

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
March 8, 2017**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, March 8, 2017.

Present were: Chair Joe Blakaitis, Vice Chair Marc Murray, and James Cofield.

Absent: Ron Forlano and Tim McKeithan.

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

Others Present: Sandy Whitman, Bryan Weisbecker and Philip Ruckle.

Others Absent: None.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for March 8, 2017 at 6:35 p.m.

PUBLIC COMMENTS

None.

OLD BUSINESS

None.

NEW BUSINESS

Discussion of Potential Sign Ordinance Text Amendments: Discussion of Concepts for Potential Amendments to Sign Standards in the Zoning Ordinance Consistent with the Recent U.S. Supreme Court Decision in *Reed v. Town of Gilbert*

Director Heard stated that this was another part of the Planning Board's process in getting the sign ordinance in compliance with the recent Supreme Court decision. He stated that this meeting is the first time that staff and the Town Attorney put all the initial concepts into a complete ordinance form for the Board's consideration so that they can see where potential changes are occurring. He explained that the staff report outlines where the proposed changes are occurring and why those changes are being recommended.

Director Heard stated that Attorney Ben Gallop is present to provide insight from his prospective as well as give the Board some legal advice. He stated that Attorney Gallop met with the Board two months back as the concepts were being developed to help the Board understand what needs

to be accomplished with the changes. He stated that Attorney Gallop was very involved in putting together the draft ordinance that is in front of the Board.

Chair Blakaitis asked when an item is removed from the ordinance, it means the Board does not need to consider it or is it removed to make it easier for the Board to not include it in their thinking regarding signs. Director Heard stated that it means that staff is proposing that it be stricken completely from the ordinance. Chair Blakaitis noted that it still has pertinence to a sign. Director Heard stated that in some cases there are things that the Town can no longer regulate. Chair Blakaitis clarified that Director Heard is striking items that can no longer be regulated. Director Heard concurred.

Director Heard explained that there are several instances where a certain standard was removed and relocated in another section where it made more sense. Chair Blakaitis noted that one is “reader board” where parts of it were stricken. He clarified that there isn’t anything added to it. Director Heard stated he is correct.

Chair Blakaitis asked Attorney Gallop to give the Board an explanation of his viewpoints on the regulation of commercial versus residential signs. Attorney Gallop stated that the basic concept is that a community cannot regulate signs based on what they say. You shouldn’t have to look at the content of the sign to determine what provisions of the ordinance apply to it. He stated that in most cases, specific types of signs are still allowable in some form or fashion. The proposed amendments look more at the physical structure of signs, whether they are allowed on commercial sites, certain types of signs, number of signs, sign size, and sign location. He added that on residential sites, it is the same sort of thing, but not caring as much about the content of the sign. He thought that is where most of the removed items went. He explained which signs will be allowed in different areas. He noted that between commercial and residential signs, the way the current ordinance is written, it treats both the same in terms of trying to be as content-neutral as possible. He added that it does have free-standing signs and wall signs that differentiate between commercial and residential zoning districts. He thought that in a bigger city, it can be broken down by each individual use, but the way the Town has a small commercial district and a large residential one. He stated that there is not be a lot of intermingling of residences in commercial areas or vice versa so the breakdown between the two is delineated by the existing zoning ordinance.

Chair Blakaitis stated that he looked at the UNC School of Government recommendations, which differ slightly from Attorney Gallop’s approach. Attorney Gallop stated that the most recent item he saw from the School of Government was a blog they had put out shortly after the *Reed v. Town of Gilbert* decision. He explained that there is a long history of case law that has gone all the way to the U.S. Supreme Court that has allowed some differentiation in how a municipality can regulate commercial signage. He stated that most are looking at a strict scrutiny application that requires a compelling government interest and the regulation must be narrowly tailored to address the compelling government interest. He stated that most lawyers look at that as it is very rare that those standards will be met.

Attorney Gallop stated that other cases in the past related to commercial speech in that it provided for intermediate scrutiny, which is hard to meet, but not impossible. He thought that the problem with the *Reed* decision is that it doesn’t reference any related cases and it doesn’t

provide additional guidance, but it is very clear that if someone looks at the content of a sign, it requires strict scrutiny. He stated that there hasn't been a case in the U.S. Supreme Court that has dealt with the question as to whether or not an intermediate scrutiny can still be applied to commercial signs. He noted that some courts in the country have said "yes" while others have said "no". Two North Carolina court opinions seem to be reading *Reed v Town of Gilbert* relatively strictly and find that looking at the content of something is a strict scrutiny analysis, but these are not sign related cases.

Attorney Gallop stated that when looking at the School of Government's position versus what his position may be, his position is one of an attorney for the Town trying to avoid risk. He stated that the least risky way is to read the Supreme Court's decision as strictly as possible. He stated that the School of Government's position appears to be from the more of theoretical perspective of professors, but they are not looking at it from the position of risk analysis. They are looking at the issue from the position of what can be done to help towns, but not dealing with the risk.

Attorney Gallop thought there are still three or four other provisions that need to be amended in the draft ordinance related to this subject, but they will be short modifications to reference back to the sign ordinance. Director Heard stated that staff has made some of the changes, but Attorney Gallop's suggestion to refer to it is preferred.

Chair Blakaitis asked if everything in the draft ordinance incorporates the conversations between Director Heard, Attorney Gallop and the Board at their last meeting. Director Heard stated that it does. Member Cofield stated that he is comfortable with the discussion the Board had at its last meeting and thought the draft ordinance reflected what was discussed.

Vice Chair Murray agreed with Member Cofield. He stated that it seemed consistent with the Board's previous conversations. He asked Attorney Gallop and Director Heard if there are other areas in the ordinance where they want to go in a direction where the Board may want to look more closely. Attorney Gallop stated that having allowances for seasonal displays and religious symbols are slightly more complicated and may require an adjustment to the definition of the term "sign". He noted that these displays are not necessarily signs with content, but are usually more of a display. However, they are presently defined as signs and will need to be addressed.

Chair Blakaitis asked if seasonal displays and religious symbols are items that Director Heard and Attorney Gallop can discuss further and bring back another ordinance draft at a future meeting. Attorney Gallop stated that they are. He thought he and Director Heard have a good grasp on all the areas that need to be dealt with. He added that 90% of what they want to do is already completed. He stated that there are a few more items that will be brought back to the Board.

Chair Blakaitis thought the Board didn't need to make a motion but will need consensus that Director Heard and Attorney Gallop make the changes and bring it back to the Board at the next meeting.

Member Cofield stated that he wants to discuss the religious symbols a little further. He asked if Attorney Gallop can provide a simple description of a seasonal sign. Attorney Gallop stated that the existing ordinance lists seasonal displays as exempt. Member Cofield asked if these include

items such as Christmas displays. Attorney Gallop stated he is correct. He doesn't think the Board wants to define seasonal displays as signs, but the way the current definition is written, it incorporates anything that conveys any sort of message. He stated that the question is if it can be limited by making the definition state that it should convey a written message or something that can be read. He noted that this is not easy wording to draft.

Chair Blakaitis clarified that Attorney Gallop and Director Heard will craft better language for the items and come back at the next meeting for the Board to review. Attorney Gallop stated that they can provide a different, and hopefully, better definition for signs.

Council Liaison Burdick thought Director Heard and Attorney Gallop are moving in the right direction regarding the draft ordinance. He suggested striking the word "morals" in the sixth paragraph. He stated that ground mounted signs have a ground clearance of eight inches or less and pylon signs had a ground clearance of greater than six inches. He asked what it means. Director Heard noted that they are existing definitions. Council Liaison Burdick stated that they don't make sense. Attorney Gallop stated that he and Director Heard will need to look at where these terms are used in the ordinance. Director Heard stated he will flag those terms to see if they are necessary or if they can be located in the single, free-standing sign category.

Council Liaison Burdick didn't know where signs and flashing signs connect to anything else in the ordinance. Director Heard stated that flashing signs are prohibited. Council Liaison Burdick pointed out that it doesn't show up anywhere else in the ordinance. Attorney Gallop stated that that it is most likely defined in one way and spelled out instead of using a one-word definition. Council Liaison Burdick stated that it is a headache regarding getting the commercial entities to abide by the sign ordinance as they like to have flashing "Open" signs. Attorney Gallop stated that the definition is not used but looks to be referenced on Page 8 of the ordinance.

Director Heard stated that Attorney Gallop had some comments after the draft ordinance was distributed. He added that Attorney Gallop had noticed that the final draft about temporary residential signs has no limit on the overall number of temporary signs and suggested capping the overall square footage of the sign. Member Cofield noted that a permit is not needed for these types of signs. Chair Blakaitis noted that there is a sign standard for residences in the draft ordinance. Attorney Gallop stated that that standard is for wall-mounted signs, but he thought they are considered permanent signs.

Vice Chair Murray asked for an example of a temporary residential sign. Director Heard stated that examples include real estate signs, yard sale signs and a construction signs for a contractor. Vice Chair Murray asked if there is a size specification elsewhere in the ordinance that can be applied to this situation. Attorney Gallop stated that the proposed standards do not specify how many signs a person can have. He didn't think the Board will want an unlimited number of temporary signs. Council Liaison Burdick noted that election signs are not limited.

Vice Chair Murray suggested taking the dimensions from a typical real estate sign, multiplying it by two or three and using that as the number. Chair Blakaitis agreed, adding that real estate signs are usually two square feet. Director Heard clarified that he included temporary construction signs in a separate category. Member Cofield stated that since the Town currently does not have any limitations, he thought it should be capped at 10. Chair Blakaitis asked if

Member Cofield means to allow 10 signs on one premise. Member Cofield stated he is correct. Vice Chair Murray noted that there is no compelling reason to do that. Chair Blakaitis agreed. Council Liaison Burdick suggested that there be a limit of one sign on a property and two signs for corner properties. Chair Blakaitis thought it should be all the same no matter the property. Director Heard clarified that under the current standards, there can be more than two signs on a property, but only two real estate signs can be on a property.

Vice Chair Murray asked if the limitation is two or only two for corner properties if the property faces two different streets. Director Heard stated that it is two for corner properties. He added that it will only be one sign on each corner. He reiterated that it only applies to real estate signs. Council Liaison Burdick suggested that the sign limitation be two for any property. Chair Blakaitis suggested putting two in the ordinance and review it at the next meeting. Member Cofield noted that two is just for real estate signs. He suggested keeping what is currently in the ordinance which is no limitation. Chair Blakaitis agreed but thought two will be reasonable. Vice Chair Murray stated that he is always in favor of no limitation whenever it can be done. Attorney Gallop stated that he and Director Heard will come up with a proposal and bring it back to the Board at their next meeting.

Director Heard stated that on Page 11 of the ordinance, it talked of how the Town deals with real estate signs. He stated that there was a suggestion by Attorney Gallop that the Town could develop another way to have standards for real estate signs without calling them that. He explained that the Town may not regulate the content, but can regulate the type of sign by giving a physical description. He added that the reference to metal frames will be changed to substantial metal or wood. Council Liaison Burdick suggested it be “a frame”. Chair Blakaitis agreed.

It was *consensus* of the Board to have Director Heard and Attorney Gallop review the draft ordinance and bring it back for consideration at the Planning Board’s April 12, 2017 meeting.

Discussion of Special Exceptions for Fill Text Amendment: Discussion of Concepts for a New Subsection Outlining Standards for Approval of Special Exceptions for Fill Over 36 Inches in Depth

Director Heard stated that during the Planning Board’s review of the recent special exception application for 1166 Duck Road, there was a considerable amount of discussion regarding the lack of definitive standards for review of a special exception for filling activities. He stated that after completing the review of the application, the Board decided to prepare a memorandum to Town Council explaining the difficulty of the situation and requesting authorization to develop special exception standards for use in the future. He noted that at Town Council’s meeting on February 1, 2017, they considered the Board’s request and authorized both the Planning Board and Community Development staff to develop a text amendment that will establish specific criteria for the review of special exceptions for filling activities. He noted that the standards will apply to both the typical fill requirements as well as soundfront fill like the situation at 1166 Duck Road. He added that the staff report lists some of the specific criteria for other types of special exceptions in the current ordinance as well as a draft outline for what can be special exception standards for fill and grading activities. He stated that these are his initial thoughts and are not intended to be complete and comprehensive.

Chair Blakaitis asked if the criteria are pulled from the other exception ordinance. Director Heard stated that some of the draft standards are pulled from other special exception standards in the Town's ordinance, but they aren't all pulled because fill has certain differences.

Member Cofield asked Director Heard to review the property ownership along the sound and the ocean. He asked how far a property owner's property extend, based on North Carolina law, into the sound and ocean. Director Heard stated that on the ocean side, it can extend up to the eastern edge of the dune. He noted that CAMA and the Town each have requirements as to where the properties are measured. Member Cofield asked if it is on the ocean, it is considered the dry beach. Director Heard stated that it is typically where the water comes up to the edge of the dune. Chair Blakaitis asked if that is the first line of stable natural vegetation. Director Heard stated that the first line of stable natural vegetation is related to CAMA setbacks and does not relate to the property line.

Member Cofield asked if the dry beach varied on the ocean side. Council Liaison Burdick thought it was the mean high water mark. Vice Chair Murray agreed. Chair Blakaitis noted that fill was not allowed on the ocean side. Member Cofield asked about the property that the Board considered at 1166 Duck Road. Chair Blakaitis stated that the water line would be at the end of the proposed new bulkhead. Member Cofield disagreed. Chair Blakaitis asked if it is further towards the property. Member Cofield stated that it is. He stated that he is trying to figure out what the Town is regulating compared to what the property owner owns. He added that the Board may be regulating property that the property owner does not own, based on what he sees. Director Heard stated that a waterfront property owner has a riparian right to the public waters in front of their property. He added that, depending on what is done, the area in the sound can become part of their property. Member Cofield confirmed that, beyond the property line on the sound, without approval from other agencies, the owner cannot go out. Director Heard stated he is correct.

Vice Chair Murray asked if the Board was tasked with only discussing criteria for special exceptions or the entire fill ordinance. Director Heard stated that the Board was tasked with discussing criteria for a special exception regarding fill. He reiterated that it isn't just fill in the sound, but everywhere. Vice Chair Murray noted that Director Heard gave the Board six examples of conditions. He asked if the Board is to discuss and/or potentially refine a list of conditions and not go back into the fill ordinance to make changes. Director Heard stated that is correct.

Member Cofield stated that it seemed to him that there is a big difference between filling in one's backyard and filling in the water area. He asked if there is a reason why the Board is trying to lump them together to create a single special exception. He added that prior to the application at 1166 Duck Road, most would have assumed that fill is for land, but the special exception application gave us reason to think about water. He asked if there is a reason why the Board does not want to create two different special exceptions – one for land and one for water. Director Heard stated that if it is the desire of the Board to do that, he doesn't see a problem in approaching it that way, if they see some significant differences. Chair Blakaitis agreed with Member Cofield's comments, but does not think there need to be two special exceptions. He added that if Director Heard takes what was on the last page of the draft ordinance, he can add

another item to the criteria. He gave the following example: “There shall be no filling of the sound on individual lots.” He noted that it can be another special exception criteria and take care of the sound issue.

Vice Chair Murray noted that on the face of it, it is disturbing, but once a homeowner has obtained a CAMA permit from the State, it is no longer the sound in the State’s mind because the owner has purchased a portion of marsh greater than that size somewhere else. He thought the Board should think very carefully about the consequences if the Town is not going to allow something that the Department of Environment and Natural Resources will allow and has a mechanism to allow it. Chair Blakaitis pointed out that there are other examples of not allowing things that other governmental agencies allow. He noted that sandbags are a good example. Vice Chair Murray agreed, but doesn’t think it can be dealt with in one sentence. Chair Blakaitis stated that he isn’t suggesting doing that, but is providing an example of adding criteria instead of creating a whole separate ordinance.

Member Cofield stated that he wants to offer another suggestion as to why they should be separated. He stated that for the issue on the water, the Town is dealing with environmental concerns that the Town does not deal with in regards to someone adding fill to a back yard. He added that the Town, in its Vision, draws that into what is important for the Town with respect to the water. He noted that the Vision read as follows: “There is a conscious respect for Duck’s fragile and extraordinary environment. We protect and preserve opportunities for our residents and visitors to enjoy our ocean, sound and natural coastal inhabitants. We value our pristine, safe, uninterrupted beaches which is our most valuable asset. Our resilience and adaptability guided by environmental awareness and forward thinking, ensure our sustainability as a community.” He pointed out that the Town fathers thought it was the vision for the Town to look at the sound. He reiterated that the Town does not consider those environmental concerns in if someone wants to add fill to their back yard.

Vice Chair Murray disagreed with Member Cofield’s comments. He didn’t think the Board can differentiate as there is no hardened surface, no concrete, or no creation of runoff. He added that all the rainwater that fell on that portion of sand at 1166 Duck Road would percolate down to the sand naturally. He stated that, filling an upland lot can create a situation, particularly when an impermeable surface is put on it, where stormwater will travel from the upland, gather pollutants and end up in the sound. He noted that it is far more damaging than zero runoff from soundfront fill. Member Cofield stated that it would be that way only under Vice Chair Murray’s example. He presented an alternative example that if he has a depressed area in his back yard and all the area around it is high ground, if he wants to fill four feet into the depressed area, it will get it closer to the surrounding high ground and not have runoff. Vice Chair Murray pointed out that Member Cofield’s example is changing the flow of the stormwater. Member Cofield disagreed. He added that it would percolate down. Vice Chair Murray stated that the Vision statement is a good one, but he felt that Member Cofield is taking a small example and using the words in the Vision statement to prove a point. He added that people are subjected to soundside erosion and a bulkhead is not the best solution to the erosion problem. He stated that if the Town is truly forward thinking and set on sustainability, staff would be seeking out grants to do wetland restoration that will stop the erosion that is happening. Council Liaison Burdick stated that staff is doing that. Vice Chair Murray clarified that it is to help with the erosion on the property at

1166 Duck Road. Council Liaison Burdick stated that the Town is seeking grants to find ways to improve the environment in the sound.

Member Cofield thought land and water are two entirely different situations and that should be looked at differently. Vice Chair Murray didn't think there will be any problem looking at them separately, but feels that the Board needs to gather more information. He added that he wants to see some data to back up which is more or less damaging. He noted that he doesn't know how to begin to go about responsibly developing an ordinance to deal with it. He added that there has to be a middle ground between development and environmental interests. He stated that he wants to see data that will tell him that filling a bulkhead will be more damaging than another alternative. He added that he would like to see other examples of the Board living up to the Vision statement. He felt that the beach nourishment project is getting a lot of attention, which is good, but felt that the sound is being neglected. He stated that before the Town tells individual property owners that they cannot do something that they are permitted to do by the State, the whole picture should be looked at.

Member Cofield stated that he doesn't have a problem looking at more data. He reiterated that they are two different items and the environmental concerns for water are very different than the concerns for land. He thought the Board needs to approach it differently. Chair Blakaitis noted that the Town already has an ordinance allowing fill up to 36 inches and the Board is not trying to change that. He stated that the Board needs to develop a procedure for a special exception.

Member Cofield agreed with Chair Blakaitis. Chair Blakaitis stated that if an owner wants to fill their pit four feet, they must come before the Board and explain why they want to do it. Member Cofield stated that he has suggested that the Board make the existing ordinance for land only and then come up with different considerations for water. Chair Blakaitis disagreed. He thought everything that applied to land also applied to water, but more things apply to water as well.

Council Liaison Burdick reminded the Board they aren't tasked with rewriting the ordinance, but trying to come up with a list of criteria that the Board and Council can consider when dealing with a special exception. He added that the Town does not have a set of standards that are adequately defined and needed to have them defined. He reminded that they are considering standards for a special exception and not a new ordinance for the fill. Chair Blakaitis thought the Board should come up with criteria for soundfront properties, which is what troubled the Board the most. He stated that if a property owner wants to fill part of a soundfront lot, there is an ordinance in place for it. He added that the applicant at 1166 Duck Road was seeking to create an unusual circumstance by moving their property 20 feet into the sound, which is the part that people did not like.

Member Cofield suggested a condition that the proposed use is not inconsistent with the Town's adopted Vision. He added that the Vision statement is concerned with the environment of the sound and ocean. He stated that he wants the Board to consider that in any request or application for a special exception. Chair Blakaitis clarified that in addition to a special exception being consistent with the Town's adopted CAMA Land Use Plan, Member Cofield wants to add his suggestion. Member Cofield stated he is correct. Chair Blakaitis stated that he has no objection to that.

Vice Chair Murray clarified that Member Cofield wants to add the CAMA Land Use Plan and the Vision statement. Member Cofield stated he does. Chair Blakaitis agreed, adding that he doesn't see anything wrong with it. Vice Chair Murray stated that the only problem he had is that the reason the Board is trying to do this was to make the decision-making criteria less vague, and the statement is extremely vague. He understands the value in it as a Vision statement, but that's all it is, a Vision statement.

Chair Blakaitis thought about it as saying that the listed criteria are good and the only criteria that bothered the Board came from the special exception request, with the main part being the filling of the sound. He asked what else can be done on a soundfront property. He noted that currently, a person can fill a hole 36 inches if they want to, based on the Town's ordinance. Vice Chair Murray agreed. Director Heard clarified that Chair Blakaitis is not referencing the sound. Chair Blakaitis stated that his comment relates to a soundfront lot and not fill in the sound. He stated that for a soundfront lot, the current ordinance takes care of what someone can do and if they want to do it differently, then they must apply for a special exception.

Vice Chair Murray stated that, from a practical standpoint, any bulkhead repair involves building a bulkhead immediately to the west of the failing bulkhead and filling that area in. Chair Blakaitis agreed, adding that the Board would like to see it six inches away. Director Heard pointed out that staff deals with that in a practical manner. Vice Chair Murray agreed, asking if the applicant for 1166 Duck Road had not proposed eight feet of fill and had proposed a three-foot bulkhead and three feet of fill, would it still require a special exception. Director Heard stated that staff would have to look at it very closely.

Vice Chair Murray stated that when the Board states that the special exception will be consistent with the applicable goals of the CAMA Land Use Plan, the plan is also evaluated by Division of Coastal Management. He added that when it states that it is consistent with the CAMA Land Use Plan, it is tricky in that it is a condition of the special exception in the sense that the applicant is going to think that CAMA has already evaluated it. Chair Blakaitis pointed out that there are other criteria that the Board can consider as well. He stated that the Board needs to add some criteria to the ordinance, adding that it should include soundfront properties. Vice Chair Murray asked if there is a way to explicitly say in the ordinance that it is the Town's evaluation of the CAMA Land Use Plan, which may be more stringent than CAMA's evaluation. Director Heard stated that he doesn't see any problem with clarifying the wording in that manner.

Council Liaison Burdick stated that the Town didn't default to CAMA regulations, but wrote its own sandbag ordinance for the beach. Vice Chair Murray agreed, but added that in this case, there isn't one. Council Liaison Burdick stated that CAMA allowed sandbags. Chair Blakaitis asked Vice Chair Murray if he was discussing the sandbag ordinance. Council Liaison Burdick stated that CAMA has a sandbag standard. Vice Chair Murray stated that it is allowed. Chair Blakaitis agreed. Council Liaison Burdick stated that the Town decided that CAMA standards were not sufficient to meet its needs, so it wrote its own ordinance that put a more stringent standard on the use of sandbags on the beach to save pools and properties. He added that CAMA allows that. Vice Chair Murray stated that it is different because Council Liaison Burdick made his point that there is an ordinance regulating sandbags. He added that it needed to be written in the ordinance that this is a more stringent interpretation that can be allowed, because it is the same land use plan.

Member Cofield stated that he is comfortable with that proposal. Vice Chair Murray inquired if the Board is bound by the ordinance in special exception cases. Director Heard stated that the Board has to find that all of the criteria in the ordinance are met. He stated that if they find that they are all met, the Board does not have a choice but to vote to approve the application. He stated that if some of the criteria are not met, the Board's only choice is to deny the application. Member Cofield stated that it should be consistent from one application to the next. Vice Chair Murray agreed, adding that it needs be in the ordinance. He added that he agrees with Council Liaison Burdick's philosophy.

Council Liaison Burdick stated that he is supporting Vice Chair Murray's comments in regards to how the sandbag issue was treated. Vice Chair Murray asked if it can be part of the conditions or if it must be embedded in the ordinance. Director Heard didn't think it needss to be in the ordinance at all from a legal standpoint. He added that if the Board wants to clarify it, there will be no problem. He explained that the Board has the authority to do it, but if they want to spell it out, there will not be a problem. He stated that if the Board wishes, he will look into the wording to that effect. He stated that he understands the concern that someone can read the current ordinance and feel that they've met the land use plan condition, because they have a CAMA permit.

Chair Blakaitis stated that when the Board was discussing sandbags, once they realized that the Town did not have any ordinances about sandbags. It was decided to craft one and Council liked it. He added that the Board was complimented for being proactive by the community. He thought the most important thing on the soundfront is enlarging the soundfront behind a house with fill. He thought that the draft criteria are good along with what Member Cofield and Vice Chair Murray suggested. He added that if the Board does not like fill in the sound, it should be stated as such. He thought the point was made that any protrusion into the sound will affect the adjoining properties. He asked the Board what they dislike about the soundfront as it relates to 36 inches of fill in the ordinance.

Member Cofield asked if the Board can put in the ordinance the following language: "Thou shalt not go into the sound more than three feet." Chair Blakaitis stated that the Board can. Director Heard stated that, currently, the ordinance already states that it cannot be done. Chair Blakaitis pointed out that there is an ordinance that states it can't be done, but the applicant at 1166 Duck Road obtained a CAMA permit to do it. Member Cofield asked what the ordinance states. Director Heard replied that that no one can fill in the Ocean and Sound Overlay district, which includes everything west of the property at 1166 Duck Road. Member Cofield asked why the Board considered the application. Director Heard stated that the applicants asked for relief from that standard through the special exception. The Board of Adjustment would have heard a variance to grant relief from it as well. He added that there are only a handful of regulations and standards that can go before the Board and Council for a special exception request. He stated that the Board and Council can consider a clarifying statement that states a special exception will be allowed for fill in one set of circumstances and not in another. He added that it can only apply to dry land if the Board wishes.

Member Cofield stated that he is almost comfortable with Director Heard's suggestion. He wondered what will happen if someone wishes to repair a bulkhead that requires them to go out

six inches to one foot to build. Chair Blakaitis noted that CAMA has provisions for it currently and it was not 20 feet. So, the homeowner can apply for a special exception to repair a bulkhead, which would likely be granted. Member Cofield didn't think the Town wants to create a special exception for it. He added that the ordinance states, "Thou shall not do this". Chair Blakaitis stated that they can still apply for a special exception. Member Cofield disagreed.

Vice Chair Murray asked if the hassle is what the Board is trying to avoid. He added that the applicant at 1166 Duck Road applied for a special exception for something that was denied. He noted that the Board approved it, but Council denied it. He thought all the Board needs to do is to put strong enough conditions on it so that the denial is a little more forceful the next time around for a case like that. He gave an example of a case where the homeowner might ask to put in two feet, six inches but the Board tells the applicant that they cannot do it more than two feet, so it will create a problem. He noted that they are not filling 20 feet out into the sound. He added that the Board is trying to refine the ordinance. Chair Blakaitis noted that it can add criteria for that situation.

Vice Chair Murray thought it would deal with things, but could leave the Town open for the possibility that there may be a case with a compelling public interest. He added that there could be an environmental impact, but there is also an environmental impact in pumping millions of cubic yards of sand onto the beach. However, the Town may come to a consensus that it is a good decision. He noted that it can happen here and he doesn't want to deny a homeowner the ability to have their case heard.

Member Cofield understood that currently, the Town ordinance states that "thou shalt not go out into the sound". Director Heard stated that he is correct, adding that it is not related to the special exception. Member Cofield noted that the only reason the special exception was before the Board was because Director Heard made the determination that a special exception is allowed under the criteria for fill. Director Heard stated that the special exception at 1166 Duck Road did not have to do with the applicant going out into the sound, but had to do with the height of the fill. Member Cofield understood. He asked why Director Heard didn't reject the application on the basis that it violated the ordinance that stated: "Thou shalt not go out into the sound". Director Heard stated that he does not have that authority and the applicant has the right to apply and have his special exception heard. He added that even if it is something he knew is improper, he does not have the authority. It must go to either the Planning Board or Board of Adjustment and the Board has to make the determination of eligibility even before discussing the merits of the application.

Member Cofield stated that he is looking for clarity that makes it clear to any applicant that it will not be considered. He thought clarity will be helpful so Director Heard will not have to struggle with it and the Board will not have to deliberate over it. Chair Blakaitis stated that it cannot be a criterion for a special exception. Member Cofield agreed. Chair Blakaitis noted that anyone can apply for a special exception. Member Cofield agreed.

Council Liaison Burdick thought Vice Chair Murray has a good point in that the Town cannot foresee all the possible events that can arise. He stated that it may be in the Town's interest to at least allow a hearing on those applications. He stated that by constructing it the way Member Cofield is trying to, there should be a set of criteria so that there is a basis for dealing with this

particular type of problem. He thought that is why the Board is where it is. Chair Blakaitis agreed. Member Cofield stated that he is fine with it. He added that he wants something that states that it cannot be 20 feet. He added that he is fine with three or four feet. Chair Blakaitis asked if it could or should be put in the criteria. Director Heard stated that it can either be in the ordinance or in the criteria for a special exception. He explained that the special exception for setbacks states that an encroachment can only go two feet into the side yards and 10 feet in the rear yards. He added that fill can be similarly limited as far as what can be asked for and granted with a special exception.

Director Heard stated that the Town is considering a marsh restoration project along the soundfront of the Town Hall property, which will involve adding some fill in the sound to build up the area where the plantings would be installed. He added that the Town would have to come the Board for either an ordinance change to create an allowance or a special exception or variance-type of process to allow the project. He noted that it is a public project to protect the public property and is planned to be an educational project to help people learn and encourage them to do similar things. Chair Blakaitis clarified that it is a project to increase sound vegetation. Director Heard agreed. Chair Blakaitis commented that it is a different type of project than what the Board is discussing. Vice Chair Murray disagreed. Director Heard stated that it is still not allowed by the current ordinance.

Vice Chair Murray questioned what would happen if someone is totally compliant today with their CAMA permit and has their house set back 30 feet or more and there is a storm even that tears the bulkhead out. He noted that a person can presently go buy a property with an existing bulkhead, the setback would be 30 feet from that and can build their house there and then a hurricane can come through making the new water line behind the house. He stated that it would be totally unreasonable of the Board to not allow them to put the bulkhead back and fill the property.

Member Cofield stated that he is in favor of something minimal to allow the restoration of a bulkhead. He didn't think what the Board was presented with is a reasonable way to get there. He stated that if the Board drafts something to help to do that, he is in favor of it; otherwise he is more comfortable with not allowing it. Vice Chair Murray thought Member Cofield is pressing to not allow fill and not allowing a property owner to apply for a variance to fill a certain number of feet into the sound. Member Cofield stated he is correct. Vice Chair Murray stated that if Member Cofield is saying that, then the Town will be bound by the ordinance to deny the person the repair, which seems unfair. Director Heard stated that a homeowner will always have the right to apply for a variance. He reminded that the Board is discussing special exceptions.

Member Cofield asked for clarification that the ordinance stating that "thou shalt not go into the sound" is a Board of Adjustment consideration and not a Planning Board one. Director Heard stated he is correct. Chair Blakaitis noted that it is already in place. Member Cofield and Director Heard agreed.

Vice Chair Murray asked how it would work from a logistical prospective where the Planning Board approved the fill based on the ordinance. Chair Blakaitis asked what would have happened if Council approved the special exception for fill at 1166 Duck Road. Vice Chair Murray asked why Council would even hear the special exception for fill before the variance.

Director Heard stated that the Council meeting was the day before the Board of Adjustment meeting. Member Cofield noted that the BOA meeting was deferred after the Council decision. Director Heard stated that the order was irrelevant. He added that the applicant had to receive approval from the Town Council and Board of Adjustment. He stated that the Board of Adjustment has very specific criteria, not specifically dealing with fill, they follow when considering approval of a variance. He stated that it doesn't mean that they can approve something that doesn't meet the special exception standards or vice versa.

Chair Blakaitis stated that the Board agrees that there should be a separate set of criteria for soundfront lots to add to the other special exceptions that are currently in place. He clarified that it is a good idea. He noted that there are not separate criteria for soundfront lot filling as it is in with the other ordinance. Vice Chair Murray pointed out that it is not allowed. Chair Blakaitis understood, but pointed out that it is not mentioned by itself. Vice Chair Murray agreed. Director Heard stated that it is mentioned that such activity is prohibited. Chair Blakaitis clarified that there isn't a set of criteria for soundfront conditions, which is the reason for this discussion. Vice Chair Murray disagreed and pointed out that the Board is meeting because there isn't a list of criteria for fill greater than three feet. Chair Blakaitis added that it is for soundfront properties. Vice Chair Murray disagreed, adding that it was just fill greater than three feet. Member Cofield pointed out that the real concern is the soundfront. Chair Blakaitis agreed, adding that the Board is sitting at this meeting with a new set of criteria that will apply to soundfront properties. Vice Chair Murray added that it will also apply to upland properties.

Vice Chair Murray thought that if the Board refined the criteria and added more, he will be comfortable with it. He added that Council may want the Board to do something. Chair Blakaitis stated that Council will have to decide that after they see it because they are not the ones who thought of it, the Board did, and asked for Council's permission to look at it. Vice Chair Murray agreed. He thought the Board should fix the problem. Chair Blakaitis agreed, adding that the Board should refine the list. Member Cofield stated that he is fine with it.

Chair Blakaitis clarified that not being allowed to fill in the sound is a Board of Adjustment consideration. Director Heard stated he is correct. Chair Blakaitis noted that it isn't for the Board to consider. Member Cofield stated that the Board can make it their issue. Chair Blakaitis disagreed, noting that it isn't for the Board to consider at this time. He wanted to clarify that it is not one of the Board's criteria, but is the Board of Adjustment's. He stated that if the Board wanted to make it one of its criteria, it can be done. Member Cofield stated that he is fine with refining the list and adding to it, but wants to do so in such a way that the Board deals with the issue that came before the Board.

Chair Blakaitis asked if there are any more suggestions. He further asked if the work should be completed when a full Board is present. Member Cofield stated that it will not be completed at this meeting. Director Heard stated that the intent is to obtain ideas for an ordinance that the Board can review at its April 12, 2017 meeting. Chair Blakaitis agreed, adding that if a full Board is desired, all of the work does not have to be completed at this meeting. Member Cofield stated that the Board was only making suggestions at this meeting. He didn't feel that the discussion should be repeated at the April meeting. Chair Blakaitis stated that it may have to.

Member Cofield asked Director Heard if he needs further clarity from the Board regarding the discussions at this meeting or if he can draft an ordinance based on tonight's discussion. Director Heard stated that he only has two items that he heard consensus on – (1) adding wording about the consistency of the special exception with the Vision Statement, in addition to the Land Use Plan and, (2) the clarifying that the evaluation of the Land Use Plan is the Town's interpretation of the Plan and may not necessarily be consistent with the Division of Coastal Management's interpretation. He noted that there were several other points of discussion, but he hadn't heard a consensus from the Board on those items.

Chair Blakaitis wondered if something can be added to the effect that the applicant needs to demonstrate that their plan is consistent with the existing requirements of fill in the sound. He added that the applicant cannot do it now, but he wondered if there is a way to bring it out somehow in a statement for use as a criterion. He explained that by doing it this way, the Town is not saying it can't be put there. Director Heard asked how a finding could be made that the applicant meets that criterion. Chair Blakaitis wasn't sure.

Vice Chair Murray reiterated that he felt that the Vision Statement is too vague to be used in making a finding, so he is opposed to adding the suggested language. He added that he is open to it, but isn't sure how to interpret it clearly enough to make a finding. Chair Blakaitis wasn't sure how a finding can be made on the suggested language. Vice Chair Murray understood the impulse of wanting to limit fill in the sound as much as possible. He asked if a mandate can be put in the draft ordinance that the circumstances under which the hardship occurs must be explained as part of the application. He further asked if it is enough to demonstrate that the standards are unreasonable or impractical due to the necessity for fill. He asked if there is a way to strengthen the language or if it is strong enough. He thought the second condition deals with the Board's dislike for fill in the sound. Director Heard stated that the wording of the second condition is consistent with the wording that is used for other types of special exceptions. The special exception is a lower bar, as it is intended to be, than a variance. He added that, by its nature, it should be easier to get approval for a special exception over a variance. He explained that the criteria for a special exception may be different, but they aren't typically as stringent as the requirements for a variance. Chair Blakaitis pointed out that Item 3 basically states what he is trying to say.

Member Cofield stated that he had written some separate wording before re-reading the list. He stated that one suggestion he had on his list is that no alternative remedies are reasonable. He thought Item 3 gets to that point, except that the Board needs to press the issue with regards to Item 3 with applicants. He noted that there was a discussion at the Board level regarding alternatives. He added that, in order for an applicant to demonstrate what is called for in Item 3, they have to say that they looked at everything and there are no alternatives and this is the minimal amount necessary to accommodate what is needed for the project. He stated that it did not happen at the last meeting. Director Heard noted that the ordinance didn't state such. He explained that there have been conversations regarding this issue with the Town Attorney and Town Manager and it is a tricky road to go down. He added that the applicant has a right to have their proposal heard. He stated that the Town is walking down a slippery slope to require the applicant to provide other alternatives. Member Cofield asked how Item 3 is demonstrated by any applicant. He further asked how it can be demonstrated without the applicant looking at other options. He pointed out that if the applicant has not looked at any other options, they

cannot make a statement that it is the best option. Vice Chair Murray stated that they can because it's a proposed project and not the minimum necessary to solve the problem. Member Cofield stated that the language is worded poorly. Vice Chair Murray stated that it is the only way it can be worded. He asked how the negative can be proven. He added that there are a lot of possible ways to resolve any problem. The applicant would ask and the engineer would have to design every possible permutation. Any responsible engineer will tell an applicant when they come before them to discuss an application for a special exception, that they did not do special exceptions because the applicant cannot afford it. He wondered if it is legal. Director Heard noted that there are challenges with implementing this requirement and suggested consultation with the Town Attorney.

Mentioning the special exception application at 1166 Duck Road, Chair Blakaitis stated that the difference between needing eight feet and needing three feet of fill is a structural calculation to prevent the structure from moving. Vice Chair Murray added that it was implied that it was tested technology in the sense that if it was done a certain way, it would work. Chair Blakaitis was doubtful as he isn't sure of where it has been tested. Vice Chair Murray wasn't sure how the Board can ask an applicant to do that.

Council Liaison Burdick stated that Council did not agree on denying the exception – two members wanted to defer it and three wanted to deny it - so it was denied. He stated that Council was hung up on the impact on the neighboring properties and the fact that if Council granted it, it was carte blanche for anyone to do it anywhere in Town and will be an ongoing problem. He stated that it will potentially generate problems for neighboring properties. He noted that it is one of the criteria that is in front of the Board. He stated that Council would have liked a better explanation of the alternatives so that they could make a better decision. He stated that it was in the best interest of the applicant to be able to show what they have come up with as to the best solution to the problem. He added that it will become more reasonable for the Planning Board and Council to be able to make a good judgement. Director Heard thought Item 3 could have been used in this application. He added that Item 3 isn't telling the applicant that they have to come up with a lot of alternatives, but have to show why the proposal is the minimum necessary for the project.

Vice Chair Murray thought the criteria with no changes will get the Board where it needs to be. Chair Blakaitis thought it will give the Board more ammunition. Vice Chair Murray stated that it would have made the Planning Board meeting and Council public hearing go far more smoothly. He thought there is enough in front of the Board. Council Liaison Burdick stated that it would have shortened the public hearing significantly. Chair Blakaitis thought the public hearing would have been shorter if Council had read the Planning Board minutes before they debated the issue. Council Liaison Burdick agreed, adding that he thought the proposed criteria are in the right direction. Chair Blakaitis agreed, adding that it will not require banning anything outright. Council Liaison Burdick agreed, adding that fill in the sound is already banned. He reiterated his point is that this proposal is going in the right direction to help the Board and Council

Chair Blakaitis suggested that Director Heard revise the draft ordinance with what was discussed and bring it back to the next meeting. Director Heard clarified that the Board wishes to include the reference to the Vision Statement. Chair Blakaitis suggested it be included to see how Member Forlano and Member McKeithan feel. Vice Chair Murray stated that if distances into

the sound are going to be discussed, he thought it would be helpful for Director Heard to come up with some current, accurate shoreline determinations to be used as examples. He added that an even better idea is to come up with examples that the Board can visit before the next Planning Board meeting. Member Cofield thought it will be helpful to have examples of what other towns have done regarding the issue. Director Heard stated that special exceptions are something that are relatively unique to Duck on the Outer Banks. Member Cofield asked if any other towns address the issue of not going out into a body of water. Director Heard stated he will check into that issue.

Member Cofield suggested adding hardship to the list. Chair Blakaitis stated that it is already a criterion. Director Heard stated that requiring hardship goes beyond the typical special exception criteria. Member Cofield disagreed, pointing out that it was in another special exception. Director Heard stated that this same issue was discussed at a few meetings, but it is not in any other special exception criteria. Chair Blakaitis explained that the Board considers it, but it is not part of the special exception. Member Cofield pointed out that it was discussed for Wampum Drive. Chair Blakaitis agreed, adding that it was explained to the Board that it is not a criterion. Director Heard agreed, adding that it is a higher standard than “unreasonable and impracticable”, so it is not something typically used in a special exception request. Council Liaison Burdick asked if hardship is used in a variance. Director Heard stated that variances require the Board of Adjustment to find an unnecessary hardship based the rules that are in place.

APPROVAL OF MINUTES

Minutes from the February 8, 2017, Regular Meeting

Vice Chair Murray had a change to Page 11 of the minutes.

Member Cofield moved to approve the February 8, 2017 minutes as amended. Chair Blakaitis seconded.

Motion carried 3-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Summary of Duck Annual Retreat, February 14-15, 2017 and March 1, 2017, Town Council Meeting

Director Heard gave an update on the February 14-15, 2017 Council Retreat and March 1, 2017 meeting to the Board and audience.

Project Updates

Director Heard updated the Board and audience about several Town projects.

BOARD COMMENTS

Member Cofield stated that at the Planning Board meeting where 1166 Duck Road was discussed, when alternatives were discussed, he showed photographs to the engineers and the applicant's consultant showing a solution that the owners of the house three doors away had established to solve their bulkhead problem. He stated that the uncredentialed structural engineer at the meeting felt that it is not an adequate solution to the problem. He noted that it isn't traditional rip rap, but blocks and stone used to reinforce the bulkhead. Vice Chair Murray asked Member Cofield what he meant by referring to the structural engineer as being uncredentialed. Member Cofield stated that it was people that talk of stop wave action. Chair Blakaitis pointed out that the engineer has his credentials as a licensed engineer. Member Cofield disagreed. Chair Blakaitis stated that at least one of the engineers is credentialed. Vice Chair Murray agreed. Member Cofield disagreed, adding that he isn't a structural engineer. Vice Chair Murray disagreed, noting that he is. Member Cofield stated that he stands corrected.

Member Cofield stated that, a few weeks ago, the house at 1172 Duck Road had a concrete company repairing the swimming pool. He stated that he talked to the contractor and asked if the rip rap had solved the problem, to which the contractor stated that it had. He added that the owners have a bulkhead on the property and are so satisfied with the results of the structural support for the bulkhead that they were spending money to repair the pool.

Member Cofield stated that the reason for raising the issue then and discussing it now is that there are solutions other than the one proposed that do not require going 20 feet into the sound. He stated that in the Board's discussion on how to move forward, he wants the Board to look at a concept of other solutions or alternatives that do not go out into the sound like the applicant at 1166 Duck Road had proposed. Chair Blakaitis stated that he doesn't disagree but would say that the Board cannot venture into the area where it tells a contractor or engineer what they have to do. He added that the contractor will have to tell the Board why it doesn't work.

Vice Chair Murray asked how a pool contractor, who is being paid to repair a pool, is a more reliable source of information than an engineer who is paid only for his designing. Member Cofield stated that his comment is that it worked on the property at 1172 Duck Road and the homeowner is so satisfied that they are spending money to repair the pool. Chair Blakaitis asked what is happening to the property where it worked. Member Cofield stated it stabilized the bulkhead. Chair Blakaitis asked if there was any house or pool moving. Member Cofield stated that he isn't aware of either one as he only discussed the pool with the contractor. Chair Blakaitis thought the pool is the only concern of the homeowner. Vice Chair Murray stated that he found it hard to believe that Board members find anyone who is being paid to reinvest in a pool to say that it will probably fail in a few years. Member Cofield stated that the pool contractor was discussing with him the decision of the homeowner and that the homeowner is satisfied and reinvesting in the pool.

Council Liaison Burdick stated that at the end of Council's March 1, 2017 meeting, he had brought up and discussed that, with the resiliency effort, a dune is being put in that was 20 feet by 20 feet. Director Heard stated that the dune will be at an elevation of 20 feet and 20 feet in width. Council Liaison Burdick stated that compared to where the dune is presently, at least for

the area of Buffell Head Road section, there aren't many places that are at 20 feet with the dune. He added that the Town will end up with a lot of people thinking that with the dune coming in, they can pull the existing stairs or let them be buried and extend the boardwalk to put the stairs down. He noted that if one looked at what is presently there, a flyover must be built over the existing dune. He stated that his concern is that all of the property owners and homeowner associations understand what will be happening as there are only so many contractors that can build stairs at the same time. He noted that it will be critical that the Town be able to maintain accessways for everyone and not just oceanfront owners. He added that the Town does not want people running up and down the new dunes. Director Heard pointed out that Town Manager Chris Layton had sent out an email to all of the Council members. He explained that an analysis had been completed based on the 2015 dune profiles, which are the most recent data, and out of all of the cross sections in the project area, nine of the ten cross sections are already at 20 feet elevation or above. He added that there was only one property that is at 17-18 feet, just north of the North Snow Geese subdivision.

Vice Chair Murray asked if the properties are 20 feet above mean sea level. Director Heard stated that the measure is to the NAVD, which is similar but not exactly the same as sea level. Council Liaison Burdick stated that if it is from the base of the dune, it will not make it. Director Heard and Vice Chair Murray stated that it is not. Vice Chair Murray added that most oceanfront lots are at an elevation of approximately 14-16 feet. Council Liaison Burdick agreed. Director Heard stated that they will not be building a 20-foot-high dune, but a dune to a height of 20 feet in elevation. Council Liaison Burdick asked where the 20-foot dune is in relation to the properties in the project area. Director Heard stated that it will not increase the height of the dune throughout most of the project area. Council Liaison Burdick thought the information is good as it is a concern. Director Heard stated that the new sand will be tied into the east side of the dune. Council Liaison Burdick stated that there will be some issues on Buffell Head Road that may be very interesting. Director Heard stated that the sand may still cover stairs as it goes out the 20 feet to the east. Council Liaison Burdick agreed, adding that it will be covering everything. He noted that there is also the problem of the house that lost its pool as it has a pool house sitting on pilings. He wasn't sure what will happen when it gets filled in. He stated that there are some interesting challenges. He wanted to make sure that everyone is prepared because the Town doesn't want people running on the new dunes.

ADJOURNMENT

Member Cofield moved to adjourn the meeting. Vice Chair Murray seconded.

Motion carried 3-0.

The time was 8:50 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman