

**TOWN OF KITTERY
PLANNING BOARD MEETING**

APPROVED
Thursday, January 26, 2006
Council Chambers

Meeting called to order at: 6:10 pm

Present: Ernest Evancic, Doug Muir, Megan Kline, Chairman White, Scott Mangiafico, Janet Gagner

Also Present: Planner Noel, Earldean Wells, Fire Chief O'Brien, Town Manager Carter

1. Roll Call

Roll call noted.

2. Public Comment on Non-Agenda Matters

Rich Balano of 3 Expand Drive introduces himself. His understanding is that the public hearing on number 6 is closed, but he has significant information that he would like to present to the Board. He handed it out to the Board already.

Chairman White has indicated to one other party who called and said he wanted to write a letter that if he got the copies in, we would look at it ourselves. As far as public testimony, we are closed to that tonight. We will take the letter and Chairman White will discuss with the Board whether to reopen the hearing for public comment.

Milton Hall, Chairman of the KPA, has a couple considerations on the working group that he wishes to discuss. After the last joint working group we had, something appeared in the newspaper referring back to the Briers. Then at the last KPA meeting, the KPA got something from the Spruce Creek Association. He wanted to address a few of his concerns about the working group. It was agreed that the Planner and CEO could look at the KPA applications first. Nine of ten piers have no land use issues. As a result, this takes unnecessary time from the Planner and CEO. The first meeting of the working group had nothing to do with what was wanted by the majority, only what was wanted by a few. The other towns are run under different statutes than those referenced to the KPA. If you are going to make comparisons, you should use Portland, and you can get their rules on the web. The other issue is the co-chair of the working group. At the time that Mr. Ledgett was put on the KPB, he was on the Spruce Creek Association and was suing the Town of Kittery. Mr. Ledgett is in conflict with the Briers and anything having to do with Spruce Creek because of his wife leading the Spruce Creek Association. He feels the KPB should have a different person representing it for the workshop. The KPA would like to go forward with the definitions it has been working on.

Chairman White saw no other hands for public comment, so we will close the public comment portion. He does not know if anyone else wants to respond to Mr. Hall.

No one responds.

Chairman White sees the letter from Chairman Hall going to the large group of all three bodies that presided over the working group, rather than to just the Planning board. It looks like Mr. Hall has copied the appropriate folks in Town. It is hard to render any judgment on the concerns raised by Mr. Hall other than to say that when we meet again on February 15, we will have had two meetings with the working group, and we will be able to gauge how it is going. If you see someone as having an ax to grind, you can bring it forward at that time.

No one else wishes to speak on this.

3. Kittery Foreside Design Committee: Welcome and introductions of candidates for the design review committee

Mr. Barter is here, but there are more coming.

Chairman White says that the Town Council has told us to deal with this. We could move item 3 to a little later in the meeting when more of the committee is here. He sees only two here now. He is sure that everyone has looked at their qualifications. He does not think it will take long to act on this item, but they might have some questions or we might have some questions.

4. Public Hearing: Oest Associates, Inc., for the Town of Kittery. Applicant is requesting review/approval for a new fire station to be constructed at 3 Gorges Road, Map 13, Lots 5-13, 5-14, zoned C-3.

A. Public Comment

Chairman White introduces the application. He says they have to do a presentation.

Town Manager Carter says that he is here to introduce this project. It is a Town project voted by the citizens of the community. Chief O'Brien will be making the presentation this evening. This is the second project to go through peer review. The findings have been made known to the Planning Board. We will hear talk of the other project; the other fire station is ready to roll. The community has rolled forward with a construction management program so that we are ready for construction of both fire stations.

Chief O'Brien says that it is his pleasure to be here. He is going to make this as quick as possible. They worked very hard on this project to complete all the requirements that the Town has in place. His engineers from Oest have been very good and have worked through every issue as it has come up. This has been designed around parameters that he thinks the Town would be proud of. They have asked for a couple waivers. They are ready to address these issues if the Board believes it to be necessary. They got approval from Ken Wood, York County Soils Conservation Service (YCSCS), who recommends no changes. He will quickly turn it over to the public and get their say on it.

Chairman White asks if there will be a presentation from the engineers involved in the project.

Fire Chief O'Brien says no, that they will go on the presentation as done in writing and will answer any questions the Board may have.

Chairman White asks if anyone is here to make any comments on this project. Hearing none, he closes the public comment portion and proceeds to Board deliberation on the materials

presented.

B. Board Deliberation

Chairman White finds the CMA review sheet to be very helpful. It goes through our ordinance and picks out any items of interest.

Fire Chief O'Brien says that he has seen the memorandum that states all the issues that they had concerns with.

Ms. Kline says we just got it tonight.

Chairman White thinks that as long as the memo is part of the record, there is no need for notes on the plan for each of these items.

Mr. Ledgett says to go through it first to make sure.

Chairman White asks about a question on the plantings.

Ms. Kline asks for the clearing limits. She asks if it is the dotted line, but that cant' be it.

Steve Harding from Oest Associates has just put a new C-3 up.

Chairman White asks if it is a new C-3. We have C-2.

Mr. Harding indicates that we have been provided with new everything.

Chairman White says he has October 31 on his plans.

Ms. Kline needed to know. She says we have a new clearing limit because of the 250' line of sight and we had talked about that at the site walk.

_ demonstrates where he thinks it is.

Ms. Kline says that from what he said, the 10' utility easement is where he will be running the wires.

Fire Chief O'Brien says that it is underground.

Ms. Kline says that if there is a pole anywhere in the vicinity of a red maple, her guess is that CMP will cut it down.

Fire Chief O'Brien says that the tree will go in after the underground utilities are laid.

Ms. Kline says that from what she has seen them do in terms of utility poles, that maple tree will probably change the landscaping plan.

Fire Chief O'Brien says that they can move it to get it away from that pole. Currently, there is nothing on that site that is any bigger than a sapling.

Chairman White asks if the Board is comfortable with the approach as to site distance.

Mr. Ledgett is.

Ms. Kline says that CMP will clear the area and she just wants to forewarn them.

Fire Chief O'Brien says that they will put something on the mylars to set that tree far enough away so that CMP will not clear it.

Ms. Kline does not want code enforcement to expect to see it there and not find it there.

Fire Chief O'Brien says that CMP will tell them where the pole will be set.

Mr. Ledgett says that CMP will also tell them CMP's cutting distance.

Planner Noel would like to introduce Bill Strobe from CMA. If the Board has any questions for CMA, the Board can direct them to him.

Mr. Ledgett says that on the next page, it is talking about a peak discharge variance. Since we don't do variances, he would like to understand what that is. It says the applicant is applying for a peak discharge variance.

Steve Harding says that they should have used the term waiver instead. There is a waiver

request in the package. There also is a note on C-2.

Mr. Ledgett asks Planner Noel on what date the request was made.

Planner Noel brings the document to Mr. Ledgett.

Chairman White asks the applicant to flesh this out a little bit.

Mr. Harding says that they are applying for a waiver. Both CMA and Ken Wood looked at the design. They will have an increase in run off from the site, but if you look at the total run off, it is well within the capacity of the two culverts. Both engineering groups have looked at it and agreed on this.

Mr. Ledgett asks for the authority to grant that waiver.

Mr. Strobe says 16.28.180 provides that authority.

Mr. Harding says that it should have no effect on wetlands. They should see a slight fluctuation temporarily in the amount that the water rises up in them, but it will subside and go down again. It will drain eventually to the culverts. The two 24" culverts will have the capacity to handle the additional run off plus the prior run off. That approach is more in keeping with what the DEP requests. They are going away from detention ponds and trying to spread out the flow and use some of the natural resources to absorb the water. They could meet the criteria by doing a detention pond, but he did not think that was the best approach.

Chairman White has the request for waivers filed originally. He is not sure what day that was. He asks if these are the three waivers.

Planner Noel says there were two. One was scratched.

Chairman White finds the waiver request we are addressing at this point. The method of disbursing run off to wetlands is preferable, but may result in an increase in peak flow. What would that be?

Mr. Strobe says that the predevelopment peak is 2 cfs and the postdevelopment is 4 cfs, so while the percentage increase is high, the actual amount is negligible.

Chairman White says that they are doubling it if you just look at the percentage increase.

Mr. Strobe says that 4 cfs is a very small number.

Mr. Ledgett says that he is looking at 16.28.180 and wondering if this proposal is in keeping with the language regarding certain required improvements. Do we have advice from the Planning Office on this issue? He has not figured out yet how to apply this to this situation.

Chairman White says that in theory, a detention pond would be an improvement, although it would be destructive to the site. Where something is not necessary for an improvement, we may modify or waive the requirement. The testimony he hears is that to make the peak flow the same pre- and postdevelopment, they need to do a more invasive water management design.

Mr. Ledgett says it may or may not be that way. We really don't have any details on what it is going to do. What is the impact on the adjacent wetlands? Detention basins adjacent to wetlands are generally good.

Mr. Strobe says that the use of a level spreader is standard practice. The waiver language as he reads it talks about either or. He believes that they are talking about a very small amount of water spread over 40'-50' with a level spreader, and the amount of water is almost trivial, so he believes the Board in good judgment could do a waiver in this case.

Mr. Ledgett asks why a detention pond is not a good thing to do.

Mr. Mangiafico says that it is only if it is not needed in the interest of public interest.

Mr. Strobe says that to create the detention pond would disturb the nature of the site. It would

create more problems than it solves.

Mr. Mangiafico says that the purpose is to preserve open space. If we are required to take out trees to put in a pond, that goes against our goals.

Mr. Ledgett understands the logic now.

Mr. Strobe says that the culvert has a capacity of 40 cfs, and you are looking at 2-4 cfs. This is not overburdening the downstream capacity. The wetland and other drainage areas are creating the 40 cfs to the culvert.

Ms. Wells would like to know if this is a mowed, grassy area or an unmowed, vegetated area.

Mr. Harding says that it is basically a trough designed to spread the flow it receives as a wide area. It would be open space and not mowed.

Ms. Wells asks if it is vegetated.

Mr. Ledgett says that it is unmowed now.

Mr. Harding says that it is going into the wetland as a sheet flow.

Mr. Ledgett says that it goes into the wetland and the wetland processes it. The culverts send water to the wetland.

Mr. Harding says no. The water leaves the wetland and goes to the culverts.

Mr. Ledgett says that we are using the wetland to process the run off.

Mr. Strobe says it is not processing it; it is receiving it. There are catch basins in the parking lot to provide some treatment.

Mr. Ledgett says that the wetlands are a better processor of it than anything that they will build. He would like to know about the sediment.

Mr. Strobe says that all of the drainage has a knock out for grease and sediment.

Mr. Ledgett says that they can get some sediment carried over into the wetland.

Mr. Strobe says that he does not believe that Oest Associates counted on the wetlands to provide additional treatment. Even if they put a detention pond in, it would carry over to the wetland.

Mr. Ledgett does not think that there is a problem with the design. He has a question as to whether we can use 16.28.180 to deal with this.

Mr. Mangiafico thinks that we can do this. He references 16.28.190.

Chairman White feels that we do have that authority because of the negligible increase in water flow and it is a good design.

Mr. Ledgett says that we need to parse that. We think we have the authority first. Then we look at whether it is a negligible increase in terms of granting the waiver.

Chairman White looks at our authority together with the circumstance. He thinks we can consider it.

Mr. Ledgett would like to reach Board consensus as to whether we have authority under 16.28.180.

The Board feels we have authority to approve or deny the waiver under 16.28.180.

Chairman White says, now, let's address the waiver. Chairman White has shown his hand.

Mr. Ledgett would propose that we agree. The waiver is to accept the slight increase in peak flow.

Ms. Kline says it has been calculated.

Chairman White says that it is not what the waiver language states.

Mr. Ledgett moves to grant the waiver.

Mr. Mangiafico seconds.

All in favor.

Fire Chief O'Brien asks for a waiver with respect to parking. They interpret the rules as saying that they need 35 spots. They have 45. They reduced the amount that they were to have in order to avoid wetland issues. He has at any given time 35 members in the house and 22-25 would show up.

Mr. Ledgett asks if we are using 16.28.180 for this as well.

Chairman White says as far as he knows.

Mr. Mangiafico asks if we need a waiver on this. We have discussed that this does not fall within a specific use.

Fire Chief O'Brien says that this is not specifically a fire station. Most of it is a garage. It has offices for the chief, captain, lieutenant, etc., which total probably one-twentieth of the building. The whole building is not all office space. He feels that most of it is a garage.

Mr. Mangiafico says that under 16.32.560, if we want to use a combination of garage and office space, we can determine our own parking requirement.

Planner Noel agrees with Fire Chief O'Brien that the parking provided should be adequate for the use. Forty-five spaces seems to him to be adequate.

Ms. Kline asks if we should continue to treat it as a waiver or proceed with Scott's suggestion of creating our own requirement.

Planner Noel says that we would need to do our own calculation.

Mr. Ledgett says that there is no standard to waive it against. There is no standard. He thinks that we should find the waiver is not required and make a determination on the amount of parking needed.

Chairman White says that we can refer to our tables to come up with something. We have testimony that it is predominantly a garage, with some office use.

Ms. Kline says that it is also a public building and that is probably what was used for the parking calculations.

_ says that they used 16.32.560, which refers to a public building.

Fire Chief O'Brien says that he respects CMA being conservative on this.

Mr. Strobe says that CMA had to make a very limited reading of the rule. He supports the reduction, however it is done.

Mr. Ledgett says that if we go to 16.28.180, and we are talking about specific parking standards....

Chairman White says that a parking space could be called an improvement.

Fire Chief O'Brien says that if the Board looked at the reduction from 49 to 45 spaces, moving away from the wetlands, the Board could view that as an improvement.

Mr. Ledgett would like to make sure we are doing this correctly.

Chairman White says that maybe we should incorporate the testimony and grant the waiver. If we see it in the future, we can ask for a narrative to give the finding of fact so that we might not need to grant a waiver.

Mr. Ledgett would like to make sure that our rationale is clearly stated.

Ms. Kline says that they were using the public building standard for their calculations. To decrease the numbers, they felt that needed a waiver.

Chairman White says that we are trying to make sure we do this in a correct manner. We have a standard, we can waive it.

Mr. Mangiafico says that the benefit would be that they are not taking down the trees, etc.

Chairman White asks for a motion.

Mr. Ledgett moves to approve the waiver with respect to reducing the amount of parking spaces from 49 to 45, referencing the 16.32.560.b parking table.

Mr. Mangiafico seconds.

Chairman White asks if there is any discussion to be had on the motion.

Ms. Kline says that when we talk about the text in the table, we know that this is a garage, and the fact is that this is lumped in with professional offices.

Mr. Ledgett says it is clear that the assumption used to determine the standard is different from what is present.

All in favor.

Chairman White asks if want to proceed back to the list and go through it.

Planner Noel says that he wishes to discuss something that may not fall within the realm of a waiver. He has had a discussion with Fire Chief O'Brien. He does not know if the Board members have the lighting standards with them tonight. There is a minor problem with the height of the lights over the garage doors. They are higher than what was described in the standards because they need to be to have enough clearance to get the apparatus in and out. If the applicant does not meet the general requirement in 16.32.1200.e, then in approving new or modified lighting, the Board may approve lighting no higher than 20' unless the applicant demonstrates that another height is necessary and that there is no practicable alternative.

Chairman White says that is not exactly a waiver.

Mr. Ledgett says but we need to make a determination on it.

Fire Chief O'Brien says that there are lights over the doors for a reason. When you are backing a fire apparatus in, it is necessary to have that lit. You need to see to get it in through the hole. They have manual lights. When they need to use the ramp, they will turn the lights on. They are only on when they turn them on. They provided all the cut sheets. There is one-tenth of one foot candle of spillage over the property line. In order to get as close as they could to the standard, that's what they had to do. It is only for 15 feet along the road. You can stand there at 2am now and can read the paper from light spillage from the lots on the other side. The lights are shielded. There will be no traffic problems. They worked very hard on that. He knows the engineers worked hard on it. They played with the lighting on this building for weeks. They are presenting the best possible scenario for the Town and for us.

Mr. Ledgett asks for the language in there. How are we supposed to handle it?

Planner Noel says that the higher height is necessary if there is no practicable alternative.

Mr. Ledgett says that is it to him.

Chairman White says the lights are under the roof overhang.

Fire Chief O'Brien says the lights will be on during the night and off during the morning. They also have manual lights that are not on unless they need them on - flood lights. If the flood lights are not on, they still have the slight light spillover. In his new life, he will be a photometric engineer.

Chairman White asks if we want to address the ordinance section and make a formal determination.

Planner Noel says to look at 16.32.1200 general requirements.

Chairman White says that we have heard the presentation on why the lights are placed higher

than the ordinance requires and have found that there is no practicable alternative to achieve the objectives of the lighting ordinance. That is his proposed language for the motion.

Mr. Ledgett so moves.

Ms. Kline seconds.

All in favor.

Chairman White saw lighting on the last page, but he did not see a comment on it.

Fire Chief O'Brien believes that was crossed out because it met the standards.

Mr. Ledgett asks if there are any other waivers.

Planner Noel believes that is it. He would presume that the Board will treat the lighting issue as a waiver, but there are two waivers.

Chairman White says that on page 2 of the check list and on page 2 of the document addressing the check list, the waivers are mentioned. It looks like the size of the drains has been appropriately addressed.

Fire Chief O'Brien says that there was a question on CMA's sheet, so he addressed it, but he does not think there was a problem with that section.

Chairman White cannot address anything to do with a catch basin.

Mr. Strobe says that the response is satisfactory.

Chairman White says that we need a note on the plan that there will be regular and periodic maintenance.

Fire Chief O'Brien says that it says that there will be maintenance on the plan.

Chairman White says that we require annual maintenance.

Fire Chief O'Brien says that they will do that. They have the Public Works Department at their beck and call.

Ms. Wells thinks that normal maintenance is in the spring and after a major storm.

Fire Chief O'Brien would like the code standard.

Chairman White asks Ms. Wells for it.

Ms. Wells does not have it.

Mr. Harding says that it sounds like something to be done during construction. After a major rainstorm, the contractor would normally go around and look and repair any damage.

Chairman White says that we usually require it.

Mr. Ledgett says that Maine has a stormwater rule.

Planner Noel is not sure how that would tie in.

Chairman White say that maybe we could fashion a note that says that there will be annual or more frequent maintenance consistent with the State of Maine standards.

Mr. Harding says that the site is too small to kick into DEP standards.

Chairman White says we usually require annual maintenance.

Fire Chief O'Brien would be very careful after a storm in winter to clean out the catch basin.

Mr. Strobe says that would fall under 16.32.390. This concept can be incorporated there.

Chairman White says that we just need the language for the note on the plan.

Mr. Ledgett would like a recommendation from the applicant on this.

Chairman White would recommend that there be annual maintenance or more frequent maintenance that is consistent with another standard.

Fire Chief O'Brien says that if they don't fall under the State of Maine standard, then they can't reference it.

Mr. Ledgett says that we need an appropriate note as to maintenance on the plan.

Chairman White says that the applicant can work with CMA to find out what that is. On to erosion control. He is satisfied with the narrative.

Mr. Ledgett says it is not a requirement.

Chairman White thinks these are all addressed by the York County SCS review. That brings us to the hydro assessment, which is not required here. Are there any further issues? To recap, we have granted two waivers, we have talked about the applicant working on the landscape issue regarding the utility pole....

Mr. Mangiafico asks for Chairman White to expand on that.

Chairman White thinks that it is a condition of approval that the applicant work with CMP regarding the location of the utility pole.

Mr. Ledgett says and to make sure that the tree is far enough from the pole that it is not cut down.

Ms. Kline says that we talked at the site walk about giving them the option of using something other than the red maple. There are a couple of trees like the ginkgo that have smaller leaves and have less of a problem with catch basins as a result. That's probably the best one in place of the red maples. It is more resistant to pollution and better for a tougher site. It is tougher when it comes to salt.

Fire Chief O'Brien thinks that a couple of red maples would look nice, but he supports the opportunity to change some of those out.

Ms. Gagner asks about a snow dump and dumpster location.

Fire Chief O'Brien does not know if there is a dumpster.

Mr. Harding says no, there is not.

Fire Chief O'Brien says that trash is kept inside the building.

_ says there is a note in C-2 or C-3 regarding snow storage and he tells where it is. It is on the other parking lot, not noted.

Mr. Mangiafico moves, having reviewed the proposed development, that we find it in substantial compliance with the Comprehensive Plan and the Land Use and Development Code, in particular 16.32.070.c. and that we approve the project created by the engineers at Oest Associates, Inc., plan dated 10/21/05 for Tax Map 13, lot 5-13, 5-14, zoned commercial C-3, and drawings G-1, C-1 through C-5, D-1 and D-2, drawing A-1 and A-2, and photometric sheet Ph1-4 as discussed with the following conditions: 1. That the applicant work with CMP on the placement of a new utility pole to retain the natural vegetation and to make sure that there are appropriate site distances of 250' in that direction; 2. That a note be added to the plan that the stormwater catch basins be maintained at least annually and that the applicant work with CMA to come up with a maintenance plan; and 3. That Chairman White sign the plan for the Board.

Mr. Ledgett seconds.

Mr. Ledgett asks if the applicant will be working with Oest Associates or CMA.

Mr. Mangiafico says CMA, the independent reviewer.

Mr. Mangiafico thinks he has the wrong dates on the plan in his motion. He moves to amend his motion to add revision dates January 20, 2006. That goes for all of the sheets referenced - plan, drawings, and photometric sheet. One shows a revision date of January 20, 2005, but that is an error. That's sheet C-2. The photometric sheets have dates of December 2005 and same January 20, 2006 revision dates.

Mr. Ledgett seconds.

All in favor of the amendment.

All in favor of the main motion.

Chairman White announces that any aggrieved party may appeal this decision to the Superior Court in 45 days. He asks the applicant to accept the minutes of this meeting as findings of fact. Fire Chief O'Brien agrees to do so.

5. Kittery Foreside Design Committee: Welcome and introductions of candidates for the design review committee

Chairman White welcomes the Design Committee members and introduces this item. We have looked at their materials. Maybe each of them could say their names and we could have a brief discussion. The Town Council basically wanted us to appoint them.

Gavin Barber is a Foreside resident and a construction project manager.

Pam Bowl is a designer with 30 years of experience.

Charles Bowl, who is also a designer, does remodeling and construction.

Jacqueline Nooney is a landscape designer who has been in business for 24 years. She is really excited about this opportunity.

Dean Rykerson is an architect with a practice in Kittery Point.

Ben Porter works in the computer industry and grew up in the development business with his father.

Mr. Barber says that Sandy Domina is not here tonight. She is ill.

Chairman White feels that this looks like a great committee, very well qualified. He asks if they have an understanding of their charge. It looks like it was created at the Town Council level. It looks like they are just trying to follow the ordinance.

Mr. Barber says that it is an advisory committee and therefore does not have a lot of real power. They considered themselves advisory to the Board and to the applicant directly. The parameters by which we would judge them are pretty well laid out in the code. Section E4 is pretty specific about the types of considerations over a project. One of the things that has been done in previous meetings is to consider using a check list to rate the proposed projects on the necessary criteria.

Ms. Kline asks if they have seen the Design Handbook.

They have not.

Ms. Kline says that it is just coming out. The Kittery Foreside Committee is mentioned but the page reference is wrong.

Chairman White says that the handbook has not been made an ordinance. It is a guideline, an illustrated book, to help developers and builders understand what we want. It may be open to improvement.

Ms. Kline says that the advantage to not having it in the ordinance is that we do not have to go through the entire process and Council review to change it. It is a working document currently.

Mr. Ledgett feels that it may be appropriate to talk about our thinking when it was created. This is a model to use. At the heart of this is promoting a strong dialogue between the developers and those experiencing the development. The power of enforcing the ordinance ultimately lies with the Board. If the Committee is struggling with something, then we would like to help. He is

hoping that the Committee will have productive dialogues with the developers so that the issues are not even present when the applications get to us. We need to make a determination at the end whether the Committee feels it is appropriate and whether we feel it is appropriate to continue with this process and then explain our decision to the Town Council. We welcome the Committee to the task and think it will help a lot.

Chairman White says that we could have a motion that the Kittery Planning Board unanimously approves the new members.

Mr. Ledgett asks whether Chairman White wants him to make the motion.

Chairman White so moves.

Mr. Ledgett seconds.

All in favor. Motion passes.

6. Public Hearing (continuation): First Step Land Development, Inc. /The Briers at Mead Farm. The Applicant is proposing to amend an approved subdivision plan with the addition of a pier, dock, and float system. Map 17, Lot 43, zoned Urban Residence.

Mr. Ledgett steps down for this application.

Chairman White introduces the application. At the last hearing, we took public comment and had a good presentation from the applicant, and we did not get into Board deliberation of this.

Mr. Ledgett had stepped down and remains off the Board for this item. He would like to check with the applicant - is the most current plan dated August 22 with a revision date of September 28?

Jim Nadeau says yes.

Chairman White thinks we have to address waivers first off, unless there are any points of order or procedural points.

Ms. Kline realizes that the minutes that we were given, issued for tonight, the minutes we are working from, have not been approved. One is from October 13, 2005, approved December 28, 2005, and she does not think that there is anything substantial in it that is different. The second is the one from November 17, 2005.

Chairman White says that we just revised them. He has the revisions with him, he thinks. He begins to check. Now he does not know if he brought them.

Ms. Kline is concerned about what it will mean if we quote something from the prior minutes or refer to the minutes at all during the deliberations.

Ms. Gagner asks if we need to approve them.

Chairman White says we did approve them, but he does not think he brought them tonight.

Ms. Gagner does not think we did approve the minutes of November 17th.

Chairman White says to wait and see if it becomes an issue.

Mr. Muir says that we have in our packet a letter from Duncan McEachern stating that we must determine if this constitutes a marina. He thinks that somewhat early in the deliberations, we must answer that question. Is this a legal use in the UR zone? It's like a waiver in the sense that you have to make a decision.

Chairman White thinks the ordinance requires us to deal with waivers first. It looks like the waivers requested are as to scale of the plan, floor plans, and surrounding structures. The check

list indicates that a dock plan was submitted and that a waiver was requested for the rest of it. It is essentially submission waivers that are being requested.

Mr. Mangiafico is looking at one document.

Chairman White shows his and Mr. Mangiafico is looking at a different one.

Mr. Mangiafico's is dated 7/12/05. It's an old one.

Planner Noel says it was updated August 22, 2005.

Chairman White has the most current one. He would like to make a determination as to what waivers are being requested and consider them. We are supposed to deal with those first, so let's deal with them first.

Mr. Nadeau says that is the most current submission for waivers. The past minutes would reflect that we did go through the waiver check list and they were in order.

Chairman White says that we went through them at the scheduling hearing to make sure they were there. Now we have to rule on them.

Mr. Nadeau says that no additional waivers were requested.

Mr. Mangiafico asks if it is just the one waiver that is applicable. 16.36.060.2.b. is as to scale of the plan. The applicant has used another scale instead of 1" to 50'. That's the only one that's really applicable.

Chairman White says that's correct as far as he can see. It looks to him that we have sufficient information to make a decision on that issue.

Mr. Mangiafico would move that we accept the request for waivers dated 8/22/05.

Ms. Gagner seconds.

All in favor. Motion passes.

Chairman White says that the second thing we need to do is take a look at the issues that were raised at the public hearing. We all took extensive notes.

Planner Noel asks the date of the letter cited by Mr. Muir from Attorney McEachern.

Mr. Muir says it is dated August 29, 2005, addressed to Planner Noel.

Ms. Kline has a list of letters of assent from the homeowners' association dated June 21, 2005. She asks for an update.

Planner Noel believes there were two sets and the applicant brought an updated set.

Mr. Nadeau says that he brought two sets; the Kittery Port Authority requested a set and the Kittery Planning Board requested a set.

Ms. Kline had one dated April 6.

Mr. Nadeau says that would have been for the Kittery Port Authority.

Ms. Kline asks if these individuals listed are still the current owners in the homeowners' association.

Mr. Nadeau would have to see the list. He takes the list.

Planner Noel has letters of assent from the homeowners' association dated 6/21/05.

Mr. Nadeau says they were current at the time. There has been one transfer on lot 10, the new owner of which is here. It changed to Mr. Swan and he is present tonight. Mr. Nadeau knows he gives his assent because he has spoken to him about it. He believes everything else is the same.

Mr. Mangiafico asks if we are going to tackle the marina question first.

Chairman White has been thinking about how to frame this. One is to look at the upland features. Also, by agreement with the developer, we are also granted the ability to look at the dock itself. That is an original condition of approval of the Briers.

Mr. Mangiafico says and we look at the use.

Chairman White says that we also look at the use and determine if it is permitted. As Mr. Muir said, that's probably the key issue. Before we deal with the other issues, we may want to deal with that. That is the elephant in the room.

Mr. Mangiafico asks if we should have the applicant present the June 25, 2005, letter from Attorney Bannon.

Chairman White asks if we need to rehear it.

Mr. Mangiafico thinks that we do if we are going to question it.

Chairman White thinks that first we should frame the question, and then we may invite the applicant to re-present. There is always a question of fairness. If we ask the applicant to re-present, then we may have members of the public that want to re-present as well. It may be that our memories have faded, but we are not ready for a full blown presentation. Chairman White would like to know to what Mr. Mangiafico is referring in Attorney Bannon's letter.

Mr. Mangiafico would like to figure out which would best discuss the use issue.

Chairman White says there is more than one letter here. There are a couple letters from the Town Attorney and a couple from Attorney Bannon.

Mr. Mangiafico says that the first issue is whether it is a marina, and if it is not, then what it is. He thinks the applicant is saying that it is not a marina, so it is a pier. We need to look at the marina definition and determine if it meets that definition.

Chairman White asks if we want to go through that exercise.

Ms. Kline reads the definition of a marina from the ordinance.

Mr. Muir says the reason he felt this was important is that it precedes other discussions. He is stimulated by the language of Attorney McEachern's letter of 8/29 saying we must determine this. Marina is not an allowed use in the UR zone. In reading the definition, he finds it very similar to the description listed there. It does have frontage, provide mooring or docking for nine boats, and may provide additional services. The point that is the most difficult is whether it does provide services for hire. He is thinking along the lines that since the object adds value to the lots in the Briers, it constitutes a commercial basis for the use. People pay more for the lots since they use the dock, and by that definition, it is a marina.

Chairman White knows Attorney Bannon has suggested looking at the dictionary if it is not in the ordinance. Chairman White likes to look at our ordinance first.

Mr. Mangiafico thinks that we would look at whether this is a marina first. The lot is owned by an individual, correct? The upland portion and high water to low water is owned by an individual and an easement has been granted to the homeowner's association to build a pier for use by the community. There is an easement along that lot and another lot to get down to it. He does not know how you can call the owner of that lot a business. There is not business. There is a homeowner's association, whose primary objective is to handle dealing with the common land.

Ms. Kline asks for the location of the common land.

Mr. Mangiafico says it is the drive.

Ms. Kline asks if that is common land.

Mr. Mangiafico says the homeowner's association was created for maintenance of the roadway, which is required.

Ms. Kline says that he is talking about Tudor Drive. They have an association for the maintenance of Tudor Drive.

Mr. Mangiafico says that whether they get a dock or not, the homeowners association is required to maintain the roadway.

Ms. Kline asks who owns Tudor Drive.

Mr. Nadeau says that Tudor Drive is private. The association is responsible for the upkeep of the land. He says that the residents own the drive and the easement in common.

Mr. Mangiafico says that as he looks at this, he does not consider the association a business because it is not there for the hiring out of slips. It is not being used for any other business that he can determine.

Mr. Muir says that the developer received financial consideration from the homeowners.

Mr. Mangiafico says that the homeowner's association is the homeowners.

Mr. Muir says that we were told before that the developer is running the homeowner's association. The argument he would make is that this is not a family pier. It is not one that is given access by consideration of family relationship. It is a commercial enterprise.

Mr. Mangiafico would agree that the development is a commercial enterprise, but after that, it will not be run as a business.

Mr. Muir says that would be fine after the developer gets out.

Mr. Mangiafico says that this is not a business. It is a homeowner's association with a community pier with an easement on the land of a private individual. The purpose is not for profit. It's for running an association for themselves.

Mr. Muir says the big number is the increase in the value of the lots. There is small change involved in the upkeep of the pier. He assumes that will be done on a fee basis. Some portion of the homeowner's fee will go to the upkeep of the pier.

Mr. Mangiafico asks if the primary purpose is a business purpose.

Chairman White says that a marina is a business establishment on navigable water with a principle use of providing services for hire. We need to see whether this is a business establishment. We know that it will have frontage. We know that it will provide, maintain, and monitor docking facilities. He is not sure the shoe fits.

Mr. Mangiafico says to look at Shepard's Cove. They own the land as common land.

Ms. Kline says they own the land in common.

Mr. Mangiafico says they are still the ones who maintain the docking facility. Whether you own it or have easement....

Chairman White says that they are not renting it out. In Shepard's Cove, the land is owned by the association. In this instance, the land is privately owned and the easement does not transfer fee ownership. It allows the use.

Mr. Mangiafico says that one of the facilities is assisted living, so there are a larger number of people using it. Here, there are very strict rules.

Chairman White is just looking at the term "for hire" and as he understands it, the covenants do not allow for that.

Mr. Muir thinks that this fits the definition of a marina. It is a little bit like the distinction between a public and a private golf course. It may be private, but it is still a golf course. If the land use rules rule out golf courses, it's done so not because of the nature of the ownership, but because of the impact of the use.

Chairman White says that is a core point.

Mr. Mangiafico says that in rebuttal to that, you pay membership dues for use of a golf course.

To get into this, you buy a house or a lot that has a value to it. As an accessory use, you have an easement on one of the other homeowner's lots to get to water, so at best it is an accessory use. You can't say that a principal use of the business is for hiring slips out there. Yes, there is added value to the house lots.

Mr. Muir says that the framers of the ordinance were concerned that a marina is a high impact facility.

Mr. Mangiafico says that there are people constantly coming and going.

Mr. Muir says that it is an intensified use of the water. It is higher than the use of an ordinary private dock. The threshold for him seems to be that where the boats are large and powerful and numerous, it is high impact. This is significantly different from Shepard's Cove where there are no power boats, no permanent mooring.

Chairman White says let's say we found this is not a marina. What does that mean? Does that mean that we have no ability to review the intensity of use? He thinks that we have the ability to review the use proposed and see whether it fits in the zone.

Mr. Mangiafico thinks that if it is permitted, then it's a permitted use.

Chairman White thinks that we look at different avenues. First we look at whether it is a marina. Then we look at whether it is a pier. This is more than a pier.

Mr. Mangiafico asks if it is.

Chairman White asks if a pier with floats is more than a pier.

Mr. Mangiafico says that the code defines piers, wharfs, floats. The Kittery Port Authority puts restrictions on the size of floats. There is no dimensional requirement for a residential pier.

Ms. Kline asks for the dimensional requirements for floats.

Mr. Mangiafico says there are none. You look to the language of the code. They are to be no longer in dimension to carry on the activity and be consistent with the use in the area. Aside from that, because that will be another argument, is it a pier.

Chairman White says it is a pier, dock and float.

Mr. Mangiafico says that if we don't like it, we can't say that it is too high a use.

Mr. Mangiafico asks if we have jurisdiction to review it any other way. If you follow Attorney McEachern's rationale, should the Planning Board conclude that it is not a marina, we should determine whether it is permitted use and then deal with the relevant provisions of the Land Use and Development Code. First we have to get to whether a pier is a permitted use.

Chairman White says that a pier is on the chart.

Mr. Muir says that a pier is not a use, it is a structure.

Mr. Mangiafico says that a pier is a land use.

Chairman White says that applies under our ordinance.

Mr. Mangiafico says that if the land use is permitted, then we look at the Land Use and Development Code to see what requirements we go by to determine if it meets our code.

Chairman White says that our code has no provision that contemplates this. There are positive things and negative things. Maybe the size and scale of this to achieve that is greater than what our Comprehensive Plan wants to see here. He does not think we can act on the Comprehensive Plan alone, but it could inform us as to how we interpret our ordinance when the ordinance is not entirely clear on this point.

Mr. Mangiafico refers to Attorney McEachern's letter, pages 9-10. Two years ago, we were confronted with a community pier at Shepard's Cove which was ultimately approved following

the same procedures as the Brier's Pier. The Kittery Port Authority rejected the notion that the community pier was a marina. This was subsequently approved by the Planning Board.

Chairman White does not remember that it was called a community pier. He also understands that no one has deeded rights to go down there.

Mr. Mangiafico asks how they got rights to go down there.

Chairman White thinks that they are allowed to as part of the association. They have on-site staff.

Mr. Mangiafico asks if they were a renter, wouldn't that be more of a business? He asks if this is any different from Shepard's Cove.

Chairman White says this is dramatically different. This is private property.

Mr. Mangiafico says that with both, you have a right to drive on the roadway.

Ms. Kline says that part of the land right is to have access to the property. The question is after how many years of having riparian rights with waterfront property, whether we are going to change that. We have had commercial ventures off of piers or private piers. They are only according to the amount of waterfront people own. The only way we can ignore that is to approve a pier for lot 3 and that owner gets a pier and he can parse it out from there.

Mr. Mangiafico asks if our code says that we can't allow him to let other people use it. Does the Land Use and Development Code prevent him from putting out a 40' float and putting 4 boats out when those are his friends? As he reads the code, he doesn't think it does.

Chairman White says that is an enforcement issue.

Mr. Muir says that a person is not likely to provide such services to nine large power boats.

Chairman White does not think it's a marina. If allowed, is it a pier; and what's a pier? This is a pier with dockage space for nine craft.

Mr. Mangiafico says that a pier is not defined in our code. Attorney Bannon suggested that we look at 16.08.010 - if we don't have a definition, then we look in the dictionary.

Ms. Kline says that is why we also have advice from the Kittery Port Authority which is in our code.

Mr. Mangiafico says that the Kittery Port Authority determined that it is not a marina.

Chairman White says it comes down to size and impact and whether that is allowed in the code.

Mr. Mangiafico thought we were going to stick to current use to start. If it is a permitted use, we apply the Land Use and Development Code.

Chairman White says that we have had dialogue between Mr. Mangiafico and Mr. Muir as to whether this fits the marina definition. Should we go to the next step and say if, for the sake of argument, it's not a marina, where do we go? Is it a pier? Do you have a dictionary definition that brings it in for us?

Mr. Mangiafico says there is one proposed by Attorney Bannon.

Attorney Bannon does not know that there is a letter from him that puts it in writing and he did not bring his dictionary tonight. He asks if Mr. Mangiafico is looking for the permitted use letter.

There is one dated 6/21/05. That's the earliest of them. There is a letter to Attorney McEachern.

Chairman White says there are a lot of piers in this area of Town and our table allows them in this area of Town. There is no question about that.

Ms. Kline says that there are restrictions on a commercial zone.

Chairman White says that the ordinance is unclear with respect to calling a pier a use.

Mr. Mangiafico says that you go to the table and look at 17a and some of the others to determine

if those are uses.

Chairman White says this does not designate types of piers; it just says piers. It gives no guidance whatsoever.

Mr. Mangiafico says that it does not provide the guidance that he wants.

Chairman White says to go through the exercise that the ordinance puts us through.

Mr. Mangiafico asks if he wants to say this is a pier and look at the Land Use and Development Code and see if it meets the requirements.

Chairman White thinks that we should do the exercise. It is still unclear to him that this is a pier.

Mr. Muir asks if this is as a means of answering the question of whether or not this is a marina.

Chairman White does not think it hangs on whether this is a marina. The question is whether this use is allowed in this zone.

Mr. Muir says that if it is not a permitted use, then we can shut down and go home.

Chairman White asks if the Board wants to vote on the marina question.

Mr. Muir asks if we would be extending the discussion to get a clearer idea on whether this is a marina or simply deferring a contentious vote.

Chairman White sensed that we would not get more light on the subject by continuing that debate. We can read the definition and people's opinions on that can be expressed when we take a vote. If someone feels we are shutting off the debate inappropriately soon, then we can continue. If there is more to say, then we can. We are suspending that issue. It seems there is a difference of opinion. One way to resolve it is to talk quite a bit and try to convince each other. The other way is to vote.

Mr. Muir asks with a six-member Board what we do with a 3-3 vote.

Chairman White thinks that if it is 3-3, it does not go.

Mr. Muir says that we have no decision.

Chairman White says that with a tie vote, the motion fails.

Mr. Muir says that then he should move that it is not a marina. We really need our constitutional structure clarified.

Ms. Kline says that a review committee is doing that, to craft language that will go before public hearing so that Kittery can vote on whether to have a definition like this in the Town code. The only definitions in the Town code are marina or pier (16.32.850). Yes, a general definition. The committee is working to make a clearer set of definitions for the Town code.

Mr. Muir asks if there is consensus that we should move forward without finalizing this discussion.

Mr. Evancic says it is very difficult.

Chairman White says anyone can make a motion that wants to.

Mr. Mangiafico moves that we determine if this is a marina. A yes vote would be that it is a marina as defined in the Land Use and Development Code and a no vote would be that it is not a marina.

Mr. Evancic seconds.

Ms. Kline thinks that we need to backtrack to the term "business" used in the code.

Chairman White asks if it reads "business establishment" or "business".

Mr. Mangiafico says that it is business.

Chairman White reads from Attorney Bannon's letter of September 1, 2005. There is no definition of the word business or the term "for hire" in the ordinance.

Mr. Mangiafico says that he does have a definition of business from a dictionary. It is a commercial or industrial enterprise or means of livelihood.

Ms. Kline says that for the purpose of the sign regulation, it is a corporation or legal entity for gain, benefit, or advantage.

Mr. Mangiafico reads further from Attorney Bannon's letter.

Chairman White asks if Ms. Gagner has anything to say.

Ms. Gagner says it has to be the principal use. This is not a business establishment like the marina we looked at on Badgers Island.

Mr. Muir has a question on majority. Is he correct that it takes a vote of four to approve an application?

Chairman White says that is a question for Attorney McEachern. Do we need a vote of four to prevail on this motion?

Attorney McEachern says that we need a majority.

Mr. Mangiafico says that it is just a majority required for either motion.

Mr. Muir says that is jumping ahead to the question of how to count votes on this. It may make a difference how people vote. People may wish to deadlock the vote.

Chairman White says that at 3-3 the motion fails, at 4-2 motion passes.

Ms. Kline says that keeping in mind it must have a business as its principal use, that would mean that the landowner building the pier would have to have that land as its principal use charging the other members of the association.

Chairman White says that it is whether the applicant's proposed use is a business or not.

Mr. Mangiafico says that we have to show that it is a business.

Mr. Muir says it is the pier.

Mr. Mangiafico restates the motion.

5 vote that it is not a marina. Mr. Muir votes that it does meet the definition of a marina.

Mr. Mangiafico says the next step is to determine whether it is a permitted use. He is sure everyone has read the June 21 letter from Attorney Bannon. He has probably three copies of it.

Ms. Kline asks for a minute to find it and follow along. She asks if it is dated June 26.

Mr. Mangiafico says it is dated June 21. It is addressed to Planner Noel.

Chairman White has tons of letters, but can't locate that one.

Attorney Bannon says that as much as he would enjoy the Board reading his words, he would like to point the Board to Attorney McEachern's words, footnote 5.

Mr. Nadeau offers an extra copy of the letter of June 21.

Chairman White says that Planner Noel is making some extra copies now.

Mr. Mangiafico reads from footnote 5. There are some that maintain that should the pier usage not be a marina, this would still not be permitted because a pier is not listed as a permitted use. Piers are allowable in the shoreland zone with proper approvals. The shoreland zone serves as an overlay zone and, therefore, piers and docks in the overlay are subject to relevant approvals.

Chairman White says that is what the ordinance says. As clear as the ordinance can be, we have to try to follow it.

Mr. Mangiafico asks if a pier is a permitted use, is this a pier? The size of this is no different from any other pier that would go out there for any other individual. He is talking about just the pier, not the floats. The pier itself goes to the low water mark. Generally, that is what the DEP and others require.

Chairman White understands that a single family lot putting a pier in would not come in front of us. That's why we don't know anything about them. The question is what you stick on the end of this pier. Is the scale the minimum necessary to accomplish the permitted use and is it in keeping with the character of the area?

Mr. Mangiafico asks if we have first determined this is a pier.

Chairman White thinks it is neither fish nor fowl. Part of it is a pier.

Megan says it is either a pier, dock, or wharf.

Mr. Mangiafico says to go to 16.32.490.n.3. This is the code we would use regarding piers. He reads from it. The pier shall not interfere with existing or natural beach areas. There are none. It shall not adversely affect fisheries. They do have verification of that. It shall be no larger in dimension than necessary to carry on the activity and be consistent with the use in the area. Attorney Bannon's letter, page 5, number 2, is the beginning of that discussion. Attorney McEachern also discussed that in a letter. He is not sure if that's the same letter. He asks Attorney McEachern which letter that is in.

Attorney McEachern says it is in his August 29 letter.

Mr. Mangiafico asks if he mentions the character and use issue in there. He found it. There is no page numbering.

Attorney McEachern says there are page numbers.

Mr. Mangiafico says it is page 3 in his letter. You might even go back to the previous page. Go back to page 2. Three-quarters of the way down the page, he speaks of the phrase "no larger than necessary." Read from there on. He reads it aloud. The Maine Supreme Court has interpreted the phrase "no larger than necessary" and to mean that it is a second criteria for judging the size of the proposed wharf. The wharf may not be either 1. Larger in dimension than necessary to carry out the activity and 2. Larger than consistent with area. The Court interprets that as "not conflicting or interfering with" so that the second part is that it cannot be so large that it conflicts or interferes with the area of the wharf. He thinks that is what Attorney McEachern is saying in this letter. There is no reason to believe that a court would interpret our ordinance any differently than it did in the case cited.

Ms. Kline has a question. She has a diagram that shows a pier on lot 2.

Mr. Mangiafico says that was submitted by someone else, not the applicant.

Ms. Kline wants to make sure that there has been no application submitted by anyone else, that lots 2, 3 and 4 do not have piers on them at this time.

Mr. Nadeau says that there are no piers on those lots. They did not submit the referenced diagram with their application.

Mr. Muir thinks that is an interesting question to ask. Might there be future docks in addition to this dock?

Ms. Kline says the other part of riparian rights are moorings. With a pier this size, what this may well do is make it so that lot 3 cannot have a mooring put in front of their lot because of the interference from the dimensions of the pier and floats, which means that their right to have a mooring will then go further out into the mooring field than it might, which is perhaps an issue for the rest of Spruce Creek. She believes that the mooring is supposed to be as close as possible to the lot.

Attorney Bannon wants to remind the Board and Ms. Kline that the owners of Lots 2,3, and 4 have transferred their riparian rights to Mr. Hollis and to the Homeowner's Association and that

they will not have moorings.

Mr. Mangiafico says that was a condition of the KPA approval that they would do that and that the covenants could not be changed without KPA approval.

Ms. Kline asks for a copy of that covenant. She would like to know if you have to dissolve the homeowner's association.

Attorney Bannon asks whether she thinks that would be to recover the riparian rights. They have deeded them to Mr. Hollis. To get them back, he would have to deed them back.

Mr. Muir would like to know who would enforce this provision of the ordinance.

Attorney Bannon says that it would go to the Kittery Port Authority or it would be normal for this Board to make enforcement a condition of Kittery Planning Board approval so that the Code Enforcement Officer could enforce them.

Mr. Mangiafico says that the Harbor Master does not make the decision. The Harbor Master would bring it to the attention of the Kittery Port Authority.

Ms. Kline says that she has heard that the right to have a mooring goes with the land. If he sells the land, it goes with the land.

Mr. Nadeau says that they have not sold the right. They have waived the right.

Attorney Bannon says that it is a conveyance, not a sale. You can sell a lot or the flats in front of it. Riparian rights are just as saleable as any other rights in land. If you have a shorefront right, you can give that up. It's an alienable right. You can verify that with the Town Attorney.

Chairman White asks if Ms. Kline feels that her concern was adequately addressed.

Ms. Kline says that in fairness to the rest of Kittery, she wants to know. What she is hearing is that there are state laws for that and if they can transfer it legally, they can do that.

Mr. Muir says that we have heard the association can transfer it back. How do we preserve the undeveloped waterfront?

Mr. Mangiafico says that the covenants say that there can be no mooring out there. It is a condition of Kittery Port Authority approval and he thinks that it should be part of Kittery Planning Board approval.

Mr. Muir could imagine a future owner wanting to have his own pier.

Mr. Mangiafico thinks that it makes sense that we make sure that their rights to do that are extinguished.

Mr. Muir would like to go back to Attorney Bannon's letter.

Mr. Mangiafico was reading from Attorney McEachern's.

Chairman White says it's in both letters.

Mr. Muir understands the logic of the judge. It doesn't change the sense of it. No longer in dimension than necessary to be consistent with the character of the area. To him, it is larger than necessary to be consistent with the character of the area.

Chairman White says the problem he has with this language, and he could get some guidance from Attorney McEachern, is that he worries about the tail wagging the dog. Someone comes in and wants nine boats and wants it this large to accommodate the use. Here, he sees something that is not a defined use and it is not clear whether, if the Town went through an ordinance-making process, it would be a defined use. Are we a captive of the proposal? If this has to be this far out to accommodate nine boats, are our hands tied?

Ms. Kline says that the shoreline involved is three parcels with shorefront, not nine. It has been very clearly presented as nine. Part of the reason to be out that far is so that they all are in the

water.

Mr. Mangiafico says that some will bottom out.

Mr. Nadeau says that when they went for a renewal with the Kittery Port Authority, they designed it to meet the water, but there are certain tides when the floats may not be in the water. The idea, like any other pier in that area, is to have the boats reach the water, if possible. It may not happen with all the boats on this float system.

Mr. Mangiafico says the idea of that is the Army Corps of Engineers does not want the floats sitting on the flats. Maybe we should make sure they are floating in most, if not all, tides.

Mr. Muir says that the requirement is no longer or larger than necessary to be in keeping with the character of the area. Are nine large craft consistent with the character of the area?

Mr. Mangiafico feels that he is interpreting it differently than the Court did.

Chairman White says, ultimately, each of us has to make our own determination.

Mr. Mangiafico thinks that we have direction from the Court and from Attorney McEachern's letter. Attorney McEachern says he would not rule differently.

Chairman White says that if we want to say this is too big, we have to have a well-founded reason. A pier is permitted. A marina is not. A pier with nine boats raises a question in his mind. There is a difference in impact between nine and three boats. There is a question as to whether a pier can be this big. This is very much tagged to three boats versus nine boats, or a single family pier versus a multifamily pier. In a sense, we are having to parse this out. He may be wrong and he may be happy to be wrong, but he does not think that we are driven to approve this for nine boats because nine boats are proposed.

Mr. Muir wants to read from Attorney Bannon's letter, June 21, page 6, paragraph 2. He comes to the point that the second dimensional requirement is that it may not be so large that it conflicts or interferes with the existing conditions, use, and character. He feels that he can find that it is so large that it interferes with the character of the area. He thinks that Attorney Bannon is of the same opinion and so we must rule on whether it is too large for the character of the area.

Chairman White thinks that he needs to read the next page as to how the Law Court looked at that.

Mr. Muir says there is a reference on the final page. It sounds like it cannot interfere with fishing and navigation. But the first sentence said that it may not be so large as to interfere with the character. It would interfere with the character of the area. It may not interfere with certain uses. Boats can pass it. The tides come and go through its pilings. But the word character is important and it gets dropped out in some of the summary statements.

Ms. Kline says that on page 7, it says that general standards could suffer the fate of being unconstitutionally vague. We have three waterfront lots and, typically in Kittery, the piers reflect the ... If we put three units at the end of the pier, that would be the equivalent of three piers. We could allow access across a lot, but in Kittery, where someone with waterfront property builds a pier, he puts out a single float. If these three waterfront properties wanted to get together and put together the equivalent of the three piers, she would not have a problem with that. If they wanted to put kayaks on there, she would not have a problem. To put nine slips on here, though, our ordinance does not give us enough guidance to do that. She is not saying the Kittery Port Authority was wrong. But as far as the Land Use and Development Code, she feels the right to put out a pier is tied to owning waterfront.

Chairman White says this is a marina-like structure.

Mr. Mangiafico says that an individual pier is 10'x20'. If I owned that, you could allow me to keep a boat along the side of it, correct?

Ms. Kline thinks so. It is what your comfort level is in terms of home insurance.

Mr. Mangiafico says that in the middle of the summer, piers will have two boats on them. If you look two down from this, there is a 40' float with at least two boats on it. He is going toward the bridge. The Meade property pier is maybe 30' long.

Mr. Mangiafico says that if someone has a large boat, we go to what's in the code.

Ms. Kline says that he is a waterfront owner. If he or she wants to have someone else use the float, that's that person's business. Our business is that we have three waterfront lots.

Mr. Mangiafico says that there will be three piers out there and they gave up their mooring rights. Very rarely do you see three waterfront owners come together and build a pier. He is not saying this is a bad thing. Our Land Use and Development Code says that we are supposed to have land and an owner. We don't have three, we have nine. We can't say that we're OK with something that's attached to their deeds. That's separating riparian rights from the deed.

Mr. Mangiafico says that the riparian rights are with respect to the mooring.

Ms. Kline says that you used to need 150' shore frontage in order to get them.

Mr. Mangiafico does not see in the Land Use and Development Code that we can deny this application, whether we like it or not.

Chairman White says that the type of pier that it is is undefined. When we are asked to provide a standard, if we had something in the ordinance that said what a community pier is and where it is allowed, that would be different. We have no standards. We are essentially comparing it to a pier on a single-family lot.

Mr. Muir says that we also can get at this through the character argument. Is this mounting more than one boat per waterfront lot? That's a measurable criterion. We could not deny an individual or three individuals with one dock per pier.

Mr. Mangiafico says that we don't deny them the right to put three boats on their dock.

Mr. Muir says that once you bought your waterfront, you probably can't afford three boats.

Mr. Mangiafico says it's a hole in our ordinance right now.

Mr. Muir says that there are human reasons why that rule exists - one dock per lot.

Mr. Mangiafico would argue that if you go anywhere along the back channel and deep water mooring areas, you would be hard pressed to find just one boat on the piers there. A lot of times they are not as big as this.

Ms. Kline says we can still stick to our rules of one pier per lot.

Mr. Mangiafico asks how you can do that.

Chairman White asks if they had 20 boats, could they do this?

Mr. Mangiafico would say that they could. We are determining whether the use is permitted.

Chairman White says that we have not gotten to land uses on this yet.

Mr. Mangiafico says that the approval of a pier is normally given by the Kittery Port Authority.

Chairman White thinks the ordinance does not give us sufficient guidance. If we had a definition of community pier, then our job would be a lot easier.

Mr. Mangiafico and Ms. Kline say that is why we are meeting and putting this together.

Ms. Kline says that we have not had the opportunity as a Town to have a public hearing on community piers.

Mr. Mangiafico says that is why he proposed that the Kittery Port Authority put together a

definition of community pier.

Mr. Muir sees the restriction of it being in keeping with the character as appropriate.

Mr. Mangiafico says that you look at whether it impedes someone's use of their property.

Chairman White thinks that they are clustering nine boats in there.

Mr. Mangiafico says that we will have open space that we would not have there otherwise because of the cluster.

Chairman White says what he looks at is that a marina is not allowed in this area. Even a small marina would not be allowed. How close is this? Maybe it is impermissible to think that way. Why is the intensity of use with respect to a marina not allowed, and what does the Comprehensive Plan say, and is that a physical limitation. He thinks that a community pier is a good idea, attractively designed, and it makes a lot of sense. If it is not in the ordinance, then he is very uncomfortable with it without having gone through the public process.

Mr. Mangiafico would like to hear where we go from here. It looks like we are just circling around.

Chairman White says that we can take a vote and parse out the issue. He thinks the applicant deserves to have a decision and not to have to wait to another meeting. If we proceed with consideration of this application, then we may have to extend the meeting to get this done.

Ms. Gagner asks if we are looking at whether it is too large.

Chairman White says that we are looking at whether it complies with the standards under 16.32.490.n.3. He feels that we do not need to rearticulate everything that has been said. A vote could allow us to proceed further or we could end it here.

Attorney Bannon says that it is good to resolve it sooner rather than later. If this goes somewhere else, there is a certain order in which the Kittery Planning Board has to make its decisions. First, the Board must look at whether it is a permitted use. Then it can look at 16.32.490.

Chairman White thinks that we have decided that a pier is a permitted use.

Attorney Bannon says that then we need to have that vote. If we don't vote on that, it will just come back to that vote.

Attorney McEachern says that we have determined that it is not a marina. Then we have to determine whether or not it is a pier. Then we have standards in the ordinance. 16.32.490 and 850. We should go through each one and make our findings. We have been discussing d. If we are hung up there, then we should at least make our findings on a, b, and c, so that someone up there will know what we did and where we are coming from. If we have determined that it is a pier, then we should proceed with the standards in the ordinance to review it as such. There should be a factual finding on each of these.

Chairman White says that each factual finding does not need a separate motion.

Attorney McEachern says that he believes it would be wise to do this.

Chairman White would like a motion.

Mr. Mangiafico moves that this application is defined as a pier and is a permitted use in the shoreland overlay and UR district.

Mr. Evancic seconds for discussion.

Chairman White would like to amend the motion to refer to 16.32.490 table 17A.

Mr. Mangiafico so amends.

Mr. Evancic seconds for the amendment.

Chairman White requests a motion to extend.

Mr. Mangiafico moves to extend the meeting to 10:30 pm.

Ms. Gagner seconds.

All in favor of the motion to extend the meeting.

Town Manager Carter asks whether that means that the Community Center folks can go home.

Chairman White apologizes and says that they can.

All in favor of the amendment.

Mr. Muir asks again for the language of the amendment and receives it.

Mr. Muir would like to offer an amendment. He think the word “and a permitted use” is what we will be discussing after this.

Ms. Kline says that table 17 is land uses.

Mr. Mangiafico says that Attorney McEachern is saying that determines what is a permitted use and what is not. If it is there, it is considered a permitted use.

Chairman White says we are basically saying a pier is permitted.

Mr. Mangiafico is saying that it is a pier.

Mr. Muir thinks the motion should say that. He is a little afraid that by voting on this he is voting to approve the project.

Chairman White says no.

Mr. Mangiafico says no.

Mr. Muir would like to amend it to remove “and is a permitted use” from the motion.

Mr. Mangiafico will not amend the motion.

Chairman White says yes means we agree that the application is for a pier.

5 in favor. Mr. Muir against.

Motion passes.

Chairman White says that we have had quite an extensive discussion of the standards. 16.32.490.N.3.a. There has been no discussion of whether the proposal complies with this or does not. He does not recall this being an issue.

The Board concurs that 16.32.490.N.3.a presents no problem.

Chairman White refers to 16.32.490.N.3.b. - shall not interfere with existing or natural beach areas.

The Board concurs that 16.32.490.N.3.b. not implicated.

Chairman White says 16.32.490.N.3.c. - he has not seen or heard any evidence that it would have an adverse impact on existing fisheries.

Mr. Mangiafico asks the applicant.

Mr. Nadeau says that in the slide show, they submitted three letters, one from the Army Corps of Engineers, one from the Kittery Port Authority. All three address the issue and indicate that it would minimize the adverse effect on fisheries and maritime commerce. The Kittery Port Authority also said that two acres of navigable waters were gained by condensing the community pier. They also have Mr. Normandeau who could explain why the dimensions of the pier were arrived at.

The Board agrees that 16.32.490.N.3.c is not implicated.

Chairman White skips 16.32.490.N.3.d for the time being.

Chairman White does not believe 16.32.490.N.3.e applies.

Mr. Mangiafico says they are not proposing to put anything on the pier other than railings and

lights.

Chairman White asks if the Board agrees that 16.32.490.N.3.e and 16.32.490.N.3.f do not apply. The Board agrees.

Mr. Mangiafico says that 16.32.490.N.3.g would not apply.

The Board agrees.

Mr. Mangiafico says that with 16.32.490.N.3.h, we should get Glenn Normandeau to state that it will be done pursuant to the Clean Water Act, etc.

Chairman White reads from 16.32.490.N.3.h.

Mr. Mangiafico says that the applicant has received permits and provided them to the Board.

The Board agrees that 16.32.490.N.3.h. does not present a problem.

Chairman White understands 16.32.490.N.3.i. has also been complied with. He moves that the Board has found 16.32.490.N.3.a, b, c, e, f, g, h, and i have been complied with or are not applicable.

Ms. Gagner seconds.

All in favor.

Chairman White says that leaves us with 16.32.490.N.3.d. Does the Board want more discussion on this point?

Ms. Kline would underscore that for her, the use of this pier has been clearly stated to be a use that exceeds her comfort level for what would normally be happening on waterfront where three land owners got together and built a single pier. She would recap that the request is to have it on Spruce Creek, that we do not allow the commercial area to have piers. We have a private pier before us that basically, from what Mr. Mangiafico said, will have the capacity to allow nine other boats to dock there for the season. If it were three single homeowners, they each would make that decision, but we are putting approval on this pier. She knows that people own more than one boat at times, but she does not think it is within our purview to plan for it without any definition of a community pier other than using this opportunity to adopt the Kittery Port Authority rules that we don't have in our ordinance yet.

Mr. Mangiafico asks if she feels this is larger than necessary to carry on the activity? Or is she tying it to the character of the area?

Ms. Kline is tying it to use and if normally we have single family piers or a commercial entity, then this is what we deal with.

Mr. Mangiafico asks if it looks different from Mark Foster's property with a 10'x40' float, the Meade estate with a 10'x30', and across the way with a 50' float.

Ms. Kline says that the Kittery Port Authority has been requested by individual upland landowners to allow those and she can't change that. The issue for her is designing something for nine boats. The applicant is not saying that he has a yacht that he wants to put there.

Mr. Mangiafico says that the other uses he has mentioned are not one float with one boat on it.

Ms. Kline says they were granted a pier and a float and how they use it is up to them.

Mr. Mangiafico says that we don't have stricter rules. We would like to have them but we don't have them yet. This is defined as an ideal mooring area by the Comprehensive Plan. In 1990, it was defined as functionally water dependent by the state. It's one of our mooring fields.

Ms. Kline asked the Kittery Port Authority at that meeting whether they were giving up a section of the mooring field and she read the testimony that Mr. Mangiafico said.

Mr. Mangiafico said that there is room to make the moorings tighter in that area.

Ms. Kline says that the pier takes up its share of the waterfront and then some.

Ms. Kline says that we are being asked to approve nine slips for nonwaterfront. That is beginning to sound again like a business.

Mr. Mangiafico says that we have already determined it is not a business.

Ms. Kline says Mr. Mangiafico keeps saying he is happy approving this.

Mr. Mangiafico says that he is not necessarily happy. The Kittery Port Authority rules are stricter than these, but he thinks they are not strict enough.

Mr. Muir says that the Kittery Port Authority rules do not go to questions of the Comprehensive Plan and its intent.

Mr. Mangiafico says that they go to the Land Use and Development Code. The Comprehensive Plan and the Land Use and Development Code have to be found to be consistent.

Mr. Muir says that they go to issues not addressed in the Kittery Port Authority rules.

Mr. Mangiafico says that if you go to the Harbor Plan, the Kittery Port Authority is to come up with rules to meet the Comprehensive Plan. So, when the Kittery Port Authority comes up with the rules, they are looking to these. They are not doing this out of the blue.

Mr. Petty says that the Foster Float that is 40' long actually including two parcels.

Mr. Mangiafico says that with this design, they actually get more boats and use less space. They originally wanted something much longer, taking up much more area and the Kittery Port Authority made them shrink it down.

Attorney Bannon says that he understands the Board rests on its minutes rather than making findings.

Chairman White says that other than the findings just made, yes.

Attorney Bannon says that for the court to understand, the members must say why they voted the way they did.

Chairman White asks if we have to do so in making a vote.

Attorney Bannon says that the court assumes that each person is making his or her own decision.

Attorney McEachern says that if we proceed and vote in favor of this, we can put conditions on it.

Chairman White says that the next vote is on 16.32.490.N.3.d. If it is thumbs up, then we need to complete the review, and, hopefully, we can do that tonight. He would like to do that vote now to give ourselves the possibility of that tonight. He proposes a motion on the issue that we have discussed for two hours. We will have the record of the minutes of discussions reflecting the viewpoints of Board members. *He moves that we find that this application is consistent with 16.32.490.N.3.d. A yes vote would mean that it is consistent and no would mean that it is not consistent.*

Mr. Mangiafico seconds.

Mr. Muir will vote no because he feels that it conflicts with the conditions, uses and character of the area.

Ms. Gagner asks if the Kittery Port Authority uses that language as well.

Mr. Mangiafico says that we refer to the Land Use and Development Code and he believes that language is in there as well.

Chairman White does not like to say how he will vote before he votes. The basis for his vote is that the applicant is providing space for nine votes where there is space for three, that this is a marina-like intensity where marinas not allowed. He still thinks it is a very good looking plan

and that after some public process, a plan of this type could be approved.

Mr. Muir thinks that the counting of lots is a quantitative measure of the character of the area. He does not think that he relies exclusively on beauty or aesthetics. He thinks the desire is that there be a uniformity of use.

Mr. Mangiafico says that the exact words are not in the Kittery Port Authority rules, but it refers to the Land Use and Development Code. The Kittery Port Authority reviewed this section and felt, as a whole, not everyone, that it was in accordance.

Chairman White no, Ms. Kline no, Ms. Gagner no, Mr. Muir no.

Mr. Mangiafico and Mr. Evancic yes.

Motion fails.

Chairman White thinks that stops the issue for tonight.

Mr. Mangiafico would like to know whether we need to go one step further and vote it down.

Attorney McEachern thinks that we should so that there is a decision. Will the Board make findings of fact on that?

Chairman White says that we voted that it is not a marina, that it is a pier, and we went through the ordinance criteria.

Attorney McEachern would like findings of fact.

Mr. Mangiafico would like to move that we extend the meeting to 11:00 pm.

Mr. Muir seconds.

All in favor.

Chairman White says that we do not craft findings of fact all that often. We usually rely on the minutes.

Attorney Bannon thinks the Law Court requires that now or they'll just send it back.

Chairman White thinks the findings of fact would be that the facility is larger than necessary to carry on the purpose.

Attorney McEachern says that is a conclusion. They need the factual basis.

Chairman White says there are nine slips.

Mr. Muir says for motorized boats up to 24' long.

Chairman White thinks that we said that quite clearly in the discussions.

Attorney McEachern says that there was a lot of back and forth.

Mr. Muir thinks there are just two issues: the size of the facility and the practice and character of the area.

Chairman White says that they are providing for nine instead of three; it is larger than necessary; and the marina-like use is inappropriate for the character of the area.

Ms. Kline says that it is larger than necessary for three waterfront owners to provide access for their boats.

Chairman White says that usually we are not called upon to do that. He is aware that this will be read by a judge.

Mr. Muir thinks that we are accepting this language that the requirements of 16.32.490.N.3.d. provide that an application does not pass the criterion if the proposal is so large that it conflicts or interferes with the conditions, use and character. We are accepting that phraseology. It is going to the use pattern of the area and one pier per landowner.

Attorney McEachern says that the Board may want to have some finding with regard to the character of the neighborhood. He has heard pieces on that. Perhaps a few sentences on that

would help. The conclusion does not help the judge reading that. Board members have said that it is larger than necessary for the character of the area.

Chairman White says that it is single floats. Commercial marinas are prohibited from the zone.

Ms. Kline says that most of the piers and floats are mid-tide pier and float systems.

Mr. Mangiafico asks if there are any in that area that do that. He wants to know if that is a true fact.

Ms. Kline says that the applicant said they had to go out as far as they did because they wanted to access deep water. The character of the immediate area is that they are all accessing deep water immediately in that vicinity. But they are individual shorefront landowners that are providing for their needs.

Chairman White says that the finding of fact is that the character of the area is lower impact, single lot piers, generally speaking, and that no marinas are allowed.

Ms. Kline says that it is also the number of floats that are specified for the use of upland nonwaterfront.

Chairman White says she means that this proposal allows nonwaterfront lots to impact the water more directly.

Attorney McEachern says that there were several photos of the area that came in in the last session.

Chairman White says they are in the record. He does not know if Attorney McEachern wants them to find them. We could refer to the Nov. 17th booklet that has photos of the area.

Mr. Muir does not think we need to go too deeply into the photos.

Chairman White does not think that we are clarifying this by discussing it more. We are just trying to do the best we can do. He wishes the ordinance were clearer.

Attorney Bannon thanks the Board.

Chairman White proposes that due to the most recent motion outcome, the application fails before the Board and cannot be approved.

Mr. Muir seconds.

Chairman White says that he is simply saying that it stops it and this gives the applicant a vote to appeal from.

Mr. Muir asks if he wants to phrase it in the positive.

Chairman White withdraws motion.

Mr. Mangiafico moves to approve project as proposed.

Mr. Muir seconds.

Mr. Mangiafico is voting yes because although the Board believes it does not meet the code, he believes that it does meet the code. He thinks that is how we should do that.

Ms. Kline asks if he can amend his motion.

Mr. Mangiafico says his motion is based on the Land Use and Development Code.

2 in favor, Mr. Mangiafico and Mr. Evancic.

4 opposed, Ms. Gagner, Chairman White, Ms. Kline, and Mr. Muir.

Motion fails.

7. Public Hearing (continuation) Sebago Technics for the Town of Kittery.

Not held.

8. Old Business

N/A

9. Planner's Time

N/A

10. Adjournment

Chairman White moves to adjourn at 10:50pm.

Mr. Muir seconds.

All in favor.