

DFW-2

Calculation of Average Setback

I. Summary:

The intent of this guidance is to establish consistent application of the average setback provision in Part 661.6.a.1. The provision states “where numerous and substantially all structures which are (i) of the type proposed by the applicant, (ii) lawfully existing on Aug 20, 1977, (iii) within 500’ of the subject property, are located closer to the subject tidal wetland than the minimum setback required by this paragraph, placement of a structure as close as the average setback of these existing structures from the subject tidal wetland shall fulfill the requirements of this paragraph.”

II. Guidance:

The following is provided in order to clarify terms in the regulation and the procedure.

A. The term “numerous” measures whether a large number, at least 50%, of the lots within 500 feet of the subject property had similar structures in place on August 20, 1977; but in no case is “numerous” less than five such structures. By using the term “numerous” the regulation intended relief only where an area was already fairly well-developed when Article 25 was enacted. Where a few structures existed, but many lots were undeveloped, this analysis is not appropriate. For this reason the word “numerous” takes the number of lots into consideration. However, when, due to large lot size, this formulation could result in a very small number of structures (i.e., less than five) being deemed “numerous”, this guidance also requires a minimum of 5 similar pre-existing structures before this analysis can be applied.

B. The term “substantially all” requires that nearly all (80%) of the pre-existing similar structures be located within 75 feet (30 feet in NYC) of the wetland boundary, before the proposed project will be subject to the average setback calculation.

C. “...of the type proposed by the Applicant...” The average setback must be developed by measuring the setbacks of like structures. The setback of a proposed single family dwelling must be compared with the setback of existing single family dwellings, not including any attached or unattached accessory structures (i.e. decks, patios, garages, pools, etc). Likewise, the setback of proposed accessory structures must be compared with other similar accessory structures. This comparison is made irrespective of the size of the proposed or existing structures. Issues related to the coverage of a given structure must be addressed through 661.6.a.4.

D. "...the subject tidal wetland..." The average setback must be developed utilizing setbacks from the wetland that abuts the subject property.

III. Purpose and Background:

The average setback provision in 661.6.a.1 is not being interpreted and applied consistently. This guidance is intended to provide a standardized process to be followed when calculating the average setback.

IV. Responsibility:

It is the responsibility of the Regional Marine Habitat Protection Unit and the Division of Environmental Permits to implement this guidance and for the DFWMR Marine Habitat Protection section to maintain the document.

V. Procedures:

The Regional Marine Habitat Protection Units will evaluate and implement the guidance. Division of Environmental Permits will make any Uniform Procedure Act determination that is required through the use of this guidance.

AVERAGE SETBACK CALCULATION

Applicants requesting consideration of this calculation must include a survey or aerial photo dated prior to 8/20/77.

The 500' radius must be clearly identified on the survey or photo. The scale of the survey or photo must be provided, and must list and describe all lots, including vacant lots, involved in this calculation (i.e. describe the lots and structures in accordance with steps 2 through 7 directly below).

1. Measure 500' radius outward from all edges of the subject property and identify the properties/lots within that radius that have any part of the respective property that abut the subject tidal wetland, in part or in whole, within this demarcation. Land locked lots are not included in this calculation. This includes all lots, whether with or without structures. **See Figure 1.**
 - a. There are 19 lots within 500' of the subject property but only 11 of the lots abut the subject tidal wetland. One lot is a public road (right of way) and does not count and lots south of the road abut a different wetland or waterbody.
2. Locate all structures existing within this demarcation.

6 of the 11 properties that qualify have structures within the 500' demarcation.
3. Identify all structures that are "of the type proposed."

6 of these structures are “of the type proposed.”

4. Identify all structures built before the effective date of part 661 (8/20/77) utilizing the appropriate tidal wetland map or other information showing structures predating the law for that area.

5 of the 6 structures were built before 8/20/77.

5. Identify all that are less than 75’ from the subject wetland (30’ in New York City).

5 of the 6 structures are less than 75’ from the subject tidal wetland (see note on Figure).

6. **Numerous:** Is the number of structures identified in paragraph 4 greater than or equal to half (50 %) of the properties/lots that abut a tidal wetland identified in paragraph 1 and equal to 5 in number or greater? If not, the proposal does not satisfy the “numerous” requirement.

If there are numerous structures identified in paragraph 4, move on to paragraph 7 and calculate substantially all. Divide the number of structures identified in paragraph 4 by the number of lots from paragraph 1. If this amount is greater than or equal to 50 % and greater than 5 structures of the type proposed and built before the effective date of the law, the proposal meets the requirement that such structures are “numerous”. There are 11 lots and 5 structures of the type proposed and built prior to 8/20/77 $(5/10) = .45$ or 45%, thus the proposal does not satisfy the “numerous” requirement. You would not move on to the next step and calculate substantially all. However, for purposes of this guidance, substantially all is calculated.

7. **Substantially all:** Divide the number of structures identified in paragraph 5 by the number of structures identified in paragraph 4. If this number is less than 80% then the proposal does not meet the requirement that “substantially all” such structures are within 75 feet of the wetland boundary. Five of the 6 structures were built before the effective date of the law, are similar and are less than 75’, so $5/6 = .83$ or 83%.

This cases does meet the substantially all requirement but does not meet the numerous requirement, so the average setback rule would **not apply . You need to meet both criteria for the rule to apply.**

Figure 1. Average Setback Calculation Diagram

