's regulations. He assured Council that one of his positions as an engineer in doing this was that he did not do public harm when he solved his client's problems. He thought it does a nice job of keeping the water at the vicinity of the house and letting it infiltrate locally.

Mayor Pro Tempore Thibodeau asked, with the additional construction that has to happen to put in the new retaining wall, it would not create more stormwater issues. Ralph Calfee stated that it would not, adding that there would be the normal amount of construction disruption to install the retaining wall, but it would not cause any stormwater runoff and it should be a relatively short duration, adding that one should not expect that it would create any problems during the construction. He stated that after construction, it will be done in compliance with the assumptions he made for the stormwater plan. He pointed out that Duck received a significant amount of rain a few days prior and there was no indication of any runoff to the south or the east. He added that there was a small amount of runoff that happened on the west because of a small issue that he knows has to be corrected on the west side, which was part of the residential development and would be taken care of. He stated that it works the way it does but would be fixed in a way that makes it more capable of accepting stormwater runoff and keeping it local.

Councilor Whitman stated that the retaining wall will act as a catcher of the water coming off the roof and into the rocks. He clarified that it would not allow the water to flow down into the five-foot spacing. Ralph Calfee stated he was correct, adding that when it is constructed, the soil on the upside of the retaining wall will be six inches below the top of the retaining wall which catches extra water, as well as allowing extra cushion. He stated that there was no reason to believe that there will be any stormwater runoff that will go over the retaining wall and into the five-foot flat area, which was suitable for stormwater infiltration. He added that they were not relying on that. Councilor Whitman clarified that the five-foot spacing was the existing grade that was there before the house

was built. Ralph Calfee stated that it was grading as far as stormwater is concerned. Councilor Whitman clarified that it was not filled. Mr. Calfee stated that the five-foot area on the site plan shows the existing slope and what the regraded area will be, which was essentially horizontal, and takes it back to the original condition.

Town Attorney Hobbs asked Kathryn Clemans if she had any questions for Ralph Calfee.

Kathryn Clemans stated that since she lives on her property, she sees the runoff from the applicant's property as well as other people's property. She stated that she was trying to ensure that whatever digging, regrading, walls, etc. that was completed does not result in extra runoff and diversion of stormwater to the rear of her property. She noted that she was not satisfied that it had been addressed in a substantial way. Ralph Calfee assured Ms. Clemans that the stormwater management on this property gives the absolute minimum runoff that would be anticipated from the property moving to the south. He pointed out that someone could build a house that has a rear hip roof that sheds water to the south, which would be fine, as it is allowed according to the Town's regulations. He stated that this one does not do that. He added that the design of the house and the stormwater system that has been established to resolve the issues, minimizes offsite runoff, and minimizes any runoff that could have occurred to the south.

Councilor Whitman asked where the regrading would be done, if a small swale could be installed from the front of the lot to the back of the lot, a foot deeper, so it would hold the water. Ralph Calfee explained that the grade decreases slightly as one goes to the south. He added that if a swale was installed, it would encourage water to move to the south, but if it was left in a flat horizontal position with vegetation, then any water that gets to that, including incident rainfall, would tend to infiltrate as much as it can rather than run off. He pointed out that the analysis he completed included the incident rainfall as well as looking at a rainfall infiltration for a rain of six inches per hour which was the 100-year rainfall rate for this area of North Carolina.

Town Attorney Hobbs asked if there were any remaining questions.

Kathryn Clemans asked Ralph Calfee if he could assure her that she would not get additional stormwater flowing through the sloped area and if she does get flooded and comes back to Ralph Calfee, he will be able to show that it wasn't from the applicant's property. Ralph Calfee explained that the design assumptions he makes, the soil conditions that are there and the rainfall conditions that are available to him were based on the weather service. He stated that he could not tell Ms. Clemans whether there would be 12, 15, or 20 inches of rain per hour in 15 years and there would be runoff. He added that he could not tell her that someone could go out there, pour paint over the rocks and seal everything off. He stated that the plan that has been completed does not create any runoff to the south.

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 Council heard a variety of evidence during the hearing and should consider sworn evidence and evidence that was competent, material, and substantial as far as the decision on the application. He stated that as to the evidence that was technical in nature, competent evidence would be one coming from a licensed professional who is trained in that area. 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.

Councilor Whitman stated that the builder had stated this was a custom home, which most homes on the Outer Banks were. He stated that he was worried that if Council started granting these, that they will continue to come before Council asking for a special use permit because it was a custom home and the homeowner moved it without thinking about it going into a setback area. He asked what will happen if Council receives more cases after this one.

Councilor Lingard stated he had the same concern, adding that the homeowner may just assume that the Town would grant a special use permit. He stated that he did not want that precedent to be set, but he also did not want the applicant to be put out because of that. He stated that he was aware of setting a precedent if Council approves this special use permit and in the future someone else could come before Council with the same issue.

Town Attorney Hobbs pointed out that with the process of special use permits, the main reason for a quasi-judicial hearing was for the presentation of evidence and the facts are different in every case. He thought it reduces the opportunity for setting a precedent since every case has to stand on its own and has to comply with the requirements in the ordinance.

Councilor Lingard clarified that Council would not be setting a precedent that could lead the Town in a court of law in the future. Town Attorney Hobbs stated that Council was required by law to follow the ordinance, adding that part of Council's responsibility is to understand what the requirements were, consider the testimony and other evidence presented during the hearing, and make a decision whether the evidence demonstrates that the requirements of the ordinance have been met. He noted that other considerations were not relevant because the Town has established the requirements, so Council has to look at the evidence and see if the requirements have been met. He stated that if there were considerations about whether the ordinance should be changed or the requirements need to be changed, that was not relevant to the case today but for another day. He added that Council has to look at what is required and they listened to the evidence from Town staff, the applicant, and the intervening party about all of those matters and it was up to Council to decide whether the case has met those requirements and whether the permit should be issued.

Mayor Kingston stated that 4(a) of the draft order talks of no negative impact to the adjoining property to the east. He asked if it could be amended to add to the south as well as a condition. Town Attorney Hobbs clarified that Mayor Kingston wished to add another condition. Mayor Kingston asked if it was a condition. Town Attorney Hobbs explained that Council has to evaluate the evidence that was presented and consider competent evidence by a professional, which was the applicant's engineer. He stated that Council has to evaluate the evidence presented by the engineer on the finding of 4(a) as far as the impact of the proposed fill. Mayor Kingston thought the engineer had stated that it was designed for a 100-year storm with no impact on the runoff. Town Attorney Hobbs stated that there was testimony regarding the impact of the proposal to the lots on the south.

Mayor Pro Tempore Thibodeau thought it could be changed to state as follows: "...the adjoining properties..." based on the testimony Council heard rather than get specific as to which side of the properties.

Town Attorney Hobbs asked if the public hearing should be reopened so the question could be asked to Director Heard. Mayor Kingston stated that it should. Town Attorney Hobbs reopened the public hearing.

Director Heard clarified that Mayor Kingston was asking to expand on the finding under 4, adding that there was no issue with that. He stated that if Council wanted to expand on the finding to note that Ralph Calfee's testimony included that it would not impact other properties as well was fine. He thought Mayor Pro Tempore Thibodeau's suggestion was fine or staff could add language to it.

Councilor Lingard suggested removing the last three words "to the east" in 4(a) to read as follows: "...impact the adjoining property." Mayor Pro Tempore agreed, adding that property could be made plural, adding that plural would indicate more than one.

Town Attorney Hobbs closed the evidentiary portion of the public hearing and turned the meeting back over to Mayor Kingston.

Mayor Kingston felt that it should be expanded since Council does not know what will happen from the retaining wall as it could have other impacts even though it was stated that there would not be any. He added that there could be impacts that happen. He stated that Council heard from a concerned property owner that was adjacent to that lot. He thought some extra protection would be good.

Mayor Pro Tempore Thibodeau appreciated what she heard from the rest of Council regarding setting a precedent. She stated that in her experience on Council, every case has been unique, adding that special use permits were not simple. She thought everyone spent a lot of time on this and did not think there would be rampant disregard for the rules that were set in place. She pointed out that in her tenure on the Council the rules have been modified from time to time. She thought looking at additional stormwater protection

when looking at development was something Council could look at in the future. She stated that she was satisfied with what she heard from the engineer regarding this design of the bulkhead as a way to go back to compliance with no fill within five feet of the property line and also takes into close consideration the runoff that could be affected. She stated that she was in support of the application.

Councilor Lingard agreed with Mayor Pro Tempore Thibodeau's comments and suggestion. Councilor Whitman also agreed.

Councilor Lingard moved to approve SUP24-002 as presented, with the findings of fact as well as the two proposed conditions listed and the one change to 4(a).

Motion carried 4-0.

LEGISLATIVE PUBLIC HEARINGS

There were no Legislative public hearings at this time.

OLD BUSINESS/ITEMS DEFERRED FROM PREVIOUS MEETINGS

Discussion/Consideration of Directing Staff to Develop an Ordinance to Ban the Release of Balloons in Duck

Town Manager Havens stated that this was a follow-up on some information that Council was provided at their February 7, 2024 meeting. He stated that Council has had communications from Debbie Swick, who was at the meeting earlier, as well as having some written communications from her. He stated that he also provided Council with a memorandum regarding balloons. He stated that staff were looking for direction, asking if Council wanted staff to prepare an ordinance, noting that the authority exists in the State to have an ordinance that bans the release of balloons, and that other towns have passed an ordinance. He stated that, alternatively, Council could direct staff to draft a resolution against the releasing of balloons. He didn't think anyone would argue that this is something that people should be stopped from doing but was a matter of how it was done.

Councilor Lingard asked what the difference was with regard to enforcement of an ordinance versus a resolution. Town Manager Havens explained that a resolution was a statement of the feelings of the Council stating that they were opposed to releasing balloons because they are bad for the environment. He stated that it would have all of the wherefores and whereases as well as resolving that the Town Council does not want people to release balloons. He stated that with an ordinance it would have the effect of law in that it would require observation of the release happening and would be a matter of a civil penalty. He explained that if someone released balloons and a police officer sees it, a ticket would be issued.

Mayor Kingston asked what the status was with other towns on the issue. Town Manager Havens stated that he was aware that two other towns were having a discussion about it

and were leaning towards the development of a resolution. He added that he was not aware of any towns that were considering an ordinance. Mayor Kingston pointed out that Debbie Swick had commented about the governor. He asked if that was the governor of North Carolina or elsewhere. Town Manager Havens stated that legislation was passed by the legislature in the State of Florida and was still waiting for the signature of the governor. He noted that the State of North Carolina does not have a state statute banning the release of balloons, adding that the State of Virginia does as well as a handful of other states. He stated that, at present, North Carolina does not. Mayor Kingston clarified that a resolution would ban releasing balloons but not selling them or using them within a house. Town Manager Havens stated that an ordinance would ban the release. He didn't think Council had the authority to ban the sale of balloons. Mayor Pro Tempore Thibodeau pointed out that Town Manager Havens' memorandum states that Council cannot ban the sale of balloons. She thought Council could not ban the use of balloons but could ban the release of them.

Mayor Pro Tempore Thibodeau noted that Town Manager Havens' memorandum stated that Council has the authority in the Town's sign regulations to prohibit them being placed on a sign, which could be added to the Town's sign ordinance. She stated that Council does not have the authority to restrict the sale, adding that Council could develop an ordinance. She thought in reading the minutes from the last discussion, Council discussed education and she thought that would be a big part of the issue regardless of what Council decides. She stated that people will need to be educated on the dangers that this creates as it will be a big part of what is achieved. Town Manager Havens pointed out that the most recent Destination Dare video talks about this issue as well as the whole issue of litter on the beach.

Councilor Lingard stated that he was of the opinion that having enforcement backs up the education. He stated that after the Council's last meeting, he found over 20 balloons on the beach, adding that on March 5, 2024, he found seven more. He stated that this was an issue, noting that the balloons could have come from another state, but the issue was the balloons released in Town, no one would probably see on the beach. He didn't think there was any downside to having an ordinance that bans the release of balloons, adding that he knew it will be difficult to enforce. He asked if there has ever been a fine issued for littering since the Town incorporated.

Police Chief Jeffrey Ackerman was recognized to speak. Police Chief Ackerman stated that there have been six cases over the last 20 years that involved littering. He stated that he could not tell Council the specifics of them since the records were so old. He noted that it was not a charge that was commonly made because an officer has to witness the act, which doesn't happen that often. Councilor Lingard asked what the penalty was. Police Chief Ackerman explained that it was a Class 3 Misdemeanor, dependent on the weight of the total trash. He stated that there were two avenues available – a criminal fine where a uniform citation would be issued with an opportunity to appear in district court to defend themselves with a fine based on a number of circumstances, with court costs it would most likely cost a total of \$300 and the other was the Town ordinance, but

he wasn't sure of the amount of the fine. He didn't believe it had a specific amount outside of \$25, which would be a civil penalty and not a criminal one.

Councilor Lingard stated that his argument with that would be if it cost \$300 for the balloons, a \$25 fine was insignificant. He thought if the fine did not have some weight behind it, it was unlikely to have any consequence. He thought education was a big thing to educating the wedding planners and venues. He thought Council needed to have some weight behind it to let people know that the Town does not want people to release balloons and if they do and it was witnessed, they will be fined whatever the fee is.

Town Manager Havens stated that other ordinances have a \$250 civil penalty. He noted that the issue with trying to capture this under littering was it was considered littering when it lands and there was no way of knowing who released the balloons. He added that if someone sees a balloon released and a police officer follows the balloon to another town where he sees it land, it would have to be coordinated with the other town as well as trying to get the district attorney to prosecute for littering which was not likely to have a lot of success. He stated that with a local ordinance banning the release, if someone witnesses a release happen, a citation could be issued.

Councilor Whitman thought there should be a resolution drafted and see what the other towns do. He thought it would not be good if Duck was the only Town fining people. Councilor Lingard pointed out that if the rest of Council agreed with Councilor Whitman, they would be getting nowhere. He added that if every Council member has the wait and see attitude, then the issue will go nowhere.

Mayor Pro Tempore Thibodeau clarified that the Town has the authority to prohibit the release of balloons within the Town and several towns in North Carolina have such a provision in their ordinances. She asked if it was attached to the littering ordinance. Town Manager Havens stated that it was a separate ordinance that bans the release of balloons. Mayor Pro Tempore Thibodeau asked if the discussion could be continued and have Town Manager Havens bring Council a copy of what the other towns in North Carolina were doing. She noted that the Town of Greenville had decided not to pass anything, but she thought there must be something that would not create a lot of work for Town Manager Havens. Town Manager Havens stated that he could bring back a draft ordinance for Council's consideration to decide on, adding that he could also bring back a draft resolution at their April 3, 2024 meeting. Mayor Pro Tempore Thibodeau stated that she would be in favor of both. She didn't disagree that the issue should be kept in the forefront, but thought education had to be a huge part of it because the rest of it will be buried in the ordinance and may be forgotten over time. She reiterated that it needed to be kept in the forefront and the Town needs to educate the public.

Mayor Kingston agreed with Mayor Pro Tempore Thibodeau's comments, adding that education and communication was important. He didn't feel that if someone was releasing balloons, that they should be fined right away, but should be told they should not release them. He stated that people will be coming to Duck and not have any idea about the regulation unless it's on a signpost like the one about the prohibition of

fireworks. He didn't think the Town needed to get heavy-handed about it, adding that communication and education were the most important. He stated that one could go to the Sanderling Inn and make them aware that balloons should not be released for weddings. Mayor Pro Tempore Thibodeau agreed, adding that she was encouraged to hear that the realtors have stopped putting them on their open house signs.

It was *consensus* of Council to have staff bring back a draft ordinance and resolution to their April 3, 2024 meeting.

NEW BUSINESS

There was no New Business to discuss.

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.

Director Heard gave a brief overview of the past month's permit activities to Council and the audience.

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

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

January FY 2024 Financial Presentation

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

MAYOR'S AGENDA

Mayor Kingston stated that he had his mayor/chairman meeting on March 20, 2024 hosted by the Town of Southern Shores. He pointed out that there will be a change on the Dare County Board of Commissioners with a few incumbents being defeated in the

primary election. He thanked Town Manager Havens and Town staff for the Council Retreat, adding that it was a good Retreat with a lot of information that was informative and beneficial. He stated that he was looking forward to the upcoming budget process.

COUNCIL MEMBER'S AGENDA

Mayor Pro Tempore Thibodeau stated that there will be a state tourism conference on March 18-19, 2024 in Greenville, NC that she will be attending. She echoed Mayor Kingston's comments regarding the Council Retreat.

Councilor Lingard echoed Mayor Kingston and Mayor Pro Tempore Thibodeau's comments regarding the Council Retreat. He stated with regard to New Year's Eve, every city and small town throughout the world celebrates the holiday at midnight except for Duck because of the Town's noise ordinance. He stated that he would like Council at a future meeting to consider changing the ordinance to allow only on New Year's Eve outdoor entertainment to go on until 12:30 a.m. He thought in this day and age, everyone celebrates at midnight and did not see any reason why Duck could not do the same.

Councilor Whitman thanked the staff for the great Council Retreat. He thanked the audience that attended the Council meeting, adding that the 1:00 p.m. meetings were working out great.

OTHER BUSINESS

Additional Public Comments

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

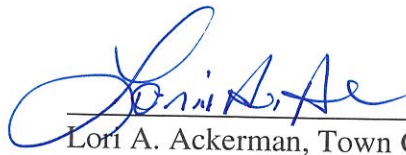
Mayor Kingston noted that the next meeting would be the Regular Meeting on Wednesday, April 3, 2024 at 1:00 p.m.

ADJOURNMENT


Councilor Whitman moved to adjourn the meeting.

Motion carried 4-0.

The time was 3:20 p.m.


Lori A. Ackerman, Town Clerk

Approved: April 3, 2024


Monica Thibodeau, Mayor Pro Tempore

