

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
April 12, 2017**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, April 12, 2017.

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

Absent: None.

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 and Frieda Berry.

Others Absent: None.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for April 12, 2017 at 6:32 p.m.

PUBLIC COMMENTS

None.

OLD BUSINESS

None.

NEW BUSINESS

Conditional Use Permit 17-001: Application by Andrew Meredith and Sugar Berry Sweets, LLC for a Conditional Use Permit to Establish a Coffeehouse/Sweet Shop (Eating Establishment) in the Recently Constructed Building at 1448 Duck Road

Director Heard stated that the application before the Planning Board is for a conditional use permit to establish an eating establishment in the recently constructed building at 1448 Duck Road. He stated that North Duck Watersports had constructed a new, mixed use building in 2016 with 1,200 square feet of retail space on the first floor and a 600-square foot apartment on the second floor. He noted that the area for the current conditional use permit is for the first-floor retail area.

Director Heard stated that the reason the permit is before the Board is that the Town's ordinance defines an eating establishment as "any establishment that provides as a principal use the sale of

food, frozen desserts or beverages in a ready form for consumption state either within the eating establishment or off-premises.” He noted that the full definition can be found in the staff report.

Director Heard stated that the property is zoned Neighborhood Commercial, which is a little different than Village Commercial, which has quite a few eating establishments. He noted that while the two districts are relatively similar, the Neighborhood Commercial does not have the same flexibility as the Village Commercial option. He stated that the property to the south contains a residence and the property to the north contains an office building, both of which are also zoned Neighborhood Commercial.

Director Heard stated the property presently contains all of the facilities associated with North Duck Watersports. He stated that the approval for the new building took place in April 2014 and that approval also included improvements to parking area, septic system, lighting, landscaping and storm water retention serving the new retail building. He noted that all of these improvements were made as per the approved plans and the owners received a Certificate of Occupancy for the building.

Director Heard stated that the proposed project will not change the site in any way as the applicant is not proposing any changes to the building or any aspect of the site, but simply looking to establish a particular use that requires this type of special permit. He added that because of that, there are not impacts on many development standards such as lot coverage, building setbacks, access to the property, number of parking spaces, stormwater management, and wastewater disposal. He pointed out that all of these improvements exist on the site and are in conformance with the Town’s standards. The proposed use will not change any of the site requirements.

Director Heard stated that, regarding the parking, with a carryout eating establishment with no seating, the parking requirements for the use default to five parking spaces, which is the minimum for any eating establishment regardless of its size. He added that the retail parking was calculated at one space per 200 square feet. With a 1,200-square foot space, it works out to six parking spaces, which are currently in place. He stated that the applicant provided 24 parking spaces on site and with the proposed change in use, they are only be required to have 23 spaces.

Director Heard stated that staff was recommending approval of the conditional use permit with the following conditions:

1. The applicant must obtain approval from the Dare County Environmental Health Department that the existing septic system can accommodate or be upgraded to accommodate the eating establishment prior to the issuance of a building permit or occupancy of the space.
2. Any new signs or changes to existing signs must be reviewed and approved under a separate permit by the Community Development Department.
3. The applicant must obtain a building permit for any necessary interior renovations. All renovations must comply with the NC Building Code and NC Fire Code.

4. This conditional use permit will expire in 12 months from the date of approval if the approved use has not been established by that date.

Chair Blakaitis noted that the staff analysis points to a requirement for a loading zone. He added that it was the only additional requirement other than the conditions. Director Heard stated that it isn't required as the Planning Board and Council did not see a need to incorporate it into this site during the 2014 approval. He added that the applicant is not changing the need for a loading zone. Chair Blakaitis noted the staff report states the site contains a 12' x 55' loading area along the northern side. Director Heard stated that the staff report in error as the reference to the loading zone appears to relate to a prior application for The Blue Point restaurant. He will correct this error. He reiterated that there wasn't a loading zone required when the site was approved in 2014.

Member Cofield asked why the proposed use is classified as an eating establishment. Director Heard stated that it falls under the definition of an eating establishment in the Town's zoning ordinance. Member Cofield pointed out that there is no eating on the premises. He asked why it is called an eating establishment. Director Heard stated that is how the Town of Duck defines the use. Member Cofield didn't think it fit into the definition of an eating establishment when a person cannot eat in the establishment. Attorney Ben Gallop was recognized to speak. Attorney Gallop pointed out that the definition includes carry-out establishments where food, frozen desserts or beverages are served primarily in disposable containers and packaged in containers that could be taken off the premises. He thought the proposed use falls under the Town's definition of an eating establishment.

Member McKeithan thought that any time there is food consumed or prepared, it went back to the septic tank issue, which was why it is classified as an eating establishment.

Member Forlano asked if there have been any complaints over the last two years of operation from the Sound Sea Village subdivision related to parking on the Sound Sea Village roads. Director Heard stated that there has not been a use in this space, adding that Sugar Berry Sweets will be the initial tenant. Member Forlano stated that it had been used for retail shops. Director Heard disagreed. He added that they received approval for the building, but never had any tenants. Member Forlano asked if the new building had been operated as a watersports area. Director Heard stated that to his knowledge it had not. Chair Blakaitis stated that it was never used. He thought Member Forlano was asking about complaints about parking for the watersports business. Director Heard stated that staff receives an occasional complaint. He added that the property across Duck Road is owned by the owner of North Duck Watersports and there has been an occasional complaint about storing equipment on that property. Member Forlano asked if there have been any complaints from the Sound Sea Village subdivision regarding people parking their vehicles on the subdivision streets and renting equipment from North Duck Watersports. Director Heard stated that he had not fielded any complaints to that effect.

Member McKeithan moved to recommend approval of Conditional Use Permit 17-001 with the conditions presented by Town staff. Chair Blakaitis seconded.

Motion carried 5-0.

Text Amendment Ordinance 17-04: Proposal to Amend Section 156.130 of the Zoning Ordinance to Bring the Town's Sign Standards into Compliance with the Sign Content Restrictions Identified during the Recent U.S. Supreme Court Decision in *Reed v. Town of Gilbert*

Chair Blakaitis noted that there were three things that were not thoroughly explored at the last meeting and more research was needed by Director Heard and Attorney Gallop. He asked Director Heard to reiterate what they were. He added that the Board looked at the original material and liked it, but no decisions were made because there were a few issues to be looked at more thoroughly.

Director Heard stated that one of the items was finding a way to allow things like seasonal displays and decorations, religious symbols and historical memorial markers. He noted that those types of things are classified as signs in the Town's ordinance, but are not commercial signs. He stated that Attorney Gallop did some good background research and has added some significant changes to the definition of the term "Signs" to address this issue. He stated that the second item was the Planning Board's conversation regarding a limitation on the number of residential signs permitted on a property. He added that the Board set standards for the size of residential signs and whether they can be wall-mounted or free-standing. He stated that there was some conversation about whether or not the Town should limit the overall number of those type of signs on a residential property. He noted that he and Attorney Gallop reviewed this issue and are proposing a limit of three residential signs in the ordinance. He explained that the rationale for that is that the Town presently allows two real estate signs on a property if it is a corner property. He stated that this standard will also allow an individual to put one other type of sign if they have the need to do so.

Director Heard stated that he cannot recall a specific third item. Chair Blakaitis stated that the Board can't recall it either. Attorney Gallop thought the third item was the additional sign provisions located elsewhere throughout the ordinance and Town Code that mentioned signs that were added to it. Director Heard agreed.

Director Heard stated that he tried to color code the changes for the Board's review. He explained that the original changes that the Board looked at on March 8, 2017 are highlighted in red in the draft ordinance. He added that the changes that have been added subsequently are listed in blue in the draft ordinance. He stated the staff report also outlines the new changes for the Board.

Director Heard stated that, in looking at the ordinance, the changes to the definition of sign were done to update the definition and to address the concerns that the Board expressed regarding allowing seasonal displays, decorations, religious or cultural symbols, gravestones, and historical memorial plaques. He added that the Board had expressed an interest in wanting to allow those things. In the amended definition, these items are no longer considered signs and will be allowed. He stated that Council Liaison Burdick had brought up a question as it related to the definitions for ground mounted signs and pylon signs regarding overlap and competing standards. He stated that after reviewing the ordinance, it became apparent that these definitions are not needed as they fall under the definition and standards for free-standing signs. He noted

that both of the definitions are removed from the draft ordinance, which removes the conflicts. Council Liaison Burdick noted that portable signs are still in the ordinance. He added that there was a definition and below it was “sign, sandwich” which is not needed since it is already defined under portable signs. Director Heard pointed out that it wasn’t specifically looked at before, but staff can look at it if the Board wishes.

Member Cofield asked what a portable sign is. Director Heard stated that it is a sign not permanently attached to the ground that can be moved from one location to another. Member Cofield pointed out that they are also temporary signs. Director Heard stated that they aren’t necessarily the same thing. He explained that a temporary sign has to do with the length of time a sign is displayed, whether permanent or temporary, and it can be a permanent structure, but only allowed for a certain period of time. He added that portable signs can be readily picked up and moved. Member Cofield asked if political signs are portable signs. Director Heard stated that they are temporary signs.

Vice Chair Murray noted that the definition for “Sign, Electronic Message Board” remained in the draft ordinance but “Sign, Time and Temperature” was stricken. He asked if it was stricken because the electronic message board covered time and temperature. Director Heard stated that it was removed, because it was a content-based requirement. Vice Chair Murray noted that on Page 9 of the draft ordinance, it reads: “No flashing sign shall be erected which flashes, except for time and temperature signs as defined in this chapter.” He thought it should be stricken. Chair Blakaitis noted that “which flashes” will be stricken. Vice Chair Murray stated that he isn’t sure if the Board should change the language to: “...except for electronic message board signs...” He wondered what is trying to be preserved. Director Heard didn’t think the Board is trying to preserve it.

Director Heard noted that on Page 9 of the draft ordinance, there are a variety of signs listed in Subsections 11 through 15 under Prohibited Signs. He added that there aren’t any changes to the items in between. He stated that they are types of signs that were previously prohibited elsewhere in the zoning ordinance so it made sense to consolidate them in this section. Council Liaison Burdick asked if the 80 feet on line 9 was something that the Town is enforcing. He didn’t think the Town is adhering to it. He added that with all of the shopping center signs in Town, he guessed there are several that aren’t 80 feet from the road centerline. Chair Blakaitis pointed out that this section of the ordinance only references signs on vehicles. Council Liaison Burdick clarified that “Town of Duck” is a sign on the water tower and, per the draft ordinance, it is prohibited. Chair Blakaitis asked why it is prohibited. Council Liaison Burdick noted the prohibition on “...any form of signage on telecommunication towers...” Chair Blakaitis stated that it became a telecommunication tower after the sign, which is why it exists. Director Heard noted that government signs are exempt so the sign is permitted anyway.

Vice Chair Murray asked about subsection 13 – signs supported in whole or in part by water, air or gas in the Ocean and Sound Overlay District. Director Heard stated that he had to deal with this type of sign when he worked for the Town of Kitty Hawk. He explained that there was an individual that decided to locate a float out in the sound with a billboard visible to drivers on the Wright Memorial Bridge. He added that ordinance is intended not to permit that type of signage in the Ocean and Sound Overlay District. He noted that these aren’t new requirements, but were moved from another section of the ordinance to this section. Vice Chair Murray wondered if

there is an issue with the airplanes that tow banners. Chair Blakaitis stated that the Town does not own the air space. Vice Chair Murray agreed. Director Heard stated that if the Board wishes to further clarify this subsection, it can be done.

Member Cofield asked why signs on the water are objectionable to the Board. Vice Chair Murray replied that it was obviously objectionable to a prior Board, then asked how much of the air space and water space the Town could claim. Director Heard stated that the Ocean & Sound Overlay district extends 1,000 feet out into the sound. Member Cofield asked again why it is objectionable to the Board. Director Heard pointed out that the Sound is a public space and not a privately-owned space so there may be some objection to using a public space for private advertising purposes. He added that some of the things the Town has in general related to signs are intended to reduce clutter and unsightliness. These types of signs may be something that people find unsightly. Member Cofield asked if the Board can approve someone having a sign out in the ocean. Director Heard stated that it isn't presently permitted, so such an application would not be approved. Member Cofield stated that he is at a loss as to why the Board had an objection to them. Vice Chair Murray thought that the examples that Director Heard gave are good reasons as to why people find it objectionable. Chair Blakaitis stated that he remembers the Board discussing the issue at prior meetings before Member Cofield was on the Board.

Member Forlano thought it is unsightly to have signage in the sound or water, specifically in the Ocean and Sound Overlay District. Vice Chair Murray agreed. He didn't think the Board can prevent it if the sign is outside of 1,000 foot boundary. Director Heard stated that these types of signs are also classified as off premise signs, which the Town does not permit. Council Liaison Burdick noted that it keeps non-Duck businesses from littering the sound with their signage.

Member Cofield asked about the signage on lifeguard stands. He wasn't sure if the lifeguard stands had signs that told people what they can't do. He added that in his subdivision, the walkway to the ocean has a sign on a post telling people what they can and cannot do. He asked if these signs are exempt because it is considered a government sign. Director Heard stated that this issue is addressed on Page 8 of the draft ordinance under Exemptions. Member Cofield noted that it covers the sign at the beach walkway. He asked about the signs on the lifeguard stands. Director Heard stated that they are government signs as the lifeguards are a function and contracted service of the Town government.

Vice Chair Murray noted that Line 42 under Definitions states: "...signs shall include all structural members and sign structures..." He noted that the Town limits the size of signs based on square footage. Attorney Gallop thought his concern is covered on Page 3 by the definition of Sign Area. Vice Chair Murray asked if the square footage on the sign area is maxed out, then any text or writing on the posts or sign structure is prohibited. Attorney Gallop stated that it should be. Permit Coordinator Cross confirmed that it is calculated that way. Vice Chair Murray thought it was the intent, but wanted to make sure he understood the definition.

Council Liaison Burdick pointed out that there is nothing in the draft ordinance regarding having flags mounted so that they are safe for pedestrians. He stated that there is a business in Town that has flags that he has walked into because the flags are mounted at the wrong height. He suggested that the Board find some safety phrase to include in the ordinance. Attorney Gallop suggested including a prohibition on signs that obstruct the ability to walk down a public area.

Council Liaison Burdick stated that it isn't just a public area, it is on someone's property. Chair Blakaitis stated that if it is on private property, he doesn't think anything can be done. Attorney Gallop stated that Director Heard can come up with some wording to address this concern. Council Liaison Burdick stated that he makes the suggestion only because he has run into the flag while walking. He doesn't think it will be a big issue for the property owners once it is brought to their attention. Director Heard stated that this issue is addressed under the standards for flags on Page 14 of the ordinance, but not specifically addressed for other types of signs. Council Liaison Burdick suggested setting a minimum height.

Member Cofield asked why setting a height limitation matters when the wording in the ordinance could simply read: "...should be safe for pedestrian traffic..." Member Cofield stated that he is suggesting it can be a safety comment as opposed to a height comment. Director Heard asked where it should be inserted. Chair Blakaitis stated that it could be on the same line. He added that Director Heard can add something that will combine those two things after the word "repair" so that it reads: "...shall be maintained in good repair and..." Member Cofield reiterated that he likes it as a safety comment whether it is a board sign or a flag. Director Heard pointed out that it will encompass all types of signs, not just flags. Chair Blakaitis thought that makes sense.

Member Forlano stated that he and Director Heard had discussed several months ago before considering the sign ordinance, the issue of LED letterboards. He stated that there is technology today has where someone can change the letters on a letterboard with an app. He added that Director Heard had indicated that the Town of Kitty Hawk addressed the issue several years ago. The problem Kitty Hawk had was related to moving or flashing letterboards. He asked if the Board will consider developing something that states that individuals are permitted to use the modern technology of LED letterboards, but prohibit the movement or flashing of the letters. Council Liaison Burdick stated it is already in the ordinance. Member Forlano pointed out that limitations on flashing signs is in the ordinance, but Director Heard had indicated that LED letterboard are prohibited. Chair Blakaitis thought the Board had discussed the issue and prohibited LED letterboards in Town because they are so bright and inconsistent with the night sky ordinance. Member Forlano stated that he did not remember that because the Town allows backlit signs. Chair Blakaitis agreed, adding that LED signs are not permitted. Director Heard noted that on Page 9 of the draft ordinance, it states that electronic message board signs are prohibited.

Director Heard noted that on Page 11, it lists the total number of temporary residential signs on a property. He added that the suggestion was made that it be limited to three signs. Member Cofield stated that it was his opinion that these types of signs should be unlimited in number for residential properties. Chair Blakaitis thought there should be some restriction on the number of signs. Vice Chair Murray thought three signs may be a little limiting. Chair Blakaitis disagreed.

Member Cofield pointed out that no rental realty signs are permitted in yards in the Town. He added that in other towns, they are permitted. He asked if it is not allowed in Duck. Director Heard stated that prohibition will change with the draft ordinance. He stated that the Town cannot dictate what free-standing signs say. Member Cofield asked if the Town presently prohibits them. Director Heard stated that they are presently prohibited.

Council Liaison Burdick pointed out that on Page 10, line 17(e) has the following wording: “A tally of all building...” He noted that the word “tally” should be changed to “listing”.

Council Liaison Burdick noted that Page 13, lines 5 and 6 had the sentence repeated twice. Director Heard stated that this is part of the original ordinance, but he can strike the second sentence and add the word “and” to the first line to resolve the concern.

Council Liaison Burdick pointed out that on Page 13, line 29 had that signs can be no closer than 50 feet to any street. He noted that in another part of the ordinance it states that it was 80 feet to the center line of the road. He stated that no one knows where the side of the road is. Director Heard stated that these standards only relate to directional signs in group developments. He added that it is not referring to the larger, main signs but only to directional signs. Council Liaison Burdick argued that the way it is written, it applies to all signs in a group development and not just to one sign. Director Heard stated that it does not apply to all, but applies to an directional sign that can be in addition to the main sign.

Chair Blakaitis noted that the amortization table was stricken. He asked if there will not be amortization for the new regulations moving forward. Attorney Gallop stated that nonconformities can be handled in two ways – deal with them when they change in the future or do it through amortization. He noted that all nonconforming signs dealt with under the amortization clause should have been removed years ago.

Vice Chair Murray moved to recommend to Town Council the approval of the changes to Ordinance 17-04 with the amendments that were noted at the Board’s meeting. Member McKeithan seconded.

Motion carried 5-0.

Text Amendment Ordinance 17-03: Proposal to Amend the Zoning Ordinance with the Addition of a New Subsection 156.128(C) Outlining Standards for the Consideration and Approval of Special Exceptions for Fill Over 36 Inches in Depth

Director Heard stated that there were a handful of items that the Board had conversation about at their March 8, 2017 meeting. He noted that there were only two changes requested of him in revising the draft ordinance. He stated that other discussion points are highlighted in the staff report in case the Board wants to consider them further.

Director Heard reviewed the comments from the last meeting:

1. Adding a statement requiring compliance with the Town’s adopted Vision. It was discussed that the Vision Statement is, by its nature, a list of vague concepts. Director Heard noted that this wording was added to Subsection (C)(5) of the revised draft ordinance.
2. The Town will conduct on its own, separate analysis for consistency with the Duck CAMA Land Use Plan. Its finding may differ from the interpretation made by the

DCDCM during its permitting process. Director Heard noted that this wording was added in Subsection (C)(5) of the revised draft ordinance.

Council Liaison Burdick did not think that the Town can interpret things less stringently than the State. He thought the only thing the Town can do was to be more stringent. Director Heard stated that for a regulation, the Town can only be more stringent, but for interpreting the Land Use Plan, the Town can interpret it either way.

3. Consider separate standards for special exceptions for soundfront fill.
4. Completely denying the opportunity for special exceptions for soundfront fill as it is generally not an activity supported by the Town. It was countered that property owners should have a right to ask. There may be situations when it is warranted. It was also noted that other environmental agencies will permit soundfront fill.
5. Limiting the amount/distance of soundfront fill.
6. Requiring an applicant to provide an analysis of alternative solutions. It was noted that this could be tricky and the Town Attorney should be consulted if pursuing this option.

Vice Chair Murray thought Director Heard captured the Board's comments very well. Chair Blakaitis agreed. He stated that he was sorry that the Board cannot add something in about the soundfront fill, but did understand the comments. He noted that the Board still has the right to consider soundfront fill as a negative if they choose. Director Heard stated that the comments he had in the staff report were not meant to suggest solution in particular. He is simply noting that the Board did not come to any conclusions on it as to what will be an appropriate standard. Chair Blakaitis noted that the Board discussed it at length and there are pros and cons.

Vice Chair Murray stated that he is looking at it from the perspective that what is in front of the Board will keep them from going through what they went through with the last applicant and in the future. If the Board wants to look at fill in a more comprehensive way, it can be done in the future. He added that this gives the Board some criteria to move forward. He didn't feel like the Board is creating any additional requirements that haven't been thoroughly thought through.

Chair Blakaitis asked the Board how they feel about the draft ordinance as written. Based on the conversations at the last meeting, it will put the Board in a better position. He added that if the draft ordinance is in effect and the soundfront fill issue comes up, where will the Board get its teeth. Vice Chair Murray stated that Conditions 1 through 6 are more defined but still open-ended enough that some interpretation can be made. Chair Blakaitis added that there will be something to discuss. Vice Chair Murray agreed. He added that he felt that this will give the Board something to hang the conversation on that makes more sense than what the Board had before.

Member Cofield stated that the reason the Board is considering these changes is due to a substantial degree of uncomfortableness from Council's standpoint regarding the issue of soundfront properties. He added that the Board is looking at trying to fit an existing standard

dealing with land that isn't waterfront and putting conditions and standards upon it to waterfront properties. He stated that it came down several different ways as excessive. He noted that the bottom line is that if this property were not waterfront, Council would not have had a problem approving the additional fill. He stated that the reason it was an issue is because it was soundfront property. He thought the Board should separately address soundfront/waterfront property. He stated that the argument was made at the last meeting could be incorporated into this draft ordinance and he doesn't see it in the draft ordinance. He noted that if it was adequately incorporated, then he would not have an objection. He stated that he doesn't think it is adequately addressed in the draft ordinance as there is no mention of waterfront, soundfront or oceanfront properties in the revisions.

Member Cofield stated that Director Heard's comment about the Vision is not in the draft ordinance. Director Heard pointed out that it is in Subsection 5. He added that both changes from the previous meeting are in Subsection 5 of the ordinance. Member Cofield stated that he is fine with the ordinance as drafted with respect to non-waterfront properties, but doesn't think waterfront/soundfront properties are adequately addressed, which was the whole reason it came back to the Board. He thought the criteria for looking at soundfront properties should be different than just looking at land that isn't soundfront property.

Vice Chair Murray asked if Subsection 4 cover Member Cofield's concerns. Member Cofield didn't think it would as it was in the previous ordinance. Director Heard clarified that none of these standards were in the previous ordinance. The Board is creating something entirely new. Member Cofield thought the Board can come up with some other provisions that specifically apply only to soundfront or waterfront properties. Council Liaison Burdick thought it covered the three things that Council had issues with – the impact on adjacent properties being spelled out; the minimum necessary to accomplish the proposed project; and consistency with the CAMA Land Use Plan and Vision. He thought they are all covered in the draft ordinance. He noted that it covered what Council needs unless Member Cofield had a specific recommendation on what additional items are needed to be in the ordinance to cover soundfront properties. He stated that those were the issues that Council dealt with.

Member Cofield stated that Council Liaison Burdick is correct. He noted that the third criteria in the ordinance read as follows: "The amount of fill proposed is the minimum necessary to accommodate the proposed project." He stated that it wasn't discussed that way during review of the special exception application, but was discussed in terms of alternatives. He stated that it is covered in the draft ordinance and may work. He felt that the Board is dancing around the real issue and he doesn't see any good reason to do so. He thought it should be called what it is and waterfront property is different from property away from the water. He saw no objection to having an ordinance that specifically deals with waterfront property.

Vice Chair Murray stated that his objection at the last meeting and still maintains that waterfront properties are traditionally permitted to be bulkheaded and bulkhead repairs traditionally are permitted, which necessitates fill on the waterfront property. He felt that these open-ended criteria give the Board and Council the opportunity to protect waterfront property when it's necessary, but don't codify in the ordinance something that will make routine repairs to bulkheads cumbersome for the Town by requiring a special exception each time material is

hauled in to shore up the back of the bulkhead that's built six to twelve inches in front of the other bulkhead.

Member Cofield disagreed with Vice Chair Murray's comment that bulkheads, by necessity, require fill. He added that they clearly do not. He explained that someone can repair a bulkhead without filling. Vice Chair Murray stated that, having experience in repairing bulkheads, by the Town's definition of fill, which was the cutting, filling or moving of material, it cannot be done. Member Cofield disagreed and added that he dealt with a lot of marina properties that had installed bulkheads. Vice Chair Murray thought Member Cofield is thinking of fill in a more practical definition while he is thinking of the Town's definition. He noted that it doesn't mean that someone is trucking in fill, it just means changing an elevation by cutting or disturbing sand.

Council Liaison Burdick asked what the definition is. Director Heard stated that Vice Chair Murray explanation was accurate. He didn't think the definition is the debate between Vice Chair Murry and Member Cofield. He noted that there is some amount of backfill that must be completed behind a bulkhead for it to perform like it's supposed to. Member Cofield disagreed. He stated that one can fill forward of a bulkhead. He asked if that is considered fill from the Town's definition. He noted that Vice Chair Murray had stated so. He explained that someone can bring a bulkhead back one to three feet. Vice Chair Murray asked how a bulkhead can be brought back with an existing bulkhead already in place. Member Cofield stated that the existing bulkhead can be taken out and have the soil brought back. Chair Blakaitis asked why anyone would want to do it that way. Member Cofield stated that he is just pointing out that it has been done, although it may not have been done in Duck.

Chair Blakaitis noted that bulkheading like Member Cofield explained is not typically done in Duck. Member Cofield disagreed. Chair Blakaitis explained that when a bulkhead is built, it must be put in an area where there is no sand and backfill it. It is always in front of where it needs to go. He added that what is put in front of it is fill. Member Cofield stated that it is on the land side and not the water side. Chair Blakaitis asked if Member Cofield had moved bulkheads back. Member Cofield stated that in jurisdictions that do not allow someone to fill out in the water, there aren't any other options. Chair Blakaitis didn't understand. Member Cofield explained that if a jurisdiction does not allow someone to go out in the water, there is no option but to bring the edge of the property back with the new bulkhead. Chair Blakaitis asked what jurisdiction does not allow someone to move it forward a few feet. Member Cofield stated that there are a lot of jurisdictions, such as every jurisdiction in Cape Cod, Massachusetts. Chair Blakaitis asked about the Town of Duck or anywhere on the Outer Banks. Member Cofield stated that he doesn't know and added that he had prefaced his comments with the fact that he hasn't done this type of work in Duck or the Outer Banks. His point is that someone can add or repair a bulkhead without back filling.

Chair Blakaitis agreed with Member Cofield that in reading the ordinance, there is nothing specific about soundfronts. He added that the Board had a discussion at their March 8, 2017 meeting regarding the possibility of requiring alternate solutions to be submitted. It was discussed that this may be complicated and the Town Attorney would have to be consulted if the Board pursued that. He stated that the Town cannot beat people up regarding alternate solutions, except to ask what they are. He added that requiring a more thorough analysis of alternate solutions could get the Board into trouble. He stated that the Board discussed limiting the

amount and distance of soundfront fill and Item 4 completely denying an opportunity for soundfront fill. He believed that Vice Chair Murray had commented that the Town can always deny it, but doesn't have to specify it in the ordinance. He stated that the draft ordinance does give the Board some ammunition to deny it and make it more restrictive even if CAMA approved the Land Use Plan as part of its permit. From that standpoint, he thought the draft ordinance is fine. He isn't sure what to put in it regarding soundfront properties.

Member Cofield stated that Provision #3 in the draft ordinance stated: "The amount of fill proposed is the minimum necessary to accommodate the proposed project." He asked how the determination will be made. Chair Blakaitis stated that he doesn't know and cannot answer the question. Vice Chair Murray stated that if the applicant is furnished with the ordinance, they need to know it is a requirement going in and the applicant will have to show that. Member Cofield asked if this is part of the ordinance that an applicant has to meet, what questions will be asked if the Board is uncomfortable with asking about alternatives. Chair Blakaitis disagreed, adding that the Board can ask about alternatives, but the Board cannot be too specific about what it wants.

Vice Chair Murray noted that the function of a bulkhead is dependent on the tieback structure. He added that he would ask the engineer to show the calculations made for the amount of fill necessary. He stated that the engineer calculates the force on the wall and the fill that is holding the tieback in the ground will have a mass. He added that any engineer will complete these calculations and that will be how the fill volume is determined. He stated that he would ask to see the calculation. He wasn't sure he would understand it so it would be possible that the Board may have to consult with the Town's engineer. He thought if the applicant is told that they needed to prove things, it is an objective standard.

Chair Blakaitis noted that the Board is discussing fill in excess of 36 inches, which is in the ordinance. He added that the Board had the right to practically deny it every time it comes up. He stated that if the Board thought the minimum required amount of fill is too much, it can state that the proposed fill will negatively impact the adjacent structures, just like Council did. Member Cofield stated that was the vote of two of the five Council members. He added that the two members that voted were in the minority because it negatively impacted the adjacent property owner. He stated that the prevailing vote of three votes was to reject the application. Council Liaison Burdick pointed out that the only difference in the votes was whether Council was going to deny the application or postpone it. He added that there was no question on the Council that it would not be approved.

Member Cofield stated that there was a lot of discussion at the Council meeting about alternatives and the view was that no alternatives were presented or discussed. He stated that it was the issue he had brought up in the Board's discussion and wasn't sure if the Board felt comfortable asking about alternatives. He isn't sure that Council will be comfortable with it. Vice Chair Murray pointed out that it was a proposed project and only the minimum fill was necessary for the project the applicant was proposing. He added that an applicant does not come before the Board and ask for a special exception and design something to solve the problem without the special exception. He stated that the engineer designs one thing and it's on him to prove that it is a good design. Member Cofield noted that that was what happened two months ago. He added that what didn't happen was presentation and discussion on whether there is an

alternative that does not require filling in the sound or more than three feet of fill. Vice Chair Murray stated that the applicant had to make another application. Member Cofield agreed. He thought that waterfront property needed to be addressed differently and separately because there is a concern, which was expressed in several different ways at the Council meeting.

Member Cofield thought the distinction that Vice Chair Murray made was important. He stated that to do what the applicant was proposing, that it is the minimum required, was what the applicant's engineer had put in front of the Board – that it was the minimum amount of fill required to do what is proposed. He added that it does not say that it is the minimum amount of fill needed to repair the bulkhead, which is the larger issue. Chair Blakaitis asked what the Board could put in the ordinance to make it soundfront-specific.

Vice Chair Murray noted that filling of the depression on an upland lot can also have consequences for neighboring properties. He added that this issue came before the Board and Council because Twiddy and Company wanted to do that and Bob Evans was concerned that the effect of filling the sand and doming the water table would cause his property to flood. He noted that it was ruled by the Town Engineer that it wasn't a significant enough amount of fill to do that. Chair Blakaitis agreed. Vice Chair Murray stated that these were finite facts, but during Hurricane Matthew, the Evans property did flood even though it never flooded before. His point is that he realized that it is Member Cofield's opinion that it doesn't matter on an upland lot and is more important on a soundfront lot. He added that it is Member Cofield's opinion and gave the Board a motivation to discuss it, which he respected. He stated that he feels responsible to continue pointing out that a blanket prohibition of fill on the soundfront does not seem acceptable to him because fill, by the Town's definition, is required for many routine activities on the soundfront. He stated that, short of a blanket ban, he hasn't heard a single suggestion of how Member Cofield would deal with these soundfront fill issues. He asked what Member Cofield wants to see protected on the soundfront.

Member Cofield stated that he hasn't thought about what he wants to see protected because he thought that if the Board addresses it specifically as waterfront property, then the Board can collectively do that. Director Heard can be charged with considering it the same way he addressed the other issues. He stated that he has only looked at what is in front of the Board. He stated that when he discussed filling in a depressed area, he wasn't talking about doming but making it flat land. Vice Chair Murray pointed out that it wasn't a depressed area on the property in question but that the adjacent Evans property is lower. He added that there are so many circumstances that it is difficult to write every one of them into the draft ordinance. He stated that he isn't objecting to revisiting the issue in the future if Council feels the proposal isn't sufficient. He stated that all he is stating is that the Board has a draft ordinance before them that can be passed that Council feels would solve some of their problems. He feels that it will give the Board a framework to work on for the next application that comes before the Board. He noted that he is not ruling out that the Board may eventually do something more detailed.

Member Cofield asked if the Board has to do something more specific with waterfront property, what can be added. Vice Chair Murray thought #3 and #4 deal with it in the sense that fill always has a perceived negative impact on a neighbor. He thought #4 will be extremely difficult to meet in the eyes of the current Council and Planning Board. He wasn't sure why the Board needed to add more requirements that are site specific to waterfront properties.

Council Liaison Burdick thought the next evolution will most likely be banning any fill on the sound. Member McKeithan noted that Currituck County has done that. Director Heard noted that the Town already bans fill in the sound, but every owner has the right to ask for a variance or special exception for fill. Chair Blakaitis stated that if the point is to make it sound-specific, that would be the area that the Board needed to discuss. He agreed with Vice Chair Murray in that he thought the draft ordinance is a good, basic ordinance that allows the Board to disapprove an application if they want to. He stated that the Board can recommend banning fill in the sound, then the only alternative for an applicant will be a variance.

Member Cofield stated that he isn't suggesting banning fill in the sound, but suggesting that the hurdle can be higher. He didn't think the ordinance is sufficient. Chair Blakaitis asked what will make the hurdle higher. Member Cofield stated that he isn't sure, but thought that if the Board gave it some thought to a waterfront-specific provision, that can be achieved. He thought Director Heard can come up with something at the direction of the Board. Chair Blakaitis thought if the Board can make the hurdle higher, that will be fine, but doesn't know how it can be made higher. He thought that something can be added to Item #4 that states the following language: "...especially in soundfront properties..." He noted that the Board gives that consideration to all the properties in Duck.

Member Cofield stated that he will be more comfortable with adding the suggested language to Item #3 and #4, especially for waterfront properties. Chair Blakaitis noted that it is a simple statement. He didn't see where it will change the ordinance, but it will put the emphasis on soundfront properties. Member Cofield agreed. Chair Blakaitis pointed out that the Board has a good ordinance in front of them and should pass the draft ordinance at this meeting.

Member Cofield stated that if the applicant at 1166 Duck Road had come to the Board with his specific proposal, the answer would have been addressed in Item #3 dealing with the minimum amount of fill required. He added that what the applicant did not address is that there are three other remedies that do not require fill. He asked how the Board will get to that issue. Chair Blakaitis stated that the Board would get to it through a discussion, but only had to get to one remedy. Vice Chair Murray pointed out that it isn't the Board's job to prove that issue, it is the applicant's job. Chair Blakaitis agreed. Member Cofield stated the Board could have denied the application in front of them, but no one except for him wanted to do that. He thought if the same proposal came back to the Board a second time with the draft ordinance in effect, there would be the same reluctance to deny it based on the proposed fill being the minimum necessary. He added that the Board was only looking at the applicant's proposal and that is the minimum required. He stated that Council discussed whether there are other remedies that do not require fill. Chair Blakaitis stated that Council gave a lot of input to the impact on adjacent properties. He stated that the Board can completely ignore the applicant's proposed method of accomplishing what he wants to do if the Board thought that the adjacent properties will be seriously impacted. He added that the applicant will have to prove to the Board that they will not have impacts. He stated that the applicant tried to prove it at the Council meeting but it didn't work.

Member Cofield noted that the applicant did not address it at the Council meeting. Chair Blakaitis agreed. Vice Chair Murray stated that the question was asked, but it would have been

addressed because it would have been one of the six criteria that he had to meet. Chair Blakaitis agreed, adding that it would have been more seriously addressed at the Planning Board level. Member Cofield stated that he will feel more comfortable if Item #3 and #4 had “especially on soundfront properties” added to them. Chair Blakaitis stated that it won’t hurt anything. Vice Chair Murray stated he was fine with the addition. Chair Blakaitis noted that it will give the Board the option to move forward at a future point. He felt that the Board needs to investigate the soundfront fill issue since Currituck County is doing it.

Council Liaison Burdick suggested moving the draft ordinance forward. Chair Blakaitis and Vice Chair Murray agreed. Member McKeithan noted that the draft ordinance supports adjacent owners that may have a concern. Chair Blakaitis thought it becomes easier for the Board to state whether or not there will be an impact on soundfront properties.

Member Cofield stated that Director Heard had indicated at the Town Council meeting that there were one or two public comments that had come in prior to the meeting and asked what those comments stated. Director Heard stated that there were two emails that had come in that stated general opposition to the special exception. He stated that they likely could not be used as evidence in a quasi-judicial hearing. He stated that the next time there is an application similar to what came in for 1166 Duck Road, the Board will have the benefit of having the Town Engineer present to advise the Board.

Member Cofield thought, from the Town’s standpoint, the Board needs to know whether there are other remedies that do not require filling in the sound. Vice Chair Murray thought there will always be other remedies. Chair Blakaitis stated that there are always other remedies; it is up to the applicant to present his justification. Member Cofield asked what will happen if the applicant doesn’t present them. Chair Blakaitis stated that they don’t have to. Member Cofield didn’t think the Board would be comfortable with denying it based on the discussion.

Council Liaison Burdick stated that Council is concerned that they can’t force an applicant to discuss alternatives. Member Cofield agreed. Vice Chair Murray stated that an application is made to do a project. It is not a planning session or a design session. He wondered how the motion will be made to approve the special exception if the design information that hasn’t been tested, calculated or provided by the Town Engineer or member of the Board. He didn’t understand how the application can move forward. Council Liaison Burdick stated that the criteria that is in front of the Board gives them something to work with when they obtain other expert input. He stated that even if the Board cannot require other alternatives, there will still need to be a reason that the alternatives are either better or worse than the proposal. He noted that these are the criteria that the Board is trying to set up. He stated that the key criterion is impacts on neighboring properties; how it works with the Land Use Plan; and especially for waterfront or soundfront properties. He thought adding it in to the draft ordinance will add emphasis. He stated that the next alternative will be to simply ban the project.

Vice Chair Murray stated that he saw alternatives being discussed in the meeting, which is fine with him. Council Liaison Burdick pointed out that the Board is discussing them against the criteria in place. Vice Chair Murray agreed, adding that he doesn’t think they need to be discussed. He stated that all the Board needs to find is that one criterion is not met, which will result in the special exception application being denied. He didn’t see the value in going into

alternatives. He asked if a citizen complained via email or letter that they felt that their property will be negatively impacted, did the Town have a mechanism to legally state that the comment is received and acknowledged and provide the citizen with a guide to the quasi-judicial process. He added that the citizen can be told that if they want their comments entered in for evidence, they will need to be made by a professional engineer that will attend the meeting. He asked if that can be done. Council Liaison Burdick stated that the citizen can be told that any evidence has to be via a professional. He explained that in a quasi-judicial situation, Council cannot use hearsay evidence. Director Heard stated that staff does let the public know what they can do.

Vice Chair Murray moved that the Board recommend to Council approval of Ordinance 17-03 with the two following additions of wording to #3 to include “especially for soundfront properties” and #4 to include “especially for soundfront properties”. Member Cofield seconded.

Motion carried 5-0.

APPROVAL OF MINUTES

Minutes from the March 8, 2017, Regular Meeting

Member Cofield moved to approve the March 8, 2017 minutes as presented. Chair Blakaitis seconded.

Motion carried 5-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Summary of April 5, 2017 Town Council Meeting

Director Heard gave an update on the April 5, 2017 Council meeting to the Board and audience.

Project Updates

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

BOARD COMMENTS

Chair Blakaitis stated that Member Forlano has decided not to seek reappointment to the Planning Board. He stated that he will be missed and is grateful for all of his help and insight over the years. He presented Member Forlano with a gift from the Planning Board members.

Member Forlano thanked the Board for the gift. He added that it has been an honor and a pleasure to serve for so long.

Member Cofield thought all of the Board members make an important contribution to the Town. He stated that Member Forlano will be missed.

Council Liaison Burdick thanked Member Forlano for his service to the Town.

ADJOURNMENT

The meeting was adjourned. There was no vote.

The time was 9:11 p.m.

Approved: _____
/s/ Joe Blakaitis, Chairman