

**TOWN OF KITTERY
PLANNING BOARD MEETING
Council Chambers**

APPROVED
Thursday, October 23, 2008

Meeting called to order at 6:06 p.m.

Members Present: Douglas Muir, Megan Kline, Ernest Evancic, Michael Luekens, D. Scott Mangiafico, Vice-Chairman, Joseph Carleton
Members absent: Russell White, Chairman
Staff: Sandra Mowery, Town Planner

Minutes: October 9, 2008

Mr. Carleton moved to approve the minutes as corrected

Mr. Mangiafico seconded

Motion carries 4-0 with 2 abstentions (Kline & Luekens)

PUBLIC COMMENT – There was no public comment.

ITEM 1 - Amendment to Title 16 Land Use and Development Code Zoning Ordinance

– **Public Hearing - Wetlands Ordinance** —Discussion of proposed revisions to Article XII
–Conservation of Kittery Wetlands; Title 16.28.380 through 16.28.500 to incorporate certain State requirements and other amendments.

Public Hearing opened at 6:24 p.m.

Duncan McEachern, Town Attorney, spoke to the proposed change of the definition of variance as used in this amendment that would make a variance review by the ZBA unavailable for a wetland setback. His opinion was that if the ordinance excludes the review of wetland setbacks in the variance procedure, it is likely that a court would strike it down as a taking of property. The process for variance review would be for the applicant to prove a hardship, which is a difficult standard to meet. The variance procedure should be available to a property owner, whether or not a variance is granted. During further discussion, it was revealed that the Kittery ZBA had not granted a variance in Counsel's memory, as the review criteria is specific and variances are difficult to obtain and uphold in court.

Mr. Mangiafico asked if the proposed definition would vary from the state's definition and, if so, is this allowed? **Mr. Carleton** read from the MRSA definition of variance. General discussion followed regarding dimensional requirements, set-backs, and state definitions and guidelines regarding ZBA functions under law. **Mr. Luekens** asked Counsel if he felt the ZBA has the authority to grant a variance from a wetland setback if they felt the hardship criteria is met, as opposed to other set-backs? **Counsel** replied that the way it is written now the Board cannot consider a variance, as it is his opinion that "yard" excludes a wetland setback. **Mr. Luekens** said that by amending the definition of variance, the ordinance would allow a process for appealing wetland setback, where there isn't one now. **Counsel** noted that the term "any dimensional requirements" under the new definition would allow for the review process. **Earldean Wells** stated that by allowing variance review will open the flood gates because, currently, variances cannot be

requested for wetland setbacks. However, in the past, a variance was not requested, rather a miscellaneous appeal, which was granted. There will be a new miscellaneous appeal for a septic system that is 36 feet from a wetland. If broader latitude is granted for review of wetland setbacks, it is important that plans submitted for review must be sufficient in detail for the Board to make a decision. **Counsel** stated that the burden of proof is on the applicant, and if plans are insufficient for the Zoning Board to make a decision of hardship, the request should be denied. However, the issue is the right to request a variance, not the content of the variance request. **Mr. Muir** read from MRSA that municipalities may adopt additional limitations in the granting of a variance. Board members reviewed other proposed definitions under consideration, including wetland alteration and development. **Mr. Carleton** asked about a change in property use that does not intensify the use. Following continued discussion, members concurred that adopting the state definition of development would meet the needs of the new ordinance. Definitions of “expiration of wetland alteration permit” and “enforcement” were reviewed.

Craig Wilson, Zoning Board of Appeals member, commented that he was in support of the changes to the proposed ordinance amendment.

Public Hearing closed at 7:31 p.m.

Mr. Carleton noted he was in favor of utilizing the state definition of development, not changing the definition of variance, and adopting the remaining recommendations of Town Counsel. Following additional discussion,

Mr. Carleton moved that the Planning Board recommend and forward to the Town Council the changes as recommended by Counsel for Article XII –Conservation of Kittery Wetlands, Title 16.28.380 through 16.28.500, except to include the state definition of development in MRSA Item 30-A, section 4301; retain the present definition of variance as found in the Kittery Zoning Ordinance and adopt all other changes as recommended by Counsel on October 23, 2008.

Mr. Luekens seconded

Motion carries unanimously, 6-0

ITEM 2 – Request to Name a Private Way – Discussion with Action – KBM Builders, Owner/Applicant, proposes to name a new street that intersects with Dennett Road, the right of way being situated in Map 12 Lot 1 and abutted by lots 1 through 8 as shown on the map entitled Plan of Residential Subdivision for KMB Builders, Inc., approved by the Planning Board on April 10, 2008.

The **Town Planner** summarized the proposal by the applicant, Bill Cullen, to name the new street Roseberry Lane. Discussion followed regarding the application format and signatures received from neighbors and municipal department heads. It was noted that there were no objections from the property owners or department heads.

Mr. Muir requested that the Town Manager change the application format to include ‘yes’ and ‘no’ selections in the property owner section similar to the department head section on the form.

Mr. Carleton moved that the request to name a private way that intersects with Dennett Road as shown on the map entitled Plan of Residential Subdivision for KMB Builders, Inc. in the application, and to name the road Roseberry Lane, be approved by the Planning Board.

Mr. Luekens seconded

Motion carries unanimously, 6-0

ITEM 3 - Plenary Site Plan – Preliminary Review: B & F Land Development, Owner, proposes to remove the existing building and parking lot and to construct two new office buildings and parking lot on 1.29 acres at 240 US Route 1, located on Map 22 Lot 13 situated in the Commercial 1 (C-1) zoning district. The Owner's agent is Christopher Baudo, RA. The **Town Planner** summarized the application's review process to date. Because of the changes requested by the Board and abutters, the applicant has submitted a revised site plan that has not received staff or peer review. Should the Board accept the revised layout submitted for this meeting, further site review will be required.

Chris Baudo summarized the changes made since the prior meeting regarding the reduction of parking spaces and the vegetative buffer area, re-location of the dumpster and fence-line, and the inclusion of additional landscape material along the ramp. Applicant provided survey information regarding the history of the parcels abutting the commercial property and the location of the private way, arguing that the use abutting the commercial property is a road, not a residential area or use.

General discussion followed whether the road was owned by an abutting property owner. **Rick Rossiter**, abutter, explained that the original owner was Manson and believed it was still owned by a member of the family. **Mr. Muir** suggested that the Town Attorney weigh in on whether a piece of land used as a conveyance to private property is considered a residential use, as the applicant maintains that a road is not a residential use. **Mr. McEachern** questioned if a buffer should be measured from a roadway or a use. **Ms. Kline** noted that the previous ZBA decision was to establish a buffer from the residential use. **Chris Baudo** stated that they have extended the buffer required by the original ZBA decision and provide a 40' buffer from the property line to the structure. Mr. Baudo read from the July 1991 ZBA decision and conclusions.

Mr. Carleton suggested that the applicant and abutters talk together in an attempt to address all concerns. **Mr. Luekens** noted that the application is in the spirit and letter of the ordinance and the applicant has consistently responded to the Board's and neighbor's requests.

Mr. Evancic and **Mr. Mangiafico** concurred with **Mr. Carleton**

David Durling, 29 Adams Drive, felt that the key issue is the road. The McCarthy property is an abutter, even though a road passes between the zones. The buffer area is supposed to eliminate any adverse effects, and the height of the proposed building cannot be hidden with 12-14' trees.

Chris Baudo stated that the building is in keeping with other buildings along the Route 1 corridor and that the developer is willing to abide by conditions placed on them by the Board in conjunction with the ZBA decision.

Mr. Mangiafico stated that he would argue that the use of the roadway is not a residential use and felt that there would be adequate buffering in place as proposed. **Mr. Evancic** noted that any development separated by a street could be viewed similarly. A buffer is a neutral area

and you can't have a use within the buffer because then it's not a buffer. **Ms Kline** asked how far the ramp area is from the property line? **Mr. Baudo** stated 25 feet, with an additional 15 feet of landscaped area, for a total of 40 feet. **Mr. Carleton** suggested that the developer and neighbors address objections but, absent a consensus, the applicant has met his burden. **Mr. Muri** asked the applicant to again consider moving the ramp to the SW side of the property where there was more room and the side facing the abutters would be totally green. **Mr. Baudo** stated that he had analyzed the idea and that it was cost prohibitive to move the driveway at this point because of the existing topography and wetlands.

Bill McCarthy, 27 Adams Drive, suggested that the Board conduct another site walk to view the potential impact on the abutters.

Mr. Mangiafico stated that there does not appear to be a strict code issue regarding vegetation and that the developer had proposed adding additional plantings to further enhance the buffer area.

Ms. Kline suggested that the drainage from the buffer be reviewed and reminded the abutter that some of the landscape plantings are not suitable for the location and need to be addressed.

Mr. Baudo stated he would have the surveyors mark the areas where the vegetation is at a minimum and propose where it could be more densely planted and indicating where construction would be intruding on the buffer, and would be willing to make planting changes.

Ms. Kline stated the site design should illustrate how the terrain will change with the ramp and what will remain so the Board can see the use of plantings and fencing to meet the buffer requirements. **Town Planner** will request peer review of the proposed plantings. **Mr. Rossiter** recommended the use of evergreens for buffering.

Mr. Carleton noted that, though 3 or 4 Board members agree that the 40 foot buffer is appropriate and meets the ordinance requirements, he still recommends that the applicant continue to work with the abutters to reach a consensus. The developer should put some thought into detailed plans as to what he is proposing.

Break

ITEM 4 - Amendment to Title 16 Land Use and Development Code Zoning Ordinance – Workshop – Shoreland Zoning –The mandatory Shoreland Zoning Act (Act), 38 M.R.S.A. Section 435-449 and the guidelines for the Board of Environmental Protection (Board) require municipalities to adopt shoreland zoning ordinances consistent with, or no less stringent than the minimum guidelines set forth in the Act and by the Board.

Mr. Carleton noted that the proposed definitions for shoreland zoning are different, prompting definition changes throughout Kittery's ordinance. **Town Planner** summarized the arrangement of the proposed ordinance in the workshop package and the exclusion of the state timber harvesting section of the shoreland ordinance, which does not apply to Kittery. **Board Members** discussed the content of the Kittery proposal and the requirements of the state and asked that it be made clear in the draft what items meet state requirements and where the state allows flexibility so that every section does not have to be as closely scrutinized.

Phyllis Ford, Spruce Creek Association, proposed providing a document from the DEP and/or SMRPC as to what is mandatory, what is considered flexible and what are simply guidelines.

Mr. Carleton suggested that those definitions that are specific to the shoreland ordinance be excluded from the general glossary of definitions, noting only in the new section that they “shall apply to the shoreland ordinance only”.

Due to limited remaining time, this item will be reviewed at the November 13, 2008 scheduled meeting.

PLANNERS TIME

Mr. Carleton excused himself as the Board reviewed the Austin Property at 37 Pepperill Road regarding a proposed lot line swap. The **Town Planner** presented the proposed lot line changes to determine whether or not the applicant should pursue the request formally before the Board. There was informal discussion regarding setbacks and corner lots. The **Town Planner** will share the plan with the town attorney to determine whether setbacks and ordinance requirements are met prior to advising the applicant on their next course of action.

ADJOURNMENT:

Mr. Mangiofico adjourned the meeting at **10:10 pm**

Submitted by Jan Fisk, Recorder
October 31, 2008