

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
January 11, 2017**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, January 11, 2017.

Present were: Chair Joe Blakaitis, Vice Chair Marc Murray, Ron Forlano, Tim McKeithan and James Cofield.

Absent: None.

Also present were: Director of Community Development Joe Heard, Council Liaison Chuck Burdick, Attorney Ben Gallop and Permit Coordinator Sandy Cross.

Others Present: Mark Martin, Jon Britt, Bryan Weisbecker, Michael O'Steen, George Wood, and Sandy Whitman.

Others Absent: None.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for January 11, 2017 at 6:35 p.m.

PUBLIC COMMENTS

None.

OLD BUSINESS

None.

NEW BUSINESS

Special Exception 16-003: Application for a Special Exception Permit to Allow Fill Material in Excess of 36 inches on the Single-Family Residential Property at 1166 Duck Road

Director Heard stated that the applicant is seeking a special exception permit to stabilize the shoreline of the property at 1166 Duck Road through the addition of a significant amount of fill material supported by a soundfront bulkhead. He added that the proposed project would require approval of the following special exception permit for fill in excess of three feet. The proposed project would add fill material eight feet in depth over an area approximately 20 feet into the Currituck Sound along the entire nearly 100-foot width of the western property line. The existing, higher retaining wall would remain behind the new fill and bulkhead.

Director Heard stated that the property is approximately 98 feet in width and 120 feet in depth to the current bulkhead. He stated that the property contains a six-bedroom, 4,324 square foot single-family residence that was constructed in 2002. He added that the deck surrounding a swimming pool is located within several feet of the edge of the existing bulkhead to the north of the residence. He stated that the rear edge of the property is presently bounded by a tall bulkhead, which ranged from 10-12 feet in height from the ground to the base of the top of the bulkhead. He noted that the existing bulkhead ties into similar bulkheads on adjoining properties. He stated that the adjoining property at 1164 Duck Road is presently undeveloped and zoned RS-1 and the other adjoining property at 1168 Duck Road is developed with a six-bedroom single-family residence and swimming pool.

Director Heard stated that Michael O'Steen was present. He added that Mr. O'Steen was a structural engineer and had submitted a letter, which was in the Board's packets that outlined the existing structural problems relating to the settlement of soil at 1166 Duck Road. He stated that Mr. O'Steen specifically noted structural issues for the swimming pool, pool deck and concrete walkway. He stated that the Board has an additional letter in their packet from Bryan Weisbecker, who is the general contractor, that listed a variety of minor structural issues with the existing residence leaning slightly to the west.

Director Heard stated that Michael O'Steen engineered a solution involving the addition of a significant amount of fill material at a slightly lower height to help support the existing retaining wall and construction of a new bulkhead eight feet in height to enclose and stabilize the new fill. He added that the retaining wall section had tie-backs for the new bulkhead anchored 10-15 feet in from the wall. He noted that Mr. O'Steen designed an additional buffer of five feet to the existing retaining wall so that construction did not extend too close to the wall, hence the total distance of 20 feet.

Director Heard stated that Subsection 156.128(A)(4)(d) of the Town Code notes that a special exception is necessary to fill in excess of three feet. He noted that the subsection does not outline any specific criteria for review and approval of such requests, but references several items that can be considered as part of the Planning Board's review. He went on to review the criteria with the Board and audience:

1. The applicant is required to submit a stormwater management plan for consideration by the Planning Board and Town Council.
2. The requirements reference compliance with the general procedures for special exceptions found in Section 156.145. While not containing a formal list of criteria, Section 156.145 notes several items that can be addressed:
 - a. Section 156.145(C) – the proposal's consistency with the Town's adopted CAMA Land Use Plan
 - b. Section 156.145(E) – that the proposed special exception will not adversely affect the public interest
 - c. Section 156.145(F) – In granting any conditional use or special exception permit, the Town Council may prescribe appropriate conditions and safeguards to the location, nature and extent of the proposed use and its relation to surrounding property, for purposes of (1) ensuring that the

conditions of permit approval will be complied with, and (2) minimizing any potentially injurious effect of the proposed use on adjoining properties, the character of the neighborhood, or the health, safety and general welfare of the community.

Director Heard noted that other than a general statement requiring compliance with State and Federal permits, staff was not proposing any specific conditions, but the Board may recommend necessary conditions to mitigate issues that arise during the review process.

Director Heard stated that staff's recommendation was based upon the following information:

1. The proposed fill and bulkhead are intended to protect the improvements on the subject property from further settlement due to structural issues with the existing bulkhead and erosion of the shoreline.
2. The design and scope of the project seem reasonable and necessary to allow stabilization of the western edge of the subject property.
3. The proposed project is consistent with State and Federal standards for coastal development as a permit has been issued by the NC Division of Coastal Management and related approvals have been granted by the NC Division of Water Resources and US Army Corps of Engineers

Director Heard stated that for the reasons listed above, staff is recommending approval of the special exception application subject to the following condition: "The applicant must obtain and comply fully with permits and approvals from applicable State and Federal agencies."

Director Heard noted that in addition to the special exception being considered by the Planning Board and Town Council, the applicant must also obtain approval of a variance from the Board of Adjustment. He added that the development standards for the Ocean and Sound Overlay District state that filling of wetlands is a prohibited activity and therefore, the applicant must also obtain a variance in order to permit any filling of wetlands along the western edge of the property adjoining the sound. He stated that both the special exception and the variance must be approved to allow the property owners to proceed with the project.

Member McKeithan asked about the timing for the Board of Adjustment hearing. Director Heard stated that the Board of Adjustment will hold a hearing on the variance request on Thursday, February 2, 2017. Vice Chair Murray asked if the Board of Adjustment had specific criteria for the variance. Director Heard stated that they do have specific variance criteria.

Member Cofield noted that in the absence of some specific criteria, Director Heard looked at some general special exception criteria. He added that there was no discussion of hardship and one of the criteria for some special exceptions is hardship. He asked why it wasn't included in this special exception. Director Heard stated that there isn't a specific requirement for hardship in the ordinance. Member Cofield stated that Director Heard's comment earlier was that he applied some general conditions or criteria for special exceptions. He asked why hardship was not one of them. Director Heard explained that for certain types of special exceptions, such as

building setbacks and building height, the Town has a specific list of criteria that state what staff and the Board need to review. He added that in the ordinance there is also a section that deals with all special exceptions generally, mainly outlining the process that has to be used. He stated that in that section, it lists very general criteria and that is where he used for this special exception request. He added that the other special exception criteria are very specific to a certain type of special exception and in this case, this application is not one of those types. Member Cofield pointed out that there was nothing that would have prohibited the Board from looking at hardship as a criterion. Director Heard stated that hardship is not a specific criterion. He added that a special exception has lesser standards for approval than a variance.

Member Cofield noted that on Page 5, Section 156.145(C) stated that the Planning Board must evaluate the proposal's consistency with the Town's CAMA Land Use Plan. He pointed out that the next paragraph stated that the Town's Land Use Plan does not address this specific type of request. He stated that it seemed to him that it is in conflict with the previous statement that stated that the Board must evaluate it. Director Heard stated that the Board is required to evaluate consistency with the Land Use Plan according to the standards in the ordinance. He added that many of the statements found in the Land Use Plan are general and not intended to be specific to a particular proposal.

Member Cofield stated that he had a concern in that Section 156.145(C) stated that the Planning Board must evaluate the proposal's consistency with the CAMA Land Use Plan, but the next sentence states that the Land Use Plan did not address this type of request. He asked how the Board is to evaluate it with its consistency if it doesn't exist. Chair Blakaitis stated that the Board can evaluate it but there is nothing specific in the CAMA Land Use Plan to cause the Board to single anything out. He explained that the Land Use Plan is for things such as maintaining the Village atmosphere, which the Board looks at with special exception requests. He added that in this case no one thought of filling in the sound in the Land Use Plan when it was developed.

Environmental consultant George Wood was recognized to speak. Mr. Wood stated that he is present to represent the homeowners. He stated that the homeowners purchased the house in April 2015 and subsequent to the purchase, a review of the property suggested that there are some structural issues, including deterioration of the bulkhead. He stated that a lot of different alternatives were looked at. He and the homeowners were concerned that the amount of bulkhead had to be such that 10 foot pilings would have to be installed. He stated that the bulkhead was built in 2002 and is a very tall bulkhead for the property. He noted that oftentimes, these type of bulkheads have difficulty maintaining their structural integrity. He stated that his application addresses why they propose to put in a bulkhead in front of the property, which was also answered during the CAMA Major permit process. He added that the application was reviewed by the State for consistency. He stated that the issue they are discussing at this meeting is about the amount of fill. He stated that they are structurally trying to make the property sound so that they can make the repairs without a catastrophic failure.

Chair Blakaitis asked Mr. Wood how he planned to straighten the house. Mr. Wood stated that it would be done through a general contractor.

The applicant's engineer, Michael O'Steen, was recognized to speak. Mr. O'Steen stated that the biggest step to straighten the house would be stabilizing the soil around the house. He stated that once that is complete, the house would be jacked up and pulled back into alignment. Chair Blakaitis asked how deep the pilings are for the house. Mr. O'Steen stated that he does not know. Chair Blakaitis stated that he is wondering if what Mr. O'Steen is proposing to straighten the house will be enough to solve the problem. Mr. O'Steen explained that without the soil and wall being stabilized, it would be a null effort to make any improvements to the home.

Member Cofield asked if the pilings were driven deeper next to the existing pilings for the bulkhead and went far enough, would it stabilize the bulkhead and house. Mr. O'Steen stated that it becomes a question of means and methods to have the access to go in there. He explained that the pilings should be driven in the marsh and dry pilings would cause abrasions and cause visual impacts on the existing pilings. Member Cofield asked Mr. O'Steen if he looked at that alternative. Mr. O'Steen stated that it was discussed and his opinion is that the proposed project would be the best management practice in creating a new wall far enough away to separate it from the existing wall. Member Cofield pointed out that there is another house about three houses from this one that has established a large pile of rip rap to solve the same problem, but it did not go out as far into the sound as what is being proposed for this house. He asked if that was looked at. Mr. O'Steen stated that rip rap is more of an issue dealing with wave energy and wave impacts on the vertical wall and is typically not intended to support the bulkhead.

Member Cofield asked Mr. O'Steen if he did or did not think rip rap will solve the problem, assuming that its first objective is wave protection. Mr. O'Steen stated that in his opinion, the shoreline is not known as being a high energy shoreline. He added that these properties are in an AE flood zone, which is a non-velocity flood zone. He stated that that is one reason he did not propose rip rap along the bulkhead. Member Cofield asked if rip rap support will solve the problem of soil settlement. Mr. O'Steen stated that it could potentially help. George Wood added that rip rap absorbs energy but does not necessarily provide resistance against the surcharge of all the soil on top of it. He added that rip rap does not retain properties as much as it protects them.

Vice Chair Murray stated that the State reviews for consistency with the Duck Land Use Plan. He asked if that is correct. Mr. Wood explained that a town develops a land use plan and then it is adopted by the community and the Coastal Resources Commission. He added that the main agency which looks at a land use plan is the N.C. Division of Coastal Management, which in this case interprets the projects consistency with the plan. Vice Chair Murray asked what percentage of the pool and other improvements versus settlement issues of the house are being dealt with. Mr. O'Steen stated that there are settlement issues with both the pool and the house. Chair Blakaitis asked if a particular issue prompted the study. Mr. O'Steen stated that the pool and house were simultaneous issues.

Member McKeithan clarified that the swimming pool was installed in 2010. He wondered if that created part of the problem, as well as the fact as to how close the pool is to the edge of the bulkhead. Mr. Wood stated that it is difficult to say. He added that the problem is old wood and the bulkhead is starting to fail in general. Member McKeithan pointed out that the bulkhead adjoins bulkheads for four to five other properties. He asked if the Town should expect that those houses are going to need to do a similar project in the future. Mr. Wood stated that the

property to the south is unimproved and deadmen could be installed through the existing bulkhead without the potential for damage or catastrophic failure of a structure. He added that he has not looked at the house to the north so he cannot speak to that one, but imagines it would have a similar situation.

Vice Chair Murray stated that he looked at the conditions for the CAMA permit and realized that there needs to be established a mitigating circumstance. He stated that this is the establishment of a new CAMA line and therefore a new buffer. He added that improvements will be allowed through CAMA's regulations up to the 30-foot buffer and then in the next 14 years, the Board could find itself in the same situation where the property continues to encroach westward. He thought this scenario was prohibitively expensive. He asked if there is any way that it would be preventable. Mr. Wood stated that he could never promote another extension of the bulkhead in front of this house. He added that the circumstances now are such that it is a necessity. He stated that it is unlikely that there will be accretion in front of the bulkhead. Mr. O'Steen pointed out that the tiebacks associated with the new wall will pretty much prevent any new improvements in the area.

Vice Chair Murray felt that the Board is responsible for looking at the issue and clearly no one thought this issue was going to be a possibility or it would have been in the ordinance. He stated that, if the Board does not have guidelines for approval of what is currently proposed, the Board should look into what can be done to not find itself in the same situation on the same lot. He added that, technically a precedent is not set through special exceptions, but these are not the only soundfront property owners with structural issues. Mr. Wood agreed. Vice Chair Murray asked if there is the possibility for a hardened structure that will not require fill. Mr. O'Steen stated it is possible, but looking at cost and best management practices, this proposal is the best solution.

Member Forlano stated that he lived on the sound for 30 years and is sensitive to the issue. He added that he lost 75 feet of property to the non-high energy wave action and took issue with the sound being described as not being high energy. He added that he replaced his bulkhead twice and when he moved a year ago, the bulkhead was leaning and needed to be replaced a third time. He asked Mr. O'Steen if he is sure that by going out 20 feet and creating a peninsula-type effect, that it will not cause any undue problems to the neighboring properties. Mr. O'Steen stated that based on the fetch to the north and northwest and based on the current mapping of the properties, the probability of that is relatively low.

Member Cofield stated that he is concerned on a few levels. He stated that he understands with respect to best management practices that driving pilings deep along the existing bulkhead may create problems for the structures that are there. He stated that it is a possible solution, but understands how it can cause problems for the adjacent properties. He added that he is not satisfied and still has a concern that the rip rap could be a solution to this property. He stated that he does not buy into the wave action response and while he isn't an engineer, he understands that it could stabilize the situation of the bulkhead improvement.

Member McKeithan stated that he is surprised that the State and Federal agencies approved the project. He added that they are not saying it is the best engineering solution, but granting

approval and wondered if there is a better solution than going 20 feet out into the wetlands. He stated that he is concerned from an environmental standpoint that this is the best solution.

Vice Chair Murray stated that he doesn't necessarily have an issue with the project as mitigating wetlands through the Corps of Engineers is an accepted practice. He added that a licensed, professional engineer is the most authoritative voice the Board will receive from a structural perspective. He stated that since the ordinance does not provide specific criteria, he thought that all the Board can do is mitigate future impacts.

Chair Blakaitis thought Vice Chair Murray offered a good assessment. He asked if there is a particular area that it doesn't meet. Vice Chair Murray stated that there are no areas and the list of criteria is not very precise and only referenced the Land Use Plan.

Member Forlano thought it is a common sense solution to a problem that is not the fault of the owners. He thought there is no other solution and felt it is a logical solution that has been engineered and approved by CAMA. He stated that he is in favor of allowing the applicant to proceed with the proposal.

Chair Blakaitis asked if the fill going in will increase the lot coverage allowance. Director Heard stated that it would. Chair Blakaitis asked if there is any guarantee that the owner will not take advantage of that fact. He asked if there is a condition that the Board can place upon the special exception that the new area, if approved, shall not be used for any construction. Vice Chair Murray thought that granting the special exception for the fill, for the purposes expressed in the proposal – to stabilize the bulkhead – is a reasonable thing and can be approved by the Board. He asked how the approval of this repair will not be abused for use elsewhere. Director Heard didn't see a reason why a condition to the effect of no building on the new fill could not be put in place if that is a concern for the Board.

Chair Blakaitis pointed out that the Board would be taking lot coverage away from the lot that the homeowner created due to the Board's approval of the special exception. He asked if there would be a legal issue if the Board tried to limit it going forward. Attorney Ben Gallop was recognized to speak. Attorney Gallop stated that he would have to look at the ordinance to determine if lot area is measured to the mean high water line. He added that the way he is reading the survey, the homeowner is not filling much past the mean high water line. He didn't think the owner would be changing the lot area considerably.

Chair Blakaitis clarified that the land behind the bulkhead up to the waterline was already included in the lot coverage calculations. Attorney Gallop expected that it is. Permit Coordinator Sandy Cross was recognized to speak. Permit Coordinator Cross thought it will create more lot coverage. Attorney Gallop stated that homeowners only own up to the mean high water line and N.C. Statutes state that the mean high water line has to be used for calculating area for the mean high water line's property value.

Attorney Gallop stated that the other issue is that the owners are proposing to fill beyond their property, into State public trust waters, and will need to obtain an easement. Mr. Wood noted that that used to be the case, but not any longer. He added that the owners are not looking to increase their lot size, they are simply looking to fix their house. He added that they would not

be opposed to any of the conditions discussed for the special exception as their primary objective is to get the house repaired so they can move in.

Chair Blakaitis stated that he would like to see the new fill, which will be higher, somehow restricted from any construction in the future. Director Heard thought there is justification that there shouldn't be anything in that area because that is the location of the tiebacks for the bulkhead.

Chair Blakaitis stated that he has some issues with the special exception. He stated that he doesn't think it is a good thing for the future of Duck, but can't pinpoint any particular area where there will be problems except other people wanting to do the same thing. He added that he had concerns over the lot coverage, which was discussed. He stated that he isn't totally convinced that this will solve the owner's problem but will defer to the engineer. He wondered how the soil will be compacted enough to make it work with all of the moisture under it. He hopes it will work. He reiterated that he is mostly concerned with the future of Duck and thought a precedent is being set with this special exception. He doesn't think this will be the last request for one of these. He stated that he is not happy with it and surprised that CAMA permitted the project.

Vice Chair Murray asked if anything is going to be done for the adjoining property owners with regard to the tie-in to the existing bulkhead. General contractor Bryan Weisbecker was recognized to speak. Mr. Weisbecker stated that the PVC bulkhead would interlock with the existing bulkheads. He added that it should last considerably longer.

Member Forlano stated that he had alluded to his property where he lost some land through erosion. He added that, many years ago, he tried to reclaim a portion of it to do what this homeowner is proposing. He noted that CAMA did not allow it at that time. He added that this is a different situation as the homeowner is trying to reclaim some wetlands to save a property from deteriorating. He thought the conditions are different this time.

Vice Chair Murray asked how the condition would read that the Board does not want any development in the fill area. Director Heard stated that two different concepts were discussed – one was a concept regarding no overall net increase in lot coverage over what currently exists. Chair Blakaitis stated that no construction in the fill area was a better condition. Director Heard stated that the second concept was no construction within the area to be filled. Vice Chair Murray noted that CAMA will not allow any construction within the area to be filled as it currently exists. He added that his concern is moving forward in the event of accretion. He stated that if the Board felt that will not happen, then putting a condition on it seems unnecessary.

Member Cofield stated that he will not vote for the Special Exception without conditions. He added that the conditions will not solve his concerns.

Vice Chair Murray asked if the survey in front of the Board is the survey of record. He pointed out that the CAMA setback is CAMA's responsibility and not the Town's. He added that the lot coverage standards are the Town's. He asked what will happen when the bulkhead needs to be repaired or if the tiebacks need to be worked on. Director Heard stated that the lot coverage

concept is the most straightforward. He explained that it allows the owner flexibility to do little things on the site that may need to be done in the future, but keeps the overall property in line with the existing conditions. Chair Blakaitis asked if the vegetation easement in the front of the property takes away from the lot coverage. Director Heard stated that it does not.

Attorney Gallop suggested a condition that no new increase in net lot area be used in the calculation of lot coverage. He stated that even if the project increases the lot size by 10%, the owner would not be able to build anything additional. He stated that they will end up with an increase in area that would not be applied to lot coverage. He added that if that is the condition, the Board may be able to avoid a problem where the owner may come back in the future and say that it is supposed to be measured further out and the coverage hasn't increased.

Vice Chair Murray stated that his issue is the increase in square footage of the lot not appreciatively increasing the owner's allowable lot coverage. Chair Blakaitis stated that he would like to be sure that nothing is ever built in that particular area. Vice Chair Murray noted that, barring any major accretion of sand, it won't happen.

Director Heard stated that George Wood provided him with a copy of a site plan that contained the lot coverage. He noted that the property is presently at almost 42%, so it is non-compliant with the current Town standards. Chair Blakaitis asked how it got to be 42%. Director Heard stated that the property was developed under Dare County standards. George Wood stated that the lot coverage on the 2002 survey showed the lot coverage at 29.7%. He added that the current plan from 2015 had the coverage at 42%. He reiterated that the intention is not to increase the lot coverage and have the repairs completed.

Chair Blakaitis moved that the application for a Special Exception be approved as written including the staff condition regarding the agency's compliance with permits. Member Forlano seconded.

Motion carried 4-1 with Member Cofield dissenting.

Text Amendment: Proposal to Amend Subsection 156.130(C)(1)(f) of the Duck Town Code by Allowing Wall Signs to Project up to Ten Inches from the Building Face to Which They are Attached

Director Heard stated that the Board had before them a proposal submitted by Arlite Sign Company in an attempt to bring into compliance a situation at the Cotton Gin with the installation of a sign that does not comply with the Town's current standards. He added that after discussing the issues with the contractor, staff talked about the possibility of looking at a text amendment proposal to resolve the issue, rather than physically doing something to the sign. He noted that the proposed amendment will not only bring the Cotton Gin sign into compliance, but might be a better standard for the Town to use moving forward.

Director Heard stated that the Town adopted sign and other development standards originally in 2002 but over time, the Town did an extensive review of every section of the zoning ordinance. In July 2004, the Town adopted a new set of sign standards. Director Heard reviewed all of the

minutes from the Planning Board's meetings as well as the Town Council's when they were going through the adoption and did not find a single reference to the sign depth standard.

Director Heard stated that he performed some general research to try to find out why this type of standard is used and did not find anything specifically supporting it. He added that, while staff appreciates businesses being involved in making improvements to the Town's ordinances, it doesn't just trust that their proposals are the best for the Town. He stated that staff asked Artlite Signs to provide justification for the proposal. He pointed out that the Board has before them a copy showing the typical dimensions that Artlite has for a sign. He added that there is an issue with regard to an internally lit sign. He noted that if a sign is not internally lit, the current six inch standard is fine, but it becomes problematic with regard to the electric components. He stated that Artlite provided specifications to show their concerns.

Director Heard stated that he called several local companies that install internally lit signs. He shared comments from Access Design noting that lighting is ideally situated 8-12 inches behind the face of a sign for proper spread. He stated that Ad Light Signs' standard is 12 inches in depth for an internally lighted sign. He stated that he looked into standards for other Outer Banks communities and noted that there are a few that have the six inch standard and a few with no limitations. Nags Head and Currituck have had recent, thorough reviews of their sign ordinances and both have a 12 inch standard.

Director Heard stated that staff is recommending changing the standard from six to 10 inches as the applicant proposed, but added that staff is not opposed to increasing the depth to 12 inches.

Member Cofield noted that the base recommendation is 10 inches, although some communities had 12 inches. He added that there is some indication that sign companies think that 12 inches will better suit their needs for signage. He asked if there is a reason why the Town would not go with 12 inches over 10 inches. Director Heard stated that the applicant's request is for 10 inches. Member Cofield thought the 12 inches will be ideal and cannot envision a problem with it.

Member McKeithan moved to recommend approval of the text amendment as stated to amend Section 156.130(C)(1)(f) to allow the depth of a sign up to 12 inches from the building's face. Vice Chair Murray seconded.

Motion carried 5-0.

Discussion of Potential Sign Ordinance Amendments: Discussion with the Town Attorney as the Board Prepares to Develop Amendments to Sign Standards in Section 156.130 of the Zoning Ordinance Consistent with the Recent U.S. Supreme Court Decision in *Reed v. Town of Gilbert*

Director Heard stated that the key to the issue is the fact that communities are no longer able to regulate signs based on the content of the sign. He stated that he and Attorney Ben Gallop went through the Town's ordinance and identified some of the sections that the Board may have to look at. He added that Attorney Gallop outlined items that were in a "gray area" - that may be content based but under certain provisions, the Town may be able to justify continuing to use those standards.

Attorney Gallop stated that he is present for questions from the Board. He stated that North Carolina has recently considered some content-based lawsuits, but none had to do with signs. He explained that courts looked at one case regarding the State's anti-bullying law. Another case was the State's requirement that sexual predators who are renters cannot be members of certain social media websites. He stated that in both cases, the law was challenged by the one that was charged as being a person in violation. He stated that in the social media case, they found it was not a content-based regulation because it was merely a list of social media sites. He added that in the case of the bullying statute, the statute stated that it was unlawful for any person to use a computer or computer network to post or encourage others to post on the internet private, personal or sexual information pertaining to a minor with the intent to intimidate or torment a minor. He noted that it didn't sound content based.

Attorney Gallop stated that the North Carolina courts so far have applied that if someone has to look at the content to understand if the regulation applies, then it is a content based restriction. He stated that in looking more broadly at the sign context, across the country, a fair number of cases have considered reading at a level that did not set a precedent for Duck. He added that the primary distinction is the courts trying to determine whether or not 30 years' precedence allowing for content based restrictions on commercial speech that had a lower level of scrutiny and whether or not it still applies. He stated that the Reed decision does not reference any commercial speech cases and it wasn't about commercial speech.

Attorney Gallop stated that there are two ways to look at modifying the sign ordinance – one is riskier than the other. He added that the least risky is to take out all consideration of content. He explained that if someone has to look at a sign to figure out whether or not a regulation applies, then it is considered content based.

Chair Blakaitis noted that if someone sees a sign with a directional arrow, the person will go in that direction. He asked if that was considered content based. Attorney Gallop stated that it is. He stated that the arrow is the content that the sign is providing. Chair Blakaitis asked what is wrong with that. Attorney Gallop stated that someone can follow the sign, but a municipality cannot tell the business that they have to take the sign down or limit it to a certain size. He added that it is a question of being able to regulate a sign and the strictest reading of the Reed decision is that a municipality can regulate the size, shape, materials, location and type of property that the sign will be placed on, but cannot regulate based on the message.

Attorney Gallop that it is like looking at the question as to if there is a difference between commercial speech and the law now or not. He stated that he can go through each provision if the Board wants to make sure it has something different for commercial speech. He explained that in looking at the content, one knows it is commercial and he can go through and make sure the Town is doing things the right way. He stated that if he is writing the ordinance, he would have the sign ordinance spelling out all different types of signs, but no mention about what is in them. He added that he will look at uses of property that the Town has, such as retail use, government use, residential use, etc. and tag it to the type of signs that could be on that property. He stated that it allowed the Town to distinguish the uses between residential and commercial type uses and allows the Town to keep the size of the signs the way it wants to, but not looking at what is on them.

Chair Blakaitis asked how the Board will approach the issue. Director Heard stated that he and Attorney Gallop can put together some ideas and concepts. He pointed out that the Board has in their packets a copy of information from the Town of Nags Head. He added that Nags Head is the only community on the Outer Banks that has gone through this process. He stated that he summarized in the staff report some of the things that the Town of Nags Head did, which could be a way of looking at the issues. He noted that a lot of it has to do with consolidating different types of signs into a single, temporary sign category. He stated that the intent with this is to try to maintain, to the best of its ability, the current standards and not to change everything significantly, but with the understanding that there may be some standards that are impacted either positively or negatively as the Town does this.

Chair Blakaitis asked if the Board should pick one and do it all at once. Director Heard stated that staff can put together some draft ideas and involve the merchants' association in the conversation if the Board desires.

Vice Chair Murray understood that Council wants the Board to address the issue, but he is hearing from Attorney Gallop that a little more development in the case law as Reed relates to commercial speech may clarify what will and will not be allowed moving forward. Attorney Gallop stated that it should, but he isn't sure how long that will be. He isn't sure when the US Supreme Court, the Court Circuit or the State Court will decide a case that will tell him something more definitive. He added that there are provisions in the Town's ordinance that could be grounds for someone to challenge the ordinance.

Member Forlano asked if there is an example in the Town's ordinance that is contrary to the findings in the Reed decision. Attorney Gallop stated that temporary directional signs were what the Reed case was about. He added that the Reed case was also about religious signs. He noted that both are clearly problematic issues in Duck's ordinance. Director Heard pointed out that the list on Pages 3 and 4 of the staff report are all examples of sections of the ordinance that could potentially be issues.

Chair Blakaitis asked why Director Heard cannot do the same thing he did with the Town of Nags Head. Director Heard stated that it is certainly a direction that the Board can look at. Chair Blakaitis suggested taking the ordinance and changing what the Board thought is best until a case comes up. Vice Chair Murray agreed. Council Liaison Burdick disagreed and suggested that the Council would like to see that the Town does not become the next case law and spend a fortune in money on attorney fees, because the Town didn't take the time to go through it and get rid of the obvious problem areas. Attorney Gallop stated that Duck's ordinance is less content based than other towns. He added that the Board can go through and piece mail the changes.

Chair Blakaitis asked if this is something that Director Heard will do, then send to Attorney Gallop to develop or will it be something that Attorney Gallop will do and send to the Board to review. Director Heard thought that if he and Attorney Gallop worked together, they can put together some thoughts and then come back to the Board and explain the concepts. He added that they can do it in a way similar to the Town of Nags Head. Chair Blakaitis didn't see why the Board couldn't or wouldn't do it that way. Director Heard stated that he and Attorney Gallop

can explain the rationale behind each proposal. If the Board feels they want to go in a different direction, he and Attorney Gallop can make the necessary changes.

Member Cofield asked if there was a reason why the Board cannot start with Nags Head's ordinance. Attorney Gallop stated that he cannot tell the Board the advice he gave the Town of Nags Head, but thought it would be best to start with Duck's existing ordinance and go from there. He added that he wouldn't consider adopting Nags Head's ordinance or start it as a base as the Town of Duck has a good base in its ordinance already. Chair Blakaitis thought that the Board can use Nags Head's style. He asked if it will be done all at once or in pieces. Attorney Gallop suggested that the Board do it all at once.

APPROVAL OF MINUTES

Minutes from the December 14, 2016, Regular Meeting

Council Liaison Burdick had a change to Page 9 of the minutes

Vice Chair Murray moved to approve the December 14, 2016 minutes as amended. Chair Blakaitis seconded.

Motion carried 5-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Summary of January 4, 2017 Town Council Meetings

Director Heard gave an update on the January 4, 2017 Council meeting to the Board and audience.

Project Updates

Director Heard updated the Board and audience about Town projects.

BOARD COMMENTS

Vice Chair Murray asked what is the mechanism for the Board to deal with the issues that arose during the special exception application earlier in the evening. He inquired if the Board can ask Council to allow them to revisit the ordinance and obtain guidance for the next time a similar special exception application comes up. He stated that when he was trying to think of a condition to put in, he felt like he was at a high risk by suggesting an off-the-cuff condition, some type of scarlet letter on the property in the event that there is soundside accretion and all of the properties adjacent to it start moving west, which would be the natural tendency. He added that the Board had limited it to the structure that was built, so he did not put a condition on it. He

stated that he would like to see the Board revisit the fill standards as they relate to bulkheads, but at the bare minimum, put some requirements in for a special exception.

Chair Blakaitis thought it is a good idea. He added that his concerns are for Duck and the future with regard to things like this. He stated that it was hard to ignore the peril of the homeowner. Director Heard noticed a consensus of the Board members in agreement and offered to draft a memorandum for all of the Board members to review before it is presented to Town Council.

Council Liaison Burdick stated that the beach nourishment project has been delayed from April 1, 2017 to mid-May, 2017. Chair Blakaitis asked why it is delayed. Council Liaison Burdick stated that apparently the contractors are completing maintenance on the equipment, which won't be available until May. Vice Chair Murray asked how long the project will take. Council Liaison Burdick stated that it will likely run until mid-July. He noted that all dates tentative. Chair Blakaitis clarified that it will push the other towns back on their project as well. Council Liaison Burdick stated he is correct. Chair Blakaitis asked if the project will still start in Duck. Council Liaison Burdick stated that it will.

ADJOURNMENT

Member Cofield moved to adjourn the meeting. Chair Blakaitis seconded. There was no vote.

The time was 9:02 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman