

Town of Kittery, Maine
Board of Appeals
June 8, 2010

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

Members absent: Thomas Battcock-Emerson, Brett Costa

Staff: Heather Ross, Code Enforcement Department
Gerry Mylroie, Town Planner

The meeting was called to order at 7:05 p.m.
Pledge to the Flag

Presentation of the Town Land Use and Development Code, Title 16 Update, by Gerry Mylroie, Town Planner.

Mr. Mylroie summarized some of the changes to the new code affecting the Board of Appeals responsibilities in their appeal review. The public hearing for final adoption of the code by the Town Council is scheduled for August 12, 2010.

Craig Wilson asked about noting the Board's jurisdiction in reviewing appeals prior to the Board's hearing.

Duncan McEchern, Town Attorney, stated it is good practice to state at the beginning of an item's hearing to address the Board's authority in reviewing the appeal before them. **Mr. Mylroie** will provide the Board with copies of Title 2 referencing the Board's appeal review authority.

Mr. Gardner read the agenda items before the Board. He noted an address error in the legal advertisement of Items 2 and 3, and asked if there were any parties present objecting to continuing with the review with these published errors. There were none.

Item 1 - Ken Markley for Nineteen Oak LLC requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 12, Section 050E2, Page 238-1, Title 16, Chapter 32, Section 490N2ABE, Page 316, Title 16, Chapter 32, Section 490K2, Page 310 in order to expand two structures within the shoreland zone by 30 percent. Located at 19 Oak Terrace, Kittery, Map 2 Lot 1, in the Suburban Residential/Shoreland Overlay Zone.

Mr. Kingsbury stated he could not view the property because of two large dogs present, and felt he should recuse himself from review of this item because he could not adequately view the property under consideration. **Mr. Wilson** noted there is a division of opinion about Board members visiting a property prior to a hearing, and is not uncomfortable with the fact that Mr. Kingsbury did not view the property, noting a decision could be made without prior viewing. Board members agreed Mr. Kingsbury should remain to review the item. **Mr. Wilson** confirmed the Board is reviewing the items before them under the prior code because the applications were submitted before the code was formally adopted. **Mr. Gardner** advised the applicants there was not a full Board contingency to review, asking if any applicant wished to return at a future date when more Board members would be present for review. All applicants agreed to continue.

Ken Markley summarized the appeal request before the Board, specifically to bring the buildings into conformance, expand two structures by 30% each, and raise the structures above flood zone. The following items are proposed to be improved by the applicant:

1. Town code requires dwelling structures to be a minimum of 650 square feet and one structure is 600 square feet
2. A structure currently 13 feet from the lot line will be rebuilt 15 feet from the lot line, reducing the existing non-conformity.
3. The non-vegetative coverage on the lot will be reduced from 41.8% to 40%.
4. The original plan to create a two-story structure has been changed to a one-story structure, thereby creating a lower profile and not blocking the neighbor's views of the water.

Mr. Markley noted the structures were built before 1989 and have not been expanded up to 30% over the lifetime of the structures, per shoreland zone requirements.

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 nonconforming lot with nonconforming structures located within the Suburban residential zone.
2. The proposal is to demolish an existing dwelling unit and an accessory structure on the deck, and to construct a new dwelling unit with an expansion.
3. Title 16.12.050 requires a minimum 40 foot front yard setback.
4. The proposed single family dwelling unit does not meet the required 40 foot setback.
5. Title 16.32.490.K.2 states:
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.
6. Title 16.32.490.N.2 requires a 100 foot setback from the high water mark.
7. The single family dwelling unit is proposed to be less than 100 feet, at approximately 13 feet.
8. Accessory patios or decks no larger than 500 square feet in area shall be set back at least 75 feet from the normal high-water line.
9. The proposed deck is less than the required 75 foot setback.
10. The total area of all structures, parking lots and other non-vegetated surfaces within the shoreland zone shall not exceed 20% of the lot.
11. The existing non-vegetated coverage is 41.8%. The proposed non-vegetated coverage is 41.4%, where a maximum of 20% is allowed.

Mr. Kaszynski noted the location of the structures to the high-water mark and asked if there has ever been water on the deck. **Mr. Markley** stated water had come up to the deck in the past, and noted the new buildings will be built 2.5 feet above the flood zone. The river is at elevation 9 and the new structures will be at elevation 11.5, where 10 is required. **Mr. Morrison** stated there is electrical service to both structures. **Mr. Wilson** stated he felt each building could be expanded 30%, as they are structures, not necessarily inhabited structures. Discussion followed regarding allowable expansion in the shoreland zone. Both structures will be removed to their foundations and a single building will be rebuilt on the same footprints, connected and expanded up to 30%. An example of a prior application before the Board was discussed, and Board members concurred this application is similar.

Mr. Pinkham motioned to grant a miscellaneous appeal to Nineteen Oak LLC to the terms of Title 16.12.050.E.2, Title 16.32.490.N.2A, B, & E, and Title 16.32.490.K.2 in order to expand two structures within the shoreland zone by 29%. Property is located at 19 Oak Terrace, Kittery, Map 2 Lot 1, in the Suburban Residential/Shoreland Overlay Zone.

Mr. Kaszynski seconded

Motion carries unanimously by all members present

Findings of Fact

1. Ken Markley, representing Nineteen Oak LLC, requested a miscellaneous appeal to Title 16.12.050.E.2, Title 16.32.490.N.2A, B, & E, and Title 16.32.490.K.2.
2. The purpose of the appeal is to expand two structures within the shoreland zone by 29% each.
3. This is a nonconforming lot with nonconforming structures located within the Suburban residential zone.
4. The proposal is to demolish an existing dwelling unit and an accessory structure on the deck, and to construct a new dwelling unit with an expansion.
5. Title 16.12.050 requires a minimum 40 foot front yard setback, where 13 feet currently exists.
6. Title 16.32.490.K.2 states:
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.
7. Title 16.32.490.N.2 requires a 100 foot setback from the high water mark. The single family dwelling unit is proposed to be less than 100 feet, at approximately 13 feet.
8. Accessory patios or decks no larger than 500 square feet in area shall be set back at least 75 feet from the normal high-water line, where 23 feet currently exist.
9. The proposed deck is less than the required 75 foot setback.
10. The total area of all structures, parking lots and other non-vegetated surfaces within the shoreland zone shall not exceed 20% of the lot, where 41.8% currently exists. The proposed non-vegetated coverage is 41.4%.
11. The proposed structures will be raised 2.5 feet above flood level, where 1 foot is required.
12. There was no public comment.

Mr. Kingsbury motioned to accept the Findings as read
Mr. Pinkham seconded
Motion carries unanimously by all members present.

Conclusion

The Board found that the existing nonconformities would not be increased and none of the proposed, expanded structures would be closer than any existing structure. The proposed expansion is 29%, where 30% is allowed and, under Title 16.28.130.D.1.A, the Board has the authority to grant this appeal.

Mr. Kaszynski motioned to accept the Conclusion as read
Mr. Pinkham 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.

Item 2 - Drew Fitch requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 32, Section 1253B2C, Page 4 of the ADU Ordinance effective as of March 11, 2010 in order to convert the existing structure formerly used as a single family residence to a 754 sq' ADU on first level with a separate proposal to create office space on second level. Located at 9 Langdon Street, Kittery, Map 1 Lot 60, in the Urban Residential Zone.

Mr. Kaszynski asked to be recused as he is a personal friend of the applicant. Board members accepted his request and he stepped down from the Board.

Mr. Wilson noted for the record that the correct address of the building under review is 14 Rice Avenue, not 9 Landon Street.

Chairman Gardner advised the applicant he would need four votes for approval and, if denied, would have to wait 12 months before he could appeal again, unless there was a substantial change in the appeal. **Mr. Fitch** agreed to proceed, and summarized his appeal request. The Rice Avenue structure was formerly a single-family dwelling unit. His proposal is to provide an accessory dwelling unit on the first floor, and use the second floor for a real estate investment business office. The building permit was denied because the existing structure is 20 feet from the front property line instead of 30, as required.

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 nonconforming lot, with nonconforming structures located in the Urban Residential zone.
2. This existing structure was a single family dwelling unit and was required to be abandoned prior to the construction of a new dwelling unit on the parcel. This occurred prior to the adoption of the new ADU ordinance. Because it is not the primary structure on the property, it must be considered an accessory structure.
3. Title 16.8.25.4.2 states that an accessory dwelling unit will not be allowed in accessory or detached buildings encroaching on yard setbacks.
4. The Urban Residential zone requires a minimum 30 foot setback. The existing structure is set back 20 feet from the road.
5. Title 16.8.25.3 authorizes the Board of Appeals to grant approval to an accessory dwelling unit that would fail to meet the unit size standards and or the development standards.

Mr. Kingsbury asked what conditions must be included with an accessory dwelling unit approval. The CEO stated the ordinance requirements, with the intent is for accessory dwelling units to be rental units.

Mr. Wilson asked if there can be more than one ADU on a lot. The CEO stated there can only be one ADU on a lot with a primary, single-family dwelling unit on the same lot. **Mr. Gardner** asked if the office space would be considered an accessory use to an accessory use. The CEO explained the office space is a separate use, and both the office and ADU are allowed uses in the UR zone. **Mr. Gardner** asked if this would be considered a mixed-use and is it allowed in this or any zone. The CEO explained mixed-use is allowed in other zones, but she was not looking at this application as a mixed-use application. **Mr. Wilson** noted a home occupation is not considered to be a mixed use, though there are two different uses in the home. **Mr. Gardner** observed an office use would be contrary to existing uses in the neighborhood. **Mr. Kingsbury** noted professional businesses are a permitted as a special exception in the zone, and the special exception for this applicant is a separate item. **Mr. Wilson** noted the only development standard the applicant does not meet for this item is the front yard dimension, as the building is existing and there are no changes to the structure to make it more nonconforming. **Mr. Gardner** asked why the structure had to be abandoned. The CEO explained the lot was not large enough to support two single-family dwelling units. With the ordinance change, the lot can support a single-family dwelling unit and an accessory dwelling unit if the Board of Appeals grants a miscellaneous appeal to the front yard dimension.

Mr. Pinkham motioned to grant a miscellaneous appeal to Drew Fitch to the terms of Title 16.32.1253.B.2.c of the ADU Ordinance in order to convert the existing structure formerly used as a single family residence to a 754 square foot accessory dwelling unit at property located at 14 Rice Avenue, Kittery, Map 1 Lot 60, in the Urban Residential Zone.

Mr. Kingsbury seconded
Motion carries unanimously by all members present.

Findings of Fact

1. Drew Fitch requested a Miscellaneous Appeal to the terms of Title 16.32.1253.b.2.C to convert

the existing structure formerly used as a single family residence to a 754 square foot ADU on first level at 14 Rice Avenue.

2. Subject structure was required to be abandoned when a single family structure was built on the same lot as the lot could not support two single family dwelling structures.
3. The structure meets all the requirements of the ADU except the front yard dimension is 20 feet where 30 feet is required.
4. The structure's footprint will not be enlarged in any way. Therefore the front yard dimension will not become more nonconforming.

Mr. Pinkham motioned to accept the Findings as read

Mr. Kingsbury seconded

Motion carries unanimously by all members present.

Conclusion

The Board of Appeals has the authority to grant this appeal under Title 16.8.25.5, and finds the structure will not be more nonconforming.

Mr. Kingsbury motioned to accept the Conclusion as read

Mr. Pinkham seconded

Motion carries unanimously by all members present.

Item 3 - Drew Fitch requesting a Special Exception Appeal in order to create a 580 sq' office space on the second level of an existing structure formerly used as a single family residence, to be used for the owner's business, and will not expand the existing structure. Located at 9 Langdon Street, Kittery, Map 1 Lot 60, in the Urban Residential Zone.

The correct address is 14 Rice Avenue, not 9 Landon Street.

Mr. Fitch stated this would be a real estate investment business, not a sales business, so the impact on the neighborhood would be minimal. Only two people will work in the office. There will be a small sign on building only.

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 nonconforming lot, with nonconforming structures located in the Urban Residential zone.
2. Mr. Fitch is proposing to add a professional business office on the second floor of the existing structure. In the UR zone, this requires a special exception from the Board of Appeals.

Mr. Wilson asked the applicant if he read the Basis for Decision and whether he felt this proposed use would support those criteria. **Mr. Fitch** said he had. The hours would be 9:00-5:00, an office with a desk and a computer, and no manufacturing.

Board members voted, by reference:

Title 16.24.060.B - Factors for Consideration

1. 4 in favor, 0 opposed, 0 abstention
2. 4 in favor, 0 opposed, 0 abstention
3. 4 in favor, 0 opposed, 0 abstention
4. 4 in favor, 0 opposed, 0 abstention
5. 4 in favor, 0 opposed, 0 abstention
6. 4 in favor, 0 opposed, 0 abstention

7. 4 in favor, 0 opposed, 0 abstention
8. 4 in favor, 0 opposed, 0 abstention
9. 4 in favor, 0 opposed, 0 abstention
10. 4 in favor, 0 opposed, 0 abstention
11. 4 in favor, 0 opposed, 0 abstention
12. 4 in favor, 0 opposed, 0 abstention
13. 4 in favor, 0 opposed, 0 abstention
14. 4 in favor, 0 opposed, 0 abstention
15. 4 in favor, 0 opposed, 0 abstention
16. 4 in favor, 0 opposed, 0 abstention

Title 16.24.060.A - Basis for Decision

1. 4 in favor, 0 opposed, 0 abstention
2. 4 in favor, 0 opposed, 0 abstention
3. 4 in favor, 0 opposed, 0 abstention
4. 4 in favor, 0 opposed, 0 abstention

Mr. Pinkham motioned to grant a special exception appeal to Drew Fitch in order to create a 580 square foot professional office space on the second level of an existing structure located at 14 Rice Avenue, Kittery, in the Urban Residential Zone.

Mr. Kingsbury seconded

Motion carries unanimously by all members present.

Findings of Fact

1. Drew Fitch requested a special exception in order to create a 580 square foot professional office space in an existing structure located at 14 Rice Avenue.
2. There was no public comment.
3. The property is a nonconforming lot, with nonconforming structures located in the Urban Residential zone.
3. Professional offices are allowed with special exception only.
4. The applicant noted the business hours will generally be 9:00 a.m. to 5:00 p.m.
5. Board members concurred that the Factors for Consideration, Title 16.24.060.B and the Basis for Decision, Title 16.24.060.A had been met.

Mr. Pinkham motioned to accept the Findings as read

Mr. Kingsbury seconded

Motion carries unanimously by all members present.

Conclusion

Under Title 16.04.050.B.3, the Board of Appeals has the authority to grant this special exception.

Mr. Pinkham motioned to accept the Conclusion as read

Mr. Kingsbury 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.

There will be no additional July meetings. The next meeting will be scheduled for August 10, 2010.

Minutes: BoA meeting of June 8, 2010

Mr. Wilson motioned to accept the minutes with corrections

Mr. Gardner seconded

Motion carries unanimously by all members present.

Mr. Gardner requested a motion to adjourn

Mr. Wilson so moved.

The Kittery BOA meeting of July 13, 2010 adjourned at 9:00 p.m.

Submitted by Jan Fisk, July 18, 2010