

1. Call to Order, Introductory, Roll Call

The chair called the meeting to order at 7:00 p.m.

Present: Barry Fitzpatrick, Craig Wilson, Charles Denault, III, Jeffrey Brake, Louis Leontakianakos, April Timko

Staff Present: Robert Marchi, Code Enforcement Officer

2. Pledge of Allegiance

3. Agenda Amendment and Adoption

The Board adopted the Agenda as given. The Board had no objection to Chair Wilson acting as secretary for the tonight's meeting.

4. Executive Session

There was no executive session.

5. Public Hearings

The secretary delineates the power of the Board.

For Item 1, the Chair stated this is an administrative appeal under 16.1.5.2(f)(2) and the Board has the power to hear administrative appeals under Title 13 - 13.2.3 Sewer Service Administrative Decision Appeals and Title 16 16.3.3 - Appeal of Code Enforcement Officer Decision.

For Item 2, this is a miscellaneous variation request under 16.1.5.2(f)(4). The Board has the power to hear this request in 16.6.4.3 - Miscellaneous Variation Request and Nonconformance as described in Article III of Chapter 16.7.

There are no violations on either property as determined by the Code Enforcement Officer and no Board members have a biased, conflict of interest.

Item 1 - Stephen Hynes, Trustee, settlement Loop, Map 66 Lot 24-25, Residential Urban/Mixed-Use zones, requesting Administrative Appeal to the terms of 13.1.6.6 & Appendix A - Fee Schedule 13 & 16 regarding determination of fees.

Testimony

Mr. Marchi described the information he included in the Board packet, which included a full copy of Title 13. he gave the definitions in Article IV of building drain/building sewer from Title 13.1.4.2.2 - the Authority to Make Assessments and following definitions that apply under

13.1.4.3.2: Benefited Parcel, Assessed Parcel, Unassessed Parcel, Dwelling Unit, Per-Dwelling Unit, which is also found in 16.2.2. Mr. Marchi also reviewed Article VI - New Sewer Service Connection Fees and read 13.1.6.3 - New Main Entrance Connection Fees and 13.1.6.6 - Special Sewer Entrance Connection Fee, which language includes "Appendix A is established on a per dwelling unit basis for residences and on a per unit of occupancy basis for nonresidential structures for each new sewer connection to the main".

Mr. Marchi reviewed the fees listed in Appendix A that are in contention. They are Building Sewers and Connections fee for residential or commercial at \$15, the New Sewer Service Connection fee for Special Sewer Entrance Connection in the amount of \$3,000 and the Plumbing Permit Fee, which are set by the State and the Manufactured Housing Board and the State Plumbing Board at DHHS. Mr. Marchi stated a portion of the fee goes to the State. Mr. Marchi also included a picture of for a new manufactured home showing the pipe from home to the sewer connection.

Brian Rayback, attorney at Pierce Atwood and representing the applicant, introduced Liz Cuomo, manager of the Yankee Commons Mobile Home Park. He explained the applicant is challenging three fees discovered when they applied for a building permit to develop Lot 2. Mr. Rayback explained the fee calculation being challenged is three of the six fees. The special sewer and plumbing fee is \$3,000 for each mobile home, which would cost the development over \$200,000. They are also appealing the building sewer permit fee at \$15 and the plumbing permit fee at \$65 per home. Mr. Rayback stated this impacts the economics of the project and will impact the cost for the homes that are supposed to be affordable.

Mr. Rayback first addressed the Special Entrance Connection Fee and gave his interpretation of the Ordinance. He read over 13.1.6.6(a) and believes the provision applies to each new sewer connection to a sewer main and do not focus on the per-unit-dwelling basis that applies to every new connection. He added there is one connection to the sewer main that is located outside of the park and, therefore, the applicant should only be charged \$3,000. All infrastructure costs will be maintained by the park. He added the park is not like a subdivision due to the infrastructure being conglomerated. He suggested the Board look at the plain language.

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Mr. Rayback next addressed the Building Sewer and Plumbing Permit Fees and contented that the Town has no authority to charge the fees since the State monitors all the building and plumbing activity and they can't be subject to the fees twice. He referred to 10 MRS §9006 of the Maine Manufactured Housing Act and 30-A §4355 regarding application fees and he believes the Town is charging a tax not a fee because there is no service provided.

In rebuttal, Mr. Marchi read the definition of the word "basis", basis-per-unit and basis of connection. He pointed out the Town has used per-unit-basis in the recent sewer assessment. He asked why would this be in the ordinance if it is a fee per connection? The Town uses a basis formula to arrive at the figure. Mr. Marchi also explained the Town has no jurisdiction inside the mobile home only outside the Town runs under the State perimeter. Mr. Marchi described the services involved for the building sewer permit fee, which include inspections of the infrastructure and the sewer pumps for every home by the Sewer Department. Inspections have already been done on the infrastructure by the Sewer Department.

Mr. Rayback responded to the issue of per-unit basis and Mr. Marchi's questioning of why would this be in the ordinance if it is just a fee per connection. The applicant believes it is both, the per-dwelling-unit fee and the connection to the sewer main - not one or the other. The applicant believes the connection fee should be standardized and the \$15 permit fee may have fallen into the category of "always having been done".

Chair Wilson opened public comment.

Rick Thayer, Martin Road, is in favor of the Code Enforcement Officer's position and commented if the Town does not charge the applicant the fees, they would be favoring the large developer over the residents. He believes the entrance connection fee should be charged for each dwelling unit and the mobile homes are separate units. He added it is not fair to those who have paid assessments based on multiple units and there are no differences from the mobile home park to a multi-family homeowner who have paid in the past.

Debbie Driscoll, resident, agreed with the Code Enforcement Officer and believes all new development should be treated fairly and the same and, if not, the Town will be further in debt.

Liz Cuomo, property manager of Yankee Mobile Home Park and resident of Kittery, is not in favor of the Code Enforcement Officer. She explained the costs of labor for the infrastructure of the park. She added the mobile home park maintains and services the internal infrastructure of the park. The \$3,000 connection fee is unfair to pay for all the mobile homes and the Town takes care of the sewer maintenance for standard homes. She believes there is a difference from a standard home on a street and a mobile home park on private property that needs to be maintained.

Ms. Driscoll replied she understands Ms. Cuomo's analogy of tying into the street but not all are homes are. She added all homeowners are responsibility for the sewer pipes on their property. The Town should treat all dwelling units similarly and fairly.

There being no further comments, the Chair closed the public hearing.

Board Discussion:

Chair Wilson commented the Board should be interpreting the law and not financial considerations. Mr. Denault asked of past practices for mobile parks. Mr. Marchi replied the same formula in assessments were done for a park on Dana Avenue and Shepherd's Cove and other properties.

Chair Wilson read a letter sent in by resident Kathryn Hawkes, 16 Stevenson Road, who is in support of the Code Enforcement Officer's decision.

Mr. Denault asked how the Town assesses the fees for the Shipyard which has one main line connecting to the Town. He added Shipyard staff takes care of all past the gate. Mr. Marchi responded the Shipyard is treated differently because building permits are not provided.

Mr. Fitzpatrick commented he did not see Mr. Hynes' signature on the application and commented on the wording on Page 2 in Exhibit A. He pointed out the cost of the units will be approximately \$2,000 and thought that was reasonable for the Town of Kittery. He added the Town recently went through a sewer process and there will be 71 homes with sewerage going into Kittery's sewer system. His opinion is the applicant should pay.

Mr. Rayback stated the applicant raised the money issues because they have the burden of proving they have standing to file the appeal. Discussion ensued of the language in the Code that was written by the Council.

Mr. Marchi recognized the Town Manager's presence. He explained why the Shipyard is different from the mobile home park. The assessment formula was the same one used for assessments of other developments. Mr. Marchi also explained the Special Assessment Entrance Fee is to gain money for non-assessed parcels and the parcel of land where the 71 mobile homes are to be placed is unbedded. No money was paid towards the infrastructure at the time. Discussion of the Dana Avenue mobile home park ensued. Chair Wilson reminded the Board they cannot base their decision on precedence but on the law.

Mr. Denault disagreed with Chair Wilson's interpretation of direct and indirect entrance into the main connection and believes it is one connection to the main. Ms. Timko did not agree with the reading of connections from the Chair and she believes the Code Enforcement Officer's interpretation is correct and is on a per dwelling unit basis and number of connection does not matter. Mr. Fitzpatrick, Vice Chair Brake and Mr. Leontakianakos also disagreed with the Chair interpretation.

Mr. Rayback responded the relevancy is each connection to the main and there is only one connection. Ms. Cuomo commented she disagrees what the fees are for and tenants will be paying lot fees to maintain the sewer lines.

Ms. Timko commented the case was clearly presented and the language of the code is clear. There is a new sewer entrance connection to a system main, which is what triggers the assessment on a per-dwelling-unit basis and number of connections does not matter. She added she is not disregarding the clause; she disagrees with the representative's interpretation.

Mr. Denault asked about what constitutes a fee. Chair Wilson referred to the language in Exhibit A. Mr. Marchi's point out there is a service provided related to the fee. Discussion of the description of the services covered for the \$15 and \$60 fees ensued. Mr. Marchi added the fees are mandated by the State.

Ms. Timko moved that the Kittery Board of Appeals upholds the fee decisions for the appeal of Stephen Hynes, Trustee, Settlement Loop, Map 66 Lot 24-25, Residential Urban/Mixed-Use zones, requesting Administrative Appeal to the terms of 13.1.6 and Appendix A - Fee Schedule 13 and 16 regarding determination of fees.

Mr. Fitzpatrick seconded the motion.

Mr. Denault commented that the special sewer connection fee is like a tax and the fee is covered under the other two fees. He questioned what the \$3,000 fee goes for other than digging and connecting the line. Chair Wilson responded that Mr. Marchi explained when the sewer comes out of the mobile home itself, someone needs to go out to ensure it is done correctly.

The motion carried 5-0-1 (Mr. Denault against).

Findings of Fact

- The Board of Appeals had a public hearing for Stephen Hynes, Trustee, Settlement Loop, Map 66 Lot 24-25, Residential Urban/Mixed-Use zones, requesting Administrative Appeal to the terms of 13.1.6.6 & Appendix A - Fee Schedule 13 and 16 regarding determination of fees.
- The hearing was advertised in *The Portsmouth Herald* on December 28, 2017.
- There are no violations on the property.
- The Code Enforcement Officer's presentation included reading of definitions of building drain/building sewer from Title 13.1.4.2.2 - the Authority to Make Assessments and Title 13.1.4.3.2 - Definitions and read Benefited Parcel, Assessed Parcel, Unassessed Parcel and Dwelling Unit, Per-Dwelling-Unit and is the same as in Title 16.2.2. He also read Article VI - New Sewer Service Connection Fee - Title 13.1.6.3 - New Main Entrance Connection Fee and Title 13.1.6.6 - Per Dwelling Unit Basis.
- The applicant was represented by Brian Rayback from Pierce Attwood and Liz Cuomo, Manager of Yankee Green Mobile Home Park.
- The presentation by Mr. Rayback focused on the special sewer connection fee which was triggered by building permit request for Lot 2 and was given the impact fees and decided to contest them.
- The main point of Mr. Rayback's argument was that the Code Enforcement Officer had focused on per dwelling unit for the assessment of the entrance connection and Mr. Rayback contended each new entrance connection needed to be read into that and it had to be both. He commented there is only one connection to the main line.
- The second and lesser item were the building sewer permit fees. The Code Enforcement Officer made the point manufactured houses are subject to state codes for uniformity and done by licensed installers. The State monitors all the building and plumbing activity and the applicant believes it is redundant to have the Town do it and the fees need to roughly reflect the approximate Town cost and the applicant felt that was not the case. The fee needed to be for a service otherwise it is a tax. There didn't appear to be a service provided.

- In rebuttal, the Code Enforcement Officer provided a definition of basis per unit, basis of connection and sewer assessment and talked of the basis formula. He talked of the inside of the mobile home being exempt from Town inspection but not the outside.
- The fees being State fees are set by the State and the Manufactured Housing Board and the State Plumbing Board at DHHS.
- There were three residents who testified at the public hearing. Rick Thayer, who felt choosing large development over the individual homeowners if in voting in favor of the applicant and pointed out past practices. Debbie Driscoll argued for fairness also and 71 units needed to pay their fair share in terms of the cost of the sewers. Against the potential motion to uphold the Code Enforcement Officer's decision, Liz Cuomo, manager of Yankee Common Mobile Home Park and resident of Kittery, Idlewood Lane, argued that the cost of all internal infrastructure was borne by the developer and in addition of installation the developer would bear the cost of its maintenance. There was a letter read into the Minutes from Kathryn Hawks, 16 Stevenson Road, in defense of the CEO's decision.
- Board discussion items included questions of past practices and how the Shipyard was assessed.
- The consensus of the Board was that the language of Title 13.1.6.6. - Special Sewer Entrance Connection Fee - was clear, and the Board's interpretation would be that for per dwelling unit basis there should be 71 special sewer entrance fees assessed to the park.
- The Board also discussed the Building Sewer Permit Fee of \$15 and the Plumbing Permit Fee, which includes \$25 administration fee and a \$40 minimum fixture fee totaling \$65. The Board felt there was a service connected to those fees and not simply a tax and are costs borne to the Town for recouping of the Town's costs via the Sewer Department's inspections and the Code Enforcement Officer's inspections.
- There was not unanimity on the Board. Mr. Denault felt that the language of Title 13.1.6.6 was clear and favored the applicant's interpretation. Mr. Wilson made a counter argument that echoed Ms. Hawks reading in both direct and indirect entrance into the main and that interpretation was not supported by the majority of the Board.

The Board unanimously accepted the Findings of Fact.

Conclusions of Law

The Board felt that the Code Enforcement Officer's interpretation of 13.1.6.6 and Appendix A Fee Schedules 13 and 16 was correct and defensible and upheld his decision.

Chair Wilson moved to accept the Conclusion of Law.

The Board unanimously accepted the Conclusions of Law.

Item 2 - Oscar Boreth, Owner, Luis Velez Ortiz, Applicant, 181 State Road, Map 22 Lot 4, commercial 3 zone, requesting Miscellaneous Variation Request to required setbacks.

Testimony

Mr. Marchi stated the applicant is looking for a permit to enclose a small section of the building. He added it is a very small footprint and they want to close in a concrete padded area to make the waiting area larger. He added the State of Maine owns the property and is very close to the applicant's building. After renovation of the traffic circle this year, the applicant does not have enough of a set back to make the change. Code Enforcement has no issues if the Board approves the request.

Applicant Oscar Boreth, gave a history of the property. He added the parking area in the front had to be moved because the State added sidewalks to the traffic circle. The setback is 5-ft. from the front of the property line. Mr. Boreth explained he paved the new lot that was relocated to the back at his own expense. He is asking for the variation request in order so his tenant to be able to expand the customer waiting area. He will be upgrading the menu and people will need to wait. The previous business was a hot dog stand and this one is different. Mr. Ortiz, the tenant, commented the current area is too small and is difficult to keep clean especially in the winter. He wants to get customers out of the weather while they are waiting for their food.

The Chair opened the public hearing. There being no comment, the Chair closed the public comment.

Mr. Leontakianakos asked if the addition is to construct on an actual slab within the 5-ft. setback of the State's property. Mr. Marchi responded it is and the Town requirement is a 50-ft. setback for that area. Mr. Fitzpatrick stated he liked the idea of enclosing the step and believes it would be a plus for the property. He added they were told the circle project was not going to impact any of the businesses in the circle. Mr. Boreth stated if it wasn't for the property he owned in the rear of the building, he would have been out of business.

There being no further discussion, Mr. Fitzpatrick moved to approve the Miscellaneous Variation Request for -Oscar Boreth, Owner, Luis Velez Ortiz, Applicant, 181 State Road, Map 22 Lot 4, commercial 3 zone, requesting a variation from the 50-ft front yard setback to more than 5- ft. but less than 50-ft. in order to construct a 134sq. ft. addition that would be 17x7'4" with four windows and one door as per the plan submitted by Louis Hamell 9/20/2017 included in application packet.

The motion was seconded by Mr. Leontakianakos.

The motion carried 6-0-0.

Findings of Fact

- Oscar Boreth, Owner, Luis Velez Ortiz, Applicant, 181 State Road, Map 22 Lot 4, commercial 3 Zone, are requesting a Miscellaneous Variation Request to required setbacks
- The Code Enforcement Officer testified that this was to enclose a small portion of an existing concrete pad to add a waiting area to the building.
- The Town had no objection to proposal.
- Oscar Boreth, applicant, presented the facts it was the Former Dog House and gave some history.
- There is a 5-ft. current front yard setback to the property line. On other side is State land. A 50-ft. front yard setback is required.
- Mr. Boreth stated he lost all his parking area in the front due to the reconfiguration of the parking circle and had a quarter acre behind the building and was able to construct parking in the rear.
- The reason for enclosure is applicant's leasee is trying a different business model and wants to have people out of the weather and wants to keep it clean.
- The addition will be 134 sq. ft., 17' x 7'4" with four windows and an interior door.
- There was no public comment on the application.

Chair moved to accept the Findings of Fact.

The motion carried 6-0-0.

Conclusions of Law

The Board has the power to hear this under 16.7.3.3.2 - Nonconforming Structure Repair and Expansion. The Board found that the structure would be no closer than the existing nonconformance. The Board had the power to grant the application and having reviewed 16.6.6 - Basis of Decision - found the conditions and factors of consideration were met to grant relief.

The Chair moved to accept the Conclusions of Law.

The motion carried 6-0-0.

6. Unfinished Business - None

7. New Business Election of New Officers

The Board was in consensus to wait until the new member is elected and suspend the bylaws until the next regular scheduled meeting to elect officers.

8. Approval of Minutes - None

9. Board or CEO Issues or Comment

Mr. Marchi commented there is no meeting scheduled at this time. He added all the other boards have moved their meetings to 6:00 p.m. and asked the Board if they would consider moving this meeting as well to that time. After discussion, the Board agreed to move their meeting to 6:30 p.m. The bylaws will be revised to reflect this.

Chair Wilson will submit in writing the Board of Appeals meetings will be changed from 7:00 p.m. to 6:30 p.m. and the meeting change will begin at the next meeting.

Mr. Marchi suggested a workshop to review Title 16 definitions to understand the application forms and issues surrounding them. Mr. Marchi commented the language needs to be addressed regarding the process of administrative appeals.

Chair Wilson informed the Board that he sent the Maine Municipal Association training schedule to them. He added there is also a possibility to have 1 on 1 training with a representative.

Vice Chair Brake moved to adjourn the meeting at 9:35 p.m.
Mr. Denault seconded the motion.

The motion carried 6-0-0.