

# **TOWN OF KITTERY ZONING BOARD OF APPEALS**

**January 8, 2008**

**Council Chambers  
APPROVED**

**CALL TO ORDER:**

Chairman Gardner called the meeting to order at 7:05 p.m.

**BOARD MEMBERS PRESENT:**

Vern Gardner, Chairman, Thomas Battcock-Emerson, Sarah Brown, Bob Kaszynski, Herb Kingsbury, Brett Costa (arrived @ 7:10 p.m.)

**ALSO PRESENT:**

CEO Heather Ross, Recorder Lisa Goms

**Chairman Gardner** introduced the members of the Board, outlined the hearing procedure and led those present in the Pledge of Allegiance. The Chair then read the Notice of Hearings.

**APPROVAL OF MINUTES:** The minutes for the ZBA meeting for 9/25/07 were approved as amended. All were in favor of amended minutes.

**PUBLIC HEARINGS:**

1. B&F Land Development for Rowell, LLC, requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 130, Table 16-12 (Page 256-1) of the Kittery Land Use and Development Code Zoning Ordinance in order to demolish existing buildings and construct a new building with 4,762.68 square feet manufacturing, 4,310 square feet warehouse, 2,100 square feet retail and 6,520 square feet office. Proposed 1,421.63 square feet within wetland (1,647.04 existing). Located at 240 U.S. Route #1, Kittery, Map 22, Lot 13 in the Commercial 1 (C1) Zone.
  
2. Scott D. Fiorentino for Kittery Point Partners, LLC requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490(N)(2)(a) (Page 316), and Title 16, Section 32, Subsection 490(K)(2) (Page 310) of the Kittery Land Use and Development Code Zoning Ordinance in order to replace the previously approved French door, double hung window, stoop, and canopy with curved Bay to match dining room Bay. Located at 10 Lawrence Lane, Kittery Point, Map 18, Lot 33 in the Kittery Point Village (KPV) and Shoreland Zones.

1. B&F Land Development for Rowell, LLC, requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 130, Table 16-12 (Page 256-1) of the Kittery Land Use and Development Code Zoning Ordinance in order to demolish existing buildings and construct a new building with 4,762.68 square feet manufacturing, 4310 square feet warehouse, 2,100 square feet retail and 6,520 square feet office. Proposed 1,421.63 square feet within wetland (1,647.04 existing). Located at 240 U.S. Route #1, Kittery, Map 22, Lot 13 in the Commercial (C1) Zone.

**Chairman Gardner** made a point of order before starting that; in order to make a second presentation, there would have to be a change that is substantial. We have to determine whether or not we want to hear this and we do that by determining whether or not the change has been substantial. If we choose not to hear this, the applicant has to wait another year. I think that before we proceed to the merits we should ask those questions. Is the Board in agreement with that? Board confirmed.

**Chairman Gardner** then recognized Christopher Badeau and asked him to explain why the Board should hear his case and whether or not it has been a year.

**Mr. Badeau** approached the podium and said: It has not been a year, but this is our third presentation before this Board. Our initial presentation was requesting relief from the wetland setback. The proposal that was put forth was a much larger building and a much larger infringement into the wetland area. The Board had denied that application and we went back to the drawing board. We reduced the size of the building without affecting the aesthetics of the building we had designed. We had asked for a front yard variance, which the Board denied in that application. In that application, we were proposing to bring the building closer to the street with the smaller building. With this particular application after being denied the front yard variance, we are proposing the smaller building now to be within the wetland setback, but the actual square footage infringing the wetland is less than the existing building that infringes the wetland setback. So where as our original proposal had a much greater square footage impact within that wetland, much greater than the existing building at hand, this proposal proposes less square footage than the existing building that sits on the site.

**Chairman Gardner** asked if CEO Ross had a counter argument. **CEO Ross** stated; No, I do not. The applicant has come before me again with a building application that my office has denied and they have the option of appealing that. The Town does not have an opinion either way on that, it will be up to the Board to decide. **Chairman Gardner** asked CEO Ross if she believed that the change has been significant. **CEO Ross** replied; I think it has. They changed the location of the building.

**Chairman Gardner** asked if there was a consensus amongst Board members to proceed with this appeal. The Board agreed to hear the appeal. Based on 16.24.050(L) Second Appeals/Requests, the Board will stand to proceed on the second appeal.

**Chairman Gardner** recognized Christopher Badeau, B&F Land Development Mr. Badeau approached the podium and stated: I am here this evening to propose a mixed use building and we are requesting a Miscellaneous Appeal for this proposed building to be set

within the existing wetland setback. As discussed, the existing building that sits on the site...there are actually two buildings and we would propose to demolish both these buildings. The larger of the two buildings which sits on the site is 1,647' and is the building that exists within the wetland setback. We are proposing that the new building be allowed to encroach the wetland by a total 1,421.33 square feet. The encroachment would be less than the building which currently sits on the site.

**Chairman Gardner** asked if there was anyone present who would like to speak in favor of, or opposed to the application.

**Chairman Gardner** recognized Dave Durling, abutter, 29 Adams Drive.

**Mr. Durling** approached the podium and stated: I still question whether you should be allowed to hear this because this is in essence the same plan as the proposal in October...the same square footage building. They did move it away from Route #1, but it is in essence the same plan with a slightly reduced size building. I like what they've done...they have moved it further away, but I am still opposed on the point that they are nonconforming buildings that they are going to destroy and create a new nonconforming building.

**Chairman Gardner** recognized Bill McCarthy, abutter, 27 Adams Drive.

**Mr. McCarthy** approached the podium and stated: I don't know whether this is an issue this Board will take up, but under 16.32.430 Buffer areas. Mr. McCarthy read the ordinance and commented I feel that this would be adversely affecting my property...I think it is being moved closer to my property with the parking spaces.

**Chairman Gardner** asked if there was anyone else present who would like to speak about the application in anyway.

**Chairman Gardner** recognized Rick Rossiter.

**Mr. Rossiter** approached the podium and stated that he owned property on two sides of the subject property. In the 1960's the State of Maine changed Route #1 in that area and they provided a field access to my field and it is not shown on the plan as being included. There is no topography of that plan so I can't tell whether I will be able to access my field...whether these will be at a higher elevation or a lower elevation. I don't know how this place into this appeal, but I wanted to make it known that I do have some issues with this plan. Also, with the surface water drainage...I can't tell what they are going to do with surface water drainage. Those are my concerns.

The Chair recognized Mr. Badeau.

**Mr. Badeau** approached and responded: In regards to Mr. Rossiter's comments, he is correct that there is in this area an access I guess he might use down to his property, as we have had current surveys done, there are no easements which restrict us from developing that portion of the land. Our proposal before the Planning Board, if we got that far, this area would be leveled out with the use of retaining walls. As far as the drainage on the site, it has been discussed with the Town Planner that all the drainage would be mitigated on site with the use of drywells so there would not be any runoff to any of the other properties. We are planning to maintain all drainage on site without spilling over into abutting properties. As for the abutter, Mr. McCarthy,

I believe the issues that he brought up are Planning Board issues and those issues would have to be dealt with as far as screening and parking setbacks with the Planning Board. We have tried with our previous presentations before this Board to feel the concerns of the neighbors and address those in our new presentation. With the Board's approval tonight we moved on to the Planning Board, we could then address any issues with parking, screening and setbacks, and possibly land banking parking spaces if need be.

**Chairman Gardner** asked if there was anyone else present who would like to speak about the application. Hearing no response, the Chair asked for the CEO's report.

**CEO Ross** reported: This is a nonconforming lot with nonconforming structures located within the Commercial 1 (C1) Zone. Table 16.12 requires a 50' setback from wetlands and 1,001 square feet to 1 acre in size. The structure currently on the lot is setback 25' from the wetland at its closest point. The proposed structure is shown to be setback 20' from the wetland at its closest point. I believe, from speaking with the developer that may be a mistake on their behalf, but it is shown on the survey that you have to be 20' for the proposed 25' for the existing. Currently there is 1,674.04 square feet of the structure within the 50' setback to the wetland. Proposed, there would be 1,421.63square feet of structure within the 50' setback.

#### Board Discussion

**Ms. Brown** said: This is a total tear down, demolition; a rebuild and I don't see how possibly we can allow them to come closer to what is allowed, which is 50'. I don't think we have the right to do that. We cannot compare what is there to what is going to be there. This is such a large project with a large parcel of land there are alternatives here. I would feel more open to allowing some discretion if this was the only possibility, but this is a huge project and there is definitely a way that this parcel of land can be developed and be developed successfully within the setbacks.

**Mr. Kingsbury** said: I do not see anything in the Code that allows us to grant relief from a wetland setback under a Miscellaneous Appeal for new construction.

**Mr. Emerson** referred to 16.24.060 (B)(12) and stated that it does allow us to look at...it requires us to look at whether the proposed use would have adequate screening and buffing.

**Mr. Kaszynski** asked: is there any way that the building can be reconfigured, redesigned such that maybe it could fall within compliance. I'm thinking about may be part of the building becoming a patio or an outside work area which would allow to fit into that compliance.

**Mr. Badeau** explained in depth the situation and design of the proposed project. There was much deliberation.

**Sarah Brown**, as secretary, read the application as follows: B&F Land Development for Rowell, LLC, requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 130, Table 16-12 (Page 256-1) of the Kittery Land Use and Development Code Zoning Ordinance in order to demolish existing buildings and construct a new building with 4,762.68

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square feet manufacturing, 4,310 square feet warehouse, 2,100 square feet retail and 6,520 square feet office. Proposed 1,421.63 square feet within wetland (1,647.04 existing). Located at 240 U.S. Route #1, Kittery, Map 22, Lot 13 in the Commercial 1 (C1) Zone. Construction shall be in accordance with the sketch submitted, dated and signed by B&F Land Development and Vern Gardner, Chairman.

A motion to approve was made by Mr. Kingsbury and seconded by Mr. Costa.

**VOTE:** Ms. Brown, No – Mr. Costa, abstained - Mr. Kingsbury, No – Mr. Emerson, No – Mr. Kaszynski, Yes – Chairman Gardner, No – 4 opposed, 1 in favor, and 1 abstention. Motion fails. 4/1/1

**Chairman Gardner** 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 they would try to get Findings of Fact out within seven days of tonight's hearing.

**FINDINGS OF FACT**

**Application #1 – B&F Land Development for Rowell, LLC**

1. *The applicant, B&F Land Development, is looking to demolish the existing building and construct a new building with 4,762.68 square feet manufacturing, 4,310 square feet warehouse, 2,100 square feet retail and 6,520 square feet office. Proposed 1,421.63 square feet within wetland (1,647.04 square feet existing).*
2. *This is a nonconforming lot with nonconforming structures located in the Commercial Zone.*
3. *The property is within the wetland setback as indicated by Table 16.12.*
4. *There appears to be Variance as oppose to a Miscellaneous Appeal.*
5. *There appears to be sufficient land area of 5,000 square feet to develop the site.*
6. *The applicant is proposing 25' setback where 50' is required.*

**CONCLUSIONS**

1. *The Board voted 4/1/1. Motion failed. Application denied.*

A motion was made by Mr. Kingsbury to approve the Findings of Fact and was seconded by Ms. Brown.

2. Scott D. Fiorentino for Kittery Point Partners, LLC requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490(N)(2)(a) (Page 316), and Title 16, Section 32, Subsection 490(K)(2) (Page 310) of the Kittery Land Use and Development Code Zoning Ordinance in order to replace approved French door, double hung window, stoop, and canopy with curved Bay to match dining room Bay. Located at 10 Lawrence Lane, Kittery Point, Map 18, Lot 33 in the Kittery Point Village (**KPV**) and Shoreland Zones.

**Chairman Gardner** recognized Scott Fiorentino for Kittery Point Partners, LLC.

Mr. Fiorentino approached the podium and stated that the project is under construction right now and our request is to remove an approved French door with a stoop and canopy in a double hung that is next to that and replace an arched bay similar to the dining room which is beyond the 100' setback so that the two elements balance each other off. That is our request. Mr. Fiorentino handed pictures to the Board.

**Chairman Gardner** asked if there was anyone present who would like to speak in favor, opposed to, or about the application in anyway. Hearing no response, the Chair then asked for the CEO's report.

**CEO Ross** reported: This is a nonconforming lot with nonconforming structures located within the Kittery Point Village (**KPV**) and Shoreland Zones. 16.32.490(K)(2) General states: "After January 1, 1989, if any portion of a structure is less than the required setback from the normal high-water line of a water body or upland edge of a wetland, that portion of the structure shall not be expanded in floor area or volume, by thirty (30) percent or more, during the lifetime of the structure". The structure as previously approved, was a decrease from the original structure. The decrease of 19.17% square footage and the decrease of 5.67% volume. The structure, as proposed, will still be a decrease from the original structure of 18.23% square feet and 3.8% volume. 16.32.490(N)(2)(a) states "All new principal and accessory structures (except certain patios and decks) shall be set back at least one hundred (100) feet, horizontal distance, from the normal high water line of any water bodies, tributary streams, the upland edge of a coastal wetland, or the upland edge of a freshwater wetland shown on the official Shoreland Zoning map....". The proposed expansion area would be setback 90' to elevation 6 from the west side of the property and 86' to elevation 6 on the south side of the property.

#### Board Discussion

**Mr. Costa** said: the front corner of the house falls under the no closer than.

**Mr. Kingsbury** referenced 16.28.130(C).

Deliberations continued. The Board decided that it was a no closer than situation.

**Sarah Brown**, as secretary, read the application as follows: Move the application of Scott D. Fiorentino for Kittery Point Partners, LLC requesting a Miscellaneous Appeal to the terms of

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Title 16, Section 32, Subsection 490(N)(2)(a) (Page 316), and Title 16, Section 32, Subsection 490(K)(2) (Page 310) of the Kittery Land Use and Development Code Zoning Ordinance in order to replace approved French door, double hung window, stoop, and canopy with curved Bay to match dining room Bay. Located at 10 Lawrence Lane, Kittery Point, Map 18, Lot 33 in the Suburban Residential (SR) Zone. Construction shall be in accordance with the sketch submitted, dated and signed by Scott D. Fiorentino and Vern Gardner, Chairman.

A motion was made to approve by Mr. Kingsbury, and was seconded by Mr. Costa.

**VOTE:** Ms. Brown, Yes – Mr. Costa, Yes – Mr. Kingsbury, Yes – Mr. Emerson, Yes – Mr. Kaszynski, Yes – Chairman Gardner, Yes. Vote unanimous 6/0. Motion passes. Application approved.

**Chairman Gardner** 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 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 that, it merely gave the CEO authority to issue such Permit.

**FINDINGS OF FACT**

**Application #2 – Scott D. Fiorentino**

1. *The applicant, Scott D. Fiorentino, is proposing to construct a bay window where a French door is presently which puts it closer to the high water mark.*
2. *This is a nonconforming lot with a nonconforming structure located in the Kittery Point Village and Shoreland Zones.*

**CONCLUSIONS**

1. *Less than 1% beyond and complied with 16.24.060 basis for decision a1-a4.*
2. *The Board determined that it was a no closer than situation.*
3. *The Board voted unanimously 6/0 in favor. Motion passed. Application approved.*

A motion was made to approve the Findings of Fact, and was seconded with all in favor.

**ADJOURNMENT:**

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

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Meeting adjourned at 9:00 p.m.

**APPROVED**