

Town of Kittery
Zoning Board of Appeals
October 13, 2009

Call to Order: 7:03 p.m.

Members present: Herb Kingsbury, Thomas Battcock-Emerson, Bob Kaszynski, Craig Wilson, Secretary, Vern Gardner, Brett Costa

Members absent: Niles Pinkham

Staff: Heather Ross, Code Enforcement Department

Pledge to the Flag

Chairman Gardner introduced Kittery's new Town Planner, Gerry Mylroie, to the Board members.

ITEM 1 - Travis Dennis and William Harlow for Stephen Goodman requesting a Special Exception Appeal to the terms of Title 16, Chapter 12, Section 110C2, Page 254 in order to purchase vehicles at dealer auctions, ship to facility, inspect, detail, repair as needed, photograph, and resell (online sales). Located at 70 Route 236, Kittery, Map 28 Lot 27, in the Commercial Zone.

Herb Kingsbury noted that he has done business with Mr. Dennis, but believes he can fairly review the application before the Board. Board members concurred.

William Harlow, applicant, read a letter from the property owner, Stephen Goodman, certifying that the building had been used as a motorcycle dealership, including repairs, and tenants had used the building for automotive and truck repairs, and, most recently, a metal fabrication shop and light automotive repair. The applicant introduced another applicant, Travis Dennis, who is a State certified automobile technician and state auto inspector. Mr. Harlow stated he is an automobile wholesaler, but the majority of his sales are over the Internet. The majority of the purchases of cars to sell will simply require detailing. The applicant spoke with Sgt. Denault of the Kittery Police Department and abutting neighbors, who indicated they had no objections to the proposed use of the property. **Chairman Gardner** asked if there was anyone present wishing to speak for or against the application, allowing the applicant to read a letter from Lt. Robert Denault of Kittery into the minutes:

I apologize for not being there this evening. I feel this is a great opportunity to express my opinion on the future growth of Kittery and the future businesses that will come. I am writing you in reference to the TD Automotive and NE Auto Wholesale, located on number 70 Route 236. I have had the opportunity to work with both Travis and Bill in a few situations. Both Travis and Bill, in my opinion, are outstanding workers and businessmen, and fully grasp the ideas of the common people. I have been running the Defense Tactics Systems here in Kittery for about eleven years. I, for one, believe that small businesses are the heart and soul of any town. I fully support their endeavors and hope that Kittery will give them the chance to succeed, for their success is our success. [inaudible]... what this does is allow the growth of the common family to venture and take chances, to make opportunities for their families. The small business is the future in promoting financial growth for us and also for the whole town. I do again apologize for not being there in person. I appreciate the opportunity to express my opinion as a long time citizen and business owner. Thank you again, for it is people like you that make small business feel big.

The applicant noted the letter was signed by Lt. Robert Denault, brother of Chuck Denault. There being no further testimony, the CEO provided:

1. This is a non-conforming lot with non-conforming structures within the Commercial 2 Zone;
2. Title 16.12.110.C.2 allows the use of the following types of businesses only with a Special Exception from the ZBA: a. Used car lot, not connected with new car sales, and j. Repair garages not located within 150 feet of a private dwelling or existing structure.

3. The application submitted is for a repair garage, vehicle detailing, inspections, and internet buying and sales of used cars. There is an existing structure within 150 feet.

Herb Kingsbury asked the CEO why the applicant had not been denied. The CEO stated that, typically, the applicant does not receive a denial letter when appearing before the Board for a Special Exception. **Mr. Kingsbury** noted that the ordinance prohibits garages within 150 feet of an existing structure. However, after 30 years of similar use, is it grandfathered? The CEO stated that there have been a variety of businesses, including medical offices and a video store. The applicant chose to come before the Board for a Special Exception because that type of business had been there before, and that the Board might allow that use again. **Mr. Kingsbury** stated that the ordinance, however, does not allow the Board to do so. **Craig Wilson** asked the applicant what the distance between the two buildings measured. The CEO stated that she had not taken the measurement, but the applicant believed it was approximately 122 feet from building to building. **Mr. Wilson** read from 16.28.110.C. Discontinuance: *A nonconforming use which is discontinued for a period of one year may not be resumed. The uses of the land or building shall thereafter conform to the provisions of this title*, and stated that the use by US Propane for 5 or 6 years, not as a repair garage, certainly exceeds the one year discontinuance. Despite of the merits of the application, Section 16.12.110.C.2.j. prohibits the Board from granting a special exception to a repair garage located less than 150 feet from another structure.

Board members discussed prior uses, proposed use of the property regarding fuels and oils, impact on the neighborhood, noting there are similar uses along the Route 236 corridor, reviewed definitions for *repair garage*, *used car lot* and *structure*, and viewed the aerial photo of the property, noting the un-scaled distance between structures. **Brett Costa** asked if a used car lot is required to have a repair garage. The CEO stated that she did not know, but it may fall under state regulations. **Thomas Battcock-Emerson** commented that repairing used cars is no different from a service garage. If repair garages in Kittery located within 150 feet of another structure were closed, there would probably not be but one or two in the town. It is frustrating that the Board must deny this applicant when the same use is known to exist throughout the community.

Herb Kingsbury motioned to approve the special exception appeal to Title 16.12.110.C.2 in order to operate a wholesale auto and repair shop at 70 Route 236, Map 28 Lot 27 in the Commercial 2 Zone.

Bob Kaszynski seconded

Motion fails: 1 in favor (Kaszynski), 5 against, 0 abstentions – The Special Exception Appeal is denied.

Chairman Gardner reminded the applicant that aggrieved persons have 45 days to appeal this decision to Superior Court.

Findings of Fact

1. Travis Dennis (TD Automotive) and William Harlow (NE Auto Wholesale) requested a Special Exception Appeal to the terms of Title 16, Chapter 12, Section 110.C.2, in order to purchase vehicles at dealer auctions, ship to facility, inspect, detail, repair as needed, photograph, and resell (online sales). Located at 70 Route 236, Kittery, Map 28 Lot 27, in the Commercial 2 Zone.
2. The applicants met with a member of the Kittery Police regarding public safety concerns at the site.
3. A letter of support from Lt. Robert Denault was read into the minutes.
4. Though not confirmed, applicant stated that the distance between the two structures was 122 feet.
5. Testimony was given that the previous tenant was USA Propane, and prior to this a skateboard/hockey business.
6. This is a non-conforming lot with non-conforming structures within the Commercial 2 Zone.
7. The application submitted is for a repair garage, vehicle detailing, inspections, and internet buying and sales of used cars. There is an existing structure within 150 feet.
8. Title 16.12.110.C.2 allows the use of the following types of businesses only with a Special Exception from the ZBA: a. Used car lot, not connected with new car sales, and j. Repair garages not located within 150 feet of a private dwelling or existing structure.
- 9.

Thomas Battcock-Emerson motioned to accept the Findings as read
Herb Kingsbury seconded
Motion carries unanimously by all members present

Conclusion

Section 16.12.110.C.2.j of the Kittery Ordinance states that a Special Exception may be granted to *repair garages not located within 150 feet of a private dwelling or existing structure*. The structure adjacent to the property is within 150 feet of the repair garage structure. The Board cannot, therefore, grant a special exception in this case.

ITEM 2 - Stephen T. Swallow requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 32, Section 490K2 and Page 310, Title 16, Chapter 32, Section 490N2, Page 316, in order to complete the renovation of 17 Water Street using plans drawn by Michelle Shields in 2006 with completion to be done in a timely fashion in keeping with Town law. Located at 17 Water Street, Kittery, Map 1 Lot 47, in the Kittery Foreside Zone.

Herb Kingsbury recused himself from review of this item as he has been a patient of Dr. Swallow for many years.

Chairman Gardner explained that with only five members of the Board present, the applicant would require a at least four yes votes to attain approval. The applicant stated he wished to proceed.

Dr. Swallow, owner, summarized his request before the Board.

Chairman Gardner asked if there was anyone present wishing to speak for or against the application.

Scott Cunningham, abutter, is concerned that the property, as an entrance to the Town of Kittery, is an eyesore and potential fire hazard as uncompleted, and supports Dr. Swallow's efforts to improve the property. There being no further testimony, the CEO provided:

1. This is a non-conforming lot with non-conforming structures located within the Kittery Foreside and Shoreland zones.
2. Dr. Swallow is proposing to complete construction of a building, including expansions previously granted, but now expired, by the ZBA. The construction would include:
 - a. Construct vertical bay windows (framed in);
 - b. Extend dormers (framed in);
 - c. Construct vertical bay windows (framed in);
 - d. Construct entryway (not constructed);
 - e. Construct two 8'x38' decks (expanded from decks previously approved);
 - f. Construct a 6'x11' deck on the third floor.
3. Title 16.32.490.K.2 allows for an expansion of no more than 30% floor area or volume for non-conforming structures in the Shoreland Zone.
4. Title 16.32.490.N.2.b requires a minimum 75' setback from the normal high water line in the Kittery Foreside zone. The proposed structures are no closer to the water than what currently exists.
5. Title 16.32.490.N.2.e states that the total area of all structures, parking lots and other non-vegetated surfaces within the Shoreland Zone not exceed 60% in the Kittery Foreside Zone. The structure is within the allowed maximum 60% coverage, at 29.7%.

Brett Costa [inaudible] believes this is no closer than what currently exists. **Craig Wilson** stated that the Board has previously reviewed all the issues regarding the decks, bay windows, etc. and that the issue before the Board is an expired appeal that must be re-issued so new permits may be obtained. **Thomas Battcock-Emerson** noted that the expansion of the two decks and the third floor deck is new to the Board, though none are any closer to the high water line than what is existing.

Craig Wilson motioned to approve the miscellaneous appeal to the terms of Title 16.32.490.K.2, Title 16.32.490.N.2 in order to complete the renovation at 17 Water Street using plans drawn by Michelle Shields in

2006, with the addition of a 6' x 11' deck on the third floor and 106 square feet of additions to the first and second floor decks on the water side. The property is located on Map 1 Lot 47, in the Kittery Foreside Zone. If the project cannot be completed within one year, the Board will entertain a request for an extension if the request is made before the permit expires.

Brett Costa seconded

Motion carries unanimously by members present

Findings of Fact

1. Stephen T. Swallow requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 32, Section 490K2 and Title 16, Chapter 32, Section 490N2, in order to complete the renovation of 17 Water Street using plans drawn by Michelle Shields in 2006. Property is located at 17 Water Street, Kittery, Map 1 Lot 47, in the Kittery Foreside Zone.
2. This is a non-conforming lot with non-conforming structures located within the Kittery Foreside and Shoreland zones.
3. Scott Cunningham, an abutter, spoke in support of Dr. Swallow's appeal.
4. The property has been before the Board numerous times and granted numerous appeals for decks, bay windows, dormers, entry ways, etc., but said permits have expired. Dr. Swallow is proposing to complete construction of a building, including expansions previously granted, but now expired, by the ZBA.
5. The Board agreed to reference prior appeal approvals in consideration of this appeal.
6. Title 16.32.490.K.2 allows for an expansion of no more than 30% floor area or volume for non-conforming structures in the Shoreland Zone.
7. Title 16.32.490.N.2.b requires a minimum 75' setback from the normal high water line in the Kittery Foreside zone. The proposed structures are no closer to the water than what currently exists.
8. Title 16.32.490.N.2.e states that the total area of all structures, parking lots and other non-vegetated surfaces within the Shoreland Zone not exceed 60% in the Kittery Foreside Zone. The structure is within the allowed maximum 60% coverage, at 29.7%.

Thomas Battcock-Emerson motioned to accept the Findings as read

Bob Kaszynski seconded

Motion carries unanimously by members present

Conclusion

The Board has the authority to grant this appeal under Title 16.28. 130.D.1.a and c - *Nonconforming structures within areas regulated by Shoreland Zoning*, finding that the expansions are less than 30%, and finding that the additions are no closer than the existing structures.

Brett Costa motioned to accept the Conclusion as read

Bob Kaszynski seconded

Motion carries unanimously by members present

Chairman Gardner reminded the applicant that this approval is not the granting of a building permit, and any aggrieved persons have 45 days to appeal this decision to Superior Court.

The ZBA meeting of October 27, 2009 will not be held.

The next ZBA meeting's will be held November 10 and November 24, 2009. The December meetings are scheduled for December 8 and 22, 2009. The CEO will not be available for the December 22 meeting, and Members agreed not to schedule a meeting on that date.

Craig Wilson noted that his term expires November 1st, and he will appear before the Council for term renewal on October 26.

Minutes

September 8, 2009

September 22, 2009

Craig Wilson motioned to accept the minutes as submitted

Thomas Battcock-Emerson seconded

Motion carries unanimously

Craig Wilson summarized the review progress of the new shoreland overlay ordinance by the Council's Ordinance Committee, and how the new ordinance language will affect the Zoning Board's review criteria. For instance, if a special exception requires Planning Board review, the ZBA will not review the application and the Planning Board will grant, or deny, the special exception. This will help streamline the review process. All appeals, not requiring Planning Board review, will still appear before the ZBA. Additionally, the Zoning Board of Appeals will be re-named *Board of Appeals*, as the Board's review is more than zone issues.

The meeting of October 13, 2009 was adjourned at 8:32 p.m.

Submitted by Jan Fisk, October 16, 2009