

Town of Kittery
Zoning Board of Appeals
February 24, 2009

Call to Order: 7:03 pm

Members present: Vern Gardner, Chairman; Niles Pinkham, Thomas Battcock-Emerson, Herb Kingsbury, Bob Kaszynski, Brett Costa, Craig Wilson, Secretary

Members absent:

Staff: Heather Ross, Code Enforcement Department

Pledge to the Flag

PUBLIC HEARING

ITEM 1 - William Pingree requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060 (Page 238.5) and Title 16, Section 32, Subsection 490N2F (Page 317) of the Kittery Land Use and Development Code Zoning Ordinance in order to remove the existing woodshed and deck, entry, steps, walk, external ramp and stairs (287 sq.' total) and construct a two story 8'x12' covered entry and 3'x9' covered stairway (119 sq.' total). Decrease non-vegetative coverage 222 sq.', increases front and side yards. Located at 9 Bowen Road, Kittery, Map 17 Lot 3, in the Urban Residential Zone.

William Pingree, applicant, summarized the proposal to remove the existing "extraneous" structures, and provide covered entries.

Chairman Gardner asked if there was any public comment for or against the item. There being none, the CEO provided:

1. This is a nonconforming lot with nonconforming structure located within the UR and Shoreland zones.
2. Applicant is proposing to demolish a woodshed, deck, entry, steps, walkway and ramp, proposing to construct an 8'x12' and a 3'x9' addition.
3. Per Title 16.28.080, Averaging Building Setbacks, the required front property line setback is 12'6". The proposed construction is 25' from the front property line and meets the minimum setback for the front property line.
4. Per Title 16 Section 12.060 of the UR Zone, a minimum 15' side yard setback is required. The existing structure is approximately 1 foot from the side property line. The proposed structure would be greater than 1 foot from the property line, but less than the required 15 foot setback.
5. Title 16 Section 32.490N2F requires that the total area of all structures, parking lots and other non-vegetated surfaces within the shoreland zone not exceed 20% of the lot. The existing area of all structures, parking lots and other non-vegetated surfaces is greater than 20% of the lot. The proposed area of all structures, parking lots and other non-vegetated surfaces will be approximately 168 square feet less.

Herb Kingsbury inquired if the applicant could include an intermediate landing on the external stairway. **Mr. Pingree** stated that the location was needed to access the upstairs and downstairs units. **Craig Wilson** noted that the CEO testimony and applicant differ on total square footage reduction of non-vegetated cover (168 sf vs. 222 sf). Regardless, the coverage has been reduced and the proposal creates new structures that are no-closer than the existing, non-conforming

structure. **Thomas Battcock-Emerson** inquired about the parking arrangements for the rental units. **Mr. Pingree** confirmed that there was no change to the parking. **Craig Wilson** reminded the applicant that silt fencing or a berm must be in place prior to any construction as the property is in the Shoreland Zone. **Chairman Gardner** asked if there was any input from the Conservation Commission regarding this application. There was none.

Herb Kingsbury motioned that the ZBA grant a miscellaneous appeal to William Pingree to the terms of Title 16, Section 12, Subsection 060 and Title 16, Section 32, Subsection 490N2F of the Kittery Land Use and Development Code Zoning Ordinance, for property located at 9 Bowen Road, Kittery, Map 17 Lot 3, in the Urban Residential Zone.

Craig Wilson seconded

Motion carries unanimously

Chairman Gardner noted that a building permit must be obtained by the applicant, and any persons aggrieved by this decision has 45 days to appeal to Superior Court.

Findings of Fact

1. William Pingree requests a miscellaneous appeal to seek relief from the 15' side yard setback and the non-vegetated surface limitations. Applicant requests to remove the existing woodshed and deck, entry, steps, walk, external ramp and stairs (287 sf total) and construct a two story 8'x12' covered entry and 3'x9' covered stairway (119 sf total). There was a discrepancy where the CEO stated there was a 168 sf reduction of non-vegetated cover, and the applicant stating a 222 sf reduction.
2. This is a nonconforming lot with nonconforming structure located within the UR and Shoreland zones.
3. Applicant is proposing to demolish a woodshed, deck, entry, steps, walkway and ramp, proposing to construct an 8'x12' and a 3'x9' addition.
4. Per Title 16.28.080, Averaging Building Setbacks, the required front property line setback is 12'6". The proposed construction is 25' from the front property line and meets the minimum setback for the front property line.
5. Per Title 16 Section 12.060 of the UR Zone, a minimum 15' side yard setback is required. The existing structure is approximately 1 foot from the side property line. The proposed structure would be greater than 1 foot from the property line, but less than the required 15 foot setback.
6. Title 16 Section 32.490N2F requires that the total area of all structures, parking lots and other non-vegetated surfaces within the shoreland zone not exceed 20% of the lot. The existing area of all structures, parking lots and other non-vegetated surfaces is greater than 20% of the lot. The proposed area of all structures, parking lots and other non-vegetated surfaces will be approximately 168 square feet less.

Bob Kaszynski motioned to accept the Findings as read

Niles Pinkham seconded

Motion carries unanimously

Conclusion

There being a decrease in the non-vegetated surfaces and the side yard setback is no closer than existing structures, the Board is empowered to grant relief under Section 16.28.130D1c.

Brett Costa motioned to accept the Conclusion as read
Thomas Battcock-Emerson seconded
Motion carries unanimously

ITEM 2 - J. W. Sobel for 17 Water Street LLC requesting an Administrative Appeal to the terms of Title 16, Section 20, Subsection 020D (Page 262) of the Kittery Land Use and Development Code Zoning Ordinance in order to renew three building permits (06-155, 06-413, and 07-219) to finish building. Located at 17 Water Street, Kittery, Map 1 Lot 47, in the Kittery Foreside Zone.

John Sobel, for applicant, summarized the request, including the history of financial, legal and administrative delays contributing to the expiration of the original building permits. Mr. Sobel spoke about the definition of what constitutes “substantial completion” of a project and noted that the permit for the bay windows will not expire until June 25, 2009. He further stated that there has been no substantive changes in the zoning that would impact the original permits and request that the ZBA re-issue permit #06-413 and renew permit #07-219. Letters of support from abutters were also presented. There are no changes proposed and it is a “shovel ready project” that simply needs permit renewal and re-issue.

Chairman Gardner asked if there were any present wishing to speak for or against the project. There being none, the CEO provided:

1. This is a non-conforming lot with non-conforming structures within the Kittery Foreside and Shoreland zones.
2. An Administrative Appeal has been filed in response to the denial of renewal of expired building permits #06-155, #06-413 and #07-219.
3. Permit #06-155 was issued on 5/25/06 for interior demolition. If applied for as an application for interior demolition, a permit could be issued.
4. Permit #06-413 was issued on 11/30/06. The ZBA heard the appeal for this permit on 11/14/06. The ZBA heard two appeals that evening. The first was a miscellaneous appeal “in order to renovate an illegal four story, 3-unit dwelling unit into a legal 2-unit by eliminating the fourth floor, raising the third floor ceilings and making each unit similar in size and usefulness by adding dormers at property.” The second appeal was a miscellaneous appeal “in order to restore original architectural features and reconstruct rotted decks at property.” The ZBA approved both applications with the exception that the bay windows shown in the proposed drawings could not be constructed. The building permit was issued, “per ZBA approval to construct an 8’x38’ two story deck, reconstruct a partial basement on the front side, extend the dormers, add a 4’x6’ side porch and gut and rehab as a 2-unit”. The building permit also stated, “ZBA approval provides for 6 months to commence, 1 year to substantially complete and to include 42” guardrails on the decks”.
5. Permit #07-219 was issued on 6/25/07. The ZBA heard the appeal for this permit on 6/12/07 as a miscellaneous appeal “in order to add bay windows to the 1st, 2nd and 3rd floors at property”, and granted the appeal.
6. On 10/14/08 the CEO met with Paul Bacon, property owner and ZBA applicant. Per the owner’s request, the CEO provided a letter (10/29/08) stating that the building permits had expired and advising him of his appeal avenues.
7. The CEO stated that the applicant chose to file an Administrative Appeal, requiring that the Board address the CEO’s denial of the building permit. The CEO’s opinion was that

to continue work on the structure would require that the applicant receive approval from the ZBA as prior ZBA approvals expired, and property expansions are within the shoreland zone.

Herb Kingsbury asked the CEO if it was her opinion that the project is substantially completed. The CEO responded that it is not. Mr. Kingsbury asked why the applicant did not approach the Board with a new request. **Mr. Sobel** stated that under 16.20.020D, the CEO could renew the permits upon application and payment of a renewal fee, but because the decision to issue permits originated through the ZBA, the ZBA must approve renewal. **Craig Wilson** noted that the ZBA does not issue building permits. **Mr. Sobel** stated that the CEO denial has prompted the Administrative Appeal because he believes the code office can re-issue these permits. Additionally, the review and decision process for this project took considerable time and since there are no changes, renewal should be straightforward. **CEO** stated that under 16.20.020, the applicant must be in compliance with all state and federal requirements, and that these permits require ZBA review because original issuance required ZBA review and is not within the code enforcement office's ability to renew. **Brett Costa** stated that there are no changes to code or application and felt that substantial interior work has been completed and that the original decision is not affected. **Craig Wilson** stated that, under 16.24.050K, the expiration is of ZBA approval, not a permit expiration. In the 10/29/08 letter this section is outlined, and the applicant was advised that an appeal to the CEO's decision could be made within 30 days. The applicant did not appeal that decision. The ZBA's decision had expired and the CEO could not act on that expiration and re-issue or renew an expired ZBA approval. **Niles Pinkham** asked if the applicant could change his appeal from Administrative to Miscellaneous Appeal at this time. **Chairman Gardner** stated that the application does not contain the content needed to review it as a Miscellaneous Appeal. **Bob Kaszynski** suggested that under 16.24.050K2 the period of time the applicant was under bankruptcy proceedings could be considered. **Craig Wilson** stated that the plan itself was not under review by a bankruptcy judge and this should not be construed as required review by another agency. **Mr. Sobel** suggested that the permit for the bay windows was completed within 6 months of permit issuance. **Thomas Battcock-Emerson** stated that there is no glass in the bay windows, and noted that substantial completion of a property would mean that the property can be used as a habitable dwelling, and that does not apply in this case. **Brett Costa** stated he felt that the period of time in litigation should count toward the permit period. Had the bankruptcy not taken place, the complete installation of the bay windows would have been completed. **Chairman Gardner** asked the Board if they would prefer to handle the request in piecemeal – by reviewing the issue of substantial completeness – or review in total, on cumulative time elapsed. He asked the applicant for documentation regarding the period of time the project was in litigation. **Mr. Sobel** stated that it was approximately 7 months, between bank foreclosure and litigation in Superior Court.

Herb Kingsbury motioned to deny the Administrative Appeal of J. W. Sobel for 17 Water Street LLC requesting an Administrative Appeal to the terms of Title 16, Section 20, Subsection 020D of the Kittery Land Use and Development Code Zoning Ordinance in order to renew three building permits (06-155, 06-413, and 07-219) to finish a building located at 17 Water Street, Kittery, Map 1 Lot 47, in the Kittery Foreside and Shoreland Zones.

Thomas Battcock-Emerson seconded

Motion carries 4 in favor (Kingsbury, Gardner, Wilson, Battcock-Emerson) with 2 against (Kaszynski and Costa) and 1 abstention (Pinkham)

Chairman Gardner noted that the applicant has 45 days to appeal the decision to Superior Court.

Findings of Fact

1. J. W. Sobel for 17 Water Street LLC requested an Administrative Appeal to the terms of Title 16, Section 20, Subsection 020D of the Kittery Land Use and Development Code Zoning Ordinance in order to renew three building permits (06-155, 06-413, and 07-219) to finish a building located at 17 Water Street, Kittery, Map 1 Lot 47, in the Kittery Foreside and Shoreland zones.
2. Applicant provided an overview of the history of the property and the permits (06-155 for demolition, 06-413 for interior improvements and 07-219 for the bay windows) that had expired (though 07-219 has not yet expired).
3. Petitions in support of the project (five immediate abutters) were presented and there were no other persons present at the hearing for or against the project.
4. The CEO stated that there were no changes to the zone that affected the property.
5. The property is a non-conforming lot with non-conforming structures.

Thomas Battcock-Emerson motioned to accept the Findings as read

Herb Kingsbury seconded

Motion carries unanimously

Conclusion

The Board found that under 16.24.050.K.1 that the approvals by the ZBA granted to the project for permits 06-413 and 07-219 had expired. Therefore, under 16.20.020.D the CEO was correct in denying re-issuance of expired permits as the ZBA approvals had expired.

Thomas Battcock-Emerson motioned to accept the Conclusion as read

Herb Kingsbury seconded

Motion carries unanimously

Minutes

January 27, 2009 minutes were accepted unanimously as presented

The CEO noted that the next ZBA meeting will be held on March 24, 2009

Herb Kingsbury stated that he will not be present at the March meeting

Niles Pinkham asked about changing an appeal during a meeting. If the information had not changed, why could the ZBA not renew or re-issue their original approval? It was discussed that a miscellaneous appeal would require a more detailed packet of information than that required of an administrative appeal. The CEO commented that abutters would not have been notified and suggested a legal opinion may be needed. Craig Wilson commented on the argument that there were other agencies that kept the project from moving forward, thus forcing the permit to expire. These agencies were not reviewing agencies, so this did not constitute a special exception in approval expiration [Section 16.24.050.K.2]. In the case of the bay windows, Thomas Battcock-Emerson stated that though construction stopped while the applicant was in Superior Court, other work could have continued. Niles Pinkham suggested that the ZBA could have granted a miscellaneous appeal with approval, and include conditions that the CEO be satisfied that the original permits were followed. Craig Wilson stated that appeal applications have specific requirements and granting appeals without the required submission requirements could lead to

legal challenges. The review procedures need to be followed for all applicants so that no one applicant is denied due process.

[During the Board's discussion, Mr. Sobel and party re-entered the meeting room. Herb Kingsbury left the meeting at 8:35 pm and returned at 8:38 pm]

Herb Kingsbury motioned to adjourn
Bob Kaszinski seconded
Motion carries unanimously

Chairman Gardner adjourned the meeting at 8:45 p.m.

Submitted by Jan Fisk, Recorder – February 25, 2009