

**TOWN OF DUCK  
TOWN COUNCIL  
REGULAR MEETING  
July 18, 2018**

The Town Council for the Town of Duck convened at the Paul F. Keller Meeting Hall at 7:00 p.m. on Wednesday, July 18, 2018.

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

COUNCIL MEMBERS ABSENT: None.

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

OTHERS ABSENT: None.

Mayor Kingston called the meeting to order at 7:04 p.m. He asked Police Lieutenant Jeffrey Ackerman and Fire Captain Jared Smith to lead the Pledge of Allegiance. Mayor Kingston led the moment of silence.

Mayor Kingston noted that Councilor Chuck Burdick was running late for the meeting but would be present shortly.

**PUBLIC COMMENTS**

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

Allan Beres of 146 Dune Road was recognized to speak. Mr. Beres stated that he wished to express his concern regarding the last two Council meetings, of which the purchase of properties was discussed, and decisions were made in closed session, while there was no opportunity for the public to comment. He stated that the process of purchasing the properties bothered him as there was no information about the substance of it. He noted that it was a departure from the Council's traditional way of conducting business and that it could erode the public trust. He stated that he wondered why the purchase was done so quickly and if there were time constraints involved, compromise in price negotiation terms, the use of the appraisal, and the need for the property. He added that the timing was bad since it took place immediately after the budget was passed for the upcoming year that included a one and a half cent increase in the levy on properties, which was justified by supporting the need for additional personnel for the Police and Fire

Departments. He stated the funding source to enable the purchase was to transfer the funds from the Town's reserves to purchase the property. He pointed out that the reserve fund was in place to see the Town through times of a natural disaster with no income coming in. He added that the need for the reserve fund was increased when personnel was added, so the purchase of the property seemed unusual to him. He stated that he wasn't sure what shape the reserve fund was in. He stated that he had a lot of concerns with the main concern being why Council did not ask for the public's participation because in the past, there was that kind of relationship and he wanted to see it continue. He stated that there has always been a lot of trust and good stewardship and he didn't doubt the intentions were wrong; but hoped in the future that Council would give some weight to the importance of public input.

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

### **CONSENT AGENDA**

**Minutes from the May 16, 2018, Mid-Month Meeting; Minutes from the June 6, 2018, Regular Meeting; Minutes from the June 20, 2018, Reconvened Regular Meeting; Minutes from the June 20, 2018 Mid-Month Meeting; Approval of the FY 2018 Audit Contract; and Approval of an Agreement for Professional Services with VHB Engineering NC related to the FY 2019 Pedestrian Improvements.**

Councilor Britt moved to approve the Consent Agenda as presented.

Motion carried 5-0.

### **SPECIAL PRESENTATIONS**

#### **Employee Service Recognition Program Recipients**

Mayor Kingston stated that in December 2011, Council had adopted an employee service recognition program that would acknowledge the service of employees of the Town at five-year intervals by providing them with a certificate of recognition as well as a gift certificate at a Duck business of their choosing.

Mayor Kingston, Police Chief John Cueto and Town Manager Chris Layton went on to present Police Lieutenant Jeff Ackerman with his 15-year service recognition certificate and \$150 gift certificate.

Mayor Kingston, Fire Chief Donna Black and Town Manager Layton went on to present Fire Captain Jared Smith with his 10-year service recognition certificate and \$100 gift certificate.

### **PUBLIC HEARINGS**

**Public Hearing/Discussion/Consideration of CUP 18-006, a Conditional Use Permit Application by Mark & Ashley Copeland (Big Momma, LLC) to Expand the Existing Restaurant with a Permanent Outdoor Seating and Entertainment Area and Apply the Village Commercial Development Option Seeking Flexible Development Standards for Structure Setbacks, Parking Setbacks, and Landscape Buffers for Roadside Bar & Grill at 1193 Duck Road**

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

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

Councilor Jon Britt was recognized to speak. Councilor Britt stated that he had several site visits with Mark and Ashley Copeland and looked at the process. He stated that he tried to help them through the process and didn't believe that anything that happened on site would affect his decision with the public hearing.

Mayor Kingston stated that Council received many emails both in support and in opposition to the application. He noted that most were included in Council's agenda packets.

Town Attorney Hobbs stated that members must base their decision on the evidence presented during the hearing and a member that has developed a pre-determined bias on the application could not participate in the decision. He asked that anyone wishing to testify come forward to be sworn in.

Town Clerk Lori Ackerman was recognized to speak. Town Clerk Ackerman proceeded to swear in the applicants and staff for the public hearing.

**The following persons were sworn to provide testimony during the hearing: Joe Heard, Michael Strader, Robert Hornik, Ashley Copeland, Dan Chiles, Jack Bodner, Dan McIsaac, John Klamut, Josh Martier, Erica Cuculiza, Reid Carter, Kent Hennessey, Jim Durham, Benny Hopkins, Hannah Frank, and Mark Copeland.**

Town Attorney Hobbs opened the evidentiary portion of the hearing. He stated that Director Heard would give an overview.

Director of Community Development Joe Heard was recognized to speak. Director Heard stated that there was a temporary conditional use permit that was issued for

Roadside Bar & Grill back in 2013 for a special event area. He stated that the approval for it expired in 2015 and was not what Council would be looking at for this meeting. He stated that there was an existing restaurant, patio and other improvements that were already in existence on the property and was not part of this discussion. He noted that the application would not affect those improvements as the applicant could continue with them.

Director Heard stated that the proposal would be thought of as a clean slate; there was nothing on the property that was part of the proposal that was presently approved. He added that Council was effectively looking at it as if it was not there and was a proposal to do what they are asking to do. He reminded Council that the significant difference with this proposal versus other conditional use permits was that most of the improvements that were proposed as part of the application currently exist on the site. He added that the applicant was seeking approval for those structures that were already built. He noted that most of the improvements that were proposed were already in place on the site. He stated that it was potentially a different type of issue for the Town if the permit was denied.

Director Heard stated that the applicant had a large outdoor area, which was an expansion of the existing restaurant and was a use that was permitted on the site as a conditional use and was subject to certain standards. He pointed out that the existing area was approximately 5,300 square feet in size and located in the septic area of the property was a variety of different functions such as the bar, entertainment stage, the grill, seating and tables, and was surrounded by a wooden fence. He stated that the applicant was proposing a reduced area, where they would be reducing it by one third of the existing size and the fence was proposed to remain and they would be looking to install a small post and rope area to delineate the smaller area.

Director Heard stated that there was currently a small shed on the northeast corner which used to be located where the bathroom currently exists on the top of the hill. He added that it was moved and encroaches 8.2 feet into the north side setback. He stated that the applicant was proposing to move the shed a little over 40 feet closer into the property to the south and would still encroach five feet into the minimum setback.

Director Heard stated that there was a trellis in the far northeast corner of the property as well as an addition that were added to the bar/storage building and extended further to the northern side setback. He stated that the closest area encroaches 9.3 feet into the rear setback and 8.8 feet into the side setback.

Director Heard stated that there was a wooden deck that wrapped around the building and encroaches .4 feet into the northern side setback. He stated that the applicant was proposing to keep it in the existing nonconforming location.

Director Heard stated that the shed/bar building was added after the original structure. He noted that the addition complied with all of the Town's setback standards and was proposed to remain in the existing location.

Director Heard stated that the survey for the performance stage showed that it encroached three feet onto the adjoining residential property, which was beyond the boundaries of the site property and encroached into the setbacks as well as the buffer for that property. He stated that the applicant has proposed to move the stage onto the subject property; however, it would be directly abutting the rear property line and would encroach the entire 20 feet into the rear setback and there would be no buffer against the adjoining property.

Director Heard stated that on the southeast corner of the property was a taller framed structure and supporting posts for a movie screen. He stated that it was 5.3 feet off the rear property line and encroached 14.7 feet into the setback and 5 feet into the southern side setback and buffer with the adjoining residential property on the southern side. He noted that the applicant was proposing to leave the structure in the existing, nonconforming situation.

Director Heard stated that on the southern side was a stone and concrete outdoor grill, sink and food service area. He stated that it was approximately eight feet long and four feet in depth and encroaches 7.1 feet into the southern side setback as well as the buffer against the residential property. He added that because of the structure's purpose, it has unique characteristics and other requirements it had to meet, which included as part of the North Carolina Fire Code and the Grill Bill – a Health Department bill that allows restaurants to use outdoor grills. He explained that there was a requirement for both for a 10-foot separation from combustible construction. He added that it was another requirement that must be completed. He stated that the applicant was proposing to move the structure forward approximately three feet; but would still be in a nonconforming location and would not comply with the separation requirements for fire code and grills.

Director Heard stated that there was a storage building located on the south side of the property that encroached 7.2 feet into the setback. He noted that the applicant was proposing to remove the structure entirely, bringing it into compliance.

Director Heard stated that there was a storage shed that was moved to the property and the eastern part was converted to a two-seat bathroom. He stated that the structure encroached 7.7 feet into the side setbacks. He noted that the applicant was proposing to keep the structure in its current location.

Director Heard stated that there was an existing parking area on the property and the challenge for it was that the area was the designated septic repair area for the property. He noted that the Health Department had emailed Town staff noting that driving and parking on that surface did not comply with the State Health Department standards and they did not permit that type of activity on a repair area. He added that the applicant was proposing to remove that area and reorient it in a manner where the parking spaces would be split closer to the northern side property line with just enough room to accommodate four parallel parked vehicles and stay off the repair area. He stated that the applicant was proposing to place a couple of bicycle racks on the property, one of which would be near

the outdoor seating/entertainment area and the other would be behind the restaurant building. He stated that the applicant was also proposing to place a portion of the existing fence that runs approximately where the outdoor area ends on the western side, extend it all the way up towards the front of the property, but would not include the rear portion of the property.

Director Heard stated that there were presently 10 unpermitted structures or additions in the proposed outdoor seating/entertainment area. He added that 9 of the improvements do not presently comply with the Town's minimum building setback standards and of those 9 structures, 8 were proposed to remain in the nonconforming locations. He stated that the applicant was proposing the following:

1. Completely remove a 160 square foot storage building, eliminating the encroachment into the southern side setback.
2. Relocate the small storage shed in the northeast corner of the outdoor entertainment area approximately three feet southward. Although still nonconforming, the proposal will reduce the setback encroachment to five feet.
3. Relocate the outdoor grill structure approximately three feet northward. Although still nonconforming, the proposal will reduce the setback encroachment to 14 feet.
4. Eliminate the encroachment onto the adjoining property by relocating the performance stage three feet westward. Once moved, the stage will abut the rear property line and still encroach 20 feet into the minimum rear setback.
5. The other six nonconforming structures and additions are proposed to remain in their existing, nonconforming locations.

Director Heard stated that the applicant was seeking some modifications to the typical development standards in the Village Commercial Zoning District, under the Village Commercial Development Option, which Council has the ability to grant. He explained that for building setbacks, there was the storage shed in the northeast corner where the applicant was seeking a five foot setback; for the trellis addition in the northeast corner, the applicant was seeking a 1.2 foot setback on the northern side and 10.7 foot setback at the rear; for the wooden decking around the bar and storage building, the applicant was seeking a 0.4 foot setback from the northern side setback and 6.5 foot setback from the rear; for the bar/storage building, the applicant was seeking a northern side setback of 7.3 feet and a rear setback of 10.7 feet; for the performance stage, the applicant was seeking 0 feet; for the movie screen support structure, the applicant was seeking a 5.3 foot setback from the rear and a five foot setback from the southern side setback; for the outdoor grill/sink/food service structure, the applicant was seeking a six foot southern side setback; and for the bathroom/storage building, the applicant was seeking a 2.3 foot southern side setback. He added that the applicant was seeking 20 parking spaces where a minimum of 48 spaces were required. He stated that the applicant was seeking to not have to provide a rear landscape buffer against the adjoining residential property to the rear.

Director Heard stated that the property was a half-acre in size and zoned Village Commercial and was a fairly deep property as it was 75 feet in width and 300 feet deep off Duck Road. He stated that a restaurant presently sits in front of the property that was 1,939 square feet with 74 seats associated with it, including the seats inside, on the porch and on the patio in the front. He noted that the patio encroached about one and one half to two feet onto the public right-of-way in the front of the property. He reminded Council that there was a portion of the patio that was removed to accommodate the sidewalk within the right-of-way, but there was currently an encroachment, and was something that has been there for a while, so they were legal, nonconforming situations. He stated that with the proposal, the applicant was not looking at increasing those nonconformities.

Director Heard explained that the adjoining property to the north was zoned Village Commercial and contained the Tomato Shack produce stand; to the south was the Loblolly Pines shopping center and to the rear was a single-family residence zoned Single-Family Residential, with frontage on Winauk Court; abutting the rear of the property was a residence also zoned Single-Family Residential and was listed for sale. He noted that this property fronted Duck Landing Lane and was at a significantly higher elevation and looked down on the applicant's property. He added that across Duck Road was the Town property, which was zoned Conservation-Public Recreation.

Director Heard stated that the applicant has recently obtained a permit from the Health Department authorizing the proposed location of the structures that abut the existing septic field as well as the proposal related to the employee parking area that adjoined the septic repair area. He noted that it was obtained after the Planning Board's recommendation, which was a positive change that has occurred with the proposal. He stated that Jack Flythe from the Health Department had provided written comments noting that the existing operating septic system for the property appeared to be functioning fine and had no issues. He stated that the other comment he received was from the Health Department related to the outdoor grill structure. He added that Misty Parnell with the Food & Lodging Division was required to review the permit before it could be used to cook food. He stated that she had provided written comments noting that the outdoor grill was not to be operated within 10 feet of combustible construction and that the Health Department will not issue a permit for the use of the outdoor grill until the Town of Duck Fire Department determined that the location of the proposed grill complied with the standard.

Director Heard stated that, ultimately if the proposal was approved, all of the structures would still have to go back and go through the approval process as far as obtaining permits and having the buildings inspected to be sure they comply with the various codes; however, because the applicant did not have zoning approval, nothing has been completed yet, meaning that the building and fire department have not completed a detailed review so the comments were not to reflect any specific requirements for the buildings. He added that due to the nature of the outdoor grill, comments have been provided about it. He explained that Fire Chief Donna Black provided comments noting that there were three requirements that this structure would need to comply with:

1. N.C. Session Law 2017-18; N.C.G.S. 130A-248(c2)(3) states that the outdoor grill shall not be operated within 10 feet of combustible construction.
2. N.C. Fire Prevention Code 308.1.4 states that open-flame cooking devices shall not be operated on combustible balconies or within 10 feet of combustible construction.

Director Heard noted that, even though the structure was proposed to be moved forward, the measurement was taken from the closest opening, which was the chimney flue, to wherever the combustible construction was located. He added that it appeared that even with the proposed shift further to the north, the structure would only be seven feet from the neighbor's fence and there was an existing wooden fence on the subject property that was approximately three feet in that directly abutted the back of the grill. He stated that the applicant has proposed to potentially alter the material that it was made of to something that wasn't combustible. He stated that the applicant did not obtain any authorization to make any improvements to either the fence or the decking on the adjoining property, which was within the 10 feet. He pointed out that the proposal for the outdoor grill did not comply with those standards

3. Town of Duck Zoning Ordinance 156.036(D)(1) requires a setback of 20 feet for structures where a commercial use/zone abuts a residential use/zone.

Director Heard noted that Council, under the Village Commercial Development Option, has the authority to grant relief from the 20-foot setback; however, the other rules would not allow the structure even if the relief was granted.

Director Heard stated that Town Attorney Hobbs had provided some comments about the application. He noted that the submittal that went before the Planning Board had a number of items that were proposed that required approval from adjoining property owners. He stated that at the time, Town Attorney Hobbs was consulted, and he offered an opinion that matters requiring an agreement or permission from other property owners should be considered requirements to be addressed during the approval process before a conditional use permit was issued rather than conditions of the permit. He stated that the key was that there needed to be a certainty that the applicant would be able to comply with that. He stated that, since the Planning Board meeting, there have been changes to the application where the shared parking agreement, the acquisition of residential property at 101 Duck Landing Lane and the removal of the existing deck at 100 Winauk Court were no longer part of the proposal. He added that with that in mind, Town Attorney Hobbs had noted that his previous comments were moot to those points since the applicant was no longer proposing items that need approval from adjoining property owners.

Director Heard stated that the use was a conditional use in the Village Commercial District. He stated that the property met the minimum lot size for Village Commercial Districts; however, the standards for the district state the following: "...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, in evaluating that part of the size requirement, staff was noting for Council that it was fair to question whether the property has an adequate size to provide all those things in light of what was being requested. He stated that the lot coverage was approved in 2013, pointing out that the maximum lot coverage was 60% and was 59.3% and with the additional structures, it added a little over 500 square feet, which bumped it to 64% lot coverage and put the property out of compliance with that standard; however, as part of the approval and the removal of the storage building and the gravel parking area on the septic repair area, the applicant was proposing to bring the property back into compliance at 59.9%.

Director Heard stated that the applicant was proposing to reduce the size of the seating/entertainment area to 3,667 square feet. He added that the applicant was proposing to reduce and delineate it through use of a post and rope barrier/fence. He noted that the applicant will still have the existing wooden fence with the gateway feature located around the larger former area. He stated that the concern staff had that was brought up at the Planning Board meeting was that people would view that whole area as being the entertainment area if the formal fence was around it. He added that the applicant, in resubmitting the proposal for Council, did include an addition where they were proposing from the gateway feature a hallway or walkway that would be lined with post and rope to keep people within that area and direct them into the new, smaller area.

Director Heard pointed out that where the landscape buffer abuts the Winauk Court property, there was an existing six-foot high wooden fence, which provided a visual buffer and was proposed to remain. He stated that the subject property sits well below the property to the rear, so unless there was a buffer with substantial mature trees, it would not be effective due to the height difference. He added that even with a 12-foot-high fence in place, one could still look down over the property, so the circumstances make it difficult to provide an effective buffer against the property.

Director Heard stated another key issue was the parking spaces. He stated that presently there were 21 parking spaces on the site, including the 16 customer parking spaces and five employee parking spaces. He noted that the five employee parking spaces did not comply with the Health Department’s standard. He added that if they were pulled, there would remain 16 compliant parking spaces on the site. He stated that there was a need for 23 parking spaces to accommodate the restaurant itself without the outdoor seating/entertainment area. He stated that the applicant was looking to shift the employee parking spaces to create four compliant parking spaces and with that part of the proposal, the applicant could accommodate a total of 20 parking spaces; however, there was the requirement for the outdoor seating/entertainment area. He stated that, at times, the operation contained more people than the restaurant itself with the seating capacity. He noted that parking was based on the square footage of the outdoor entertainment area, but it added up to a requirement of 48 parking spaces to accommodate the restaurant as well the outdoor seating/entertainment area, but only 20 parking spaces being proposed for the site. He stated that the concern was if the property was getting that level of use and there

wasn't enough parking on site, they would be forced to look at other options in the surrounding area and the impacts it may cause to the other properties.

Director Heard stated that there was a proposal to add an additional ADA parking space towards the rear of the property near the outdoor seating/entertainment area. He reminded Council that there were also bicycle racks being proposed.

Director Heard stated that the Town has standards for outdoor dining areas. He pointed out that there were seven standards in the ordinance and the applicant could comply with four of them as one was irrelevant in that it didn't address this type of situation; however, there were two that the proposal would not comply with unless the Council grants approval for the Village Commercial Development Option. He explained that they related to the amount of parking on the site as well as the landscape buffer.

Director Heard stated that requirements for the Village Commercial Development Option could be looked at by Council as part of their consideration. He noted there were pros and cons to the application regarding whether or not Council approves the option. He added that the existing development itself was a good example of what the Town was looking for in consideration of the Village Commercial Development Option. He added that a lot of the existing items on the property was consistent with it, but that area was not part of the proposal, so Council would need to see how the outdoor entertainment/seating area fit into that. He stated that it was challenging as a lot of the standards related to the Village Commercial Development Option were clearly things that related more to structures and could be difficult to apply in this circumstance. He stated that while the outdoor seating/entertainment area offered a distinctive place to recreate, Council would need to look at whether the architectural character of the proposed area was consistent or inconsistent with the surrounding community. He noted that an area double the size of the principal use – the restaurant – the scale may be too large for the property as well as almost all the proposed structures encroach into the setbacks and whether significant reductions were something that Council felt were consistent with the Village Commercial Development Option.

Director Heard stated that the Town has had four similar conditional use permit proposals from other restaurants that have been approved. He pointed out that in all previous applications for establishment of those areas, the applicants all complied fully with Town standards for building setbacks, lot coverage, parking, and other development criteria.

Director Heard stated that at the Planning Board's meeting on June 13, 2018, the Board recommended denial by a 4-1 vote of the conditional use permit to re-establish an outdoor seating and entertainment area. He stated that the Planning Board members had a very thorough meeting and discussed a variety of items and found the following as the rationale in support of their decision to deny the application:

1. The proposal does not comply with all outdoor dining standards found in Section 156.129(c) of the Zoning Ordinance.

2. The intensity of the development and activity being proposed for this relatively small parcel exceeds the capacity of the lot. The reason the applicant is requesting substantial modifications to minimum parking standards and building setbacks is that the scale of development proposed simply doesn't fit on the subject property.
3. 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 insufficient to serve the needs of a business of this scale and puts additional pressure and wear and tear on the parking at properties in the surrounding area.
4. The requested substantial reduction of the building setbacks increases the impact of these structures on adjoining properties. The lack of adequate setbacks and buffer creates concerns for neighboring property owners about privacy, noise, lighting, and safety.
5. In all previous applications for establishment of outdoor seating/dining/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 modifications being requested from these development standards is inconsistent with prior decisions, unfair to compliant businesses, and sets a challenging precedent for future applications.
6. The Town Council purposefully granted only temporary conditional use approval for a similar proposal on this property in 2013 in order to evaluate its operation and impact on the community because, at the time, the Town did not have formal standards for outdoor seating/dining areas. Use of the area had an impact on nearby properties and in addition, the applicant failed to comply with most of the conditions that were placed on the layout and operation of the business under the temporary conditional use permit.
7. Staff presented concerns about enforcement of the layout, scope, and intensity of the outdoor seating and entertainment area, if approved as submitted.

Director Heard reminded Council that the Planning Board recommended denial and the recommendation did not mean that the applicant could never have an outdoor seating or entertainment area. He added that the Planning Board made a recommendation based on the plans that were submitted by the applicant – they cannot redesign it but could only react to what was submitted. He noted that if the applicant chose to submit a plan for an outdoor area on a scale that was more in line with the dimensions of the property, with other outdoor seating and entertainment areas in Town, maybe one that was more substantially compliant with the minimum Town standards, it would likely be more well received by staff and the Planning Board in developing recommendations that Council had before them.

Town Attorney Hobbs noted that the staff report and the print out of the staff presentation would be added to the official record. He asked Council if they had questions for Director Heard.

Mayor Pro Tempore Thibodeau stated that the proposal that Council had before them seemed to have evolved since the Planning Board's denial in so much as the applicant has gotten Health Department approval as well as the parking. She asked if that was an accurate summary of what has changed since the Planning Board denied the application. Director Heard stated that prior to the Planning Board meeting, the applicant and representatives approached staff to let them know there were five items that they were going to propose revisions to at the Planning Board meeting. He stated that as those changes came up, the applicant presented information about them and asked the Planning Board to consider the revisions. He stated that the five revisions were discussed at the Planning Board meeting as well as the other revision, which was the addition of the hallway feature from the gateway into the new, reduced area. He stated that there was the removal of consideration for the items that involved other property owners such as the shared parking arrangement that was being considered and the applicant was attempting to negotiate with Kellogg Supply, which did not happen and was removed from the application. He noted that there were a couple of items that the Planning Board was not aware of at the time to consider it.

Mayor Kingston asked what on the layout had changed since the Planning Board reviewed with regard to the parking. Director Heard stated that the post and rope hallway feature and the shared parking agreement with Kellogg Supply, which has since been removed from consideration. He stated that if it was successful, it may have brought their proposal into compliance with parking, but without the agreement, the applicant had to step back and were now asking for relief from the parking requirements to only allow 20 parking spaces. Mayor Kingston clarified that none of the buildings have changed since the Planning Board reviewed the application. Director Heard stated that there were five items that the Planning Board heard but were not on the site plan that the Planning Board received in their packets but were considered at the Board's meeting. Mayor Kingston clarified that what was in front of Council was exactly what the Planning Board had before them. Director Heard stated that it was but with some exceptions. He added that the stage was being pulled three feet to come onto the subject property and in the Board's original proposal, there was conversation about buying a piece of the adjoining property to the rear.

Michael Strader of Quible & Associates was recognized to speak. Mr. Strader stated that the employee parking spaces were also called into compliance. He added that with regard to the outdoor oven, the original plan that the Planning Board reviewed was still not meeting the 10-foot horizontal space for combustible. He stated that the adjoining property owner allowed the replacement of their fencing and deck and since then, the grill has been proposed to be pulled further into the site.

Councilor Burdick clarified that there were eight problems with the setbacks in the original proposal. Director Heard stated that there were nine. Councilor Burdick clarified that none have been resolved. Director Heard stated that the only one that would be completely resolved by the proposal would be the storage building on the southern property as it will be removed in its entirety. He added that two other structures were proposed to be moved further in but would still be encroaching in the setbacks and the

others were proposed to remain in their existing locations. Councilor Burdick noted that there were still major problems with the setbacks. Director Heard stated that there would still be eight structures encroaching into the setbacks.

Mayor Pro Tempore Thibodeau stated that, in looking at the original conditional use permit, which has expired, there was no food service in the back. She added that there really wasn't any mention of food in the application. She clarified that there was no mention of food. Director Heard stated that it was originally approved as a special event area to accommodate seven events over the year. He added that there was food service involved for some of those events. Mayor Pro Tempore Thibodeau stated that it was for the special events, but when it was just a regular, outdoor waiting area, it was permissible to have drinks served in that back area. She added that the special events may have had food but the regular day to day waiting was just drinks. Director Heard stated that there wasn't a regular day to day component to it in 2013. He stated that there would be some cooking on the grill for the events for this application. Mayor Pro Tempore Thibodeau stated that she wasn't sure what was going on with the grill, unless the applicant was bringing food in, cooking it on the grill and then bringing it into the restaurant.

Councilor Burdick pointed out that the special events included things such as an oyster roast, which the cooking was done in that area. Director Heard stated he was correct.

Councilor Britt asked if in the period of 2013 to 2015 when the applicant had more than seven events going on, the Town ever approached the applicant about it. Director Heard stated that no one did to his knowledge, but it would have been former Planning Director Andy Garman that would have contacted them, and he couldn't speak to whether or not he approached them.

Mayor Pro Tempore Thibodeau clarified that the bulkhead in the back at the property line was compliant as it currently existed. Director Heard stated that the bulkhead would be considered the same way a fence would be considered, meaning it would be allowed to encroach to the property line and would not be an issue.

Mayor Kingston thought the original conditional use permit had an emphasis on the applicant informing Town staff of the events that were planned. Councilor Burdick and Mayor Pro Tempore Thibodeau didn't think that was correct. Councilor Caviness stated that she remembered six events in the original conditional use permit.

Town Attorney Hobbs directed the applicant to make a presentation.

Robert Hornik of the Brough Law Firm was recognized to speak. Mr. Hornik stated that he was the attorney for the applicants. He stated that the applicants have a good and bad situation – the bad news was that the applicants had fallen out of compliance with the Town code and the good news was that because of the experience that the applicants had over the last five years, even though the application was being treated as an expansion of use, they know what could be done in that area.

Robert Hornik stated that the applicants were asking for a conditional use permit for the Village Commercial Development Option. He stated that the purpose of the Village Commercial Development Option was as follows: "Development and redevelopment within this area will recognize the linear pattern of development over time in the village commercial zoning district and will provide opportunities for custom site-specific development review to implement Town policies encouraging shared parking, limited vehicular access and pedestrian accommodation, promote a mix of land uses, and reinforce the Village Commercial District as an exceptional and distinctive place to live, work and recreate." He stated that what the applicants have accomplished and what they do on that site was entirely consistent with the last sentence. He thought the Town of Duck recognized what the applicants add to the environment in the Village of Duck.

Robert Hornik noted that Roadside Bar & Grill were big contributors to the Town of Duck and were recognized in a national food magazine as being the number one establishment of their kind in the state of North Carolina. He added that they bring vitality to the Village area of Duck; were an asset to the Town; and would like to continue to be an asset.

Robert Hornik stated that under the Village Commercial Development Option, while there were setbacks required that were established by the zoning ordinance, the Village Commercial Development Option allowed the Council to essentially raise, reduce or modify those requirements. He added that they were asking Council to do that in circumstance. He stated that their concern was with the north and east boundaries of the property. He stated that to the east of the property was a significant rise in the elevation that was heavily vegetated. He added that the deck was not elevated and was a substitute for the grass. He stated that the deck that abuts the bulkhead on the north side of the property had an undeveloped area along with the Tomato Shack and the back of the property was a densely vegetated area. He pointed out that there was no one in that area that would be disturbed by what was happening on the applicant's property.

Robert Hornik stated that on the southern boundary line was residential property that has been vacant for many years and was the area to the rear of the property. He added that the Loblolly Pines Shopping Center is next to the applicant's property. He noted that the vast majority of the southern property line adjoined Loblolly Pines Shopping Center and no residential property.

Robert Hornik stated that they had spoken to various neighboring property owners as well as having considerable discussions with Kellogg Supply. He pointed out that Kellogg Supply had originally had no problem with the parking, but they also said they were not going to sign an easement for 20 years, binding them to providing the applicant with that parking. He stated that he looked at the staff report and identified other places where there were approvals and shared parking agreements, one of which was an easement with Dare County. He stated that none of those shared parking agreements had recorded parking easements. He stated that he was not trying to cause issues for others but knew that there were shared parking arrangements that were approved by the Town and that zoning rules stated that there has to be a 20-year easement, exclusive, and non-

cancelable. He stated that he saw on the Register or Deeds site that those properties did not show any parking easements for other adjoining properties. He added that he did not know how the Town was policing or enforcing it.

Robert Hornik stated that he had suggested to the Town that because they have experience at the site using it the way it has been used, they believe that the parking they have on site was adequate. He pointed out that most of the people present for the meeting would tell Council that when they come to the restaurant, they don't drive, but walk or ride their bicycles. He added that he has been to the site multiple times in the last month and it was packed in the backyard area, but there were more bicycles than there were vehicles. He knew that the Town holds an annual jazz festival where thousands of people attend and park all over Town. He thought there would be some testimony that the Town's parking facilities were not sufficient as people were parking at Roadside's property. He stated that parking and traffic were issues in Duck, but he was submitting that it was not an issue that was caused by Roadside Bar & Grill's use in the backyard.

Robert Hornik agreed that it seemed that the applicant was asking for a lot of relief, which they were. He explained that they were asking for relief from some of the requirements of the zoning ordinance, but when Council adopted the Village Commercial Development Option, they empowered themselves under appropriate circumstances to grant relief. He stated that he was submitting that Roadside Bar & Grill provided circumstances where relief was appropriate. He hoped that Council would exercise that discretion to grant relief. He added that the applicant was ready to talk through each of the issues to try to come out with something that everyone could live with. He hoped it would be the result of this hearing. He noted that Michael Strader would speak to the grill in that it could be moved, but that they would rather not move it. He added that the flue could be reconfigured in a way that would achieve the 10-foot setback from the neighbor's fence. He stated that they were willing to work to try to satisfy the issues that Council felt existed so that Roadside Bar & Grill can continue to be an asset to the Town of Duck and continue to provide a great place for recreation for Duck residents and visitors.

Mayor Kingston stated that Mr. Hornik had discussed working with Council on solutions and met with Town staff and the Planning Board more than one time. He asked why the applicant did not work with the Planning Board on solutions. Robert Hornik stated that they sat at the Planning Board meeting for over four hours and were going through things item by item with Vice Chair Marc Murray leading the discussion. He stated that when they got to six of the eight issues, there seemed to have been a consensus about how to address them. He added that there was good discussion and a final agreement. He pointed out that they were working on recognition from the Planning Board that it may have been an approval with conditions. He stated that they got to the very end and then at least one Planning Board member from the beginning had stated that he was not comfortable with making a decision on the new information. He added that the same Planning Board member had stated the same thing at the end of the discussion and he thought that this member had eventually persuaded the other Board members that they should recommend denial. He noted that they received the staff report before the

Planning Board meeting on either Thursday or Friday and only had the weekend and two days to try to react to it. He stated that they did not have a lot of time get items distributed to the Planning Board members before the meeting. He added that at the beginning of the meeting, they let the Planning Board know they had some ideas about potential solutions that they wanted to discuss. He stated that he represents towns and boards all over the State of North Carolina and it was not unusual at meetings to do this. He explained that there was an application, it's noted that it's not perfect and they try to talk with the Board about potential solutions. He thought they had a very productive discussion about the potential solutions. He agreed that some of the information was brought to the Board at that meeting and the minutes from that meeting reflected the amount of discussion. He thought at the end, the Planning Board was not comfortable agreeing to the conditions. He reiterated that they only had two business days to react to the staff report.

Councilor Burdick stated that it seemed that there was a wide gap between what Roadside had proposed and what the situation was. He stated that when Robert Hornik noted that that they were prepared with the Planning Board to work their way through things, they were a mile apart and ended a mile apart. He added that it was concerning to him. Robert Hornik disagreed, adding that he thought the Planning Board recommended denial, but there was certainly no agreement on everything, but suggestions that were made and discussed by the Planning Board that were acceptable to the applicant and seemed to be acceptable to the majority of the Planning Board. He added that when it got to be 10:30 p.m., it was time for the Planning Board meeting to be over and they just decided to recommend denial. He pointed out that it was an accurate representation of what happened at the meeting.

Councilor Caviness stated that she has never attended a Planning Board meeting purposefully because there was a designated Council liaison but thought to characterize the Planning Board to cut a meeting short because it was time for them to leave was really unfair. She added that Robert Hornik had no idea how hard the Board members work. Robert Hornik agreed and apologized for his statement, adding that it was a very long session.

Councilor Britt stated that he was the Council liaison at the Planning Board meeting and did not feel like it was a result of a tie that they voted for denial. He added that the Board members gave a strong deliberation for as long as they could but agreed that it was hard to read where it was going at the meeting as they went individually through all of the items and provided some reasonable suggestions. He reiterated that he did not know where the meeting was going to go until the end of it and it was a long meeting. He agreed with Councilor Caviness that the meeting did not end because they wanted to go home, but that they had reached a point where certain Board members were not comfortable with the scope of the project. Robert Hornik apologized for his statement and agreed that the Board members worked very hard that evening.

Attorney Ben Gallop was recognized to speak. Attorney Gallop stated that Robert Hornik had mentioned that the Planning Board had discussed items that the applicant was



willing to accept. He asked what changes were made in the application since the Planning Board meeting to propose those changes to Council. Robert Hornik stated that they were proposing to move the grill and realigning the employee parking.

Attorney Gallop clarified that the change to the grill and the parking were in the plan that was brought to the Planning Board. Robert Hornik stated that he wasn't sure. Attorney Gallop clarified that, other than angling the employee parking and showing the existing roped area for accessing the entertainment area, there haven't been any changes to the plans since the Planning Board meeting. Robert Hornik stated that he wasn't sure.

Michael Strader stated that items that did change from the plan that was submitted to the Planning Board, but that the Planning Board was not willing to consider the changes that were brought to them the day of the meeting. Those items were the employee parking spaces, pulling back the five-foot setback requirement, the removal of any discussion about the reconfiguration of the rear, the pulling of the rear stage forward onto the property, and working with a structural engineer to review all of the existing structures on the site to confirm compliance with North Carolina Building Code. He added that it included the support system of the relocated and shifted stage onto the property with the way it was supported. He noted that it was also run by the Health Department and subsequently approved. He stated that the addition to the bar was reviewed and viewed to be in full compliance with the North Carolina Building Code. He stated that, with regard to the outdoor oven, originally it had been requested to remain in its existing location with requirements that the existing fence line of the adjoining property be replaced with non-combustible material along with portions of the adjoining property's deck to be removed so that no combustible materials would be within 10 feet of the outdoor oven. He explained that the outdoor oven was shifted to meet the 10-foot requirement, which was one of the items that he wanted to correct, in that the new location met the Grill Bill, because it required the flue to be adjusted and brought in to match the same front opening of the outdoor oven. He added that the flue would have to be able to discharge at the same pace as the front of the grill.

Michael Strader stated that the hallway/corridor would be the entry to the outdoor service area and would be delineated with post and rope. He stated that this application did not request any deviations from any codes or state laws. He stated that it would need Dare County Health Department approval, the North Carolina Building Code, the Grill Bill and all state requirements. He added that he fully expected Council to keep all of the conditions in the suggested approval of the conditional use permit. He stated that it requested Council to approve the utilization of the flexibility of the Village Commercial Development Option. He stated that the plan for the outdoor oven was submitted in compliance with the Grill Bill and the applicant would prefer to relocate it to an area that would also continue to meet the horizontal setback. He added that the portion of the existing fence that would delineate the drain field would need to be removed so that there were no combustible materials within 10 horizontal feet of the structure and he would provide Council with the Dare County Health Department's approval of the application of the outdoor oven.

Michael Strader stated that they heard comments and provided post and rope delineation to the outdoor seating area. He felt that while it provided delineation to that corridor, it could be abused, and the applicant would prefer not to split it, but it was ultimately up to Council if it should remain as a delineation of the gateway to the outdoor area.

Mayor Pro Tempore Thibodeau noted that Michael Strader had stated that all the state requirements, laws and construction were overall sufficient, including the Health Department. She understood that the bathrooms were originally a shed that was purchased and retrofitted to have bathrooms in it as opposed to having port-o-johns. She asked if that was acceptable with the Health Department and the North Carolina Building Code that that kind of structure was on site. She further asked that since the stage had to be moved anyway, why it wasn't moved in a little further from the rear setback to reduce the open area. Michael Strader stated that he wasn't the professional to answer all the building code related items, but the applicant did contract with an engineering firm for construction engineering services and he believed that with the application package the restroom/port-o-john type of facility was a requirement from the Town. Mayor Pro Tempore Thibodeau agreed, adding that it was for their events. Michael Strader stated that this was the applicant's way of addressing the issue of having the port-o-john on the site. He added that Council should include any recommendation that the restroom would have to meet North Carolina Building Code, or the applicant would have to provide documentation to show that it met the requirements. He stated that with regard to the stage, the applicant would like to bring the entire stage in a little further but part of the issue was that there could not be penetrations onto the existing active drain field and the way they would be able to accommodate it would be through an overhang so it was a structural issue where it would have support members.

Mayor Kingston asked Michael Strader if he proposed that the grill would be moved. Michael Strader stated that it was an offer that the applicant would relocate the grill further off the property line.

Councilor Britt asked where the grill was located. Michael Strader stated that the grill structure was L-shaped with the right-hand side being the customer service area and the grill opening facing south. He added that the applicant would have to remove any combustible materials within 10 feet and would require that the fencing be removed, which would open the grill to the customer in that receiving area. He added that they would continue to isolate that existing drain field so that no additional traffic could be in that area.

Councilor Caviness stated that she was a little confused. She stated that the report in front of Council stated that without plans or inspections, it was likely that most of the structures may not comply with the building code. She asked if some of the structures complied with the building code since the application was submitted. Michael Strader stated that the construction engineering services inspection/observation and design that was submitted in the staff report appeared to address the foundation pads for the relocated stage, the restroom and expansion of the existing bar and outdoor stove. Director Heard stated that the construction and engineer's letter that was received in Council's packets

was submitted a week prior to the meeting. He added that he could not confirm whether it included those comments or not as they were last minute additions to the packet. He noted that the engineer's comments did not state that all of the buildings complied with the standards, but they highlighted how changes have to be made. Michael Strader added that regardless of whether it was provided to Council as of this meeting or not, it would have to be met and typically, the applicant would seek conditional use permit approval prior to submitting plans and applications for building permits.

Councilor Britt pointed out that the problem was that the applicant could not get their permit until they have the zoning approval. He added that if Council made the condition that everything must be brought up to standard, it would be done after Zoning approves it. He reiterated that they could not do it until they obtain zoning approval.

Councilor Burdick pointed out that, at this point, there were no drawings or back up information for the structures. Councilor Britt agreed. Councilor Burdick clarified that there was nothing there except the structures and no backup information to even show what the design was supposed to be. Michael Strader stated that a licensed professional structural engineer or any engineer would need to make the visual observation but if it did already conform, they would provide a stamped letter certifying that it did conform. He noted that if they found there were improvements required, they would have to present both the proposed improvements on a certified plan for the building inspection. He stated that they would fully expect Council to put a timeline associated with this. He stated that Councilor Britt was correct in that once the conditional use permit was approved, there was a timeframe where the building and permit applications needed to be submitted for each of the structures. He added that the applicant would need time associated with it so that they can operate, and the Town had control over making sure that those were pulled properly.

Councilor Burdick asked, of all the things that were currently sitting on the property that were in the setbacks, if Council was to say they had to remove all of them, what would happen to the site. He further asked what could and could not be done that would have to be eliminated. Michael Strader stated that all of the structures would have to be removed from the various setbacks. Councilor Burdick asked if they could be moved. Michael Strader stated that he was tasked with trying to bring things into compliance without totally eliminating the outdoor area. He added that he compressed the outdoor area by at least a third, tried to remove structures that they could and tried to relocate or shift structures where they could, but there were certain limitations in that they could not have structures on the drain field and shouldn't have structures in that area.

Councilor Burdick clarified that the screen and the stage would have to be removed. Michael Strader stated that he was correct. Councilor Burdick stated that he was trying to understand the impact of where things were. Michael Strader agreed. Councilor Burdick pointed out that there were eight things that were out of compliance. He added that Michael Strader noted that the grill could be moved.

Ashley Copeland of Roadside Bar & Grill was recognized to speak. Ms. Copeland explained that the reason everything was in the setback was because of the drain field. She added that they could not have any permanent structures on the drain field and have done everything around the perimeter, not to increase the size of the entertainment area, but because they could not be on the drain field. Councilor Burdick stated that he understood. He pointed out that there were eight structures on the site and asked which ones could be fixed and which ones could not be fixed as well as what would be done. He asked if they would have to be removed. Ashley Copeland stated that they would remove them.

Mayor Pro Tempore Thibodeau stated that one of the eight structures were the grill. She thought there were seven structures. Councilor Britt stated that if the grill moved, it would come out. Councilor Burdick thought it would be helpful if the applicant delineated exactly the limits of where they could put things. Michael Strader stated that he would show the setbacks. Councilor Burdick stated that not only the setbacks should be shown, but also the drain field to show how it could not be encroached. Michael Strader stated that the drain field was shown.

Mayor Pro Tempore Thibodeau asked if the applicant was referencing dining other than the special events because the Planning Board ended their findings by saying that it was inconsistent with the standards for outdoor dining areas. She didn't think there was any dining in the rear except for when a special event was held. Michael Strader stated that it was considered an outdoor waiting area, but they worked with the Planning staff to determine what it was considered and the way it would park would be based upon the outdoor seating area, just like the front porch area.

Attorney Gallop clarified that Michael Strader's job as an engineer was to take empty sites, have people tell what they want on it and figured out where the items could go to meet the setbacks. Michael Strader stated he was correct. Attorney Gallop clarified that Roadside Bar & Grill's site had a few elements, with one being seating and entertainment. He added that they have a bar, some storage, more storage associated with a shed, a stage, a movie screen, an outdoor grill, bathrooms and the gateway. Michael Strader stated that they did have all of those elements on the site. Attorney Gallop asked if Mr. Strader took all of those elements together for an empty lot, someone could come to him to ask if all of those things could fit on the property. Michael Strader stated he was correct. Attorney Gallop clarified that the property owner would ask Mr. Strader to design the lot with all of those elements. Mr. Strader stated he was correct.

Attorney Gallop clarified that Michael Strader was never asked to provide those elements outside of what already existed at Roadside Bar & Grill but was asked to deal with the elements as they sat and figure out how to move them around. Michael Strader stated he was correct. Attorney Gallop clarified that no one said to Mr. Strader what they wanted to do in the year and to forget what existed and tell them what how it could be done so it would fit within the requirements. Michael Strader stated he was correct.

Attorney Gallop asked Michael Strader if he thought he could design a site that had all the elements on it that would meet all of the Town's requirements. Michael Strader stated that it was a good question as there were a lot of challenges on the site and he hadn't thought about it. Attorney Gallop asked Michael Strader if there was anything he was aware of that would keep him from doing it. Michael Strader stated that he wasn't sure.

Attorney Gallop agreed that the permitting for the property was a later stage but clarified that the letter that was received did not state that the structures complied with the Building Code and did not need any future permits. Michael Strader stated that was incorrect as there were suggestions offered on a couple of topics. Attorney Gallop clarified that it was common knowledge that a permit was needed for things. Mr. Strader stated he was correct.

Bob Hornik asked Michael Strader what the single largest constraint was on the property. Michael Strader stated that it was on-site wastewater system and the parking. Mr. Hornik clarified that the building permits and the plumbing permits typically followed receipt of the zoning approval. Mr. Strader stated that he was correct. Mr. Hornik clarified that if it was a vacant site and the Council granted the conditional use permit, permits for the structures to be built on the vacant site would follow the conditional use permit approval. Mr. Strader stated he was correct.

Attorney Gallop clarified that construction usually follows after a permit was obtained. Michael Strader stated he was correct.

Ashley Copeland gave a short PowerPoint presentation on all of the activities that Roadside Bar & Grill do in Duck to Council and the audience. Town Attorney Hobbs noted that Ms. Copeland's presentation would be submitted into the record.

Mayor Pro Tempore Thibodeau asked if Mark or Ashley Copeland had a general contractor's license. Ashley Copeland stated that they did not. She added that Mark Copeland did not but has been building houses on the Outer Banks for many years and has a lot of experience. She noted that people usually ask for permission before starting construction, but they liked to make changes without having to ask. She stated that it wasn't malicious and that they were just doing their thing by running their business.

Dan Chiles of 327 Sea Oats Trail was recognized to speak. Mr. Chiles stated that Roadside Bar & Grill was his favorite restaurant and hoped that Council would be willing to work with Mark and Ashley Copeland. He hoped there was some common ground where everyone could compromise.

Jack Bodner of 121 Olde Duck Road was recognized to speak. Mr. Bodner stated that there were not a lot of rules and regulations written for the original permit for Roadside Bar & Grill, as it was an experiment for outdoor seating and entertainment. He stated that it was clear that there were setback issues but thought that the majority of the setback

issues had no immediate impact on the adjacent properties. He asked Council to approve the conditional use permit.

Dan McIsaac of 317 Jean Court was recognized to speak. Mr. McIsaac hoped that Council would exercise their powers to work with some creative influence to find solutions and approve the conditional use permit.

John Klamut of 123 Duck Landing Lane was recognized to speak. Mr. Klamut stated that he was present to represent himself as well as the Duck Landing Property Owners Association. He stated that he had sent a letter to his Board on Friday, July 13, 2018, which received a 5-0 approval. He stated that he and the Duck Landing Property Owners were present to let Council know that they didn't think that the Town's flexible zoning standards for the Village Commercial Development Option should be used to mitigate violations that were implemented without using the prescribed permitting process. He stated that they were very concerned about the encroachment of the stage on the property line. He realized that the applicant was advised to move it to the property line, but he felt it was unacceptable. He stated that his board did not think that under any condition, a sound stage should be approved on a residential property line. He noted that just by the nature of the stage, the sound levels at the residential line would be above any reasonable standards.

John Klamut thought Council had heard from other surrounding neighbors that the noise was unbearable at times. He stated that the owner of 102 Winauk Court had stated that during some of the performances, they could hear it in their house with their doors and windows closed. He stated that his Board was recommending that Council deny the application and to make the first condition of any future compromise that an agreement of the 20-foot setback along the residential property line requirement be maintained. He added that his board thought that there should be a fence that would cordon off the 20-foot setback and that it should extend around the dining area. He stated that his board may not object to having the storage area be put in there as long as it didn't have access from the setback.

John Klamut stated that his board thought it was nice that part of the stage had gotten approval to be put over septic field on a timber ledge. He added that his board thought it would be better to have the whole thing over there and have the stage designed to deflect the sound away from the residential property. He stated that his board thought that some acoustic testing should be done after the stage was moved to see what might be acceptable on the adjacent residential properties.

John Klamut stated that the second condition his board would like Council to consider was that the applicant complied with all codes that affect public health and safety. He stated that his board was not opposed to the flexible parking standards or to the reductions in the setbacks or adjacent commercial property. He noted that there was previous discussion regarding an easement and understood it was a moot point. He added that his property association currently holds an easement over the setback of that property and will not sell or deed away that easement. He stated that his board thought that the

applicant should start with a clean sheet of paper and create a design that complied with the existing ordinances that honors the separation requirements for the residential property. He noted that the setback separation was the only defense that a residential property had to assure its quiet enjoyment of the property. He stated that his board thought if Council approved a zero setback or diminishment of it, it would affect the quiet enjoyment of the property to the rear. He pointed out that there were a lot of people present for the public hearing who supported the application because they like to eat and drink at Roadside Bar & Grill. He added that for every 60-100 people that dine there, there was another 60-100 people in the residential area trying to enjoy their properties. He stated that Roadside's operation was affecting the quiet enjoyment of the residential properties.

Mayor Pro Tempore Thibodeau asked John Klamut if he or anyone personally had lodged a noise complaint regarding the property and if so, when. John Klamut stated that he had not, adding that the music was loud at times from his property, but he did not complain. He stated that he did not have access to the complaints that have been made, but the people that he came in contact with did not lodge a complaint.

Councilor Britt clarified that no one had come to John Klamut as the president of Duck Landing to complain about the noise. John Klamut stated that no one had to come to him, but he has had discussions with people at the western end of the street that complained about the noise. He stated that there were a lot of absentee owners in Duck and on Duck Landing Lane, but they were aware of what was going on and his board was hoping that the recommendation for denial was for their benefit as well as the benefit of any future property owners that may move into the neighborhood. He stated that one person stated that they received negative feedback from the real estate broker that people did not like the outdoor area. Councilor Britt asked John Klamut if this was his position or the position of the Duck Landing board. John Klamut stated it was the position of the board with a 5-0 vote. Councilor Britt asked John Klamut if he had reached out to the owners. Mr. Klamut stated that they did not but sent copies of the public notice to 10 property owners that live closest to the facility and did not send it to the entire ownership. He added that he did not receive any feedback from those 10 owners but did receive feedback from a property owner at 139 Duck Landing Lane who stated that he enjoyed the restaurant and would not want the Town to do anything to close it. He stated that he wasn't suggesting that the restaurant be closed but was suggesting that the applicant start over again and come up with a better design.

Robert Hornik noted that John Klamut had stated that his board voted 5-0. He asked if there was a formal board meeting for this vote. John Klamut stated that there wasn't. Robert Hornik asked if there was a signed petition from the Duck Landing property owners. Mr. Klamut stated that there was not. He pointed out that his board came before Council another time with a recommendation from the board without taking a formal vote. He explained that his board requires a vote for changes to the by-laws and approval of the budget and the by-laws did not address this specific issue, but they felt that their board has addressed specific issues that have come up at public hearings.

Josh Martier of 113 Ocean Boulevard was recognized to speak. Mr. Martier stated that he was a local musician and has played in Duck. He stated that Mark Copeland has been strict about following the noise ordinance. He added that he was not aware of any noise complaints. He felt that Roadside Bar & Grill added to the diversity of Duck while providing employment.

Erica Cuculiza of 408 Wallace Street was recognized to speak. Ms. Cuculiza stated that she works for Roadside Bar & Grill. She stated that everyone loved going there. She understood there were rules that should be followed but hoped Council would grant the conditional use permit application.

Reid Carter of 153 Speckle Trout Drive was recognized to speak. Mr. Carter encouraged Council to use as much leniency and provide exceptions to the rules that were developed by the Town. He stated that this was a special case and they have done a lot of things to contribute to the community. He urged Council to give leniency to let things continue at Roadside Bar & Grill. He added that he knew that parking was an issue but pointed out that the Town has more activities that needed parking. He suggested that the Town try to establish a committee to study the issue of how to deal with everyone being in too small of a space for the amount of activities held and work on the problem. He reiterated that he wanted Council to give Mark Copeland leniency with regard to setbacks and parking, even if he had violated the rules. He thought Council could make an exception. He added that he went through the process recently with his business and didn't think it was Council granting an exception to Roadside that would contribute to other businesses coming forward to try to skate the rules. He thought the rules were good to have but did not agree with, during the middle of the summer season, shutting Roadside Bar & Grill down. He thought the image of Duck would be substantially harmed by taking something that most people consider to be an interesting part of the Town and making them abide by the rules as it didn't seem right.

Kent Hennessey of 104 Skimmer Way was recognized to speak. Mr. Hennessey stated that a lot of people have said what needed to be said regarding the popularity of Roadside Bar & Grill. He stated that where he worked, every day they would receive inputs for their production that did not totally meet the requirements. He stated that requirements were made in the absence of practice. He stated that many requirements were because things were done a certain way, but when one looked at the specifics, oftentimes it did not affect the form, fit or function. He urged Council to look at the reasons for the violations for Roadside Bar & Grill that did not affect the form, fit or function of Duck and compromise as much as possible.

Jim Durham of 109 Plover Drive was recognized to speak. Mr. Durham stated that all of the points others have voiced have shown the Town that Roadside Bar & Grill knows how to bring people together.

Benny Hopkins of 100 Winauk Drive was recognized to speak. Mr. Hopkins stated that his property was adjacent to the applicant's property and thought that any commercial



property that was adjacent to residential property should have courtesy to the homeowners. He added that he was supportive of the conditional use permit application.

Mayor Pro Tempore Thibodeau clarified that Benny Hopkins was the adjacent property owner and his main issue was that people continue to stay at Roadside Bar & Grill past 10:00 p.m. Benny Hopkins stated that she was correct.

Hannah Frank of 35 Circle Drive was recognized to speak. Ms. Frank asked Council to give Roadside Bar & Grill the leniency it deserved.

Town Attorney Hobbs asked Council if they wished to hear from anyone that has already spoken. There was no one.

Director Heard clarified that there have been some conversations with Bob Hornik regarding the fact that there were only three days for them to prepare for the Planning Board meeting. He pointed out that there were also four other meetings and opportunities where the draft was reviewed over a period of four months with five different views that were conducted before the application came before the Planning Board. He added that there was the technical review committee, the original Planning Board application, a second technical review committee where staff met with the applicants and engineer, and then the second Planning Board meeting. He noted that there were numerous opportunities to revise the proposal and do things to bring it further into compliance.

Mark Copeland of Roadside Bar & Grill was recognized to speak. Mr. Copeland stated that he would bring everything into compliance, would move the fireplace and obtain building permits as well as whatever else needed to be done to have it done correctly. He stated that he had an engineer look at everything and approved it all; the Health Department approved everything and had no issues, including his parking. He stated that people have been parking in the same area for the past 25 years and when the drain field was first drawn up, there were five septic lines and now he has six, meaning he has already encroached on the repair area. He noted that it was also engineered. He added that the Town has him going down to four parking spaces, but he could get eight vehicles there. He stated that the Town was reducing his parking and if parking was an issue, then it was being taken away from him.

Councilor Burdick asked Mark Copeland how the Town would work its way through the issues with the stage, movie screen and extra decking that was added. Mark Copeland stated that the screen was in place since day 1 as it was the first thing he did. Councilor Burdick asked when that was. Mark Copeland stated that it was before the bulkhead was put in. He added that when he put the bulkhead in, former Building Inspector Cory Tate approved it, and he had two 18-foot poles for both sides. He added that Building Inspector Tate had asked what they were for and he told him it was for the tv screen. Councilor Burdick asked if that was before the temporary conditional use permit. Mark Copeland stated that it was. He added that when he received the conditional use permit, Building Inspector Tate came by and inspected the bar and passed it; Davco Electric performed the electrical work, which was approved. Councilor Burdick clarified that it

was there since before the project was started. Mr. Copeland agreed, adding that it was in 2009.

Councilor Burdick asked when the stage was built. Mark Copeland stated that the stage used to be on top of the drain field, but he moved it off the drain field and put it on top of the bulkhead. He added that years ago, the person who owned the residential property backwashed their pool onto his property and he would have to go out and move all the sand off his drain field.

Councilor Burdick asked if Mark Copeland's engineer could find a way to put the stage back on the drain field and not anchor it permanently. Mark Copeland stated that he had to set it on pedestals. He added that he would pull it all the way to the bulkhead, so it would sit on the bulkhead and have two pedestals on the bulkhead that the engineers designed and the Health Department approved, and they would not penetrate the ground, but would sit on top of it.

Councilor Burdick asked about the decking that surrounds the bar area. Mark Copeland stated that he built it, so his wife wouldn't have to worry about snakes. Councilor Burdick understood that that was one of the additions that was an issue because of the setback. He asked if that was correct. Mark Copeland stated that the bulkhead was a permanent structure. He believed he had eight feet from the walkway up the hill to the property line. Councilor Burdick pointed out that the plans noted that it was six and one-half feet. Mr. Copeland agreed, adding that he did not have the plans in front of him. Councilor Burdick asked Mr. Copeland if he needed the walkway. Mr. Copeland stated that he did but could remove it if Council wanted him to. He stated that he would remove the main shed and take the grill and move it. He added that the Health Department has already approved the restrooms and if he needed to, he would bring in a licensed electrician. He noted that he did all of the work himself and has done it hundreds of times.

Councilor Burdick asked if it was possible for Mark Copeland to work with Director Heard to see if he could get it down to a minimum of issues. Mark Copeland stated that he called to get a permit for the front patio. He stated that he had asked if he could piggyback that permit in order to get everything to comply but was told that he could not. He stated that he was hoping to piggyback the permit to get the restroom approved and move the shed. Councilor Burdick stated that the problem was that Mr. Copeland was putting the cart before the horse.

Councilor Burdick stated that it was obvious that it was a situation where Mark Copeland developed a very popular entertainment place as well as a restaurant. Mark Copeland pointed out that it was the number one unique outside bar in the state of North Carolina. Councilor Burdick stated that the Town has rules and regulations to try to have reasonable order and unfortunately, in this case, that did not happen. He added that now Council was trying to figure out how they can accomplish the objective of keeping the good – which was the entertainment – and at the same time, not create a situation where the Council has set a precedent that will cause issues in the future. He explained that

when Sanderling wanted to add a floor to one of their buildings, they came before Council and asked to be allowed to exceed the 35-foot height limit. He added that Council voted to deny the application because if they did that, then there would be other businesses asking for the same thing, which was a precedent Council did not want to set. He added that Council was now caught in a bind and the question was how they could work through that so that another precedent is not set where a business could do what they want and then come before Council later to let them know it has done a lot of good. Mark Copeland noted that it all started because of one of his competitors.

Councilor Burdick stated that the question was how Council could work with Mark Copeland to work through it, so a precedent is not set for the future. Mark Copeland reiterated that he was willing to work with the Town and willing to get the stuff done. He noted that it was the middle of July and could not do anything at this point. He added that once the season comes to an end, he could start sometime in September. He reminded Council that he still had a permit on the front patio and that it needed to be completed first. He added that once he finishes the work on that and gets it inspected, then he could start on the other stuff. He pointed out that he could start on the back area now by getting the stage off the residential property.

Councilor Burdick asked Director Heard if he felt comfortable enough that the application could be worked through. Director Heard stated that he didn't feel comfortable working through it at the meeting, but as far as looking at options and speaking to the applicant and engineer regarding what they need as well as the options for items that could be relocated, staff was open to working with them to find a solution.

Mayor Kingston asked why Council was trying to work through these things at the meeting when the applicant had time to work with Town staff and the Planning Board. He noted that now the application was in front of Council with all of the same issues, which could have been worked out prior to this meeting. Mark Copeland stated that he wasn't able to pull any permits to do the work.

Mayor Kingston stated he wasn't asking about doing the work but wondered why Mr. Copeland couldn't have had work sessions with Town staff and the Planning Board before coming to Council. Robert Hornik pointed out that Town staff could not grant the relief that the applicant was asking for, only Council could. Mayor Kingston understood, but noted that it wasn't his point. Robert Hornik stated that his point was that the applicant could not resolve the issues before now. Mayor Kingston and Councilor Burdick disagreed.

Councilor Burdick stated that Council worked with Roadside Bar & Grill previously on some exceptions that were similar to the ones in front of Council at this meeting. He thought the Town has been able to do it in the past and the applicant should not be saying that he couldn't do it. He thought what Council needed from the applicant was a commitment to get the work done. He thought Mark Copeland was ready to do that. Mark Copeland stated that he would take care of everything.

Robert Hornik pointed out that if the code stated that there needed to be a 10 or 20-foot setback, Director Heard could not tell the applicant that it was okay to have a structure five foot in the setback; only Council could. Councilor Burdick noted that Director Heard could come back to Council and recommend that it was a reasonable thing for Council to allow, as he has that flexibility. Mr. Hornik stated that it sounded like Council was authorizing Director Heard to exercise that flexibility. Mayor Kingston disagreed, adding that Council was not authorizing Director Heard to do that. He asked if the applicant knew what the rules and regulations were, why he didn't work towards it instead of looking for total exceptions and not a solution that meets the regulations of the Town.

Councilor Burdick stated that he didn't need a solution at this meeting. Mayor Kingston agreed. Councilor Burdick stated that he needed a commitment from the applicant that the work would get done to the best of everyone's ability. Mark Copeland stated that he would do it. Robert Hornik stated that the applicant and Town staff will work together to find solutions.

Mayor Pro Tempore Thibodeau understood where the issue was with regard to the Village Commercial Development Option in that Town Council was the mechanism to get to the point where relief was granted to the normal zoning regulations. She understood what Mayor Kingston and Councilor Burdick were stating as Council was in an awkward position because there has been a lot of time that has passed with trying to get things finished. She thought it was a moving target, adding that it has moved since the Planning Board denied it 4-1 back in June. She stated that Council was working with a moving target and she thought what she was hearing from the other Council members was that they wanted to work through it but were in an awkward position because there hasn't been procrastination and avoidance of where things stood from staff's perspective. She commended Director Heard for being very objective about the application as she thought he would come in with a chip on his shoulder regarding the effort of the applicant. She stated that she liked that Mark Copeland was agreeing to get the work done, adding that there were certain restrictions that did not allow it, such as not being able to build on the septic drain field. She stated that she could see some leniency on the setbacks as every situation and property was different. She stated that the precedent did not have to be set, like with the height restriction, because each property was different and there was a lot of vegetation around this property. She stated that she liked that staff and the applicant could work together but thought it has been difficult to work through it because it was evolving, but more work needed to be done as well as the commitment from the applicant that the work will get done.

Robert Hornik stated that he was not being critical of Director Heard as he understood he had a job to do, but solutions have to be found.

Town Attorney Hobbs noted that on Page 25 of the staff report, there were eight potential conditions that could be reviewed by Council should there be an inclination towards approving the proposal. He asked Council if there were any comments about those proposed conditions, whether they should be changed, kept the same, added to, etc.

Mark Copeland stated that he had an issue with Condition #1 and #3. Michael Strader stated that the applicant was not in favor of Condition #1 and #3. Councilor Burdick clarified that the applicant did not have an issue with Condition #2. Michael Strader stated that the applicant was fine with Condition #2. Town Attorney Hobbs understood that the applicant did not agree with Conditions #1 and #3.

Councilor Burdick asked if Condition #3 meant that the applicant could not park on the repair area or couldn't put the gravel there. Director Heard explained that the issue with Condition #3 and the reason for the recommendation was that he had in writing from Jack Flythe of the Dare County Health Department, in response to questions staff had asked, a citation from the State law that said the applicant could not have any vehicular use on the septic repair area to include parking and access to it, which was what was presently occurring in that area on the applicant's property. He added that it did not comply with what Mr. Flythe had sent him in the citation and violated State Health Department law.

Michael Strader noted that the Health Department stated that the septic repair area did not need to be barricaded off. Attorney Gallop pointed out that the barricade would keep someone from parking in that area. He added that the Health Department was trying to keep the cars from parking in the repair area. Director Heard noted that the recommendation for the fence and barricade was not from the Health Department, but from staff and the Planning Board in looking at how to enforce that. He added that if it was left open, then the applicant may continue to allow people to park there.

Michael Strader clarified that the applicant's concern with Condition #1 was that he would be okay with the timeline but wanted to make sure that the use of that area did not completely cease to be used. He stated that the applicant had discussed a timeline with the Planning Board. Councilor Burdick thought Council could set a time limit.

Director Heard explained that with regard to Condition #1, the Board had an extensive discussion about it before they decided to vote for denial. He added that there was a lot of discussion on an appropriate timeframe rather than ceasing the use immediately. Councilor Britt added that there was discussion, but not a lot of agreement.

Councilor Burdick thought Council could set a 90-day timeframe or something like that. Councilor Britt agreed and thought it was appropriate. Councilor Burdick asked if it would make more sense. Michael Strader stated that it would.

Town Attorney Hobbs asked what the applicant would recommend with regard to Condition #1.

Attorney Gallop stated that he was sure that Robert Hornik was aware of the pending creation of a statute of limitations that comes up in October. He asked if Mr. Hornik were to put a timeline and Attorney Gallop asked for a condition that Mr. Hornik would enter into an agreement with regard to any statute of limitations. He asked Mr. Hornik if he would accept that condition. Robert Hornik stated that he would and that it would be fair.

Attorney Gallop explained that the agreement would be the day that all agreed that the statute of limitations would not apply, otherwise the Town would not be in the situation where the applicant received their 90 days and the statute of limitations kicked in with the new statute on October 1, 2018 and the Town could not do anything to enforce the existing violations. He stated that if the applicant agreed to that condition and it was set, they would be agreeing to uphold the statute of limitations against them in that if they did not meet the deadline that Council set, even if it was outside of the statute of limitations, the Town would be able to pursue them to ensure enforcement. He added that the applicant would have an opportunity to do what they need to do, but if they didn't do it, it would ensure that the Town would have an opportunity to take other action to correct it.

Councilor Burdick asked the applicant if 90 days was acceptable. Michael Strader stated that it was. He stated that they did not discuss during the Planning Board meeting that Condition #1 was to begin 90 days after the conditional use permit approval, or the applicant must cease use of the outdoor seating/entertainment area. Councilor Britt added that it would not apply if the applicant did all of the corrections.

Town Attorney Hobbs asked the applicant about Condition #2. Michael Strader thought Councilor Burdick had asked if the applicant had an issue with the 90-day issue. Councilor Burdick pointed out that the applicant had an issue with Conditions #1 and #3. Michael Strader agreed. Town Attorney Hobbs thought he was asking about Condition #3. Councilor Burdick pointed out that Director Heard had answered the question regarding Condition #3. Michael Strader stated that they were fine with Condition #2 assuming that Council did approve the Village Commercial Development Option.

Mayor Pro Tempore Thibodeau thought the applicant needed some relief with regard to Condition #2. Councilor Britt thought if Council granted the applicant the accepted setbacks through the Village Commercial Development Option, then Condition #2 would not be an issue with the applicant.

Robert Hornik stated that Condition #3 had to do with removal of the gravel on the employee parking area. Michael Strader noted that the real issue was not the removal of the existing gravel but was the condition of the barricade around the barrier. Councilor Burdick asked what the problem was with the barricade. Michael Strader explained that the existing drain field has a barrier in place currently that separated the back yard and the repair area. He added that there was already a barrier there and then there was the repair area. He stated that if they did what was in Condition #3, it would be two fences next to each other and it did not seem appropriate.

Councilor Britt clarified that there was nowhere else that the repair area could be moved on the site. Michael Strader stated that there wasn't.

Town Attorney Hobbs asked the applicant about Conditions #4 through #8. Robert Hornik stated that they were acceptable. Town Attorney Hobbs stated that from the applicant's perspective, there was a change to Condition #1 with regard to the time of

changing it from immediately to 90 days. He added that for Condition #3, the applicant could leave in the gravel removal but not require a fence. He added that Attorney Gallop had a suggested Condition #9, which was toll agreement. Robert Hornik stated that they could do something with signage with regard to Condition #3 to discourage anyone from accessing the septic repair area.

Mayor Pro Tempore Thibodeau asked Michael Strader if the new requirement was not to park on the septic repair area. She added that the Health Department has gotten stricter with septic in the last few years at the state level. She stated that it was just a repair area with dirt. Michael Strader stated that it has always been in place, but locally there may be some flexibility. Mayor Pro Tempore Thibodeau pointed out that it was there in the event that the main septic failed.

Town Attorney Hobbs asked if there was any other testimony with regard to the conditions. He asked if there were any questions from Council with regard to what was discussed about the conditions if Council was inclined to consider approval. Mayor Kingston stated that all that has been done was that the applicant was asked what they would agree to. Town Attorney Hobbs agreed, adding that it was up to Council to assign the conditions. Mayor Kingston clarified that Town Attorney Hobbs was asking the applicant what they would like to see. Town Attorney Hobbs stated he was correct as it gave Council perspective from staff and the applicant about what conditions Council may want to consider. He added that Council could consider any and all of what has been recommended or suggested.

Town Attorney Hobbs asked if Attorney Gallop or Robert Hornik had any closing arguments to make.

Robert Hornik thought that the applicant felt like he had done as much as he could and still have a viable site. He stated that they were okay with the conditions that were discussed and want to keep the vitality of the back yard as much as possible and appreciated everyone's time and patience with it. He asked that Council approve the conditional use permit with those conditions.

Attorney Gallop stated that after everything that was heard earlier in the meeting, the point was that no one was trying to shut the bar in the backyard down and no one was trying to shut the backyard down. He stated that everyone was trying to get as close as possible to meeting the public policy as defined in the Town's ordinances over years of refinement, as to setbacks and everything else. He stated that no one was questioning the Copeland's generosity to the community; their desire to have a good business; or their desire to be good citizens of Duck. He stated that the real issue, which was uncomfortable for staff and him advocating on staff's behalf, was to deal with situations such as this one where someone has completed work without permits, without numerous levels of permitting that they needed to go through. He added that if they came in and dealt with that initially, there may have been a way to solve the problem or else Council would not be present to deal with the issue now. He stated that, stepping into the future, it was even more uncomfortable when staff works with people as much as they can, but

every time they met with the applicant, they would find out that there was something else that they could change. He thought what Council was hearing and asking questions on was what the bottom line was and when they were going to get to a point where the applicant changed everything they could change that let them run their business and compare it to how it balanced against the requirements that they have decided to put against other businesses.

Attorney Gallop stated that Council could do multiple things – they could table it for another hearing or time, consider more changes, and consider differences. He didn't think he was advocating for that and didn't think Director Heard was advocating for it. He stated that he heard some indication and wanted to let Council know it was something they could do. He stated that Council could vote to deny the application or vote to approve it as is or approve it as is with some changes or conditions.

Attorney Gallop noted that it was the applicant's burden to show Council that they meet the Town code. He added that in this case, if the applicant was just applying for an outdoor event area, everyone in the room would agree that they didn't meet it. He explained that the only way the applicant can get there is to go through the Village Commercial Development Option, which Council has a lot of discretion. He stated that Council could move setbacks but didn't have to. He stated that what Council was supposed to do was to take into account the Land Use Plan, the architectural control considerations of the area, and the existing requirements that would apply and how the changes to those were affecting the area as well as taking into account the public interest and how the public interest was affected. He noted that public interest were the people outside of the property.

Attorney Gallop stated that the last consideration was that it has to promote the public health, safety, and welfare and find that it does. He explained that Council has to find that whatever they decide to do, if they approve anything, that it meets that standard. He stated that as far as looking at the Land Use Plan, he thought most of the testimony heard from Director Heard was that it wasn't that much in conflict with the Land Use Plan. He thought the testimony Council heard from Director Heard with regard to architectural controls was that the restaurant fits but the restaurant wasn't the issue, that the rest may or may not fit and probably doesn't necessarily fit with the Town's architectural controls.

Attorney Gallop stated that when looking at the requirements, he thought the issue was compromise, but were only seeing compromise from the applicant when they hear the word no. He added that every time the applicant heard they could not do something, they would give Council something else. He asked where the bottom line was. He added that, to some degree, the applicant was not asking for reduced standards, but asking for no standards and asking that everything in the backyard that was not related to the restaurant – which did not meet any setbacks – to remain as it was permanent. He stated that Council had the ability to adjust it, but in doing so, they would need to take into account how much and how it would affect all the requirements that were put on everyone else in that district.



Attorney Gallop stated that the last issue was the public interest. He stated that the question was how it affected the public interest. He pointed out that it did not affect the homeowner in the home behind the property; Mr. Hopkins to the south didn't have a problem with it; the homeowner to the north did not give an opinion; and the business owner in the south shopping center stated that he didn't have a problem with it. He stated that the big issue was that these people may not always own these properties. He added that if the setbacks were changed, which Council has the ability to do, Council should take into account not just the effect on the people who actually were already there, but the fact that the setbacks will potentially be changed permanently for these things that Council was granting the use for, assuming that the applicant does not add more without permits in the future, as they would have to go through this process again. He stated that Council still needed to think about not only what was there, but what could be there and who could be there. He stated that that was the reason for setbacks as they were not there to hamper the owner of the property that was being applied the setbacks but were there to help the adjacent owners.

Attorney Gallop noted that Mark Copeland has a fence going down the north side of his property. He added that when the next person comes in on the other side and wants to do something, and Mr. Copeland has the fence and the trellis that was too close to the property, the next person will have the same issue Mr. Copeland has with Mr. Hopkins' property as it was a property outside of his property that was making him have to do something because he was within the setback. He noted that if he was outside of the setback, Mr. Copeland would not have a problem, but by Mr. Copeland expanding his setbacks out, he may in the future give the people on either side of property line a problem that is not seen today. He stated that that was where the public interest came into play. He stated that setbacks were in place to protect neighbors.

Attorney Gallop stated that, as far as the conditions, if Council did decide to grant approval, he thought Condition #1 with the time limit as long as there is a condition added that the applicant would enter into a tolling agreement, would be okay, but without the tolling agreement, he thought Council could tell them to cease now. He added that if things weren't going to change, the Town would have to figure out what to do between now and October to deal with what's going on with the property. He stated that with regard to Condition #3, he thought it wasn't a Health Department requirement but a requirement that the Town would put on to insure that the Health Department requirements for no parking were met. He added that it was a fence and four bollards and not something complicated, but some separation so no one will drive a vehicle on the septic repair area.

Attorney Gallop reiterated that it was the applicant's burden to produce the evidence that they will meet the requirements and their burden to show that they meet the public health, safety, and welfare and their burden to say they have met the public interest, and to show Council that they should, in their discretion, vary the setbacks as the applicant has asked, contrary to typical requirements for the district. He thought Council should take that into account as they were considering the application.

Councilor Burdick asked if Council approved the request, but contingent on the conditions, that unless the conditions were all met within 90 days, it meant that the approval was no longer valid. Attorney Gallop thought Council could take the opportunity to revoke the approval or send a notice of violation that the applicant was in violation of the permit and then the typical enforcement process would go from there, just as it has happened with the current permit they have. He added that their permit ran out and they have received notices of violations and the Town has moved forward with that process, which was why the applicant was at this meeting to try to solve the issues related to that.

Mayor Kingston clarified that Council has not really defined some of the items. He pointed out that the setbacks have not been defined that Council would agree to under the conditions. Attorney Gallop stated that the conditions listed were if Council voted to approve the plan. He explained that at that point, Council would be voting to approve the applicant's plan and add the conditions on top. He added that by approving the plan, Council would be approving the setbacks as the applicant has shown on the plan. He suggested that if the applicant offered to move the stove, that Council accept that offer if the plan was approved as amended to move the stove.

Councilor Burdick thought the amendment should include moving the stove. Councilor Britt pointed out that an amended plan could be accepted. Attorney Gallop agreed, but he was not in favor of that because Michael Strader could not show exactly where the stove would be put, he could only show the general area where it would be moved to. Robert Hornik stated that he and the applicant were discussing it and the stove location could be in a location that was acceptable by the Planning Board. Attorney Gallop stated that Council could put it on Director Heard, but he would want to see it on a plan. Director Heard stated that staff could work with the applicant on a design for a better proposal to come more into compliance with what's left. Attorney Gallop pointed out that the important concept was that it was not shown on the plans in front of Council, so if a Council member makes a motion to approve, they have to make the motion to approve with some form of amendment that states that the stove would be moved over by the bar as proposed and Director Heard would have an opportunity to approve that afterward.

Councilor Burdick clarified that the stage would be moved off the bulkhead. Attorney Gallop stated that the stage was already being moved. Councilor Burdick disagreed. Attorney Gallop asked Councilor Burdick if he wanted it moved all the way to the bulkhead. Councilor Burdick stated he was correct, adding that Mark Copeland had volunteered to do it. Attorney Gallop thought any of those changes could be made in an amendment when the motion to approve was made. Mark Copeland stated that the back of the stage will come off and sit on top of the bulkhead. Councilor Burdick stated that that was the reason for the needed change. He clarified that it would be moved forward up to the bulkhead. Mark Copeland stated that it would. Councilor Burdick asked if Council could come up with an amendment covering those items. Mayor Kingston stated that Council needed to deliberate first.

Town Attorney Hobbs asked Robert Hornik if he had anything else to discuss before the public hearing was closed. Robert Hornik stated that he did not.

Town Attorney Hobbs closed the public hearing. He explained that Council would now deliberate on the application. He stated that Council heard a lot of evidence and it would require a vote of the majority of Council on a motion. He added that Council had the option to make a motion to approve the application, potentially with amendments as were discussed, a motion to approve could include conditions. He stated that Council has been presented with a series of conditions and with additional comments from the applicant and discussion about those that Council could consider, should there be a motion to approve. He stated that Council's approval would need to include findings of fact and necessary conclusions of law to grant the conditional use permit. He suggested that, based on the amount of evidence, if Council felt there has been sufficient evidence to support the findings of fact necessary to reach the conclusions, that it be indicated in the motion and as part of that, Council could delegate to the attorney for the applicant to prepare a proposed order granting the conditional use permit and present it to Mayor Kingston for review, approval and signature at some point after the meeting date. He added that as part of the motion, Council could also grant or delegate that authority to the Mayor to review, approve and sign the order granting the conditional use permit.

Town Attorney Hobbs stated that if there was a motion to deny the application, then a similar order could be prepared by him or Attorney Gallop to address the items and delegate to the Mayor the authority to review, approve and sign the order. He stated that unless there were other questions, he was turning the meeting back to Mayor Kingston.

Councilor Burdick stated that a point that has been bothering him was how to get to a satisfactory conclusion. He stated that it sounded like the applicant has a willingness to get there and thought Council should move forward and try to work with them to make it happen. He believed what they have with their facility added to the Duck image and thought it needed to be preserved if Council could find a way to do so.

Mayor Pro Tempore Thibodeau stated that, looking at the setbacks and the narratives of this property, it was amazing that this much can happen on the property and has happened with relatively little impact to the surrounding community. She agreed that it was an enhancement to the community and the applicant was working with a high level of requirements for setbacks but taking into account that the applicant has a lot of green space to the north and a lot of commercial area to the south, she thought there could be some relief on the setbacks. She thought it could be at least half the amount of what normally would happen and there was the benefit of the large hill in the back to bring it into the applicant's property. She appreciated the point that it could affect people in the future but thought if the applicant and the things that were happening could come to a point where things don't keep happening without any permitting, that there was a willingness of the Town to try to work this through. She added that the applicant has gotten itself into a tight spot, but no one wants to see the backyard shut down. She stated that she thought it fit within the architectural character of the Town. Councilor Britt agreed.

Mayor Kington thought Council needed to go back to the facts. He stated that the Town did not create the situation but has to deal with it now. He pointed out that there were 10 unapproved structures with one removed, while the other eight were in violation of the setbacks. He added that the parking issue has not been resolved and there were still landscape buffer issues. He stated that the application went through Town staff, which they denied. He added that it went to the Planning Board and the Board deliberated about it and denied it 4-1. He stated that there has not been a good spirit of working through and solving the problems. He stated that he did not want to close down the operation, but thought Council had a responsibility in the Town that there were ordinances, rules and regulations. He stated that Council sat as a deliberating board with four to five other operations in Duck and they had to comply with setbacks and parking. He stated that as far as setting a precedent, if Council allowed this application to move forward, another operation could come before Council and point out that it was allowed with this application and now they want to infringe on their setbacks, build in the setbacks and have less parking too. He noted that Council was pretty stringent with the other organizations that came before Council. He added that Council was stringent with the Sanderling Inn. He thought there were facts that it would not say there couldn't be a workable solution, but he wasn't sure that Council should be the ones that come up with the workable solution. He thought it was up to the applicant to come back with a design and a plan that fits in with what the Town was looking for. He thought they could do that with Town staff and the Planning Board. He stated that he felt very troubled trying to outline what the applicant should be doing on that property as it was overdeveloped and unfortunate. He stated that it could be used, but thought Council needed to receive a plan back that they could deal with and not one they were trying to design on the fly. He stated that he was troubled by all of the issues that were in front of Council. He wondered if all of the structures were needed, could there not be put in bigger setbacks and who should determine that. He added that it was difficult as a Council to do that. He reiterated that he was troubled by moving forward even with conditions at this point in time, as they were undefined. He agreed that no one wanted to shut down their operation and he understood that, but thought Council had the responsibility to enforce the regulations and ordinances of the Town. He pointed out that all of the other businesses in Town had to conform and it was difficult to make an exception for one, when he wondered what would happen with the rest of the businesses as well as what will happen in the future. He stated that parking was still an issue. He added that Council makes people put in additional parking spaces, the issue with this application was 28 parking spaces. He stated that he was troubled with moving forward with it and thought more work needed to be done between the applicant and the Town and Planning Board before Council should take action.

Councilor Caviness thought Council was sitting with a terrible mess that was unfortunate. She thought it had put dozens of people in really bad positions. She stated that as Council looked at the current application, an application has come forward to Council with multiple deficiencies and for that reason and after a lot of deliberation, the Planning Board denied it. She stated that as a Council member, if she were to accept the application as it stood and override the decision of the Planning Board, she would find her behavior to be indefensible. She added that she has sat as a Council member on all of

the other projects that have come before Council where people have been compliant, followed the rules, and made concessions as well as a lot of other business and types of residential issues where people encroached on the setbacks and Council made them fix it. She added that it has been a hardship, but they agreed. She stated that she appreciated all of the testimony that was given, but someone had stated that the applicant could resubmit a proposal that was more in line. She thought that was where she would like to see the application as this point. She felt that it was so full of problems with structures that were not necessarily up to code, a lot of encroachments, and a lot of other types of problems. She stated that she would rather see a resubmittal of a plan, not a moving target, but something that was workable. She reiterated that there seemed to be so many deficiencies and problems. She stated that she always tries to be fair and equitable to everyone that has come before Council and has had similar types of hardships. She added that Council has always tried to hold the line and think of the big picture, but there have been people that have had to do some really hard things. She thought it would not be fair for all of the people that followed the rules and have come before Council to meet the conditions, to just approve this application as it was. She agreed with Mayor Kingston in that she did not feel that she had the skills to sit and manipulate the recommendations in this meeting going forward. She felt that it was outside of her ability and would rather see a plan come forward that can be properly analyzed.

Councilor Britt understood the other Council member's comments. He thought the Village Commercial Development Option was written when he was the chairman of the Planning Board and was exactly for this situation. He stated that there were small pieces of property in Town that the Planning Board knew would grow as the Town grew and would have problems. He added that the Planning Board fought to get this through and this was why it fits. He thought if one read a certain section of the Town's Vision Statement, Roadside Bar & Grill was what it was talking about – a small, family owned business, character and etc. He added that Council knew what the public's sentiment was regarding Roadside and thought it was an asset to the community. He pointed out that old places such as Roadside do not exist anymore because they get caught up in the rules and regulations and have to come up to conform, or they could not pay their bills. He stated that he has a lot of faith in Michael Strader as he thought if Mr. Strader made the applicant clean the slate and come back with a plan, it would not look a whole lot different. He noted that the drain field and repair area existed where it was and was 75 feet wide. He agreed that there could be a couple changes, but if one looked at the setbacks, the Planning Board reviewed each one individually and realized that each one individually was not that big but ended up being a lot where it added up the nine, which is what overran the Planning Board. He stated that the majority of the Planning Board at the discussion did not have an issue with any of the individual setbacks, it was the whole part of it. He thought the condition that all of the buildings would have to be brought back to code was going to be a lot of work and he thought it will get the property back to where it needed to be. He thought that Ashley Copeland would not allow Mark Copeland to continue working without asking. He stated that he was not concerned about moving forward. He stated that he was comfortable with the plan in front of Council to give the leniency to Director Heard to reposition the fire pit in the general area where it was shown; to move the stage to the bulkhead to get a little more encroachment; and didn't

have a problem with the trellis or deck as well as the movie screen that was only in the setback if one measured from the corner. He thought he could move forward with the application with the conditions as they were written and thought they were ambitious conditions. He thought bringing the whole site back into compliance would be a lot of work, but thought if they did that, it was good. He stated that he did not have an issue because of the Village Commercial Development Option and got into government to be the voice of the people. He didn't have a problem with a precedent being set because he thought it was a unique situation and an asset to Duck, that it wasn't an issue. He thought Council owed it to the applicant, but if Council was going to table it, they needed to go through and give the applicant more guidance.

Mayor Pro Tempore Thibodeau agreed with Councilor Britt's comments. She stated that the nature of the business needed to be looked at. She stated that it was a gathering spot during the hours of 6:00 to 10:00 p.m. and events were held in the afternoon for children. She stated that a lot of people were walking through Town, they're gathering and stopping by. She noted that it was very pedestrian oriented. She stated that she would never think to try to pull their parking and would ride her bicycle there if she was going there. She stated that Council should look at the nature of what was happening in the backyard as it was very pedestrian, very people oriented. She noted that there was no dining particularly and was a gathering place to listen to music while having some community time. She thought that plus the fact it was what it was – a skinny little deep lot abutting mostly commercial deserved a little leniency. She knew it was frustrating, but Council was the body that makes the exceptions and the Planning Board wasn't able to suggest that. She thought that going forward, there needed to be a lot more transparency and working with the Town as opposed to not doing it. She stated that she would be ready to approve it as it has been discussed.

Councilor Burdick thought the whole point was that there was a thriving business that was really contributing to the Town. He stated that it was in a parcel of land that was very restrictive. He stated that the applicant has been trying to maximize what they were doing and thought they had. He stated that his problem was how they went about doing it and now Council has to fix it. He felt that dragging it out was not worth the Council's time and effort. He felt that Mark Copeland was at the point where he was willing to work with Town staff to minimize the problems with setbacks. He added that the movie screen was in place for the past five years and Council had approved it in 2013. He reiterated that Council was making an issue out of something that should not be an issue.

Councilor Burdick moved to adopt the CUP with the conditions that have been enumerated, the nine conditions, and the two amendments for moving the grill and stage.

Councilor Burdick asked that since there would be a 90-day termination point on the application, if there shouldn't be a report back at the Council's September meeting to make sure things are moving forward instead of waiting until the end. He asked if it should be added to the motion. Councilor Britt thought it could be updated. Councilor Burdick stated that he would like Director Heard and Mark Copeland to be prepared to discuss their progress at Council's September meeting.

Mayor Kingston asked how Council should define some of the issues that Council was approving in the conditional use permit. He asked how Council will define the standards for setbacks, landscape buffers, and parking. He noted that Council has not defined what they were approving. Mayor Pro Tempore Thibodeau stated that Council was approving the plan. Councilor Burdick disagreed and stated that Council was approving the plan as presented. Mayor Pro Tempore Thibodeau added that it was being approved with the conditions and the new things.

Town Attorney Hobbs clarified that Councilor Burdick's motion was to approve the conditions as discussed with the applicant, meaning the changes to #1 and change to #3. Councilor Burdick stated he was correct and noted that it was adding Condition #9. Town Attorney Hobbs asked if a Condition #10 should be added where the applicant would report back to Council at their September meeting as far as progress goes. Councilor Burdick stated he was correct. He explained that when he was talking about progress, he meant progress in coming up with a final plan and not getting it all done. Town Manager Layton noted that the final plan was in front of Council. Mayor Pro Tempore Thibodeau noted that the plan was in front of Council. Councilor Burdick disagreed. Attorney Gallop explained that the only thing the applicant would be doing after this meeting is seeking to obtain permits for building or inspections in order to approve things. He added that once Council approves the plan, they would be approving whatever setbacks were on the plan in front of Council. Councilor Britt added that tolling would be requiring that every building comes up to code and everything was the way it should be.

Attorney Gallop stated that the only necessary change in setbacks would be if the applicant ran into something where building code made them do it. Councilor Britt agreed.

Town Attorney Hobbs asked Councilor Burdick what his motion was regarding Condition #3 regarding the fence and bollards to prevent vehicular traffic. Councilor Burdick stated that he didn't change it as he was waiting to hear what Director Heard wanted. Town Attorney Hobbs explained that the public hearing was over, but he could reopen it if Councilor Burdick wanted more testimony about it. Councilor Burdick stated that there needed to be some separation and thought it was the intent. Town Attorney Hobbs clarified that the motion for Condition #3 would remain exactly as proposed by staff. Councilor Burdick stated he was correct.

Town Attorney Hobbs asked if there were any other questions about the wording of the conditions as far as Councilor Burdick's motion. Councilor Britt clarified that Condition #1 was 90 days and then it was added that they would report back in September. Town Attorney Hobbs stated that the tolling agreement was added as well.

Councilor Caviness asked if Council approved the alternate recommendations list, they would be approving all of the encroachments. Attorney Gallop stated that staff was recommending denial in the original recommendation. He added that the alternate

recommendation was approval with the conditions if Council voted to approve it. Councilor Britt explained it was approving the plan, plus having the fire pit moved to the new location and the stage coming to the edge of the bulkhead. He added that everything else was as is. Town Attorney Hobbs explained that the two amendments had to do with working with Town staff.

Councilor Burdick stated he was lost with regard to Condition #2. Attorney Gallop stated that Condition #2 was not an issue, as the applicant did not have an issue with the condition. Councilor Burdick agreed, adding that if one read Condition #2, it stated that, in spite of the fact that Council was approving the plan, the applicant has to look at anything that did not comply with the Town code. Mayor Pro Tempore Thibodeau disagreed, pointing out that Council was changing the code. Attorney Gallop explained that Condition #2, for the stove, it was currently in a place that did not comply, but once Council approves the plan, the stove would have to be moved. He added that there were other things shown on the plan that would be moved, such as the shed that will be removed, so the Town standards that were now to be applied were what was on the plan. Town Attorney Hobbs stated that Council approved it as part of the approval for the conditional use permit. Attorney Gallop stated that he wasn't trying to advocate, he was just trying to explain.

Councilor Caviness clarified that in 90 days, all of the Health Department, fire code and building code would have to be done. Attorney Gallop stated she was correct, adding that if it wasn't, the applicant would have to cease using the backyard until it was brought into compliance. Councilor Britt stated that if the applicant pulled permits and did not complete the work, they would have to cease using the backyard until they were finished.

Mayor Kingston asked about the definition of the opening paragraph in the conditional use permit. He asked what Council said about granting modifications of standards for setbacks, landscape buffers and parking in the conditions. Mayor Pro Tempore Thibodeau stated that it was as presented. Mayor Kingston asked about the parking. Councilor Britt stated that Council was approving the parking as presented. Councilor Burdick agreed. Town Attorney Hobbs explained that the staff report set forth the setbacks as set forth in the plan that would be approved if the motion was approved. He added that they would be approved except for the possible changes that may be made with staff dealing with the stove and the stage, otherwise, they would all be indicated in the conditional use permit along with the findings of fact and the conclusions, which was the plan that Council was approving.

Mayor Pro Tempore Thibodeau pointed out that there was a two-year conditional use permit proposal from 2013-2015. She asked if this proposal was something that should also have a time limit on it and then re-evaluate it in five years. Town Attorney Hobbs stated that he would not recommend it.

Mayor Kingston stated that he was still concerned about the precedent Council was setting by approving the exceptions; the disservice Council has done to Town staff and the Planning Board with respect to the due diligence they did; the effect it will have on



other businesses within the Town; and the effect it will have back on the Town with respect to exceptions. He stated that he would prefer to see Council go back to the applicant and have them bring back a clean plan, not necessarily starting over, but to do the due diligence for something that was more acceptable to other parties in the Town as well as on Council.

Councilor Britt understood Mayor Kingston's concern about precedent, but thought the situation was one where there will be no precedent and the Council will not see another issue like this one. Mayor Kingston asked what will happen when another business comes in and wants to put tables in the setback or build a building in the setback. He wondered what would be done. He added that Council already granted an exception. Councilor Britt stated that it was an exception for an existing situation that has been in place for some time, which he felt was different. Mayor Kingston pointed out that it wasn't permitted to be there, so it was not like it had been approved by the Town.

Mayor Pro Tempore Thibodeau stated that she had looked at the question about precedents and asked the questions about it and it was explained to her that Council was not setting a precedent because every situation was different. She added that this application was not like the one for the height request from Sanderling. She stated that this situation was unique and that was what the Village Commercial Development Option was for. Mayor Kingston pointed out that Council was enforcing other businesses to abide by the Town's rules, ordinances and regulations. He added that, most recently, Council forced Coastal Cravings to make some changes because of encroachments. He stated that his point was that Council was not treating this application fairly with regard to every other business that has come before Council with a conditional use permit.

Councilor Burdick thought Council needed to look back at what it did five years ago with this same property. He stated that Council allowed similar exceptions for almost the same reasons. He thought Council could force the applicant to work on it and cut off pieces of their roof and move things around, but thought it was an overkill for this property given the septic system restrictions on the entire property. He thought sending it back to have it redone could gain the Town something, but he didn't think it would remove all of the setback problems without totally destroying what was there. He didn't think it was Council's intent. He stated that he appreciated where Mayor Kingston stood as that was where he was initially with regard to the Sanderling project and had the same problem with regard to precedents for treating everyone fairly.

Mayor Kingston pointed out that the original conditional use permit for Roadside Bar & Grill was not for an entertainment area, but for a pooling area. He added that there was a bar, which the applicant moved. He stated that Council approved that along with seven events that the applicant said they would have. He stated that it was apples and oranges and one could not compare what Council did five years ago against what was happening at this meeting. Councilor Britt reminded Council that what was on the site was not broken. He added that Duck has a vibrant downtown area and a key part of it was Roadside Bar & Grill. He stated that it has been there a long time and Council was not setting a legal precedent but was doing what was right for the community and for the

business side of things. He agreed that there were setback issues, but there were also geographical reasons for a number of them. He stated that the Planning Board had no major problems with any of it. He stated that he was still comfortable with his position and was ready to vote.

Councilor Burdick called for the vote.

Town Attorney Hobbs stated that he had explained earlier the potential for having the attorney for the applicant prepare a proposed order if the conditional use permit was approved, and then have the mayor authorized to review and sign the order afterwards. He assumed that was part of the process that Council was approving, if the motion was to be approved. Councilor Burdick agreed.

Attorney Gallop asked if the tolling agreement would be brought back in three weeks. Robert Hornik thought he could have the proposed order for Town Attorney Hobbs and Attorney Gallop's review by Monday, July 23, 2018. Attorney Gallop stated that he wanted to put a four-week time limit on the tolling agreement as he didn't want to wait until the day before October 1, 2018 to deal with it.

Town Attorney Hobbs suggested that Council have a motion to amend the original motion, to add a four-week deadline for the tolling agreement to be negotiated, approved and signed.

Mayor Pro Tempore Thibodeau moved to amend the original motion to include the four-week deadline for the tolling agreement.

Councilor Caviness asked if after 90 days there was no compliance, the entire back bar operation would be shut down. Attorney Gallop stated she was correct, adding that it would be shut down until they comply. He stated that they would still have time, under various permitting, or the Town would have to take some enforcement action.

Motion carried 4-1 with Mayor Kingston dissenting.

Town Attorney Hobbs reminded Council that the next vote would be for the main motion that was made.

Motion carried 3-2 with Mayor Kingston and Councilor Caviness dissenting.

Mayor Kingston called for a 10-minute recess. The time was 11:23 p.m.

Mayor Kingston reconvened the meeting.

### **OLD BUSINESS/ITEMS DEFERRED FROM PREVIOUS MEETINGS**

There was no Old Business to discuss.

## **NEW BUSINESS**

There was no New Business to discuss.

## **ITEMS REFERRED TO AND PRESENTATIONS FROM THE TOWN ATTORNEY**

Town Attorney Hobbs stated he had no report.

## **ITEMS REFERRED TO AND PRESENTATIONS FROM THE TOWN MANAGER**

### **Update on Departmental Activities**

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

Fire Chief Donna Black was recognized to speak. Fire Chief Black gave a brief overview of the past month's fire activities to Council and the audience.

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

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

### **Update on the Town of Duck Beach Nourishment Project**

Town Manager Layton stated that he received the final invoice and was finally able to complete a full accounting for it. He stated that the profile surveys were completed and they are going through the data. He added that he would not have the results of the data for probably another month. He stated Dare County has decided that they will provide funding for some of the planting that was completed if the Town had money left over in the project account, which it did. He stated he received a \$29,000 check, which was how Dare County reimbursed the Town for all of the planting completed in the project area. He noted that the money would be accrued back into the Capital Reserve Fund.

### **Update on the Public Safety Building**

Town Manager Layton stated that a lot of the work was moving very slowly, and staff had reason to believe that it was working its way through the channels. He stated that the request was sitting with real estate, which he assumed meant that it has left the Vicksburg office and was in the Wilmington office for them to review any requirements they may have. He stated that the one requirement that they finished reviewing was for the unexploded ordnances as they didn't think there were any issues. He stated that they were

in the process of determining what type of environmental assessment may be required. He explained that environmental assessments could be minor or extremely expensive. He stated that the way it was left with the real estate office, was that they would touch base approximately every two weeks with an update.

Town Manager Layton stated that he has spoken with the architects at RRMM and they are in the process of looking at the next phase of work that will need to be completed as well as working on the proposal for it.

Councilor Burdick asked if the changes in personnel for the police and fire departments would impact the building. Town Manager Layton stated that it would not change the overall design.

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

Town Manager Layton stated that all of the signatures have not been obtained and there were still two signatures needed. He stated that in the interim, a family squabble has arisen, which is one of the reasons that staff has not issued a press release about the property. He noted that until all signatures were obtained, the deal was not signed. He thought it may not mean anything in the grand scheme of things, but when eight signatures were required, there could be issues related to it. He stated that he had hoped to let Council know that all of the signatures were obtained, and the process of due diligence had started with the environmental assessment, but that was not the case.

### **Financial Statement for June FY 2018**

Town Manager Layton reviewed the financial statements, beach activities and beach nourishment reports with Council and the audience.

### **MAYOR'S AGENDA**

Mayor Kingston stated that he will be attending his mayors meeting the week of July 23, 2018. He stated that he had passed out an email earlier from Town of Kill Devil Hills Mayor Sheila Davies where one of their Council members would like to have a meeting on storm water management and was inviting other towns to participate. He wasn't sure if anyone from Council would like to participate but added that he sent the invitation to Director Heard in case he wished to participate. He stated that he attended the North Carolina League of Municipalities Finance meeting the previous week via web video. He explained that they have switched over all their investments to an investment firm and were doing very well with their investments. He stated that he attended a board meeting on July 17, 2018 via web video. He stated that in September, CityVision 2018 would be held in Hickory, North Carolina, which he would be attending. He thanked Town staff for a great 4<sup>th</sup> of July celebration. He thanked Town Clerk Ackerman for her help with the North Carolina League of Municipalities packets he needed recently.

## COUNCIL MEMBERS' AGENDA

Mayor Pro Tempore Thibodeau thanked Town staff for a great 4<sup>th</sup> of July parade and for all of the work they do on a daily basis. She stated that she appreciated Jane Lindley's presentation at the June Council meeting and thought it could be discussed more at a future meeting or the Council Retreat. She stated that there were a lot of public comments about the wireless facilities that were going in in Town and appreciated the details Council received on it. She wondered if Council could receive an update on it at a future meeting. She noted that it sounded like the Town did not have a lot jurisdiction, but it has raised a lot of questions. She thought there could be a discussion in the future.

Mayor Pro Tempore Thibodeau thanked Allan Beres for his comments during the Public Comment period and appreciated the fact that Council needs to be as transparent as possible. She noted that it was a unique situation and she rethought the idea that it could have been discussed more simply because Council got to a point where the sellers were at a particular price. She added that the Town was not technically under contract but wanted to take Mr. Beres' comments to heart in terms of getting more public input since that was how the other properties were purchased. She thanked Mr. Beres again and apologized for him feeling that Council was not as transparent as they needed to be. She thought once the Town was under contract, Council will want to explain to the public what their rationale was and what their thoughts were regarding it. She stated that she would like to get public input if there were people that disagreed with Council's decision.

Councilor Burdick apologized for coming to the meeting late. He stated that he heard that the 4<sup>th</sup> of July parade was great. He thought the discussion on Roadside Bar & Grill was very good with a lot of participation. He thought the important points were covered. He pointed out that the vote was not unanimous, but he thought Council spoke as one as to where they wanted to go.

Councilor Caviness thanked Mayor Pro Tempore Thibodeau for bringing up the wireless facilities. She asked if other towns have taken a position statement on them as to if they were to happen, could they be more mindful of the neighborhoods. She knew Duck could not but wasn't sure if the Town could offer any kind of weight that would reinforce the concerns of the affected neighborhood and future neighborhoods.

Town Manager Layton explained that the School of Government has provided guidance. He stated that there were materials available about what a town could do. He stated that there was no reason to believe that there were opportunities if the companies were willing to work with the Town in dealing with it. He stated that the situation in the Poteskeet subdivision was still fluid, and he and Director Heard have not had a chance to speak about it. He stated that he and Director Heard had spoken to the representative of Mobilitie earlier in the day and the comments were that there was going to be 2,000 small wireless antennas in Duck was probably a misstatement. He stated that he was told that there were four that were identified by Sprint for the Outer Banks, adding that it didn't mean there would not be a proliferation of them at some point. He stated that there were other locations that they identified in Duck other than Poteskeet that could potentially

deal with it. He added that if the wireless company decided to put the facility in another subdivision and there were complaints, it could be a challenge. He stated that there were some opportunities, but they were limited.

Town Manager Layton reiterated that the issue was if it were in a residential area that was private property, where there was a private road, or the ideal location was on someone's property, then it would be through a conditional use permit and there would be an opportunity like earlier in the meeting for input. He added that because it was a state right-of-way, staff has to be careful with how they deal with it. He stated that he hasn't had a chance to analyze the issue, but every street that the representative identified was a public street. He stated that he and Director Heard will talk with the representative to see if there is a location where people weren't as concerned.

Councilor Britt stated that Council did not come upon the decision lightly to purchase the property. He added that Council did not mean to not be transparent, but in hindsight, it appeared that Council was. He apologized to Allan Beres and the other members of the audience for that. He hoped there would be more explanation in the future. He stated that he, his son and Officer John Gilreath were recently in a video about golf carts. He encouraged Council and the audience to watch it. He stated that with regard to his restaurant, he was waiting on the walk-in coolers. He stated that the 4<sup>th</sup> of July parade was great. He thanked staff for staying so long for the meeting.

### OTHER BUSINESS

#### Additional Public Comments

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

Mayor Kingston noted that the next meeting will be the regular meeting on Wednesday, August 1, 2018 at 7:00 p.m.


### ADJOURNMENT

Councilor Britt moved to adjourn the meeting.

Motion carried 5-0.

The time was 12:03 a.m.

  
Lori A. Ackerman, Town Clerk

Approved: September 5, 2018  
  
Don Kingston, Mayor

