

**APPROVED**

**TOWN OF KITTERY  
BOARD OF APPEALS**

**February 13, 2007**

**Council Chamber**

**CALL TO ORDER:**

Chairman LaMarca called the meeting to order at 7:00 p.m.

**BOARD MEMBERS PRESENT:**

Vern Gardner, Herb Kingsbury, Niles Pinkham, Craig Wilson and  
Michael LaMarca, Chairman

**ALSO PRESENT:**

CEO, Heather Ross, Recorder, Chris Kudym, Recorder, Lisa Goms, Recorder, Kevin  
Swenson (Resident), Dave Sowerby, (Resident), Ken Wood (Attar Engineering),

Chairman LaMarca introduced the members of the Board, announced that Secretary, Sarah Brown would not be present, then explained to those present the process of how an appeal is granted, led those present in the Pledge of Allegiance. Chairman LaMarca made comment on the untimely passing of Jim Noel, Town Planner, and read the Notice of Hearings.

**PUBLIC HEARINGS:**

1. Derek Swenson requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060.D (Page 256), Title 16, Section 32, Subsection 490.K (Page 380) and Title 16, Section 32, Subsection 490.N.2.a (Page 388) of the Kittery Land Use and Development Code Zoning Ordinance in order to reconstruct chimney on the exterior of house at property located at 2 Paul Street, Map 8, Lot 26, Kittery, in the Shoreland Zone.
2. DSS Land Holdings, LLC requesting a Special Exception to the terms of Title 16, Section 20, Subsection 130.C.9 (Page 290) of the Kittery Land Use and Development Code Zoning Ordinance in order to construct a mixed use development including a three-story hotel, two 10,000 square foot restaurant/convenience store buildings, and two 15,000 square foot retail buildings at property located at US Route 1, Map 60, Lots 24 & 24A, Kittery, in the Mixed Use and Rural Residential Zones.

The Chair then recognizes Mr. Kevin Swenson.

1. Derek Swenson requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060.D (Page 256), Title 16, Section 32, Subsection 490.K (Page 380) and Title 16, Section 32, Subsection 490.N.2.a (Page 388) of the Kittery Land Use and Development Code Zoning Ordinance in order to reconstruct chimney on the exterior of house at property located at 2 Paul Street, Map 8, Lot 26, Kittery, in the Shoreland Zone.

Kevin Swenson (representing son, Derek Swenson) came to the podium and explained the renovation project at 2 Paul Street which had begun less than a year ago. Mr. Swenson commented that it was brought to their attention by the CEO in November that the property is zoned shoreland property which requires a strict regulation of the zoning. In the course of renovation, prior to our knowledge of the zoning, the chimney was inspected by a licensed mason and determined to be unsafe and not up to code. Mr. Swenson believed a letter got out regarding the condition of the chimney. Mr. Swenson mentioned that he had a letter from Jim Leslie, Mason of South Berwick, dated September 2006. Mr. Swenson reads letter to the Board. The recommendation is to relocate and build new chimney.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of, opposed to, or about the application. Hearing no response, the Chair requested the CEO's report.

CEO Ross reported: This is a conforming lot with non-conformance structure located in the urban residential and shoreland zones. Mr. Swenson is proposing to construct an 18"x32" chimney with closer than the 100 ft. set back across the water into the pond. It is proposed to be 67 ft which is no closer than but because of the expansion of the structure, not necessarily the floor area or volume, but the only overages by code are allowed to be authorized by my department are no more than 24" overhangs in which this does not apply.

Chairman LaMarca asked what the original size was. CEO Ross replied that it was inside the house, and it actually went up to the center of the structure. Chairman LaMarca asked if the Board had any questions. Mr. Gardner asked how far up? CEO Ross explained that it only allows up to a 24" overhang for eaves or gutters, it does not allow any overages for the chimney so that is why this is seen as an expansion.

Chairman LaMarca asked if the new chimney is going to be roughly 67' from Legion Pond and the closest point of the house is 57'? CEO Ross responded that the closest point of the deck is about 57' and believes the house itself is 60'. The Chair asked if there were any further questions from the Board. No more questions were asked. Chairman LaMarca remarked that he had no issues with this and to move for a motion. Move the application of Derek Swenson requesting the Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060D, Title 16, Section 32, Subsection 490.K and Title 16, Section 32, Subsection 490.N.2.A of the Kittery Land Use and Development Code Zoning Ordinance in order to reconstruct chimney on the exterior of house at property located at 2 Paul Street, Map 8, Lot 26, Kittery, zoned Shoreland. Construction shall be in accordance with the sketch submitted, dated and signed by Kevin Swenson and Mike LaMarca, Chairman. A motion was made by Mr. Wilson, seconded by Mr. Gardner. The Chair requested a vote for granting the appeal:

*A SHOW OF HANDS RESULTED IN A UNANIMOUS VOTE IN FAVOR.  
MOTION PASSES 6/0. APPLICATION APPROVED.*

Chairman LaMarca informed the applicant that any interested party of standing had 45 days to appeal the decision of this Board at the York County Superior Court and that they would try to get Findings of Fact out within seven days of tonight's hearing.

The Chair further informed the applicant that this approval was not the granting of a Building

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Permit as he would still need to see the CEO for such Permit, it merely granted the CEO authority to issue the same.

The Chair informed Mr. Swenson that his son had submitted a letter to the Board, dated January 26, 2007, requesting the Board to allow him to build a 5'x12' deck instead of the 3'x12' deck that the Board previously granted him. Chairman LaMarca told Mr. Swenson that this could not be done this way; the request has to be noticed, appealed, submitted to abutters, etc., and to please let his son know that this was not a denial, but it has to be noticed.

FINDINGS OF FACT  
Application #1 – Derek Swenson

1. *This appeal involved a nonconforming lot with nonconforming structure.*
2. *The applicant is looking to remove an interior chimney and replace with a new 32"x18" chimney on the exterior of the house. The chimney will be approximately 67' from the Shoreland. The nearest fasad to the Shoreland is approximately 60'.*

CONCLUSIONS

1. *The Board voted based on 16.28.130D that this was a no closer than situation. 6/0.*

*A motion to accept the Findings of Fact, as written, was made by Mr. Costa, seconded by Mr. Kingsbury, with all in favor.*

2. DSS Land Holdings, LLC requesting a Special Exception to the terms of Title 16, Section 20, Subsection 130.C.9 (Page 290) of the Kittery Land Use and Development Code Zoning Ordinance in order to construct a mixed use development including a three-story hotel, two 10,000 square foot restaurant/convenience store buildings, and two 15,000 square foot retail buildings at property located at US Route 1, Map 60, Lots 24 &24A, Kittery, in the Mixed Use and Rural Residential Zones.

The Chair asked who would be speaking on behalf of DSS. Mr. David Sowerby approached the podium and introduced himself as the owner of the Homestead Property. Mr. Sowerby explained that the history of this application involves the potential sale to an out-of-state developer, lots of litigation, lots of contention over the project and was rejected by the town. About two years ago at the end of that process, Mr. Sowerby decided that if he was going to do something with the land, then he would do it himself. He started the process by going to the officials in the town, Planning Board members, Code Enforcement, everyone he could think of to come up with a plan that would be the best use of that land for everyone involved. Mr. Sowerby went on to say that after two years of putting all that work together, that he is at this meeting tonight to present it for the Board's approval. Mr. Sowerby stated that he had Ken Wood of Attar Engineering and other people at this meeting on his behalf. He explained that he tried to access people from around town and that the only out-of-town contractor is the architects, but are very familiar with the area. Mr. Sowerby then turns the podium over to Mr. Ken Wood.

Mr. Wood came to the podium and explained that Mr. Sowerby had come to Attar a couple of years ago with his wish to design a mixed use development that met the requirements of the code. This parcel is parcel that the Homestead Nursing Home is sitting on now; it goes up into Adams Road and is on the left-hand side of the road when heading north. It is Map 60, Lots 24 & 24A, the total parcel is 29.6 acres. It sits both in the mixed use and the rural residential zone. About 18.5 acres sit in the mixed use and about 11.2 acres sit in the rural residential zone. Mr. Sowerby has proposed a 64-room hotel with a 36 room expansion for 100 total rooms and a pool. Two 10,000s.f. restaurant/convenient store and two 15,000s.f. retail use.

Mr. Wood continued that the purpose for being in front of the Board at this time was because the hotel use is a Special Exception according to the ordinance. It was also proposed to have 6 lots fronting on Adams Road. Mr. Wood mentioned that Robby Woodburn from Woodburn & Co., Bob Martel were present to speak briefly on the project. Mr. Wood went on to say that this parcel was once proposed for Kittery retail ventures, but that project never went forward. It started the process of going to the District Zoning Board, Planning Board and the Maine Department of Fire and Protection. We did apply to the DEP back in November, November 27th. On November 2nd part of the permit application we were required to have a public informational meeting that would have provided notification to all abutters and publication in the newspapers, notification to the town. Eight people attended that meeting. Most of which were residents on Adams Road; they wanted to see what was going on with the residential subdivision. It would be fair to say that their comments could be summarized that they were satisfied with the residential subdivision.

Rob Martel approached the podium and explained that this building may need to conform to the franchise requirements or guidelines for the work to be established. The general style of the building can be described as New England style, with the roof design being pitched; in fact, the overall building looks as though it has several additions put onto the main portion of the front building. So the building steps away from the front entrance, which is very visible beneath the canopy. The canopy itself also has a pitched roof and it is proposed that that would be metal. The main roof will have a shingle appearance to it. The building itself has brick portions to it and the main entrance is highlighted with an accenting vinyl flat board. Mr. Martel continues further with a general architectural description of the building.

Bobbie Woodburn, Landscape Architect with Woodburn & Co, from Newmarket, NH, approached the podium and explained that on the landscape plan, three separate things were being addressed: 1) along the right-of-way a 4-foot fern is being provided according to the regulations with a mix of shrubs and perennials and in front of that is a line shermapples just inside at about a 50-foot center. That meets the requirements of the front. There is then a mix of trees associated with parking, running about between 30-40 feet on the center. Those are broad shade trees that will give scale to the parking lot and then a good buffer between the development and the residential properties. The trees that have been specified are those that are native to the environment.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of, opposed to, or about the application. Hearing no response, the Chair requested the CEO's report.

CEO Ross reported: This is a conforming lot with a mixed use and rural residential zones. The property currently has an abandoned nursing home. DSS Land Holdings, LLC is proposing a

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mixed used development containing a three-story hotel with 64 rooms initially, and a proposed additional 36 future rooms for 100 rooms total; 2, 10,000 sq. ft. restaurant/convenience stores; 2, 15,000 sq. ft. retail office buildings and six residential lots. Title 16, Section 20, Subsection 130.C.9, (Page 290) specifies for a motel/hotel under Special Exceptions that: a) multi-unit storage structures are encouraged, b) whenever practical, building orientation should not be parallel to U.S. Rt. 1, but take the maximum advantage of the depth of the mixed use district and; c) not more than three separate hotels and/or motels are permitted within the mixed use district. There are no more than that, apparently there is just one. The hotel is allowed in the mixed use district, but is allowed only on Special Exceptions and is why it is before the Board this evening.

Chairman LaMarca asked to be shown on the sketch where the existing nursing home was and then asked if the new development, the old asphalt and building area is completely encompassed.... Yes. The other question for CEO Ross; there are no boundary issues, no wetland issues, nothing as far as this is concerned. CEO Ross responded, no. The Chair then asked if there were any more questions before going on to the considerations. Mr. Gardner referred to page 332, Special Exception Referral, 1) Before granting any special exceptions, the Zoning Board of Appeals may refer the application to the Planning Board and/or Port Authority, for a report prior to any subsequent ZBA review of the application, and wondered if the Board had the authority to refer this to the Planning Board so that they could go through their process and whether there are legal citations within our handbook that also support that. Mr. Wilson commented that he feels that the whole purpose is to look at the hotel and the implications of a hotel there. Also that the issues only dealing with the motel should be fairly compact other than the fact that this is a 24-hour operation, the Board shouldn't have to be concerned about the global issues regarding the project.

Chairman LaMarca added that what the Board would be approving, if they approve this appeal, is the authority to put a hotel on the property. The Board would not be approving the building, the lot, site; that all goes to the Planning Board. The Chair asked for a vote of all members who feel that the appeal should be postponed until the Planning Board makes their decision. A show of hands, all were in favor of going forward with application.

Mr. Kingsbury stated that other than the mixed use zone, as described in the manual, one of the purposes of the mixed use zone is for any development that will retain the predominantly rural character of the district, how does this project do that? Mr. Martel explains that the project does represent a mixture of uses which are allowed in that zone. It is less intensive than previous parcels that have been approved. It is felt that the secondary facilities, the two restaurants and retail buildings compliment the hotel and that people coming to the hotel facility will use the other facilities. There is one primary entrance and one secondary entrance. About 70% of the whole cite that the hotel sits on remains in open space. Even with a residential subdivision in the RR zone, it is believed that there would be more coverage than the 70% of green space that would be maintained. It is also upward from the existing mobile home park on the side of the large wetland areas. It is to the rear by the forested areas. That is how it meets those criteria and the mixed used criteria as well. Mr. Martel commented that this project has been addressed to the Planning Board, the CEO, Chief O'Brien and had done a presentation to the Conservation Commission.

Mr. Kingsbury asked how far from the road is the hotel? What is the height of the hotel. Mr. Martel responded with about 650 feet from the road and about 40 feet. The retail buildings are

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two-story; there is a 7500 square foot, the two convenient store/restaurant are single story. So you go from single story to two to three.

The Chair noted that there were 26 points that have to be gone through for Special Exception. Typically what has been done in the past is one at a time, basically it is read through quickly and the Board will review the item. There will be a vote on each one individually. Typically how this works is that we read it, I say is there any discussion. If there is no discussion, we have a all those that feel that this is not an issue say "I" or raise your hand, and then we press on. At any time that anyone has any issue or question as we go over these, that is the time to talk about it. At the end we figure out how many yeas or neighs there are and do a final vote.

Mr. Wilson commented that at the last Special Exception, instead of reading each one word for word, we paraphrased.

Chairman LaMarca noted they did need to go over each one but did not have to read them word for word; they would simply reference each line starting on Page 333 and if any member of the Board took issue with any item, they could speak up.

**16.24.060 Basis for decision**

- A. Conditions. In hearing appeals/requests under this section, the Zoning Board of Appeals shall determine:
1. That the proposed use will not prevent the orderly and reasonable use of adjacent properties or of properties in adjacent use district;
  2. That the use will not prevent the orderly and reasonable use of permitted or legally established uses in the district wherein the proposed use is to be located, or of permitted or legally established uses in adjacent use district;
  3. That the safety, the health, and the welfare of the town will not be adversely affected by the proposed use and its location;
  4. That the use will be in harmony with and promote the general purposes and intent of this title.
- B. Factors for Consideration: In making such determination, the Zoning Board of Appeals shall also give considerations, among other things to:
1. The character of the existing and probable development of uses in the district and the peculiar suitability of such district for the location of any of such uses;
  2. The conservation of property values and the encouragement of the most appropriate uses of land;
  3. The effect that the location of the proposed use may have upon the congestion or undue increase of vehicular traffic congestion on public streets or highways;
  4. The availability of adequate and proper public or private facilities for the treatment, removal or discharge of sewage, refuse, or other effluent (whether liquid, solid, gaseous or otherwise) that may be caused or created by or as a result of the use;
  5. Whether the use, or materials incidental thereto, or produced thereby, may give off obnoxious gases, odors, smoke or soot;
  6. Whether the use will cause disturbing emission of electrical discharges, dust, light, vibration or noise;
  7. Whether the operations in pursuance of the use will cause undue interference with the orderly enjoyment by the public of parking or of recreational facilities, if existing, or if proposed by the town or by other competent governmental agency;

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8. The necessity for paved off-street parking;
9. Whether a hazard to life, limb or property because of fire, flood, erosion or panic may be created by reason or as a result of the use, or by the structures to be used therefore, or by the inaccessibility of the property or structures thereon for the convenient entry and operation of fire and other emergency apparatus, or by the undue concentration or assemblage of person upon such plot;
10. Whether the use, or the structures to be used therefore, will cause an overcrowding of land or undue concentration of population; or, unsightly storage of equipment, vehicles, or other materials.
11. Whether the plot area is sufficient, appropriate and adequate for the use and the reasonably anticipated operation and expansion thereof;
12. Whether the proposed use will be adequately screened and buffered from contiguous properties.
13. The assurance of adequate landscaping, grading and provision for natural drainage;
14. Whether the proposed use will provide for adequate pedestrian circulation;
15. Whether the proposed use anticipates and eliminates potential nuisances created by its location;
16. The satisfactory compliance with all applicable performance standard criteria contained in Chapter 16.32.

The Board had no objections to 16.24.060.A.1.

Mr. Gardner raised the question about traffic in response to 16.24.060.A.2. He asked if a traffic study had been conducted and if the report is available. Mr. Martel responded that there was a traffic study done and he had the report. He also mentioned that he gave the Board the numbers for the hotel in the application, and received the traffic report from Bill Eaton, Eaton Traffic Engineering, and is contained in the Planning Board application. The hotel generates 45 pce (passenger care equivalents), about 45 trips during the peak hours of the initial 64 rooms, the expansion to 100 rooms results in 70 trips. The Board discussed this issue and decided:

The Board had no objections to 16.24.060.A.2. There was a 5/1 vote to 16.24.060.A.3. The Board had no objection to 16.24.060.A.4.

The Board had no objection to 16.24.060.B.1 and 16.24.060.B.2; 16.24.060.B.3 was a 5/1 vote; 16.24.060.B.4 and 16.24.060.B.5 had no objections. The Chair commented that the applicant would have to meet lighting standards, and that there was a strict lighting standard in Kittery. Mr. Martel mentioned that a lighting plan has been submitted to the Planning Board in the application and is designed in accordance with the standards. Mr. Kingsbury was concerned about the lighting on the residential properties and wanted to know if they would be impacted by the hotel lighting. Mr. Martel responded that the plan was designed to have no light at the property boundaries. The ordinance protects any adjacent properties from any light spillover and all fixtures are cut-off fixtures as required by designed guidelines.

Mr. Wilson was concerned about lights from headlights in terms of the residential properties. Not knowing what protection would be given. Mr. Martel commented that the area is heavily forested and did not feel that this would be affected. Mr. Wilson explained that he would like to see a condition that should there arise an issue of headlights on the residential properties that the applicant would be responsible.

The Chair noted that there be a stipulation that read that "should any issue arise from the headlights on the residential zones, that the applicant would need to mitigate that situation". Discussion continued as to whether or not the lighting would affect the residential area then the Chair asked for a vote for adding a stipulation in regards to the lighting; 2/4 in favor of not adding a stipulation.

Mr. Kingsbury raised the issue of noise, such as trash compactors, etc. How would that affect the neighboring properties? Mr. Martel pointed out that the trash compactors are away from neighboring properties and will be screened. As there were no more issues, a vote of 5/1 was made to 16.24.060.B.6.

The Board had no objection to 16.24.060.B.7 through 16.24.060.B.11; 16.24.060.B.12 was a 5/1 vote. Under 16.24.060.B.13, the Chair noted that there was a large body of water with a paved area not far away and asked if there was a drainage plan for this. Mr. Martel explains that there is a full drainage plan. After the applicant's description of the project's plan for drainage, the Board voted 6/0 that this would not be an issue. The Board had no objection to 16.24.060.B.14 through 16.24.060.B.16.

The Board had no objection to 16.24.060.C.1 through 16.24.060.C.6. The Chair confirmed with the CEO that there were no outstanding violations.

Chairman LaMarca read the application as follows: Move the application of DSS Land Holdings, LLC requesting a Special Exception to the term Title 16, Section 20, Subsection 130.C.9 of the Kittery Land Use and Development Code Zoning Ordinance in order to construct a mixed use development including a three-story hotel, two 10,000 square foot restaurant/convenience store buildings, and two 15,000 square foot retail buildings at property located at US Route 1, Map 60, Lots 24 & 24A, Kittery, in the Mixed Use and Rural Residential Zones. Construction shall be in accordance with the Attar Engineering Plans, dated 11/8/06 and signed by David Sowerby and Michael LaMarca, Chairman. A motion to approve the application was made by Mr. Gardner, seconded by Mr. Pinkham.

The Chair requested a vote for granting the appeal:

*A SHOW OF HANDS RESULTED IN A UNANIMOUS VOTE IN FAVOR.  
MOTION PASSES 6/0. APPLICATION APPROVED.*

Chairman LaMarca informed the applicant that any interested party of standing had 45 days to appeal the decision of this Board at the York County Superior Court and that they would try to get Findings of Fact out within seven days of tonight's hearing.

The Chair further informed the applicant that this approval was not the granting of a Building Permit as he would still need to see the CEO for such Permit, it merely granted the CEO authority to issue the same.

FINDINGS OF FACT  
Application #2 – DSS Land Holdings, LLC

1. *DSS Land Holdings, LLC is looking to construct in the mixed use and rural residential development zone a three-story hotel, two 10,000 square foot restaurant/convenience store buildings, and two 15,000 square foot retail buildings in a conforming lot in a mixed used and rural residential zone.*

CONCLUSIONS

1. *The Board deliberated and voted on 16.24.060 Basis for decisions, Special Exceptions A D and voted 6/0 based on that the Special Exceptions did fit into the guidelines and was approved.*

ACCEPTANCE OF MINUTES

The Minutes for December 12 were accepted as amended.

ADJOURNMENT:

A motion to adjourn was made and seconded, with all in favor.

MEETING ADJOURNED AT 8:35 p.m.

