

Town of Kittery, Maine
Board of Appeals
May 11, 2010

Members present: Vern Gardner, Bob Kaszynski, Niles Pinkham, Herb Kingsbury

Members absent: Craig Wilson, Thomas Battcock-Emerson, Brett Costa

Staff: Heather Ross, Code Enforcement Department

The meeting was called to order at 7:06 p.m.

Pledge to the Flag

Chairman Gardner advised the applicants present that there were only four members of the Board available to render a decision on the items before them. Therefore, all decisions had to be unanimous. He asked if any applicants would prefer to postpone review to another meeting, before a more represented Board. Both applicants elected to proceed.

Item 1 - Raymond J. Arris, Trustee & Mary Thron, Trustee requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 32, Section 490K2, Page 310, and Title 16, Chapter 32, Section 490N2A, Page 316 in order to replace the existing greenhouse with partial roof with a smaller greenhouse with no change to the footprint, widen the driveway, improve drainage, retaining wall, stairs and small patio to the new door into the greenhouse, and solar panels. Located at 73 Tower Road, Kittery Point, Map 58 Lot 42, in the Rural Conservation Shoreland Zone.

Kevin Keilor, Brady Built Homes, representing the owners, corrected the agenda item to state the greenhouse will not be smaller, but the same size, however the glass on the new greenhouse will be smaller. Mr. Keilor provided materials to the Board members illustrating the proposed greenhouse, and summarized the proposed plans for the property.

Chairman Gardner asked if there was anyone present wishing to speak in favor or against this item. There being none, the CEO provided:

1. This is a non-conforming lot with non-conforming structures located within the Rural Conservation and Shoreland zones.
2. Mr. Arris has filed a miscellaneous appeal to replace an existing greenhouse attached to a dwelling unit with a new greenhouse within the same footprint.
3. Title 16.32.490.K.2 requires a one hundred foot setback from the high water mark. The greenhouse is less than the required setback.
4. Title 16.32.490.N.2.A allows for an expansion of no more than 30 percent floor area or volume with Board of Appeals approval.
5. The proposed new greenhouse would be no larger in footprint than what currently exists and a volume expansion of 240 cubic feet, which is less than the maximum 30% allowed.

Herb Kingsbury questioned if the CEO's denial was because the plan exceeded the non-vegetated coverage allowance, volume and non-conformity.

Mary Thron noted she read the ordinance as allowing 20% non-vegetated lot coverage, and 6% allowable building coverage. Following review of the ordinance, the CEO agreed. The applicant is not exceeding the non-vegetated coverage, the greenhouse is 76' from the high water mark, and the proposed new construction would, therefore, not be more non-conforming.

Bob Kaszynski motioned to grant a miscellaneous appeal to Raymond J. Arris, Trustee & Mary Thron, Trustee, to Title 16.32.490.K.2 and Title 16.32.490.N.2.A. in order to replace the existing greenhouse

with no change to the footprint, widen the driveway, improve drainage, retaining wall, stairs and small patio to the new door into the greenhouse, and solar panels.

Niles Pinkham seconded

Motion carries 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. This is a non-conforming lot with non-conforming structures located within the Rural Conservation and Shoreland zones.
2. Mr. Arris has filed a miscellaneous appeal to replace an existing greenhouse attached to a dwelling unit with a new greenhouse within the same footprint.
3. Title 16.32.490.K.2 requires a one hundred foot setback from the high water mark. The greenhouse is less than the required setback, at 76 feet.
4. Title 16.32.490.N.2.A allows for an expansion of no more than 30 percent floor area or volume with Board of Appeals approval.
5. The proposed new greenhouse would be no larger in footprint than what currently exists, with a volume expansion of 240 cubic feet, which is less than the maximum 30% allowed

Bob Kaszynski motioned to accept the Findings as read

Herb Kingsbury seconded

Motion carries by all members present

Conclusion

Under Title 16.32.490.K.2 and Title 16.32.490.N.2.A, the Board of Appeals unanimously granted the miscellaneous appeal.

Herb Kingsbury motioned to accept the Conclusion as read

Niles Pinkham seconded

Motion carries by all members present

Item 2 - Christopher P. Mulligan for D. Scott and Nancy Mangiafico requesting an Administrative Appeal in order to appeal the Code Enforcement Officer's decision. Located at 108 Whipple Road, Kittery, Map 10 Lot 14, in the Urban Residential Shoreland Zone.

John Bosen, representing Scott and Nancy Mangiafico, summarized the appeal request. Because Kittery's ordinance does not include a definition for a retaining wall, Mr. Bosen read an encyclopedia definition of a retaining wall, as follows: *a structure designed and constructed to resist the lateral pressure of soil when there is a desired change in ground elevation that exceeds the angle of repose of the soil*. He argued the timbers under review are vertically connected, redirecting the flow of water and was constructed to impede the Mangiaficos' use of the area as a gravel turnaround. He argued this retaining wall was not professionally constructed or its effectiveness studied.

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

Mekeel McBride, Keene Terrace, supported the appeal stating the ties constrict the roadway, making it too narrow for larger vehicles and emergency vehicles.

Charlie Case, 108 Whipple Road, presented a survey illustrating Keene Terrace, Whipple Road and the abutting property owners. Lengthy discussion followed regarding where Keene Terrace ends, the history

of the area and the disagreements between the property owners over the use of and turnaround on the private road, and legal opinion over the use of the road as a civil matter. Mr. Case discussed a report by Cristie Ribasca, stormwater consultant, dated July 22, 2008. Her recommendations were followed to control excess runoff and, for the most part, have been successful. Additionally, Chris Copi from the DEP viewed the work and stated it was adequate.

There being no further comment, the CEO provided:

1. This is a nonconforming lot, with nonconforming structures in the Suburban Residential zone.
2. Mr. Managiafico has submitted an administrative appeal to a letter issued by the Code Enforcement Officer to Sherry Walworth and Charlie Case dated March 25, 2010 which stated: *The code Enforcement office approved a building permit to construct a retaining wall on your property located at 108 Whipple Road. Upon a visual inspection of the work, it was concluded that the work performed on the property in the form of several 4"x4" timbers, connected horizontally, did not require a building permit. Therefore, your building permit is cancelled as it is not needed, and you will be mailed a refund for the permit fee paid.*

The CEO also read from Title 17, §2808, Alteration of surface water flow: *Unreasonable use of land that results in altered flow of surface water that unreasonably injures another's land or that unreasonably interferes with the reasonable use of another's land is a nuisance.* The Town considers this to be a civil matter and if it is a matter of stormwater moving from one property to another, private legal review is necessary. Additionally, the CEO read a letter from the Town's attorney, dated January 3, 2008:

**McEACHERN &
THORNHILL**
Attorneys at Law

NR 4 2010 PM 1:59

January 3, 2008

handed to cw 1/30/08

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

Re: Keene Terrace

Dear Heather:

You have asked me to review the legal status of Keene Terrace and render an opinion with regard to the rights of the abutters in Keene Terrace.¹ You also inquire whether such rights are affected in any way with regard to the area designated as "FILL AREA" on the "Boundary Survey Showing Property of Sarah F. & Scott B. Lamont" dated September 1996, prepared by Anderson Livingston Engineers.

By way of background, I am aware that there exists an on-going dispute between Scott Mangiafico, the owner of Lot 13 on Kittery Tax Map 10, and Charles and Sherry Case, owners of Lot 14 on Kittery Tax Map 10. That dispute apparently continues and is likely the reason prompting your inquiry to me.

¹Keene Terrace is sometimes referred to as "Keen Terrace" in various documents. The 1995 Kittery Tax Maps depict Keene Terrace but do not reference it by name. The Tax Map merely refers to it as "R/W." The 2005 revision of the Kittery Tax Maps depicts Keene Terrace but again it does not reference it by name nor does it carry the reference "R/W."

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McEACHERN & THORNHILL
Attorneys at Law

Ms. Heather M. Ross
Re: Keene Terrace
January 3, 2008
Page 2

I have not undertaken a historical search to determine when Keene Terrace was initially created nor do I think it necessary for me to do so now. I assume it was created many years ago as access to the Keen Family property located at the end of Keene Terrace. I did, however, review the deed of Mr. and Mrs. Case as well as some of the prior deeds in their chain of title. I also reviewed the deeds to Map 10, Lots 11, 12 and 13 abutting Keene Terrace on the southeast.

The Case deed includes the fee (title to the land) to Keene Terrace. A prior deed in the Case chain makes it clear that the Case property is "subject to rights of way of record."

The deed to the former Wyman property at the corner of Keene Terrace and Whipple Road [one of the three lots abutting Keene Terrace on the southeast] refers to Keene Terrace as "a private way." The deed into Scott Mangiafico describes Keene Terrace as an "existing right of way or roadway leading from the north-westerly corner of the premises herein described to Whipple Road, so-called."

Neither the Case deed nor any of the other deeds to the three properties abutting Keene Terrace on the southeast describe Keene Terrace by metes and bounds or by any other specific dimensional description. The Plan drawn by Anderson Livingston

McEACHERN & THORNHILL
Attorneys at Law

Ms. Heather M. Ross
Re: Keene Terrace
January 3, 2008
Page 3

shows the apparent location of Keene Terrace and specifically states that "'Keene Terrace' is of unspecified width and length." I suspect that the Anderson Livingston survey depicts Keene Terrace as it exists on the face of the earth at the time the Plan was prepared in 1996.

All the above merely confirms my opinion that Keene Terrace is a private way extending from Whipple Road across the Case property and abutting the other three properties on the southeast. I have discussed Keene Terrace with Richard Rossiter, the Commissioner of Public Works, and he has confirmed his belief that Keene Terrace is a private way. The Town has neither plowed or otherwise maintained it in the past. As a private way, the Town had no municipal interest in Keene Terrace as part of the Town's road system.

Insofar as there exists any current dispute among the area property owners as to the exact dimensions of Keene Terrace, where it exists on the face on the earth, what area is included within the rights of the various parties (including the so-called "fill area") or the extent or scope of such rights among the parties are not concerns that the Town should express opinions on. If Mr. and Mrs. Case and Scott Mangiafico have differences between themselves with regard to any of these issues, they

McEACHERN & THORNHILL
Attorneys at Law

Ms. Heather M. Ross
Re: Keene Terrace
January 3, 2008
Page 4

should seek to resolve them by negotiation, mediation, or litigation, or whatever course of action they prefer. The Town should not voluntarily become a party to this private dispute. As a Town, we have attempted in the past to avoid involvement in such private disputes.²

You have also requested that I review whether there exists any rights in the abutting property owners of Keene Terrace to that area depicted on the Anderson Livingston survey as "FILL AREA." For the same reasons noted above, I refrain from rendering any opinion on this other than to say that the Town should not become involved unless it raises land use violation issues. From the information before me, I don't anticipate that the parties' private dispute involving the use of that area would involve such issues.

Finally, as Code Enforcement Officer, you have jurisdiction over matters of Ordinance interpretation and enforcement as well as the issuance of building permits and the like as they relate

²For example, there currently is a dispute over the rights of certain property owners on Charles Hill Road as to rights of a particular property owner to travel over that road. While the Town has been brought into that litigation on the issues involving the Rule 80B Appeal from the Planning Board, the Town has refrained from taking any position on the Charles Hill Road title issue between the disputing parties.

McEACHERN & THORNHILL
Attorneys at Law

Ms. Heather M. Ross
Re: Keene Terrace
January 3, 2008
Page 5

to properties including those along Keene Terrace. I don't see this as involving any of these considerations. Beyond that, I do not see any basis for you to become involved in what appears to be a strictly private property dispute.

Please let me know if there is anything else you wish for me to address regarding this situation.

Very truly yours,



Duncan A. McEachern

DAMcE/cn
Copy to
Mr. Jonathan L. Carter
Ms. Sandra Mowery

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January 3, 200813934

Mr. Bosen stated they are not disputing the legal issues addressed in Attorney McEachern's letter, but to address the use of the railroad ties, requiring a building permit. **Niles Pinkham** noted he has worked for both the Mangiaficos and the Chases in the past. Board members concurred this would not present a conflict in his deliberations. **Herb Kingsbury** stated he did not believe the timbers constituted a structure, and would uphold the CEO's decision. **Niles Pinkham** and **Bob Kaszynski** concurred that their charge is to determine if the CEO's decision was correct. **Mr. Chase** provided further illustration of the location of the installed timbers on his property. The Town's definition of a structure (effective January, 2010) was read: *anything built for the support, shelter, enclosure of persons, animals or goods or property of any kind or anything constructed or erected with a fixed location on or in the ground or attached to something having a fixed location on or in the ground. The term includes decks. The term does not include fences less than 8 feet in height or any required by the Planning Board or town planner to be taller, flag poles no higher than 50 feet in height, signs in conformance with Article 12, Chapter 16.32, electricity generators and propane and oil tanks for residential use only, and the pads on which they are located, provided the pads are less than 20 square feet in size.*

Discussion continued regarding the issue before the Board of Appeals versus the extension of Keene Terrace. **Mr. Chase** stated if they are not in compliance with the ordinance, they will remedy the problem.

Herb Kingsbury motioned to grant an administrative appeal to the decision of the Code Enforcement Officer.

Niles Pinkham seconded

Motion fails, 0 in favor, 4 against, 0 abstentions

Chairman Gardner advised the applicant that this decision may be appealed to Superior Court within 45 days.

Findings of Fact

1. This is a nonconforming lot, with nonconforming structures in the Suburban Residential zone.
2. The Board's position is that this is not a structure, therefore not requiring a building permit.
3. Keene Terrace residents spoke in favor and in opposition to the appeal.
4. Additional issues discussed during the meeting concerning Keene Terrace are civil issues and not within the Town's jurisdiction.
5. The definition of a structure (Kittery ordinance, revised January 2010) and a retaining wall (Wikipedia) was read into the minutes.
6. The Board upholds the CEO's decision by denying the administrative appeal.

Niles Pinkham motioned to accept the Findings as read

Bob Kaszynski seconded

Motion carries unanimously

Conclusion

The Board of Appeals determined the materials utilized do not meet the definition of a structure, requiring a building permit, and upholds the decision of the Code Enforcement Officer, denying the Administrative Appeal.

Herb Kingsbury motioned to accept the Conclusion as read

Bob Kaszynski seconded

Motion carries unanimously

Minutes: BoA meeting of April 27, 2010

The minutes were accepted without a motion.

Chairman Gardner noted the Town Planner has revised the BoA agenda format, excluding the legal references to Kittery's ordinance. This information is important to the Board's deliberations, and referenced in court proceedings. Because these references were omitted, the legality of the public notice is in question. Therefore, the next BoA meeting is tentatively scheduled for May 25, 2010.

Herb Kingsbury motioned to adjourn
Vern Gardner seconded
Motion carries unanimously

The Kittery BOA meeting of May 11, 2010 adjourned at 8:30 p.m.
Submitted by Jan Fisk, May 12, 2010