

# For Discussion

## Summary Conclusions Regarding Code Requirements for Elevating Structures in a Flood Plain

- For conforming properties, the ability to elevate the structure to FEMA requirements appears to be unrestricted but subject nevertheless in most cases to the height limit in Table 2 Bulk Requirements.
  - Properties generally may be elevated in the same configuration or rebuilt in any conforming configuration.
  - For substantially damaged properties (50% or more of value) to be elevated in same configuration, height limit is waived for structures built before adoption of Flood Insurance Rate Maps (FIRMs).
  - Owners of less than substantially damaged or undamaged properties who wish to voluntarily elevate their property to FEMA requirements in the same configuration but doing so would exceed the Table 2 height limit, may seek a height limit variance and if denied may seek relief from the FEMA requirements.
- For nonconforming properties, properties generally may be elevated in the same configuration again subject in most cases to the height limit in Table 2.
  - If property is elevated in a different configuration, it must conform to all FEMA and bulk requirements.
  - For substantially damaged properties (50% or more of value) to be elevated in same configuration, height limit is waived for structures built before adoption of Flood Insurance Rate Maps (FIRMs).
  - Owners of less than substantially damaged or undamaged properties who wish to voluntarily elevate their property to FEMA requirements in the same configuration but doing so would exceed the Table 2 height limit, may seek a height limit variance and if denied may seek relief from the FEMA requirements.
- Request legal review of interpretations and recommended changes presented in attached table.
  - Particular attention needed for interpretation of Section 101-34 and recommendation that this section be eliminated.

## Elevating Buildings in a Flood Hazard Area

### Questions for Discussion

1. Structures built prior to the Town's agreement to become part of the FEMA program and the adoption of flood insurance rate maps (FIRM) are not subject to the height limit specified in Table 2 of the town code if the structure is substantially damaged, thus must be elevated to FEMA standards, and is rebuilt in the same configuration. (Section 185-46) Should this waiver be retained? Should it be extended to post-FIRM properties?

Recommendation: Retain height limit waiver for pre-FIRM structures. We have no data on how many properties are affected or reasoning for establishing the waiver in the town code. Source of waiver may be ordinance 682, dated July 10, 2010 or ordinance 718, dated May 9, 2015.

2. If an owner wishes to elevate a structure (not substantially damaged) in the same configuration to avoid future flood damage, should the owner be permitted to exceed the FEMA minimum standards provided that the elevated structure does not exceed the town height limit? Structures that encroach in any required setback are currently prohibited from elevating the structure beyond the FEMA minimum standard (Section 101-27 A3). Should this restriction remain or be extended to all non-conforming properties? Should there be any restrictions on conforming properties other than the height limit in Table 2.

Recommendation: For conforming properties, the height limit should be the only restriction. All non-conforming properties should be limited to FEMA plus freeboard levels when elevated.

3. If an owner wishes to elevate a structure in the same configuration (not substantially damaged) to avoid future flood damage, but meeting FEMA minimum standards would exceed the Table 2 height limit, should the owner be able to apply to the Board of Adjustment for a height variance? Should the owner be able to seek relief from the FEMA standards? Should the availability of a BOA process be different for conforming structures and non-conforming structures?

Recommendation: The BOA process for obtaining a height variance should be available for both conforming and non-conforming properties. The BOA process for obtaining relief from FEMA requirements should be deleted.

4. Is elevating a non-conforming structure considered an extension or alteration as referred to in Section 185-60? Should it be?

Recommendation: Make clear that elevating structure is an alteration and should be permitted if doing so does not increase the degree of non-conformity.

5. Some language in the town code distinguishes structures that do not conform to any setback from those that conform to some but not others. Should this distinction be retained?

Recommendation: Drop distinction and treat all non-conforming properties in the same way. Permit elevation of existing structure if there is no increase in the degree of non-conformity.

## Code Requirements for Structures in a Flood Plain

Type of Structure	Current Code	Comments/Possible Change
<b>Conforming</b>		
Pre-FIRM, less than Substantial Damage	May be rebuilt to any conforming configuration and elevated to FEMA minimum plus freeboard. Height limited to 32' from BFE plus freeboard (per Table 2). If elevating and rebuilding to same configuration but height would exceed limit, can apply to BOA for variance under Article X. If BOA denies height variance, can apply for relief from FEMA base elevation requirements under Section 101-34.	
Post-FIRM, less than Substantial Damage	May be rebuilt to any conforming configuration and elevated to FEMA minimum plus freeboard. Height limited to 32' from BFE plus freeboard (per Table 2). If elevating and rebuilding to same configuration but height would exceed limit, can apply to BOA for variance under Article X. If BOA denies height variance, can apply for relief from FEMA base elevation requirements under Section 101-134.	Need to confirm that BOA is available in both situations.
Pre-FIRM, Substantially Damaged	Must elevate to FEMA minimum plus freeboard and can rebuild to any conforming configuration. Height limit of 32' from BFE plus freeboard is waived (per 185-46) if rebuilt to same configuration.	Recommend the elimination of the variance provisions of Section 101-34. Section 101-34 establishes an extremely high standard in order to grant a variance from the base elevation requirements. On its face, the standard of Section 101-34 appears much more demanding than that of granting a variance from the Table 2 height limitation in the Zoning Code. Since the decision-making body in both the application for a building height limitation variance and that for a flood plain base elevation requirement variance is the same, i.e., the BOA, we surmise that it would be extremely unlikely and most likely never that the BOA would deny the former and then grant the latter application.
Post-FIRM, Substantially Damaged	Must elevate to FEMA minimum and can rebuild to any conforming configuration. Height limited to 32' from BFE plus freeboard (per Table 2). If rebuilding to same configuration would exceed height limit, can apply for variance from BOA per 101-27 A4. If BOA denies height variance, can apply for relief from FEMA base elevation requirement under Sections 101-27-A4 b2 and 101-134.	The BOA is the creature of Chapter 3 of the of the DE Code that addresses Municipalities Zoning Regulations; in turn, the Town BOA is the creature of Chapter 185 of the Town Code that deals with zoning matters. The power of the BOA to act on Chapter 101 matters that lay outside of zoning issues could possibly be challenged.

Pre-FIRM, Undamaged,  
Voluntary

May elevate, or rebuild to any conforming configuration and elevate, to FEMA minimum plus freeboard. Height limited to 32' from BFE plus freeboard (per Table 2). If elevating in same configuration and meeting FEMA requirements would exceed height limit, can apply to BOA for height variance under Article X. If BOA denies height variance, can apply for relief from FEMA base elevation requirements under Section 101-34.

If the previous substantive reasoning were not sufficient to obviate the need for Section 101-34, we believe that the possibility of legal challenges to the ability and/or power of the BOA to adjudicate requests for variances to the requirements of Chapter 101, should tip the scale decidedly in favor of amending Chapter 101 of the Town Code to eliminate the variance provisions of Section 101-34.

Post-FIRM,  
Undamaged, Voluntary

May elevate, or rebuild to any conforming configuration and elevate, to FEMA minimum plus freeboard. Height limited to 32' from BFE plus freeboard (per Table 2). If elevating in same configuration and meeting FEMA requirements would exceed height limit, can apply to BOA for height variance under Article X. If BOA denies height variance, can apply for relief from FEMA base elevation requirements under Section 101-34.

**Non-Conforming**

Pre-FIRM, less than  
Substantial Damage

May be rebuilt to same configuration (per 185-59). May be elevated to FEMA minimum plus freeboard (per 101-27 A(3) and 185-60 B). Height limited to 32' from BFE plus freeboard (per Table 2). If elevating and rebuilding to same configuration but height would exceed limit, can apply to BOA for variance under Article X. If BOA denies height variance, can apply for relief from FEMA base elevation requirements under Section 101-134.

Clarify interpretation. What is effect of 185-60B -- is elevation an alteration or extension? If it is, then elevation would not increase degree of nonconformity and would be permissible. If not, then no other apparent provision would prohibit elevation. Need to clean up language in 185-60B -- "A building nonconforming only as to height, area, or bulk requirements." Height and area are bulk requirements. Should Section 101-27(A)(3) be amended to prevent owner from seeking variance from BOA if meeting FEMA minimum plus freeboard would exceed Table 2 height limitation?

Post-FIRM, less than  
Substantial Damage

May be rebuilt to same configuration (per 185-59). May be elevated to FEMA minimum plus freeboard (per 101-27 A(3) and 185-60 B). Height limited to 32' from BFE plus freeboard (per Table 2). If elevating and rebuilding to same configuration but height would exceed limit, can apply to BOA for variance under Article X. If BOA denies height variance, can apply for relief from FEMA base elevation requirements under Section 101-134.

Pre-FIRM, Substantially Damaged	Must elevate to FEMA minimum plus freeboard and build to same configuration (per 185-59 A and 185-46). Height limit of 32' from BFE plus freeboard is waived (per 185-46)	Amend 185-59 A as follows: Except that in the process of repairing or reconstructing a non-conforming residential-use structure located in a flood-prone area (e.g., a FEMA-designated VE, AE, or AO flood zone) that does not conform to the required setbacks in any respect and does not meet Town building elevation standards and that has suffered substantial damage, said structure shall be elevated to the relevant minimum building-elevation requirement as per § 185-60B subsection 2 of this chapter. Strike 185-59 A (3).
Post-FIRM Substantially Damaged	Must elevate to FEMA minimum and build to same configuration. Height limited to 32' from BFE plus freeboard (per Table 2). If elevating and rebuilding to same configuration but height would exceed limit, can apply to BOA for variance under Article X. If BOA denies height variance, can apply for relief from FEMA base elevation requirements under Section 101-134.	Strike or make more specific "essentially similar configuration" language in 185-59 and "substantially similar configuration" language in 185-46.
Pre-FIRM, Undamaged, Voluntary	May elevate in same configuration to FEMA minimum plus freeboard (per 185-60 B). Height limited to 32' from BFE plus freeboard (per Table 2). If meeting FEMA requirements would exceed height limit, can apply to BOA for height variance. If BOA denies height variance, can also apply for relief from FEMA requirements under Section 101-34.	Clarify interpretation. What is effect of 185-60B -- is elevation an extension or expansion?
Post-FIRM, Undamaged, Voluntary	May elevate in same configuration to FEMA minimum plus freeboard (per 185-60 B). Height limited to 32' from BFE plus freeboard (per Table 2). If meeting FEMA requirements would exceed height limit, can apply to BOA for height variance. If BOA denies height variance, can also apply for relief from FEMA requirements under Section 101-34.	Clarify interpretation. What is effect of 185-60B -- is elevation an extension or expansion?