

**BOROUGH OF FENWICK
PLANNING AND ZONING COMMISSION
INLAND WETLANDS AGENCY
SPECIAL MEETING
SATURDAY, OCTOBER 27, 2018
MINUTES**

Present: Chuck Chadwick – Chair, Art Wright, Sallie Boody, Bill Christensen, T. Van Itallie, Rick Neely (Alternate), Marilyn Ozols – ZEO, Attorney Michael Zizka (present for the discussion of short term rentals).

Absent: None.

Members of Public: Attorney Ed Cassella, Joe Wren, Jim Lanza, Barry and Jackie Gosin, Frank Keeney.

1. Call to Order.

C. Chadwick called the meeting to order at 9:00 a.m. A quorum was established (Chadwick, Wright, Boody, Christensen, Van Itallie).

- 1. Public Hearing: ZSpP18-001, 10 Mohegan Avenue, map 10, lot 13, Jacqueline Gosin, owner and 20 Mohegan Avenue, map 10, lot 13-1, Barry Gosin, owner;** Barry Gosin, applicant; Special Permit and Coastal Site Plan Review to raise garage and construct covered terrace, swimming pool and pool terrace with associated landscaping and site work and for treatment of invasive plant species and restoration/enhancement of primary dune.

M. Ozols reminded the Commission that all questions or concerns should be brought up in the hearing, not in the following discussion, so that the applicant and the public have the opportunity to respond.

E. Cassella (attorney) and J. Wren (engineer) presented.

E. Cassella reviewed the history of the property and stated that

- the application seeks to raise the driveway and garage by 3 feet to make the garage more flood resistant, add a pool and pool terrace, and add an open air covered terrace;
- it includes dune restoration with a separate plan prepared by GZA and incorporated into the Indigo Land Design plan, building elevations by Brooke Girty Design, and landscaping by Rick Worcester;
- they have fielded comments from DEEP, the Zoning Enforcement Officer, and Tom Metcalf;
- the specific planting list for the dune was revised in response to comments from Dr. Barrett, and the planting will be done this spring, which is the optimal planting time, as noted in the proposed conditions;
- as part of the application, the two lots will be merged and a deed has been drafted to do this;
- the Coastal Site Plan application asks the Commission to determine if the structures and activities proposed have an adverse impact on the beach, tidal wetlands, or dune system, and if so, to determine if adequate mitigation is proposed;
- the dune plan takes a step beyond the natural revegetation in the area of the 2006 violation and proposes a better dune system and ecological habitat;
- the garage is proposed to be raised for flood protection with the intent to minimize but not necessarily eliminate flooding potential;
- a new code compliant septic system is proposed and has been approved by CRAHD;
- and the southwest corner of the house lot has gone back to sand and beach revegetation and in response to DEEP comments, they agree to maintain it that way.

C. Chadwick inquired how the Coastal Jurisdiction Line (CJL) was established. J. Wren stated that it was established by the land surveyor, but it is a dynamic line with the fluctuation in sand elevation; since

2005, it has been surveyed several times and his office has information delineating the line in 2012, 2016, 2017, and 2018, all of which are within ten feet of each other but have changed; the plan now has the latest information obtained after March of this year. He pointed out the contours, the CJL just below the 3 foot contour, and the 50 foot CJL setback on the plan, noting that the accessory addition within that setback is not habitable. For clarity, he highlighted the CJL, the CJL setback, and the coastal resource setback on a copy of the plan submitted as Exhibit X.

A. Wright asked if the existing house is within the CJL or coastal resource setback. J. Wren stated that it is not in the setback on the south side, but part of the northwest corner of the house is in the setback. He identified the rear setback line on the plan.

T. Van Itallie inquired about the setbacks on the east side of the house. J. Wren stated that there is no CJL setback from the east, but the north and south setbacks extend into the east lawn; additionally, the side setback is at the edge of the house. M. Ozols noted that the unintended consequence of having the setback computed based on the width of the property was that enlarging a property could be precluded because it would create a side setback nonconformity and this was addressed by a recent regulation amendment.

T. Van Itallie stated that it is not clear to him that the Commission is in a position to approve this application under the regulations. He referenced Section 5.2.3 which provides for exemptions and stated that this application “reads out” the references to dock, boardwalk, or fence. E. Cassella stated that the regulation refers to marine facilities or accessory structures and the examples help define marine facilities but not accessory structures; none of the items listed are accessory structures. He added that land use is in derogation of common law and when the court interprets regulations it says that they must be interpreted narrowly in deference to the property owner. Additionally, from a Coastal Site Plan perspective, review is based on statutory goals and policies, the first of which refers to the “rights of property owners”, and the Commission needs to balance the impact. He stated that in this case mitigation becomes the issue and the other activities that are proposed make this property better; the area that is most susceptible will be strengthened.

A. Wright asked what is in the setback and J. Wren pointed out approximately half of the covered porch, portions of the pool and open terrace, and the septic system. He noted that the septic system is a repair for a system already in the setback; the repair complies with the current Health Code and has a smaller footprint than the existing system. A. Wright stated that for a modest amount of structure in the setback, they are getting more coastal protection.

T. Van Itallie referred to the previously proposed amendment that would have allowed structures in the setback and noted that it was voted down by the Commission. M. Ozols stated that the amendment separated marine facilities and structures into different sections for clarity and suggested that perhaps it should be revisited with different criteria in order to avoid the interpretation issues noted in this application.

Members discussed whether the proposed generator, located in the CJL/coastal resource setback, should be considered a utility and whether it could be relocated. It was noted that it cannot be moved to the east side of the house because it will be in the side setback; location in the front of the open terrace will likely not be aesthetically pleasing; the generator needs to be at elevation 13 and this is the area of the property where the ground level is highest; the generator will need to be significantly elevated in any other location.

J. Wren stated that the house was previously raised 5 feet but the garage was not raised at that time; it is now proposed to be raised 3 feet; the driveway will be raised to that height and blended back landward of the CJL as shown in the cross section.

A. Wright asked if the proposal has gone to HDC and was told that it was scheduled to be heard at a meeting the following week.

C. Chadwick noted that the plans have evolved over time; earlier plans were drawn when the CJL was farther south and an attempt has been made to stay out of the setback. J. Wren and E. Cassella added that when they originally thought there was more room, two bedrooms were proposed over the terrace and these have now been removed from the plan.

C. Chadwick inquired whether the Commission was interested in dividing the application into the various components of the plan and this was declined.

B. Gosin, property owner, stated that

- they had started the process over a year ago;
- he was not interested in pursuing the lawsuits initiated by the previous owner;
- he would only purchase the two properties since he believed that a house on the property to the west would be offensive and not in keeping with the history of the property;
- he has no plans to build in the dune area and has spent a lot of money designing a dune restoration;
- his original plan was to try to get his entire family under one roof, which was the reason he had wanted two additional bedrooms, and he had hired a team to try to accomplish this;
- the pool without the structure would be a box against the house and would be disrespectful to the design of the house;
- originally a stone wall was planned along the driveway and he eliminated this in favor of a dune and native plants so lifting the road will now look natural;
- raising the garage will prevent flooding – currently water comes into the garage with a storm above 8½ feet;
- Brooke Girty has designed something respectful of the house;
- the concept of doing the work in pieces is not in anyone's best interest including the historical integrity of the house;
- he is doing everything he can to not be an invasive component of this beautiful place and special neighborhood;
- they looked at this from a wholistic point of view to create a project that Fenwick will be proud of;
- they will never build on the west lot and are being respectful of the natural dune;
- he is generally willing to find a different solution for the generator location but wants to start work within weeks in order to complete the work this year.

W. Christensen thanked him for his willingness to work with all aspects of the Borough and stated that his only issue was the placement of the generator. Various locations were discussed and B. Gosin stated that he was willing to continue to look at all options for placement.

T. Van Itallie referred to the letter from DEEP which recommended that the setback be strictly adhered to and expressed concern that once it was varied the Commission would have difficulty applying the setback in the future. J. Wren stated that the regulations currently allow any accessory structure in the setback and noted that the DEEP letter also commends the applicant for the proposed easement. He added that this proposal is unique as far as a precedent might be concerned because it includes building a dune. M. Ozols reminded the Commission that if they are concerned that this interpretation might be setting a precedent, the correct solution is to amend the regulation to more clearly represent the intent; and that the application needs to be reviewed according to the goals and policies in the Coastal Management Act and the Commission needs to consider whether there are adverse impacts, and, if there are, whether they are appropriately mitigated. E. Cassella added that there is no precedence in land use, especially in the case of a special permit; every application has to be looked at individually.

There being no additional comments or questions from the public or from Commission members, the chairman closed the public hearing.

2. **ZSpP18-001, 10 Mohegan Avenue, map 10, lot 13, and 20 Mohegan Avenue, map 10, lot 13-1.**
Possible decision.

Based on the discussion during the hearing, S. Boody moved that the Commission finds that the application for Site Plan and Coastal Site Plan Review to raise the garage and construct a covered terrace, swimming pool and pool terrace with associated landscaping and site work and for the treatment of invasive plant species and restoration/enhancement of the primary dune at 10 & 20 Mohegan Avenue, with the stipulations noted, is consistent with the goals and policies of the CT Coastal Management Act and that it complies with the review standards in the Borough of Fenwick Zoning Regulations, and approves the application based on the plans and documents submitted with the following stipulations:

1. Except in the terrace area shown on the plan, existing trees, grasses, and sand areas shall be maintained in the southwest corner of the current 10 Mohegan Avenue lot.
2. Dune plantings shall be installed immediately following dune construction and during the dormant months of March and April.
3. Any new exterior lighting shall comply with Section 4.5.1 of the Zoning Regulations and shall be directed downward.
4. Revised plans shall be submitted to address the above conditions and the approved site plans shall be endorsed by the Commission chairman and filed on the Land Records of the Town of Old Saybrook.
5. Verification of the merger of the two properties shall be submitted prior to issuance of a Zoning Permit.
6. The applicant shall make every effort to build and finish construction during the 10 month period from September through June or to minimize any disturbed or unfinished appearance of the site and building between July 1 and Labor Day.
7. An existing conditions survey (including the buildings, pool, septic system, drainage structures, driveway and patio/terrace) with distances to property lines, certification of finished ridge elevation from natural grade, calculation of post construction coverage, and final topography shall be submitted prior to issuance of zoning compliance for a Certificate of Occupancy. All surveys and certifications shall be prepared by a licensed surveyor.
8. An as-built planting and dune location plan shall be submitted upon completion of the dune restoration work. Additionally, the applicant's biologist shall certify that the revegetation is in compliance with the approved plan.
9. Copies of the updated FEMA elevation certificate and CRAHD permit to discharge shall be submitted prior to issuance of a Certificate of Zoning Compliance.
10. Certification of the actual cost of construction shall be submitted prior to issuance of a Certificate of Zoning Compliance.
11. In accordance with the adopted fee schedule, the applicant shall reimburse the Borough for all engineering fees prior to issuance of a zoning permit for construction and prior to issuance of zoning compliance for a Certificate of Occupancy. Reimbursement shall include all costs incurred to that point in time.
12. The dune restoration and revegetation plan associated with this approval shall supersede ZSP12-004 approved September 6, 2012 and shall be completed by June 30, 2019. Lack of maintenance in accordance with the approved plan shall be deemed to be a violation of this approval.
13. This approval shall expire on October 27, 2020 unless work has been commenced prior to that date.

A. Wright seconded the motion and it was further discussed.

After discussion, members decided not to include a recommendation on the generator location but it was understood that the applicant may take another look at the location. T. Van Itallie stated that he continued to be concerned that this decision will set a precedent for structures in the setback area. M. Ozols reminded the commission that the way to address this kind of concern is to amend the language in the regulation to be more clear. A. Wright stated that a special permit is always based on the unique character of the property so there is no precedent. R. Neely noted also that this application is being considered

under the current regulations which can be modified going forward. A. Wright stated that he considered this application with a wholistic view that includes the dune reconstruction and the applicant's attempt to stay within the letter of the law as best as possible; he was not concerned with any precedent set by the modest intrusion created by the terrace.

The vote was called and the motion was approved 4-1-0.

Approved 4-1-0

For: Chadwick, Wright, Boody, Christensen.

Against: Van Itallie.

Abstain: None.

The record plans for this application are:

- *Coastal Site Plan Prepared for Barry M. Gosin and Jacqueline S. Gosin, 10 Mohegan Avenue - Map 10 Lot 13, Borough of Fenwick - Old Saybrook, CT* by Indigo Land Design dated January 3, 2018, rev. through 10/25/18
- *Soil Test Data & Septic Design Criteria Prepared for Barry M. Gosin and Jacqueline S. Gosin, 10 Mohegan Avenue - Map 10 Lot 13, Borough of Fenwick - Old Saybrook, CT* by Indigo Land Design dated January 3, 2018, rev. through 10/25/18
- *E&S and Construction Details Prepared for Barry M. Gosin and Jacqueline S. Gosin, 10 Mohegan Avenue - Map 10 Lot 13, Borough of Fenwick - Old Saybrook, CT* by Indigo Land Design dated January 3, 2018, rev. through 10/25/18
- *The Gosin Cottage, 10 Mohegan Avenue, Fenwick, Connecticut* by Brooke Girty Design
 - *Proposed Renovations*, dated Sep. 27, 2017, rev. Sep. 26, 2018 sheet A1
 - *Proposed Renovations*, dated Sep. 27, 2017, rev. Sep. 26, 2018 sheet A2
 - *Proposed Landscape Plan*, dated August 10, 2018, rev. October 24, 2018, sheet L2
- *Proposed Dune Restoration and Enhancement Plans, Sections and Details, 10, 20, Mohegan Avenue, Borough of Fenwick, Old Saybrook, Connecticut* by GZA GeoEnvironmental, Inc., dated September, 2018, revised October 26, 2018
 - *Cover*
 - *Existing Conditions Plan*, Sheet V-1, rev. 9/26/18
 - *Existing Vegetation Plan*, Sheet V-2, rev. 9/26/18
 - *Dune Restoration and Erosion and Sedimentation Control Plan*, Sheet C-1, rev. 10/26/18
 - *Dune Cross-Sections*, Sheet C-2, rev. 9/26/18
 - *Notes and Details*, Sheet G-1, rev. 10/25/18

4. Referred Regulations on Short Term Rentals.

A. Wright explained that the Burgesses have contemplated what constitutes a short term rental and what problems may occur with them. They feel strongly that there should be a definition and limitations. The version referred to P&Z is the result of several meetings and is an attempt to put some boundaries on them. There was collective support for this language but it was not unanimously supported.

S. Boody stated that she is not in favor of regulating rentals. She realized that there are issues but believes there are some homeowners who want to be part of the community but need to rent their property in order to stay. She added that she had heard some concern with the number of cars on a rented property and noted that the same is true for residents.

C. Chadwick stated that the initial recent complaint had to do with the notion that rental is a commercial use. A. Wright clarified that the Burgesses were concerned with potential problems, not with whether this is a "commercial use". C. Chadwick summarized what he had heard to be the concerns:

- a strange face making residents uncomfortable;
- the issue of safety – not knowing a renter's background;
- special events held on the rented property;
- the effect on property values.

He stated that these issues all seem to fly in the face of common sense and added that he did not see any of them as making a regulation necessary.

Relative to the issue of recusal, C. Chadwick stated that this regulation will affect every property owner in the Borough, so there is no reason for recusal.

R. Neely stated that he sees a need for some version of regulation but he finds this language too complicated to enforce. He proposed something more simple like not more than one rental every 14 days, which would provide stability, noting that air bnb's can be a real risk. He also requested clarification of "primary occupancy"

Attorney Zizka first stated that he was not here as a proponent of the language presented by the Burgesses; he had simply crafted language that responded to the requests of the Burgesses. Relative to "primary occupancy" he explained that a house in the Borough may not be the primary residence of the owner, but may be the primary occupancy of the person(s) who are authorized by the owner to use it as a home. There needed to be a way to differentiate how the rental was used because some courts (although there is no case on point in Connecticut) have indicated if the occupants are using the house as a home, it is not a commercial use. The draft regulations were meant to consider four categories of use: ownership even if not using the property as a home; using it as a home; using it for short term as a domicile; using the property but theoretically not using it in the way that a home is intended to be used.

R. Neely clarified that his concern is the use of any property short periods of time.

T. Van Itallie stated that he does not see any consensus in the Borough for the existence or nature of a problem that justifies a 14 day minimum rental period which in his experience is very difficult to obtain. He added that clearly there is concern about some issue and the preference is for a regulation under the control of P&Z. Therefore, he proposed a minimum rental of seven consecutive days with a two day no move in period between rentals as a middle ground approach to try, noting that it could be amended in the future if it didn't work.

Commission members expressed concern about "grandfathered" rental properties and community buy in for regulation.

Relative to grandfathering, Attorney Zizka explained that there is a concept in the statutes that if someone is conducting a lawful use for more than just minute periods of time in a way that is known in the neighborhood, the commission cannot create a regulation that causes the use to stop unless the owner intentionally abandons the use. He added that a grandfathered use follows the property, not the owner. He also stated that he thinks it is probably more than 50% likely that a Connecticut court will say renting to someone who uses the property as a residence is not a commercial use.

S. Boody stated that it is unclear what a regulation will accomplish if there are a number of people who have been renting for a period of time that will be grandfathered.

W. Christensen stated that the concern is the nature and character of the Borough and a two or three day rental changes that character. He stated that the regulation should be less complicated and should provide the homeowner with flexibility while still preserving the character of the neighborhood. He suggested no more than two rentals per month.

T. Van Itallie stated that the most opportunity to defray expenses is in July and August and reducing that opportunity to only four rentals will not provide sufficient income for that purpose.

A. Wright moved that the Planning and Zoning Commission send the regulation as presented by the Burgesses, who are the elected representatives of the Borough, to public hearing for possible adoption. W. Christensen seconded the motion.

C. Chadwick read into the record the proposed Section 4.3.14:

Notwithstanding the provisions of Section 4.3.13, the owner(s) of a dwelling unit may allow another family, with or without a lease, to have the primary occupancy of that dwelling unit for purposes other than as a domicile, but only under the following circumstances: (1) the uses of the dwelling unit must be no different in nature than those that are customary and incidental to a domicile; (2) the short-term occupancy interval

shall be no fewer than 14 consecutive calendar days for any one family; and (3) no more than two short-term occupancy intervals shall be permitted in any period of 30 consecutive calendar days. The purpose of this section is to protect the single-family residential character of the Borough and to prohibit the rapid turnover of occupants within any particular dwelling unit in order to enhance neighborhood safety, stability and security and to reduce the possibility of conflict with nearby residents.

And the proposed modifications to Section 4.3.13:

When the owner(s) of any dwelling unit allow other persons, with or without a lease, to have the primary occupancy of that dwelling unit for purposes other than a domicile, such use shall be deemed to be a commercial use and shall not be allowed except as provided in Section 4.3.14.

S. Boody asked whether the motion was as proposed for a fourteen day minimum as opposed to the seven days discussed by the Commission. C. Chadwick stated that it was, but expressed the opinion that the fourteen days or two rentals per month as written will not create sufficient high summer month rental to bring in the necessary income. He agreed that there is concern with constant turnover or the renting of rooms.

Members noted that many of the current good citizens in the Borough started as renters, but concurred that there is a concern with someone new each week especially someone who has thirty visitors. A. Wright stated that there is a universal fear of daily or two-day internet/website rentals. W. Christensen added that he is vehemently opposed to unlimited turnover.

F. Keeney was recognized in the audience and stated that it is hard to believe that anyone involved in Fenwick activities does not see this as an issue. He added that it was the opinion of the Warden and Board of Burgesses that a greater number of residents favor some restriction on the number of rentals; that a zoning regulation was the preferred vehicle since it is easier to enforce than an ordinance; and that the issue is likely more related to events than term of rental, but the expectation is that longer term rentals reduce the likelihood that the purpose is for an event.

S. Boody noted that there are parties with Fenwick residents that are just as noisy and disrespectful of neighbors as might occur with renters.

Attorney Zizka summarize the options for continuing:

1. put this on the table for public hearing to get input, although there is concern with the number of attendees this time of year;
2. work on something to send back to the Burgesses;
3. send ideas or reasons for not proceeding back to the Burgesses.

It was noted that the Commission could also craft different language and send it directly to public hearing but it was felt that it was a good idea to refer something back to the Burgesses before proceeding.

A vote was called and the motion Failed 1-3-1.

Failed 1-3-1

For: Christensen.

Against: Chadwick, Boody, Van Itallie.

Abstain: Wright.

At this time A. Wright left the meeting and R. Neely was seated.

Attorney Zizka was asked to discuss how the grandfathering can be addressed. He stated that 99% of the time, the ZEO makes a decision or issues an order and the landowner appeals it to the ZBA to establish his grandfathered right. The other 1% of the time a regulation is devised that allows P&Z to hold a hearing and determine if the property is grandfathered. The benefit of this is that it doesn't start with an order, which is automatically contentious. If the finding is not challenged in court, it would be binding on the Commission and the ZEO. There can also be a mechanism included to file the decision on the land

records and make it easier to prove in the future. The Commission agreed that they preferred the second option.

Attorney Zizka stated that a property can only be grandfathered for the legal uses that were actually made of the property and that grandfathering may also be specific to the timeframes in which the activity was conducted (for example, seasonal uses vs. year-round uses). A finding of legal nonconformity cannot be based on a proposed, but not actually initiated, use. He added if there is an issue of credibility, who to believe is determined by the board. He also reminded the Commission that it would be best to get the community on board before moving forward with any regulation.

T. Van Itallie proposed that a one week minimum with a two day interval between rentals would be responsive. He added that the objective is to create a regulation with enough buy-in that people won't need to grandfather existing uses.

R. Neely stated that it is important to get something on the table before one or two day rentals get established; the longer it goes without regulation, the more properties that will have the potential to be grandfathered.

All agreed that it is important to get information out to all homes in order for a regulation to move forward.

C. Chadwick will draft a memo to the Burgesses summarizing the discussion at this meeting and will distribute it to Commission members to review. Members were cautioned not to "reply to all" if they had comments since this would constitute a meeting as defined by FOI (discourse via email between all members is considered a meeting).

At this time Attorney Zizka left the meeting.

5. Recommended Modifications to the Ordinance Concerning Flood Plain Construction Zone Regulations.

M. Ozols explained that updates to the building code effective October 1 have created a number of inconsistencies between the ordinance and the building code. In order to avoid confusion, DEEP has recommended that ordinances be updated to be consistent and has provided a model ordinance to accomplish this. The changes presented represent these updates plus one date correction. Additionally, requirements for historic structures should be clarified since FEMA recommends that regulations include provision for either an exemption or a variance and the current ordinance includes both, which is contradictory. Changes to the ordinance will need to go through the Board of Warden and Burgesses, but as with the original adoption, there should be a recommendation from P&Z.

After further discussion, **R. Neely moved to select the exempt language in the definition of substantial damage for historic structures and forward the full amended text to the Board of Warden and Burgesses for adoption. W. Christensen seconded the motion and it was approved unanimously.**

Approved 5-0-0

For: Chadwick, Van Itallie, Boody, Christensen, Neely.

Against: None.

Abstain: None.

6. Approval of Minutes of previous meeting: Planning & Zoning/Inland Wetlands – August 22, 2018.

R. Neely stated that he had voted against the motion to not accept the proposed changes to Section 5.2.3 and the definition for "developed" (page 4).

R. Neely moved to accept the Borough of Fenwick Planning and Zoning Commission minutes for the August 22, 2018 meeting as amended. S. Boody seconded the motion and it was approved unanimously.

Approved 5-0-0

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

7. Staff Report.

M. Ozols reported that:

Sciame Takings Case. This lawsuit has been withdrawn. There are currently no active land use lawsuits.

Hepburn Preserve. GZA Geotechnical has been 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 near future. The LPLT has been seeking grants to fund the work.

Sequassen Avenue. There is nothing new since the August P&Z meeting to report.

Anticipated Applications. In addition to the Hepburn Preserve, P&Z can expect an application for 11 Pettipaug (Wilson on behalf of Arnault). This proposal will go to HDC on November 3.

8. Other Business.

None.

9. Adjournment.

At 12:29 p.m., it was moved by S. Boody and seconded by R. Neely to adjourn the meeting. The motion passed unanimously.

Respectfully submitted,
Marilyn Ozols, Acting Secretary