

**TOWN OF DUCK  
TOWN COUNCIL  
REGULAR MEETING  
July 1, 2015**

The Town Council for the Town of Duck convened at the Duck Meeting Hall at 7:00 p.m. on Wednesday, July 1, 2015.

**COUNCIL MEMBERS PRESENT:** Mayor Don Kingston; Mayor Pro Tempore Monica Thibodeau; Councilor Chuck Burdick; and Councilor Jon Britt.

**COUNCIL MEMBERS ABSENT:** Councilor Nancy Caviness.

**OTHERS PRESENT:** Town Manager Christopher Layton; Director of Community Development Joseph Heard; Police First Sergeant Jeffrey Ackerman; Police Sergeant Melissa Clark; Fire Chief Donna Black; Town Attorney Robert Hobbs; Attorney David Gadd; Ocean Rescue Director Mirek Dabrowski; Public Information Officer Denise Walsh; Administrative Assistant Bethany Conery; and Town Clerk Lori Kopec.

**OTHERS ABSENT:** None.

Mayor Kingston called the meeting to order at 7:04 p.m. He asked Ocean Rescue Director Mirek Dabrowski to lead the Pledge of Allegiance. Mayor Kingston led the moment of silence.

Mayor Kingston noted that Councilor Nancy Caviness was excused from the meeting.

**PUBLIC COMMENTS**

Mayor Kingston opened the floor for public comments. He asked that any comments regarding the public hearings be held off. There being no one wishing to speak, Mayor Kingston closed the time for public comments.

**SPECIAL PRESENTATIONS**

**Introduction of 2015 Lifeguards**

Mirek Dabrowski, Director of Ocean Rescue, was recognized to speak. Mr. Dabrowski introduced each member of Ocean Rescue to Council and the audience.

Mayor Kingston and Council thanked the lifeguards for everything they do to keep people safe on the beach.

**Employee Service Recognition Program Recipients**

Mayor Kingston stated that in December, 2011, Council had adopted an employee service recognition program that would acknowledge the service of employees of the Town at ten year intervals by providing them with a certificate of recognition as well as a gift certificate in the amount of \$100 at a Duck business of their choosing.

Mayor Kingston, Town Manager Layton, First Sergeant Jeff Ackerman and Sergeant Melissa Clark went on to present a certificate to Police Officer Tara Poulin.

**Introduction of Firefighter/EMT's Trey Batschelet and Jacob Dempsey**

Fire Chief Donna Black was recognized to speak. Fire Chief Black went on to introduce Trey Batschelet and Jacob Dempsey as the Fire Department's newest firefighters, to Council and the audience.

**CONSENT AGENDA**

**Minutes from the May 20, 2015, Mid-Month Meeting; Minutes from the May 22, 2015, Reconvene Meeting; Minutes from the June 3, 2015, Regular Meeting; FY 2015 Audit Contract; Hurricane/Disaster Debris Removal Interlocal Agreement**

Councilor Burdick moved to approve the Consent Agenda as presented.

Motion carried 4-0.

**PUBLIC HEARINGS**

**Public Hearing/Discussion/Consideration of CUP 15-003, a Conditional Use Permit Application by Village Square, Inc., Property Owner, for a Conditional Use Permit to Add a Seasonal Outdoor Seating/Entertainment Area for Red Sky Café in the South Side Yard at 1197 Duck Road**

Mayor Pro Tempore Thibodeau stated that since she was involved in the application, she asked to be recused from the discussion at the Council level. It was *consensus* of Council to recuse Mayor Pro Tempore Thibodeau.

Mayor Kingston turned the meeting over to Town Attorney Hobbs.

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 that anyone wishing to testify come forward to be sworn in.

Town Clerk Lori Kopec proceeded to swear in the applicants and staff for the public hearing.

**The following persons were sworn to provide testimony during the hearing: Joe Heard, John Klamut, Dennis Rose, Jeff Shields, Monica Thibodeau, John Fricker, Joe Blakaitis, Wes Stepp and John Manning.**

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 stated that the applicant was requesting approval of a conditional use permit to add a seasonal outdoor seating/entertainment area for Red Sky Café in the south side yard at 1197 Duck Road. He stated that the proposal specifically included the following:

- Addition of up to eight tables and 35 seats in an outdoor dining area on the lawn to the south of the building. The proposed dining area is approximately 500 square feet in size.
- Use of an existing concrete pad on the south side of the building as a band performance area. He noted that the applicant did propose a change to the entertainment area to locate it within the lawn containing the dining area.
- Strings of “café lights”.

Director Heard noted that Council received a copy of a letter from the Duck Landing Property Owners Association, which contained some comments regarding the application. He added that there were approximately nine emails received from property owners in the Duck Landing subdivision in opposition of the application.

Director Heard noted that the Duck Landing Lane right-of-way did include the road and extended further north and included the landscaped area adjoining the road as well as the sidewalk that ran parallel to the road and adjoined the area proposed for the outdoor dining area.

Director Heard stated that there were a number of factors that staff would go through regarding development standards on a site; however, due to the nature of the proposal, there was not a lot that was proposed to change. He stated that he would be focusing on a couple of the development standards where there were existing non-conformities, in order to make Council aware, as well as discuss the issue of parking, which was the only substantial item that the Planning Board looked at with regard to being addressed.

Director Heard pointed out that, on the southern side of the building, there was a setback distance of 14½ feet from the side property line to the south and the closest point of the building. He stated that the minimum setback under the Town’s current standards was 15 feet, leaving a ½ foot encroachment into the existing side setback. He stated that the proposed project would not change the setback or increase the encroachment. He stated that the side setback, due to it being a corner property, was larger than what is typical for a side setback. He added that the proposed outdoor seating would only involve the placement of tables and chairs on the grassed area. He stated that there would not be anything that would be considered a structure at the property.

Director Heard stated that the estimated minimum parking requirement for the site for the existing uses rounded up to 54 parking spaces. He added that the property currently contained 35 parking spaces, making it 19 spaces short of what would be needed under the Town’s current ordinance to serve the existing uses. He noted that since the current parking does not meet the minimum parking requirement, it was considered a non-conforming parking situation. He stated that in looking at the rear parking area, some of the location, layout and parking surface for the site did not comply with the Town’s present standards; however, it has been in place before the Town incorporated, adding that the property was developed in 1994. He stated that there was nothing in the proposal that would change the parking since the parking area was not proposed to be increased or altered in any way that would require it to be brought into compliance with the Town’s current standards.

Director Heard stated that, with the addition of the outdoor seating area, the Town’s standards that were adopted in 2012 state that one parking space needs to be added to the requirement for each 150 square feet of gross area with the outdoor seating. He noted that in this case, with approximately 500 square feet of gross floor area and the first 150 feet excluded from the

calculations, there would be a need for an additional 2.3 parking spaces, bringing it to a total of 56 parking spaces needed to accommodate the site. He stated that after looking at it from that standpoint, staff realized it could not be accommodated, but the applicant put forth a proposal that presented a reasonable way of accommodating the parking needs for the restaurant and outdoor seating area. He explained that the applicant was proposing a shared parking arrangement that would stagger the parking needs on the property. He stated that the applicant was proposing that the outdoor dining area would only be used by Red Sky Café during the hours of 6:00 p.m. to 10:00 p.m., which ensured that an adequate number of parking spaces would be available.

Director Heard stated that the Town's 2012 adopted standards set specific standards for outdoor dining areas. He explained that covered dining areas could not be enclosed with permanent sidewalls or be air conditioned. He noted that the proposed area would be an open air space with no roof or walls. He stated that parking shall be provided for in accordance with the standards. He stated that outdoor dining areas located in a common area of group developments shall be directly contiguous to the frontage of the unit containing the eating establishment. He noted that the property was not a group development as it was under a single roof. He stated that the location and use of the outdoor dining area shall not obstruct the movement of pedestrians, goods or vehicles or be located in driveways or parking areas. He noted that the proposed location complied with the standards. He stated that the outdoor dining area shall not be located in the front yard, landscape, buffer areas or septic areas. He noted that the proposed area was located in the side yard and was not within a required buffer area and that the septic system was well away from the proposed area. He stated that adequate solid waste and recycling containers shall be provided, serviced and maintained in a neat and clean manner. He noted that the applicant planned to provide the containers to comply with the standards. He stated that live music and other forms of entertainment conducted in an outdoor area shall not occur after 10:00 p.m. He noted that the applicant intended to comply with the standard.

Director Heard stated that the Planning Board voted unanimously at their June 10, 2015 meeting to recommend approval of the conditional use permit application and that staff was also recommending approval with the following conditions:

1. In order to prevent parking needs from overlapping, the outdoor dining area can only be used between the hours of 6:00 p.m. to 10:00 p.m.
2. The applicant must obtain approval from the Dare County Environmental Health Department that the existing septic system can accommodate or be upgraded to accommodate the restaurant's outdoor expansion prior to the issuance of a building permit.
3. The applicant must obtain a building permit for installation of the proposed lighting.
4. A directional sign must be added by the entrance to the front parking area notifying customers that additional parking is available to the rear of the building.

Town Attorney Hobbs asked Council if they had any questions.

Mayor Kingston noted that the building was built in the 1990's by Dare County. He asked what the status of the road was at that time. He asked what the history of Duck Landing Lane was. Director Heard thought the applicant would be able to answer that question.

Councilor Burdick assumed that with the rear parking area, there must be some type of easement agreement to use Duck Landing Lane for the parking. He thought it needed to be clarified. Director Heard stated that he had photographs of the property if Council needed them for discussion and consideration.

Town Attorney Hobbs asked the applicant to make a presentation.

Monica Thibodeau of 126 Sea Hawk Drive West was recognized to speak. Ms. Thibodeau stated that she was the owner of 1197 Duck Road as well as the applicant. She noted that Wes Stepp, owner of Red Sky Café, was present as well. She stated that Mr. Stepp had approached her with the idea of adding outdoor entertainment for people and she thought it was a nice idea. She stated that, as the property owner, she applied for the Conditional Use Permit and spoke to Town staff regarding what would be involved in the application. She noted that when she purchased the property in the early 1990's, the property behind the site was landlocked and owned by Charles Meeker and his family trust. She stated that she approached the family trust about going in on a purchase together so that there would be an access way for the undeveloped property behind her property. She stated that she purchased the property with the Meeker family so that they could have a roadway and thought at the time that it made sense to have an access off of Duck Road on the front and back of the property and that was how the property was built. She noted that there was a dedicated easement and thought it was a nice flow as it limited the curb cuts on Duck Road.

Monica Thibodeau stated that she shared the property with the Meeker family trust and kept the trees that were there to preserve them when the road was built. She stated that she had some picnic benches behind her building before Duck Landing was developed and they still existed. She added that the Duck Landing Property Owner Association talked to their constituents and asked that the picnic benches that were sitting in the mulched area be removed. She stated that they gave her until July 10, 2015 to move the benches and added that she was working on getting them removed.

Monica Thibodeau stated that she and Wes Stepp met with the property owner association for Duck Landing and discussed issues and concerns that they had and at that meeting. She understood that the owners were worried that patrons would come off of her property and onto the sidewalk in order to get to the area that would be hosting music. She stated that, in discussions, she thought there was consensus that she would keep everything on the grassy area, including the band area, which was the reason why the application changed slightly. She added that the band area was removed from the concrete pad and brought onto the grass. She stated that she was planning to re-do the landscaping so that it would not go on the sidewalk and would add a fence as well as a vegetative buffer and a clear entrance to the lawn so that everything would be contained on the property. She stated that everyone agreed with that plan and she thought it went well.

Monica Thibodeau noted that, in addition to removing the picnic benches and making sure no one would utilize the sidewalk, the Duck Landing Property Owners asked if she would consider having a special indemnification on her insurance policy that would hold Duck Landing Property Owners Association harmless if anyone was injured on the sidewalk. She stated that when she forwarded the request to her insurance company, they told her not to do it. She added that she checked with two different insurance companies regarding it and they both concurred that since everything was happening on her property, it wasn't needed. She stated that she was in favor of the CUP as it was something that people see a lot in Duck. She added that Duck was very pedestrian friendly and people like hearing music outside, pointing out that several other restaurants in Town have outdoor music. She noted that she has nothing to gain from the CUP

other than losing the picnic benches. She stated that she contacted the Health Department and they stated that they were willing to allow it as long as the system was maintained. She stated that if the Health Department noticed that the septic system was being overtaxed, the outdoor dining activities would cease.

Mayor Kingston clarified that Duck Landing Lane was part of Monica Thibodeau's property prior to the homeowner association and she sold it to Duck Landing. Monica Thibodeau stated that the Charles Meeker family trust was approached about the property behind hers and asked if they wanted to go in together to put in an access. She added that at the time of purchase, the access was drawn up. Mayor Kingston asked if the width of the road was determined by State standard. Monica Thibodeau stated that she wasn't sure, adding that she wasn't sure if she was non-conforming. She thought that it could be due to the standards changing, as she built her property to Dare County's standards. She thought her property was conforming and added that she has the easement.

Councilor Burdick asked what the easement was for. He asked if it was just to use the parking lot or a general easement. He noted that it was obvious that people who walk along Duck Road to access 1197 Duck Road may naturally walk up Duck Landing Lane to get into the parking lot. Monica Thibodeau agreed. She stated that she wasn't sure of the nature of the easement, but knew that she had access to it. She noted that a lot of people use the sidewalk, but it wasn't the only way to access the building, as access was in the front of the building. She stated that she wasn't sure how the easement was written, but she knew how she always used it.

Councilor Burdick asked if insurance has been an issue. He clarified that the property owners association would have to cover anything that happened on their property. Monica Thibodeau thought that was the way it has been since 1994. She added that she wasn't sure. She stated that she hesitated on the indemnification due to the number of people that use the sidewalk. She stated that she did not feel comfortable and since it was working fine in the past, she didn't think there was a need to make the change.

Mayor Kingston noted that the insurance issue was between the property owner and the homeowner association. He added that it didn't affect the Town so it would not be considered with regard to the Conditional Use Permit. Monica Thibodeau stated that she agreed to everything that the property owner association asked except the insurance issue. Councilor Burdick asked if the property owner had given a cost for the indemnification. Ms. Thibodeau stated that they did not.

Mayor Kingston asked if there were any discussions with regard to the delineation between the two properties. Monica Thibodeau stated that they discussed a fence being erected as well as having a vegetative buffer to delineate the properties, particularly where it involved the grassy area. She thought it had been a nice arrangement for many years, but was fine with adding vegetation.

Wes Stepp, owner of Red Sky Café was recognized to speak. Mr. Stepp thanked Monica Thibodeau for supporting his idea for the outdoor entertainment. He stated that he would not have put Ms. Thibodeau in the position she was in if he knew there was so much opposition to the Conditional Use Permit. He noted that everything will be done on the property and it was a nice area. He stated that the overflow area would be outside. He pointed out that Duck was very different than other areas on the Outer Banks in that one could park and walk to various shops. He stated that he was going to make sure the outdoor area would be top notch and make it nice

for Duck. He stated that he understood the issue with noise, adding that he will only have one to two people performing jazz or casual music for the public.

Wes Stepp stated that when he and Monica Thibodeau met with the property owner association, one member told him his idea was a great concept. He noted that it wasn't his concept, but that he was trying to keep up with the rest of the businesses in Duck as well as making his restaurant more appealing and a place where people could walk to and enjoy themselves. He stated that there was an easement and was agreeable to the landscaping. He thought once the landscaping was completed, it would look great. He stated that as far as the insurance issue, he agreed with Mayor Kingston that it was between the applicant and the property owner association. He stated that he contacted his insurance company and was told that he was already covered as the activity was on his property. He felt that what he wanted to do would fit in with the scheme of Duck.

Mayor Kingston asked what would be served outdoors – meals, appetizers and/or drinks. Wes Stepp stated that it would be family friendly and would be primarily for people waiting for their table. He added that it would not be full service outside and would be mainly drinks, cocktails, soft drinks and tea.

Councilor Britt asked if there would be fewer tables now that everything will have to be in the grassy area. Wes Stepp stated that there would not be a lot of tables. He added that it would be comfortable and a nice area for people to stay.

Town Attorney Hobbs asked if any of the sworn individuals wished to make a presentation.

Dennis Rose of Rose, Harrison and Gilreath was recognized to speak. Mr. Rose stated that he was present to represent the Duck Landing Property Owners Association. He added that John Klamut had sent in a letter on behalf of the Duck Landing Property Owners Association to Council and would be giving his and the HOA's position on the adverse consequences that could potentially affect the HOA. He stated that Jeff Shields, who was present on behalf of the management company, would also be giving a presentation.

John Klamut of 123 Duck Landing Lane was recognized to speak. Mr. Klamut stated that he was on the Board of Directors of the Duck Landing Property Owners Association and was representing them as well as his own interests. He stated that the HOA sent a letter to Council on June 24, 2015 and hoped that Council had a chance to read over it.

John Klamut stated that, specifically with respect to the Conditional Use Permit process, the HOA was surprised by the application and only had 10-12 days to review it. He thought that the Conditional Use Permit process itself was special and strongly encouraged an applicant to seek out other people that may be interested, adjoining property owners specifically. He noted that the HOA did not have any special communication or communication with Monica Thibodeau prior to the Planning Board meeting or with the Planning Board itself prior to their meeting. He stated that the Duck Landing Property Owner Association's input was not included in the recommendation. He added that their concerns that were expressed in the letter they sent to Council were not included in this process.

John Klamut stated that he did have a meeting with Monica Thibodeau and discussed a fence as well as moving the music area. He noted that neither was included in the Planning report. He added that there was nothing in the Planning report about a fence being put up or a plan being put in place to control employees and visitors to keep them off Duck Landing Lane's sidewalk. He stated that none of that was put in writing and were conditions that the HOA needed in writing as

an adjacent property owner. He stated that he respected everything that has been said so far, but over a week passed since the Planning Board meeting and the application had been changed since the meeting.

John Klamut stated that the HOA had three main concerns – the increased liability and insurance costs. He stated that they were an association with 50 properties that owned not only their homes, but a clubhouse, tennis courts and the sidewalk, which was referred to as a right-of-way. He noted that it wasn't a right-of-way, but was Duck Landing Common Use property and there were two easements for it. He added that he has never seen either one in writing, but heard that they existed and there was supposedly an easement for each driveway. He stated that the sidewalk, the street and the landscaped area with the trees as well as one to two feet of grass to the north of the sidewalk was all owned by Duck Landing Property Owners Association. He didn't know of any other easements, adding that they co-existed for 15 years with only one injury on the sidewalk where gravel was thrown out of the rear parking lot onto the sidewalk and a lady broke her leg. He stated that she only asked for her medical bills to be paid. He noted that in that case, the applicant's insurance did not cover the injury, but Duck Landing Property Owners Association's did. He stated that they approached the applicant and they were not cooperative. He stated that because of that, the Association was concerned about how future liability issues would work. He stated that they had typical homeowners' property insurance and it doesn't take into consideration an operation where there was drinking and turnover of people.

John Klamut noted that this new use would cause more people to use their sidewalk to get to the rear of the Red Sky Café property in the evenings. He added that one could not control people accessing property. He pointed out that there was no direct access from the back parking lot to the new eating area. He added that people would have to use Duck Landing's sidewalk, walk down the sidewalk and access the building. He stated that it would have to be a condition that an access would have to be built.

John Klamut stated that as far as insurance, Duck Landing Property Owners Association carried standard property owner's liability insurance. He stated that they have gotten quotes in the past and would be looking at adding \$2 to \$3 million dollars to their umbrella coverage. He stated that they communicated with their insurance agent but have not talked to the underwriters, adding that the agent strongly advised that they needed to draft language and get indemnities from the applicant for the operation. He stated that they also advised the Association that the tables needed to be moved. He noted that leaving the tables where they currently existed would mean that the applicant would be using Duck Landing Property Owners Association's property without any agreement in place. He stated that their insurance would increase by \$2,000 to \$3,000.

John Klamut pointed out that without an indemnity from the applicant, Duck Landing Property Owners Association's only recourse would be to sue every time there was an accident because it was on their property. He likened what the applicant wanted to do with a neighbor setting up picnic tables, having a beer party every day and getting beer and people through the property.

John Klamut noted that the applicant has not submitted an agreeable plan as to how they would contain people on the property. He stated that there was nothing about a fence or anything in writing. He stated that the Association felt that there was a strong chance that their property would be another part of the applicant's eating area. He noted that one could walk down their sidewalk and get a drink or food from a table whether a fence was put up or not, because it was so close to the eating area.



John Klamut stated that the Duck Landing Lane Property Owners Association wanted to see a plan and a physical drawing showing the fence. He stated that if Council voted on the Conditional Use Permit, the Association would want that condition added to the permit. He stated that they wanted to see a physical fence, the pathways from the parking lots and a table layout. He noted that the Town code required a detailed table layout and access drawings for restaurants, which included outdoor eating areas. He added that there has not been a detailed table layout or plan provided by the applicant.

John Klamut stated that the Duck Landing Property Owners Association felt strongly that if the Conditional Use Permit does get approved without the condition related to insurance, related to restricting access as well as a real plan and not a promise to keep people off the property, that the Association will be harmed if something happens and they will litigate it.

John Klamut thought from a zoning perspective, the eating area was not in the right place. He stated that Director Heard had talked of the part of the ordinance that stated that eating areas should not be in the front setback. He thought that whoever wrote the code, forgot to mention corner lots. He stated that, in general, the same requirements are put on a side access street for a corner lot, than they are for a front access. He wondered why an eating area was not permitted in the minimum front setback of a property, but was permitted in the minimum side setback. He reminded Council that they had a non-conforming side setback and now an eating area was being added. He wondered what the purpose was behind the statement in the Code. He thought the width of the front setback provided some distance between pedestrian and vehicular traffic as well as the eating area, adding that it separated the activity from the main pedestrian and vehicular traffic.

John Klamut pointed out that zoning generally protected residential use and items in the residential use zone from commercial activities. He stated that, in looking at the Village Commercial District, it required a 10 foot vegetated buffer between adjacent properties as well as a 20 foot setback between commercial and residential properties. He added that there wasn't a house on the street, but it was still Duck Landing residential common use property. He asked Council to ask the Planning Board what it all meant and if the Town was taking a plain view of four to five little clauses in the Code or looking at the whole thing. He thought it was important since the Town was going to be installing sidewalks and there needed to be a better definition and clarification of where the eating areas could be placed. He stated that if there was a provision that people walking up Duck Road could drop into an eating area, it would not be a good idea. He felt it could not be in the minimum front setback of 15 feet. He added that his side setback was also 15 feet on Duck Landing Lane.

John Klamut stated that he has had a lot of issues over the years with the parking lot at 1197 Duck Road. He added that the end of Duck Landing Lane was very congested with trucks coming in and out as well as parking on Duck Landing Lane and blocking access. He stated that the loading situation was awful and sometimes there wasn't any parking spaces left in the parking lot. He noted that deliveries were made at night, Red Sky Café ran a catering business and did not cater in the mornings, but a lot of it was done in the evenings with catering trucks coming in and out of the property. He stated that one of the recommendations of the Planning Board was to put up a sign directing people to the back lot. He stated that the Board was essentially recommending directing people into an unsafe lot. He thought Council should have someone look at the property and determine if the parking spaces were legitimate, if they were safe places for people to park and make their way to the eating area. He stated that one of Council's obligations in granting a Conditional Use Permit was to ensure the safety of the public.

John Klamut stated that he was glad to hear that Monica Thibodeau and Wes Stepp decided to move the music into the area where people would be eating. He noted that it was Duck Landing Property Owners Association's idea and it made sense since their concern was, having it 30-40 feet away would cause unnecessary amplification. He stated that their development was suffering from a "battle of the bands" with all the music from the Town park as well as other restaurants. He noted that the Association was fine with the music, but wanted it to be acoustic and not electric. He thought that given the size of the area – it was less than 500 square feet – he wasn't sure how 35 tables would fit. He stated that the Association wanted a condition that the music be acoustic.

John Klamut stated that the Conditional Use section definition states: "...in granting any Conditional Use, the Town Council shall prescribe conditions and safeguards that minimize any potential injurious effect on adjoining properties that affect the character, health and safety of the community..." He noted that the Duck Landing Property Owners Association had a financial impact on their association as well as some safety concerns for the community. He thought before Council approves the permit, they should come up with a laundry list of conditions that they would like to see and then send it back to the Planning Board to have those conditions put in writing.

Councilor Burdick stated that he was having a problem with what easement the applicant had with regard to the use of the road and the sidewalk. He added that it was obviously not a "gentleman's agreement" and was a written one. He stated that if the easement permitted the applicant to use those facilities unrestricted, he thought the issue of who could use the sidewalk was moot. He understood John Klamut's concerns as far as people walking back and forth on the sidewalk. He thought there needed to be clarification on what the easement contained. John Klamut agreed. He added that he has not seen any documented easements. He explained that the easements that existed were for access to the parking lots. He did not know if there was an easement for the sidewalk. Councilor Burdick pointed out that the only way to access the parking lot while walking was to use the sidewalk or Duck Road. Mr. Klamut stated that Duck Landing was one of the few developments that have a sidewalk. He stated that it has been used over the years primarily by people who were living or vacationing in the Duck Landing subdivision as well as Red Sky Café and Carolina Designs Realty employees and people that want to move from Duck Road to the side door of Carolina Designs Realty. He stated that he hasn't seen a formal easement. Councilor Burdick thought it should be clarified so there was no issue over having another access or ability to use the access.

John Klamut stated that the idea was to create an indemnification which would be more of a licensing agreement for Carolina Designs Realty and Red Sky Café to use Duck Landing Lane's property in the way that it was currently being used. He added that, if they couldn't manage to keep everyone inside the fence that was north of the sidewalk, when people pay their bill, they may be impaired and could get hurt. He thought the indemnification not only provided Duck Landing Lane with a liability because of the sidewalk, but it also provided the applicant with a liability because of the location of their entertainment. He added that it wasn't like it was 20 feet back from Duck Landing Lane's sidewalk or that one would have to go into the building, but the people would be waiting outside on Duck Landing's property.

Councilor Burdick asked if the Duck Landing Property Owners Association had asked the applicant to pay the liability insurance. John Klamut stated that they did not. He stated that they didn't think they needed additional insurance, given their current situation. He added that now that they know that there will be people drinking on the property, along with the fact that Red Sky Café was proposing 35 seats, which could mean well over 100 people, they felt it put Duck

Landing Property Owners Association at risk. He stated that buying additional umbrella coverage was the prudent thing to do and was strongly recommended by their agent. Councilor Burdick asked a second time if the cost of the additional insurance was discussed with the applicant. John Klamut stated that they did not because they thought it could be done in another way. He explained that they thought the applicants would hold Duck Landing Property Owners Association harmless. He added that they weren't being asked to be held harmless with regard to misconduct, but there was a four inch difference in the sidewalk and if someone tripped, it could be Duck Landing Lane's fault. He stated that they were concerned about people leaving the area and falling either by leaving Red Sky Café or approaching their sidewalk from the back parking lot. He thought Duck Landing Property Owners Association would be exposed if someone was hurt.

Mayor Kingston stated that he found the whole discussion regarding liability insurance troubling. He reiterated that insurance was not a Town issue and added that Red Sky Café was an existing 58 seat restaurant. He pointed out that people already wait for their items and the liability currently existed with people leaving the restaurant and walking on Duck Landing Lane's sidewalk. He didn't see what would increase or change since the restaurant and realty company was already in existence. He stated that he was troubled by all the increased liability that was being discussed. He agreed that there may be more traffic for a couple of weeks but thought the liability was there whether or not the outdoor eating area was there. He stated that people would use the Duck Landing Lane sidewalk and back lot, adding that some people may park in the back parking lot and walk to another restaurant. He wasn't sure why Duck Landing Property Owners Association wanted increased liability insurance just because there would be people waiting outside for a table. He thought the insurance aspect was between Duck Landing Property Owners Association and the applicant and not involving the Town.

Mayor Kingston stated that the other thing that concerned him was looking at the access to the sidewalk and road. He added that Mr. Klamut was implying that Duck Landing Property Owners Association did not want the public to walk on the sidewalk. John Klamut thought the Association did not want direct access from their sidewalk to Red Sky Café's eating area. He added that until the applicant showed them a plan of the type of fence or barrier they want to put up and how people would access the property, the application as presented showed a direct access to Duck Landing's sidewalk to the grassy area.

Councilor Burdick clarified that John Klamut and the applicant have already agreed to have some type of barrier put up on the property. He added that there would not be a lot of in and out traffic due to the barrier. John Klamut agreed that they had discussed it but pointed out that it was not in the Conditional Use Permit package. Councilor Burdick understood and explained that Council had the capability to add provisions if they could sort out what would be considered necessary. John Klamut stated that it was more than just moving the music area, there were a lot of other things that Duck Landing Property Owners Association wanted to see added to the permit in order to feel comfortable about the applicant using the area. He thought that having 100 more people drinking outdoors on his property would be different than having it in an enclosed, air conditioned environment. He thought it was a liability.

Mayor Kingston pointed out that people already come out of the building and access the sidewalk on Duck Landing Lane. John Klamut agreed, adding that it was putting pressure on that area. Mayor Kingston clarified that John Klamut wanted the applicant to put a fence in to keep the area contained. John Klamut stated that they wanted a fence and when someone enters the property; that they access it from 1197 Duck Road only. He stated that they wanted to see dedicated accesses to the parking lots.

Councilor Britt clarified that there was currently direct access from the walkway into the side access of Carolina Designs Realty. He asked, from the sidewalk, there was currently direct access to the entrance of Carolina Designs Realty and it ran to Red Sky Café. John Klamut stated that there was a set of stairs in that area. Councilor Britt asked if Duck Landing Property Owners Association objected to that access in the past. John Klamut stated that they did not, adding that the access was primarily used by Carolina Designs Realty customers to pick up keys or sign contracts. He added that that activity was occurring less now due to electronic access to homes. He stated that the access for those customers were not of an eating or drinking nature, but there to do business with Carolina Designs Realty. Councilor Britt stated that he was curious about the objection.

Councilor Burdick stated that he was trying to sort out what the key issues were with Duck Landing Property Owners Association. He added that the points brought up were insurance and use of the sidewalk. He noted that the applicant already had free use of the sidewalk unless the Association could show otherwise. He asked if John Klamut could show Council that the easement prohibited the applicant from using the sidewalk for anything. John Klamut stated that they were not asking for a prohibition. Councilor Burdick disagreed and stated that it was what they were asking. Mr. Klamut stated that they were asking that the applicant not have direct access to the eating area from their sidewalk. Councilor Burdick disagreed and pointed out that Mr. Klamut wanted the applicant to put in another access from the back parking lot. He added that Duck Landing Property Owners Association was stating that they did not want the applicant's customers on their sidewalk. He stated that he was trying to clarify whether it was a real issue that could be contested. He added that if the applicant did have access already specified, then there wasn't an issue. He understood the noise issue but noted that there was a noise ordinance in place for the entire Town so there could be reasonable entertainment in Town without disrupting everyone.

Councilor Burdick stated that he was trying to understand the issues and what, if anything, that should or could be done different. He stated that the only issue he wasn't sure about was the insurance, unless Mr. Klamut could show Council something different with regard to the access. He appreciated the concern, but his issue was if the applicant already had the access approved, then the discussion was over an issue that didn't exist. He stated that it was between Duck Landing Property Owners Association and the applicant if they wanted it changed. He stated that he was trying to get to a point where he could understand where Duck Landing was as a homeowner's association as well as individuals that live there versus a business that was trying to improve their business within the confines of the ordinances of the Town.

John Klamut stated that he was trying to explain the hardships that were on the homeowners association. He added that they were financial and there was also a certain loss of peaceful enjoyment of their homes. He stated that the issue didn't have anything to do with Duck Landing Property Owners Association, but he was asking Council to look at the back parking lot and see if it complied. He noted that the applicant stated that there were no structural changes, but it was a use change and a use change affects the parking requirements as well as the effect on the neighboring properties. He stated that the Association would be paying \$2,000 - \$3,000 more for insurance unless he doesn't tell his insurance company about the new use.

Councilor Burdick clarified that the issue was the \$2,000 - \$3,000 insurance. John Klamut stated that they were also concerned about people getting hurt and having to deal with the insurance claims as a result of the new use. Councilor Burdick thought it needed to be recognized that, as a summer resort town, part of the attraction was that people could go out at night and enjoy dinner,

refreshments and music and part of the ambiance of Duck was to promote that. He stated that the Town has agreed that it would be done and as a result, quite a few establishments have music in a controlled circumstance where the volume is controlled but the music is not eliminated or prohibited. John Klamut pointed out that everything in Town was enforced by complaint. Councilor Burdick stated that there were decibel limits in the existing noise ordinance no matter what the noise was. He added that there was also a limit on the hours. John Klamut pointed out that someone could take a drink from the Red Sky Café and walk on Duck Landing Lane with it. He added that there was no way to enforce that unless he sees it for himself and talks to the person. Councilor Burdick stated that it existed Town-wide. John Klamut asked why the Town was being selective if it happened on his property. He asked why Duck Landing Property Owners Association had to bear the burden. Councilor Burdick stated that he wasn't suggesting that, but was trying to get to what they wanted changed fundamentally, which was putting up a fence, prohibiting people from using the Duck Landing Lane sidewalk – which was unrealistic – the noise and insurance. He felt Mr. Klamut was most concerned about insurance and a fence. John Klamut stated he was correct.

Councilor Burdick asked if there was a condition that a fence had to be installed, it would satisfy John Klamut's needs. John Klamut disagreed. He stated that he would like to see all of the conditions he brought up in the permit as well a fence that was properly designed and the accesses for control. He stated that their main concern was to keep the activity on the applicant's property. Councilor Burdick understood. John Klamut understood that people would use Duck Landing Lane's sidewalk in order to enter the property for check-ins and check-outs, but in the meantime, the applicant needed to come up with a plan to keep people on their property, not only with using a physical fence but also some other plan to monitor people to make sure that they won't leave the property. Councilor Burdick stated he was having an issue with that. He noted that if Council agreed to that condition for the sidewalk, it would have to be done for the entire Town and it wasn't logical. John Klamut pointed out that this was a unique condition and Council did not have to approve it. Councilor Burdick agreed.

Councilor Burdick clarified with Monica Thibodeau that some of the issues brought up had been discussed while others haven't. He thought it was understood that there was an agreement for some type of fencing to be installed between the grassy area and the sidewalk. Monica Thibodeau stated that there was. She added that when they met, they discussed the concerns as well as the height of the fence and vegetation that would run along it. She stated that she would have to move a couple of bushes to allow access in the rear of the property. She thought all of that had been arranged. Councilor Burdick asked if the problem was solved with regard to access from the parking lot down. Monica Thibodeau disagreed, adding that it would be from Red Sky Café down the stairs and keeping people on the grass. Councilor Burdick asked if she was in agreement to provide some type of barrier between the sidewalk and the grassy area. Monica Thibodeau stated that she was. She clarified that she did not agree to something with regard to a previous injury. She stated that there was an injury with someone tripping on the sidewalk and when she was made aware of the issue with regard to the Village Square activity, she corrected it. She stated that she was never asked to help someone with regard to an injury and insurance.

Councilor Burdick thought he understood that at some point, there was a layout of the proposed tables, etc. He asked if there has not been a new plan put together since it was agreed that the band area would be moved. Monica Thibodeau stated that there was never a definitive layout that Wes Stepp had put together. She stated that he wanted to have up to 35 seats. She stated that they just had an initial plan to show where the tables would be placed.

Mayor Kingston asked Monica Thibodeau if she ever received complaints about Carolina Designs Realty or Red Sky Café using the sidewalks. Monica Thibodeau stated that she never received any complaints. She stated that they have always been good neighbors to Duck Landing Lane for the past 15 years. She added that the picnic benches became an issue recently and she understood that she needed to move them.

Councilor Britt asked if the perception of the easement was that it was a driving one or for pedestrian access on the sidewalk. Monica Thibodeau stated he was correct. She added that when the property was developed, it was never specified that the sidewalk could not be used. Councilor Britt thought that when Duck Landing was approved by Dare County, the sidewalk was to be used for pedestrian access as well as access for customers of Village Square. Monica Thibodeau thought it was a group thing. Councilor Britt noted that it has been treated that way all along. Monica Thibodeau agreed.

Councilor Burdick asked Wes Stepp what could be accommodated given the change to the initial layout for the music area. Wes Stepp stated that they decided to move the music so it would be in the corner and would also be moving the landscaping. He added that it may affect five people. He stated that 35 seats would be the maximum and he didn't expect to have that many there. Councilor Burdick asked if he was in agreement to put up the fence. Wes Stepp stated that he was.

Town Attorney Hobbs asked if any other sworn witnesses wished to make a presentation.

Jeff Shields of 163 Beech Tree Trail was recognized to speak. Mr. Shields stated that he represented the Duck Landing Management Company. He stated that John Klamut summed up the position for the Management Company.

Jeff Shields noted that the Duck Landing HOA was made up of 50 homeowners that have a concern about the Conditional Use Permit process and how quickly it moved. He stated that in light of what has happened, Monica Thibodeau mentioned that she was not interested in an insurance indemnification. He added that there were many forms of protecting parties from increased liability concerns related to insurance matters, such as naming Duck Landing Property Owners Association as an additional insured. He asked Monica Thibodeau if she would be willing to delay the decision on the Conditional Use Permit to allow Duck Landing's attorney to draw up an insurance contract that she could consider, which would provide other means to protect the Association without an indemnification. He noted that the use of the property that abuts the Homeowners Association changed as well as how it would be used. He stated that there would be 35 tables, music, sitting and eating with the applicant stating that it would be a place for people to come and drink prior to eating at the restaurant. He stated that it changed the use and did give Duck Landing's insurance company concern with how the common property that abuts it would be used. He asked again if Monica Thibodeau and Council would consider delaying the decision until Duck Landing's attorney could draw up an insurance contract. Monica Thibodeau stated that she listened to what the Property Owner Association had said as well as what they proposed, but she could not say that just because they were proposing things, that she would agree to them. She added that she was not inclined to agree to an insurance contract.

Jeff Shields thought it was a fair answer from Monica Thibodeau. He thought the HOA was asking to look at alternatives for Ms. Thibodeau to consider and give to her attorney in order to determine what her liability would be. He thought if language was drafted that Ms. Thibodeau could consider and take to her attorney, the HOA may be in a better position to come back and be less confrontational about the Conditional Use Permit. He urged Council to delay their decision.

Mayor Kingston didn't think Council would make the insurance as a part of the Conditional Use Permit. He stated that it was reiterated a number of times that the insurance aspect was between the applicant and the homeowner association. He stated that if Jeff Shields was asking the applicant to go back and renegotiate things, it won't come back to Council until their August 5, 2015 meeting. He stated that by asking for a deferral, it would delay things by about 30 days.

Councilor Burdick thought the insurance issue was on the homeowner association and the applicant and not Council. He added that the Conditional Use Permit needed to be decided based on what the applicant asked for versus the impacts. Jeff Shields thought Monica Thibodeau would be willing to enter into a contract. Councilor Burdick disagreed, adding that she did not state she was willing to delay the permit. Mr. Shields disagreed, adding that he thought he had heard that Ms. Thibodeau would be willing to look at it. Councilor Burdick pointed out that the two issues were if she would delay the request and if she would consider it. He added that she would consider it but did not say she would delay the request.

Monica Thibodeau pointed out that there wasn't a Council mid-month meeting and she didn't know if delaying the permit would create different feelings for the HOA. She stated that she wasn't sure she could agree to whatever she was asked to do with regard to the insurance. She stated that if Council wished to delay the permit; that would be the choice she would accept.

Jeff Shields stated that the HOA needed more time to discuss things. He added that he was asking on behalf of the HOA for Council to give them an opportunity to talk to the applicant and not make a decision at this meeting. Mayor Kingston stated that if the HOA wanted time, the Conditional Use Permit would have to wait until the Council's August 5, 2015 meeting. He noted that the issue was between the applicant and the HOA, which was outside of what Council was deciding.

John Manning of 117 Duck Landing Lane was recognized to speak. Mr. Manning stated that he had an issue with the parking. He stated that Council needed to consider if the parking would be adequate for the use.

Dennis Rose stated that Council had an obligation to do what had to be done to consider the consequences to the adjoining property owners. He added that there was no guarantee on how fast the insurance issues could be resolved. He urged Council to table the CUP so the issues could be worked out, including the easement issue. He thought details needed to be worked out or there may be problems in the future.

Joe Blakaitis of 115 Sandpiper Cove was recognized to speak. Mr. Blakaitis noted that he was the Chair for the Planning Board and pointed out that this application was as short term as expected or how the Duck Landing Property Owners Association thought it was. He stated that the information came to the Planning Board in May, which was an extra month for the HOA to prepare. He stated that the Board would have applauded the HOA's efforts to attend the Planning Board meeting so some of the issues could have been resolved before coming before Council. He didn't think the CUP should be delayed.

Mayor Kingston asked how the Planning Board dealt with the parking issue. Joe Blakaitis stated that the Planning Board works on the information available in the ordinance. He stated that Director Heard presented the Board with information that they worked with and acted on that information. He added that with regard to the shared parking, the Board acted on the information that was presented and decided that what was presented was acceptable. Mayor Kingston asked if

it was fair to say that there would be adequate parking. Joe Blakaitis stated that there was. Mayor Kingston asked if there was adequate parking to support the restaurant. Mr. Blakaitis stated that the Board felt that there was. He stated that, with regard to the easement and the questions, gave him pause. He stated that he was surprised that if it was so important, why there wasn't a copy of it.

Dennis Rose clarified that the easement was not considered at the Planning Board meeting. Joe Blakaitis stated that it was not presented at the Planning Board level. Dennis Rose stated that Mr. Blakaitis indicated that the application came before the Planning Board in May. Joe Blakaitis stated that the application came to the Planning Board at their June meeting, but information regarding the meeting was posted on the Town's website for the public to view well before the meeting. Dennis Rose clarified that notice of the meeting was not sent to the property owners. Joe Blakaitis stated that notice was sent out. Mr. Rose believed that his client would state that they were not made aware of the meeting. Mr. Blakaitis thought as per Town procedures, the notice was sent to the appropriate owners. Mr. Rose noted that it was not sent to the adjoining properties. Mr. Blakaitis stated that the notice was sent to the adjoining properties.

Director Heard noted that the original notice for the Planning Board meeting was posted to the Town's website, advertised in the local newspapers and notices were sent to the adjoining property owners, at least one of whom was the property owner to the east of the applicant's property. He stated that the Duck Landing Property Owners Association was given notice on June 12, 2015, which was when John Klamut came to the Town office and was provided with the same packet of information that the Planning Board received. Dennis Rose asked what property owners were notified. Director Heard stated that it was sent to the adjoining properties, which were the properties that abut the subject property. Dennis Rose clarified that the Duck Landing Common Area was not notified. Director Heard stated that the Town traditionally does not send notices to streets. Dennis Rose stated he was trying to figure out why the notice was not sent to the properties. Director Heard stated that notice for the Council meeting was provided on June 12, 2015.

Joe Blakaitis noted that it wasn't uncommon for the Planning Board to add conditions very quickly, such as fencing. Mayor Kingston clarified that given that the properties were built in the early 1990's, the Planning Board had no reason to think that the easements didn't exist. Joe Blakaitis stated that the Planning Board did not discuss easements.

John Fricker of 105 Carrol Drive was recognized to speak. Mr. Fricker noted that he was the Vice Chair for the Planning Board and there was no discussion at their meeting on where the property line was on the south side of the applicant's property. He assumed that they owned the grassy strip, the sidewalk and the mulched area to the edge of the road. He stated that there was nothing presented at the meeting about it, or about easements across property lines. He stated that with regard to the issue on giving notice, he had raised it to staff at the beginning of the Planning Board meeting and was told there were no requirements to give notice to any property owner for a Planning Board meeting, but staff voluntarily sent a notice to the owner of 100 Duck Landing Lane. He stated that he wasn't sure if anyone knew whether the owner of the property received the notice. He stated that he was surprised that several people allegedly were on notice regarding this agenda item prior to the Planning Board meeting. He pointed out that a sign was put up at the applicant's property but it didn't mean that anyone had actual notice.

Town Attorney Hobbs asked if anyone wish to make any concluding comments.



Mayor Kingston asked Monica Thibodeau if she wished for Council to withdraw the application or move forward at this meeting, excluding the insurance portion. Monica Thibodeau stated that she would prefer that the application not be delayed, but would stand by Council's decision if they wished to delay it. She stated that she thought her intentions were clear and pointed out that the property to the east of her property was on board with the project. She stated that she would not withdraw the Conditional Use Permit.

Councilor Burdick clarified that Monica Thibodeau spoke with a member of the Duck Landing Property Owners Association. Monica Thibodeau stated that she did. Councilor Burdick asked if it was before the Planning Board meeting. Ms. Thibodeau stated that they discussed the entire application. She added that the member did receive the letter since he was the abutting property owner and she didn't know that he was on board until he told her during their discussion. She added that they did discuss his concerns, which was mainly noise.

John Klamut stated that he went to Town Hall and obtained the information on June 12, 2015 and subsequently sent out a letter to the Duck Landing board members on June 14, 2015 and at that point, none of the members were aware of the application. He stated that the person Monica Thibodeau met with was Frank Tapsell, adding that he received a notice shortly thereafter regarding the public hearing. He stated that he was unaware that Mr. Tapsell had talked to Monica Thibodeau about it. He added that not everyone looked at the Town's website, noting that there wasn't a legal notice that the Planning Board was meeting to discuss the issue. He stated he wasn't sure how anyone could have expected the Duck Landing board to show up for the meeting due to the fact that he is the only local resident in the subdivision.

John Klamut reiterated that the ordinance regarding Conditional Use Permits strongly recommend that the applicant seek out the adjacent property owners and resolve issues before and during proceedings.

Director Heard noted that Frank Tapsell was one of four adjoining owners that were sent notice of the Planning Board meeting. Joe Blakaitis added that legal notice was posted in the local newspapers for the Planning Board meeting prior to the meeting.

Jeff Shields agreed that legal notification was sent out. He added that the Association received the letter on June 16, 2015, which was well after the Planning Board meeting. He pointed out that a member of the Planning Board stated earlier in the meeting that the Board would have welcomed input from the Duck Landing Property Owner Association. He stated that the Association was now asking for that. He stated that the Association was using this forum to provide information. He added that the Association did not have the opportunity, didn't check the Town's website enough, or didn't look at the Town's marquee to see that the meeting was posted. He stated that the Association found out about the meeting after the fact. He didn't think that was how the process should work. He stated that the Association would have loved to have provided input to the Planning Board as a lot of the issues would have been worked out. He stated that the Association was asking Council to let them finish the process since it was derailed early on. He stated that the Association would come back to Council once they finish the process even if it took 30 days. He urged Council to delay the application.

Mayor Kingston asked what would be accomplished in the next 30 days. Jeff Shields stated that he had a lot of confidence that he and representatives of the Board could sit down with the applicant to hash things out. He thought all could come to an agreement and come back to Council without spending a good portion of the meeting discussing the issues. He stated that if an agreement was achieved, the process could move forward. Mayor Kingston asked Jeff Shields to

define the two issues. Jeff Shields understood that the insurance was not Council's issue and the Association needed time to discuss it with the applicant. He added that Monica Thibodeau had told him previously that she would look at it; however, they have not had an opportunity to present the document to Ms. Thibodeau for her to review. He stated that they wanted the opportunity to put the information in writing, and come to Monica Thibodeau and Wes Stepp to work out an agreement that would satisfy all parties.

Councilor Burdick pointed out that Council has said that insurance was not an issue to consider. He agreed that it was an issue for the Association and the applicant. He stated that nothing that Council decided at this meeting would prevent the Association from working with the applicant to come to an agreement as to how to approach the issue. He stated that Council's decision would not make a difference as far as the insurance portion. He stated that Council has asked what the key issues were that it should consider and Mr. Shields was back to talking about insurance, which was not one of the key issues. He stated that Council would have to determine what the key issues were and would figure out how to deal with them. Jeff Shields stated that the key issue was insurance in that the Association would incur additional costs and that was something that Council was supposed to take into consideration. He added that he did not use the word insurance, but the Association would incur additional costs as a result of Council's action.

There being no one else wishing to speak, Town Attorney Hobbs closed the evidentiary portion of the hearing and turned the meeting back over to Mayor Kingston.

Councilor Burdick understood that the key issue left was the fencing or separation barrier between the eating area and the sidewalk. He stated that it seemed to him that the applicant had previously agreed to take action to eliminate that problem. He proposed, as part of the conditions, that the applicant must install adequate fencing and that it be handled administratively by Town staff. Mayor Kingston clarified that it would be erected to delineate the property. Councilor Burdick agreed, adding that it would avoid pedestrians passing back and forth between the property and the sidewalk.

Councilor Britt stated that he was still concerned on the easement issue. He added that no one knew what the easement was for and thought it was a problem. He noted that it was a neighborly easement for many years, but looked like that was ending. He thought the easement needed to be looked at to see if it included the use of the sidewalk or not as it was a key part of the decisions for the application. Councilor Burdick thought the alternative would be that Council could require that the applicant provide a separate walkway to the parking lot if the easement does not provide them with the access. He noted that it could be added as a condition. He stated that if there wasn't an easement stating that the applicant could use it, then they would have to provide their own access.

Mayor Kingston pointed out that parking was within the Town's ordinance after 6:00 p.m., music was within the ordinance; an agreement was established with regard to the outdoor lighting and it now came down to delineating the property with fencing as well as access to the back lot. Councilor Burdick proposed that the applicant would have to submit to the Director of Community Development what the easement was and what it contained. He added that if there wasn't an easement, the applicant would have to show a plan to install a walk area to get to the property.

Councilor Burdick moved to approve CUP 15-003 as presented with the findings and four conditions recommended by the Planning Board as well as adding the following conditions: (1) the applicant provide adequate fencing to delineate the property line in the proposed eating area,

which will be handled administratively through Town staff and (2) the applicant needs to clarify the easement and if they clearly have an easement to use the sidewalk, there will be no further issues; however, if they do not have an easement to use the sidewalk from the back parking lot, the applicant would have to install their own access way to the back parking lot, which will be handled administratively through Town staff.

Motion carried 3-0.

Mayor Kingston called for a five minute recess. The time was 9:33 p.m.

Mayor Kingston reconvened the meeting.

**Public Hearing/Discussion/Consideration of Ordinance 15-10, an Ordinance Updating Standards for Wireless Telecommunications Systems Consistent with Recent Changes in State and Federal Laws**

Mayor Kingston turned the meeting over to Town Attorney Hobbs. Town Attorney Hobbs stated that his law partner, David Gadd, would be sitting in for him for the public hearing since he had assisted Director Heard and the Planning Board with the review of the text amendment.

Attorney David Gadd was recognized to speak. Attorney Gadd stated that the public hearing was open. He asked Director Heard to give a presentation.

Director Heard noted that the public hearing was advertised in the *Coastland Times* on June 14 and 28, 2015; the *Outer Banks Sentinel* on June 17 and June 24, 2015; as well as advertising it on the Town's website on June 11, 2015.

Director Heard stated that Council had voted at their December 3, 2014 meeting to authorize the Planning Board to evaluate and prepare recommendations regarding potential text amendments identified by Community Development staff. He stated that this specific proposal involved amendments to Section 156.058, Wireless Telecommunications Systems, to comply with recently adopted standards in the Federal Telecommunications Act and N.C. Cell Tower Deployment Act. He stated that the Planning Board recommended the following amendments:

- Amend terminology to be consistent with current state and federal laws
- Administratively permit modifications to existing wireless communications facilities that do not substantially change the physical dimensions of the facility
- Remove requirements for certain types of locational, technical, and business information that can no longer be required of the applicant
- Limit time periods for review
- Set parameters for use of technical consultants
- Improve the process and standards for dealing with abandoned wireless telecommunication facilities
- Add new telecommunication towers or antennas as conditional uses in the Conservation-Public Recreation zoning district.

Director Heard stated that the Planning Board voted to recommend approval of the text amendment and staff was also recommending approval.

Attorney Gadd asked Council if they had any questions for Director Heard.

Mayor Kingston asked if there were any public comments regarding the ordinance at the Planning Board meeting. Director Heard stated that there weren't any comments.

Councilor Burdick stated that he still was not happy with the change of allowing a Conditional Use Permit, especially with regard to the Corps of Engineers property. He understood the reasoning why the Town would like the flexibility in case it wanted to do something with its own property, but he wanted protection with regard to the Corps property until such time as the Town would know the long-term disposition of it. He explained that if the Corps decided to sell the property, the Town would be giving an outsider the right to go in immediately. He added that the whole idea behind the ordinance was to prevent that. He proposed that they be split in two and use the original prohibition instead of allowing it through a CUP for the Corps property. Director Heard stated that the C-PR district originally did not allow the towers, but was changed to allow them via CUP. Councilor Burdick proposed that the language be changed to the original language just for the Corps property.

Mayor Kingston asked if the Town could control what happened on the Corps of Engineer's property. Councilor Burdick stated that the Town could not, adding that Council was discussing not controlling what the Corps did as they could do what they want, but rather controlling if the Corps decided to dispose of the property, prohibiting another entity from coming in there and erecting a tower immediately. Town Manager Layton pointed out that the Corps of Engineers property and the Town property were both zoned C-PR and it could not be split.

Mayor Pro Tempore Thibodeau thought the safeguard was that it wasn't a right and that an applicant would have to come before Council for a CUP. She asked if showing it as a CUP in the ordinance almost granted the idea that it could be done as long as the conditions are met. Attorney Gadd stated she was correct.

Councilor Burdick stated that it worried him, adding that the original language made things controllable. Town Manager Layton stated that if the Corps property were disposed of, it would be zoned C-PR and would not prevent anyone from requesting a change, but it would have to be changed from C-PR to allow any kind of residential or commercial development.

Mayor Pro Tempore Thibodeau noted that the reason the Town created the C-PR district was over concerns about the Corps disposing of the property in the future. She thought the point was brought up at the last meeting that a public place might be more desirable. Councilor Burdick agreed but felt that prohibiting it would stop it until Council could consider it. Attorney Gadd stated that the only thing the Town could restrict was requiring that the towers be placed on Town property. He added that it gave the Town a lot of leeway to decide what would be allowed in the different zones. He stated that Council could change it. Director Heard agreed.

Councilor Burdick reiterated that he was still uncomfortable with the language and asked that the language be changed so that towers were not allowed in the C-PR district. Director Heard stated that Councilor Burdick made some valid points, but the other side was that if they were not allowed, a tower applicant would likely not pursue those properties.

Mayor Kingston asked what the Towns of Southern Shores and Kitty Hawk have done with regard to their town properties. Director Heard stated that the Town of Kitty Hawk had a hierarchy that encouraged towers on their property but it was being removed from their ordinance. He stated that the Town of Kitty Hawk allows towers in some of the commercial districts and was not proposing to change districts. Mayor Kingston asked if the Town of Kitty

Hawk had a C-PR district, which was designated for their town properties. Director Heard stated that it didn't but had a park district.

Councilor Britt stated that Duck was different and the Town property contributed to the tourist economy. He agreed with Councilor Burdick's concern in not wanting the towers in the C-PR district.

Attorney Gadd asked if members of the Planning Board wished to comment or make a presentation. There were none.

Attorney Gadd asked if members of the public wished to comment or make a presentation. There were none.

Attorney Gadd asked if anyone else wished to comment. There being no one wishing to speak, he closed the public hearing and turned the meeting back over to Mayor Kingston.

Councilor Burdick moved to approve Ordinance 15-10 with the change to the C-PR zoning district to the original designation of Administrative for existing wireless but not allow it for the other districts.

Motion carried 4-0.

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

### **Board of Adjustment Appointment**

Mayor Kingston stated that at Council's June 3, 2015 meeting, it re-appointed all current members that were eligible to the Board of Adjustment. He added that one position on the Board, the second Alternate, remained open so Council could request applications. He stated that Town staff solicited applications for the position via social media and, to date, received five applications. He stated that the applications were from James Cofield, Jr., Bill Guillaume, Robert Jacobs, Mike Klimkiewicz and Randy Morton. He noted that the term for the Alternate would expire on July 1, 2017.

Mayor Kingston moved to appoint Bill Guillaume as an Alternate to the Board of Adjustment for a term to expire July 1, 2017.

Councilor Burdick asked if other nominations could be added. Mayor Kingston stated that the motion needed to be voted on before other nominations could be considered. Councilor Burdick stated that if the Council approved the motion, an individual would be appointed without discussion of the other candidates. Mayor Kingston agreed, adding that the process had to move forward since there were five people that were interested in the position. Councilor Burdick stated that he wanted Council to discuss other candidates.

Mayor Pro Tempore Thibodeau asked what the rationale was in choosing Bill Guillaume. Mayor Kingston stated that he looked over the applications, adding that he knew a few of the individuals personally. He stated that he's known Mr. Guillaume for many years and felt he was the most qualified for the position.

Motion carried 3-1 with Councilor Burdick dissenting.

Councilor Burdick thought Council should have had a discussion on the other candidates as a procedural issue. Mayor Kingston understood but added that he was trying to have the issue move forward.

## **NEW BUSINESS**

### **Overview of Residential and Commercial Solid Waste and Recycling Proposals**

Town Manager Layton stated that the Town currently contracted with Waste Management for residential solid waste and commercial solid waste and recycling services, and with TFC Recycling for residential recycling services. He stated that the contract with TFC Recycling will expire in September, 2015 and the contract with Waste Management was up for review in September, 2015 with the option of two one-year renewals. He stated that staff solicited proposals from Waste Management and Bay Disposal for residential and commercial solid waste and recycling services and from TFC Recycling for residential recycling services. He noted that the Town did not solicit a proposal from Dare County.

Town Manager Layton stated that TFC Recycling proposed the lowest cost for residential recycling service and Waste Management proposed the lowest cost for residential and commercial solid waste and bulk waste collection services. He added that Bay Disposal proposed the lowest cost for commercial recycling services. He pointed out that without residential recycling; the proposal from Waste Management was \$149,063 lower than Bay Disposal's proposal. He recommended that Council authorize him to prepare a contract with Waste Management and TFC Recycling for waste and recycling services. He added that the contracts would be brought back to Council at their August 5, 2015 meeting.

It was *consensus* of Council to have Town Manager Layton come back with contracts at their August 5, 2015 meeting.

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

Town Attorney Hobbs stated that his firm has been working with Town staff on the beach nourishment easements and was making good progress on them.

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

#### **Update on Departmental Activities**

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

First Sergeant Jeff Ackerman and Sergeant Melissa Clark were recognized to speak. First Sergeant Ackerman and Sergeant Clark gave a brief overview of the past month's police activities to Council and the audience.

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

Public Information Officer Denise Walsh was recognized to speak. Public Information Officer Walsh gave a brief overview of the past month's activities to Council and the audience.

### **Project Update on Beach Nourishment Project**

Town Manager Layton stated that Town staff has been plugging away with the easements with Town Attorney Hobbs, Director Heard and Permit Coordinator Sandy Cross doing a lot of hard work on getting the easements. He stated that the Town needed 119 easements and currently had approximately 89 received to date. He reminded Council that even though the Town needed 119 easements, it didn't equate to 119 properties because there were some properties that had more than one owner that needed to sign the easement. He thought staff would have issues with some of the last easements to be received, but only in the sense of getting the owners to meet the Town's timeline. He stated that he was pleased with the process and felt it has gone very well.

Town Manager Layton stated that he continued to work on access issues and staff still has a dialogue going on with the Corps of Engineers. He hoped to know something in the next few days as to where they stood. He added that there were two properties – one that staff would be meeting with next week to see what would be required in order to get permission to use property that they own as an access. He stated that the other was from an individual property owner that reached out to staff to indicate that he may be willing to talk about an access. He emphasized that Town staff may have some options if the Corps of Engineers was not willing to permit access.

Town Manager Layton stated that Council had the latest letter from CP&E in their packets and added that they obtained part of the Major CAMA permit. He stated that the Corps of Engineers also received it. He stated that CP&E completed an updated engineering design report and was available on the Town's website. He noted that he had a new book that came in that included all of the reports related to the comprehensive marine sand search and was available online for the public to view. He stated that they have not concluded what they would recommend in terms of the use of the borrow pit off of Duck and Kill Devil Hills.

### **Police Chief Search**

Town Manager Layton stated that there was no status change with regard to the Police Chief position. He had hoped that he would have a release ready, but there have been some delays with regard to some of the final background information, so he wasn't comfortable putting the release out now. He stated that he did not expect any issues and was still planning for a start date in early August. He hoped to issue a full release by mid-July. He noted that an offer had been made and staff was completing its due diligence to make sure the Town was protected.

### **Financial Statements for the Month of June for FY 2015**

Town Manager Layton reviewed the financial statements with Council and the audience.

### **MAYOR'S AGENDA**

Mayor Kingston stated that he has his monthly mayor's lunch on July 21, 2015. He gave a short update on the sales tax redistribution to Council and the audience. He noted that Melva Garrison of the Dare County Board of Elections was retiring after working for Dare County for over 44 years. He reminded Council that the filing for next year's election started July 6, 2015 and ran for two weeks. He added that there was a new form that would need to be filled out that required a notary signature. He stated that he attended two meetings recently – one with Representative Tine to discuss the use of occupancy taxes for dredging and the other with Jim Hobbs, who was on the board with the North Carolina Tourism and Travel Coalition to discuss the same issue. He felt that both meetings went very well. He passed out a spreadsheet to Council to show what the

other towns and Dare County compensated their boards, noting that the Towns of Kill Devil Hills and Manteo were increasing their compensation. He noted that he was not using the spreadsheet as a recommendation, but just for Council's information and felt it could be something that could be looked at in 2017. He stated that he was looking forward to the Fourth of July parade.

**COUNCIL MEMBERS' AGENDA**

Mayor Pro Tempore Thibodeau gave an update on the Government Access Committee meeting to Council and the audience.

Councilor Burdick stated he was looking forward to the Fourth of July parade.

Councilor Britt stated that he was looking forward to the Fourth of July parade.

**OTHER BUSINESS**

**Additional Public Comments**

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

Mayor Kingston noted that the next meeting would be the regular meeting on Wednesday, August 5, 2015 at 7:00 p.m.

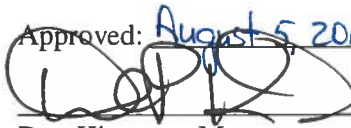
**ADJOURNMENT**

Councilor Britt moved to adjourn the meeting.

Motion carried 4-0.

The time was 11:00 p.m.

  
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Lori A. Kopec, Town Clerk

Approved: August 5, 2015  
  
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Don Kingston, Mayor

