

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
June 13, 2018**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, June 13, 2018.

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

Absent: None.

Also present were: Director of Community Development Joe Heard, Permit Coordinator Sandy Cross, Council Liaison Jon Britt, Fire Chief Donna Black, and Attorney Ben Gallop.

Others Present: Philip Ruckle from the *Coastland Times*, Michael Strader from Quible & Associates, Mark and Ashley Copeland of Roadside Bar & Grill, and Robert Hornik.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for June 13, 2018 at 6:36 p.m.

PUBLIC COMMENTS

Brian Newman, 1713 North Virginia Dare Trail, was recognized to speak. Mr. Newman stated that he has built over 100 buildings in Duck and that this meeting isn't about those buildings, but about the people in Duck. He stated that there are a lot of outstanding people in the community. He stated that the truest value for good architecture is how well it is received. He wasn't sure of anywhere that is better received or enjoyed than the Backyard Bar that Mark and Ashley Copeland have. He sees that the Planning Board is considering a conditional use permit for them and hoped that they will move forward with it and recognize that everything that was built on that site was built in the past and the Board needs to accept the value of looking at it and trying to accommodate them.

Kent Hennessey of 104 Skimmer Way was recognized to speak. Mr. Hennessey stated that he and his wife have been long-time customers of Roadside Bar & Grill. He stated that the Backyard Bar has been enjoyed by them every season of the year. He thought the Town has done a great job in taking care of its citizens and thinks a reasonable accommodation that keeps Mark and Ashley Copeland's values intact as well as the business climate in Duck is something that he will be in favor of. He noted that the Planning Board members are reasonable people that help its citizens. He pointed out that Town government should always be there as it is the lowest level of government and most responsive to the public. He thought this is an opportunity for government to be flexible to allow the Backyard Bar to continue.

Shane Faison of 112 Ocean Bay Boulevard was recognized to speak. Mr. Faison stated that the Town of Duck was built on the backs of young entrepreneurs who come here because they don't want to deal with the hustle and bustle of bigger cities. He stated that Mark and Ashley

Copeland have been partying for a long time and it has been a great party. He stated that he appreciated everything the Town has done. He added that he's been coming to Duck for a long time.

Patricia Gryce of 121 Four Seasons Lane was recognized to speak. Ms. Gryce stated that she is present to represent all of the people in her neighborhood because they wanted to support Roadside Bar & Grill's Backside Bar. She stated that she doesn't know Mark Copeland, but has enjoyed going to the restaurant for many years. She added that she enjoys the music and meeting new people at the outdoor venue. She hoped that it will continue and wished the Copelands luck and hoped things will work out for them.

There being no one else wishing to speak, Chair Blakaitis closed public comments. He explained to the audience that the Planning Board is an advisory group that sends its recommendation to the Town Council for final approval. He noted that nothing is final until Council votes on it. He added that anyone that has comments or made comments can also make comments at the Council meeting. He stated that while the Planning Board is glad to hear the comments, the Town Council meeting will also be a place to make comments about the conditional use permit.

NEW BUSINESS

Conditional Use Permit 18-006: Application for a Conditional Use Permit to Apply the Village Commercial Development Option Seeking Flexible Development Standards for Structure Setbacks, Lot Coverage, and Parking to Accommodate Expansion of the Outdoor Seating and Entertainment Area at Roadside Bar & Grill, 1193 Duck Road

Chair Blakaitis understood that the applicant had a few changes that he wishes to bring forward.

Robert Hornik of the Brough Law Firm was recognized to speak. Mr. Hornik stated that he is present on behalf of the applicant. He stated that after he received the staff report from Director Heard, Michael Strader – the applicant's engineer – responded to some of the comments and observations in the report and made some refinements to the site plan. He went on to hand out the changes to the Board. He stated that his client is trying to address as many concerns as possible. He stated that the changes may not look like much, but that is because the changes are subtle but important. He didn't think these are huge changes to the site plan, but will affect setbacks and encroachments. He noted that the stage will be moved from the neighboring property to be only on the Roadside Bar & Grill property. He stated that he wants to discuss the site plan with the Board as he doesn't want the process to be delayed any further. He thought it will be easy for the Board, Director Heard and Mr. Strader to go through each of the changes and discuss them.

Member Cofield thought it would be easier to comprehend things if the changes in relation to what was in the agenda package is reviewed ahead of time. Robert Hornik stated that Director Heard could go through his staff report and then review the site plan. Director Heard stated that he had a Power Point presentation to help the Board and audience understand the proposal, different structures, and other site improvements. He thought as something comes up during his

presentation up, it can be discussed. Member Cofield stated that it will help his understanding of the application.

Director Heard stated that the public meeting was properly advertised as per the policies of the Planning Board. He stated that the Board is looking at a couple of conditional use permit requests. He explained that there was a general conditional use permit to expand the restaurant with the outdoor seating and entertainment area. He stated that as part of that proposal, there are a variety of requests being made for the Village Commercial Development Option, which allows flexible development standards for properties being developed in the Village Commercial District.

Director Heard stated that the property is approximately a half acre in size, about 75 feet in width and 300 feet in depth. He stated that the property as it was developed has the existing restaurant in the front that consists of a historic cottage with a few additions and the outdoor area toward the rear of the property. He stated that the adjoining property to the north contains the Tomato Shack produce stand and to the south is the Loblolly Pines Shopping Center. He added that directly behind Loblolly Pines is a single-family residence that is zoned residential and backs up to the restaurant property as well as another residential property to the east of the subject property, which has a significantly higher elevation and looks down on the restaurant property.

Director Heard stated that the application is for the expansion of the existing restaurant. He stated that the outdoor area is approximately 5,300 square feet in size, located on top of the existing septic field, and contains a bar, grill/food service area, performance stage, seating, tables, entertainment activities, storage and a bathroom. He stated that the main customer area is surrounded by a wooden fence. He explained that the proposal involves reducing the size of the outdoor seating/entertainment area to approximately 3,667 square feet. The fence around the larger area is proposed to remain, but a post and rope barrier will be put up to delineate the smaller area. He stated that one of the main reasons for reducing the size of the area is to reduce the parking requirement for the use. He added that the parking requirement is based on the square footage of the outdoor seating/entertainment area with the ratio of one space for each 150 square feet. He explained that staff is concerned as they look at enforcement for the future. He stated that if there is an existing, substantial fence with a large gateway, people will view that as the area where the outdoor area starts. The concern is if the fence and gate are left there, it will default to being the new boundary. He stated that while the new boundary is delineated on paper, it will not be the new boundary in reality. He stated that staff is recommending that something be done to either move or remove the fencing and gateway around the larger area so that the area that may be approved as delineated in some way where it doesn't read as the larger area.

Michael Strader of Quible & Associates was recognized to speak. Mr. Strader stated that, regarding the fence removal and relocation of the gateway, he had discussions with the applicant and they are proposing that the existing fencing remain and that there be a post and rope pathway to delineate the path to the entertainment area for septic purposes.

Kent Hennessey asked who was making the proposal to reduce the property. He asked if it is a recommendation from the Town or the applicant. Director Heard stated that it is from the

applicant. Chair Blakaitis stated that it is from both the Town and the applicant. Director Heard disagreed, adding that the reduction is solely from the applicant's request.

Director Heard stated that the storage shed in the northeast corner is 42 square feet and was moved to the current location from the southwest corner of the outdoor seating/entertainment area. It encroaches 8.2 feet into the north side setback. He added that it is proposed to be moved five feet off the southern property line but would still be encroaching five feet into the minimum setback. He stated that there are a couple of improvements that were not noticed with the consideration that the Board had in front of them several months ago, but were picked up with the new survey. He stated that one is a trellis addition in the northeast corner that is 84 square feet and encroaches 8.8 feet into the northern side setback and 10 feet into the rear setback. He noted that it received temporary approval in 2013 when the Town Council required that the shed/bar be moved southward to comply with the side setback. He stated that the move was completed and documented on the as-built survey, but then after that was done, the addition was added back into the setback. He stated that the trellis is proposed to remain in the existing nonconforming location.

Director Heard stated that the wooden deck on the northeast corner is approximately 174 square feet and wraps around the north side and rear of the bar/storage building. He added that it encroaches 14 feet into the rear setback and 9.6 feet into the north side setback. He noted that it is proposed to remain in the existing nonconforming location. He stated that the bar addition is 49 square feet and located in the northeast corner of the outdoor seating/entertainment area. He noted that the original bar structure is 330 square feet in size and was approved after its relocation in 2014. He added that it complies with the setbacks and is proposed to remain in its existing location.

Director Heard stated that the performance stage is 108 square feet and included a tall backdrop. He added that it encroaches 3 feet onto the adjoining residential property to the rear and encroaches into the buffer with the residential property. He noted that there was a proposal to acquire a piece of the adjoining residential property and have the rear setback encroachment of 18.3 feet. However, an agreement has not been reached with the adjoining owners, nor is the property zoned for commercial use. Mike Strader pointed out that it is a substantial concern as proposed, mainly because the Board and Council will have to review the plan as it currently exists and cannot be reviewed based on some proposed or conceptual lot line reconfiguration. He stated that the applicant initially approached the adjacent landowner who was agreeable to provide an easement for the encroachment. However, it was discussed with Town staff that an easement will not resolve the issue. He stated that the applicant has proposed to relocate the stage westward to remove the encroachments so the stage will be completely within the subject property. He added that it will still require the Board to consider the reduced rear yard setback, but would eliminate the existing encroachment. Director Heard asked if the intent, moving forward, would make it a zero setback. Michael Strader stated that he is correct.

Director Heard stated that the movie screen support structure is 15 feet in width and located in the southeast corner of the property. He noted that there are supporting posts built into the retaining wall and that it encroaches approximately 13 feet into the rear setback and eight feet into the southern side setback and buffer with the adjoining residential property. He noted that it is proposed to remain in the existing nonconforming location. He stated that the outdoor

grill/sink/food service is L-shaped, 14 feet long and 72 square feet. He stated that it encroaches 7.1 feet into the southern side setback and into the buffer with the adjoining residential property. He noted that it does not comply with the 10-foot separation from combustible construction and has not received Health Department approval. He pointed out that the applicant has pursued Health Department approval, but until compliance with the separation requirement is documented by the Town, it will not be approved. He added that the outdoor grill is proposed to remain in the existing nonconforming location and the applicant has proposed to remove the decking on the adjoining residential property to gain separation compliance. However, the adjoining owner has not agreed to remove any of the decking. He stated that it doesn't appear that it is a viable proposal since there is no agreement from the adjoining property owner.

Michael Strader stated that the applicant will shift the outdoor oven to the north to obtain the 10-foot setback with the adjacent deck and fencing within the 10-foot area will be replaced with non-combustible fencing. He understood that Mark Copeland has also discussed that change and the stage relocation with the adjoining property owner.

Director Heard pointed out that Fire Chief Donna Black is present, has reviewed the structure, and has the authority to make the determination on the non-combustible material. Fire Chief Donna Black was recognized to speak. Fire Chief Black stated that she spoke to the Copelands and they know that it is a code issue. She stated that they have to comply with the 10-foot rule and thought some of the suggestions would be workable.

Mark Copeland of Roadside Bar & Grill was recognized to speak. Mr. Copeland noted that a sprinkler system is available. He commented that the building code states he can install an automatic sprinkler system if it is anywhere near a balcony, buildings or decks. He asked if it is something he can do. Chair Blakaitis asked where it would be installed. Mark Copeland stated that it would be on top of the grill. Chair Blakaitis asked if he is proposing that in place of moving the grill. Mark Copeland stated he is if it is possible. Director Heard stated that it will be something that Fire Chief Black will have to review as part of the application. Robert Hornik understood that Mr. Copeland had complied with the code. He added that Mr. Copeland was stating that the language in the code suggests that putting a sprinkler there may satisfy the code in place of moving the grill with regard to the separation requirement. He thought the preference will be to have the sprinkler system installed so the grill will not have to be moved. He added that it is subject to approval and he suggested that either it be sprinklered or moved to satisfy the code. Chair Blakaitis pointed out that it is new information that the Board did not receive in the original proposal. He stated that he wants Fire Chief Black to think about it and when the Board starts their deliberations, she can give her opinion.

Director Heard stated that another storage building is 160 square feet and located on the south side of the property. He pointed out that it encroaches 7.2 feet into the southern side setback and into the buffer with the adjoining residential property. He noted that the rear "wall" of the structure appears to be the fence and that this structure is proposed to be removed entirely. He stated that the bathroom/storage building is 112 square feet and located up the hill from the rest of the outdoor seating/entertainment area. He stated that it encroaches 7.7 feet into the southern side setback. He noted that the structure is a prefabricated shed that was moved to the property and the eastern part of it was converted into a two-seat bathroom. He added that there was no

permit obtained for it or any Health Department approval for the bathroom. The applicant has proposed to keep the structure in the existing nonconforming location.

Director Heard stated that the employee parking area can presently accommodate five to six vehicles with angled parking, but is located within the septic repair area. He stated that the issue with this is that the parking area and drive aisle are on the septic repair area, which is not consistent with what the Health Department allows. He noted that the applicant has proposed to remove the gravel parking on the septic repair area and add four stacked employee parking spaces along the northern side property line. He added that stacked parking is not something that the Town generally approves of. However, in the Village Commercial district, it doesn't specifically prohibit or permit stacked parking. He stated that limited stacked parking is allowed for residential areas, but there is nothing that expressly prohibited it in the commercial districts. He stated that in light of the fact that the parking is for employees, the stacked parking could potentially work. He stated that the Board has a layout before them. The concerns staff has about the layout is that there are four parking spaces located four feet from the northern property line. He noted that the requirement for parking setbacks is five feet. He added that the applicant will be seeking approval for that minor encroachment as part of the Village Commercial Development Option.

Mark Copeland stated that his employees have parked in the same area for the past 24 years. He stated that he never allows parking on a septic repair area. He added that the Health Department has no issue with his employee parking at all. He stated that he will never use that area as a septic repair area. Director Heard noted that Jack Flythe from the Health Department would disagree with Mr. Copeland's statement. He stated that he has spoken to Mr. Flythe and that it is definitely a requirement and had asked that the area not be used for parking as it is not consistent with Health Department regulations.

Director Heard stated that the layout of the stacked parking runs into the adjoining spaces for customers and does not appear that anyone can park in the westernmost employee space. He stated that it appears that there is enough room if the applicant will angle the last parking space. He thought there is enough room to stack four vehicles, but the plan will need to be adjusted to show the reoriented parking space. He stated that if the area is dedicated as employee parking, a sign would need to be posted accordingly. He stated that the existing gravel use area will need to be removed and be fenced off to preserve the septic repair area.

Director Heard stated the applicant has 20 parking spaces on the site. To serve the existing restaurant, they need 23 parking spaces. He stated that any additional space for the outdoor dining area will have additional parking requirements. He noted that, as a nonconforming situation, the applicant cannot increase the parking nonconformity without bringing it into compliance. He stated that the applicant has proposed a shared parking agreement with Kellogg Supply for 30 parking spaces between the hours of 6:00 p.m. to 10:00 p.m. He pointed out that the agreement has not been reached and the document reviewed by the Town's attorney is not a recordable document, but can be fixed. He stated that the document references an exhibit that provides more detail that the parking spaces to be shared by Kellogg Supply. Providing this exhibit is of great importance, because staff only counts 22 parking spaces at Kellogg Supply. He added that there is nothing that shows Kellogg Supply had 30 parking spaces to offer. He

stated that the proposal will need to show what parking spaces are proposed so that staff and the Board can review to determine they are valid spaces.

Suzanne Wetzel of 141 Betsy Court was recognized to speak. Ms. Wetzel stated that the extra parking aspect of the proposal seemed a little nit-picky since Duck is a small town. She wondered if the Town has to count how many people are being served at Duck Deli and Red Sky Café as well as the number of parking spaces there. She stated that she hates to think that staff has to go look at all of the parking at the other restaurants. Director Heard stated that both businesses mentioned were been reviewed and have parking that is in compliance with the Town standards.

Bob Hornick stated that he and the applicants have had various discussions with Kellogg Supply with respect to parking. He stated that there is a draft easement, which he obtained from the Town Attorney's office and used as a template, currently being reviewed by Kellogg Supply. He stated that they are working on it and it is their intention to have the shared parking agreement with Kellogg Supply available in time for the Town Council meeting.

Vice Chair Murray clarified that the businesses that were mentioned comply with the ordinance and all of the outdoor entertainment areas that have been approved complied with the Town's ordinances. He asked if there were any Village Commercial Development Options being used in any of those approvals mentioned. Director Heard stated that there are none as they all complied with the basic standards of the Town. He added that there is a shared parking agreement for Red Sky Café with Carolina Designs Realty that helps them achieve compliance.

Bob Hornik understood that the Village Commercial Development Option allows for some flexibility by the decision-making bodies. He stated that the applicant is proposing 12 bicycle parking spaces. He added that one of the factors discussed with them is the nature of Duck and encouraging walkability and biking. He stated that Mr. Copeland told him that a considerable portion of his clientele bikes and walks. He hoped this fact will be taken into consideration as the parking issues are worked through.

Director Heard stated that the other concern related to the shared parking agreement has to do with the timing. He explained that Kellogg Supply closes at 5:00 p.m. so there is no issue with the parking beginning at 6:00 p.m., but the hours between 6:00 p.m. – 10:00 p.m. are an issue. He stated that while the entertainment ends at 10:00 p.m., the outdoor area itself is not closed at 10:00 p.m. as people in the outdoor area are still enjoying each other's company. He stated that the 10:00 p.m. timeframe does not capture the full time that the area is open. Director Heard also noted that for many of the larger events that are hosted on-site, they are either all day long or much of the day events and are typically held on the weekends. He noted that they begin long before 6:00 p.m., so this agreement will not cover some of the events where extra parking may be needed most. Robert Hornik pointed out that the revised shared parking agreement includes the hours of 5:00 p.m. to 11:00 p.m. on weekdays and Saturdays and Sundays. He stated that the applicant knows the issue and understands the concerns. He is working to request the shared parking agreement and expected to receive it.

Member McKeithan asked Robert Hornik to repeat his comments about Saturday and Sundays. Robert Hornik explained that the shared parking agreement will also include shared parking on

Saturdays and Sundays. Member McKeithan pointed out that Kellogg Supply is open on Saturday and Sunday until 5:00 p.m. Mr. Hornik stated that the specifics of exactly how it will be used are still being discussed. However, there will be parking there but he doesn't have the exact details of it. Mark Copeland stated that the Backside Bar is wide open on Saturdays and Sundays in season. Member McKeithan thought that one of the issues with the special events is that if an event is on the weekend, Mr. Copeland will not be able to utilize Kellogg Supply's parking lot during the day. Mark Copeland agreed, adding that he will have people parking in other areas, such as at the Town's property.

Director Heard stated that the applicant, at this point, has not applied for building permits for most of what was discussed, so they do not have a firm set of comments as to what may or may not need to be done to bring individual buildings into compliance. He stated that there are some things that they had a chance to look at informally, but permitting and review is something that staff is recommending be done should the proposal be approved, that they go through that process for all of the structures and uses. He stated that as far as all the structures will still need to go through a building approval and fire inspection to be sure that they were constructed properly and that they meet applicable codes. He noted that, should the application be approved, staff is recommending that as a condition of approval.

Director Heard stated that Town Attorney Robert Hobbs had reviewed the application and observed that in order for the property to meet the requirements of the zoning ordinance, several changes to the property and adjoining properties not owned by the applicant will need to be made, such as the shared parking agreement with Kellogg Supply. He noted that Town Attorney Hobbs is recommending that the document be in place rather than being a condition of approval. Robert Hornik stated that he recognized that this is just the zoning approval and that the other permits for approvals from the Health Department, Building Inspection, and Fire Department are necessary.

Director Heard stated that while the lot meets the minimum requirement for the district in which it is located, the requirements state that, "...commercial lots shall be of sufficient size to meet the requirements of the Dare County Health Department, to provide adequate siting for structures, and to provide parking, loading, and maneuvering space for vehicles..." He stated that staff is questioning whether the property, particularly as it relates to parking, is of sufficient size to support the level of proposed development activity.

Director Heard stated that removal of the shed building on the southern side and the removal of the employee parking area, would bring the property into compliance with maximum lot coverage requirements. He noted that it is currently estimated at 64%. With the changes proposed in the Board's packets, it would bring it to 59.6%. He stated that since the applicant is not acquiring the small piece of property from the residential lot, it will change the calculations slightly, but it still comes in at 60%, which complies with the lot coverage requirements.

Director Heard stated that there are a total of nine structures added without permits since 2014. Eight of them presently have nonconforming setbacks. He stated that the, under the proposal the Board received, one of the nonconforming structures is proposed to be removed, another is proposed to be moved but still in a nonconforming location, and the other six are proposed to remain in their current, nonconforming location. He stated that, at this meeting, the applicant has

proposed bringing the performance stage back onto the subject property, but with no setback from the rear property line. He stated that the trellis also encroaches into the rear setback and the applicant is seeking relief from that. He noted that the storage shed, trellis, wooden deck, performance stage, movie screen, outdoor grill and sink, and bathroom building are structures for which the applicant is seeking relief from setbacks.

Director Heard stated that the Town has a requirement for a 10-foot buffer between commercial and residential properties. He explained that during the previous approval of the temporary conditional use permit in 2013, the Council opted to grant relief from the buffer requirement as long as the applicant maintained a six-foot high opaque fence between their property and the adjoining residential property along the southern side. He noted that the fence is aging and the applicant is proposing to replace the fence with a new, opaque fence that is six feet in height, which is consistent with what had previously been approved. He mentioned the difference in elevation between the subject property and the residential property to the rear and explained that a fence in that area will not be effective.

Director Heard stated that there are seven criteria in the staff report regarding the standards for outdoor dining areas. He stated that the applicant's proposal appears that it will comply with five of the seven requirements. He noted that the applicant is proposing some encroachments in the landscape buffer and does not comply with the requirement as written. He added that the requirement has to do with parking. He stated that until staff has everything in order as it relates to the shared parking agreement, the proposal does not comply with this requirement.

Director Heard stated that there are specific requirements for the Village Commercial Development Option that the Board should consider. He explained that the Board can look at the character of the community, types of uses, how it fits into the village, pedestrian orientation, and mixed land uses or appropriate land uses. He added that staff has outlined a few pros and cons in the staff report. He encouraged the Board to consider that as to whether the proposal meets the intent of the Village Commercial Development Option as they are considering the requested flexible development.

Director Heard pointed out that over the last few years, there have been four different proposals for establishing outdoor dining, seating and entertainment areas in Town - Red Sky Café, Duck Deli, Coastal Cravings, and the Blue Point Restaurant. He explained that in all cases, those applicants made site improvements and complied fully with the Town's standards for setbacks, lot coverage, parking and other applicable development criteria. He asked the Board to think about the consistency of this proposal to the other four; fairness to those other businesses who went to the trouble to comply; and setting a precedent for future applications that could come before the Board.

Director Heard stated that is recommending denial of the application as submitted for the following reasons:

1. In general, the applicant is attempting to transform a moderately-sized restaurant on a narrow half-acre lot into one of the largest restaurants in Duck Village. If approved as proposed, the amount of seating for the Roadside Bar & Grill will exceed Aqua, Fishbones, Red Sky Café, Coastal Cravings, and Duck Deli and may even exceed the

Blue Point Restaurant during larger events. The intensity of development and activity being proposed for this relatively small parcel exceeds the capacity of the lot. The reason that the applicant is requesting substantial relief from minimum parking standards and building setbacks is that the amount of development proposed does not fit on the subject property.

2. The applicant has provided only 20 parking spaces to accommodate 74 existing restaurant seats and events that can exceed 100 attendees. That totals 20 parking spaces for 174 or more potential customers and 12 employees. While the Town of Duck's recent sidewalk project will encourage more people to walk or bike to local restaurants and shops, the amount of parking available at Roadside Bar & Grill is vastly insufficient to serve the needs of a business of this scale. The failure to provide adequate parking forces customers to park on neighboring properties including the Loblolly Pines shopping center, Carolina Designs Realty/Red Sky Café, Kellogg Supply, and Duck Town Hall/Town Green, creating greater wear and tear on those properties and a burden to those property owners. The applicant has proposed a shared parking agreement with Kellogg Supply to acquire rights to use up to 30 parking spaces during certain hours of the day. At this point in time, Kellogg Supply has not agreed to the proposal, the submitted shared parking agreement is deficient, and it was not clear that Kellogg Supply has 30 parking spaces to give. Consideration of these shared parking spaces seems to be premature until these issues are resolved.
3. Reduction of the building setbacks to two or three feet in several instances increases the impact of these structures on adjoining properties. Rather than an additional buffer to minimize impacts of Roadside's more intensive commercial use on adjoining residential properties, the adjoining residential properties are facing no buffer and reduced setbacks from the commercial activities next door. Privacy, noise, lighting, and safety are common concerns of neighboring property owners.
4. The applicant has proposed to acquire a small portion of the residential property at 101 Duck Landing Lane to eliminate the existing encroachment of the performance stage. (The applicant's comments earlier in the meeting alleviated this concern.)
5. The applicant has proposed removal of the existing decking at 100 Winauk Court to achieve minimum separation requirements for the outdoor grill. (The applicant's comments earlier in the meeting alleviate this concern.)
6. In all previous applications for establishment of outdoor seating/entertainment areas at restaurants in Duck Village, the applicants complied fully with Town standards for building setbacks, lot coverage, parking, and other development criteria. Granting approval of the substantial waivers being requested from the development standards would be inconsistent with prior decisions, unfair to compliant businesses, and set a challenging precedent for future applications.
7. In 2013, the Town Council purposefully granted only temporary conditional use approval for a similar proposal on this property in order to evaluate its operation and impact on the community. Use of the outdoor seating/entertainment area had an impact on nearby

properties as evidenced by noise complaints and parking on properties in the surrounding area. In addition, the applicant failed to comply with most of the conditions placed on the layout and operation of the business by Town Council under the temporary conditional use permit.

8. Staff has concerns with enforcement with the layout and intensity of the outdoor seating and entertainment area, if approved as submitted. The applicant has not addressed staff's request to clearly define the boundaries of the outdoor seating/entertainment area and employee parking near the northeast corner of the property. The applicant has previously disregarded conditions placed on the layout and operation of the business by Town Council under the temporary conditional use permit and subsequent violation notices issued by Town staff.

Director Heard stated that, should the Board wish to grant approval, there is an alternative set of recommendations that list suggested conditions.

Chair Blakatis suggested that the Board review each item and decide how it fits, whether they like it or not and move onto the next item. He asked how many new items were added to the application. Council Liaison Britt noted there were five changes.

Kent Hennessey stated that he listened to staff's presentation that gave standards that the Board has to consider. He stated that he understands the reason for the rules as well as the reason for enforcing them as he is a former engineer. He stated that he did not hear anything that compels him to believe an accommodation cannot be reached. He asked if anyone had asked the other restaurant owners in Duck whether or not they have any issues with anything the applicant is proposing or anything that has been done in the past and if they thought it is an unfair way of conducting business with respect to their competition. Chair Blakaitis stated that none of the other restaurant owners have commented. He added that there are many things that the Board has to consider.

Chair Blakaitis stated that he would like to discuss the outdoor grill first and wants to hear what Fire Chief Black had to say.

Attorney Ben Gallop was recognized to speak. Attorney Gallop noted that after Fire Chief Black makes her comments, the applicant will have an opportunity to give a presentation. Chair Blakaitis agreed and asked the applicant to give a presentation.

Robert Hornik reminded the Board that he is the attorney for the applicants. He stated that he looked at the Village Commercial Development Option in the zoning ordinance. He reminded the Board of the purpose of the VCDO. He suggested that what the Copelands are doing is entirely consistent with the purpose of the Village Commercial District. He wanted to make sure the Board took into consideration the topography on the eastern side of the property in that the seating area has a different elevation which is heavily vegetated, and is a substantial natural buffer along the property line. He added that, along the northern boundary line, it was equally heavily vegetated. He reminded the Board that, with respect to the Village Commercial Development Option, there are specific references to the yard requirements. He stated that Section 4b of the yard requirements does not reference any side yard requirements or rear yard

requirements in the VCDO. He stated that the VCDO is intended to allow a lot of flexibility with respect to setbacks and what is required. He thought it was consistent with the purpose that he read to the Board from the zoning ordinance as it allows some changes and customization to site plans. He stated that Roadside Bar & Grill is a unique place to recreate in Duck. He asked the Board to keep those things in mind as they want to be recommended for approval with conditions and do not want a recommendation of denial. He added that they recognize that ultimately it is the Town Council that will be deciding on the site plan and application.

Fire Chief Black stated that there are two issues – one is the combustible material within 10 feet of the property line. She added that she can work with that. She stated that the other issue is the location of the grill. She asked if it was 2.9 feet from the setback. Director Heard stated that it is 2.9 feet from the side property line, so it is 7.1 feet into the setback. Fire Chief Black asked about the area that adjoins the residential property. Director Heard stated that the setback increases to 20 feet in that area. Fire Chief Black stated that, as the Fire Chief, she doesn't deal directly with zoning codes, but there is a reason for setbacks. She explained that part of the reason for setbacks is to have separation for wind driven fire. She stated that the applicant is asking her to approve a structure that has open flame within the setback in a wind driven environment. She stated that she wished the applicants had come to her before they installed the grill as a discussion could have been had regarding maintaining some level of setback.

Chair Blakaitis asked Fire Chief Black if she thought the proposal on the new drawing will take care of the setback issue. Fire Chief Black stated that she needs it staked so she can look at it. Chair Blakaitis asked if it were to occur, will it probably satisfy the requirement and the concerns that Fire Chief Black has. Fire Chief Black stated that with regard to the question about sprinklers, she isn't sure the applicants want to do that because putting one in will mean having it inspected and meeting the Fire Code. She thought moving the grill will be the best option, but that is something that can be looked at. She stated that she will hold the line in regard to the setback as she thinks it is a safety issue.

Chair Blakaitis asked if the applicant went the sprinkler route, how would it work with regard to weather. He asked if the applicant is having serious problems on a particularly windy day, there is a particular force that the water will have to come out of the nozzles to reach where the fire is or if the water will be blown away. Fire Chief Black stated that the engineers would have to look at that.

Chair Blakaitis stated that his interpretation is that if the grill is moved, the issue will be satisfied. If it was sprinklered, the Board will need more information that is not available at this meeting. Vice Chair Murray clarified that the condition from the Board's perspective is that if it is moved to satisfy the fire code, then the Board will not have to get into the specifics of it and the applicant can work it out after the fact. Chair Blakaitis stated it could be in another location. Director Heard stated that why they move the grill is not necessarily relevant and that the Board is evaluating whether the move will bring the structure into compliance or not. Vice Chair Murray thought it will be safer to say that it will be moved in such a way that it satisfies the fire code. Chair Blakaitis stated that it makes sense.

Member Cofield stated that he studied the proposal and had a bit of unreadiness in being able to properly address the new issues or changes that were proposed at this meeting. He stated that he

would like to study those. Chair Blakaitis thought they seemed pretty clear. He asked if they can be discussed and see where to go. Member Cofield didn't think the Board can, because some of the proposal is contingent upon other agencies or third parties agreeing to agreements. He stated that he is not ready and feels uncomfortable going forward on changes that he cannot review. Chair Blakaitis understood Member Cofield's concern, but is just suggesting that the Board review and listen to the parties that have been contacted to make the project better or determine what is wrong and see where the Board should go. He stated that he is interested in seeing how everything summed up with regard to the denial or approval. If the Board has enough conditions that can't be satisfied, then it will have to be denied. He noted that the discussion regarding the grill is clear to him. Member Cofield stated that there is still an encroachment. Chair Blakaitis thought it will be out of the encroachment. Vice Chair Murray noted that it is still in the setback. Director Heard stated that it will still be in the setback, but 10 feet off the property line. Council Liaison Britt noted that it will still be in the setback because it bumps up against residential where the setback shifts.

Robert Hornik reminded the Board that in the Village Commercial Development Option, the Board can recommend something other than the 10-foot setback. He stated that in looking at the zoning ordinance, the Town Council has authority to say no setbacks are required. He stated that there are standards in the ordinance for the setbacks and when looking at the language of the Village Commercial Development Option where it talks about yards, it says that for the side yard and rear yard, the requirement is none, but the Town Council shall determine what the setbacks should be under certain circumstances. He stated that the way he reads it, it means that the Board and Council have great flexibility in determining what setbacks will meet the circumstances. He stated that he is suggesting that the Board remember that the applicant is not bound by 20 feet, 10 feet or five feet, but thought the Board should consider what is appropriate in this circumstance. Chair Blakaitis stated that the Board understands the fact that they are able to consider the options and that Council can also consider them. He stated that the Board's problem is how much of that do they want to consider. He pointed out that the Board has a whole list of items and the Board should consider all of them.

Chair Blakaitis directed the Board to discuss the storage shed. Vice Chair Murray pointed out that it is proposed to be five feet off the property line. He added that he is fine with reducing the setback for it. Member McKeithan stated that in making the decisions, the Board is faced with a facility that has zoning, building code, and Health Department violations within the outdoor seating/entertainment area. He wondered if the Board has the ability, using the Village Commercial Development Option, to approve this request for a conditional use permit when there are building improvements that have never been approved by the Health Department, Dare County, and the Town. He added that it is different than deciding on things such as setbacks, lot coverage, parking, and buffering. He stated that there are issues with safety and fire that need to be resolved before the applicant comes to the Planning Board with a proposal for a conditional use permit and implementing the Village Commercial Development Option. He felt that before the Board reviews the individual items, there are a lot of structures that have never been inspected or approved and the problem has been going on for years. He pointed out that the improvements that were made have not been approved and the applicant is in violation. He thought it needs to be resolved before the Board starts approving the items that they cannot approve under the development options.

Chair Blakaitis stated that Member McKeithan makes a good point. He stated that he isn't suggesting that the Board approve or deny anything, but is just suggesting that the Board get a feel for things by going through them all and then trying to make a decision. He stated that what Member McKeithan is suggesting was fine and if the Board feels that way, then someone will have to put a motion forward.

Vice Chair Murray stated that the violations are building code violations and the zoning is what the Board is concerned with (setbacks and parking). He stated that the building inspector and fire marshal, Health Department, and other permitting bodies have their jobs to do. He stated that these are mentioned as conditions of the permit. He noted that the enforcement side has been dealt with as the applicant being fined significant amounts of money for the violations. He understood that the Board's responsibility is to review the application as if all new items that are being proposed. He added that the fact that the items already exist and are being dealt with through the enforcement side, is not the Board's responsibility. He added that the Village Commercial Development Option is available to allow business owners to do things that improve the community and, just from an historical perspective as far as the number of people that generally attend the Board's meetings, the community support for this being a positive development in most people's eyes is pretty overwhelming. He felt that even though the Board is evaluating it as a new application, the Board often sits and reviews these type of applications and wonders how the community will be affected by the development in the future. He added that in this case, the Board knows how the community will be affected in the future, because it's been going on for five years. He stated that it wasn't included in the Board's packets, but sitting before them is one formal letter of complaint. The rest of the letters and those that spoke are in support of the application. He thought any bad behavior and not getting permits is being dealt with on the enforcement side and the only way that things will get resolved is by having the Board review it and making a recommendation to send to Council.

Member McKeithan thought the other way is to have all of the violations corrected and then the applicant can come before the Planning Board with a request. He wondered if it needs clarification. Chair Blakaitis pointed out that the Planning Board often passes a lot of things with the condition that the applicant needs to obtain a permit.

Mark Copeland pointed out on April 18, 2018, he had asked if he was able to piggy-back a permit, which he did on the front porch. He stated that Building Inspector Steve McMurray had come over and looked at the structures and was told that the person will be over to check, but he never heard back from anyone. He noted that he did ask if he could piggy-back and go forward with getting those structures inspected, finalized, and approved as well as pay the fines, but he never heard back from anyone. Chair Blakaitis stated that he does not know anything about it. Mark Copeland stated that he made the attempt to get them approved before this meeting. Ashley Copeland stated that she also brought it up to staff and was told that she had to complete the conditional use process this before the permit would be issued.

Attorney Gallop agreed with Vice Chair Murray's comments. He stated that the zoning is a step in the process where the ultimate pinnacle is obtaining a building permit and the Board should treat this as if there is nothing there. He stated that the continued enforcement, if Mark Copeland obtains the building permits and never corrects anything to match, of the building permit requires other changes or if he does not do the proposed changes from this meeting, then the enforcement

goes on and the Town deals with it, but the enforcement is not of the non-existing conditional use permit. It would be that Mr. Copeland did not comply with the conditional use permit received. He stated that just because Mr. Copeland receives a recommendation from the Planning Board to go to Town Council for them to grant or deny a conditional use permit, if they ultimately grant it, doesn't mean that Mr. Copeland gets to keep everything that's out there. Rather, it means that he gets to arrange it as he has proposed within the zoning context. He stated that the building code requires certain things to be done and Mr. Copeland will have to do those things to comply with the building code and obtain a building permit. He stated that it could ultimately end up that Mr. Copeland will have to come back and amend the zoning. He stated that this process is based on placement of structures and should be treated as if it is a new application without the rest of it going on. He noted that it is a step in the path of the process for Mr. Copeland. He added that it is not the final step as there are other steps that Mr. Copeland will have to take.

Robert Hornik noted that in most jurisdictions he's worked with, one cannot obtain a building permit without a zoning permit. He stated that Mr. Copeland is in a catch-22 situation in that he cannot get the building permits until he obtains the zoning permit. He agreed with Attorney Gallop that this is the first step in all of the processes. He added that they have to get through this process before Mr. Copeland can obtain building permits. He stated that Mr. Copeland realizes he has to obtain Health Department approval.

Chair Blakaitis noted that Member McKeithan and the rest of the Board have a lot of concerns regarding the application. He suggested that the Board review each item and see where they stand on each.

Vice Chair Murray asked for confirmation that the proposed trellis addition is covered in greenery. Mark Copeland stated that it is and the trellis is just criss-cross lattice that covering the area. He noted that he used to have his tractor in that area, but he no longer has the tractor and has an ice machine there that was covered by nothing. He noted that the tree on the neighboring lot fell on top of it and is still there.

Member Whitman clarified that Mark Copeland stated that he is also using a storage area for the ice machine. Mark Copeland stated he is correct. Vice Chair Murray stated that Michael Strader had mentioned something about trellises and fences. He asked if it is something the applicant wished to pursue. Michael Strader thought when he read the ordinance, no setback for the fencing and trellis are required. Director Heard stated that the exemption applies to fencing, but not trellises. He added that a 10-foot setback is required for the trellis. Member Whitman asked what the difference is. Director Heard stated that trellises are tall structures with a partial roof on top. Mark Copeland pointed out that Pizzazz Pizza has one. Member Whitman noted that the trellis is also used as a storage building for the ice machine, so it is not just a trellis with a vine around it. Mark Copeland stated that there are no sides to it and is something over top of the ice machine to protect it from the sun. Member Whitman inquired if there is a roof on it. Mark Copeland stated that it has lattice on top. Director Heard stated that it is a partial roof. Mr. Copeland noted that rain flows through it. Chair Blakaitis noted that it is minor compared to some of the other items.

Chair Blakaitis directed the Board to review the wooden deck. Vice Chair Murray clarified that it is the deck on the east side of the shed. Director Heard stated he is correct. Director Heard stated that it wraps around from the eastern to the northern side. Vice Chair Murray clarified that the deck is parallel to the back of the shed. Mark Copeland stated that it runs along the back of the shed and the bulkhead. He added that it is a walkway back to the ice machine.

Vice Chair Murray stated that the setback relief for the rear is the part he is most comfortable with since he realized that the land transfer did not happen. However, there is at least an email in the Board's packet with the adjoining property owner expressing enough support for the business that they would grant an easement. He stated that it doesn't seem like setback relief is important to that adjoining property. He noted that there is also an elevation difference. Mark Copeland added that he is not asking for an easement anymore since he is moving the stage to get it within his property line.

Member Whitman pointed out that Mark Copeland had to move the building a number of years ago into the five-foot setback. He asked why he didn't keep everything in the five-foot setback, including the decking and ice machine storage area. Director Heard clarified that the building was actually moved to comply with a 10-foot setback. Mr. Copeland stated that there used to be a roof on it, but he had to cut the roof and the rafters off. He added that he put in a trellis with lattice over top of it. He reiterated that there isn't a roof on it.

Member Whitman noted that the bar is only 7.3 feet from the property line. He added that Mark Copeland had stated that it was moved 10 feet. He asked which is correct. Chair Blakaitis stated that the Board is discussing the wooden deck. Member Whitman stated that when the trellis ended the deck area, Mark Copeland showed the bar only being 7.3 feet in and had just told the Board he had moved it 10 feet. Mark Copeland stated that he didn't move anything. He stated that he removed the roof so he would be outside the 10 feet of the setback line on the north side. Member Whitman pointed out that the plan the Board has before them, the setback is only 7.3 feet. Director Heard stated that he has a copy of the as-built survey that was submitted in 2014 that listed it at 10.2 feet. Member Whitman stated that he is talking about the deck. Director Heard understood, adding that at that time, the bar/shed building was 10.2 feet from the property line. Vice Chair Murray pointed out that there is an inconsistency between the site plan and the previous survey.

Chair Blakaitis asked where the shed is located on the property. He further asked if it is 7.3 feet or 10 feet from the setback. Director Heard stated that current survey shows it at 7.3 feet. He isn't sure if it was expanded or changed. Vice Chair Murray asked Michael Strader if he has any records. Michael Strader stated that it looked like the 7.3 feet is measured from the edge of the deck to the corner of the shed. Chair Blakaitis noted that this is something that was not discussed but asked if it is okay with Director Heard. Director Heard stated that it would become another Village Commercial Development Option item for the Board to consider.

Chair Blakaitis asked the Board how they feel about the decking. Vice Chair Murray stated that he is not bothered by the decking. Member Whitman stated that he doesn't have a problem with the rear, but noted that the sides are not even. Vice Chair Murray stated that there needs to be verification that it is 10 feet from the setback if it was to be required to be 10 feet.

Member McKeithan noted that all of the structures are putting more facilities on a very small lot. He added that the applicant is expanding out, and in every case, the applicant is exceeding the setback lines. He stated that the Board has not given that exception for the other outdoor eating establishments in their requests. Member Whitman stated that Member McKeithan's comments are important in that when the Board approved other outdoor eating establishments, they made the applicants stick with the 10-foot setback in the rear of the property. Vice Chair Murray pointed out that the Board seems to be hung up on precedent. He understood that conditional use permits, special exceptions, and variances do not set a precedent and that they are not permitted to be cited for future requests for the same relief.

Attorney Gallop stated that, technically, Vice Chair Murray is correct. He explained that the Board needs to be somewhat consistent, but he thinks the better answer is that each case is so different ultimately, that they do not hit each other from a precedent perspective because there is such a difference between each one. He added that the Board should consider each one on its facts as it comes before the Board. He stated that there are other issues related to prior decisions, but from a precedent perspective, he doesn't think it is a significant issue. He added that it doesn't keep the Board from using a prior thought process and coming to a similar conclusion. He thought as far as it being a precedent in analyzing it similarly, he doesn't think that it is uncommon but it is a legal precedent. He stated that the Board is really applying the facts on a specific site to the rules. Chair Blakaitis agreed. He thought the Board is more concerned with the fact that there is so much in this application and it is so major, not a one-foot encroachment in the 20-foot setback, but setbacks of only zero foot or 1.2 foot and they have to be added up. He thought that is what the Board is concerned about. Whether it sets a precedent or not, he thought it will set some type of precedent. Attorney Gallop stated that whether it does or not, if someone else wants to do it, they would bring it up. Chair Blakaitis agreed.

Vice Chair Murray directed the Board to review the performance stage. He thought the Board can move on as it is the same as the other one. Chair Blakaitis pointed out that the Board has four items that they are somewhat okay with but wants to see what the others are.

Vice Chair Murry directed the Board to review the movie screen. He noted that it has been changed. Robert Hornik disagreed. Mr. Hornik pointed out that the movie screen is just two 6x6's and hasn't changed. Chair Blakaitis agreed. Member Whitman stated that he doesn't have an issue with it.

Vice Chair Murray directed the Board to review the outdoor grill. Chair Blakaitis stated that the Board accepted that. Vice Chair Murray asked Member Cofield if he is not commenting because he felt that the Board should not be deliberating. Member Cofield stated that he had stated his position earlier in the meeting. He doesn't see a need to comment on each item. He stated that he would like to see a record that will clearly identify those changes for the Board. He stated that he doesn't want to have to guess at it. He stated that if the Board wants to proceed the way they have been, he isn't going to object. Chair Blakaitis thought when the Board is finished, then a decision can be made. Vice Chair Murray asked Member McKeithan if he is of the same opinion as Member Cofield. Member McKeithan stated that he is looking at the overall issues. He reiterated that the applicant is trying to put too much into a space and it results in things like one of the residents that had sent an email where they spoke highly of the restaurant and back grill, but the intensity and activity proposed for the size of the parcel exceeds its capacity. He

stated that if one is in the Backyard Bar, they are enjoying it, but it is straining the system by not having enough parking and being way out onto the lot line. He reiterated if someone is there, they are enjoying themselves, but if they aren't it is creating an overload on Duck Village.

Member Cofield thought it is very intense use of the site. He stated that if the comeback is to eliminate the screen or move the screen, or eliminating something else to make it a less intense use of the site, then he thought it will be worthy of further consideration, but the proposal is not changing the intense use of the site. He noted that this is not the only applicant that he has had a problem with. He reiterated that it is a very intense use of a small site. Chair Blakaitis clarified that Member Cofield will not support the application. Member Cofield stated he is correct.

Ashley Copeland stated that all of Duck is a very small space that is used intensely. She added that it is the nature of the Town. He stated that it is quiet in the winter, but in the summer, people flock in by the millions. She noted that traffic and parking are issues. She added that it isn't just their business, but everything. Mark Copeland added that it is everyone. Ashley Copeland stated that every business in Duck is small because they have such a short amount of time to make money. She added that there are a lot of people in Town in the summer, all want to be entertained, and she is providing a service to the tourists that come and love it here. She stated that the tourists love Duck because it's fun and has a lot of activities. She thought the Board should focus on one thing at a time instead of caring what the businesses are doing. She thought the businesses should do all that they can to make Duck the best town around.

Member McKeithan stated that one of the issues he had was that it started out that Roadside wanted to develop 5,300 square feet back in the back lot, which is only 75 feet wide and now they have made some concessions to reduce that down to 3,667 feet. He felt that it is still more than the property can accommodate. Ashley Copeland noted that they have done it for years and it has accommodated it. She stated that no other restaurant in Town has noticed their property. She added that this is her family's living as well as her employees' living and it will not be ruined. She stated that she is the one that is most concerned with the property. She reiterated that they have been doing the same thing for years and there has never been a problem. She added that the police have never come to their property. She noted that the Health Department has never had an issue with their property as everything is working fine. She feels that the Town and the Board are looking for a problem that doesn't exist. She stated that people are having a great time at their restaurant. She noted that it isn't like a development, adding that people are sitting in the back on plastic chairs, drinking and listening to music. She reiterated that everyone is just having fun. She stated that she has 1,000 names on a petition that will be presented to Town Council as well as emails and comments on her Facebook page of people supporting the restaurant. She pointed out that there has only been one negative letter. She stated that she has tried to be as considerate and hospitable to the neighboring properties as she possibly can. She noted that the owner behind the restaurant was going to give them a piece of their property so they can make this work. She stated that there is one complaint and the Board's concern that what they have is not going to work was incorrect as it has been working.

Janis Miller of 109 Beachcomber Court was recognized to speak. Ms. Miller stated that the site is not stretched or strained in any way and there has not been any problem there. She stated that it is well maintained. She stated that she is angry over the whole issue as there isn't a problem. She encouraged the Board to go to the property and see it for themselves. She stated that

Roadside Bar & Grill and the other restaurants are the reason she wanted to come to Duck. She stated that she has a lot of friends that live in Nags Head and Manteo, and they come to Duck because of the special things. She asked the Board to keep the good things in Duck going and do what they can to make sure it stays the way it is and not try to fix things that aren't even broken.

Vice Chair Murray thought the Board needs to go through the list. He stated that he understands the comments that people are making. Chair Blakaitis stated that the comments are appreciated, but unfortunately the Board has to consider other things, which they are trying to do in a fair way.

Vice Chair Murray stated that the bathroom has a 2.3-foot setback. He stated that it has the six-foot fence behind it. He clarified that the residential property is by the grill and the bathroom is behind Pizzazz Pizza. Director Heard stated he is correct, adding that the bathroom abuts the Loblolly Pines shopping center.

Chair Blakaitis asked if the outdoor bathroom can be eliminated. He further asked if it can be put somewhere else, such as an area that complies with the rules. Ashley Copeland stated that they put the bathrooms there because the Town asked them to have a port-o-john. She pointed out that no one wanted to use a port-o-john. She noted that there was always a shed there. So, they moved it and put the bathroom in so people would have a place to use the restroom. She stated that anyone is welcome to use it as they keep it open all day and people come and go, including people that are not customers, and the Town was welcome to put it on their maps as a public restroom. She stated that by moving it, it will create more strain on the system in the restaurant and they will have a port-o-john that no one will be using that they will have to pay a lot of money to rent.

Mark Copeland noted that they had the port-o-john for years at \$150.00 per month and had to have it cleaned twice a week. He stated that it was a disaster as it wasn't handicap accessible. He stated that he went ahead and bought a larger shed with two bathrooms in it and Jack Flythe from the Health Department came and looked at it. He received a statement from Mr. Flythe that said he had no issue at all with the bathrooms. He added that Building Inspector Steve McMurray came over and looked at them and noted that they aren't handicap accessible, but explained to him that the State of North Carolina requires one handicap bathroom and he has that inside his restaurant. He reiterated that the port-o-john was not handicap accessible and was very nasty.

Vice Chair Murray directed the Board to review the employee parking spaces. He felt that Director Heard's suggestion that the westernmost parking space be shown made sense. Chair Blakaitis asked where the parking is regarding the setback. He thought it was still one-foot in. Director Heard stated that they have enough room to slide it over one foot. He explained that the proposed change would bring it to five feet, which is all they need for parking, which is a different distance than buildings. Chair Blakaitis noted that it would be compliant with the change.

Attorney Gallop asked Chair Blakaitis if he had asked for some sort of fencing or delineation along the parking spaces. Chair Blakaitis noted that it was suggested that it be fenced off so they cannot park the old way. Director Heard stated he is correct. Member Whitman pointed out that

the original drawing had indicated it will be at five feet and the revised drawing has it still at five feet. He asked what the correction was. Michael Strader believed it was at four feet. Director Heard explained that if one measured it, it measured out at four feet. He added that Member Whitman's point was well taken. He stated that the point is, with the proposed changes, the applicant is proposing five feet.

Vice Chair Murray directed the Board to review the landscape buffer in the rear. Chair Blakaitis pointed out that there isn't a buffer in the rear because everything in the rear is at 0 or 1.2 feet. Member Whitman asked if on the south side where the 14-foot stage setback is located, the buffer can be put in. Chair Blakaitis stated that there is one there. Vice Chair Murray asked what happens behind the bulkhead. He clarified that the screen is over top of the bulkhead. Member McKeithan stated he is correct. Mark Copeland explained that 6x6 poles were installed when he built the bulkhead and were bolted. The structure is 18 feet long and in the ground with a 4x4 across the top. Vice Chair Murray asked what is behind it. Mark Copeland stated that it is just vegetation. Vice Chair Murray clarified that it is 14 feet. Mr. Copeland stated he is correct as the space continues on up the hill all the way to the property line. Chair Blakaitis stated that the other side of the property line does not show a fence line. Michael Strader stated that the area is extremely dense and the fence continued up to the property line.

Chair Blakaitis directed the Board to review the parking. He noted that there are a lot of questions regarding it and few solutions because it has been happening for a long time. Member McKeithan thought the parking is one of the most critical things that should not be waived, because parking is an issue. Member Whitman stated that he feels the same way. Robert Hornik stated that they are not proposing to waive the parking, they are proposing to satisfy the shared parking agreement. Mark Copeland stated that he will have the shared parking agreement on June 14, 2018. Chair Blakaitis stated that the question for the Board is if they are going to worry about the parking being five cars short. Michael Strader stated that the parking had 22 spaces. Director Heard noted that there are 22 marked parking spaces in the front. Mr. Strader reminded the Board that the Kellogg Supply property is larger than what one sees as it isn't just Kellogg Supply, but also PNC Bank. The bank leases from Kellogg Supply for their parking so all of the spaces on that parcel are in excess of 30 spaces. He added that in the agreement that is being worked out is only for 30 spaces. Chair Blakaitis clarified that the parking spaces are for Kellogg Supply and PNC Bank. Mark Copeland stated that Kellogg Supply owns the properties. Chair Blakaitis understood and clarified that the applicant is looking for an agreement with Kellogg Supply and PNC Bank. Michael Strader stated he is correct.

Director Heard pointed out that a key question will be if PNC Bank's lease will allow it. He added that they have an ATM and will not want Roadside's customers taking up all of their parking. He added that staff will need some information about which parking spaces are being shared. Michael Strader stated that it will be provided.

Vice Chair Murray stated that there is an agreement and then there are some comments about the parking. He asked about the pending agreement as one of the conditions. Attorney Gallop stated that he would not recommend it to Council if it is left pending. He noted that the big issue is if the applicant is going to have to transfer property to deal with the stage in the back as there cannot be a zoning approval for use of a property that the applicant does not own. He thought Town Attorney Robert Hobbs' perspective with regard to the shared parking agreement is that it

be ready to record. He added that if it is ready to record, he doesn't see why the applicant does not go ahead and get it recorded before the meeting. He was sure that Mr. Hornik agreed with him in that it will probably happen if the applicant obtains the agreement. Robert Hornik stated that he spoke to Town Attorney Hobbs a week prior and received an email from him with a parking easement that the Town has used before. He added that he took that parking agreement, changed the names and parties to it, amended the terms to it slightly, and sent it out on June 12, 2018 after speaking to representatives of Kellogg Supply. He expected to have it soon.

Attorney Gallop noted that the agreement that is in the Board's packets is not the agreement that Town Attorney Hobbs gave Mr. Hornik. He stated that he isn't sure where it came from. Mark Copeland stated that he obtained the agreement from Kellogg Supply after he and representatives from Kellogg came up with an agreement. He stated that he had it signed and notarized and Kellogg Supply also signed and notarized it. He pointed out that the format is not acceptable so it has to be redone. Attorney Gallop doesn't expect that the format to be the issue, it will be whether or not they obtain the agreement. Director Heard noted that he has requested that the document be provided for the Town Attorney's review before it is processed.

Chair Blakaitis stated that the way he sees it, looking at every single item that was discussed, it is basically that the Board does not mind pretty much what is there, but the setbacks are an issue and the property is being really stretched to the maximum. Member Cofield stated that it is a very intense use of the property. Chair Blakaitis agreed and added that the enormous setback infringements are a concern. He wondered what else the Board can discuss. Vice Chair Murray felt the Board went through the list and most of the items were okay. Chair Blakaitis agreed.

Vice Chair Murray moved that the Planning Board recommend approval, based upon the conditions listed in the staff report with the change to Condition #4 that the fourth employee parking space be reoriented on an angle; the addition to Condition #5 that a hallway be created via a post and rope method directing traffic to the outdoor entertainment area and away from the area that was not included in the application; and Condition #6 altered to say that the outdoor grill/food service structure be brought into compliance with fire and building code requirements.

Vice Chair Murray asked if "prior to signing a recordation" implied that it will happen before the Council meeting or if it is expressed. Attorney Gallop thought the applicant's expectation is that they will get it to the Town and have it recorded before the Council meeting. Robert Hornik stated that there is no sense in his client having it recorded if they do not receive the conditional use permit for it. He stated that they can have it ready to be recorded, but if the property is not going to be used that way, then there is no sense for Kellogg Supply to give the shared parking agreement. He suggested that they have it in hand ready to record. Attorney Gallop explained that Robert Hornik's suggestion is a recommendation for a condition that it be recorded after the approval. He added that if they do not record it, ultimately, they will be in violation of a condition of the conditional use permit. Robert Hornik stated that they need to work with Council on this.

Member Whitman pointed out that Council's next meeting is Wednesday, July 18, 2018, so he thought the Board can vote on it at this meeting and the paperwork will be here. Attorney Gallop noted that it can be done that way, but it would not be a recorded document. He stated that if the applicant does not obtain the conditional use permit, they do not necessarily need the shared

parking agreement. Member Whitman stated that the Planning Board has not seen the shared parking agreement. Vice Chair Murray stated that Town Attorney Hobbs will review it. Member Whitman asked if it can be approved without the shared parking agreement in hand. Attorney Gallop stated that the Board can recommend it, but Council will need to see it at their meeting before they approve the conditional use permit. Robert Hornik stated that his client will not be signing a shared parking agreement until they know that it will satisfy the requirements. Attorney Gallop added that the Planning Board can recommend it with the condition that it is in place to be signed and recorded by the Council meeting. However, Council may ultimately not approve the permit because the applicant cannot show that they have enough parking and Council will have to back off and tell them that they can only use the parking on their site.

Chair Blakaitis asked Vice Chair Murray if he is making a motion for approval with the conditions so stated, which were item #2 and #3 of Director Heard's recommendation. Vice Chair Murray stated he is correct. Chair Blakaitis asked about the grill. Vice Chair Murray stated that it was added that whatever is done to the grill will have to meet fire and building codes. Attorney Gallop suggested the following language be added to the motion: "...as amended by the site plan the applicant provided tonight..." Director Heard agreed, adding that it should be clear in the motion that the Board is including the amendments that were proposed by the applicant. Vice Chair Murray stated that he wants to include that but does not want to imply that just doing what is being proposed will satisfy. Attorney Gallop agreed. He added that there will be a recommendation for approval as amended with the conditions spelled out with regard to the grill meeting fire and building codes.

Chair Blakaitis asked if all of the conditions in the alternative recommendation are included in the motion. Vice Chair Murray stated that they are. He thought the conditions are reasonable.

Member McKeithan and Chair Blakaitis clarified that Condition #1 will be one that is voted on. Vice Chair Murray thought it is reasonable. Chair Blakaitis asked the applicant if he is prepared to cease use of the outdoor facility until all permits have obtained, required information submitted, necessary work completed, final inspections approved, and certificates received in hand. Robert Hornik and Ashley Copeland stated that they do not want to do that. Mark Copeland pointed out that it is summer time. Mr. Copeland stated that he will obtain all the permits needed, but pointed out that this is how they make a living. He added that the Town has already taken three tables from him on the patio and he cannot afford to lose any more. Ashley Copeland added that they now have to pay attorney fees. Mark Copeland stated that ceasing operations would do some serious financial damage to his business.

Chair Blakaitis pointed out that Mark and Ashley Copeland were making a living under the present circumstances before anything started. Mark Copeland stated he is correct. He stated that he had asked if he can piggy-back the permits and have had things taken care of. Chair Blakaitis asked how soon the work could be completed. Mark Copeland stated that it will be as fast as he can get it done. He added that he will build a bicycle rack and take the shed out.

Vice Chair Murray stated that he does not have a problem with striking Condition #1 in his motion. He stated that he had a sense that the sentiment of the Board is that they don't think there any chance of a motion passing. He asked if there is any other mechanism that any Board member can propose as a condition. Mark Copeland stated that he can start construction right

away. He added that the back bar is closed on weekends. Vice Chair Murray clarified that even though the condition states “immediately”, the Planning Board is just an advisory board. Director Heard stated that if the Council chooses to approve with that condition, it would be enforced on July 19, 2018. Vice Chair Murray pointed out that the applicant will be back up and running once the changes are made. Ashley Copeland stated that it will be something they go before Town Council to discuss. Chair Blakaitis noted that it has to be decided what will be put in the motion. Ms. Copeland clarified that the Planning Board is not telling them they have to shut their business down this evening. Vice Chair Murray stated that they aren’t. He explained that if Council approves the permit, then they can apply for building permits to resolve the issues. Member McKeithan stated that the permits can be applied for on June 14, 2018. Vice Chair Murray disagreed. He clarified that the applicant cannot submit for a building permit until the zoning is approved. Director Heard stated that zoning approval is part of the process and usually it comes first. Mark Copeland clarified that he cannot obtain building permits until after the Council meeting. Director Heard stated that until Council considers the application, staff doesn’t know if Roadside Bar & Grill will be able to use the property as proposed. Mark Copeland questioned if in the interim, he can pull a permit.

Michael Miller of 109 Beachcomber Court was recognized to speak. Mr. Miller suggested placing a timetable on the permit and giving the applicant a reasonable time to come into compliance. He stated that by doing that, it allows the applicant to keep open their business since this is the busy season in Duck. Chair Blakaitis stated that Mark Copeland is not in the business of the Backyard Bar, he is also in the business of providing food to the restaurant. He added that it is part of the whole thing. Mark Copeland asked again if he can pull a permit. Chair Blakaitis stated he cannot.

Chair Blakaitis noted that a partial motion was on the floor.

Member McKeithan stated that he is confused. He pointed out that there is a restroom being used that was never approved. He asked if Mark Copeland cannot get it inspected or approved. Vice Chair Murray stated that he cannot because Town Council could make a condition that it may have to be torn down or moved. Member McKeithan thought it could stop being used until approval is granted. Vice Chair Murray explained that the Planning Board is not capable of granting the approval. He stated that when the application process starts, everything stays the way it was and it was at an enforcement stage at this point as the applicant is being fined on a daily basis. Chair Blakaitis stated that the remedy is for the applicant to appear before Council and get approved. He clarified that nothing can change on the property until the Council looks at the application. Attorney Gallop stated he is correct. He stated that the Copelands have received a notice of violation, are in violation of various things, they can fix those violations today, they can go through an approval process to allow some of those violations to continue and then starting with zoning, obtain building, and other permits. He added that the Town’s primary objective with violations is compliance, whether it is compliance by fixing it, getting text amendments, or obtaining permits.

Chair Blakaitis stated that Member McKeithan’s question is what the Board can do now, if anything. Attorney Gallop stated that the Planning Board cannot do anything about the permits. He explained that the Board can either vote to recommend denial or approval, with or without conditions. He added that even if a condition is put on the approval, it is recommending that

Council adopts the condition when they make their ultimate decision. He stated that in the meantime, Council may or may not have other remedies that they can pursue, but it is not something that the Planning Board can deal with. He added that the Planning Board can either recommend approval, denial, or add conditions that Town Council will ultimately consider.

Member McKeithan noted that Attorney Gallop had stated that if Mark Copeland wants to correct the problem, such as using the restrooms, they can get it into compliance according to the Dare County Health Department. Attorney Gallop stated he is correct, but they have chosen not to and have chosen to continue to accrue penalties and take the risk that the Town will file a lawsuit and get an injunction that makes them stop. He stated that they have chosen that path while also choosing to try and come before the Planning Board and then Council to see if they can get the problematic things approved, with some changes. He stated that whether or not that happens will remain to be seen once it goes before Town Council. He reiterated that the Planning Board recommends what it thinks Council should do with it when they receive it.

Chair Blakaitis stated that the Planning Board cannot fix the restroom unless Attorney Gallop issues an injunction. Director Heard noted that the issue is that it is not an approvable structure currently in terms of setbacks and he cannot grant the zoning approval until the Planning Board and Town Council state the bathroom is fine where it is or they have to move it. He added that it also means that Mark Copeland cannot obtain a building permit.

Chair Blakaitis pointed out a second time that a partial motion is on the floor. He asked the Board if Condition #1 should be included. He added that it needs to be decided and then the motion will need a second before a vote is completed.

Member Whitman stated that he wants Condition #1 in the motion. Vice Chair Murray stated that he is fine with keeping Condition #1 in the motion.

Chair Blakaitis asked for a second.

Michael Strader stated that the applicant would like to propose that the design engineers submit a courtesy review to minimize the lapse in time for potential closure. He stated that they do not want to wait until after Council approves the conditional use permit and then the design engineers take time to do what they need to do, which could take months, and bring it back to the Building Inspection department. He stated that the applicant is offering to have an engaged design engineer work with the building permit application after it is submitted to the Inspections department. He reiterated that it would be a courtesy review. Chair Blakaitis didn't see how it would make a difference. Vice Chair Murray stated that it can potentially save the applicant one week, which he understood, but it will be a courtesy that the Town could extend and not be a condition of the conditional use permit. Director Heard agreed, adding that it will not necessarily change the potential condition that is being discussed, but is certainly something that can be worked on with the understanding that the applicants are proceeding at their own risk and any expense they make could be for naught if Council does not approve. He stated that as long as that is understood, staff does not have a problem with it. He reiterated that a permit will not be issued, but as far as working with someone to get an approvable project, staff is fine with it.

Robert Hornik stated that if there is a spirit of mutual cooperation, they can get the plans in for review so that the day after the Council meeting, if the conditional use permit is approved, they can have the permission.

Member Whitman asked if “Fire Inspector” can be added to Condition #6. Vice Chair Murray thought he had stated such in his motion.

Chair Blakaitis asked for a second to the motion.

Member McKeithan stated that with Condition #1, it will help the applicant if the language reads as follows: “...30 days after CUP approval, the applicant must cease use...” Vice Chair Murray clarified that it will be if they are not in compliance. Member McKeithan agreed, adding that it gives the applicant 30 days after the CUP is approved. Vice Chair Murray stated that he would have added that, but didn’t get the impression that the rest of the Board wants that. Member McKeithan noted that Vice Chair Murray can amend his motion.

Vice Chair Murray moved to amend his motion with the new language for Condition #1 being that the applicant must cease use of the outdoor seating/entertainment area if the project has not been brought into compliance within 30 days.

Member McKeithan noted that he is trying to give the applicant some wiggle room. He suggested the language read as follows: “...30 days after CUP approval, the applicant must...” and then continue with the condition as it was originally written.

Vice Chair Murray moved to amend his motion a second time with the revised language.

Chair Blakaitis once again asked for a second to the motion.

There being no second, the motion died.

Member Cofield stated that he had an unreadiness with not having the documents in front of the Board to discuss, all of which were discussed. He suggested that all recommendations brought to this meeting that were discussed be recommended for approval. He stated that if the applicant is willing to do that, then the Board can make a decision at their next meeting or, alternatively, make a motion to deny the application. Chair Blakaitis didn’t think it was right to split things up the way Member Cofield is proposing, but noted it can be done that way.

Member Cofield moved to recommend that the conditional use permit be denied.

Chair Blakaitis asked for a second.

Vice Chair Murray noted the meeting schedule with regard to the next Planning Board meeting. He asked if the Board can reconsider the application then. He noted that the applicant is on the agenda for the meeting tonight. Director Heard stated that the issue is that the Planning Board meets July 11, 2018 and the next Council meeting is on July 18, 2018. He stated that the issue is the timing of advertising for the Council public hearing. He stated that with that schedule, it

could go before Council at their August 1, 2018 meeting. Chair Blakaitis stated that he is open to recess to a mid-month meeting if the information can be given to the Board by then.

Ashley Copeland stated that she isn't sure how they can meet the revisions when they cannot pull permits. Member Cofield stated that it will be for the things they are proposing. He stated that it is a very intense use of the site that is under the applicant's control. Ashley Copeland noted that Member Cofield kept referring to their property as an intense use. She reminded the Board that it is only intense for four months out of the year. She asked about the other eight months where nothing is going on.

Michael Strader noted that the applicant is proposing greater than 30% reduction of their outdoor seating. Member Cofield stated that he is sure that staff will be prepared to sit down and discuss it further, but it is unacceptable. He added that his motion is still on the floor. He stated that the applicant can still come back to the next meeting. Chair Blakaitis disagreed, adding that they will have an open path to Town Council. Michael Strader stated that he heard it expressed that if there is satisfaction in the reduction that the applicant brought forth regarding the outdoor seating is one of the positives. Chair Blakaitis stated that it is only one item. Director Heard explained that the intent isn't that the final figure is a good figure, but that it is a step in the right direction by reducing the size of the outdoor area.

Member Cofield stated that the Board had a hearing two months ago and many of the comments given at this meeting were similar to what was heard at the other meeting.

Member Cofield reiterated his motion to deny the application. Chair Blakaitis seconded.

Member McKeithan clarified that the Board is not going to have a mid-month meeting. Chair Blakaitis stated he is correct.

Motion carried 4-1 with Vice Chair Murray dissenting.

Attorney Gallop asked Robert Hornik if he agreed that the applicant needed to confirm a lack of consistency with the Land Use Plan. Mr. Hornik stated that consistency is not necessary for a conditional use permit.

Kent Hennessey clarified that this motion as carried allowed Roadside Bar & Grill to continue their operation of the Backside Bar. Director Heard responded that they have not been allowed to legally operate for the past three years.

OLD BUSINESS

Text Amendment Ordinance 18-06: Proposal to Amend Section 156.126 of the Zoning Ordinance by Establishing Standards for the Scale of Single-Family Residential Development

It was *consensus* of the Board to table the item until the July 11, 2018 meeting.

APPROVAL OF MINUTES

Minutes from the May 9, 2018, Regular Meeting

Member Cofield moved to approve the May 9, 2018 minutes as presented. Chair Blakaitis seconded.

Motion carried 5-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Summary of June 6, 2018 Town Council Meeting

Director Heard gave an update on the June 6, 2018 Council meeting to the Board and audience.

Project Updates

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

BOARD COMMENTS

Vice Chair Murray stated that it was brought to his attention at the last meeting regarding a procedure made for Duck for notifications for applicants as to what their responsibilities were. He stated that it was either implied or expressed in tone that certain people had the sentiment that he was implying that they were not doing an effective job. He apologized for any tone or error as it was not his intention. He stated that it has since been discussed with Director Heard and Permit Coordinator Cross and a checklist has been drafted that will be discussed at a future meeting to help the Board and staff have an acknowledgement from the applicant that they know what their responsibilities are.

Member Cofield stated that once the checklist is drafted, he suggested that it be circulated for review. He stated that he does not have a problem with the checklist, but asked that before the Board meets, that it be circulated so that the rest of the Board can view it. He stated that the problem he sees is if there are 10 things listed on an application, and the applicant comes before the Board and the applicant is asked additional questions, the applicant can say they aren't on the checklist that was given to him. He stated that it can be a problem with doing this. Director Heard stated that a statement can be added that the checklist is not meant to be a comprehensive list. He added that the intent is for the Board to get a better product for review.

Director Heard reminded the Board that there are two conditional use permit applications for the July 11, 2018 meeting and they will be discussing the maximum house size at that meeting as well. He asked the Board to keep them in mind. He added that one is for an expansion of Treehouse Coffee and the other is for a small cellular wireless antenna in a residential community.

ADJOURNMENT

Member Cofield moved to adjourn the meeting. Member McKeithan seconded.

There was no vote.

The time was 9:55 p.m.

Approved: _____
/s/Joe Blakaitis, Chairman