

Achieving Nitrogen Zero in Wareham

Nitrogen Regulation Subcommittee – 12-9-10

10:00AM Wareham Town Hall Cafeteria

1. Introductions.
2. BOH Jurisdiction.
3. Draft Regulations.
4. Companion Regulations/Bylaws Needed from Other Boards or Town Meeting.
 - Planning
 - Zoning
 - Enterprise Account
5. Further Information we Need.
6. Next Meeting.

Nitrogen Regulation Subcommittee - Sign-In
December 9, 2010

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**Achieving Nitrogen Zero in Wareham
Town Hall Cafeteria
Drafting Committee Meeting Notes
December 9, 2010 – 10am-12pm**

Attendees:

- Diane Allen
- Tom Berkley
- Bob Brady
- Linda Burke
- Bob Ethier
- Brian Grady
- Dave Pichette
- Alan Slavin
- Richard Wheeler
- William White
- Korrin Petersen
- Kerri Driscoll

Call to Order – 10am (Bob Ethier)

Confirmation of BOH Jurisdiction to Issue N Regulations

- Memo from CBB attached.

Procedure for Project Approvals:

- Need to change the flow of the procedure – BOH first for site plan approval before planning.
- Applicants should be filing concurrently (like ZBA & ConCom).
- The key is scheduling/timing and keeping the BOH decision within the planning board hearing schedule.
- Could Wareham develop a development cabinet (administrative review process with representation from all relevant boards to review/discuss the project and give initial feedback prior to formal hearings)?

BOH Approval:

- The BOH will be limited to what the numbers show.
- A board can issue a permit contingent upon the comments/approval of another board to minimize “back and forth.”

Nitrogen Offset Fee:

- Developer will be responsible until the homeowners association is established.
- The fee will not raise enough to build infrastructure.
- Need to make the fee a disincentive.
 - Should offset fees not be available until every other N source has been minimized?
 - Could be treated as a waiver. Once you have no other possible way to reduce your load and you have minimized it to the maximum extent possible.
- How is the fee paid? One lump sum? Annually?
- Makepeace Case Study: Crane Landing

- Marketing plays a big role. The more restrictions you place on a property, the less marketable it becomes.
- Do we want to require or incentivize?
 - Similar to a density or zoning bonus. (carrot v. stick)
 - A density bonus will need town meeting approval as a zoning change.
 - Could use the cluster bylaw as a model.
 - Subdivision regulations will need town meeting approval.

Hypotheticals:

- Scenarios were presented using a minimum lot size of 30,000 sq. ft. and assuming 4,000 sq. ft. for house footprint, driveway and road.

Implementation:

- Town will give the applicant the state numbers to use.
- Need to consider water retention/LID/rain gardens.
- Does attenuation need to be addressed in the regulations? (similar to Zone 2 of Title 5)
- Is there an offset for single-family homes connected to sewer?
- How do we address subdivisions with <10 homes and approval not required lots?
 - Group decided that the regulations should go beyond the bylaw to address both.
- Fee at \$1,100/lb. N may be low. Calculated using the betterment, but could also take into account the sewer hookup.

Next Meeting:

- **January 3, 2011 @ 10am – Town Hall Cafeteria**

MEMORANDUM

To: Nitrogen Regulation Subcommittee
From: Korrin N. Petersen, Esq. & Kerri M. Driscoll, Esq. The Coalition for Buzzards Bay
Date: November 29, 2010
Re: Board of Health Jurisdiction to Issue Nitrogen Net-Zero Regulations

At the last meeting of the Wareham Board of Health Nitrogen Regulation Subcommittee held on November 18, 2010, the question of whether the Wareham Board of Health had the legal authority to issue nitrogen net-zero regulations was presented. Our research indicates that **the Wareham Board of Health has the authority under Chapter 21A, Section 13 and Chapter 111, Section 31 of the Massachusetts General Laws as well as under Title 1 and Title 5 of the State Environmental Code (310 CMR 11.00 and 15.00) to issue Nitrogen Net-Zero Regulations, the purpose of which is to improve and protect water quality.**

Chapter 21A, Section 13, establishes the state environmental code, otherwise known as Title 5, and **requires** local boards of health to enforce such code. Section 13 states, "The commissioner of the department of environmental protection shall adopt, and from time to time amend, regulations to be known as the state environmental code. . . . The code shall deal with matters affecting the environment and the well being of the public of the commonwealth over which the department takes cognizance and responsibility including, by not limited to, standard for the disposal of sewage. . . . **Local boards of health shall enforce said code** in the same manner in which local health rules and regulations are enforced but, if any such local boards fail after the lapse of a reasonable length of time to enforce the same, the department may in like manner enforce said code against any violator." (emphasis added)

Chapter 111, Section 31 allows boards to adopt reasonable health regulations. It goes on to allow boards of health to adopt regulations which exceed the minimum requirement for subsurface disposal of sanitary sewage as provided by the state environmental code. "Boards of health may make reasonable health regulations Prior to the adoption of any such regulation or amendment which exceeds the minimum requirements for subsurface disposal of sanitary sewage as provided by the state environmental code, a board of health shall state at said public hearing the local conditions which exist or reasons for exceeding such minimum requirements." While Chapter 111, section 31 authorizes the Board to enact reasonable health regulations and does not specifically state environmental regulations, this authorization allows regulations to go beyond the minimum requirements of the state environmental code, which clearly states that its purpose is for the protection of public health, safety, welfare and the environment. Clearly, local conditions exist which justify the passage of nitrogen net-zero regulations.

Title 1 of the State Environmental Code, 310 CMR 11.00, states that, "Unless otherwise expressly provided in any other title, the legally designated health authority of any city, town, county or other legally constituted governmental unit within the Commonwealth having the

usual powers and duties of the board of health may, as it considers necessary to promote and protect the health and well being of the particular locality under its jurisdiction, **adopt under its own legal power as exists in the General Laws any rules or regulations containing requirements stricter than those contained in this code.** Nor should the existence of this code limit or otherwise affect the power of any health authority with respect to any matter for which this code makes no provision.” (emphasis added)

Finally, Title 5 of the State Environmental Code, 310 CMR 15.00, states as its primary purpose, “to provide for the **protection of public health, safety, welfare and the environment** by requiring the proper siting, construction, upgrade, and maintenance of on-site sewage disposal systems and appropriate means for the transport and disposal of septage.” (emphasis added) Title 5 goes on to state, “In general, full compliance with the provisions of 310 CMR 15.000 is presumed by the Department to be protective of the public health, safety, welfare and the environment. Specific site or design conditions, however, may require that additional criteria be met in order to achieve the purpose or intent of 310 CMR 15.000.” Furthermore, Title 5 states, “Local approving authorities may enact more stringent regulations to protect public health, safety, welfare and the environment only in accordance with M.G.L. c. 111, § 31 and M.G.L. c. 21A, § 13.”

Below are examples where other municipalities Board’s of Health have enacted regulations for environmental purposes:

- Mashpee Board of Health issued “Regulation to Protect Water Quality in the Town of Mashpee for All Properties” acting under the authority of Chapter 111, Section 31 and Chapter 21A, Section 13 of the Massachusetts General Laws and under Title 1 and Title 5 of the State Environmental Code (310 CMR 11.00 and 15.00). The regulation was promulgated in an effort to decrease the amount of nitrogen contribution from septic systems. It requires all on-site septic systems with a design flow greater than 600 gallons per day to achieve no greater than 10 mg/l total nitrogen in the effluent.
- Chatham Board of Health issued a “Nitrogen Loading Regulation” acting under the authority of Chapter 111, Section 31 of the Massachusetts General Laws. The regulations generally provide that no disposal system construction permit shall be issued by the Board of Health unless the proposed system is designed to receive or shall receive 440 gallons per day or less per 40,000 square feet of lot area or ratio thereof. It also requires that on-site systems for single family dwellings be designed for the actual number of bedrooms present and systems designed for less than 3 bedrooms shall cause the property to be deed restricted to the actual numbers of bedrooms present.
- Orleans Board of Health issued “Nutrient Management Regulations” under the authority of Chapter 111, Section 31 of the Massachusetts General Laws. The regulations generally provide that no disposal system construction permit shall be issued by the Board of Health unless the proposed system is designed to receive or shall receive 440 gallons per day or less per 40,000 square feet of lot area or ratio thereof.