

MEMORANDUM

TO: Cape Elizabeth Planning Board
FROM: Maureen O'Meara, Town Planner
DATE: May 7, 2013
SUBJECT: Normal High Water Line Shoreland Zoning Amendments

Introduction

The Town Council has referred to the Planning Board a request to amend the Shoreland Zoning definitions used for the Normal High Water Line of Coastal Waters and the Coastal Wetland definitions.

Shoreland Zoning Regulations

Shoreland Zoning is a state mandated regulation of the following areas:

all land within two hundred fifty (250) feet, horizontal distance, of the:

- normal high-water line of any great pond and the Spurwink River
- upland edge of a coastal wetland, including all areas affected by tidal action such as cobble and sand beaches, mudflats, and rocky ledges;
- upland edge of a freshwater wetland

and all land areas within seventy-five (75) feet, horizontal distance, of the normal high-water line of a stream.

State shoreland zoning rules also apply to some RP1 wetlands and the 100-year floodplain.

The state requires that shoreland zoning be implemented by local ordinance. The Town of Cape Elizabeth has adopted Shoreland Zoning regulations that the State of Maine, Department of Environmental Protection, has determined is in compliance with state minimum standards. The most recent update to the shoreland zoning regulations was adopted in 2009.

Town and State Definitions

The state requires that locally adopted shoreland zoning meet or exceed state minimum standards, unless "special local circumstances" can be demonstrated to deviate from the state minimums. The Town of Cape Elizabeth has not adopted the state normal high water definition, but rather a definition that was part of a 1972 court case where the town prevailed. The current town definition is:

Normal High Water Line of Coastal Waters: That line on the shore of tidal waters which is the apparent extreme limit of the effect of the tides, i.e. the top of the bank, cliff or beach above high tide.

It has been the town's position that the town definition is more restrictive than the state definition and therefore it can be used in place of the state definition, found below:

Normal high-water line (non-tidal waters) - that line which is apparent from visible markings, changes in the character of soils due to prolonged action of the water or changes in vegetation, and which distinguishes between predominantly aquatic and predominantly terrestrial land. Areas contiguous with rivers and great ponds that support non-forested wetland vegetation and hydric soils and that are at the same or lower elevation as the water level of the river or great pond during the period of normal high-water are considered part of the river or great pond.

NOTE: Adjacent to tidal waters, setbacks are measured from the upland edge of the "coastal wetland."

Coastal wetland - all tidal and subtidal lands; all lands with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous low land that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes.

NOTE: All areas below the maximum spring tide level are coastal wetlands. These areas may consist of rocky ledges, sand and cobble beaches, mud flats, etc., in addition to salt marshes and salt meadows.

The State has a definition for non-tidal normal high water line and then supplements that definition with a "coastal wetland" definition to cobble together a definition of normal high water line for tidal areas.

Why amend the local definition?

The Code Enforcement Officer has recommended that the historical town definition be retired in favor of a version of the state definition. The town definition was preserved because it was upheld in a court decision in 1972 where a landowner challenged the denial of a permit.

More recently, the town definition has been the center of controversy, being one element in three current lawsuits. The former Code Enforcement Officer has interpreted the normal high water line location on a case-by-case basis. The "top of bank" phrase has often been a point of contention where the "top" may be far beyond existing residential development and a point not at the "top" has been designated as the normal high water line.

The current Code Enforcement Officer recommends a more predictable approach using the state definition. Use of the state definition also allows the town to benefit from the history and practice of using the standard state definition. Because so much of what can happen on the waterfront depends on where the normal high water line occurs, the location will never be completely without controversy. Nevertheless, a clearer and more widely applied definition should add predictability and consistency to determining the location of the normal high water line.

Draft Amendment for Planning Board Consideration

The amendment below deletes both normal high water line definitions and replaces them with one definition. A search of the Zoning Ordinance shows that, except for these two definitions, "normal high water line" is the only term used in the Zoning Ordinance. "Notes" have been incorporated into the definitions.

Coastal wetland: all tidal and subtidal lands; all lands with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous low land that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes. All areas below the maximum spring tide level are coastal wetlands. These areas may consist of rocky ledges, sand and cobble beaches, mud flats, etc., in addition to salt marshes and salt meadows.

~~Normal High Water Line of Coastal Waters: That line on the shore of tidal waters which is the apparent extreme limit of the effect of the tides, i.e. the top of the bank, cliff or beach above high tide.~~

Normal High Water Line of Inland Waters: That line which is apparent from visible markings, changes in the character of soils due to prolonged action of the water or changes in vegetation, and which distinguishes between predominantly aquatic and predominantly terrestrial land. Areas contiguous with rivers and great ponds that support non-forested wetland vegetation and hydric soils and that are at the same or lower elevation as the water level of the river or great pond during the period of normal high-water are considered part of the river or great pond. Adjacent to tidal waters, setbacks are measured from the upland edge of the coastal wetland, defined herein, on the shores and banks of non-tidal waters which marks normal high water, and which is apparent because of the contiguous different character of the soil or the vegetation due to the prolonged action of the water. Relative to vegetation, it is that line where the vegetation changes from predominantly terrestrial to predominantly aquatic vegetation. (By way of illustration, aquatic vegetation includes but is not limited to the following plants and plant groups—water lily,

~~pond-lily, pickerelweed, cattail, wild-rice, sedges, rushes and marsh
grasses, and terrestrial vegetation includes but is not limited to the
following plants and plant groups—upland grasses, aster, lady slipper,
wintergreen, partridge berry, sarsaparilla, pines, cedars, oaks, ashes,
alders, elms, and maples). In places where the shore or bank is of such
character that the normal high-water line cannot be easily determined
(rockslides, ledges, rapidly eroding or slumping banks) the normal high
water line shall be estimated from places where it can be determined by
the above method. Areas contiguous with rivers and great ponds that
support non-forested wetland vegetation and hydric soils and that are at
the same or lower elevation as the water level of the river or Great pond
during the period of normal high water are considered part of the river or
Great pond. (Effective October 15, 2009)~~

Next Steps

The Planning Board should discuss how they want to the normal high water line definition to function. Once there is general consensus, the Board can evaluate amendment language at a future workshop.