

Town of Kittery
Zoning Board of Appeals
April 14, 2009

Call to Order: 7:05 p.m.

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

Members absent: Brett Costa

Staff: Heather Ross, Code Enforcement Department

Pledge to the Flag

PUBLIC HEARING

ITEM 1 - Matt Hart for Landmark Properties requesting an Administrative Appeal to the terms of Title 16, Chapter 32, Section 370.B in order to construct a 36'x36' two story single family dwelling with a 24'x26' garage. Located at 49 Betty Welch Road, Kittery, Map 65 Lot 1, in the Rural Residential District Zone.

Matt Hart stated that the lot he wishes to develop was a lot of record prior to April 26, 1990, and believes that the his request should be approved as the ordinance heading states "private systems on unimproved lots created after April 26, 1990", not private systems created after April 26, 1990.

Chairman Gardner asked if there was anyone present wishing to speak for or against this item.

Rick Hart, abutter and father of applicant, spoke in favor of the request noting that lots developed prior to this lot have had septic systems in place for many years, with no problems.

Rob Harris, abutter, noted that septic systems approved by the state on adjacent lots have been functioning with no problems after more than 20 years.

Bibb Longcrier, abutter, stated he had no objection to the applicant's request, but inquired if there are other planned projects on Gee Road that would impact his property.

There being no further testimony, the CEO provided:

1. This is a conforming vacant lot located within the RR zone;
2. Mr. Hart is proposing to construct a single family home and septic system. The new septic system would require a new system variance. Due to the soil conditions on the property, the proposed septic system could not meet the minimum soil requirements.
3. The proposed construction requires a wetland crossing. A wetland crossing would be reviewed by the Planning Board.
4. Because of the complexities of the application, the CEO met with the Town Attorney and Town Planner to review.
5. The Town Attorney submitted the following letter of opinion [read verbatim into the minutes]:

**McEACHERN &
THORNHILL**
Attorneys at Law

42009 PM 11:15
ST. W. 5025

February 2, 2009

Ms. Heather M. Ross
Kittery Code Enforcement Officer
200 Rogers Road
Kittery, ME 03904-1478

Re: Subsurface Drainage

Dear Heather:

You have asked me to interpret 16.32.370 of our Land Use and Development Code Zoning Ordinance to determine if it applies to newly constructed subsurface waste disposal systems on certain lots of record. Specifically, you inquire whether this Section applies to subsurface waste disposal systems installed on lots of record existing prior to April 26, 1990. Section 16.32.370 provides:

Private systems on unimproved lots created after April 26, 1990.

- A. Where public sewer connection is not feasible, the developer shall submit evidence of soil suitability for subsurface sewage disposal. Additionally, on lots with a limiting factor identified as being within twenty-four (24) inches of the surface, a second site with suitable soils shall be shown as a reserve area for future replacement should the primary site fail. Such reserve area shall be shown on the plan; shall not be built upon; and, shall comply with all the setback requirements of the Subsurface Wastewater Disposal Rules.
- B. In no instance shall a disposal area be permitted on soils or on a lot which requires a new system variance from the Subsurface Wastewater Disposal Rules.
- C. Test pits shall be of sufficient numbers (a minimum of two) and so located at representative

Duncan A. McEachern & Dan W. Thornhill
10 Walker Street, P.O. Box 360
Kittery, Maine 03904-0360
Telephone: 207/439-4881 Fax: 207/439-8893

points within the disposal area to assure that the proposed disposal area can be located on soils and slopes which meet the criteria of the State Plumbing Code. [Emphasis added]

The interpretation of 16.32.370 hinges on how one interprets the headnote language stating that the provisions of 16.32.370 are intended to apply to "Private systems on unimproved lots created after April 26, 1990." There is some suggestion that this headnote language provides that "private systems" on unimproved lots created after April 26, 1990 would be the only systems covered by the provisions of 16.32.370. This interpretation suggests the emphasis of 16.32.370 is focused on the date at which the unimproved lot is created. I do not ascribe to this interpretation. I believe that the emphasis and application of 16.32.370 is directly to the date when the private system is created rather than the date the lot is "created." If the subsurface waste disposal system is "created" after April 26, 1990, in my opinion the provisions of 16.32.370 apply.

Subsurface sewerage systems are closely linked to the promotion of public health and welfare considerations. It makes little sense that the drafters of 16.32.370 would have focused on the date on which a lot is created rather than the date on which the sewerage system is created (installed). Moreover, 16.32.370 appears in the section of the Ordinance [Article VIII Sewage Disposal] dealing with sewerage systems and not with the creation of lots.

Should you have any further questions with regard to what I have set out here, please give me a call.

Very truly yours,



Duncan A. McEachern

DAMcE/cn

6. The Code Enforcement Office agrees with Attorney McEachern's interpretation of the ordinance and it is the determination of the CEO that this is a request of a new system variance and that a new system variance is not allowed per ordinance.
7. Mr. Hart has filed an administrative appeal of the denial of his application.

Chairman Gardner read a letter from the Kittery Conservation Commission dated April 3, 2009:

The Kittery Conservation Commission has reviewed the material submitted by Matt Hart for Landmark Properties requesting an Administrative appeal to the terms of 16.32.370B in order to construct a 36'x36' two story single family dwelling and a 24'x26' garage located at the above listed address.

Professionally drawn site plans with all wetland boundaries clearly and accurately delineated, would present the ZBA with factual information on which to base their decision.

KCC respectfully requests that the ZBA uphold the terms of 16.32.370B regarding subsurface sewage disposal systems (and also uphold the Code Enforcement Officer's denial of the application) by not granting a variance for the above listed property.

It is also noted that the applicant must apply to the Planning Board and the DEP for a wetland crossing review for the driveway that is proposed to be constructed through a wetland.

Herb Kingsbury stated he was in agreement with the CEO's decision to deny Mr. Hart's appeal application.

Craig Wilson questioned when and why ordinance revisions created this section, however, agreed with the Attorney's interpretation to uphold the decision of the CEO.

Niles Pinkham and Bob Kaszynski concurred that the heading is poorly written. Lots are created and systems are installed. The ordinance states "lots created". **Chairman Gardner** noted that when referencing ordinance language, it is reviewed as printed and not interpreted.

Bob Kaszynski asked what would the impact of the system be on the surrounding wetlands?

Craig Wilson stated that determination of the septic system meeting state requirements is not the Board's task, but whether the CEO's decision will be upheld by the Board.

Chairman Gardner noted that the Board has the authority to modify a decision by the CEO.

Craig Wilson stated that, given new technologies, this could possibly work, but at this time the ordinance clearly does not allow a new system variance. **Thomas Battcock-Emerson** agreed with the CEO's and Attorney's interpretation of the current ordinance, but wastewater disposal technology has changed significantly since 1990, and the code should be reviewed in light of these advancements.

Rick Hart stated that he had a long discussion with the Town Clerk in an effort to determine why that specific date is included in the ordinance, but were unable to track the changes or the reasons behind it.

CEO noted that the lot does not meet the State's requirements for subsurface wastewater disposal.

Herb Kingsbury motioned to deny Mr. Hart's administrative appeal to Title 16, Chapter 32, Section 370.B in order to construct a 36'x36' two story single family dwelling with a 24'x26' garage.

Thomas Battcock-Emerson seconded

Motion carries 4-0-2 (Niles Pinkham and Bob Kaszynski abstained)

Chairman Gardner advised that any aggrieved parties have 45 days to appeal this decision to Superior Court.

Findings of Fact

1. Applicant Matt Hart appealed the decision of the CEO to Title 16, Chapter 32, Section 370.B to construct a 36'x36' two story single family dwelling with a 24'x26' garage.
2. Property is located 49 Betty Welch Road, Kittery, Map 65 Lot 1, in the Rural Residential District Zone.
3. The lot required a new system variance. The interpretation of the heading of 16.32.370 received an opinion from the Town Attorney, dated February 2, 2009, which upheld the decision of the CEO.
4. A letter from the Kittery Conservation Committee, dated April 3, 2009, requested that the ZBA uphold the decision of the CEO.
5. Abutters appearing before the Board were Rick Hart, father of the applicant and Rob Harris who both testified that they were in support of the requested appeal and that functioning systems in the area had not failed. Mr. Bibb Longcrier, an abutter, also had no objections to the requested appeal. Rick Hart also testified that he had a conversation with the Town Clerk in an attempt to ascertain the reason for the April 26, 1990 date in the ordinance.
6. The CEO held a meeting with the Town Attorney and the Town Planner to discuss the application.

Bob Kaszynski motioned to accept the Findings as read

Niles Pinkham seconded

Motion carries unanimously

Conclusion

The majority of the Board felt that the interpretation of 16.32.370 was such that it meant systems created after April 26, 1990, and supported the decision of the CEO.

Herb Kingsbury motioned to accept the Conclusion as read

Thomas Battcock-Emerson seconded

Motion carries unanimously

ITEM 2 - Deane Rykerson and Wendy Pomeroy requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Section 090.C.2 and Title 16, Chapter 20, Section 020.E in order to upgrade septic with pretreatment to have a kitchen sink in the studio building creating an additional dwelling with a zoning requirement of 40,000 sq.' per dwelling allowing temporary and in-law residence with no impact to property. Located at 1 Salt Marsh Lane, Kittery Point,

Map 69 Lot 14E, in the Rural Residential District Zone, Resource Protection Zone, and Shoreland Zone.

Deane Rykerson summarized his request and read two letters from abutters in support of his appeal.

Chairman Gardner asked if there was anyone present wishing to speak for or against this item. There being none, a letter from the Kittery Conservation Commission, dated April 3, 2009:

The Kittery Conservation Commission has reviewed the material submitted by Deane Rykerson and Wendy Pomeroy requesting a Miscellaneous Appeal to 16.12.090.C.2 and 16.20.020.E in order to upgrade the septic system in the Shoreland Zone.

While the Code Enforcement Officer has denied the application due to insufficient land area for two dwellings, it appears, from the site plans that were submitted, that the applicants may not have the setback necessary for a subsurface waste disposal system in the Shoreland Zone.

KCC respectfully requests that the ZBA uphold the Code Enforcement Officer's denial of this application and not grant a Miscellaneous Appeal.

The CEO provided the following:

1. This is a conforming lot with non-conforming structures within the Rural Residential, Shoreland and Resource Protection zones.
2. Mr. Rykerson has proposed an alteration to his existing septic system in order to be allowed to continue to occupy two dwelling units on his property.
3. On December 11, 2002, Mr. Rykerson was issued a building permit (02-304), to construct a 24'x38' dwelling unit and studio/workshop.
4. On May 30, 2003, Mr. Rykerson was issued a certificate of occupancy for the studio/temporary residence. Mr. Rykerson was given permission to occupy this residence while the proposed house was being constructed. At that time, I discussed with Mr. Rykerson the use of the building as a temporary residence, and that once the new house was occupied, that the studio could no longer be occupied as a dwelling unit.
5. The septic system tank permit, issued on October 7, 2003, stated "Upon completion of the new two bedroom house, the kitchen facilities will be removed from the one bedroom cottage, thereby keeping this a single family dwelling in accordance with the existing three bedroom disposal area design".
6. On September 19, 2003, Mr. Rykerson was issued a building permit for a house and garage. On August 16, 2004, a certificate of occupancy for the house and garage was issued. It was understood, at that time, that once the family moved into the new house that the studio would no longer be used as a dwelling unit, and that the kitchen facilities would be removed. This never happened.
7. Mr. Rykerson has filed a miscellaneous appeal in response to the denial of a revised septic system permit, and has filed this application in order to use both the studio and the house as separate dwelling units.
8. Per the Shoreland zoning table, page 312, a single family dwelling unit within the Resource Protection zone requires ZBA approval. Per 16.12.090 (page 241), dimensional

standards for the Resource Protection zone are the same as those of the Rural Conservation zone.

9. Title 16.12.080 requires a minimum 80,000 sf per dwelling unit. This property is approximately 129,809 sf. The property is predominately within the Resource Protection zone, where two dwelling units would require a minimum lot size of 160,000 sf and ZBA approval.

Mr. Rykerson stated that the leach field is in compliance with the setbacks, based on a survey. **Thomas Battcock-Emerson** noted that the issue is the number of dwelling units on the size of the property, as the septic system has capacity for the requested number of dwelling units. **Herb Kingsbury** asked if this property is in violation, can the Board hear the appeal? The **CEO** stated that because the appeal request does not meet the lot size requirements, the appeal should be heard as a variance. If the applicant kept the second dwelling for in-law use only, and not as a rental unit, the Board could review a request for an Interfamily Dwelling Unit at another time, requiring a separate application. **Craig Wilson** noted the septic design is for a five bedroom dwelling. The **CEO** stated he was denied the system because it was for two dwelling units, but if he removes the fixtures that create a second dwelling unit, he could use the system as designed.

Thomas Battcock-Emerson motioned to deny the miscellaneous appeal by Deane Rykerson and Wendy Pomeroy to the terms of Title 16, Section 12, Section 090.C.2 and Title 16, Chapter 20, Section 020.E to upgrade septic with pretreatment to have a kitchen sink in a studio building, and creating an additional dwelling, located at 1 Salt Marsh Lane, Kittery Point, Map 69 Lot 14E, in the Rural Residential District Zone, Resource Protection Zone, and Shoreland Zone.

Herb Kingsbury seconded
Motion carries unanimously

Chairman Gardner advised that any aggrieved parties have 45 days to appeal this decision to Superior Court.

Findings of Fact

1. Deane Rykerson and Wendy Pomeroy requested a Miscellaneous Appeal to the terms of Title 16, Section 12, Section 090.C.2 and Title 16, Chapter 20, Section 020.E in order to upgrade septic with pretreatment to have a kitchen sink in a studio building, creating an additional dwelling with a zoning requirement of 80,000 sq. feet per dwelling unit.
2. Property is located at 1 Salt Marsh Lane, Kittery Point, Map 69 Lot 14E, in the Rural Residential District Zone, Resource Protection Zone, and Shoreland Zone.
3. This is a conforming lot with an illegal, non-conforming use.
4. The chronology of activity is as follows:
 - a. On December 11, 2002, Mr. Rykerson was issued a building permit (02-304), to construct a temporary dwelling unit.
 - b. On May 30, 2003, Mr. Rykerson was issued a certificate of occupancy for the temporary residence and was given permission to occupy this residence while the proposed house was being constructed.
 - c. The septic system tank permit, issued on October 7, 2003, stated "Upon completion of the new two bedroom house, the kitchen facilities will be removed from the one bedroom cottage, thereby keeping this a single family dwelling in accordance with the existing three bedroom disposal area design"

- d. On September 19, 2003, Mr. Rykerson was issued a building permit for a house and garage. On August 16, 2004, a certificate of occupancy for the house and garage was issued, with the understanding that the kitchen facilities in the temporary dwelling would be removed, and this was not done.
5. Mr. Rykerson read two letters from abutters in support of his appeal.
6. The appeal denial was based on the fact that the Resource Protection zone overlay utilizes the Rural Conservation zone standards which require 80,000 sf per dwelling unit. The lot size of 129,809 sf cannot support two dwelling units.
7. A letter from the Kittery Conservation Committee, dated April 3, 2009, requested that the ZBA uphold the decision of the CEO.

Niles Pinkham motioned to accept the Findings as read
Herb Kingsbury seconded
Motion carries unanimously

Conclusion

The Board felt that there was no power granted to it, other than a variance appeal, by which the 80,000 square feet per dwelling unit standard could be waived.

Herb Kingsbury motioned to accept the Conclusion as read
Bob Kaszynski seconded
Motion carries unanimously

Chairman Gardner advised that any aggrieved parties have 45 days to appeal this decision to Superior Court.

ITEM 3 - Charles Denault requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 32, Subsection 490.K.2 and Wetlands Table 16.28 in order to replace the existing shed roof with a normal pitch roof for structural strength and construct an addition no closer to the existing wetland. Located at 24 Haley Road, Kittery, Map 47 Lot 19, in the Rural Residential District Zone and Shoreland Zone.

Niles Pinkham noted that he had visited the property to discuss a septic system, but felt this did not affect his ability to review the appeal. Board members concurred.

Charles Denault summarized the history of the property and his appeal request. When investigating a new septic system, it was found that the existing system was an overboard discharge with a 500 gallon septic tank. This system will be replaced and the new system will be moved to the front.

Chairman Gardner asked if there was anyone present wishing to speak for or against this item. There being none, a letter from the KCC requesting that the ZBA uphold the denial was read into the record.

The Kittery Conservation Commission has reviewed the material submitted by Charles Denault requesting a Miscellaneous Appeal to the terms of 16.32.490.K.2 and Wetlands

Table 16.28 in order to replace an existing roof with a normal pitch and to construct an addition no closer to the existing wetland.

It appears from the site plans that were submitted by the applicant, that both of the existing structures are located within a wetland, since the wetland delineation on the abutting property stops at the property line. Professionally drawn site plans, with all wetland and shoreland boundaries clearly and accurately delineated, would present the ZBA with factual information on which to base their decision.

Wetlands Table 16.12 requires a 50 foot setback from a wetland 1,001 square feet to one acre in size and intermittent streams, and a 100 foot setback from wetlands greater than one acre in size. It appears, from the site plan submitted by the applicant, that the proposed application cannot meet this standard.

KCC respectfully requests that the ZBA uphold the Code Enforcement Officer's denial of this application and not grant this Miscellaneous Appeal.

The CEO provided:

1. This is a non-conforming lot with non-conforming structures located within the Rural Residential and Shoreland zones.
2. Mr. Denault has proposed a roof expansion and to construct an addition to an existing home.
3. Title 16.32.490.K.2 states that after January 1, 1989 if any portion of a structure is less than the required setback from the normal high water line of a water body or upland edge of a wetland, that portion of the structure shall not be expanded in floor area or volume, by thirty (30) percent or more during the lifetime of the structure.
4. The existing floor area within the 100' setback is 622 square feet. The proposed floor area within the 100' setback is 750 square feet, or an increase of approximately 20%.
5. The increase in volume is approximately 7%.
6. Table 16.12 requires a minimum 50' setback from a wetland 1,001 square feet to one acre in size and intermittent streams, and a one hundred foot setback from wetlands greater than one acre in size.
7. The proposed addition is less than the required setback.
8. The roof expansion and the proposed addition would be no closer to the wetlands and the shoreland than what currently exists.

Discussion followed regarding the proximity of new construction to wetland locations on the property, a drainage ditch along Haley Road and a ditch adjacent to an existing rock wall on the property line. **Craig Wilson** commented that he felt that the application was very good and that the applicant provided the information needed, and that the proposal does not exceed the 30% requirement and construction is no closer than the existing structure. **Niles Pinkham** and **Thomas Battcock-Emerson** concurred that the proposed addition is no-closer than the existing structure. **Chairman Gardner** asked if the ditch is considered a wetland? The **CEO** responded that if the ditch is regularly maintained and is less than 12 feet in width, it is not considered a wetland.

Herb Kingsbury requested a condition be added that the CEO confirms that all wetland setbacks are met.

Niles Pinkham motioned to grant a Miscellaneous Appeal to the terms of Title 16, Chapter 32, Subsection 490.K.2 and Wetlands Table 16.28 in order to replace the existing shed roof with a normal pitch roof and construct an addition no closer to the existing wetlands. Property is located at 24 Haley Road, Kittery, Map 47 Lot 19, in the Rural Residential District Zone and Shoreland Zone.

Bob Kazsynski seconded
Motion carries unanimously

Findings of Fact

1. Charles Denault appealed the terms of Title 16, Chapter 32, Subsection 490.K.2 and Wetlands Table 16.28 in order to replace the existing shed roof with a normal pitch roof and construct an addition no closer to the existing wetlands.
2. Property is located at 24 Haley Road, Kittery, Map 47 Lot 19, in the Rural Residential District Zone and Shoreland Zone.
3. This is a non-conforming lot with non-conforming structures.
4. Testimony by Mr. Denault that this is a two-bedroom structure with an existing overboard discharge system constructed in 1958.
5. The existing footprint of the structure is 20'x26', with the addition of a kitchen and living room to the front of the structure, toward Haley Road.
6. A condition of approval is that the additions will be at least 50' from the wetlands on the west. The existing setbacks from wetlands are 73' and 96' from the corners of the building. New construction shall be no closer to wetlands than the existing structure.
7. A drainage ditch on the east side of the property widens out to a wetland as it proceeds to the creek.
8. A letter from the Kittery Conservation Committee, dated April 3, 2009, requested that the ZBA deny the appeal.
9. Within the Shoreland Zone, there is an expansion from 622 sf to 750 sf, approximately 20% increase in volume.
10. The cubic foot increase in the proposed addition is approximately 7% (7380 cf to 7802cf).

Niles Pinkham motioned to accept Findings as read

Herb Kingsbury seconded
Motion carries unanimously

Conclusion

Per section 16.28.130, Nonconforming Buildings, and Section 16.28.130D.1.a., the Board has the authority to grant the appeal request.

Thomas Battcock-Emerson motioned to accept the Conclusion as read

Bob Kazsynski seconded
Motion carries unanimously

Chairman Gardner advised that this approval does not provide a building permit and that any aggrieved parties have 45 days to appeal this decision to Superior Court.

Minutes

The minutes of March 24, 2009 were accepted as revised.

There will be no ZBA meeting on April 28, 2009.

Chairman Gardner adjourned the meeting at 9:20 p.m.
Submitted by Jan Fisk, Recorder – April 16, 2009