

TOWN OF KITTERY, MAINE  
BOARD OF APPEALS

APPROVED  
November 25, 2014

Members present: Brett Costa, Craig Wilson, Gary Beers, Brian Boyle, Niles Pinkham  
Members absent: none  
Staff: Shelly Bishop, Interim Code Enforcement Officer

The meeting was called to order at 7:04 p.m.

1. Call to Order
2. Roll Call
3. Pledge of Allegiance

Mr. Costa: Applicants require 4 like votes for approval. Applicants may postpone their hearing when more members are present.

4. Second Christian Congregational Church, Map 4 Lot 57, 33 Government St, Mixed-Use Kittery Foreside (MU-KF) requesting a Miscellaneous Variation request to the terms of Title 16, Section 3.2.15D, in order to demolish an existing garage and to construct a new garage.

Mr. Wilson: The Board of Appeals has the authority to hear this item under Title 16.1.5.2.F.4.

Chris Swiniarski, Applicant Agent/Attorney for Verizon Wireless: Summarized the proposal; noting the telecommunications equipment will be stored in the church steeple and the existing garage will be renovated to store computer and transmission equipment. There will be no change in the footprint or height to the existing garage building, they are only renovating and repairing the structure, with no expansions. The setbacks are less than what is required to the side (8'6") and rear (2'11") where 10 feet are required for each.

The CEO provided: The lot is conforming, and the existing nonconforming building (23.3' x 16'8") does not meet required setbacks.

The Public Hearing began at 7:12 p.m.

Bradford Sherman, Second Christian Church Council President: In favor of the proposed construction on the church property.

There was no further testimony.

The Public Hearing ended at 7:13 p.m.

Mr. Beers: He understood the structure would be demolished.

Mr. Swiniarski: The building will not be demolished. The framing will be maintained.

Mr. Beers: Title 16.7.3.5.5 allows for the repair and maintenance of a nonconforming structure; the proposed changes are no more nonconforming than what currently exists; the building is not in Shoreland Overlay Zone; the project conforms to Title 16.6.6 Basis for Decision. He has no issues, and the project may be approved as presented.

Mr. Wilson: Will there be external lighting? What about diesel generator noise and exhaust exit point?

Mr. Swiniarski: There will be no exterior lighting. The generator will be smaller than 5 liters and will not exceed noise thresholds. The closest properties are a plumbing business and commercial/residential. The exhaust muffler will be situated away from the residential units. A 20-minute weekly test will be performed at a time convenient to abutting properties (usually at 2:00 p.m.), otherwise the generator will only run when power is out.

Mr. Beers moved to grant a Miscellaneous Variation to Title 16.3.2.1.5D, in order to renovate the existing garage at Second Christian Congregational Church, Map 4 Lot 57, 33 Government St, Mixed-Use Kittery Foreside (MU-KF), with construction in accordance with the testimony of the applicant's attorney.

Mr. Pinkham seconded  
Motion carried unanimously

Mr. Costa noted this approval is not the issuance of a building permit, and any aggrieved party has 45 days to appeal this decision to Superior Court.

#### Findings of Fact

1. Second Christian Congregational Church, Map 4 Lot 57, 33 Government St, Mixed-Use Kittery Foreside (MU-KF) requesting a Miscellaneous Variation request to the terms of Title 16.3.2.1.5D, in order to renovate an existing garage.
2. Mr. Swiniarski, Attorney, testified there would be no change in footprint or height of the existing structure.
3. The setbacks are less than what is required to the side (8'6") and rear (2'11") where 10 feet are required for each.
4. This is a conforming lot with nonconforming buildings;
5. The existing nonconforming building is 23.3' x 16'8".
6. Bradford Sherman testified in favor of the project.
7. The property is not in the Shoreland Overlay Zone.
8. Applicant's agent testified there will be no external lighting.
9. Applicant's agent testified the generator will not exceed noise thresholds and will be exhausted to the rear of the property. The Code Enforcement Officer will enforce the Code requirements regarding noise thresholds.

Mr. Wilson moved to accept the Findings of Fact as read  
Mr. Beers seconded  
Motion carried unanimously

#### Conclusion

The Board has the authority to grant approval per Title 16.7.3.5.5, finding the project will be no more non-conforming than what currently exists.

Mr. Wilson moved to accept the Conclusion as read  
Mr. Beers seconded  
Motion carried unanimously

5. Nanci Lovett, Map 26 Lot 25-1, 11 Pepperrell Terrace, Residential-Kittery Point Village (R-KPV), and Shoreland Overlay zones (SLZ). Nanci Lovett requesting Administrative Appeal to the terms of Title 16, Section 3.2.17, Title 16, Section 8.25.4, & Title 16, Section 3.2.17 in order to turn existing garage into Accessory Dwelling Unit (ADU) for family member.

Mr. Beers: Summarized the basis for denial by the Interim Town Planner, and referenced a letter (11/4/14) from the MDEP outlining their opinion, noting the date of the Notice of Decision (10/6/14) preceded the date of the MDEP letter referenced in the Notice.

Mr. DiMatteo: The Notice of Decision was dated to reflect the date of the original denial.

Mr. Beers read a prepared statement outlining Title 16 regulations and state shoreland rules regarding ADUs in the Shoreland Zone; asked why the applicant was not instructed by staff as to the difference between an ADU and a Temporary Intra-Family Dwelling unit permit process; provided a hypothetical example as to how property owners could develop their property that would violate code; noted the Board of Appeals does not have the authority to accept an ADU application in the Shoreland Overlay Zone, which requires Planning Board review; and concluded the local ordinances and state rules appear to be in conflict. If this application were for a temporary intra-family unit, it would be allowed in the Shoreland Zone as an accessory use, expansion not exceeding 30%.

Discussion followed regarding the applicability of *accessory dwelling unit* versus *temporary intra-family unit* by definition; whether the request requires Board action; what the intended use would be.

Nanci Lovett: The application is to provide a living area for her aging mother at this time, but wanted to apply for the ADU to increase the value of her property.

Mr. Beers: If this is the direction the applicant wishes to take, it should be referred to the Planning Board as it is in the Shoreland Overlay Zone, and the current language in state and local laws would not permit an ADU in this zone.

Mr. Wilson: Would Ms. Lovett prefer to now apply for an intra-family unit at this time and deal with the ADU in the future?

Nanci Lovett agreed.

Following discussion, the Board agreed to review her application as a "special exception" to create a temporary intra-family dwelling unit in her attached garage.

Debbie Driscoll Davis: Ms. Lovett is my cousin, and lives next door. She is not adding on to the house and wished the Board could approved an ADU for her as they did on October 14 for another applicant. Will the Board's decision impact her legal rights if she should decide to appeal? Questioned whether the request needs to go to the Planning Board as there is no expansion of the structure in the Shoreland Zone.

Jon Watts, Agent: Before the Notice of Decision was written, the ADU application was approved by the Code Enforcement Officer. The ADU application does not exclude single family units in the Shoreland Zone; though the code now requires a minimum 40,000 sf lot, the Appeals Board allowed this property as a 24,000 sf lot in 1984; this request does not make it any more nonconforming.

Mr. Beers: In response to Ms. Driscoll, the ADU application previously approved by the Board was done so in error based on inadequate and incorrect information provided by the Code Enforcement Officer. This Board cannot hear ADU requests in the Shoreland Zone. Though approved in error, *once the appeal period has expired, an applicant may rely on the permit even if improperly issued [Juliano vs. Town of Poland, 1999]*.

Mr. Wilson: The applicant may wish to go forward with the second appeal, which the Board would have to deny, and then appeal the Board's decision.

Mr. Beers: The first appeal before the Board is an Administrative Appeal to the decision of the Interim Planner and then proceed with the Miscellaneous Variation which is now an intra-family dwelling unit.

5 minute recess

Meeting resumed at 8:23 p.m.

Mr. Wilson: There is a condition that requires a statement as to how the intra-family unit will be converted to the previous use. This must be determined by the CEO.

Mr. Wilson and Mr. Beers referenced Title 16.8.21.2 Temporary Intra-Family Unit Standards:

D. Parking

Mr. Watts: There will be no changes in the parking.

F. Accessibility

Mr. Watts: The unit is directly accessed through the principle dwelling and has another side exit.

G. Character:

Mr. Watts: There will be no change to the character of the existing principal dwelling.

H. Common metering:

Mr. Watts: The unit will share metering with the principle structure.

K. Adequate wastewater disposal:

Mr. Watts: There is a plan in place for an advanced pre-treatment system for wastewater disposal.

L. Transient lodging facility

Mr. Watts: This unit will not be used for a transient lodging facility.

M. Financial gain:

Mr. Watts: This unit will not be used for financial gain.

Mr. Beers: Satisfied the standards of 16.8.21.2 have been met and the applicant will comply with conditions in 16.8.21.3 as written.

Mr. Beers moved to grant a special exception approval to Nanci Lovett at 11 Pepperrell Terrace, Map 26 Lot 25-1, R-KPV and Shoreland Overlay Zones, for a Temporary Intra-Family Dwelling Unit as outlined in Title 16.8.21.1-3

Mr. Boyle seconded

Motion carried unanimously

Mr. Costa noted this approval is not the issuance of a building permit, and any aggrieved party has 45 days to appeal this decision to Superior Court.

#### Findings of Fact

1. Applicant agreed to change the Accessory Dwelling Unit request to a special exception request for a Temporary Intra-Family Dwelling Unit.
2. Public testimony in favor was received from Debbie Driscoll and John Watts asked questions about the direction the application has taken.

3. The intent is convert a 15'6" x 30' garage space into a Temporary Intra-Family Dwelling Unit.
4. The property is in the Shoreland Overlay Zone and is a nonconforming lot with nonconforming buildings.
5. Through discussion with the applicant and her agent, the Board was satisfied that the standards and conditions of Article XXI, Temporary Intra-Family Dwelling Unit would be met.

Mr. Wilson moved to accept the Findings of Fact as read  
Mr. Beers seconded  
Motion carried unanimously

Conclusion

The Board has the authority under Title 16.1.5.2.F.4.d Special Exception Use Request to review and grant approval, and that Title 16.8.21.1-3 and Title 16.6.6 Basis for Decision criteria have been satisfied.

Mr. Wilson moved to accept the Conclusion as read  
Mr. Beers seconded  
Motion carried unanimously

6. Nanci Lovett, Map 26 Lot 25-1, 11 Pepperrell Terrace, Residential-Kittery Point Village (R-KPV), and Shoreland Overlay zones (SZ). Nanci Lovett requesting Miscellaneous Variation Request to the terms of Title 16, Section 3.2.17, Title 16, Section 8.25.4, & Title 16, Section 3.2.17 in order to turn existing garage into Accessory Dwelling Unit (ADU) for family member.

The applicant withdrew the Miscellaneous Variation request.

7. Unfinished Business - None

8. New Business

- a. Election of Officers:

Mr. Beers nominated Brett Costa as Chairman  
Nomination carried unanimously

Mr. Beers nominated Craig Wilson as Secretary  
Nomination carried unanimously

Mr. Wilson nominated Gary Beers as Vice-Chairman  
Nomination carried unanimously

- b. Comprehensive Plan Committee:

Mr. Beers nominated Brett Costa as Board representative to the Comprehensive Plan Committee.

- c. Recognition of Vern Gardner:

Mr. Wilson requested the CEO compose a letter of appreciation for Council signature in recognition of Vern Gardner's years of service on the Board of Appeals.

9. Board Issues or Comment

a. By-Law discussion:

A meeting will be scheduled for December 9 to discuss Board By-Laws, followed by a workshop to discuss Title 14 and other Board matters and business.

10. Acceptance of previous minutes

Mr. Costa moved to accept the minutes of October 14, 2014 as corrected

Mr. Wilson seconded

Motion carried with 4 in favor (Mr. Pinkham left the meeting)

Mr. Wilson moved to accept the minutes of August 19, 2014 as submitted

Mr. Beers seconded

Motion carried with 4 in favor (Mr. Pinkham left the meeting)

11. Adjourn

Mr. Wilson moved to adjourn

Motion carried unanimously by all members present

The Board of Appeals meeting of November 25, 2014 adjourned at 8:57 p.m.

Submitted by Jan Fisk, Recorder, November 29, 2014