

APPROVED

**TOWN OF KITTERY
BOARD OF APPEALS**

October 24, 2006

Council Chamber

CALL TO ORDER:

Chairman LaMarca called the meeting to order at 7:02 p.m.

BOARD MEMBERS PRESENT:

Brett Costa, Vern Gardner, Herb Kingsbury, Niles Pinkham, Craig Wilson, Sarah Brown, Secretary, and Michael LaMarca, Chairman

ALSO PRESENT:

CEO Heather Ross, Recorder Chris Kudym, Christopher Saint, Brian McKenzie, Ross Hansen, Kevin Carpenter, Glenn Shwaery, Lee Consavage, Joe Watts, Milton Hall, Leo Guy, Dan DeFault, Mike Lasso, Paul Fowler, Peter Hedrick, Ben Walden, Mike Zellar, Heather Hale, Joe Afienko, Steve Delaney, Nancy Willett, Dominic Goupil, Mr. and Mrs Charles Cribby, John Thompson

Chairman LaMarca introduced the members of the Board and outlined the hearing procedure. The Chair then led those present in the Pledge of Allegiance and read the Notice of Hearings.

PUBLIC HEARINGS:

1. Christopher Saint requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060.D (Page 256) of the Kittery Land Use and Development Code Zoning Ordinance in order to build a temporary deck around a hot tub close to the house but out of the way for a future addition to go where the current patio is at property located at 17 Sterling Road, Map 14, Lot 85, Kittery, zoned Urban Residential
2. Ross Hansen, on behalf of Shoals Marine Laboratory, requesting a Miscellaneous Appeal to the terms of Table 16.32.490 21 (Page 383) of the Kittery Land Use and Development Code Zoning Ordinance in order to install a 7.5 KW wind turbine, which will allow UNH's AIRMAP to have year round power for air quality sampling, help SML cut down on diesel fuel usage and act as a teaching tool for sustainability, at property located at Appledore Island, Map 70, Lot 17, Isles of Shoals, Kittery, zoned RP.
3. Litson Villas, LLC requesting a Special Exception to the terms of Title 16, Section 12, Subsection 100 C (Page 262) of the Kittery Land Use and Development Code Zoning Ordinance in order to allow a mixed use of new building with residential over commercial property located at 127 State Road, Maps 8 and 14, Lots 15 and 25, Kittery, zoned LB.
4. Litson Villas, LLC requesting a Special Exception to the terms of Title 16, Section 32,

Subsection 560.I of the Kittery Land Use and Development Code Zoning Ordinance in order to allow shared parking counts, per studies done by Gorill Palmer, Traffic Engineer, at property located at 127 State Road, Maps 8 and 14, Lots 15 and 25, Kittery, zoned LB.

5. Charles Cribby requesting a Variance to the terms of Title 16, Section 12, Subsection 490.N.2.a (Page 388) and 490.N.2.f (Page 389) of the Town of Kittery Land Use and Development Code Zoning Ordinance to construct a 52' x 57'4" single family house at property located at 6 Spinney Cove Drive, Map 2, Lot 65, Kittery, zoned Suburban Residential.

1. Christopher Saint requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060.D (Page 256) of the Kittery Land Use and Development Code Zoning Ordinance in order to build a temporary deck around a hot tub close to the house but out of the way for a future addition to go where the current patio is at property located at 17 Sterling Road, Map 14, Lot 85, Kittery, zoned Urban Residential.

Mr. Christopher Saint came forward and told the Board he received a hot tub through a friend. He planned to put an addition at the back of his house toward the garage and if he placed the hot tub there, it would be in the way of that addition. He had asked his neighbor, Brian McKenzie, about it and Mr. McKenzie had said it was not a problem.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of the application and Brian McKenzie of 19 Sterling Road came forward and told the Board he had no problem with Mr. Saint building his deck right by his property, which was right next to where it was being built.

The Chair asked if there was anyone else present who would like to speak in favor of the application and received no response. The Chair asked if there was anyone present who would like to speak opposed to or about the application in any way. Receiving no response, the Chair asked for the CEO's report.

The CEO reported that this was a nonconforming lot with nonconforming structures within the Urban Residential Zone. Mr. Saint was proposing to construct a 10'x17' deck attached to the garage. The Urban Residential Zone required 15 feet from side property lines, the garage currently was three feet from the side property line and Mr. Saint was proposing to construct a deck five feet from the side property line.

Mr. Kingsbury noted he had stopped by to look at the house and asked Mr. Saint if the deck was already there. Mr. Saint replied, yes, he built it before he knew he needed a Permit because it was under \$1,000. Mr. Kingsbury questioned the three feet on the sketch, thinking it was quite a bit more.

CEO Ross explained to the Board that a site inspection was done once the building application was received and that Jack Copley had done the inspection.

Mr. Wilson said he could understand Mr. Kingsbury's puzzlement because he also was puzzled and went back a second time. The garage had a lean-to on it and he didn't believe it covered the 23'x36' footprint and it didn't have the height of the garage. He then asked the CEO if they had any history on the garage? Mr. Wilson wondered if that lean-to was in violation. CEO Ross said they did not have a history of it, which wasn't unusual. Mr. Wilson noted that it seemed to him, in scaling it out, between the brick patio and garage, there was a space for a 10'x17' addition without the need for relief from setback.

Mr. Saint said that, unfortunately, there was not and Mr. Wilson asked if the deck could be scaled back? Mr. Saint replied, no, because of the size of the tub, which he believed was six or seven feet and octagonal in shape.

Mr. Wilson said he did not go onto the property and had observed from the street but according to scaling, there should be enough space. Ms. Brown asked Mr. Wilson if he thought it would fit in there without the lean-to? Mr. Wilson answered he was looking at their traditional response in not encroaching further. They didn't have any evidence that the lean-to was proper or improper so they had to make a decision if they were going to say no closer to because, in a sense, they would be saying that lean-to was proper.

Ms. Brown said she also visited the property and was dismayed that it had already been built. Otherwise, for her, the biggest question was how No. 19 Sterling felt about it and she was very pleased to see that neighbor at the hearing because that was a big deal. However, she had major concerns with the fact it had already been built and that they possibly had another structure that was built unpermitted. Ms. Brown asked Mr. Saint if he built the extension onto the garage and Mr. Saint replied that it was there when they bought the house three years ago. Ms. Brown asked if he didn't think he needed a Permit and Mr. Saint reiterated he didn't spend \$1,000 on it so didn't think he needed a Permit.

CEO Ross stated that any change of footprint, more than \$1,000 worth of work, electrical or plumbing, any one of those things would trigger it, so the change in footprint, even though it was less than \$1,000, would need a Permit. Ms. Brown asked the CEO if that would be a reasonable misunderstanding? The CEO noted that someone should always first call the Code Enforcement Office.

Ms. Brown was also concerned about the fact that the deck was already built hadn't been on the application. Wouldn't Jack have seen the deck had already been built? The CEO said perhaps he noted it with Shelly but she had not understood that the deck had already been constructed. Ms. Brown asked Mr. Saint why he hadn't noted on his application that it had been built and Mr. Saint replied that he didn't think he needed to.

Mr. Costa noted that, under the Code, the Board wasn't supposed to take into consideration the fact that it had already been built but deal with it as if it hadn't been and Ms. Brown replied that the Code also said if the property was in violation, they shouldn't even consider a case.

Mr. Gardner said, for him, it was a simple "no closer than" and didn't see it carrying it a great deal of weight. His understanding was their Ordinance didn't prevent them from considering this even though the deck might be in violation and he would vote for it.

Chairman LaMarca agreed; it was understandable that Mr. Saint thought \$1,000 was the break point and, other than that, as long as that was an actual structure, not just a roof, it also appeared to him to be a "no closer than." He also agreed with Ms. Brown that having his neighbor with him, who was really the only one who would be affected by it, was huge.

The Chair noted for the record that Mr. Costa arrived and would not vote on this application.

Ms. Brown, as secretary, read the application as follows: Move of the application of Christopher Saint requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060.D of the Kittery Land Use and Development Code Zoning Ordinance in order to build a temporary deck around a hot tub close to the house at property located at 17 Sterling Road, Map 14, Lot 85, Kittery, zoned Urban Residential. Construction shall be in accordance with a sketch submitted, dated and signed by Christopher Saint and Michael LaMarca, Chairman. A motion to approve the application was made by Mr. Gardner, seconded by Mr. Pinkham.

A SHOW OF HANDS RESULTED IN A UNANIMOUS VOTE, SIX IN FAVOR, ZERO OPPOSED. MOTION PASSES 6/0 APPLICATION APPROVED.

Chairman LaMarca informed the applicant that any interested party of standing had 45 days to appeal the decision of this Board at the York County Superior Court and that they would try to get Findings of Fact out within seven days of tonight's hearing.

The Chair further informed the applicant that this approval was not the granting of a Building Permit as he would still need to see the CEO for such Permit, it merely granted the CEO authority to issue the same.

FINDINGS OF FACT
Application #1 – Christopher Saint

1. *This application involved a nonconforming structure on a nonconforming lot.*
2. *The applicant was looking to build a 10'x17' deck attached to an existing garage.*
3. *The existing garage was three feet from the property line, the deck would be in further at five feet from the property line.*
4. *The deck was already built but that fact did not play into the Board's approval process.*
5. *Mr. Saint's neighbor from 19 Sterling Road voiced no objection and, in fact, voiced approval of the application.*

CONCLUSIONS

1. Based on 16.28.130, the Board found that this was a "no closer than" situation and voted 6/0 to grant the appeal

A motion to accept the Findings of Fact as stated was made by Mr. Wilson, seconded by Mr. Kingsbury, with all in favor

2. Ross Hansen, on behalf of Shoals Marine Laboratory, requesting a Miscellaneous Appeal to the terms of Table 16.32.490.21 (Page 383) of the Kittery Land Use and Development Code Zoning Ordinance in order to install a 7.5 KW wind turbine, which will allow UNH's AIRMAP to have year round power for air quality sampling, help SML cut down on diesel fuel usage and act as a teaching tool for sustainability, at property located at Appledore Island, Map 70, Lot 17, Isles of Shoals, Kittery, zoned RP.

Mr. Ross Hansen came forward and told the Board they would like to install a small turbine on Appledore Island primarily for year-round power for UNH's AIRMAP air quality monitoring station. They had been out there for six summers now getting summer data and they were getting really good data and he would like to continue that year round. They were a seasonal facility, generating their own power, and with nobody to run the generators, it was not feasible or cost effective to run the generators year round. They had looked into solar, however, it turned out to be more costly, as well as not as effective due to the time of year desired and the size of the array that would be required. They had been working with the State's Department of Environmental Protection and Inland Fisheries and Wildlife Association for well over a year and that application was moving forward, looking for approval in the near future and they hoped for the Town's approval as well.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of the application.

Kevin Carpenter approached the podium and told the Board he represented UNH and the AIRMAP Program. He had been working with Ross Hansen and the Shoals Marine Laboratory for almost six years and thought it might be helpful to give the Board some background as to why they needed this program. It was an international air quality monitoring program with goals to develop air quality forecasts and determine sources of pollution, how much was due to local pollution versus distant sources, as well as evaluating the impact of air quality on human health. In the five to six seasons they had been out there, they had found the data to be very interesting. The seacoasts of New Hampshire and Maine were heavily impacted by a pollution corridor of emissions coming up from the eastern seaboard and Appledore Island was a unique location to help them better understand the transport mechanism associated with it. They needed the wintertime operations to further understand the pollution so they started evaluating alternative energy options and two years ago, they started to talk with Mr. Hansen and Shoals Marine Lab about how they could operate their instruments out there. They did extensive preliminary studies about solar and wind and wind really stood out by far as a possibility for wintertime options. They also wanted to address migratory bird issues. Mr. Hansen had done an excellent job working with bird banding and to support that, they designed the turbine to tilt down so they could take it down for any amount of time period if they saw an impact during the

migratory bird season and they were fortunate that the bird banding station was willing to monitor the impact. So, in addition to this being a teaching tool related to power, it was also an excellent avenue for them to do effective research in determining what the impact of these turbines would be on the birds in this area.

Glenn Shwaery of Pepperrell Road came forward and told the Board that the AIRMAP project was a project from the Earths, Ocean and Space Center of Excellence at the University of New Hampshire and one of the other scientists was Cameron Wake, who was a Kittery resident and who, with Bob Shepherd of Clean Air/Cool Planet, had been facilitating a Town pilot project at the land fill, looking at the potential for a wind turbine generator there for the Town to generate its own energy. Mr. Shwaery said the reason he would support this on Appledore was that it would provide data the Town could leverage, which would help Kittery in its pilot project in terms of quick pay back. It would also facilitate more data, giving them more information than they could get from their simple project up at the landfill.

Lee Consavage from Eliot came forward and told the Board he was an engineer who had worked with Mr. Hansen and Mr. Carpenter on the project and said it would be a great learning tool to find the wind resource they had available since the wind was strongest when the generators were not on the Island and it would be great to find out if they could lower their dependence on diesel fuel

Joe Watts from Love Lane came forward and said he was the Conference Center Director on Star Island and worked for the Star Island Corporation; they were the property owner and abutter of the Island and supported this project.

Kevin Carpenter noted that he had some photos and showed the Board pictures of what the turbine looked like from a mile away and that the Appledore Island turbine would be seen from six miles away

The Chair asked if there was any one else in favor of the application. Receiving no response, the Chair asked if there was anyone present who would like to speak opposed to or about the application in any way.

Milton Hall came forward and said he wanted to bring up the Comprehensive Plan on the Isles of Shoals. It was the only area in Kittery that fell under direct State control so the essential significant wildlife habitat program was the Isles of Shoals and he just wanted them to be aware of that. Mr. Ross noted that they had been working with the State and were fully aware they were in a significant wildlife habitat.

Chairman LaMarca asked if there was anyone else present who would like to speak about the application in any way and hearing no response, asked for the CEO's report.

CEO Ross reported that this was a conforming lot within the Resource Protection Zone. Star Island Corporation was proposing a 7.5 kilowatt wind turbine tower. The proposed monopole design tower would be 80 feet high with several small concrete pads underneath it. The RP Zone specified that permanent and special exception uses were allowed in accordance with Table 16.32.490, which also stated that essential services were allowed with approval from the Zoning Board of Appeals.

Chairman LaMarca complimented Mr. Hansen on a very complete package. The Chair then noted that the Board could not do a Miscellaneous Appeal but could do a Special Exception and asked Mr. Hansen if he would like to make that change, which he did

Mr. Costa wondered about the reason for the tower being 80 feet high and Mr. Hansen explained that typically, the higher up, the better, for wind flow without turbulence.

CEO Ross noted to Chairman LaMarca that permanent and special exception uses were allowed under 16.32.490, Land Uses in the Shoreland Zone and the Land Use Standards Established in Shoreland Zoning, so it specified uses and special exceptions, it didn't explicitly say that this had to be a Special Exception but that it had to be reviewed by the Zoning Board of Appeals.

Mr. Kingsbury asked what this qualified as and the CEO responded, as an essential service

Mr. Wilson said he would conclude that it was a permitted land use, just to be reviewed by the Board as a permitted use.

The Chair noted that the Resource Protection Zone did not appear to have a list of special exceptions as did other zones and, with consensus of the Board, asked Mr. Hansen if he wanted to go back to a Miscellaneous Appeal, which Mr. Hansen agreed he did want to do.

Mr. Wilson agreed with the Chair's statement regarding the completeness of the package, that it gave them all the information they could imagine and he would be in favor of a motion to approve.

The Chair voiced a concern he had that the structure would be "ugly" on the Island but saw that the impact was so minimal and he felt strongly that this was a good application.

Mr. Pinkham asked if they had a deal with Star Island Corporation if they didn't like it in the summer and Mr. Hansen replied that they would love it year-round, however, if it affected the aesthetics from Star Island, their land owners, the monopole design lent itself to be taken down very easily.

Ms. Brown said it was one of the best applications she had ever seen and thought it was a fabulous idea. She also commented to the Star Island people that, if it worked well, they might end up getting a couple of wind turbines.

Ms. Brown, as secretary, read the application as follows: Move the application of Ross Hansen, on behalf of Shoals Marine Laboratory, requesting a Miscellaneous Appeal to the terms of Table 16.32.490.21 of the Kittery Land Use and Development Code Zoning Ordinance be approved in order to install a 7.5 KW wind turbine, which will allow UNH's AIRMAP to have year round power for air quality sampling, help SML cut down on diesel fuel usage and act as a teaching tool for sustainability, at property located at Appledore Island, Map 70, Lot 17, Isles of Shoals, Kittery, zoned RP. Construction shall be in accordance with a sketch submitted, dated and signed by Ross Hansen and Michael LaMarca, Chairman. A motion to approve was made by Ms. Brown, seconded by Mr. Costa.

A SHOW OF HANDS RESULTED IN A UNANIMOUS VOTE, SEVEN IN FAVOR, ZERO OPPOSED MOTION PASSES 7/0 APPLICATION GRANTED.

Chairman LaMarca informed the applicant that any interested party of standing had 45 days to appeal the decision of this Board at the York County Superior Court and that they would try to get Findings of Fact out within seven days of tonight's hearing.

The Chair further informed the applicant that this approval was not the granting of a Building Permit as he would still need to see the CEO for such Permit, it merely granted the CEO authority to issue the same.

FINDINGS OF FACT

Application #2 – Shoals Marine Laboratory

1. *Shoals Marine Laboratory was requesting a Miscellaneous Appeal to install a 7.5 KW wind turbine on a conforming lot on Applegate Island in the Resource Protection Zone.*

CONCLUSIONS

1. *Based on 16.12.090.B and 16.32.490.21, the Board determined that this was an essential service, would be a permitted land use for that area, and voted 7/0 to grant the appeal.*

A motion to accept the Findings of Fact as stated was made by Mr. Gardner, seconded by Mr. Pinkham, with all in favor

3. Litson Villas, LLC requesting a Special Exception to the terms of Title 16, Section 12, Subsection 100.C (Page 262) of the Kittery Land Use and Development Code Zoning Ordinance in order to allow a mixed use of new building with residential over commercial property located at 127 State Road, Maps 8 and 14, Lots 15 and 25, Kittery, zoned LB.

Leo Guy came to the podium and told the Board he was the owner of Litson Villas and that he had grown up and lived in Kittery. Mr. Guy said he would make the presentation of the development and then turn it over to the design team. When purchasing the Villas, their plan was to develop the property to benefit the community and included a skating pond, delis, coffee shop, retail, and offices around a walkable space without a lot of traffic. The site was easily attainable from Route 1 and he had spoken with seven of the immediate abutters by telephone, who voiced no opposition and appreciated being kept in the loop. They were looking for the Board to approve the project as a mixed use. Mr. Guy then introduced Dan DeFault, Mike Lasso and Paul Fowler, architects, and Peter Hedrick, Traffic Engineer, and Ben Walden.

Dan DeFault of York, Maine and Florida, came to the podium and explained that he specialized in mixed use developments and his experience was that they could really enhance and bring character to an area. Directing the Board's attention to the layout sketch, he said it created a walking community, was a good tax base and helped to facilitate a local business zone. They had

mixed use components open to the public, a residential component, an office component, retail, restaurants and public. Mr. DeFault noted the benefits of creating condominiums for commercial business owners, as well as affordably priced housing, also telling the Board they thought the property happened to be very good space to encourage local businesses and was smart growth. Mr. DeFault said they looked forward to the Board's consideration and doing a good job with it.

Mike Lasso of Lasso Architects came forward and said that one of the keys issues towns faced was how to deal with growth and traffic in a way that made sense. In an area that already had water and sewer, allowing mixed use to occur was smart growth and this project was one of the ways of doing it. Creating an area that allowed people to walk or ride their bikes to Portsmouth and part of their plan included covered bicycle areas. There would be 44% of open space, green space buffers of 50 feet and contiguous green space for the residents.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of the application.

Mike Zellar of Shapleigh Road approached the podium and told the Board he had worked all over the country and lived in mixed use communities before, with and without kids, and it had been great for the residents; there was nothing better than that village community feeling. Mr. Zellar offered the following observations – this project was confluent with the Route 1 expansion, it would and did enhance the tax base and he would like the Board to accept the plans as presented.

Heather Hale came forward and told the Board her back yard was a direct abutter. After speaking with Mr. Guy, they were really excited about it and the changes for that area; it would save them from going to Portsmouth for their Sunday coffee.

Joe Afienko, Picott Road, approached the podium and told the Board that, for all the reasons already stated, he thought it was a good idea and that it flowed with the Comprehensive Plan they completed a few years ago. He also thought it was a good thing real estate-wise for the Town. Mr. Afienko said he had known Mr. Guy, who was a hometown boy, for a couple of years and thought this concept made sense. The design was not a "hodge podge" of a mixed use area like those seen on Route 1 from New Hampshire to Florida, but established a model and he hoped the Board would approve their application.

Steve Delaney, 97 Pepperrell Road came forward and expressed support of the application.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of, opposed to or about the application in any way.

Nancy Willett, 100 Old Post Road, approached the podium and told the Board she thought this was a great idea and had tried to get hold of Mr. Guy but had not heard back from him. She had questions about parking, dumpsters, etc. She was in the process of trying to sell her house and the very first people who looked at it were no longer interested after hearing about the project so she wanted to know more about it.

Chairman LaMarca explained to Ms. Willett that the Town notified abutters that were within a 150-foot radius.

Mr. Wilson also explained to Ms. Willett that part of the process was bringing the plan before this Board for a Special Exception and there were certain standards used but site plan review happened at the Planning Board level, which was another whole level of review.

Nick O'Keel, 132 State Road, came forward and voiced a possible concern, explaining to the Board that if the entrance onto State Road was moved in any way for this project, it would create a problem for him; where it was now, headlights from oncoming cars shined in a specific direction.

Chairman LaMarca explained that those types of specific details would be reviewed at the Planning Board level. Mr. Gardner noted that both parties referred to an adverse affect on their property value, which was part of the Board's pervue. The Chair then asked for the CEO's report.

CEO Ross reported that Mr. Guy was proposing six separate buildings, a residential, and retail project, which would require further approval from the Planning Board.

Chairman LaMarca explained to the applicants that, as part of their procedures, they had 16 factors for consideration plus 6 criteria for Special Exceptions. The Chair began to go through the list of factors for consideration and asked the Board for a vote on each one – a "yes" vote if they felt the project met that certain criteria or a "no" vote if they felt it did not.

FACTORS FOR CONSIDERATION:

1 *The Character of Existing and Possible Development and Peculiar Suitability for Such District*
The Board voted unanimously; 7 "yes" votes, 0 "no" votes.

2 *Conservation of Property Values and Encroachment*
The Chair stated that, based on Ms. Willett's comments, he thought they needed to look at what would be there.

Ms. Brown asked about a timetable and was told it would be two to three years but that their plan was to take one part of the site at a time, not to do it all at once, and that appropriate work hours would be established

CEO Ross suggested that the Board might want to consider an extension of time for this project.

Mr. Gardner noted that State Road was an area in transition where property values would change from focusing on residential to commercial so land values would start to rise and residences would start to fall.

The Board voted unanimously; 7 "yes" votes, 0 "no" votes.

3 *Affect on Traffic*

Mr. Kingsbury wondered how they would know and Ms. Brown said she had a lot of questions in relation to traffic.

Peter Hedrick, a traffic engineer, addressed the Board and explained to them they would be approaching the Maine Department of Transportation. Since there was access on two sides of the project and a main route, they didn't anticipate it having a significant impact on the overall