



# The Town of Fenwick Island

800 Coastal Highway, Fenwick Island, DE 19944-4409

302-539-3011 ~ 302-539-1305 fax

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## Board of Adjustment Hearing

Dwight Hurst  
501 Glenn Avenue  
June 29, 2022

### **Board of Adjustment Members Present:**

Marlene Quinn, Chair  
Liz Lear  
Ed Bishop  
Paul Wilson

### **Board of Adjustment Member Not Present:**

Robert Warburton

### **Also Present:**

Luke W. Mette, Town Solicitor  
Patricia J. Schuchman, Town Manager  
Erin Ellinger, Police Clerk/Code Enforcement  
Raelene Menominee, Town Administrator

The hearing began at 10:00 A.M. on Wednesday, June 29, 2022 with Marlene Quinn reading the official notice of the public hearing that appeared in newspapers and online. Town Solicitor Luke Mette requested that exhibits 1-13 and recently submitted 14a-14g be entered into evidence:

Exhibit #1 Notice of a Public Hearing  
Exhibit #2 List of Neighbors Notified by Registered Mail  
Exhibit #3 Copy of page Zoning Code 160-8B  
Exhibit #4 Copy of Memo from Pat Schuchman to Board of Adjustment  
Exhibit #5a & 5b Copy of Letter from Dwight Hurst requesting a variance  
Exhibit #5c Copy of check for the Board of Adjustments Hearing Fee  
Exhibit #6 Copy of Preliminary Clearance  
Exhibit #7a Copy of Building Permit Application  
Exhibit #7b Copy of Building Permit  
Exhibit #7c Copy of check for the Building Permit Fee  
Exhibit #8a Copy of Request for Authorization Form ..  
Exhibit #8b, 8c, 8d Copy of W.S.L.S Approved Plans  
Exhibit #8e DNREC Division of Water Statewide Activity Approval Conditions  
Exhibit #9a & 9b Copy of Sussex County Building Permit #BP-176239



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Exhibit #10 Aerial view of 501 Glenn Avenue

Exhibit #11 Photo taken 3-8-2022 showing unfinished dock

Exhibit #12 Photo taken 5-30-2022 showing finished dock

Exhibit #13 Photo taken 5-30-2022 showing finished dock being used

Exhibit #14a & 14b Copy of position statement from 501 Glenn Avenue Neighbors

Exhibit #14c Photo of neighborhood children using the lagoon

Exhibit #14d Photo of finished dock with boat attached at 501 Glenn Avenue

Exhibit #14e Diagram submitted by Greg Nowak, 21 Bayside Drive

Exhibit #14f Diagram submitted by Greg Nowak, 21 Bayside Drive

Exhibit #14g Copy of page Zoning Code 160-8B

Town Solicitor Mette stated the role of the Board of Adjustments is limited and can hear either an appeal of a decision or a request for a variance.

Town Solicitor Mette asked Erin Ellinger to submit testimony. Her position currently with the Town of Fenwick Island is Police Clerk and Code Enforcement. In January of 2022 she took on some additional Code Enforcement duties. She stated she worked for the Town from 2018-2019 and came back in 2021 for the Police Clerk position. Town Solicitor Mette asked if Erin was familiar with construction of a dock at 501 Glenn Avenue and if it is within the corporate limits of Fenwick Island. Erin replied yes to both. He then asked her if the width of the lagoon is less than 60 feet at 501 Glenn Avenue. Erin replied that it was less. Town Solicitor Mette asked if she had issued a building permit to construct a dock at 501 Glenn Avenue. He also asked if the construction of a dock is permitted under Town Code at 501 Glenn Avenue if the dock projects beyond the bulkhead line. Erin stated it was not. Town Solicitor Mette asked if she was able to issue a building permit in violation of Town Code and Erin replied no.

Town Solicitor Mette asked Erin what the document was listed as Exhibit 6. She replied it was the preliminary clearance. He then asked what the document was dated, to which she replied February 25, 2022. Town Solicitor Mette asked what the preliminary clearance was issued for, and Erin replied to repair and replace a 40' bulkhead.

Town Solicitor Mette asked Erin what document was listed as Exhibit 7a. She replied it was Town of Fenwick Island Building Permit to repair and replace a 40' bulkhead. He then asked who submitted it to which she replied Sussex Marine on behalf of Dwight Hurst of 501 Glenn Avenue. Town Solicitor Mette asked what the scope of the permit was, and Erin replied to repair and replace a 40' bulkhead. He then asked would construction of a 22'x9' triangle dock be in violation of the Town Code and Erin replied yes. He then asked if she issued a permit to Mr. Hurst/ Sussex Marine Construction to build a dock at 501 Glenn Avenue and she replied no.

Town Solicitor Mette asked Town Manager Pat Schuchman to submit testimony. He asked what her title was with the Town of Fenwick Island. She said currently she was the Town



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Manager and had been with the Town for 25 years. As Town Manager, she enforces policy and procedures enacted by the Town Council and manages Town employees. Pat stated she oversees Erin, and that Erin is being trained to replace the Building Official. She also said that she had been the Building Official for the Town of Fenwick Island for 22 years where she issued building permits, reviewed plans for construction and issued permits.

Town Solicitor Mette asked Pat if she was familiar with the issue regarding construction of a dock at 501 Glenn Avenue. She replied yes. Town Solicitor Mette then asked if the lagoon or canal is more or less than 60 feet in width at that location. Pat replied it was less than 60 feet. He then asked if the Town issued a building permit to Mr. Hurst or Sussex Marine to construct a 22'x9' triangle dock at 501 Glenn Avenue. Pat said no, a permit was issued to repair and replace a 40' bulkhead. Town Solicitor Mette then asked if construction of a 22'/9' dock was permitted under Town Code at 501 Glenn Avenue. Pat replied that it was not. He then asked if Pat believed her or Ms. Ellinger has the authority to issue building permits in violation of the Code. Pat replied neither would have.

Town Solicitor Mette asked Pat when she first became aware of the construction of the dock. Pat replied on March 8, 2022, the Public Works Department came to her and asked if she knew about a dock being built to which Pat did not. She said she then went to 501 Glenn Avenue, saw a dock being built and told John Staehle of Sussex Marine Construction the job was shut down. Town Solicitor Mette asked how the job was shut down. Pat replied that a stop work order was now in place and that Mr. Hurst needed to call Pat that day, which he did. When Mr. Hurst called Pat, she told him the dock was in violation of Town Code and there was no permit issued for the dock and that he was able to come before the Board of Adjustments for a variance. Town Solicitor Mette asked who specifically told her the dock was being constructed. Pat replied John Farrace of the Public Works Department. Pat said that John Farrace accompanied her back to the job site. Town Solicitor Mette asked Pat if she took the photograph of the unfinished dock dated March 8, 2022 (Exhibit 11). She replied that John Farrace had taken the photograph. He then asked if she felt it was a fair and accurate representation of what she observed on that day. Pat replied it was. Town Solicitor Mette asked if the picture showed the dock not quite completed and Pat said there was still some work to be completed. He then asked if Mr. Staehle or Mr. Hurst complied with the verbal stop order you issued on March 8, 2022. Pat replied the stop work order was not complied with. Town Solicitor Mette then asked if she has had an opportunity to observe the dock since March 8<sup>th</sup>. Pat replied yes and that the dock has been completed now.

Mr. Dwight Hurst was sworn-in by Chair Marlene Quinn. He stated that the only way to get to this meeting was to ask for an appeal through the Board of Adjustments. Mr. Hurst felt the only way to look at this situation was to consider it both an appeal and a request for a variance. He believed that he was coming before the Board with a "non-typical" issue. He stated



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that permits were issued, construction was completed and then a stop work order was issued on March 8<sup>th</sup> because it did not comply with Town Code. Mr. Hurst stated that walking through the permit process was as follows: DNREC permit issued (Exhibit 8a) showed a description of permit given, a bulkhead with a triangle dock. He also said that a description was given on Exhibit 8b. Mr. Hurst said that his contractor John received this permit and gave the packet of information to the Town of Fenwick Island. He said a preliminary clearance was discussed and issued the next day. Mr. Hurst stated there was no reference to non-approval of the dock and a permit was issued. He said the next step was approval from Sussex County with Exhibit 9a showing the description of the bulkhead, 22'/9' triangle dock and all those items along with the DNREC permit were submitted again and received on February 25, 2022. Mr. Hurst stated a final building permit was issued on March 1, 2022 (Exhibit 7a). On that building permit the boxes were checked for building plans provided from Sussex County and DNREC.

Mr. Hurst stated the only way to have a Board of Adjustments was to pay a fee of \$1200, but he does not believe it was an error on their part. He said a process was followed and a permit was issued. Mr. Hurst then stated that construction commenced, and a stop work order was issued on March 8<sup>th</sup>. He said Exhibit 11 was eight boards short of completion and he said that he finished the dock himself due to a safety hazard. Mr. Hurst believes that an implied permit was given by the Town of Fenwick Island and a dock was built. He stated that he is not paying for it and his contractor is not paying for it. Mr. Hurst stated that he believes the Town has a great errors and omissions policy on their insurance. He said that he was sorry it happened, but it was not intentional to come over on anything. Mr. Hurst again stated the procedure that followed, submit for a permit, receive a permit, and begin building. He stated that Exhibit 8b shows the usability of the bulkhead which is restricted due to riprap. He stated there is a lot of land use and short bulkhead for use. Mr. Hurst believes that if he went through a typical variance process there would have been a good outcome.

Board Member Ed Bishop asked on Exhibit 7a, the Town of Fenwick Island Application for Building Permit, why it only says to repair and replace a bulkhead. He then asked why would it not have said to build and construct a dock. He then stated that this is what the Town issued a permit for. Board Member Paul Wilson asked if that was Mr. Hurst's signature at the bottom of 7a. Mr. Hurst replied no.

At this point Board Member Liz Lear had a question for Mr. John Staehle of Sussex Marine Construction. She asked if he had done work in Fenwick Island before. He stated that he has been in business for 19 years and that every canal is different along with different rules for different Towns. Mr. Staehle stated that the fact that the dock was not written in was a mistake of the Town and not his. When he took the plans to Sussex County, they wrote all the information in. He said that he brought the State approval to the Town to get the preliminary approval. Mr. Staehle state that he then took the preliminary approval to the County to get their approval which was brought back to the Town to get final approval. He also stated that the



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permit fee included the dock and not just the bulkhead. Mr. Staehle stated that the process was done correctly and he did not try to get something approved that should not have been. He stated that everything was approved multiple times by different agencies and that it was not a typical dock.

Chair Marlene Quinn stated that Exhibit 7b states to only repair and replace a 40' bulkhead. She then asked Mr. Staehle that he believes those approvals are implied and do not have to be on the permit. He said he agreed because he turned in everything he is supposed to, approvals and permits, etc. Mr. Staehle stated that they would not have put the dock in if they didn't believe it was going to be approved. Board Member Ed Bishop asked if he has been doing work in Fenwick Island for 19 years than why did he not follow the process laid out in Section 160-8B(4)(a) Which says prior to submitting to the State, DNREC or anywhere else, documents need to be submitted to Fenwick for preliminary review and approval. Mr. Staehle stated that he has never done that before, and Towns always need an approval permit. He stated that every other Town needs a State permit, County permit and then Town approval.

Town Solicitor Mette asked Mr. Hurst if the letter he submitted to Pat, Exhibit 5a and 5b, was signed by him at the bottom. He replied yes.

Town Solicitor Mette then asked if in the letter it stated, "this letter dated March 31<sup>st</sup> shall serve as my official appeal". Mr. Hurst stated that was correct. Town Solicitor Mette then asked about the third paragraph down if it correctly said, "the canal behind my home is 60 feet or less". Mr. Hurst replied yes.

Town Solicitor Mette asked Mr. Hurst what the date of the preliminary clearance was. Mr. Hurst replied February 25, 2022. Town Solicitor Mette then asked what the date of the building permit application was. Mr. Hurst replied March 1, 2022. Town Solicitor Mette then asked what was the date of the building permit, Exhibit 7b. Mr. Hurst replied March 1, 2022.

Town Solicitor Mette then asked Mr. Hurst if he recognized either of the signatures on Exhibit 8a, the Request for Authorization Form for the State of Delaware Statewide Activity Approval for Construction in Tidal Artificial Lagoon Systems. Mr. Hurst said he recognized the top signature dated July 26, 2021. Town Solicitor Mette asked what the date of the contractor's signature. Mr. Hurst replied August 17, 2021.

Town Solicitor Mette then asked on Exhibit 8e if Mr. Hurst could see condition #5 under SAA conditions. "The issuance of this Permit does not constitute approval for any activities that may be required by any other local, state or federal government agency". Mr. Hurst replied that was correct.





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Town Solicitor Mette then asked Mr. Hurst if he completed the dock even though Pat had issued a stop work order. Mr. Hurst replied yes. Town Solicitor Mette then asked if Mr. Hurst had been using the dock including parking boats there. Mr. Hurst replied that on the date the photograph was taken (Exhibit 13) his boat was pulled up to the dock and parked there for a 1 hour and 40 minute time period.

Town Solicitor Mette then asked if Mr. Hurst was contending to the Board of Adjustments that the document he submitted was the form of a variance. Mr. Hurst stated that it was not a complete outline for a variance but he believed that the letter submitted to Pat states the reasons for a variance.

Town Solicitor Mette then asked if was his position based on his testimony that Town of Fenwick Island had a permanent duty to expressly write in that a dock was not permitted. Mr. Hurst replied that on the Town of Fenwick Island Application for Building Permit it says Sussex County Building Permit along with a permit number and plans received. He said the application also stated that DNREC permit and plans were received. Mr. Hurst said that he has never received a permit for something that was in the plans but not approved by Town Code. He also said plans were clearly given to the Town of Fenwick Island.

Town Solicitor Mette asked Mr. Hurst if he had read the Town Code. Mr. Hurst replied he had after the stop work order was given. Town Solicitor Mette then stated that they both had to have read the provision in The Town Code Section 160-8B(4)(a) paragraph 4, "prior to submitting... the application shall be accompanied with a letter stating there is preliminary clearance." He then stated that the preliminary clearance letter was not included in the application to DNREC because the preliminary clearance was issued in 2022 and the application was submitted in 2021. Mr. Hurst asked who was enforcing these procedures and said he assumed that the Acting Building Official would be the first to alert the contractor if there is something on the plans that has not been approved. Mr. Hurst said that it is called an implied permit. Town Solicitor Mette asked where implied permits were in the Town of Fenwick Island Code. Mr. Hurst said he did not have an answer for him.

Town Solicitor Mette then asked Mr. Hurst if he was blaming his contractor for the fact that the building permit application was not designed correctly. Mr. Hurst replied no.

Town Solicitor Mette asked Mr. Hurst if the building permit only refers to a bulkhead and not a dock. Mr. Hurst replied yes.

Chair Marlene Quinn said she was interested in hearing more about the rationale on continuing work after the stop work order. Mr. Hurst replied it was a safety precaution and cited OSHA regulations for job sites.

### **Public Participation**



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**Greg Nowak, 21 Bayside Drive-** Mr. Nowak read a neighbor statement into record. He explained Exhibit 14e showed two boats that are legal docked along with the boat docked illegally. Exhibit 14f shows what 9 feet out looks like from everyone's property.

**Karen Sambuco, 30 Bayside Drive-** Ms. Sambuco stated she has been in Fenwick Island for 54 years. She is dismayed at finding out a dock was completed after a stop work order was issued.

**Craig Aiken, 504 Glenn Avenue-** Mr. Aiken said there has been some suggestion that a variance would be approved. He asked if there was any precedence in Fenwick Island where a dock has been approved for less than 60 feet in width.

Town Solicitor Mette stated that the role of the Board of Adjustments is clear. The Board should make their decision based on the Town Code and not threats of what could incur. Title 22 Section 327, Board of Adjustments may hear and decided appeals. This is an appeal to the Town of Fenwick Island Code. The Town of Fenwick Island does not have a code for special exceptions.

Town Solicitor Mette stated testimony of the neighbors is directly important if determined this was a variance matter. Nothing in the letter that refers to a variance, only refers to an appeal. He also stated the Town did not issue a permit to build a dock, the permit only refers to repair and replacing a bulkhead. Town Solicitor Mette stated that whatever the County and DNREC permits have said are absolutely irrelevant because the processes have not been followed and was inverted by the applicant. He then stated that he would encourage a reading from the quick check if the Board is looking at it from a variance perspective, which is not a permitted use from this location at all. Town Solicitor Mette then state that there is no basis in reversing the decision to no basis to grant the variance.

Attorney Nick Kondraschow stated the first issue for the board is they needed to decide if Mr. Hurst was here for a variance or appealing the decision of the Town Official.

Chair Marlene Quinn asked Mr. Hurst directly whether he was looking to appeal or request for a variance, Mr. Hurst stated he was looking to appeal because a permit was issued. Mr. Kondraschow said based on that the Board would look to the language of the ordinance. He read the ordinance chapter 160-8B(1).

Board member Ed Bishop, voted no. He stated it was clear that the process was not followed. Board member Bishop said Mr. Hurst was issued a permit for a bulkhead and approval was never given for a dock.



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Chair Marlene Quinn, voted no. She believes the Town of Fenwick Island issues permits and not implied permits. She said there are codes for building docks and there are valid reasons this dock does not fit into the code.

Board member Liz Lear, voted no. She stated that a dock is not permitted in the Town Code, and it is very clear had anyone read it.

Board member Paul Wilson, voted no. He stated the process was not followed. The dock is not permitted, and that Town Officials did everything they were supposed to do.

The meeting was adjourned at 11:29am by Chair Marlene Quinn.