

Town of Kittery, Maine  
Board of Appeals  
March 9, 2010

Call to Order: 7:05 p.m.

**Members present:** Thomas Battcock-Emerson, Craig Wilson, Vern Gardner, Brett Costa, Herb Kingsbury, Bob Kaszynski

**Members absent:** Niles Pinkham

**Staff:** Heather Ross, Code Enforcement Department  
Pledge to the Flag

**Mr. Wilson** suggested the two applications should be combined as the evidence presented will be the same for both appeal requests. The differences being the first request re-constructs on the same footprint area and the second request moves the footprint forward, toward Chauncey Creek Road and the 40 foot frontyard setback.

**Item 1** - Patricia A. Tobey requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 32.490, Section N2, Page 316 and Title 16, Chapter 32.490, Section K2, Page 310 to remove the existing structure due to decaying conditions of the structure and to construct a new structure. Located at 60 Chauncey Creek Road, Kittery Point, Map 45 Lot 75, in the Residential - Kittery Point Village Zone.

**Chairman Gardner** asked if there is any reason why the two agenda items could not be reviewed in the same discussion. **Alex Ross**, Ross Engineering for the applicant, noted that Mr. Wilson's summary of the appeal applications was correct, and they could be reviewed together. Mr. Ross distributed a colored plan highlighting the setbacks, property area and proposed new structure outline, and summarized the applicants appeal, noting the owner prefers the first appeal option, locating the new building in the same footprint area. The applicant requests the flexibility to move the structure forward to Chauncey Creek Road should ledge or grades restrict the illustrated location. Site photos were also distributed to the Board members.

**Chairman Gardner** asked if there was anyone present wishing to speak in favor or against this appeal. **Martha Kowal**, 62 Chauncey Creek Road, stated she has no issue with the request and asked if the cupola and decks had been included in the 30% expansion calculations. The current home was built in 1830 and has hand-hewn beams in the attic. She requested these materials be recycled to Habitat for Humanity. There being no further testimony, the CEO provided:

1. This is a nonconforming lot with nonconforming structures located within the KPV and Shoreland zones.
2. Ms. Tobey is proposing to demolish an existing structure and to construct a new single family dwelling unit within the same footprint.
3. Title 16.28.140 states: *Any legally nonconforming building which is hereafter damaged or destroyed by fire or any cause other than the willful act of the owner or his or her agent, may be restored or reconstructed in conformity with the dimensions of the original building within twelve months of the date of said damage or destruction, provided however, that such restoration shall not enlarge the size or make it more nonconforming than the prior nonconforming building. Nothing in this section shall prevent the demolition of the remains of any building so damaged or destroyed.* The proposed construction of a single family dwelling is not the result of a nonconforming building damaged or destroyed by fire or any cause other than the willful act of the owner.

4. Title 16.32.490.K.2 states: *General. 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 percent or more, during the lifetime of the structure.* A new single family dwelling unit is proposed, not an expansion. The proposed expansion is less than the maximum 30% expansion of floor area and volume, at 24%. The cupola does not contain a floor and the decks had not been included in the 30% calculations, but one deck is smaller and one larger than the existing, and would fall within the 30% allowed.
5. Title 16.32.490.N.2 states: *All new principal and accessory structures (except certain patios and decks) shall be set back...at least one hundred (100) feet, horizontal distance, from the normal high water line of any waterbodies, tributary streams, the upland edge of a coastal wetland...* The proposed single family dwelling is approximately 55 feet from the high water mark, and no closer than the existing structure.
6. Title 16.32.490.N.2.B states: *Accessory patios or decks no larger than five hundred square feet in area shall be set back at least seventy-five feet from the normal high-water line of any waterbodies, tributary streams, the upland edge of a coastal wetland, or the upland edge of a freshwater wetland shown on the official shoreland zoning map. Other patios and decks shall satisfy the normal setback requirement for principal structures in the shoreland zone.* The proposed deck is less than the required setback from the high water mark, and no closer than the existing structure.

**Herb Kingsbury** asked if the proposed new construction is in the same footprint of the existing dwelling. **Mr. Ross** stated the proposals would place the new construction in the same footprint, at 55 feet from the high-water line, or moved slightly forward, placing the new construction at 63 feet from the high-water line. The existing building is an 'L' shape and the new construction is square, so there is a small extra area not within the existing footprint, but no closer to the existing 55 foot setback from the high-water line. The **CEO** explained the state requires a structure be moved back the greatest practical extent. **Mr. Wilson** cited Title 16.28.130 which states buildings may be repaired, maintained, or enlarged, but no closer than the existing structure. **Mr. Costa** concurred. **Thomas Battcock-Emerson** noted this is a fairly small design on a large parcel. **Bob Kaszynski** asked about a wooden platform on photos. It was determined this was probably a seasonal structure no longer in use. **Craig Wilson** referenced Title 16.28.130.D.2 *A nonconforming structure may be relocated within the boundaries of the parcel...to the greatest practical extent...* and would advocate relocating further from the shoreline. The **CEO** explained the averaging of front property setbacks would not allow a reduced front yard setback. **Mr. Wilson** asked about increased impervious area with the proposed new roof structure. Following discussion, it was determined the increase of square footage would not create a significant increase in stormwater runoff. **Mr. Ross** noted that the majority of runoff would be to Chauncey Creek, but the lot is very large and can absorb the small increase. **Mr. Wilson** noted that a filtration area would be advisable. And, though the Board cannot require it, believed Ms. Kowal's request to have housing materials recycled had merit. **Mr. Ross** stated he felt the owner would be amenable to this request. **Chairman Gardner** asked if there was to be a floor in the cupola, as the use of the cupola would add to the 30% expansion calculations. **Mr. Ross** stated he was not aware of plans to use the cupola area, but if the owner decided to use this area, there is sufficient room in the 30% expansion limit to allow this, requiring BOA review and approval if elected to do so. Discussion followed regarding conformity and nonconformity of relocated structures. **Bob Kaszynski** asked about the septic system. **Mr. Ross** stated the system is sufficiently sized to meet the needs of the proposed construction, requiring CEO approval if found to be substandard.

**Brett Costa** motioned to grant a miscellaneous appeal to the terms of Title 16.32.490.N.2 and Title 16.32.490.K.2 to remove an existing structure and to re-construct a new structure at property located at 60 Chauncey Creek Road, Map 45 Lot 75, in the Shoreland and Kittery Point Village Zones, with the following conditions:

1. The house shall be reconstructed at 55 feet from the high-water mark where the current house is located, or at 63 feet, against the 40' front yard setback line; and
2. A no mow filtration strip, which shall be 10 feet high starting from the high-water mark to serve as a filtration buffer. The homeowner may control the height of the vegetation within this strip, and a foot path may cut through the buffer.

**Thomas Battcock-Emerson seconded**  
**Motion carries unanimously by all members present**

Chairman Gardner advised the applicant that this decision is not the granting of a building permit and may be appealed to Superior Court within 45 days.

#### **Findings of Fact**

1. The Board of Appeals granted a miscellaneous appeal to the terms of Title 16.32.490.N.2 and Title 16.32.490.K.2 to remove an existing structure and to re-construct a new structure at 60 Chauncey Creek Road, Map 45 Lot 75, in the Shoreland and Kittery Point Village Zones;
2. The parcel is .68 acres, is a nonconforming lot with nonconforming structures;
3. Alex Ross, Ross Engineering, presented the application on behalf of the owner and outlined the conditions of the property, prompting the removal and re-construction appeal;
4. The existing structure is 55 feet from the high-water mark, where 100 feet is required;
5. Decks are located less than the required 75 feet from the high-water mark;
6. The new structure will be no closer to the high-water mark than what currently exists;
7. The home has been occupied by four generations of the Tobey family, constructed in 1830;
8. One member of the public spoke to the project, and a letter of support was received by Charles and Patricia G. Tobey, abutters [not read into the minutes];
9. There was no communication from the Kittery Conservation Commission.
10. The proposed construction represents a 24% expansion in area, and a 29.6% expansion in volume.

The **Findings were accepted unanimously by all members present** [no motion was made or seconded]

#### **Conclusion**

The Board of Appeals is authorized to grant this miscellaneous appeal under Title 16.28.130, Nonconforming Buildings, and under Title 16.28.130.D.1.a, area and volume expansion not to exceed 30%.

The **Conclusion was accepted unanimously by all members present** [no motion was made or seconded]

**Chairman Gardner** advised Board members that discussion of BOA items by members outside of meetings should not occur. **Mr. Kingsbury** announced he will be out of town for the next month. The next BOA meeting is scheduled for April 13, 2010

#### Minutes of February 9, 2010:

There were no changes to the minutes as presented. **Bob Kaszynski** asked if the different plan dates noted in Items 2 and 3 were correct. This will be verified.

**Brett Costa motioned** to accept the minutes as presented pending verification

**Thomas Battcock-Emerson seconded**  
**Motion carries unanimously by all members present**

The Kittery BOA meeting of March 9, 2010 adjourned at 8:10 p.m.  
Submitted by Jan Fisk, March 10, 2010