

**TOWN OF DUCK
TOWN COUNCIL
REGULAR MEETING
August 1, 2018**

The Town Council for the Town of Duck convened at the Paul F. Keller Meeting Hall at 7:00 p.m. on Wednesday, August 1, 2018.

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

COUNCIL MEMBERS ABSENT: None.

OTHERS PRESENT: Town Manager Christopher Layton; Police Chief John Cueto; Fire Chief Donna Black; Director of Community Development Joseph Heard; Town Attorney Robert Hobbs; Director of Marketing and Special Events Christian Legner; Public Relations Administrative Assistant Betsy Trimble; Permit Coordinator Sandy Cross; and Town Clerk Lori Ackerman.

OTHERS ABSENT: None.

Mayor Kingston called the meeting to order at 7:03 p.m. He asked Mayor Pro Tempore Monica Thibodeau to lead the Pledge of Allegiance. Mayor Kingston led the moment of silence.

PUBLIC COMMENTS

Mayor Kingston opened the floor for public comments. He asked that any comments regarding the public hearing be held off.

Fred Vallade of 102 Flight Drive was recognized to speak. Mr. Vallade stated that he was present to represent the Gulls Flights Homeowner Association. He stated that his main purpose was to make Council aware of the serious flooding issue in Duck that has magnified in the past week. He noted that the situation has existed for many years and involved the Ocean Pines subdivision pumping water from their subdivision to the Gulls Flight subdivision. He added that the Ocean Pines subdivision has also pumped into the ocean in the past. He stated that he was unaware of any action taken against them for pumping into the ocean. He stated that currently, because of all of the rain the Outer Banks has received recently, one of the homeowners in the Gulls Flight subdivision found a lot of water on their property from pumping being done from the Ocean Pines subdivision. He stated that the police were called, but couldn't find anyone pumping, so they turned the water off; however, it happened again the following day. He stated that the water had not receded in Ocean Pines and the pumping starting again towards Gulls Flight. He stated that a few residents had approached the manager of Ocean Pines and were told that the Town and the Duck Police Department had told them that they had the

right to pump on their property. He stated that he had told the manager that the water pumping was overflowing to the Gulls Flight subdivision and was told it was Gulls Flight's problem.

Fred Vallade stated the pump hose continued down the property lines until July 31, 2018 when the water receded. He stated that he came home recently and found the side of his house flooded from the pumped water flowing onto his driveway.

Nancy Lane of 160 Flight Drive was recognized to speak. Ms. Lane stated that she owned her property since 1999 and as a rule, there is flooding at times, but it doesn't usually last long. She stated that her home was surrounded by water and her issue was that it was dark and had a strong odor. She stated that the Ocean Pines subdivision was pumping water over their septic beds onto her property. She stated that she has tried to warn the tourists staying at rental properties in Gulls Flight to not walk in the water.

Ed Devlin of 124 Flight Drive was recognized to speak. Mr. Devlin stated that he wanted to know if there was a noise ordinance in effect regarding the pump noise as the pump from Ocean Pines was near his bedroom window and runs constantly. He added that he also wanted to know if there were any ordinances regarding water runoff from one property to another.

Martha Gangi of 110 Flight Drive was recognized to speak. Ms. Gangi stated that she's been a resident of Duck since 2014. She stated that she had two to three inches of rain under her home and back yard. She stated that the pumping from the Ocean Pines subdivision was coming onto the septic field of her home, resulting in over a foot of water on her property and six inches of hazardous groundwater. She went on to read a news article regarding excessive bacteria levels due to the recent rain events to Council and the audience.

Nicki Johnson of 115 South Snow Geese Drive was recognized to speak. Ms. Johnson stated that she has been a resident of Duck for 15 years. She stated that she has been very pleased since the Town incorporated with how the Town has been shaped, formed, self-regulated, as well as with all of the policies and procedures that have been put into place, until Council's July 18, 2018 meeting with the decision on Roadside Bar & Grill. She added that she was confused by the decision. She noted that she liked the restaurant as well as the other restaurants in Duck. She stated that she was unable to attend the July 18, 2018 meeting, so she did not have all of the information that led to the vote made by Council but was confused by a Council vote that disregarded the Planning Board's and Town staff's recommendation. She wasn't sure what Council's intentions were but could see the result of their decision and the impact of it. She stated that it has made a lot of people question fairness because it appears that all of the restaurants and other businesses were not being treated equally. She stated that she was concerned about the treatment of one business in comparison to the others. She added that she knew that Roadside Bar & Grill was coming back to Council as there were things that needed to be addressed; but she asked Council to question themselves about the message they were sending about

equal treatment, special treatment, favoritism and equality, as well as how they make their decision and what that message says to everyone else.

John Klamut of 123 Duck Landing Lane was recognized to speak. Mr. Klamut stated that he wanted to follow up on the remarks made at the July 18, 2018 meeting about Roadside Bar & Grill. He stated that he left the meeting asking himself what had happened and thought about it and realized that a clever property owner came before Council and used a provision of the zoning code that was intended to bring owners, the planning professionals and the Planning Board together to talk about development solutions and come up with solutions by working together. He added that the owner used the provision to obtain forgiveness for six to eight years of ignoring the rules and thumbing his nose at the Town with respect to building requirements. He thought it was wrong, adding that the owner received approval for siting six or more illegal buildings, approval for stacked parking, approval to encroach on residential setbacks with the stage, and approval for 0 parking and adding 100 seats to the restaurant, when his establishment was already short with regard to seating.

John Klamut stated that he sent the Planning Board and Council a letter suggesting a solution to the problem, so it wouldn't happen again. He hoped that Council thought it was a problem. He stated that his suggestion was to change the code so that the Village Commercial Development Option would be denied to applicants who had existing zoning or building violations against their property. He added that he suggested that the code be clarified to prevent reductions of the setbacks between commercial and residential properties. He stated that he suggested having a study in Town as there were a lot of applicants that note that people walk to their establishments, but do not have any proof. He thought the Town should do an inventory or a supply/demand study of the parking in the Village area. He stated that another option would be to look at the noise ordinance. He pointed out that most of the other towns on the Outer Banks have decibel-based noise ordinances with some objectivity regarding what is noise and what wasn't. He thought it would help the applicants because when a stage is set up, staff could look at it and determine what the right level was. He explained that currently, it takes two people complaining in order to get any action or a police officer and the complainant to agree that the noise was a problem. He thought the Town was at the point that it needed to use some technology related to noise.

John Klamut asked Council to consider his request and as the work at Roadside Bar & Grill moves forward, that Council give their support to the professionals to make sure the outcome was safe and met the codes. He added that it was a tight space that will have more than 100 people on it along with cars and cooking equipment and he didn't want anything bad to happen at the property.

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

CONSENT AGENDA

There were no Consent Agenda items to consider.

PUBLIC HEARINGS

Public Hearing/Discussion/Consideration of CUP 18-008, a Conditional Use Permit Application by Craig Readman (Scarborough Faire in Duck, LLC) to Expand an Existing Eating Establishment and Apply the Village Commercial Development Option Seeking Modified Minimum Parking Standards for the Scarborough Faire Shopping Center at 1177 Duck Road

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

Town Attorney Robert Hobbs was recognized to speak. Town Attorney Hobbs stated that the Council would be sitting as a quasi-judicial body for the public hearing, meaning that they will sit as a court and must make its decision based upon competent material and substantive evidence that will be presented during the course of the hearing. He stated that anyone wishing to give testimony would have to give it while under oath with the applicant afforded due process rights including the right to present evidence, examine and cross-examine witnesses. He asked that anyone wishing to testify come forward to be sworn in.

Town Clerk Lori Ackerman was recognized to speak. Town Clerk Ackerman 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, Craig Readman and Ralph Calfee.

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 a conditional use permit to change previous retail uses to an eating establishment – Treehouse Coffee/Rope Ladder Kitchen – with 32 indoor seats and six outdoor seats, encompassing all of Building 3 in the Scarborough Faire Shopping Center. He added that the applicant was seeking approval of a conditional use permit to apply the Village Commercial Development Option seeking modified minimum parking standards to accommodate existing and proposed development. He noted that there were no site improvements associated with the proposed change.

Director Heard stated that one of the units had been converted to a restaurant use earlier this winter/spring without first obtaining the necessary permits and approval. He explained that the change of use was discovered during a fire inspection and subsequent zoning inspection on April 22, 2018. He added that the Rope Ladder Kitchen was an expansion of the Treehouse Coffee establishment and the two units containing Treehouse Coffee were previously approved for use as a carryout establishment with no seating. He

stated that seating has been added in this area, changing the use to an eating establishment. He noted that a commercial kitchen was in Unit 1 and was connected to and served the other two units, effectively making the entire building a single restaurant. He stated that the applicant was seeking to bring the restaurant expansion into compliance through the conditional use permit application.

Director Heard stated that the Scarborough Faire Shopping Center was originally approved in 1983 by Dare County and has had changes in tenancy as well as minor changes to the site layout over the subsequent years. He stated that while most changes in tenancy have been approved administratively over the years, several conditional use permits have previously been approved by Dare County and the Town for Scarborough Faire. He stated that CUP 06-1995 through Dare County was approved to permit to convert an existing 866 square foot retail space to a bakery with on-site food preparation, retail/wholesale, and delivery; CUP 01-2001 through Dare County was approved to convert an existing 574 square foot retail space to a deli with six customer seats; CUP 2003 was approved to expand the deli operation to an adjoining 600 square foot retail space and add nine customer seats to the deli; and CUP 14-002 was approved to convert two retail spaces totaling 964 square feet into an eating/drinking establishment currently known as Treehouse Coffee. He stated that the applicant had proposed a carry-out business with no indoor seating but had proposed a 208 square foot outdoor dining area that contains six seats. He added that the applicant could have up to 12 indoor seats without increasing the minimum parking requirements, but approval of those seats was neither requested or granted.

Director Heard stated that sometime after the approval of CUP 14-002, the applicant added 12 indoor seats to the Treehouse Coffee operation without obtaining an amended conditional use permit or approval from the Town. He stated that during a fire inspection in April 2018, Fire Department personnel noticed that walls had been knocked out between two adjoining units and seating added to create an expansion of the existing business into Unit 2 of the building. He stated that Community Development staff met on site with the owner/applicant to document the violations for a change of use and building improvements without obtaining the necessary permits. He noted that staff verbally notified the applicant that the current operation was in violation and requested submittal of a conditional use permit application to have the use considered for approval. He stated that the applicant submitted the application for consideration by the Planning Board to bring the existing violations into zoning compliance.

Director Heard stated that the site was compliant with a vast majority of Town standards. He added that there were instances where it was grandfathered as it was developed in that manner. He stated that the applicant was not proposing to change any of those characteristics as part of their proposal and did not trigger the need to bring anything up to standards on the few things that would affect the outcome such as the parking areas that were within the setback. He noted that it was an existing situation that the applicant was not seeking to increase that nonconformity.

Director Heard stated that the key thing that the Planning Board looked at had to do with the amount of parking. He explained that with the change of use, it triggered some changes in the amount of parking. He added that the original retail use required 9.3 parking spaces and with the changes to an eating establishment and the amount of seating, it resulted in an increase of 2.8 parking spaces for Building 3. He added that it was a fairly minimal increase; however, in evaluating what was occurring on the site and how it fit in the overall parking for the site, it was noted that there have been other changes, such as the addition of seating in restaurants on the property in this building as well as the other restaurant known as Heart. He stated that with those changes, the property as a whole had fallen out of compliance with the minimum parking standards, meaning that the increase in seating has brought those requirements up above from what they have on site.

Director Heard stated that, in looking at the proposed change, he looked at it similar to a couple other recent applications such as the Loblolly Pines Shopping Center and Roadside Bar & Grill, and the further development of the property could not increase the parking requirement unless Town Council modifies the minimum parking standards through the Village Commercial Development Option. He stated that in total, with all of the uses, there were 115 parking spaces required and the applicant has 107 parking spaces on site. He added that in reviewing the Village Commercial Development Option, the Planning Board looked at several factors in choosing to recommend ranking the Village Commercial Development Option to reduce the amount of parking required on the site to 107 spaces.

Director Heard stated that the Planning Board reviewed the application at their July 11, 2018 meeting and recommended approval, subject to the following conditions:

1. The applicant must cease use of the approved expansion until all building permits have been obtained, necessary work completed, final inspections approved, and certificates of completion/occupancy issued in compliance with North Carolina Building and Fire Code standards.
2. The applicant must add one additional ADA compliant parking space to the shopping center.
3. The Building Inspector and Fire Department must review and approve the proposed improvements for compliance with applicable codes.
4. Any new signage must be reviewed and approved under a separate permit by the Community Development Department.
5. This conditional use permit will expire in 12 months from the date of approval if the building improvements have not been permitted and completed.

Director Heard stated that the Planning Board had noted that Council may want to consider amending Condition #1 by offering a similar timeframe for permitting, inspections, and compliance as the recently approved Roadside Bar & Grill CUP application and that the revised site plan in Council's packets showed the location of the proposed ADA compliant parking space recommended in Condition #2.

Town Attorney Hobbs asked Council if they had questions.

Councilor Burdick clarified that the parking spaces on Christopher Drive were not legal parking spaces because they were encroaching in the right-of-way. Director Heard stated that they were not legal parking spaces because they were not on the property, but on the public right-of-way of Christopher Drive. He added that they could not be counted towards the applicant's parking requirements.

Mayor Kingston asked how many seats would be eliminated to meet the 107-parking space requirement. Director Heard stated that approximately 20-25 seats would have to be eliminated on the site. Mayor Kingston asked if there was any discussion with the applicant about it. Director Heard stated that he had conversations with them when they were deciding on how to approach the application and what considerations to make. He stated that after some conversation, the applicant decided to go ahead with what they had and felt that they had some reasonable points to make in support of allowing the Village Commercial Development Option. He added that it was their preferred option. He noted that Council had a letter in their agenda packet from the applicant that outlined some other ways that they can have parking on site. He stated that the Planning Board felt that they didn't want to do anything that detracted from the existing character of the site with the way it was laid out as far as far as removing vegetation, so they opted to recommend approval as it was proposed.

Mayor Kingston asked if the restaurant has already been expanded to the other two locations. Director Heard stated that it has been functioning that way and was currently in violation.

Mayor Pro Tempore Thibodeau thought one of the comments regarding the background information was the fact that the timing of the uses of the different places in the shopping center were ebbing and flowing with regard to people coming to the site. Director Heard stated that the draft Planning Board minutes reflected that as Ralph Calfee, the engineer for the project, had brought that up and felt it was a factor in that the businesses were not all open at the same time. He added that they felt it was a factor in being able to accommodate the parking needs.

Mayor Kingston asked if the kitchen had any inspections or if it was existing. Director Heard stated that the applicant could answer when the inspections took place since he didn't have the full history.

Councilor Caviness clarified that no more changes in development could happen at Scarborough Faire because of this project pushing it above its limits. She further clarified that if any of the other businesses or apartments wanted to make a change, it would trigger more parking and it would be on Council to revise the Village Commercial Development Option. Director Heard stated she was correct. He added that it was not solely due to this proposal as this proposal was only adding 2.8 parking spaces. He noted that the property was already out of compliance due to other changes that were made with

regard to the amount of seating. Councilor Caviness clarified that everyone that was living or running a business at Scarborough Faire was aware that the property is maxed out. Director Heard stated that he wasn't sure if they were aware but pointed out that the owner/applicant was aware in that a change in use would require a higher parking requirement and would require them to come back to amend the Village Commercial Development Option if Council chose to do that.

Councilor Caviness asked if there was any discussion regarding the number of seats being asked for to be more in line with the barbeque restaurant, which has 15 seats. Director Heard stated that staff had that conversation with the applicant during the initial phases of the development of the proposal. He stated that the applicant sought to move forward and request what they have on site and what they want, which was an option, to reduce the parking requirements, which was something that Council could do. He added that the Planning Board's recommendation was based on the full amount of seating as it currently existed.

Town Attorney Hobbs asked the applicant to make a presentation.

Craig Readman of Treehouse Coffee was recognized to speak. Mr. Readman thanked Council for considering his application. He stated that he has taken over the existing property. He explained that all of the walls at Scarborough Faire were connected at one point and were all retail establishments. He stated that he removed a wall from the kitchen that had been in place for 20 years. He added that Unit 2 was originally Rub A Dub Duck and was connected to the kitchen of his restaurant. He noted that he did not do any construction to the walls. He stated that with regard to permitting for the kitchen work, he was inspected by former Building Inspector Cory Tate, the Fire Department and Dare County Health Department.

Town Attorney Hobbs asked Council if they had questions for the applicant. There were none. Town Attorney Hobbs asked if any of the sworn witnesses wished to give a presentation or comment on the application.

Ralph Calfee of Calfee Engineering was recognized to speak. Mr. Calfee thought Director Heard gave a good overview of the project and was sure Council were already aware of what existed at the Scarborough Faire Shops. He added that Scarborough Faire has been in existence before Duck incorporated. He stated that they were seeking approval for the specific uses that increase the number of seating. He stated that they were asking for a 7% parking allowance. He stated that the 107 parking spaces were the ones that currently existed on the site and there were additional spaces on Christopher Drive. He stated that when the project was built, the parking backed out onto the right-of-way, which was common on the Outer Banks. He noted that he was not trying to ask Council to change their regulations as it would not be a good idea. He added that if the parking spaces on Christopher Drive were counted – like they were in the past – then there was more than enough parking at the site.

Ralph Calfee noted that the lot coverage on the site was less than 49%. He explained that, typically when looking at a commercial site, the lot coverage was hard up against the allowances. He added that this site had room for more parking. He stated that looking at the history and current usage of the site, there was not a parking problem. He explained that one of the reasons was because it was a mix of different businesses, so it was not like a single entity that had all of its parking at one time. He stated that the site functioned very well and worked. He noted that the applicant had performed the work without obtaining permits, but now knew going forward if he wanted to do anymore redevelopment, the awareness was clear that permits would need to be obtained before any work could start. He stated that they agreed with the findings that the Planning Board made with what they recognized as being important and agreed with the recommendations with the inclusion of an allowance of a period of time to bring the site into compliance.

Mayor Pro Tempore Thibodeau asked for an overview of the building permits that were still required. Ralph Calfee stated that the one condition that they were asking Council to make an exception to was Condition #1. He explained that the amount of work that needed to be done was modest, but they knew they needed to obtain a permit for certain things. He noted that the reality was that they had a nonstructural wall that was taken out that had a wire in it, which was why they were asking for the 90-day condition to come into compliance. Mayor Pro Tempore Thibodeau clarified that it had to do with the interior walls. Ralph Calfee stated that 99% of what was being discussed was openings through walls. He added that there were openings cut through walls so that the units would connect. He noted that the units were already in place and the partitions were not structural.

Mayor Kingston clarified that the 13 parking spaces were included in the 107 parking spaces. Director Heard stated that they weren't. Mayor Kingston clarified that they were over and above. Director Heard stated that they were not included anymore. Ralph Calfee stated that the 13 parking spaces were additional, and the 107 parking spaces were all on site and the 13 were partially on site and backed into the right-of-way.

Councilor Burdick understood that the owner of the property has taken the position that the parking situation would not affect the other businesses. He asked if that was correct. Ralph Calfee thought the demonstration was a fact that everything was working fine on the site. He added that it was not adversely affecting the other businesses, occupancies or tenants.

Mayor Kingston clarified that Ralph Calfee was not speaking on behalf of the owner of Scarborough Faire, but making a personal statement. Ralph Calfee stated he was correct, adding that it was his observation that there was no issue with parking in general.

Councilor Burdick stated that he was trying to get confirmation because in Council's packet there was a note that stated that the owner was in agreement that this would not affect anyone else. Ralph Calfee stated that he felt very comfortable with the statement that this would not adversely affect the operation at the site.

Town Attorney Hobbs asked if anyone wished to address the application. There were none.

There being no one else wishing to speak, Town Attorney Hobbs closed the evidentiary portion of the public hearing and turned the meeting back over to Mayor Kingston. He reminded Council that a vote of the majority – three Council members – would be needed to approve the application. He added that if Council adopted the approval, they would need to include specific findings and conditions.

Councilor Britt stated that he sat through the Planning Board meeting as the Council Liaison and thought their conclusions were good. He thought the extra seats and parking were valid due to the uses of the adjacent parking spaces and the Planning Board did not see a problem with it. He added that he did not have a problem with those spaces as they have always functioned as a part of Scarborough Faire. He agreed with giving the applicant 90 days as Council did in the past, if it comes to that point. He felt the Planning Board did a good job and he didn't see any problem with moving forward.

Councilor Burdick thought there was a comment made earlier that the Town was getting to the point with regard to parking where the law of supply and demand was taking over. He added that the supply was limited from here on out. He stated that the Town could make tweaks but there were no significant changes to be made. He thought the recommendation was right as the amendment was proposed because the property owner felt it would have no impact on the businesses. He thought that was important and was in support of the conditional use permit.

Mayor Pro Tempore Thibodeau appreciated the Planning Board and staff's effort on the conditional use permit. She felt it was a reasonable request, particularly based on the additional parking spaces that were adjacent to the property. She thought it had some interesting parallels to what Council worked on at its July 18, 2018 meeting and thought parking was at a premium in Duck, but as evidenced by the Town's pedestrian plan and studies, there was a lot of people that walk-through Town. She stated that she did not see any adverse effects with the project and agreed to the 90-day plan to bring the site into compliance with the building code.

Councilor Caviness pointed out that for the second month in a row, Council had an application come forward, requesting something that has been operating illegally, which was only discovered due to a fire inspection, was disturbing to her. She stated that while it was not as egregious and as full of problems as the application from Roadside Bar & Grill, it was still an application that was coming forward asking for concessions for a business that was operating without permits as well as work being done without permits. She noted that it was very bothersome to her and based on the amount of email and public comments Council received earlier, it was bothersome to a lot of the people in the community. She guessed it was also bothersome to other business owners who have spent a lot of money trying to do things right because they know the rules. She agreed that

while the request seemed reasonable and that the lot could probably handle what's going on, she felt that it was something that should not be happening.

Mayor Kingston stated that he shared Councilor Caviness' comments, although he agreed with the Planning Board's recommendation. He thought Council needed to give the applicant additional time, but only because Council gave the previous applicant time to meet code and obtain permits. He stated that he had concerns in that where the rule of law in Duck was from the standpoint of people doing unauthorized work, only to be caught after the fact and then coming to Council for forgiveness. He stated that Council was now in a situation where it has to go ahead and make amends and provide things to an applicant that may not have been approved if they had gone through the regular process. He stated that he was fine with the parking due to the 13 additional spaces; but was concerned after the last public hearing Council had in that the controls needed to be tightened and Council needed to look at the Community Development Option. He thought it needed to be discussed with the Town attorney, staff and possibly the Planning Board. He thought Council had a situation where they didn't want to shut the business down; but were once again put in a situation where they have to compromise as to what they were doing as a Town, which concerned him moving forward. He hoped that the other businesses that did comply as well as other businesses would comply going forward.

Councilor Britt moved to approve CUP 18-008 as presented, with the conditions set forth by the Planning Board, and adopting the change that was discussed.

Motion carried 4-1 with Councilor Caviness dissenting.

Councilor Burdick thought that people making changes to their property – including uses – without obtaining permits, was becoming a problem. He agreed that it was reaching a stage where a different approach was needed to let people know that they need to follow the rules. He thought it was fortunate that the fire department has been completing business inspections, as that was what was triggering things. He suggested that the Planning Board look at this aspect to find out how the Town could better manage changes. He added that parking has become an issue that Duck will not be able to get away from. He thought Council needed a fresh look and he strongly supported having the Planning Board look at parking and what was reasonable for a town that has used up its parking. He thought Duck reached a point where the parking supply was limited and wondered if it was a supply and demand issue where the Town would let the property owner decide if they have a problem or some other approach. He thought a shuttle service could be an option during the summer months to encourage people not to come to Town in their vehicles. He further recommended that the Planning Board start the investigation as to what other options Council should be considering.

Mayor Pro Tempore Thibodeau stated that she wasn't sure if having the Planning Board make these kinds of studies was the right approach. She thought it was something that should start with Council and thought it could be discussed at the Retreat in order to delve into the issue as there was a lot of pedestrian traffic in Town as well as a lot of

people driving through Duck. She pointed out that Duck has a lot of traffic and thought it was the product of its own success. She noted that parking requirements were triggered by food establishments, adding that eating establishments require a conditional use permit. She stated that there were a lot of pieces that go into parking requirements. She didn't know if she agreed that the Planning Board needed to look at the issue on their own without a discussion from Council. She reiterated that she would like to discuss the issue at the Retreat or have it put on the agenda for a future meeting. She wasn't sure if there was even a problem. She pointed out that there were a lot of vehicles in Duck, but there were parking spaces in various areas for people to use. She reiterated that she wasn't sure if there was a huge parking issue, but it can be discussed. She stated that she would rather not give it to the Planning Board right now.

Mayor Kingston thought Mayor Pro Tempore Thibodeau and Councilor Burdick made good points, but one of the problems he had was that Council has been very inconsistent. He explained that three public hearings back, Council made someone take out two seats in a restaurant, so another restaurant could have parking. He added that Council has been very inconsistent on how they are managing parking. He stated that he and Town Manager Layton had a discussion on the issue and wanted to get the Town attorney involved and part of the thought process was that they could go through the issues and bring it to Council and try to decide what Council wants to accomplish before sending it back to the Planning Board. He agreed with Mayor Pro Tempore Thibodeau that the first step would be through Council in order to give the Planning Board direction. He stated that the problem Council was having was it was managing on an inconsistent basis, which was proven earlier in the meeting. He thought it was worth a serious look by Council but thought the Retreat may be too far off before discussing it.

Mayor Pro Tempore Thibodeau agreed and thought it could be pushed up. She stated that when Council looks at the 90-day condition with the last two public hearings, the reason it was done was because the people were trying to run a business and have been running their business. She stated that the 90-day condition was put on them so they could get through the summer and have time to address it. She thought maybe it could be as simple in the future that Council not give 90-days and when a violation is discovered, the business is shut down. She stated that if that was the case, then businesses needed to be made aware of it so there were no surprises or semblance of double standards.

Councilor Burdick stated that his concern was how anyone would discover the problems. Mayor Pro Tempore Thibodeau suggested hiring another building inspector. She added that the Fire Department was doing a good job of doing inspections to make sure the businesses were running safely. She stated that there needed to be some public information and thought that an amnesty period could be set up like it was years ago with regard to signage. She stated that it needed more foresight and thought the word could get out to everyone.

Town Manager Layton stated that he heard three things that were separate items. He stated that one was the whole discussion in general of the Village Commercial Development Option. He explained that it was one that as it was reviewed with the

Roadside Bar & Grill application, staff worked with the attorneys on it and there were some items that were brought to staff's attention that needed to be looked at. He suggested that staff meet with the attorneys, bring something back to Council and then Council can decide if they want the Planning Board to look at the Village Commercial Development Option.

Town Manager Layton stated that the second item was the issue of how to better manage changes, such as things that require permits, in the Town. He noted that there was one legislative item that has a major impact on how the Town approach things going forward, which was the recent legislation that grandfathers items that weren't discovered within a certain period of time. He explained that, going forward, when the Town sees a violation, it has to act on it or it becomes legal. He stated that he was bringing the issue up because as Council discusses it, it becomes a policy issue before it becomes a matter as to how the Town would make what Council's policy was. He explained that the policy has been a gentler approach where staff works on the goal of compliance to try to bring people through without a whole lot of trouble. He wasn't sure Councilor Burdick meant for the Town not to approach it that way but to figure out a way to be more efficient. He stated that the bottom line was that there needed to be a discussion with Council on philosophy and how they would like staff to approach and then staff could determine exactly how to do it. He noted that there was a benefit from the commercial standpoint of the fire inspections in that with the Fire Department handling those, they will be done on a more consistent basis.

Councilor Burdick asked if there was any information with regard to the fire inspections as to whether there have been changes made to a business or if the changes were discovered when an inspection was done. Fire Chief Donna Black was recognized to speak. Fire Chief Black stated that they have a coordinated system with Permit Coordinator Sandy Cross where she prepares all of the inspections for the Fire Department, so they have all the information from the previous inspection to compare things. She added that this was how the occupancy discrepancy was found with Treehouse Coffee. Councilor Burdick stated that it seemed that was what has become the discovery process.

Councilor Caviness asked if that was typically how things get discovered – the Health Department or Building Inspector comes in to do an inspection and finds the issues. Town Manager Layton stated she was correct. He stated that there were things that staff could notice and there were plenty of establishments that will make changes that would require permits and there would then be follow-up on it.

Mayor Kingston asked if conditional use permits were pulled before the inspections were done. He thought it could get to the bottom of a lot of the issues. Town Manager Layton explained that if a conditional use permit was associated with it, there were business inspections. He stated that the conditional use permit could be pulled based on the circumstance, but the file would be pulled. Mayor Kingston stated that it would tell what type of businesses give the Town issues. Town Manager Layton agreed. He added that if it was a stand-alone restaurant or retail business, that property file would be pulled.

Town Manager Layton stated that the third item was the parking demand. He thought it was a topic that, before it got to the Planning Board, needed some kind of consensus among Council about what they wanted the Planning Board to look at. He thought it was a good Retreat or work session item and staff could see how elaborate or expensive a parking study would be if that would help in making a decision. He guessed that the answer would be if Council wanted parking for the demand. He stated that if Council wanted to spend a few thousand dollars on a study, staff could make it happen if it would help Council make a decision. He thought it was something that was better suited for Council to develop a consensus before it went to the Planning Board. He stated that the question became what information would be needed to have that discussion. He added that if Council thought a study was necessary to do it, staff could start exploring what it would take, what would go into the study, and bring a recommendation back on how to proceed.

Councilor Burdick thought if it was decided to use an outside consultant, that input would be received not just on what the situation was, but also given the situation, what the alternatives would be that could be considered to control or alleviate the issue. Town Manager Layton stated that if Council wanted to go forward with it, he could get recommendations on it or break it into pieces. He thought staff could talk to some consultants to find out what a typical scope of work may look like and then bring it back to Council.

Mayor Pro Tempore Thibodeau noted that some of the consultants that the Town uses knew that Duck was a seasonal area and a study that was completed in December would be different than one completed in July. Town Manager Layton agreed, adding that it may take a lot of time to do the studies, but there was data available from other sources that may help answer some of the questions.

Town Manager Layton stated that he would get an idea on what a scope of work would look like and bring it back to Council to see if they wished to pursue it.

Mayor Kingston asked if staff would be pursuing enforcement and community development along the lines of developing ideas and thoughts. Town Manager Layton stated that his intent was not to bring that to Council's next meeting, but they could be possible Retreat items. He added that staff could do an internal discussion on it and have something prepared for discussion for the Retreat. Mayor Kingston thought it was a good idea.

Councilor Caviness asked if the legislation Town Manager Layton referred to was something that was being discussed at the General Assembly level or if it was a done deal. Town Manager Layton stated that it had already passed. Director Heard stated that it passed in the fall of 2017 and depending on the circumstances, it was either a five year or seven-year window that the Town has for enforcement.

Town Attorney Hobbs explained that North Carolina case law basically put no limit on the ability of a town when there was no waiver or stop order argument that the owner could allege that, no matter how long the violation was in place, it can have towns and counties take enforcement action. He stated that this was presumably in response to that and thought it was the trend in the General Assembly with this as well as the limits placed on towns and counties to limit as far as the number of bedrooms, where there was more limitation on what government actually could do on private properties.

OLD BUSINESS/ITEMS DEFERRED FROM PREVIOUS MEETINGS

Discussion/Consideration of Authorizing a Public Hearing on Ordinance 18-06, Establishing Standards for the Scale of Residential Development

Director Heard stated that during the Town's annual Retreat on February 21, 2018, Council and the Planning Board had discussed the pros and cons of a variety of options to address the Town's interest in maintaining the village character by adopting reasonable limitations on the scale of residential development in Town. He added that Council requested that the Planning Board continue its work with Community Development staff and the Town Attorney on developing standards that better address the issue.

Director Heard stated that after considering some options, the Planning Board prepared a draft ordinance that combined the concepts found in the ordinance adopted by the Town of Nags Head and the use of traditional development standards to establish reasonable limits on the scale of development in Duck. He noted that the proposed ordinance would establish a maximum size for residences based on the size of a property. He added that the proposal would allow larger residences to be established if certain development criteria were met, including a minimum lot size, increased building setbacks, landscaping, maximum wastewater capacity, and an overall maximum size of 7,000 square feet.

Mayor Pro Tempore Thibodeau stated that she would be sure to make the public aware of the public hearing so that everyone could be informed. She asked if after some kind of devastation, people would have to adhere to the new rules with regard to nonconformities or they would be grandfathered. Director Heard stated that in the case of total devastation, there was a different provision than having to come into full compliance. He stated that the Code of Ordinance read as follows: "Notwithstanding any other regulation with respect to non-conforming structures or lots, any principal structure used for single-family residential purposes that is subject to documented casualty loss..." He stated that when that was the case, the homeowner was allowed to repair or replace in kind with a similar structure as long as the enlargement or replacement did not create new non-conformities or increase the extent of any existing non-conformities with respect to the number of bedrooms, setbacks and parking. He stated that it would require the homeowner to update any parking requirements in that they would need to bring it up to code in case they were non-conforming.

Councilor Britt clarified that it would be to the best of the homeowner's ability. Director Heard stated he was correct.

Mayor Pro Tempore Thibodeau clarified that the allowances for people that wish to go beyond the maximum in a lot may have some leeway. Director Heard stated that Page 2 of the draft ordinance was a chart that listed lot sizes and the maximum size house. He added that the one of the criteria states that it was only applicable to lots that were conforming and were 15,000 square feet. He noted that the small non-conforming lots would not be able to take advantage of this. Mayor Pro Tempore Thibodeau clarified that lots that were 15,000 square feet or above, up to 7,000 square foot homes would have some latitude with regard to the design elements. Director Heard stated she was correct.

Councilor Britt stated that there was a lot of discussion at the Planning Board meeting on the issue and he thought they were mostly in agreement with what was going on, but the issue was the discussion regarding conditional use permits for structures over 7,000 square feet.

Councilor Britt moved to authorize a public hearing for the September 5, 2018 Council meeting as presented.

Councilor Burdick asked Town Attorney Hobbs if he was satisfied that the ordinance would be enforceable. Town Attorney Hobbs stated that he had some reservations about the wastewater provisions, but overall staff and the Planning Board did a good job and he supported the ordinance.

Mayor Pro Tempore Thibodeau stated that based on the way that the Planning Board came up with the tiered approach, it would dissuade people from combining lots. She added that she didn't think Duck had a problem with house size since it was almost built out. She wasn't sure where the problem was but thought it would be discussed at the September 5, 2018 meeting.

Motion carried 5-0.

NEW BUSINESS

Update on Annual Hazard Mitigation Plan Implementation

Permit Coordinator Sandy Cross was recognized to speak. Permit Coordinator Cross gave a short presentation on the hazard mitigation plan implementation, noting that in order for the Town to be a part of the National Flood Insurance Program Community Rating System, it must develop the plan and regularly update the status of the plan's strategies to address flood issues. She noted that Duck was part of the Albemarle Regional Hazard Mitigation Plan along with Dare County, the Towns of Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head and Manteo.

Mayor Pro Tempore Thibodeau asked if the information presented would be put out for people to see. Town Manager Layton stated that staff would put it on the website and track revisions and changes internally in a way that provides the most clarity.

Councilor Caviness asked if the storm water improvements were part of the plan. Town Manager Layton stated that they were not as it was a different item.

Councilor Burdick moved to approve the 2018 Duck – Albemarle Regional Hazard Mitigation Plan update as presented.

Motion carried 5-0.

Overview of Proposed FY 2019 Duck Trail Improvements

Town Manager Layton stated that as part of the FY 2019 Budget, funding in the amount of \$80,000 was set aside to continue with the repaving and improvements of the Duck Trail. He stated that Town staff and the engineers have identified three areas for the improvements, which were Station Bay Drive to the Sanderling Inn, Waxwing Lane area, and south of Four Seasons Drive. He explained that the engineers have proposed that the Town consider the use of concrete over asphalt going forward for the Duck Trail for the following reasons:

1. Less cost – this is true for long linear projects with a pavement width of less than 10 feet. Projects with an asphalt paving width of less than 10 feet requires a specialty paver that pushes the cost of asphalt over the cost of concrete.
2. Impervious to the intrusion of grass – concrete is inert and does not promote the growth of fine vegetation.
3. Better resistance to root upheaval – roots tend to have much more difficulty penetrating the concrete and are forced to lift entire concrete slab sections over causing individual root ripples.
4. Longer life expectancy – can last up to and over 50 years where asphalt will have a 12-20-year life expectancy prior to needing an overlay.
5. Easier to repair – repairs can be made by small local contractors, no need to hire a paving company who will have to find specialty pavers to fix the damaged area.
6. White color is easier to see at dusk and at night.
7. White color reflects sun, cooler to bare feet, and has a lower albedo.
8. Better control over shaping of the final surface and slopes – due to the fact that concrete must be formed, there is a better opportunity to check forms and assure positive drainage prior to pouring the concrete. This extra check and balance is not generally available for asphalt paving.
9. Using concrete opens the bidding up to more contractors. Asphalt projects are limited to the two local asphalt paving contractors. More competition makes for a lower project cost.

Town Manager Layton stated that Council was being asked to approve the locations of the trail improvements and the use of concrete. He noted that if it was approved, the

intent of staff would be to use the unit prices from the Phase II Comprehensive Pedestrian Plan Improvements and add the work to that contract.

Councilor Burdick asked how many years it would take to go from asphalt to concrete. Town Manager Layton stated that he could not speculate that at this time, but it would take several years.

Councilor Caviness asked if there was any difference regarding storm water management water displacement of concrete versus asphalt. Permit Coordinator Cross stated that concrete was recommended because it was easier to mold into the grade needed, where asphalt did not have the flexibility that would be needed. Councilor Caviness asked if there would be curves. Permit Coordinator Cross stated that there would not be.

Mayor Pro Tempore Thibodeau stated that it seemed strange that the Town did not start with asphalt. She asked if the price of concrete went down. She remembered a concrete shortage at one time. She asked if it was a supply and demand thing. Permit Coordinator Cross thought it had more to do with the number of contractors that were available.

Councilor Caviness clarified that when it was installed, the disruption would not be on the scale of what they were doing in Town. She further clarified that they would dig up the asphalt and put boards down. Town Manager Layton stated that there would be some disruption, but the timeline would be similar to what it was to install asphalt. Permit Coordinator Cross noted that the difference was due to the weather as well.

Councilor Burdick asked if the Town had enough savings that it could do some additional concrete work. Town Manager Layton stated that it was always possible and guessed that because of the storm water improvements associated with this, the Town was looking at not having enough money to do all three projects; but may be close enough to come back to adding to it. He added that with the funding available, he wanted to stretch it as far as he could. Councilor Burdick thought the Town would want to piggyback this on the pedestrian plan and that would be the large factor in the equation. Town Manager Layton agreed.

Mayor Kingston moved to approve the proposal as presented and switch from asphalt to concrete on the locations listed in Phase 2 of the Pedestrian Plan.

Motion carried 5-0.

ITEMS REFERRED TO AND PRESENTATIONS FROM THE TOWN ATTORNEY

Town Attorney Hobbs stated that he was working with staff related to Phase II of the pedestrian project.

ITEMS REFERRED TO AND PRESENTATIONS FROM THE TOWN MANAGER

Update on Departmental Activities

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

Director of Public Information, Marketing and Special Events Christian Legner was recognized to speak. Director Legner gave a brief overview of the past month's 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.

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

Update on the Public Safety Building

Town Manager Layton stated that there would be a conference call coming up with the real estate and environmental divisions of the Army Corps of Engineers on Monday, August 6, 2018. He stated that it should tell staff what the next steps would be as far as what it will take to obtain approval and whether an environmental assessment will need to be completed. He stated that he would report back to Council at their September 5, 2018 meeting with more details.

Update on the Purchase of Property at 101 and 103 Scarborough Lane and 1165 Duck Road

Town Manager Layton stated that staff opted to have the discussions done between the attorneys and the report staff received from Starkey Sharp – the attorney for the Herron's – was that he has not received a response from two signatories. He stated that the purchase was at a standstill at this point.

Financial Statements for June of FY 2018, July FY2019

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

MAYOR'S AGENDA

Mayor Kingston stated that he was supposed to host the mayors lunch this month, but it was rained out. He stated that he would be hosting it the third week of August. He added that it was a busy time for the League of Municipalities and he would be attending their annual meeting in Hickory, North Carolina from September 19-21, 2018. He stated that the rest of Council as well as Town staff were welcome to attend the meeting if they wished. He stated that he would be attending another board meeting in October in Wilmington for the existing and new members to the board. He stated that the League of

Municipalities was running a series of grassroots roundtables by district and the district he represents would meet potentially on October 4, 2018 during the day in either Duck, the Town of Nags Head or the Town of Manteo. He thought it would be a good opportunity for other Council members and staff to attend. He thanked Town staff, the Police and Fire Department for all that they did during the recent rain events. He thanked the Wall Décor Committee for the new art exhibit as well as the art reception that was held before the Council meeting.

COUNCIL MEMBERS' AGENDA

Mayor Pro Tempore Thibodeau thanked staff for everything they do to keep Council on top of things. She stated that, with regard to the public comments received at the beginning of the meeting about water disposal on adjoining properties, she would like to ask more questions about it in order to get an understanding as to what the Town was allowed to tell people. She knew the Town was very limited and restricted in terms of what could be done with private properties and getting involved in private property disputes, but it seemed awful that one property owner would pump water onto an adjacent owner's property. She stated that it has been a real challenge for people. She stated that she was still interested in having a public discussion regarding the purchase of the property that Council was waiting to get word on from the attorneys. She thought that she would like to have it put on a future agenda in order to have a brief discussion in front of the public as to what Council's thoughts were. She noted that all of the bad weather has caused issues for all of the towns on the Outer Banks.

Mayor Kingston asked if someone could follow up with Fred Vallade of the Gulls Flight subdivision regarding his request for ordinances, rules and regulations. Director Heard stated that he would follow up with Mr. Vallade.

Councilor Britt echoed Mayor Pro Tempore Thibodeau's comments regarding the storm water issues. He thanked Town staff for all of their efforts.

Councilor Caviness thanked Director Legner and Public Relations Assistant Betsy Trimble for all of their help with keeping everyone updated with regard to the weather and associated events.

Councilor Burdick stated that he appreciated Council and Town Manager Layton coming forward to look at what the Town was doing about unpermitted changes as well as the parking situation as they were good items for discussion. He stated that he was concerned about the water pumping issue and wasn't aware that it was going on. He thought that the Town had some ordinance in place that would assist in doing something about it.

Town Manager Layton stated that staff had discussions with a variety of property owners regarding the pumping issue. He stated that the Police Department was out on several occasions responding to calls and where they did see the pumping being directed towards properties and a pipe was installed, they shut the pump off. He stated that, to his

knowledge, at that point, there was no direct pumping onto the properties. He stated that he and Director Heard went out on several occasions and there was no direct pumping going onto any property in Gulls Flight. He noted that there was pumping happening on a property in Ocean Pines, which was an issue. He stated that staff does not condone and would not allow – ordinance or not – someone to directly discharge water onto someone else's property. He thought what was happening was that it was not surface transferred water, but underground water. He stated that it did not appear to meet any regulation to prevent someone from pumping on their own property, and if it was determined it was going on another's property, then it becomes a civil matter. He stated that staff did not know if the exact conditions described at Ocean Pines were there, but there could be an influence. He added that the question was if someone was pumping onto another property, where does the jurisdiction fall. He noted that staff asked the Division of Water Quality about it and was told that if it was not surface transportation of water, there wasn't much that could be done. He stated that staff asked the attorneys to see if they saw anything and without there being direct discharge, there wasn't much that could be done.

Town Manager Layton stated that staff did not have an opportunity to research whether Council could prohibit the property owners from pumping on their own property; but wasn't sure it was something that Council would want to do. He added that if this was a forbearer of the fact that the Town would have rain events that cause this type of disruption on a more frequent basis, then it would be something that Council and staff would have to figure out a way to deal with it. He stated that he would be coming back to Council with some suggestions that would require a lot of discussion going forward. He stated that staff was starting to get information together knowing that the discussion was needed to determine what needed to be done. He noted that if the final result was a policy of what the Town could do and the options available, it will take a while to get all of the information together before presenting it to Council.

Town Manager Layton stated that Director Heard has had many conversations with the Ocean Pines property owners and the issue was basically where the water could be pumped. He added that Ocean Pines was lucky because they have a lot of property, so they can pump the water somewhere and had the same option as any other subdivision, whether a public or private road, to obtain an emergency pumping permit. He stated that there was nothing preventing them from coming to the Town to seek a permit to pump.

Town Manager Layton stated that staff will need to see evidence of pumping and will likely go out again to look and possibly get a tour to see what the complaints were about. He stated that staff has been out multiple times and did not see any direct pumping. Director Heard stated that Ocean Pines had ceased pumping as of this morning.

Mayor Pro Tempore Thibodeau asked if they were trying to mitigate the water on the road. Director Heard stated she was correct.

OTHER BUSINESS

Additional Public Comments

Mayor Kingston opened the floor for public comments.

Ben Vorndran of 104 Sea Hawk Drive West was recognized to speak. Mr. Vorndran cautioned Council against using permeable concrete for the Duck Trail repaving as it was dangerous and noisy. He suggested that regular concrete be used instead.

Allan Beres of 146 Dune Road was recognized to speak. Mr. Beres asked Councilor Burdick to speak into his microphone as it was hard to hear him at the meetings when he didn't speak into it.

John Wander of 119 Sandcastle Court was recognized to speak. Mr. Wander stated that he had a problem with the Town's purchase of the property. He stated that he was receiving a lot of questions as to why it was purchased and how it was paid for. He noted that the timing was also an issue due to the recent tax increase. He stated that Council has had a good reputation and the public was very supportive of them, but the purchase of this property was an issue.

John Klamut of 123 Duck Landing Lane was recognized to speak. Mr. Klamut stated that the ordinance for residential homes was well thought out. He asked if safety aspects related to the large homes has been looked at. He thought it was an opportunity to see if the existing codes matched the special kind of homes in Duck. He suggested that it be looked at.

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


Mayor Kingston noted that the next meeting will be the regular meeting on Wednesday, September 5, 2018 at 7:00 p.m. Councilor Burdick noted that he would not be at the September 5, 2018 meeting as he would be in Scotland.


ADJOURNMENT

Councilor Burdick moved to adjourn the meeting.

Motion carried 5-0.

The time was 10:08 p.m.


Lori A. Ackerman, Town Clerk

Approved: October 3, 2018

Don Kingston, Mayor

