

**BOROUGH OF FENWICK
PLANNING AND ZONING COMMISSION
INLAND WETLANDS AGENCY
SPECIAL MEETING
WEDNESDAY, AUGUST 22, 2018
MINUTES**

Present: Chuck Chadwick – Chair, Art Wright, Sallie Boody, T. Van Itallie, Rick Neely (Alternate), Marilyn Ozols – ZEO.

Absent: Bill Christensen, Ann Pulver (Alternate).

Members of Public: Frank Keeney, Bill Webster.

1. Call to Order.

C. Chadwick called the meeting to order at 5:02 p.m. and seated R. Neely as a voting member. A quorum was established (Chadwick, Wright, Boody, Van Itallie, Neely).

2. Public Hearing: Proposed Amendments to Zoning Regulations to create a special permit mechanism to allow minor additions or accessory structures on a previously developed property where the developed area falls within the 50 foot buffer adopted in 2011; add a definition for “developed”; delete reference to inland wetlands in Section 5.2.3 and 5.4.1 because there are now separate Inland Wetland Regulations; and create a special permit mechanism to raise an existing structure in a flood zone when the new height will exceed the maximum permitted height.

C. Chadwick opened the hearing, read the subject into the record, and requested that the ZEO summarize the proposed changes.

Deletion of Reference to “Inland Wetlands”

M. Ozols explained that when the Regulations were written, the Borough did not have Inland Wetlands Regulations and a setback was included in the Zoning Regulations. Since that time, Inland Wetland Regulations have been adopted and it is no longer appropriate for an inland wetlands setback to be included in the Zoning Regulations. Additionally, the two Regulations have conflicting requirements.

T. Van Itallie asked for clarification on which is more stringent, and M. Ozols responded that the Zoning Regulations are more stringent since they apply to a number of different types of resources in many different locations. When the Inland Wetland Regulations were written, the exact locations of the inland wetlands in the Borough were known so it was possible include a lesser distance. It is also a buffer or review area, which is what is prescribed for inland wetlands regulations, rather than a strict setback. The amendment removes the confusion over conflicting regulations; the Inland Wetland Regulations are the appropriate regulations to govern activity near inland wetlands.

Section 5.2.2

M. Ozols explained that this amendment allows an existing building to be raised to meet FEMA requirements even if the new height will exceed 35 feet. It is intended only to allow raising the building, not enlarging it. It avoids having to go for a variance, which is based on a unique hardship of the land. There are actually not too many houses in Fenwick that are tall enough for this to be an issue.

F. Keeney, 41 Pettipaug Avenue asked if this will allow someone to raise a building more than is required by the FEMA regulations. M. Ozols responded that the regulation specifies the minimum necessary, which is the first floor one foot above the flood elevation.

Section 5.2.3 and Definition of “developed”

M. Ozols explained that the purpose of this amendment is to allow minor work to take place on already developed properties by special permit when the existing structure was built prior to the regulations and is

already within the coastal resource setback line provided that the applicant can show the Commission that the new development does not have a detrimental impact on the identified coastal resources. In many cases, minor construction in the already developed area will not have an appreciable impact on the coastal resources intended to be protected by the regulation. Further, it is inappropriate to send applicants to ZBA for a variance since there is no hardship as defined by statutes. The regulation as written creates a problem for some existing developed properties and strict interpretation of a total prohibition does not, in her opinion, necessarily serve a real zoning or environmental purpose. She emphasized that this is an environmental regulation; it is not a light and air, separation from neighboring property, regulation. It is an environmental regulation to protect the coastal resource that was partly new in the 2011 rewrite because prior to that the setback only applied to the Connecticut River and its associated wetlands; it did not apply to beaches, dunes, or Long Island Sound. There was a CAM review but no required setback. The 2011 regulations had the effect of impacting some already developed properties where there was already developed or lawn area closer than 50 feet to the resource. She added that if the Commission goes forward with the regulation, she recommends eliminating the words “or the volume” from Section 5.2.3.2.b. Computation of volume can be extremely cumbersome especially for the home owner who does not have an engineer or architect to perform the calculation, and the impact to the coastal resource is more likely to be from the new area covered than by the height or volume of that coverage.

A definition for “developed” is added at the suggestion of the Commission attorney. M. Ozols proposed modifying the definition from what was provided to eliminate the reference to “excavated” and to read “A term used for land that has been legally filled, graded, landscaped, or paved, or on which structures have been erected.” She noted that is also not the Gateway definition. She also recommended eliminating the parenthetical definition in Section 5.3.5 to avoid confusion.

In response to questions, she stated that there are actually a number of houses, especially out on the point and over by the Gay and Adams properties where the developed area is within the 50 feet, which makes it difficult to do anything. Most of the houses by the seawall are about 60 feet from the seawall. Another example is the carriage house on Mohegan Avenue which was approved prior to the 2011 regulations becoming effective. When the owner proposed filling in areas that were already within the 50 feet but not enlarging the footprint or going any closer to the resource, the ZBA denied the variance because there was no hardship, which was appropriate. However, the intent of the regulation is to protect the coastal resource so the decision as to whether it should be permitted would be more appropriate in a special permit where it can be reviewed based on the intent of the regulation, whether there will be any detrimental impact on the resource, rather than on the hardship as defined by statute.

T. Van Itallie clarified that the proposed regulation would also allow expansion. M. Ozols concurred but noted that this could only happen if the special permit was approved based on an evaluation of the impact. The applicant must prove to the satisfaction of the Commission that there is not a negative impact on the coastal resource.

C. Chadwick noted that the changes were not supported by all the agencies to which the Commission referred the proposals and members discussed both the Gateway and DEEP letters.

A. Wright clarified that these regulations in no way change the requirements for setbacks, lot coverage, etc. He noted that the current 50-foot setback seems to be adequate and the regulation allows certain activities such as marine facilities and walkways. M. Ozols clarified that except for the special permit items, the current regulations include a hard and fast setback that can only be changed with a variance from the ZBA based on a unique hardship of the land as defined by statute. She added that the Commission has interpreted the special permit activities rather liberally in the past and this regulation will better address those activities. A. Wright reminded the members that the proposal does broaden the activities to include habitable space.

T. Van Itallie cited the DEEP objections and M. Ozols noted that if the Commission chooses to go forward they may want to change some of the wording based on the DEEP comments. Relative to the Gateway comments, it was noted that the objection seems to be that the language is not consistent with the

Gateway model. C. Chadwick referred to the opinion letter previously written by M. Zizka relative to Fenwick's inclusion in Gateway, which was made an exhibit. T. Van Itallie added that it appeared to him that although the legislature intended for Fenwick to be included in Gateway, the language of the statute does not do this.

T. Van Itallie clarified that this regulation is limited to existing structures, which is addressed in the first paragraph of Section 5.2.3.2, and inquired about the standards for determining whether a proposed activity should be permitted. M. Ozols stated that this would generally be much of the same criteria now applied to any Coastal Site Plan application including all the fact sheets and information from DEEP. She added that the exact distance is probably not as important as the evaluation of what is being done; with this regulation identifying the exact location of the edge of a dune does not become the issue; the focus is more on the impact than on arguing the location of the edge of the dune in order to be more than 50 feet away; this makes it more of a buffer rather than a setback; in a buffer you evaluate the impact; in a setback you measure and draw a line. She clarified that this amendment does not affect the 50-foot setback from the Coastal Jurisdiction Line and the Commission discussed the combined application of the two regulations.

A. Wright noted that this regulation will allow new accessory structures or additions by special permit on previously developed lots, but if there is no house nothing can be done. He questioned why it was different for vacant lots. M. Ozols stated that it will not allow clearing of native vegetation and new construction close to the coastal resource. A. Wright expressed concern that the language would allow an addition an existing house closer to the resource than a tear down and rebuild would be permitted.

T. Van Itallie clarified that applicants might bring in experts to make their arguments and that the Commission has the right to bring in its own experts. He also suggested that the language might be adjusted in order to be more restrictive or more specific than proposed.

All members of the public having left, **on a motion by A. Wright, seconded by R. Neely, it was voted unanimously to close the public hearing.**

3. Possible Action on Proposed Amendments to Zoning Regulations.

Based on the discussion in the hearing, **R. Neely moved to adopt the proposed amendments to the Zoning Regulations with the changes recommended by the ZEO. T. Van Itallie seconded the motion.**

In discussion, members indicated that they would prefer to vote on the amendments separately. Considering this, the Chair called for a vote on the motion on the floor and it failed in order to allow for separate votes.

Failed 0-5-0

For: None.
Against: Chadwick, Wright, Boody, Van Itallie, Neely.
Abstain: None.

Based on the discussion during the hearing, **A. Wright moved to adopt Section 5.2.2 relative to building height in FEMA flood zones as proposed. R. Neely seconded the motion and it was approved unanimously.**

Approved 5-0-0

For: Chadwick, Wright, Boody, Van Itallie, Neely.
Against: None.
Abstain: None.

Based on the discussion during the hearing, A. Wright moved to delete "inland wetlands" from Sections 5.2.3 and 5.4.1 as proposed since there are now separate Inland Wetland Regulations. S. Boody seconded the motion and it was approved unanimously.

Approved 5-0-0

For: Chadwick, Wright, Boody, Van Itallie, Neely.
Against: None.
Abstain: None.

M. Ozols was requested to verify that there are no other references to inland wetlands in the regulations that should be removed.

Members further discussed Section 5.2.3.

A. Wright stated that the proposal is a broadening of what is in the regulations now and allows for habitable structures and some other changes within the buffer zone which were not permitted before. He added the he does not think the change is necessary or helps in the implementation of the regulations; and he does see the reason for existing structures to be treated differently from new structures.

R. Neely stated that essentially this substitutes a special permit for a variance.

In response to questions, M. Ozols stated that she sees this as addressing the untended consequence of the regulations that were adopted in 2011 which were meant to clarify that the Commission cared about beaches, dunes, and Long Island Sound, not just the river and associated wetlands, which is what was regulated previously. Some of the houses that are here now are already in the setback.

C. Chadwick suggested that everyone in the Borough already has full use of their property and if that is not the case in the future, there is a mechanism available in the existing regulations.

T. Van Itallie expressed discomfort that there is no limit on the incursion into the setback that someone can argue for and that DEEP emphasized that adverse impacts in this zone should be minimized to the greatest extent possible. He felt that the determination will be difficult for the Commission and this is a further erosion of what is an important barrier zone.

R. Neely stated that he is willing to consider the change because it creates the opportunity for a special permit' gives a party the opportunity to make its case, and there is more flexibility than with claiming a hardship under a variance. He verified that a property will still need to comply with all other zoning requirements.

S. Boody made a motion not to accept the proposed changes to Section 5.2.3 and the definition for “developed”. T. Van Itallie seconded the motion and it was approved 4-0-1.

Approved 4-0-1

For: Chadwick, Wright, Boody, Van Itallie.
Against: Neely.
Abstain: None.

The proposed amendments to Section 5.2.3 and the definition for “developed” were not adopted.

In discussion, S. Boody noted that the subject can be reconsidered at a future date if the Commission desires.

A Wright moved to set the effective date for the amendments to Sections 5.2.2, 5.2.3, and 5.4.1 for September 1, 2018. C. Chadwick seconded the motion and it was approved unanimously.

Approved 5-0-0

For: Chadwick, Wright, Boody, Van Itallie, Neely.
Against: None.
Abstain: None.

4. Election of Officers.

S. Boody moved to nominate C. Chadwick as Chairman of both the Planning and Zoning Commission and the Inland Wetlands Agency. T. Van Itallie seconded the motion and C. Chadwick was elected unanimously.

Approved 5-0-0

For: Chadwick, Wright, Boody, Van Itallie, Neely.
Against: None.
Abstain: None.

R. Neely moved to nominate A. Wright as Vice Chairman of both the Planning and Zoning Commission and the Inland Wetlands Agency. T. Van Itallie seconded the motion and A. Wright was elected 4-0-1.

Approved 4-0-1

For: Chadwick, Boody, Van Itallie, Neely.
Against: None.
Abstain: Wright.

A. Wright moved to nominate S. Boody as Secretary of both the Planning and Zoning Commission and the Inland Wetlands Agency. T. Van Itallie seconded the motion and S. Boody was elected unanimously.

Approved 5-0-0

For: Chadwick, Wright, Boody, Van Itallie, Neely.
Against: None.
Abstain: None.

5. Discussion: Short Term Rental.

M. Ozols reported that the Burgesses were working with Attorney Zizka on this. They have held a public forum and a follow up meeting for discussion where they directed Attorney Zizka to draft a proposed regulation. They will meet again on August 30 to review this draft and at that time will most likely forward to P&Z for consideration. P&Z can then decide whether and how to move anything forward. A. Wright added that it was his understanding that the Burgesses will recommend prohibiting more than one rental in any two-week period.

6. Approval of Minutes of previous meeting: Planning & Zoning/Inland Wetlands – May 15, 2018.

S. Boody moved to accept the Borough of Fenwick Planning and Zoning Commission minutes for the May 15, 2018 meeting as presented. A. Wright seconded the motion and it was approved 4-0-1.

Approved 4-0-1

For: Chadwick, Wright, Boody, Van Itallie.
Against: None.
Abstain: Neely.

7. Staff Report.

M. Ozols reported that:

Hepburn Preserve. GZA Geotechnical has started working on the plans for the hybrid living shoreline (salt marsh creation and stone sills) at the Hepburn Preserve. P&Z can expect an application in the fall. The LPLT is actively seeking grant funds for construction. In response to a question from T. Van Itallie, M. Ozols verified that the Burgesses have not committed any Borough funds for engineering or construction.

Sequassen Avenue. At the request of W. Webster, GZA has developed a proposal to develop conceptual drawings for a living shoreline along Sequassen Avenue as well as to raise the road. It has not yet been presented to the Burgesses.

Sciame Takings Case. The parties have been working on a settlement and the next conference call with the judge is scheduled for August 30. It is unclear at this time what will happen then.

8. Other Business.

C. Chadwick asked if the construction in the Borough was complete by the end of June and if there were any issues with the Hammer Laws. M. Ozols responded that construction was completed in time and the contractors complied with the Hammer Laws. She added that there were some contractor vehicles observed after June 30, but they were not related to prohibited work.

9. Adjournment.

At 6:35 p.m., it was moved by T. Van Itallie and seconded by S. Boody to adjourn the meeting. The motion passed unanimously.

Respectfully submitted,
Marilyn Ozols, Acting Secretary