

**APPROVED MINUTES**  
**Approved on January 26, 2009**

**KITTERY TOWN COUNCIL**  
**SPECIAL MEETING**

**January 5, 2009**

**Council Chamber**

1. **CALL TO ORDER**

Chairman Jeffrey Thomson called the meeting to order at 6:30 p.m.

2. **INTRODUCTORY**

Chairman Thomson read the Introductory.

3. **PLEDGE OF ALLEGIANCE**

The Chair led those present in the Pledge of Allegiance.

4. **ROLL CALL**

Answering the roll were Councilors Gary Beers, Frank Dennett, George Dow, Ann Grinnell, Glenn Shwaery, Vice Chair Judith Spiller and Chairman Jeffrey Thomson. Also present were Town Manager Jonathan Carter, Town Attorney Duncan McEachern, CEO Heather Ross, KCC Chair Earledean Wells, ZBA Chair Vern Gardner, Craig Wilson, Recorder Chris Kudym, members of the press and others.

5. **DISCUSSION BY THE PUBLIC (Pertaining to Item 6; three minutes per person)**

Chairman Thomson stated that this was a Special Meeting called as a result of conversation that took place at Council's last regular meeting of December 22, 2008. Discussion would be specifically limited to the one item on the Agenda, which was a request by the Kittery Conservation Commission to fund an appeal of a Zoning Board of Appeals case concerning wetland setbacks. The Chair noted that Item 5 called for discussion by the public pertaining only to that item and if the Council had no objection, he thought the best way to handle this was if, during the course of Council's discussion, someone had a question they wished to raise or have answered, they could do it that way.

6. ***THE KITTERY TOWN COUNCIL MOVES TO DISCUSS A REQUEST BY THE CONSERVATION COMMISSION TO FUND AN APPEAL OF THE ZONING BOARD OF APPEALS CASE CONCERNING WETLAND SETBACKS.***

Chairman Thomson asked Ms. Wells to summarize why the Conservation Commission made this request.

Earledean Wells, Chairman of the Kittery Conservation Commission, stated that the issue concerned a subsurface waste disposal system that would be 36 feet from the wetland. The KCC felt there had been a violation of Kittery Ordinance 16.12, which clearly stated that a 100-foot setback was required for a wetland greater than one acre in size, which this wetland was. The Zoning Board of Appeals had granted this appeal with conditions but the KCC felt those conditions were not adequate to safeguard this particular wetland. Ms. Wells said the KCC also felt there had been a violation of 16.24.050.1, which required a one-year wait before another appeal could be presented, and this development plan had been before the ZBA in February of 2008 and had been denied. Article

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16.28.090 stated that two or more combined, contiguous non-conforming lots would be deemed as one lot. The ZBA had concluded that this was a non-conforming lot but, according to Kittery tax records as well as the developer's plans, it no longer was. According to 16.28.140, if a legal non-conforming building was damaged or removed it must be rebuilt within the same dimensions within one year and this particular building had been removed for over 20 years and, therefore, no longer had standing under the law.

Ms. Wells explained that the KCC was simply requesting to have the opportunity to let a Maine Court decide whether or not the ZBA's decision was proper.

Chairman Thomson asked Ms. Wells if any abutters had been present at the ZBA meeting to speak to those concerns and she replied she thought people were there but didn't know if they had addressed these particular items. However, she said, the KCC had written a number of letters detailing their concerns and citing these passages so the issues had been brought up and which was why they had not been granted a re-consideration.

The Chair requested that someone from the ZBA address the sequence of events.

Vern Gardner, Chairman of the ZBA, came to the podium and indicated that the KCC had submitted a point by point list of ten or a dozen items and the Board had gone through each and every one of them at their meeting and had voted on them. Responding to a question from the Chair, Mr. Gardner explained that the KCC had brought forward no new information that would kick in a reconsideration of the Board's decision.

Referring to 16.24.050.1, regarding the one-year lapse between applications, Councilor Shwaery asked if that was up to the CEO to determine and then schedule before the Board? CEO Ross indicated that it was up to the Board to decide if the appeal was of a similar nature. If the application had the appearance of being similar, they discussed it prior to the hearing and voted to decide whether or not to hear it. The CEO said there were several aspects to this case; the first two applications concerned the house and the septic system came separately.

Councilor Shwaery asked if a waiver of 16.24.050.1 had been necessary in order to proceed and Mr. Gardner stated that the Board decided the one-year waiting period did not apply since the application contained significant changes.

ZBA Member Craig Wilson explained to the Council that in the February '08 application, there had been no mention of the house. The next time it came before the Board, it was an application that posited there was a homestead that had never been absorbed into the larger lot and that stood on its own, so then they were asking the Board to look at an application for that smaller piece.

Councilor Dow asked if it was the homestead that made the lot non-conforming and Mr. Wilson replied, no, it was the inability to put a structure more than 100 feet from the wetland. Other pieces of the lot had been broken off, making it non-conforming prior to '77. The contention was this small piece had stood alone since the 1800's and once they convinced the Board that was true, they could then deal with it as a non-conforming lot of record. That argument, Mr. Gardner added, was the hinge that allowed them to open a discussion on all the other points.

Councilor Dow asked if the design was in accordance with State regulations and Mr. Gardner replied, yes, and noted that the Board also applied further conditions.

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Mr. Gardner continued to explain how the Board came to their decision. When there were contiguous lots owned by the same person, he said, they were merged together for assessment purposes and the Board's thought had been that that was what happened in this case when, in fact, they were separate. Mr. Gardner noted that counsel for the applicant had effectively argued this point to the Board. Councilor Dow asked if there were individual maps and lot numbers for these individual contiguous lots and Mr. Gardner replied that, in the Board's mind and in the argument, there were indeed.

Ms. Wells drew Council's attention to the December 26, 2002 Opinion Letter of the Town Attorney that stated the ZBA could not – the Town Ordinances did not allow it – reduce wetland setbacks and this was the first reduction since 2002.

Mr. Wilson noted that Atty. McEachern's Letter needed to be put in context, that under another section of the Ordinance, the ZBA was not permitted to reduce wetlands but this was an entirely different section of the Ordinance (16.28.070), which the Board interpreted as applying to wetland setbacks.

Mr. Gardner thought that getting into the specifics of the Ordinance would be placing Council in the position of serving as a Court; the Chair thought the Council needed to get an understanding of Atty. McEachern's 2002 Opinion Letter.

Town Attorney Duncan McEachern noted he had not come that night to argue the merits of whether the ZBA was right or wrong but saw this in a larger, more general, context. His understanding was that the KCC wanted to appeal this decision and wanted the Council to fund it. He also thought he was asked to address the recent referendum that gave the KCC certain authority to deny permits.

Atty. McEachern noted that the KCC was a worthwhile and very valuable Town Commission and was very visible at all these meetings of the Planning Board and ZBA, however, he would like to review with the Council the authority given to the KCC by ordinance.

The ordinance itself was adopted pursuant to a State Enabling Statute, which it substantially parrots, and basically consisted of two essential aspects, duties and powers. Duties consisted of: (a) keeping an index of all open areas and recommending programs to municipal officers for better protection of those areas; (b) conducting research; (c) keeping records of meetings and (d) coordinating activities of conservation bodies. Regarding powers, which were limited to what was stated in the ordinance, they had the power to: (a) make recommendations; (b) prepare and print books, etc; (c) serve as an advisory body to the Public Works Department; (d) receive gifts in the municipality's name with the approval of the Town Council; and (e) develop and implement a management plan for Rogers Park.

Atty. McEachern said that, based upon their charge and enabling authority contained in the Ordinance, he would maintain that the KCC did not have the authority to initiate litigation and have the Council fund it. Even if they did have the authority, he said, they would have to prove standing in the Court.

The Town Attorney noted that the Commission influenced Boards by their attendance and acted as defenders of the areas they "patrol" and he thought they had been very effective. Over the years, however, they were going to get decisions from Boards that they didn't care for. Whether or not the Council wanted to fund an appeal for them, the Attorney said, since he, himself, would represent the ZBA, they might have to fight it out in Superior Court whether or not the KCC had authority and/or standing.

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Chairman Thomson said that after hearing Atty. McEachern's explanation of what he saw as a stumbling block for this process moving forward and re-reading the ZBA's Minutes of December 9<sup>th</sup>, his understanding was that the ZBA had established a policy in December of 2005 dealing specifically with requests for reconsideration of previous actions that contained two factors: (1) the presentation of new evidence that could have altered the decision; and (2) an explanation of why this new evidence was not presented at the first hearing. The Chair confirmed with ZBA Chair Gardner that the ZBA's decision on December 9<sup>th</sup> was that no new evidence had been presented, noting that the ZBA had satisfied their own policy for requests for reconsideration, as well as satisfied State Law regarding the same.

Town Attorney McEachern returned to the podium to address the referendum issue. Ordinance 16.28.490, Enforcement, was amended through a referendum procedure and included the following language: "*the Kittery Conservation Commission (KCC) is empowered to deny a wetland permit or the Applicants fail to meet the requirements of Article 12 of the Kittery Land Use and Development Code Ordinance to submit necessary information and plans requested by the KCC to meet the design specifications...*" Atty. McEachern stated that, in his view, he didn't think that would get by any type of Court review. This provision, he said, did not amend the Conservation Commission Ordinance but had been plugged into the Zoning Ordinance. It did not include a process for any hearings nor did it contain procedures for an appeal so, to him, it lacked due process. The only provision was to give the Conservation Commission this authority, which it didn't even have under the ordinance that created it, and he didn't see it being effective or enforceable.

Referring to Councilor Dennett's objection to the Planning Board deleting this language because he felt it had been adopted by the voters, Atty. McEachern noted that something adopted by the voters was very important but if it wasn't adopted in an enforceable form, he didn't think they had to carry it just because it had been through the referendum procedure; it still had to be able to stand on its own two feet. The Town Attorney stated the provision actually gave the Conservation Commission the authority of the Planning Board or the Zoning Board of Appeals and he didn't think that was the proper procedure.

Councilor Beers confirmed that 16.28.490 would not be relevant in this particular case because no wetland permit was part of the circumstance.

Councilor Dennett noted that the Town Attorney had also been asked to address his letter regarding variances and the difference between a variance and a miscellaneous appeal. Atty. McEachern indicated that since he didn't know if there were pending appeals and he might find himself on one side or the other, he had been trying to stay away from a discussion of the merits.

Councilor Shwaery referred Council to the ZBA's December 9<sup>th</sup> Minutes where in discussion of the KCC's December 2<sup>nd</sup> letter, which included an opinion that a 36-foot setback would not provide the same level of protection that 16.12 intended, Thomas Babcock-Emerson noted that this opinion was not supported by technical data. Councilor Shwaery said, in his opinion, 16.12 was meant to protect wetlands of an acre from infiltration by fully untreated subsurface waste treatment and, although he was not sure how the 100-foot setback had been chosen – there was probably some scientific aspect to it but not completely since it was too a round a number – but the decision had been made to allow a septic system up to 36 feet away from that wetlands area even though the application also included no scientific data stating that the septic treatment plan or this type of soil was going to provide that level of protection. Councilor Shwaery said it seemed to him that the burden was on the

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applicant to show that the wetlands were going to be protected by this somewhat advanced septic system and different types of soil and asked if part of the ZBA's discussion had included the opinion that, in this case, they weren't going to worry about whether untreated waste got into the wetlands or if there was any scientific data showing that this new septic system would provide the same level of protection as 100 feet?

ZBA Chair Gardner replied that the Board had taken it upon itself to move to the highest possible level of septic disposal and instructed that the soils be structured in such a way as to aid the mitigation of any septic. Mr. Gardner indicated that there was no scientific evidence to show whether these conditions would provide the same protection as 100 feet would. The ZBA did the best they could with the information provided to them and if the Conservation Commission wanted to provide that information, the Board would certainly have taken it.

Councilor Shwaery said he didn't see that as being the responsibility of the KCC. The applicant was asking for setback relief so, he asked, wouldn't the onus be on them to provide data as to what kind of release into this wetland there could possibly be by hiring a soil scientist to provide enough information for a Board to make that decision. ZBA Chair Gardner indicated that a soil scientist had been hired to delineate the wetlands.

ZBA Member Craig Wilson said he had not been at the December 9<sup>th</sup> meeting so he could not speak to Mr. Babcock-Emerson's statement but could speak to Councilor Shwaery's question. The information the ZBA had had before them included a State-certified soil scientist's statement that with the design he had, being at 36 feet was acceptable to the State. Knowing that Kittery wanted a higher standard than the State, the Board tried to ratchet it up, getting a higher-tech system, making it smaller and moving it back more than 36 feet. Mr. Wilson said the Board asked that the conditions between the bed, the septic system and the edge of the wetlands be designed by a soil scientist or a landscape architect to provide enhanced protection so even though the State said that 36 feet was acceptable, the Board had acknowledged that Kittery had a higher standard. The applicants had, in fact, presented scientifically based evidence that said it was acceptable to the State. Mr. Wilson said there wasn't a logic to it all the time that you could absolutely follow but the Board made decisions based on the evidence they had.

Chairman Thomson asked if there were any motions to be made by the Council pursuant to Item 6 of the agenda for the Special Meeting. Hearing none, the Chair said he would entertain a motion to adjourn.

7. ADJOURNMENT

**COUNCILOR BEERS MADE A MOTION TO ADJOURN, SECONDED BY VICE CHAIR SPILLER, WITH ALL IN FAVOR.**

***MEETING ADJOURNED: 7:24 P.M.***