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To Members of the Town of Chatham Joint Zoning Subcommittee
of the Board of Selectmen and Planning Board

January 10, 2010

Your subcommittee now appears to have completed its work on recommending to the Board of Selectmen and the Planning Board a proposal to create one or more ad hoc committees to consider a revision and rewrite of certain portions of the zoning bylaw.

At one of your earlier meetings, and as part of a general discussion regarding the increased growth which is expected to be brought about by the oncoming sewerage of the Town and whether there were legal limitations to revising the zoning bylaws to restrict such growth, I offered to provide your subcommittee with an outline of such limitations.

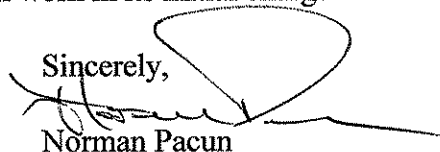
In preparing such an outline, I first thought it necessary to review the existing Town policies contained in the Comprehensive Wastewater Management Plan (CWMP), the Board of Health Nitrogen Loading Regulations, Article 2 of the Town Sewer Regulations, as well as the recent Certificate issued by the State Secretary of Energy and Environmental Affairs in his approval of the CWMP. Since our existing zoning bylaws do not contain any limitation on the number of bedrooms allowed to be constructed in a single-family residence, it is only these other Town policies referred to above that have presently placed restrictions on unchecked growth as the Town prepares for such oncoming sewerage.

I would like to share this review with you now even though your duties as a Subcommittee may be coming to a close. I am doing this because we have often heard it stated by Town officials that increased growth should be regulated primarily if not entirely by our zoning bylaws. In fact, the Town CWMP and, even more importantly, the state certification approving such Plan, both specifically call for the Town to utilize all of the above policies and regulations---- not just the zoning bylaws--- to regulate unrestricted growth which will be expected to arise once Town-wide sewerage commences.

While it is my hope to shortly complete the outline of the zoning laws that I promised you, I believe it equally important in the interim for the new committee(s) to be aware of the need to correlate any zoning revisions with the other policies of the Town so that they can properly and appropriately be used to regulate such anticipated growth.

I continue to believe that the greatest problem facing the Town today is the likelihood of change---- undesirable change for the long-term---- that will inevitably come about if we sewer succeeding sections of the Town without having in place a combination of policies, regulations and revised zoning bylaws to deal with such growth. It is my strong recommendation, therefore, that the new zoning bylaw revision committee(s) include such work in its initial charge.

Sincerely,



Norman Pacun

SUMMARY OF NON-ZONING BYLAW REQUIREMENTS
AFFECTING FUTURE DEVELOPMENT AND
REDEVELOPMENT IN CHATHAM, AS
OF DECEMBER 31, 2009

Chatham Wastewater Management Plan (CWMP) Major Recommendations:

The CWMP (Sec. 11.2) identifies a recommended plan for Chatham which “would involve the implementation of an adaptive management approach, including the following major components”:

- Expand the Wastewater Treatment Facility (WWTF) in two stages: Phase 1 would treat approximately 1.3 mgd on an average annual basis to meet total nitrogen TMDL requirements in Stage Harbor, Pleasant Bay, Sulphur Springs, and Taylors Pond watershed areas, with Phase 2 treating approximately 1.9 mgd on an average annual basis in the remaining areas of Town.
- Expand the existing collection system to match the above two Phases, with the possibility of sewerage all of the 94 sewersheds in Town or at least 61 such sewersheds in order to address TMDL requirements.
- Evaluate freshwater restoration of Muddy Creek.
- Continuation of modified embayment water quality monitoring program.
- Continued public education on fertilizer use and management of other controllable nitrogen sources.
- **Continued enforcement by BOH of Nitrogen Loading Regulations in those areas not designated for immediate (next 5 to 10 years) connection to WWTF. (Emphasis Added)**
- **Implementation of Art. 2 of the Sewer Dept. Regs. regarding “growth neutral and new sewer use regulations.” (Emphasis Added)**
- Continued implementation of storm water improvements and management.

Thus, the CWMP specifically recommends retaining the BOH Nitrogen Loading Regulations for those areas of Town not designated for sewers for the next 5-10 years, as well as implementing Art. 2 of the Sewer Dept. Regs., the so-called “growth neutral” (or sometimes referred to as “flow neutral” or “flow-equivalent”) provisions. It should be clear that neither of these are zoning bylaws; that the former is implemented by the Board of Health on its own authority under State law; and that the latter is implemented by the Water and Sewer Department, as approved by the Board of Selectmen, and thereafter by Town Meeting.

Chatham Wastewater Management Plan Recommendations for Growth Management:

The CWMP, under Sec. 8.13 (Growth Management), then reviews the existing provisions of both the BOH Nitrogen Loading Regs. and Art. 2 of the Sewer Regs and reaches the following conclusions:

- That with the actual and anticipated installation of sewers, “growth may be a concern... [and] this growth may be attributed to the removal of the current growth limitations” which have been imposed by (1) the BOH in its restrictions limiting the number of bedrooms allowed for a property, and (2) the Sewer Department in its adoption of a “growth neutral” (or “flow neutral/flow-equivalent”) regulation (Art. 2) that limits the number of bedrooms to the extent allowed under Title V and the BOH Regulations.
- That Art. 2 does not allocate a specific flow to a specific property, and that this should be done through zoning and not wastewater allocation.
- That once the CWMP is completed and approved (and the WWTF is expanded and ready to accept additional connections), the sewer bank will be dissolved and “Art. 2 will take its place”. As indicated above, Art. 2 limits the number of bedrooms only to the extent allowed under Title V and the BOH Regs., but does not allocate a specific flow to a specific property.
- Zoning modifications can also be used to limit growth in other areas to prevent future nitrogen discharges into sensitive embayments, and these could include increasing allowable minimum lot sizes and establishing restrictions on building sizes and uses, and these may be part of the undergoing review by the Town of its zoning bylaws.
- Adoption of a District of Critical Planning Concern under the Cape Cod Commission Act is another management option to deal with (1) the protection of existing resources or areas of sensitive ecological conditions which render an area unsuitable for development or (2) the proposed building of a major capital public facility.

The CWMP then specifically recommends that the Town should consider the above zoning and planning tools---not only those contained in zoning bylaws— to prevent increased growth.

Further Examination of the Provisions of the Chatham BOH Nitrogen Loading Regulations, Article 2 of the Town Sewer Regulations, and Title V (310 CMR 15.00)

1. Title 5 Regulations:

- Under State law, a Title 5 system must be designed for a minimum flow of 330 gpd, but there is no maximum flow specified or established.

- For each single family residence, there is a formula established equating one bedroom with 110 gpd of wastewater discharge, so that the smallest Title 5 system must be designed to accommodate 3 bedrooms, but there is no restriction within Title 5 on designing or installing a larger system.

2. Chatham BOH Nitrogen Loading Regulations:

- These regulations are stricter than the State Title 5 regulations and are applicable to any new residential construction in Chatham which is not served by the Town sewers. They limit Title 5 septic systems on new construction to only two bedrooms per 20,000 sq. ft of land (½ acre), or four bedrooms per 40,000 sq. ft. (1 acre).
- Upon approval of the BOH, an additional bedroom may be allowed with the installation of an I.A. System, and variances may also be available to individual homeowners for good cause shown.
- Section 5.3 of the Regulations requires that the Title 5 system be designed for the actual number of bedrooms present “or that number determined by the BOH or its Agent.” The intent of this provision should be to preclude residential property owners from installing a larger Title 5 system than the number of permitted bedrooms and thereby circumventing the Regulations.
- These regulations are intended to limit growth because of the potential damage to town embayments caused by the passage of additional nitrogen into such embayments. Once nitrogen from wastewater is no longer deposited in the ground, these regulations have lost their primary purpose.

3. Art. 2 of Town Sewer Regulations:

- All new connections to the Town Sewer Bank are currently restricted because of limited capacity of the WWTF and an Administrative Consent Order, and no new construction is allowed to connect up without special approval of the Water and Sewer Department.
- A residential property which is allowed to be connected to the sewer system is presently limited to the number of bedrooms that are currently allowed under Title 5 and the BOH Regs, i.e. the so-called “flow neutral” or “growth neutral/flow equivalent” policy.
- The allocation of a specific flow to a particular property, however, is not covered, except as set forth above.

4. Interaction of the Above Regulations:

- Title 5 does not itself limit growth because (a) it does not prohibit the construction of houses with more than 3 bedrooms, and (b) a Title 5 System can be designed to handle this increase.
- The BOH Regulations do limit growth presently, but are inapplicable to new residential construction which “are already connected to town sewer.” Therefore, once the WWTF is expanded and has become operational, new residential construction or additions will connect into the sewer system, and under the current BOH Regulations, there is no limit to the number of bedrooms that can then be built in such sewered residences.
- **Once a single family residence is tied into the sewer system, the Title 5 Regs. are no longer applicable, but even if they were, Title 5 itself does not limit the maximum flow nor the number of bedrooms, so long as the system itself has sufficient capacity.**
- **The limitations established under Art. 2 of the Sewer Regs. —by reference to Title 5 and to the BOH Regs.— may not constitute any limitations at all. This is because (i) Title 5 does not have a maximum number of allowable bedrooms and there will be no Title 5 septic system in place and (ii) the BOH Regs. specifically exempt properties which are connected to the sewer. The language in the CWMP recommendations specifically says that Art. 2 “...stops short of physically assigning a flow value to the property.”**

Conclusion: While the precise operation of Art. 2 is subject to further clarification, it is the moratorium on further connections to the sewer bank because of the present lack of capacity and the existing ACO, that is really preventing construction of additional bedrooms and increased growth. The CWMP appears to recognize that once additional sewer capacity is in place, there is no single prohibition that would clearly limit the number of bedrooms to be constructed in single family residences. Thus, either a strengthening of Art. 2 or a major revision of the BOH Regs. (to be applicable to single-family residences placed on the sewer, to the extent legally permissible), or revisions and modifications to the zoning bylaws, or the establishment of a DCPC— or any combination of these— are necessary if the Town is to be protected against the effects of increased growth.

Effect of the FEIR/Final CWMP Certificate Given by the Secretary of Environmental Affairs.

1. Approval of the CWMP is set forth in the Final Certificate given by the Massachusetts Secretary of Energy and Environmental Affairs, Ian A. Bowles. One of the specific conditions of the approval is set forth under the heading “Sewering and Growth Management”) (at pp. 9-10) which takes particular note of the problem of additional growth that an expanded sewer system will bring about in Chatham. The Certification initially states as follows (at p. 9):

“The FEIR/Final CWMP includes a discussion of the potential future build-out of the proposed Phase 1 and Phase 2 sewer areas and the consistency with Ex. Order #385 which discourages unrestricted growth within areas planned for sewerage. In May 2005, the Town passed a new section of the Town of Chatham’s Rules and Regulations of the Sewer Department to limit new growth that might occur in newly sewerage areas of Chatham. As described in the FEIR, the Town has adopted a ‘flow-equivalent’ regulation that would limit the development or redevelopment of existing properties by restricting the number of bedrooms allowed to the number of bedrooms the property is currently allowed under Title 5 and local zoning.” (Emphasis Added).

2. While the intent of the Certification is absolutely clear, it is partly inaccurate when it refers to the restrictions on development imposed under the Sewer Department Regulations as being the same allowed under Title 5 and “local zoning”— what it should have referred to were the “local BOH Regulations” discussed above (but which it also should have noted are inapplicable to residences connected to the sewer). **For the record, the Town has not adopted any local zoning bylaws which restrict the number of bedrooms in single-family residential properties.**

3. The Certification then goes on to state as follows (at p. 10):

“I encourage the Town of Chatham to consider additional growth control by-laws, regulations and policies and note that the Town of Orleans has recently proposed (EEA #14414 May 6, 2009) to implement a ‘checkerboard’ sewer connection by-law that will enable the Town of Orleans to select specific lots that will be connected to the municipal sewer system and lots that do not need sewerage and therefore will **not** be allowed to connect to the new sewer

system. **The Town [of Chatham] should adopt any proposed growth by-laws, regulations, and policies prior to the construction of any new sewer extensions.** (Emphasis Added).

4. The Certification of the CWMP is the clearest statement of authority yet that unrestricted growth within areas of additional sewerage will come about unless the Town adopts further bylaws, regulations and policies “prior to the construction of any new sewer extensions.” The Certification, in fact, specifically says that the Town “**should adopt**” such growth by-laws, regulations, and policies”. Note that this is not limited to zoning bylaws, but includes other “regulations and policies”, such as those recommended by the CWMP itself----- BOH regulations and Town sewer policies, as well as a possible DCPC under the Cape Cod Commission Act.

5. Previous statements by Town officials that additional growth can only be regulated by zoning by-law amendments are incorrect and are specifically contradicted by both the CWMP and the Certification of the Secretary of Environmental Affairs. All of these are tools which can and should be used by the Town in this important and time-sensitive effort.