

Town of Kittery
Zoning Board of Appeals
August 12, 2008

Call to Order: 7:03 pm

Members present: Vern Gardner, Chairman; Craig Wilson, Bob Kaszynski, Niles Pinkham, Thomas Battcock-Emerson, Brett Costa

Members absent: Herb Kingsbury

Staff: Heather Ross, CEO; Jan Fisk, Recorder

Pledge to the Flag

Minutes: Minutes were not addressed

PUBLIC HEARING

ITEM 1 - Russell Wheeler for Judith Seaward requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490N2A (Page 316) of the Kittery Land Use and Development Code Zoning Ordinance in order to remove and replace the existing retaining walls leading into garage. Located at 28 Rice Avenue, Kittery, Map 1 Lot 56, in the Urban Residential Zone.

Russell Wheeler summarized the applicants request to replace an existing wall that is currently hazardous, with a new wall, identical to the failing wall.

Ann Borden, Conservation Commission, requested that the application be denied because of the setback within the shoreland zone.

CEO read notes:

1. This is a non-conforming lot with non-conforming structures located within the Urban Residential and Shoreland zones.
2. Mr. Wheeler is proposing to demolish two existing retaining walls, and to construct two new retaining walls.
3. Title 16 Section 32.490N2a, page 188 requires a minimum 100 foot setback for structures.
4. The existing retaining walls are approximately 70 feet from the high water mark. The proposed new retaining walls would be no closer to the high water mark than the existing walls.

Niles Pinkham stated that property owners have the right to repair what is existing, and this certainly applies here.

Tom Emerson noted that this is a “no closer than” issue and, while respecting the shoreland zone, to not address the problem would be negligent.

Craig Wilson concurred with Tom Emerson.

Niles Pinkham suggested that silt fences and hay bales be utilized as a compromise to the objections of the Conservation Commission.

Craig Wilson motioned to approve the applicant’s request to replace existing retaining walls, “like with like” leading into the garage. The property is located at 28 Rice Avenue, Kittery, Map 1 Lot 56, in the Urban Residential and Shoreland Zones.

Bob Kaszynski seconded

Motion carries unanimously

Chairman Gardner reminded the applicant to pursue all required permits with the CEO.

Findings of Fact:

1. Applicant is requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490N2A (Page 316) of the Kittery Land Use and Development Code Zoning Ordinance in order to remove and replace the existing retaining walls leading into garage. Located at 28 Rice Avenue, Kittery, Map 1 Lot 56, in the Urban Residential Zone.
2. This is a non-conforming lot with non-conforming buildings
3. Request is to replace two retaining walls leading to a garage, like for like, in exact location and dimensions of existing dilapidated retaining walls
4. The proposed location of the walls is 70 feet, where 100 feet from the shoreland zone is required.
5. The Conservation Commission opposed the appeal.

Niles Pinkham motioned to accept the Findings

Tom Emerson seconded

Motion carries unanimously

Conclusion

1. The Board found that the applicant will place the new structure no closer than the existing structure
2. The Board believed that a hazardous situation exists and that granting this appeal will remedy the problem.

Unanimous agreement

ITEM 2 - B & RH Associates, Inc. requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060D (Page 238-5) of the Kittery Land Use and Development Code Zoning Ordinance in order to construct an 8'x16' addition (128 sq'), 8' from the rear property line, but no closer than the existing dwelling. Located at 2 Keene Circle, Kittery, Map 10 Lot 67A, in the Urban Residential Zone

Russell Sylvester, B&RH Assoc., requesting to add an addition in line with the existing building, no closer to the property line than the existing building.

Greg Hudrus supports appeal request as it will add to the neighborhood value.

CEO notes:

1. This is a nonconforming lot with nonconforming structures, two dwelling units, located within the Urban Residential Zone.
2. Mr. Sylvester is proposing to construct an addition, 8'x16', on an existing dwelling unit.
3. Title 16, Section 12.060D, page 238.5, requires a minimum 15' rear yard setback.
4. The existing structure is 8 feet from the property line. The proposed addition would be no closer to the rear property line than the existing structure.

Russell Sylvester noted that there are two dwelling units, two sheds and a garage. The two sheds are scheduled to be removed. The garage will be removed as well, eventually.

Craig Wilson noted this appears to be a classic "no closer than" issue

Chairman Gardner noted that because of the location of the house on the survey, it appears the extension would be closer than the existing home.

Russell Sylvester noted that the actual survey did allow the extension while remaining 8 feet from the property line.

Niles Pinkham stated he had no problem with the request if the expansion was the same distance as the existing home. The drawing may not show the exact measurements from the plan.

Bob Kaszynski stated he had no issue with the expansion as it is “no closer than”.

Tom Emerson inquired about the encroachment on the ROW setback.

CEO explained that this was a “reserved way” for the owners of the property and not a ROW. A reserved way does not have a setback.

Tom Emerson asked why the addition could not be changed to meet existing setbacks.

Russell Sylvester noted that functionally and financially it would not work out as well for the applicant. They are not encroaching any more than existing, and the removal of the two sheds removes a bigger encroachment and detriment to the property.

Brett Costa concurred that as long as the applicant maintains the 8’ existing setback (“no closer than”), he has no objection.

Craig Wilson motioned to grant an approval to B&RH Associates requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060D (Page 238-5) of the Kittery Land Use and Development Code Zoning Ordinance in order to construct an 8’x16’ addition, to the northwesterly building. Located at 2 Keene Circle, Kittery, Map 10 Lot 67A, in the Urban Residential Zone.

Bob Kaszynski seconded

Motion carries unanimously

Findings of Fact

1. B & RH Associates, Inc. requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 060D (Page 238-5) of the Kittery Land Use and Development Code Zoning Ordinance in order to construct an 8’x16’ addition (128 sq’) to the dwelling unit northwesterly on the property. 8’ from the rear property line, but no closer than the existing dwelling. Located at 2 Keene Circle, Kittery, Map 10 Lot 67A, in the Urban Residential Zone
2. This is a nonconforming lot with nonconforming structures, two dwelling units and two sheds, located within the Urban Residential Zone. Two of the sheds will be removed, one of which is 4’ from the property line and the other 6’ from the property line.
3. The proposed addition will be 8’ from the property line where 15’ is required, “no closer than” the existing unit.
4. One abutter spoke in favor of the appeal.

Niles Pinkham motioned to accept the Findings

Bob Kaszynski seconded

Motion carries unanimously

Conclusion

1. The Board has power under Title 16.28.130, *Non-conforming buildings, A. Repair and enlargement* to grant relief from the 15 foot setback.
2. As the basis for its decision, 16.24.060 found that the proposed application would not violate any of those conditions.

Unanimous agreement

ITEM 3 Patrick S. Bedard, Esq. for Robert D. Harris requesting a Miscellaneous Appeal to the terms of Table 16.12, (Page 256-1) of the Kittery Land Use and Development Code Zoning Ordinance in order to build a home within the 28'x50' bounds of the old Carter Homestead. Located at Gee Road, Kittery, Map 65 Lot 1G, in the Rural Residential Zone. 27-36-08-20

Chairman Gardner noted Patrick Bedard is his attorney and Mr. Bedard has served on the Zoning Board of Appeals. Board members did not feel that this information or relationships pose a conflict in reviewing this issue.

Patrick Bedard summarized the history of the Carter Homestead and the deed recordings as part of a summary brief provided to Board members. The Homestead lot does not meet the ordinance requirements for conformance, but would not be required to merge with a contiguous, conforming lot, per ordinance. The ordinance allows relaxation of yard and other requirements through a miscellaneous appeal.

Chairman Gardner asked the Board if they wanted to hear both applications together.

Patrick Bedard noted that if first appeal is granted, they would withdraw the second appeal on the agenda.

Ann Borden, speaking for the Conservation Commission, requested the ZBA deny the application based on the wetland setback.

CEO pointed out that another letter from an abutter was included in the Board packet.

Frederick Hart, abutter, stated he had no objection to the appeal.

CEO notes:

1. This is a conforming vacant lot within the Rural Residential Zone.
2. Mr. Harris is proposing to construct a dwelling unit.
3. Mr. Harris was before the board on February 12 for a Variance Appeal. The appeal was denied.
4. Per Title 16 Section 24.050L, page 268-1, the Board must deem whether this is an appeal of a similar nature. Title 16 Section 24.050L states:
If the Zoning Board of Appeals shall deny an appeal/request, a second appeal/request of a similar nature shall not be brought before the ZBA within one year from the date of original denial, unless the appellant shall submit new evidence and the ZBA, by formal action, decides the evidence is significant and warrants a new hearing, or unless the ZBA finds in its sole and exclusive judgment that an error or mistake of law or misunderstanding of facts shall have been made.
5. Mr. Harris has now filed a miscellaneous appeal to construct this dwelling unit.
6. Table 16.12 request a minimum setback of 100 feet from wetlands greater than one acre in size.
7. The proposed construction would be 52 feet from the wetland.
8. The appeal submitted by Mr. Harris states that his is two lots, one nonconforming and one conforming. The deed to this property lists this as one lot.

Board members voted five (5) in favor with one (1) abstention (Emerson) to hear the appeal

Brett Costa noted that according to the ordinance, the Board has the authority to include wetland setbacks as part of the approval process.

Chairman Gardner asked the CEO if it can be agreed that this is a non-conforming lot of record.

CEO said that the town records show that this is one lot. The deed shows the Carter Homestead as part of the same lot. The Board needs to look at whether or not they should be considered separate lots even though by tax records and deed descriptions they've been shown as one or if they wish to seem them as two separate lots.

Tom Emerson suggested that the Town attorney should review this issue of separate lots because the application has not been submitted for the entire parcel.

CEO stated that the application is for the entire parcel because that is how the town sees it. Typically, if the town has a non-conforming parcel, it will be combined, for town records, as one parcel.

Bob Kaszynski suggested that this is an unusual situation and it is difficult to apply current situations to a property that has been there for a long time. There was a home there at one time.

Tom Emerson felt that it was unclear if the Board has enough information or authority to determine if this is a lot of record. **Chairman Gardner** said he thought they had both. **Tom Emerson** further questioned if the Board has the authority to ask the applicant to move the building forward into the front yard and deliberately build outside of the lot in order to get it off the wetlands and bring it more closely to the location of the Carter Homestead. **Chairman Gardner** noted that the Board had done this in the past and the action would be to move it to the most conforming location. **Tom Emerson** suggested that the Board needs to prioritize between the distance between the structure and the street and the distance between the structure and the wetlands, given that there was, at some point in the history of the lot, a structure that existed considerably closer to the street, and would now be 15' off the lot line. Can we ask them to move it forward to do better by the wetland setback?

There followed discussion of combining of parcels for tax purposes vs. merging of parcels, legally.

Niles Pinkham stated that the Board should consider this a separate lot as the deeds have not shown that there was a legal combination of the lots. **Chairman Gardner** said that the question whether or not it is a free-standing lot and, if it is, it is non-conforming and the Board can proceed.

There followed discussion regarding the use of the terms "parcel" and "lot".

Niles Pinkham motioned to consider this as a separate, non-conforming lot of record, as the deeds appear to do so.

Bob Kaszynski seconded

Craig Wilson stated that he is not satisfied that these are two lots based on the information provided and would prefer to have the town attorney weigh in on the issue.

Motion carries with four votes.

Craig Wilson stated that if we are going to relax requirements, he would be in favor of relaxing front and side-yard requirements in order to maximize wetland setbacks and, if wetland setback is less than 100 feet that the Board can place some restrictions within that setback. **Niles Pinkham** suggested that rain gardens, crushed stone, etc. and run off should be contained to

protect the wetlands, and the other requirements be conforming to keep the house from being constructed too close to the road.

Robert Harris stated that the DEP, wetland and soil scientists all stated that the area was a wetland of no significance, does not support wildlife and could be filled. The **CEO** stated that the DEP may allow a property owner to fill that particular area of wetlands, but Kittery requires that there be full Planning Board review, and that the setback would be measured from the original edge of the wetland and not the new edge of the created area. Because the Board has determined this is a separate lot, septic regulations require a 10' setback from lot lines and a 100' setback from wetlands. **Patrick Bedard** stated the applicant is not pursuing a septic permit at this meeting and will return to the CEO at a later time.

Craig Wilson recommended that the wetland areas remain undisturbed. **Niles Pinkham** agreed and added that the new structure should not be close to the road. **Tom Emerson** inquired about what was going to happen to the small rectangular piece of land on the corner. **Brett Costa** concurred with the need to protect the wetland area or design a system to minimize construction impact.

Craig Wilson asked to hear from the applicant regarding the issue of moving the house from the proposed location. **Robert Harris** said that wherever the Board wishes the house to be built was acceptable as much time and money has been spent to date and he needs to get started. The **CEO** noted that to receive a building permit for a dwelling, the septic system must be part of the building permit application. **Craig Wilson** noted that the septic system does not need to be on the property lot. **Patrick Bedard** asked if the applicant could place a structure on the property and not define the structure as a home that requires a septic system.

Bob Kaszynski motioned to grant to Robert D. Harris a Miscellaneous Appeal to the terms of Table 16.12, (Page 256-1) of the Kittery Land Use and Development Code Zoning Ordinance in order to build a structure, 28'x50', on the old Carter Homestead. Said structure shall be as depicted in Exhibit 1 of the *Exhibits-Appeal of Dean and Colleen Harris* as prepared by Patrick Bedard, Esq. with the following modifications:

1. Said structure shall be 10' from the northern (side) property line and 20' from the front property line, the westerly boundary.
2. The first 25' of the wetland setback from the wetland shall remain in an undisturbed nature, unless the applicant presents to the CEO a plan to mitigate the impact prepared by a licensed landscape architect or soil engineer.

Craig Wilson seconded

Motion carries unanimously

Chairman Gardner reminded the applicant that this is not a permit and appeals may be made to Superior Court.

Findings of Fact

1. Robert D. Harris requesting a Miscellaneous Appeal to the terms of Table 16.12, (Page 256-1) of the Kittery Land Use and Development Code Zoning Ordinance in order to build a home within the 28'x50' bounds of the old Carter Homestead. Located at Gee Road, Kittery, Map 65 Lot 1G, in the Rural Residential Zone.
2. The Board found that Carter Homestead parcel was a lot of record established prior to 1977 and therefore accorded the benefit of 16.28.170 "non-conforming lots of record".

3. Relaxed setback from wetland that will be determined when applicant applies for a building permit and shall be greater than 52' but less than 100' requirement.
4. The Board references the Exhibit Brief prepared by Patrick Bedard, Esq.
5. The first 25' of wetland area shall be left in a natural state or a mitigation plan be submitted by a certified landscape architect or soil scientist and approved by the CEO.
6. The front yard setback may be reduced from 40' to 20' and the side yard setback from 20' to 10'.

Brett Costa motioned

Niles Pinkham seconded

Motion carries unanimously

Conclusion

1. The Board, having determined this property to be a non-conforming lot of record in accordance to with 16.28.170 A, *Vacant Lots*, reduced yard and other requirements.

Unanimous agreement

ITEM 4 - Patrick S. Bedard, Esq. for Robert D. Harris requesting a Variance Appeal to the terms of Table 16.12, (Page 256-1) of the Kittery Land Use and Development Code Zoning Ordinance in order to build a home within the 28'x50' bounds of the old Carter Homestead. Located at Gee Road, Kittery, Map 65 Lot 1G, in the Rural Residential Zone.

Item withdrawn by applicant

The Kittery ZBA meeting of August 12, 2008 concluded at 9:06 pm

Submitted by Jan Fisk, Recorder –