

**BOROUGH OF FENWICK
PLANNING AND ZONING COMMISSION
INLAND WETLANDS AGENCY
SPECIAL MEETING
SATURDAY, JULY 20, 2019
MINUTES**

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

Absent: None.

Members of Public: Bill Christensen, Attorney Michael Zizka – Commission Counsel, other members of the public.

1. **Call to Order.** C. Chadwick called the meeting to order at 9:00 a.m. and seated R. Neely as a voting member. A quorum was established (Chadwick, Boody, Wright, Van Itallie, Neely).

C. Chadwick summarized the process, noting that they would ask for comments on each section separately, but they would allow additional comments on any section before closing the hearing.

2. **Public Hearing: Proposed amendments to the Borough of Fenwick Zoning Regulations:**

1. **Amendments to Section 4.3.13 along with the associated definitions that will limit short term rentals.**

C. Chadwick read the existing and proposed language and invited public comment.

Tom Ryder, 30 Fenwick Avenue – thanked the Commission for its work but stated that he hates the proposal since it would allow someone to rent a home 36 times per year, which is more than anyone does now, and this would energize the rental business. He added that he believes there is room for compromise, and he listed the pros and cons for rentals:

Reasons not to rent:

1. Rentals are risky – for the property owner and the community.
2. Rentals dramatically increase traffic.
3. Renting cheapens the value of properties and makes the front row look like Motel 6 row.
4. The way houses are currently presented for frequent rentals is a commercial venture.
5. Renters use the facilities without paying – there is no enforcement.

Reasons to rent:

1. Renting helps the homeowner afford the maintenance and taxes. Considering the costs related to his property, he calculated that it costs him between \$5,000 and \$10,000 per night for the time he is in his house.
2. Renting allows nice families to be part of Fenwick.
3. Renting allows good people to see and value the property and thus keep property values up.

He proposed:

1. Homeowners may rent up to six times per year, any one or more of which can be for multiple months, but there can be no more than one rental per calendar month.
2. Enforcement is important.
 - a. The owner should be required to post the names of renters in some public place (website, facebook, kiosk).
 - b. The owner should be responsible for the weekly, monthly, or annual recreation fee. This would be something that can be audited.

Finally, he stated that he had substantial governing experience and he felt that some members of the Commission have a real conflict and should recuse themselves.

Frank Sciame, 100, 102A, and 102B Sequassen Avenue and 6 Mohican Avenue – agreed with Tom Ryder and does not think that the language is strong enough. He stated that he belongs to a number of coops which have strict rules. He added that he has been letting people in his company use 6 Mohegan Avenue on weekends off season, but he will stop if that's not allowed. He added that when he owned the Hepburn house, he was offered \$250,000 for a wedding but turned it down because he did not think it was appropriate. He favored what Tom Ryder proposed but it may not be strict enough.

Tom Riggio, 539 Maple Avenue – asked the Commission to consider the ramifications of subletting, adding that there are more negatives than positives and subletting should be addressed.

Edie Gengras, 19 Agawam Avenue – thanked the Commission and stated that she was glad there was a specific proposal to look at. She stated that she was totally against one week and does not see how it can be regulated if someone pays for one week but comes for three days to hold a party. She added that all the residents enjoy parties but if a party gets to be too much, it's easy to go to a neighbor to ask them to shut it down. She would not feel the same about a renter and would have to call the police for a rental party.

Charlie Robertson, 20 Fenwick Avenue – read from a prepared statement noting that there is only one place that he has been that feels like Fenwick and it is an association in the Hamptons where short term rentals are banned and any other rental must be approved by the Board and must pay a \$5,000 fee for the use of the beach, tennis courts, and amenities. He stated that with three rentals per month, there is too much incentive for residents to capitalize on the sense of community the residents value, and the privacy they value is a profit opportunity which they, along with others who chose not to rent, forgo in order to maintain a sense of community. He added that if the proposal passes, and just 10 or 20 houses participate, rental rates will fall and the sense of community will become false advertising as it becomes a neighborhood of transients; property values would follow as a home's value becomes grounded only in its rental potential. He stated that their house is a centerpiece in the community and sleeps twenty - imagine a new group of twenty there every other week all summer. He noted that with very close friends on the other side of this issue, he is on board with a compromise like no rental less than 30 days or, as the Arutes have suggested, no more than two rentals per year, or Tom Ryder's suggestion. This maintains the sense of community and continues to welcome the long time renters that have become part of the community.

Sam Jones, 31 Pettipaug Avenue – commended the Commission for its work and agreed 100% with Tom Ryder. He asked why there couldn't be a lease structure approved by the Borough that must be used by every renter.

Bob Gay, 44 and 98 Sequassen Avenue – addressed the other side stating that 98 Sequassen is next to the lighthouse, which is different from "downtown", but they have rented it for family use or to Fenwickians for fifteen or sixteen years. He added that they have never advertised and have always required renters to pay the recreation fee, and they have generally only done full month rentals in June, July and August, but have had requests from Fenwickians for any length of time in the swing months. He believed this type of rental is symbolic of what Fenwickians want and is a long tradition - many current owners rented first. He stated it is difficult to write a regulation that addresses all aspects, but that the proposal is a nice initial compromise that can always be modified in the future.

Newt Brainard, 27 Pettipaug Avenue – stated that he is against the proposal because it does not go far enough. He indicated that his position has changed in the last year as he watched short term rentals in his neighborhood. He stated that if the regulation does not address rentals for parties, it institutionalizes the behavior that is going on. People that rent for two, three, or four weeks, they are invested in the community; when they come for a weekend for a party, they are not invested in the community. Allowing the type of transient activity that is going on on a short term basis is not what this community values; the transient nature of it erodes the very things that make Fenwick special.

Scott Pulver, 29A Pettipaug Avenue – stated that the process is currently broken and this proposal does not fix it. He added that they need to stop the weekend rentals and that the people on the Commission benefitting from rentals should recuse themselves.

Lori Arute, 9 Pettipaug Avenue – agreed with the majority who have spoken and stated that the state has determined that short term rental is a business activity and taxes it. She added that she does not understand how this upholds the residential character in any way, shape, or form and stated that weekly rentals will not maintain the values of the community.

Jessica Gay, 44 and 98 Sequassen Avenue – urged the commission to consider the shoulder season when the place is “dead” separate from July and August when everyone is here, and perhaps create a two tier system.

Sue Webster, 112 Sequassen Avenue – stated that some people live here year round and there should not be a two tier system.

Lori Arute, 9 Pettipaug Avenue – asked how Fenwick is prepared to enforce or police the regulation with no zoning enforcement officer in place and with resources stretched.

C. Chadwick reminded people that they would have the opportunity to add comments after the other items in the hearing were discussed.

W. Arute, 9 Pettipaug Avenue – thanked the Commission, noting that this is a huge challenge. He added that Tom Ryder had a great proposal and asked if there is a budget for enforcement. He also noted that this is a can of worms for the Borough relative to risk, liability, and insurance. He requested that Lori’s letter go on the record (Exhibit K) and agreed that there is a conflict of interest on the Commission.

2. **Amendments to Section 5.2.3 that will clarify which structures or activities can be allowed by special permit in the 50 foot setback from a watercourse, tidal wetlands, coastal bluff or escarpment, beach or dune.**

C. Chadwick read the existing and proposed language and invited public comment.

Frank Keeney, 41 Pettipaug Avenue – asked if this regulation runs afoul of the Harbor Management responsibilities.

M. Ozols stated that the Harbor Management Commission has jurisdiction over the water and the view from the water; the Planning & Zoning Commission has jurisdiction over the land. Additionally, any proposal before Zoning that can be seen from the water is referred to HMC for comment.

3. **Amendments to Section 8 on Non-Conformance along with the associated definitions that will 1) align the regulations with recent changes in statutes, 2) provide a mechanism for a property owner to file with the commission the intent to retain a temporarily discontinued nonconformity, and 3) provide a process for a property owner to obtain a determination of non-conforming status.**

C. Chadwick called on Attorney Zizka to summarize why this section needed to be updated. Attorney Zizka stated that issues surrounding nonconformity have been in flux in the General Assembly for a number of years. Statutes now stipulate that zoning regulations cannot require a nonconforming use to stop without considering the intent of the owner. Additionally, regulations cannot consider a non-conforming structure that has been destroyed to be abandoned, and they cannot prohibit it from being put back. The proposed language makes changes to address both of these items and also includes language that gives the property owner a mechanism to establish his/her intent.

C. Chadwick asked for comment on this section. There being none, he asked for any further comments on any of the items.

C. Chadwick read into the record a statement from *Brooke Girty, 10 Pettipaug Avenue* (Exhibit L) relative to Section 5.2.3. She stated that the proposal is impractical because dunes are irregular in shape, poorly defined, could be considered anywhere where sand has blown, and move from year to year. Because of this and the fact that the entire peninsula is a dune system, no professional is willing to draw a straight line on a plan to indicate the setback. She recommended that the Commission reconsider the previous proposal that allowed the Commission to consider the impact on the coastal resource of each proposed structure on an individual basis. She added that the proposed language will adversely affect many property owners and could lead to many costly lawsuits.

Frank Sciamie, 100, 102A, and 102B Sequassen Avenue and 6 Mohican Avenue – stated that he did not have time to research the impact of the proposed language on his properties but he urged that they strongly consider Brooke Girty's comments.

Attorney Zizka stated the proposed language changes the types of structures that will be allowed in the fifty feet, but the fifty foot restriction is not new. If the Commission wants to completely address the issue as suggested, they will need to come forward with a new proposal.

Ginny Robertson, 41 Agawam Avenue – stated that some of our issues are from our own residents (e.g. kids riding bicycles with out helmets, children under 15 driving golf carts) and residents must be mindful of checking their own family and friends.

C. Chadwick asked for any additional comments. There being none, he closed the public hearing at 10:05 a.m.

At this time the Commission took a short recess and then reconvened the meeting. Members asked about timeframes. Because these are Commission generated proposals, there is no deadline for a decision. They can also vote on any or all of them at this time.

3. Possible Decision – Amendments to Section 4.3.13 and associated definitions.

Relative to the issue of recusal that was brought up in the hearing, C. Chadwick noted that under a strict reading they would not have a quorum to vote, and that there are many interrelationships in the Borough which would make a quorum difficult on many applications. Attorney Zizka added that the courts had distinguished between Commissions acting in a legislative capacity and in an administrative capacity. When acting on regulations (i.e. changing law) they are acting in a legislative capacity and conflict rules do not apply since generally legislation is applicable to the entire community.

Relative to the question on subletting, Attorney Zizka stated that the regulation is directed at the use, not the person. A property cannot be sublet in a manner that violates any provision of the regulation, but it could be sublet in a manner that complies with the regulation if the property owner permitted it. Ultimately it is the owner who is responsible for compliance with the regulation. From the standpoint of zoning law, however, they can't distinguish between letting and subletting.

S. Boody clarified that as long as it is one family living in the house, regardless of how many are in that family or which members come and go, the use is in compliance.

R. Keeney asked if these issues could be better addressed by an ordinance as opposed to a zoning regulation. Attorney Zizka stated that it wouldn't really matter as far as the language is concerned. The main difference is in enforcement ability, but there could also be an issue if there is an attempt to cover by ordinance what should be covered by zoning.

Relative to the suggestion in the hearing that standard lease language be required, Attorney Zizka stated that the Zoning Commission cannot dictate the terms of the contract, but they may be able to request that owners use a certain format. There could be suggested language - it would not be enforceable, but there is no legal issue with suggesting it. C. Chadwick discussed "moralsuasion" noting that there has been some irresponsible renting.

Members agreed that the office should know the names of renters, but the names should not be published. C. Chadwick added that he has always informed his neighbors when he has renters, but not everyone does that.

Relative to the suggestion that there be a two-tiered regulation that separates out the high season, Attorney Zizka stated that this would be legally permissible.

C. Chadwick noted that it was not the intent of the regulation to allow up to thirty-six rentals per years which would be the number if there were three rentals every month.

Members asked about the reference in L. Arute's letter to the hotel tax in Connecticut statutes making any rental a commercial use. Attorney Zizka stated that the statute is broader than some might think and there is a reference in the statute to "furnished house", but Zoning is not bound by how state law uses terminology in a different context, and this reference in the tax law does not affect what Zoning calls a commercial use.

C. Chadwick discussed enforcement noting that there is a process, but it is not clearly understood. He referenced a number of recent emails about an issue with none of them addressed to the Zoning Enforcement Officer who was able to address the issue once she found out. He added that there is an option of a referral to Housing Court which has the power of arrest. Attorney Zizka added that every zoning violation is also a criminal violation under Section 8-12 of the Connecticut statutes and the courts will enforce this in certain circumstances.

C. Chadwick requested input on grandfathering. Attorney Zizka stated that when someone lawfully commences a use and has been carrying on that use in a fashion reasonable known to the public, they can be entitled to maintain that use. He noted that it sounds like a number of people in the community have traditionally been renting and they could be entitled to continue, but the person claiming to have a grandfathered use has the burden of proving it. He referenced a comment made previously that if the regulation restricts the use in a reasonable fashion, people may be willing to go along with it, but if it is considered too restrictive, they may either seek to continue what they were doing or take the issue to court. T. Van Itallie added that too restrictive a regulation could have the practical effect of alienating a number of people with no productive effect and he recommended coming up with language that will enlist those people who might be entitled to more rentals to comply with the limits in the regulation. C. Chadwick added that although there is no way to prevent early departures, there is a need to limit the number of rentals per month.

Continuing the discussion on grandfathering, C. Chadwick noted that the normal process is for the ZEO to become aware of the noncompliant use and, if not convinced that it should be grandfathered, issue a Cease and Desist Order, which could then be appealed to the ZBA who would make a determination as to whether the use should have been grandfathered. The proposed Section 8 will provide a means for an owner to apply to P&Z to establish a grandfathered use. R. Neely noted that people at the hearing did not understand that some rentals could be grandfathered or that there was a linkage between the short-term rental regulation and the nonconformity regulation. S. Boody added that properties that are grandfathered can still rent in the manner that they have in the past and there is nothing that can be done about it.

B. Christensen stated that there were differing views on the Commission, but his takeaway from the public was that allowing thirty-six rentals per year was not acceptable and the Commission should listen to the public. He added that he did not think the Commission was capable of coming up with language that the whole community would be happy with.

S. Boody and R. Neely stated that it was important to prevent things from getting worse and to protect the Borough going forward.

T. Van Itallie stated that they have gotten public input and now must respond to the community even though only a small slice was present. He added that seven days was too much of a flash point to hold

onto and that he could let it slide to two weeks in order to get more buy in from the community. He continued that they need to try to deal with the party issue, but that language needs more work.

S Boody moved to table action on Short Term Rentals for more discussion. T. Van Itallie seconded the motion.

A. Wright expressed the opinion that they should discuss it more at this time rather than table it. Members concurred.

The motion failed 0-5-0.

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

A. Wright referred to the commercial use question. Attorney Zizka stated his opinion that it is not a commercial use if the person renting uses the house as a residence. Zoning only looks at the use, not the person doing it so does not differentiate between the owner and the renter. If people are using a house the way a house is normally used, it is hard to distinguish that from a residential use. However, the shorter the duration of the rental and the more frequent the turnover, the harder it is to consider the use residential. The purpose of the regulation is to describe appropriate residential use. He added that Fenwick has no regulation relative to special events, so the court decision in Kent, which has such a regulation, is not directly applicable.

C. Chadwick stated that they could prohibit rentals completely but that would not affect the people who are now doing what others don't like since they would be grandfathered. Attorney Zizka added that someone could at some point bring the issue of whether the use was indeed commercial, and thus not lawfully established, to court. A court decision would establish whether any rental is a commercial use and thus whether any rental could or could not be grandfathered.

A. Wright stated that the prevalent opinion is probably that the minimum rental should be one month, but he would favor two weeks as a compromise. Currently, there can be 365 rentals per year, so they might consider limiting the number per year rather than per month. He added that although they need to discuss special events, this is less of an issue if the rentals are longer.

Attorney Zizka stated that they cannot differentiate between residents and people renting, but if the rental is for a special event, that would not be permitted. People renting for a short period of time are more likely to be using it for a special event rather than sleeping there. T. Van Itallie reiterated the distinction that a renter can have a special event during the rental, but cannot rent for the purpose of holding a special event. Attorney Zizka added that another option might be to have a provision that someone renting for fewer than x days cannot have a special event. Members further discussed language for special events but did not reach a consensus and noted that this language could be added at a later date.

R. Neely asked about the original Burgess proposal. A. Wright stated that it was for fourteen days and not more than two in any 30-day period. He added that it is more important to listen to the public than address that proposal.

In response to questions, Attorney Zizka stated that case law is that if there is both a zoning regulation and municipal legislation, the more strict prevails. There is no state statute that addresses grandfathering relative to ordinances. Rather this would be a due process issue with a vested right argument through the court system. Relative to enforcement, the charter is restrictive to fines but not to other actions. Relative to the suggestion in the hearing, he stated that the Commission cannot require the posting of names and cannot require homeowners to pay a recreation fee.

Members discussed limiting rentals to two in 30 days or a calendar month but noted that if the minimum rental is fourteen days, there is no need to address the number per month. Members then discussed setting a maximum per year somewhere between six and ten.

S. Boody moved to approve the proposed amendments relative to short term rentals with the following modification:

4.3.14 Short-Term Residential Use of Dwelling Units.

Notwithstanding the provisions of Section 4.3.13, the owner of a dwelling unit may allow one family, with or without a lease, to have short-term occupancy of that dwelling unit, 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) no short-term occupancy interval shall be less than ~~seven~~ **fourteen** consecutive calendar days; and (3) ~~no more than three short-term occupancy intervals shall be permitted to begin or end in any calendar month~~ **ten short-term occupancy intervals shall be permitted in any calendar year**. 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.

T. Van Itallie seconded the motion and it was approved unanimously.

Approved 5-0-0

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

Against: None.

Abstain: None.

S. Boody noted that people need to remember that there are responsibilities that go along with renting.

4. Possible Decision – Amendments to Section 5.2.3.

M. Ozols requested that the Commission table this item so that she could verify that all the correct language was in the version before them.

A. Wright moved to table action on Amendments to Section 5.2.3 to the next meeting. R. Neely seconded the motion and it was approved unanimously.

Approved 5-0-0

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

Against: None.

Abstain: None.

5. Possible Decision – Amendments to Section 8.

S. Boody moved to adopt the proposed new Section 8. A. Wright seconded the motion.

T. Van Itallie expressed concern that the language seeks to take away statutory rights. C. Chadwick disagreed, stating that Section 8.7 provides relief in that it allows people to apply to maintain a nonconformity. R. Neely agreed, indicating that the language is more transparent.

The motion was approved 4-1-0.

Approved 4-1-0

For: Chadwick, Boody, Wright, Neely.

Against: Van Itallie.

Abstain: None.

Members discussed the effective dates for the amendments noting that, although Section 8 could have an August 1 effective date, they should allow more time for the short-term rental regulation because there are existing rentals.

S. Boody moved to set the effective date for the short-term rental regulations for October 1, 2019 and the effective date for Section 8 for August 1, 2019. R. Neely seconded the motion and it was approved 4-0-1.

Approved 4-0-1

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

T. Van Itallie stated that he would like clarification on contracts for rentals after October 1 that are currently in place. Members concurred that it should not apply if there is already a signed contract in place.

6. **Approval of Minutes** of previous meeting: Planning & Zoning/Inland Wetlands – May 20, 2019.

R. Neely moved to defer approval of minutes to the next meeting. S. Boody seconded the motion and it was approved unanimously.

Approved 5-0-0

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

7. **Adjournment.**

At 12:15 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