

**TOWN OF DUCK
PLANNING BOARD
REGULAR MEETING
February 12, 2020**

The Planning Board for the Town of Duck convened at the Paul F. Keller Meeting Hall on Wednesday, February 12, 2020.

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

Absent: Randy Morton.

Also present were: Director of Community Development Joe Heard, Council Liaison Sandy Whitman, Town Attorney Robert Hobbs, and Permit Coordinator Sandy Cross.

Absent: None.

Others Present: David Cotner, Jeannine Cotner, Kent Zimmerman, Olin Finch, Paul Snerer, Jay Overton, Whit Patterson, Sharon Hart, Martha Speight, and Duke Geraghty.

Chair Blakaitis called to order the Regular Meeting of the Planning Board for February 12, 2020 at 6:33 p.m.

PUBLIC COMMENTS

None.

NEW BUSINESS

Special Exception 19-002: Special Exception at 1398 Duck Road to Support and Stabilize a Significant Amount of Fill Material with a Soundfront Bulkhead

Director Heard stated that at their meeting on January 8, 2020, the Planning Board received presentations from Town staff and the applicant, evaluated the proposed special exception, and voted unanimously to recommend denial of the special exception application. He stated that the day after the meeting, the applicant met with Town staff to discuss options for amending the proposal to better address the concerns that were voiced by the Planning Board members. He added that at the applicant's request, the proposal is now being brought back for reconsideration by the Planning Board.

Director Heard stated that during the on-site meeting with Town staff on January 9, 2020, the applicant expressed an intent to reduce the proposed scale of the project and retain an engineer to complete a study analyzing the potential impacts of the project on adjoining properties. He noted that local engineer Barrett Crook prepared a Shoreline Stabilization Engineering Report for the Board's consideration; however, the applicant chose not to submit a proposal with revised dimensions for the project and requested that the Planning Board reconsider the same bulkhead/fill design that was previously submitted.

Director Heard stated that Town Attorney Robert Hobbs offered the following advice to the Planning Board: since action by the Planning Board is not a final determination on an application, *res judicata* (“a matter already judged”), also known as a claim preclusion, would not apply, and the Planning Board may consider the amended application and not be bound by its prior consideration of the original application. Whether the Planning Board recommends approval or denial of the amended application, it would be the amended application that the Planning Board would send to the Town Council for consideration.

Director Heard stated that the applicant was seeking to construct a bulkhead and backfill up to 23 feet behind the three-foot high bulkhead to build up the height of the property, effectively creating a level lawn area approximately 30 feet in width behind the bulkhead with the proposed bulkhead approximately three feet high for much of its length, but it will taper to a height of 18 inches on higher ground near the northern side of the property. He explained that to be constructed as proposed, the improvements will require approval of a special exception for a bulkhead to be used as a method to stabilize or contain fill.

Director Heard stated that the proposed bulkhead and fill behind it would extend across the entirety of the property and tie back into the property with perpendicular bulkhead walls running down the sides of the property. He added that the applicant has submitted a cover letter with her application as well as engineered plans for the bulkhead, which explains that the bulkhead design has ties that extend 15 feet into the property behind the bulkhead to help support the structure. He noted that part of the justification for the requested special exception is to accommodate the tie-back posts west of the existing swimming pool.

Director Heard stated that Subsection 156.128(C) of the Duck Town Code establishes special exception review criteria for applications involving fill and grading activities. He pointed out that the following standards must be considered as part of the Planning Board’s review:

1. The site for the proposed fill is otherwise adequate in size, shape and other characteristics to accommodate the proposed project.
2. The applicant has demonstrated that the requirements of this chapter are unreasonable or impractical due to the necessity for the fill, lot shape, topographical features, location of mature vegetation, or location and characteristics of existing improvements on the lot.
3. The amount of fill proposed is the minimum necessary to accommodate the proposed project, especially for soundfront properties.
4. The proposed fill will not negatively impact adjacent properties or the surrounding area, especially for soundfront properties.
5. The special exception will be consistent with any applicable goals, policies and objectives specified in the Town’s adopted CAMA Land Use Plan and Vision Statement. This review includes the Town of Duck’s evaluation of the proposal’s consistency with its adopted CAMA Land Use Plan, which may be more flexible or more stringent than interpretations by others.

6. The applicant has submitted a drainage plan consistent with the requirements described in Subsection 156.128(A)(4)(c).

Director Heard stated that as several of the required findings are not met in staff's opinion, staff is recommending denial of the special exception application. He added that if the Planning Board decides to recommend approval of the request, staff was asking that the Board consider the following condition:

1. The applicant must submit required application materials and obtain a land disturbance and/or building permit prior to commencing work.

Sharon Hart of 1398 Duck Road was recognized to speak. Ms. Hart stated that the last time she was before the Planning Board, Vice Chair Cofield had asked if she had an analysis completed. She stated that she did have one done after the January Planning Board meeting. She stated that Chair Blakaitis had asked her if she had considered alternative methods, which she has at this time. She stated that the bulkhead is proposed at 30 feet and not 35 feet as the staff report indicated. She stated that the staff report also notes that she was effectively creating a level lawn area, which is not her objective. She explained that she was trying to save her trees as the roots of her trees extend out as far as her neighbor's tree roots. She noted that Barrett Crook's report states that the bulkhead should be extended out from the tree roots, which she agreed with. She noted that Mr. Crook's report has answered all the Board's questions and concerns.

Sharon Hart explained that she needs a storm wave buffer on her property because when Hurricane Michael come through in 2018, it took two feet of sand from her waterfront. She added that with the gale force winds that came through a week prior, she lost another 10 inches of sand. She stated that every time the wind blows or if there is a storm, she loses sand on her property. She added that every day that goes by, she has less and less sand as well as less protection. She stated that the proposed bulkhead is nine feet west of the tree. She pointed out that her tree has more than two feet of exposed roots and she would ultimately lose the tree.

Sharon Hart stated that the height of the proposed bulkhead on the south side is 18 inches and 36 inches on the north side. She pointed out that at Planning Board's last meeting it was 17 inches and 36 inches, respectively. She stated that that 36 inches was now 41 inches on the north side and 27 inches on the south side. She added that she is constantly losing sand as her property is more exposed. She stated that she needs something in place to stop losing the sand. She noted that in Whit Patterson's proposal, there is a return wall on the south side as well as her neighbor's bulkhead that goes to her property line but is covered up. She stated that she took photographs of the adjacent property where the wave washed 25 feet onto the property. She added that if that is the case with a small bulkhead, she would end up having water up to her pool.

Sharon Hart stated that, with regard to the 15-foot ties to help support the bulkhead structure, the 15-foot ties were the anchor system to support the bulkhead. She explained that they are attached to the deadman structure which has been dug into the ground. She stated that she is requesting the same height as her neighbors' bulkheads to the north and south.

Sharon Hart stated that she wants to have a root system instead of sand so it will hold the material in place. She noted that Barrett Crook had addressed the use of sills and living shorelines in his report and that they will not be adequate. Chair Blakaitis pointed out that there are other sills on the sound in other areas besides Duck. Sharon Hart asked what the cost comparison was. Chair Blakaitis stated that he isn't sure.

Sharon Hart noted that the issue started long before she bought her property as well as before the Town incorporated. She explained that her house was built in 1997 with a permit obtained to build a house, a pool, and pool deck. She noted that the original homeowners built the house too close to the sound and now she has inherited the issue. She reiterated that she is just trying to protect her trees and her property.

Sharon Hart stated that she bought her property in 2018 and has guests that stay at her house. She noted that a living shoreline and/or sill will attract snakes. She wondered who will be responsible then as she doesn't want this to be a guinea pig project. She added that she has limited time to get the project done. She asked the Board to reconsider and approve the project.

Chair Blakaitis if engineer Barrett Crook is present for the meeting. Sharon Hart stated he is not. Chair Blakaitis asked Sharon Hart if her attorney is present. Ms. Hart stated that she is not.

Vice Chair Cofield noted that he visited Sharon Hart's property recently and it was a windy day. He stated that he was surprised that Ms. Hart noted that there was a bulkhead to the south immediately abutting her property. He asked how high the bulkhead is. Sharon Hart guessed it is about 2 feet. Vice Chair Cofield noted that the day he was on Sharon Hart's property, the wind was blowing from the southwest. He added that the wave action was on her neighbor to the north's property. He stated that with southwest winds, the neighbor to the north will receive the most damage, noting that the wave action would not just be on Ms. Hart's property. Sharon Hart agreed, adding that she wants to protect her property.

Member Murray noted that the bulkhead is buried on Sharon Hart's neighbor's property. He clarified that her property lined up with it. Sharon Hart stated that it does not as her bulkhead is out a bit further. She added that the return wall would tie into it. Member Murray asked if the return wall ties into the existing wall, would it protect the tree roots of her neighbor's tree that is in question. Sharon Hart stated that her neighbor's tree is not the one of concern. Member Murray asked if Sharon Hart's return can tie into that bulkhead. Ms. Hart stated he is correct. Member Murray clarified if Sharon Hart lines up with the neighbor's bulkhead, it would be at her tree. Sharon Hart stated that it would be behind her tree. Member Murray inquired if the southern return was confirmed as part of the proposal that was in front of the Board. Sharon Hart agreed. Member Murray asked if the return and the east/west line of that bulkhead is in the peninsula area. Ms. Hart stated he is correct.

Town Attorney Hobbs asked Sharon Hart if the Planning Board considered approving the application, she would agree with adding the two conditions reflected in the comments made by the Town's engineer. Sharon Hart asked what they were. Director Heard noted that it was Town Engineer Mike Robinson's understanding, based on the report from Barrett Crook, that there is not a bulkhead return on the south side. Sharon Hart stated that there is. Town Attorney Hobbs clarified that if conditions were added to clarify that, Sharon Hart would not have any objections.

Ms. Hart stated that she would not. Director Heard stated that the second condition has to do with protecting the roots of the existing Live Oak on the adjoining property to the north. Sharon Hart stated that she would be fine with that.

Kent Zimmerman of 1400 Duck Road was recognized to speak. Mr. Zimmerman stated that he has planted grass on his property and as far as he could tell he hasn't lost anything since Hurricane Irene. He stated that he was fearful of the bulkhead. He added that he read the engineer's report and the tree in the report is on his property. He stated that he is personally not a fan of bulkheads as he planted grass on his property.

Chair Blakaitis clarified that Kent Zimmerman had success with planting grass on his property. Mr. Zimmerman stated that he did. Chair Blakaitis asked how long the grass had been in place. Mr. Zimmerman stated that he planted it after Hurricane Irene. Sharon Hart pointed out that Mr. Zimmerman's house sits further back from the sound than hers does.

Member McKeithan commented that Town Engineer Robinson's report notes that any impacts to adjacent properties should be the sole responsibility on the landowner causing the impact. He asked what it means and why it is in there. Director Heard stated that they are caveats as Town Engineer Robinson was not been retained to complete a full engineering study on the issue. He is just commenting on the engineer's report and looking at the circumstances in a very brief way. He added that it is possible that something will happen and if so, that's the owner's responsibility as far as correcting any damages.

Member McKeithan asked if the homeowner put in a bulkhead and it causes damage to the adjoining property, the property that was harmed has recourse to be reimbursed or have the problem corrected by the owner that installed the bulkhead. Director Heard stated that it is always a possibility that damage could happen.

Member McKeithan asked when Director Heard and the homeowner were discussing items and the question of how far back the fill went from the bulkhead, the bulkhead was still in the same position, but it was how far back the fill would go. He asked if Director Heard was talking about moving the bulkhead further away from the water. Director Heard stated that it would be the bulkhead itself. He clarified that he does not make any recommendations to anyone regarding the distance. He added that when he walked the site with Ms. Hart, he pointed out that one of the concerns that the Board members had was the scale of the project. He explained that if there is anything the homeowner can do to bring it back or make it lower, the Planning Board could look at and see that she made a good faith effort to minimize the scale of the project. He noted that there was conversation as to where the bulkhead could go and still be effective. He stated that he talked to the homeowner on site about moving it back and submitting a redesigned plan to show that. He stated that the applicant has opted not to change the dimensions of the project.

Member McKeithan clarified that when Director Heard was talking to the homeowner, the question was not to move the location of the bulkhead but to determine how far back from the bulkhead the fill should go. Director Heard disagreed, noting that it was to move the bulkhead back as well as the fill behind it. He added that the question was whether there would be a three-foot bulkhead and a level lawn or only a two-foot bulkhead that would slope upward.

Member Murray clarified that Items 2 and 3 in the staff report work together with regard to whether the proposal is the minimum to get the job done. He added that the applicant's position seems to be that what has changed since the last application isn't the physical characteristics but the evidence that this is the minimum. Director Heard stated he is correct.

Vice Chair Cofield stated that he is faced with competing interests. He stated that it was his view more generally that when faced with issues such as a special exception, to give relief to help fix a problem. He stated that he is very concerned that when the Town fixes a problem for one property owner, that it doesn't create a problem for the adjoining property owners. He stated that he is concerned that, in the interest of Town staff, that there are other options that have not been explored and if they are, they would probably minimize the impacts to the adjacent property owners. He stated that he has visited the property twice and does not see the retaining wall on the south immediately abutting the subject property. He noted that it raises the question if the retaining wall was lower, and some water washed up, that it would create wave action that would erode the property further. He didn't think there has been enough effort made to make this as unobtrusive as possible which would diminish the damage to the adjacent properties.

Chair Blakaitis agreed with Vice Chair Cofield's comments. He stated that he is troubled because the Town has special exception criteria that needs to be looked at. He noted that two of the major findings did not agree and the Board is tasked with making the findings agree in order to approve the text amendment. He added that he is concerned about the adjacent property to the north as he thought there will be a problem with it. He noted that the only difference with this application and the one prior was that is that an attorney and a consultant have given information, both of which he doesn't agree with. He doesn't think anything has changed between the last presentation and this one and doesn't see whether the Board can obtain more information that would change the situation as it was at the last meeting.

Town Attorney Hobbs explained that the Board is required to look at the requirements of the ordinance and the evidence presented. He stated that the Board was presented with, besides the testimony, evidence of the two engineering reports by the applicant's engineer and one from the Town's engineer, which was a review report which provided comments and addressed the adjoining properties. He stated that the Board is entitled to review those and consider that as part of their review of the various requirements in the ordinance.

Vice Chair Cofield stated that he is not persuaded that the application before the Board substantially changed the rationale the Board had for rejecting it at their January 8, 2020 meeting. He stated that there are two problem areas that presented a real challenge to him. He stated that he is not prepared to make a different finding than what staff had.

Vice Chair Cofield moved to recommend denial of the application as presented. Chair Blakaitis seconded.

Town Attorney Hobbs asked if the Board wanted to specify which findings, they found that were not met.

Vice Chair Cofield amended his motion to recommend denial of the application based on the fact that Conditions 2 and 3 were not met. Chair Blakaitis seconded.

Member McKeithan stated he was very sympathetic to the request, but based on the information received, he thought the applicant could have reduced the scope of the work. He stated that if it was not to be reduced, then he could not support the application.

Member Murray pointed out that he was swayed by the additional evidence that was presented as well as the application granting the CAMA permit. He thought it was significant.

Sharon Hart stated that two professionals had looked at the project. She asked the Planning Board members if any of them were professional engineers. Chair Blakaitis asked if it mattered. Ms. Hart stated that it did because the Board is dictating what she can do to her property to protect it. She knew they had goals and vision, but she has a square problem and the Board is trying to put it into a round hole and it is not working. She stated that Barrett Crook addressed everything in Conditions 2 and 3 and since he is a professional, he knows what he is talking about. She felt that the Board should listen to the professionals as this is a professional situation and the Board is discussing an excess of fill. She stated that it cannot be overfilled as it isn't higher than three feet. She stated that she will have water in her pool. She added that she will have grass planted to protect her neighbor's property.

The motion to deny failed 2-2 with Member Murray and Member McKeithan dissenting.

Director Heard noted that the application would move forward to the Town Council for their March 4, 2020 meeting.

Special Exception 20-001: Special Exceptions relating to Fill and Grading Activities at the Unaddressed Property North of 1336 Duck Road (1) to Allow the Use of a Bulkhead to Contain and Stabilize Fill and (2) to Allow Fill Approximately Five Feet in Depth Behind the Proposed Bulkhead, Exceeding the Maximum of Three Feet of Fill Permitted

Director Heard stated that the proposed project involves clearing, grading, and fill to accommodate the construction of a soundfront bulkhead approximately five feet in height extending approximately 45 feet along the shoreline from a point 20 feet north of the existing bulkhead on the property to a point approximately 25 feet south of the northern property line. He noted that in order to contain the sides of the fill, the proposed bulkhead would turn eastward on both ends and gradually taper into the grade of the property as the elevation of the property increases toward the east. He added that the exact length of the returns is unknown but would probably range between 30-50 feet, effectively creating a level lawn area approximately 30 feet in width behind the bulkhead. He noted that the proposed bulkhead will be approximately three feet high for much of its length but will taper to a height of 18 inches on higher ground near the northern side of the property. He stated that a boat ramp 20 feet in width at a lower grade would be located between the existing and proposed bulkheads and rip rap stone would be placed along the existing shoreline in the area north of the proposed bulkhead extending to the northern property line. He pointed out that existing wetlands located in the northwest corner of the property would remain accessible and not be impacted by the proposed improvements. He stated that at the southern edge, the proposed bulkhead and fill would extend nearly 25 feet out from the current shoreline to be in line with the existing bulkhead to the south. Fill was proposed well upslope of the bulkhead, extending approximately 180 feet eastward into the lot to provide a

more level lawn and building pad for future home additions. He noted that in order to be constructed as proposed, the bulkhead and fill will require approval of the following special exceptions:

1. Subsection 156.128(A)(6) requires approval of a special exception permit for retaining walls to be used as a method to stabilize or contain fill. The proposed project involves clearing, grading, and the addition of off-site fill to build up the height of the property for a distance of approximately 180 feet behind and approximately five-foot-high bulkhead at the rear of the subject property along the Currituck Sound.
2. Subsection 156.128(A)(12)(a) requires approval of a special exception permit for fill in excess of three feet in height. The proposed project adds fill material with a depth of approximately five feet directly behind the proposed soundfront bulkhead. The amount of fill gradually tapers to a narrower depth as it moves up the slope of the property to the east.

Director Heard stated that the Town has permitted many dozens of bulkheads to be constructed along the Currituck Sound and these soundfront bulkheads are generally constructed at a particular height and location to stabilize the existing shorelines but were not built outward or upward to recapture land that was already lost. He stated that the Town allows a reasonable amount of fill to be placed behind a bulkhead as part of the construction process but generally this area does not exceed more than a few feet in width. He pointed out that, as with many properties along the Currituck Sound, the subject property has shown evidence of an eroding shoreline due to the forces of wave action and storms. He added that the shoreline appears to have eroded toward the east and several trees have roots that have been partially exposed by erosion.

Director Heard stated that the property to the south – which is under the same ownership – contains a bulkhead five feet in height that supports the rear yard of the property and extends into the Currituck Sound. He pointed out that the bulkhead and fill on the subject property are proposed to match the height and length of this bulkhead and property. He noted that the adjoining lot to the north does not have a bulkhead and its shoreline matches the shoreline of the subject property and begins to extend further into the Currituck Sound on its northern side. He stated that the series of lots located to the north do not contain bulkheads but extend further out into the sound than the subject property.

Director Heard stated that Subsection 156.128(C) of the Duck Town Code establishes special exception review criteria for applications involving fill and grading activities. He pointed out that the following standards must be considered as part of the Planning Board's review:

1. The site for the proposed fill is otherwise adequate in size, shape and other characteristics to accommodate the proposed project.
2. The applicant has demonstrated that the requirements of this chapter are unreasonable or impractical due to the necessity for the fill, lot shape, topographical features, location of mature vegetation, or location and characteristics of existing improvements on the lot.

3. The amount of fill proposed is the minimum necessary to accommodate the proposed project, especially for soundfront properties.
4. The proposed fill will not negatively impact adjacent properties or the surrounding area, especially for soundfront properties.
5. The special exception will be consistent with any applicable goals, policies and objectives specified in the Town's adopted CAMA Land Use Plan and Vision Statement. This review includes the Town of Duck's evaluation of the proposal's consistency with its adopted CAMA Land Use Plan, which may be more flexible or more stringent than interpretations by others.
6. The applicant has submitted a drainage plan consistent with the requirements described in Subsection 156.128(A)(4)(c).

Director Heard stated that as several of the required findings were not met in staff's opinion, staff was recommending denial of the special exception application. He noted that if the Planning Board decided to recommend approval of the request, staff was asking that the Board consider the following conditions:

1. The applicant must obtain a CAMA major permit from the North Carolina Division of Coastal Management prior to issuance of a land disturbance permit for the fill/grading or building permit for the bulkhead.
2. The applicant must submit required application materials and obtain land disturbance and building permits prior to commencing work.

Chair Blakaitis asked if the rip rap would be as high as the bulkhead. Director Heard stated that it would not.

Martha Speight of 3 Canterbury Road, Richmond, Virginia was recognized to speak. Ms. Speight stated that she is present with her builder, Paul Snearer. She stated that she has had the property since 1996 and now she has the opportunity to improve the lot with the goal of retiring to Duck. She stated that she wants to protect the wetlands and avoid anything that causes erosion. She stated that she has not been to her property since 1996, but she has a bulkhead as well as her neighbor's property, adding that it was all grass and trees. She stated that it was a difficult decision to bulkhead along the Currituck Sound, but it has saved her property a number of times. She stated that she was willing to plant and has planted various plants over the years. She noted that in order to safely expand her home, she thought the special exception was the best option.

Chair Blakaitis questioned if the retaining wall would curve up and go alongside the boat ramp. Paul Snearer stated that the retaining wall would be at grade and would not be visible. Chair Blakaitis asked if the height of the outer portion would be the same as the height going up. Paul Snearer stated he is correct, adding that he will tie it in structure-wise so there was some stabilization.

Member Murray clarified that the retaining wall would slope to the north. Paul Snerer stated he is correct. Member Murray stated that it seems like he was looking at Conditions 2 and 3 except the Board is looking at two special exceptions – one for the fill depth and one for the use of the bulkhead to stabilize it. Director Heard stated he is correct.

Chair Blakaitis asked if the two special exceptions had to be voted on separately. Director Heard stated that if there were findings that were different concerning the two, it could be done separately; otherwise it could be done with one motion. Town Attorney Hobbs noted that the proposed conditions would apply to both applications.

Vice Chair Cofield asked the applicant if they were aware of the Town staff's recommendation. Paul Snerer stated that they were. Vice Chair Cofield stated that when someone asked for a special exception, there are conditions that have to be met. He asked if the applicant discussed with the Town staff whether this was the minimum amount of fill needed to solve the problem. Paul Snerer stated that he had a discussion regarding options with Director Heard. He stated that he discussed the wall on the south and, as a compromise, one could go around the bulkhead and boat ramp and knock the five feet down to four feet before making the turn. He stated that he was trying to keep the consistency of the project.

Vice Chair Cofield clarified that the solution was an aesthetic one and not the one that meets the objectives of the Town. Paul Snerer stated that a three-foot bulkhead will not protect his client's property from the open sound. He stated that the three foot cannot be put straight across because it will not last.

Chair Blakaitis asked if a bulkhead was ever installed at a certain height, such as five feet, but only filled to another height behind it at a lower height. Director Heard stated that it generally is not as the fill is a structural component of the bulkhead. Paul Snerer explained that 10-15 anchors are needed for a bulkhead and then it needs to be back filled entirely to keep the wave action out. Chair Blakaitis clarified that the entire length of the bulkhead will not be in the water. Martha Speight stated that it would not.

Vice Chair Cofield asked Martha Speight if she was doing the minimal amount needed to solve the problem. Paul Snerer stated that, monetarily, yes. Chair Blakaitis thought Vice Chair Cofield meant physically. Mr. Snerer stated that it all ties together. He thought he is proposing the best thing for the property.

Member McKeithan asked how much fill is needed to join the two lots. Chair Blakaitis stated that the house would join where it currently was. Director Heard explained that the house has a substantial amount of fill on the western edge that tapers back down as the lot rises. He added that there was an area where the existing bulkhead return stops that has a very similar elevation as the adjoining lot. He stated that there would be fill added as a transition across the two properties. Paul Snerer stated that the fill would slope down toward the lot on the other side.

Member Murray asked what the timeline was for the project. Martha Speight stated she has been working on the plans for two to three years. She stated that she would like to do it sooner than later, but she wants to make sure the property is protected and safe. Chair Blakaitis clarified that

if Ms. Speight is granted the special exception request, she would start building right away. Paul Sneider stated that it would be nice but understood it will take a while.

Vice Chair Cofield asked how the work can be minimized while meeting the objective. Paul Sneider did not think the project is something that would coexist with the Town Code Section 156.128(A)(4)(c). He added that if it was the beginning of the project without an existing house on it, it can be done. He reiterated that a three-foot bulkhead wall will not work for this project. Chair Blakaitis clarified that the answer is no. Mr. Sneider agreed. Martha Speight noted that they are making the walls as close as possible. Chair Blakaitis thought that, aesthetically, it would match the southern property. Paul Sneider stated that it is the objective. Martha Speight stated that, aesthetically, it is more about protection of the property and the wetlands.

Member Murray asked what the consensus of the Board was. He stated that he understood Vice Chair Cofield's concern that the project does not meet Conditions 2 and 3. He asked if that is correct. Chair Blakaitis thought it was a conundrum by not meeting the two criteria. He pointed out that there were the same concerns on the last application, but the circumstances aren't exactly the same. Member Murray agreed adding that the last applicant had a time issue. He stated that the Planning Board is tasked with using the ordinance as it existed, so perhaps an application for a text amendment would be a better way to handle the scope of what the applicant wants to do. He noted that as the ordinance is written, he doesn't see the Board having a wide lane. He stated that the Board cannot say that the project sounds reasonable so it would be approved, they have to find whether it meets or does not meet the ordinance. He noted that the ordinance as it is written had shortcomings in the applicant's opinion. He reiterated that a text amendment to the ordinance may be a more appropriate way to obtain what the applicant is after. Director Heard stated that it is an option. He explained that it is a special exception because it does not comply with the ordinance. He added that there are certain criteria that have to be met and there are instances where the Board may feel comfortable making that finding and approving it.

Director Heard stated that there were two avenues that the applicant can take with the advantage that it was dealing with their particular situation. He added that for a text amendment, it would be something that they would draft but would not just apply to their project and would have to make sense for everyone up and down the Currituck Sound shoreline. He stated that it may be harder to come up with a concept as well as being harder to sell.

Member Murray thought the text the applicant would be seeking to change is in the requirements of Condition 2 and 3. He noted that two applicants have come before the Board with the same scenario, which was what was the least amount of project reasonable to meet the goal. He asked what would be required to obtain the case by case relief. Chair Blakaitis noted that Member Murray is discussing the criteria and not a text amendment. Director Heard explained that the burden would be on the applicant to present the Board with enough evidence to make the Board feel that the applicant meets the criteria. He added that staff offered an opinion and the Board may, on an individual case, decide they feel differently on the matter or make a different interpretation. Town Attorney Hobbs reminded the Board that the burden on Number 2 is that the applicant needs to show that this property is unique in some ways so that it really doesn't fit the application of the ordinance. He added that they would have to show the uniqueness of the property.

Chair Blakaitis wondered if the applicant had shown the uniqueness of the property. He thought they did. Member Murray thought they did because of the adjacent plat for the bulkhead. Chair Blakaitis thought it was partially correct but not completely. Member McKeithan noted that it was showing that storms were coming over a five-foot bulkhead. Vice Chair Cofield stated that the objective was to not keep the water from coming over but to prevent erosion. Chair Blakaitis agreed.

Chair Blakaitis thought there was some uniqueness but wasn't sure how it could be added. He asked Vice Chair Cofield if he thought there was enough uniqueness in the property to make it work. Vice Chair Cofield did not think there was. He pointed out that the property is on the sound and there are some issues. He did not see anything unique about it. He asked Chair Blakaitis how it was different from other properties. Chair Blakaitis stated that the shape of it made it a little unique and the aesthetics, although the Town does not use aesthetics to control things.

Vice Chair Cofield stated that he would like to see the applicant come back and address some of the issues that were discussed in a different manner than they have. Chair Blakaitis asked what he meant. Vice Chair Cofield pointed out that it was not the minimum to alleviate the erosion issue. Chair Blakaitis stated that the minimal amount of work would refer to the amount of fill that the applicant would be putting in. Vice Chair Cofield stated that they can do that or something similar to a living shoreline. He stated that he does not see that the two hurdles have been met. Chair Blakaitis stated that they have not. Vice Chair Cofield stated that they are the requirements for a special exception. Chair Blakaitis reminded Vice Chair Cofield that they were not hard, fast requirements and if the Board felt that it has been met in some degree that staff had them. Vice Chair Cofield stated that he is making it clear that he disagrees.

Town Attorney Hobbs reminded the Board that even though the Planning Board's decision is not the final one, it is a recommendation and when Council makes the final decision, the same or similar application will not be able to come back before the Planning Board again as it would have to be substantially different for it to be reconsidered by Council. He added that the difference with the previous application was that it was resubmitted before it went to Council, so no final decision had been made.

Martha Speight stated that her property does not have enough wiggle room to be substantially different. Chair Blakaitis noted that what was being proposed was the minimum requirement for what they thought would work. He added that the Board needs to decide if it is good enough to move forward or not. He thought he heard enough.

Town Attorney Hobbs pointed out that staff has given the Board their recommendation and in addition to that, the Board had the Town engineer's report.

Member Murray clarified that Vice Chair Cofield's concern was with Item #3 – the minimum necessary to accommodate. He asked if Vice Chair Cofield felt that Item #2 has been met. Vice Chair Cofield stated that it had not been met in his opinion. Member Murray asked if the uniqueness and the scope were insufficient. Vice Chair Cofield stated that he does not think that the applicants had overcome the objections that were stated in the staff report. Member Murray asked if the preference would be to move it forward to Council or to try to satisfy the concerns of

staff prior to moving to Council. Paul Snerer stated that since meeting with staff, it's been on his mind as to what could be done to move the project forward. He stated that he would like it to go before Town Council because he doesn't know what else to do as it would throw the value of the property, which would not be right.

Chair Blakaitis moved to recommend denial of the application due to Items 2 and 3 not being met. Vice Chair Cofield seconded.

Motion carried 4-0.

Special Exception 20-002: Special Exception at 108 Cook Drive to Allow an Encroachment of Four Feet to Accommodate an Addition within the Minimum Front Setback of 25 Feet

Member Murray asked to be recused from the meeting as he was representing the applicant for the project.

Member McKeithan moved to recuse Marc Murray from consideration of the special exception. Vice Chair Cofield seconded.

Motion carried 3-0.

Director Heard stated that the applicant is seeking a special exception permit to allow an addition over 26 feet in width to encroach four feet into the minimum front building setback for the existing single-family residence at 108 Cook Drive. He noted that Subsection 156.030(D)(3) of the Zoning Ordinance requires a minimum front yard setback of 25 feet. He added that, if approved, the applicant will be able to locate the proposed addition as close as 20 feet from the front property line.

Director Heard stated that attached to the southeast corner of the existing house, a majority of the proposed addition was three stories in height with the upper stories containing additional living space for the residence. He stated that the portion of the proposed addition that encroaches into the front setback was only one story in height and contained part of a two-car garage. He added that the current residence, decks, and swimming pool improvements all comply with the current setback standards of the Town. He pointed out that the proposed addition has been designed to fully comply with the minimum side setback requirement as it would be over 11 feet from the eastern side property line and the proposed addition would increase the lot coverage to 34%, which was well below the allowable maximum of 50%.

Director Heard stated that Section 156.054(C) of the Town Code states that Town Council may grant a special exception only after determining that that application meets the following criteria:

1. The site for the proposed use is adequate in size and shape, and the proposed use will not negatively affect adjacent property or the surrounding area.
2. The special exception will not be inconsistent with the objectives specified in the CAMA Land Use Plan.

3. The applicant has demonstrated that the requirements of this chapter are unreasonable or impractical due to unusual building design, lot shape or mature vegetation; or there are practical siting constraints where original placement of the dwelling on the lot prohibits reasonable improvements that meet existing requirements.
4. Any height special exception authorized under the terms of this section for an addition to an existing structure shall be limited to no greater than five feet beyond the maximum height permitted in the zoning district.
5. The proposed structural modifications meet sound residential design objectives to: (a) minimize loss of privacy on neighboring properties; (b) maximize image of quality residential development to the street frontage; and (c) avoid reduction of light and air to neighboring properties.

Director Heard stated that since the request complied with all applicable findings in staff's opinion, staff was recommending approval of the special exception application, subject to the following condition:

1. The applicant must submit required application materials and obtain a building permit prior to commencing work.

Vice Chair Cofield thought that the proposed addition did affect aesthetically the area of the neighbor's property but given that it was a small lot and the nature of some of the other homes, it would minimize his judgment.

Chair Blakaitis moved to recommend approval of the Special Exception 20-002 as presented with the condition noted. Vice Chair Cofield seconded.

Motion carried 3-0.

Member Murray returned to the meeting.

OLD BUSINESS

Dare County Flood Maps/Flood Damage Prevention Ordinance

Director Heard stated that at their January 22, 2020 meeting, the Board completed a thorough review of the draft ordinance and made decisions and amendments to it. He noted that the following were a general summary of the proposed changes:

- Establish a minimum local elevation standard of 10 feet in X flood zones.
- Establish a freeboard of three feet or elevation of 10 feet, whichever is greater, in A flood zones.
- Maintain free and clear standard of two feet and establish a freeboard of two feet in Coastal High Hazard Areas.
- Include all oceanfront properties in a Coastal High Hazard Area subject to V zone standards.

Vice Chair Cofield asked why since they were clearly topographical differences. Director Heard stated that part of it has to do with the existing V zone and how far it extends as well as the amount of reduction that is bringing a handful of homes out of that zone. He stated that even though they may be back a little bit, topographically there isn't a huge difference as far as dune height and things of that nature. He stated that there are properties that have more depth than others and that was where this is coming into play. Vice Chair Cofield stated that the other thing that raised questions for him are the properties to the north of the Pier as opposed to the properties to the south of the Pier. He stated that there is clearly a difference. He added that, south of the Pier, there isn't the extent of beach erosion that properties to the north have had. He stated that a single standard for all oceanfront properties seems to not be looking at the differences in oceanfront properties since they weren't all the same. Director Heard stated that it was FEMA's requirements and did not differentiate north and south for oceanfront properties. Vice Chair Cofield agreed, adding that he had a problem with applying a single rule to all oceanfront properties.

- Require typical A zone standards to development below RFPE in X zones.
- Allow enclosures below RFPE to be temperature controlled.

Vice Chair Cofield asked if the Town would be exempting owners from heated space. Director Heard stated that by standard, homeowners were only allowed to use enclosures below the RFPE for storage and entry.

- Allow remodeling or renovation of existing enclosures below RFPE.
- Require lateral additions to be constructed at or above RFPE.

Vice Chair Cofield clarified that it could not be accepted on a piecemeal basis. He added that requiring an addition to be elevated seemed onerous if a homeowner wants to build a five-foot lateral addition.

Member Murray clarified that homeowners would not be allowed to do an existing home improvement if they aren't making it larger as they would be able to remodel that space. He asked if the 50% rule applied. Director Heard stated that it would. Member Murray clarified that as long as the homeowner stays under 50% of the value of the total structure, they could remodel an existing living space below the RFPE. Director Heard stated he is correct. Member Murray clarified that if the homeowner went above, they would have to elevate that space. Director Heard stated that the entire structure would have to come into compliance.

Chair Blakaitis asked how a storage room would work. Director Heard stated that storage could go to the ground as long as there are flood vents.

- Require existing structures proposing substantial – over 50% - repairs or improvements to be brought into compliance with current ordinance standards.
- Require pre and post development elevation certificates. Encourage, but remain optional, an additional elevation certificate at rough-in.

Director Heard noted that all changes that the Board had suggested at their January 22, 2020 meeting had been completed. He pointed out that the following items in the ordinance still needed further review:

1. Page 14 – 150.14 Town Attorney wrote penalty provision.

Town Attorney Hobbs explained that one statute was already stated by the General Assembly that this was a criminal violation of some kind. He added that the other was one that authorizes a city to impose a criminal sanction. He stated that the section in the ordinance has already imposed a criminal sanction, so there would be no need for the Town to re-address it because it is already state law. He added that the way he reworded it was that he took the Town's version and added a clause in the beginning that referenced the statutory provision because the Town was not required to re-impose it. He stated that it continues with the rest of the civil penalty provision and added at the end a catch-all that confirms that it did not prevent the Town from exercising other remedies such as an injunction.

2. Page 41 – 150.27(A) Recommend Town standard for reference level in AO flood zone.
3. Page 41 – 150.28(B) Recommend Town standard for reference in AH flood zone.

Director Heard stated that the Board members had also discussed that there could be corresponding amendments necessary to the Town's definition of "Building Height" in the Zoning Ordinance. He stated that consistent with past policy, the Town does not want to penalize property owners by reducing allowable height for compliance with flood elevation standards. He noted that after reviewing the "Building Height" definition, staff found that the existing wording will accommodate the revised standards in the Flood Damage Prevention Ordinance. He added that staff had recommended several changes adding references to the Flood Damage Prevention Ordinance as well as a couple other points of clarification for the measurement of height.

Member Murray noted that Page 10 of the draft ordinance has the term "Reference Level" introduced to clarify what it was. He clarified that reference level was when there was no RFPE. Director Heard stated he was correct. Member Murray asked if the reference level language needed to be added to the Building Height section of the draft ordinance as it would act as the RFPE when none was present. Director Heard stated that the definition of RFPE contains a standard for the X zones.

Director Heard stated that on February 6, 2020, planners from Dare County and Outer Banks municipalities met to discuss the proposed changes to their ordinances and discuss additional guidance and direction offered by the North Carolina Department of Public Safety. He stated that as a result of those conversations, the following additional amendments were proposed in the draft ordinance:

- Page 13 – Add Section 150.08 providing justification for the adoption of local elevation standards. This change required renumbering of all subsequent sections and reference numbers throughout the ordinance.
- Page 29 – (3)(b) Add allowance for engineered flood openings.

- Page 33 – (I)(3) Add prohibition on above-ground tanks not meeting elevation requirements in the Coastal High Hazard Area.

Chair Blakaitis asked if a propane tank would be considered an above-ground tank. Director Heard stated he was correct. Member Murray asked if the tank could be buried below grade. Director Heard stated that there is a provision for buried tanks in the draft ordinance. Chair Blakaitis asked if air conditioning units were separate. Director Heard stated that they would have to be elevated. Chair Blakaitis asked about existing units that may not be elevated. Director Heard stated that it would depend on the 50% threshold. Chair Blakaitis clarified that a homeowner does not have to check if their existing air conditioning unit is up high enough. Director Heard stated he was correct.

- Page 38 – (I)(1) Add provision offering discretion for the floodplain administrator when requiring an engineering analysis.

Director Heard stated that the Town of Kill Devil Hills had adopted another provision regarding the discretion for the engineering analysis. He explained that it was taking the place of 3, 4, and 5 under Fill and Grading. He stated that staff was recommending keeping 1 and 2 and then removing 3, 4, and 5.

Director Heard stated that after speaking with Jay Overton and discussing the application of those standards, they were areas in the AO zone, which was shallow flooding as well as the AH zones, which the Town did not have. He explained that the majority of these areas used to be V zones. Chair Blakaitis asked what the next level up from an AO zone would be. Director Heard stated that it would be a V zone or Coastal High Hazard Area.

Director Heard stated that he wanted the Board to consider some changes. One would be making the proposal three feet above, as these zones already have a standard or requirement to be elevated one or two feet. He added that he was proposing another three feet above that or 10 feet, whichever was greater. He stated that he was proposing in both the AO and AH zones to change the three feet to one foot.

Jay Overton of the Outer Banks Homebuilders Association was recognized to speak. Mr. Overton stated that they are looking for consistency. He noted that the Board discussed the reference level, which have had issues in the past and now they were looking for a new reference level, which was located at the bottom of the floor joice and the top of the girder. He pointed out that it automatically adds another foot. He stated that the biggest issue he has seen was that the AE zones are dropping on the new flood maps. He added that the VE zones are generally consistent with what were on the past maps. He stated that the AO zones deal with the depth of the water. He stated that most municipalities have chosen to go with an eight-foot reference level with regard to AO zones. He added that he would also be comfortable with nine feet. He stated that the Planning Board and Town Council need to make sure they are doing what should be done for the good of the citizens of Duck.

Vice Chair Cofield stated that he would like to see proportionality with respect to bump outs and lateral additions. He stated that he could see someone wanting to do a lateral addition where the new section is fine, but the rest of the house may flood. Chair Blakaitis clarified that Vice Chair

Cofield wants to make an exception. Director Heard noted that that portion of it would not be affected by the flood zone. Vice Chair Cofield stated that it was only 10% and then 90% would end up flooding.

Vice Chair Cofield noted that there were three requests for special exceptions earlier in the meeting. He asked how the Board would handle a situation of a lateral addition. He asked if it could be a special exception. Director Heard stated that it could not. Vice Chair Cofield stated that it is a problem. Member Murray noted that it could be a variance. Director Heard stated that it could be a variance from the flood standard, which is discouraged.

Jay Overton asked with regard to lateral additions, if there were only 137 properties in Duck that were possibly below the 10 feet, what the harm would be with those properties being able to build a lateral addition at the existing elevation. Chair Blakaitis didn't think it was a big deal.

Vice Chair Cofield stated that he could see someone wanting to do a small, lateral addition and the Town would be creating a hardship for that homeowner. Chair Blakaitis asked if that was possible. Director Heard stated that it was. The Board members discussed an allowance for lateral additions 25% or less of the adjacent floor

Member Murray moved to recommend to Town Council the adoption of the draft ordinance with the changes referenced during the Board's discussion. Chair Blakaitis seconded.

Motion carried 4-0.

APPROVAL OF MINUTES

Minutes from January 8, 2020, Regular Meeting

Vice Chair Cofield moved to approve the January 8, 2020 minutes as presented. Member McKeithan seconded.

Motion carried 4-0.

Minutes from the January 22, 2020, Regular Meeting

Vice Chair Cofield moved to approve the January 22, 2020 minutes as presented. Member McKeithan seconded.

Motion carried 4-0.

OTHER BUSINESS

None.

STAFF COMMENTS

Project Updates

Director Heard gave a short overview on various projects going on in Town.

BOARD COMMENTS

Chair Blakaitis thanked Town Attorney Hobbs for attending the meeting.

ADJOURNMENT

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

There was no vote.

The time was 10:45 p.m.

Approved: _____
 /s/ Joe Blakaitis, Chairman