

Town of Kittery
Zoning Board of Appeals
November 10, 2009

Call to Order: 7:00 p.m.

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

Members absent:

Staff: Heather Ross, Code Enforcement Department
Pledge to the Flag

ITEM 1 - Kenneth A. Wood, P.E. for the Town of Kittery requesting an Administrative Appeal to the terms of Title 16, Chapter 32, Section 1000, Page 350-1 in order to construct a salt shed, approximately 50'x84', at the Public Works Facility. Located at 200 Rogers Road, Kittery, Map 22 Lot 20A, in the Commercial 3, Local Business, and Urban Residential District Zones.

Ken Wood, Attar Engineering, summarized the appeal on behalf of the Town, explaining the building is unheated, has no electrical or mechanical services, and will not house equipment or people. Because of the size of the building, a dry-type sprinkler system would be required, utilizing an air compressor system to activate the water sprinklers. The shed is accessible by the fire department from all directions.

Norman Albert, Interim Commissioner, DPW, noted that if there is a malfunction or a fire and a sprinkler is activated, resultant salt water runoff will go into the catch basin and creek, and approximately \$15,000 in salt would be ruined. Mr. Albert noted the Fire Chief stated to him that as long as there are no vehicles stored in the building, he has no objection to not sprinkling the building.

Don Robinson, Shepards Cove, inquired about the final plan approved by the Planning Board and whether the plan provides for a berm and evergreen landscaping to help shield the shed from his property.

Ken Wood illustrated on the approved site plan that a 120 foot long, 3-4 foot high berm and landscaping has been included. There being no further testimony, the CEO provided:

1. This is a conforming lot with nonconforming structures located within the Commercial-3, Local Business and Urban Residential zones.
2. Title 16.32.1000.A.3 requires that an approved automatic sprinkler system be installed in areas of new buildings 100,000 cubic feet in volume, or 10,000 square feet in floor area. The proposed salt shed building would be greater than 100,000 cubic feet in volume.
3. Title 16.32.1040, Sprinkler Administrative Appeal, states: If any party is aggrieved by a determination of the Kittery fire chief, under the requirements of this section, a written appeal may be filed with the ZBA within ten days from the date of notification of such determination by the fire chief. Such written appeal shall set forth a concise statement of the grounds upon which the party contends the fire chief's determination to be in error.

Craig Wilson referenced the letter from David O'Brien, Fire Chief, dated October 27, 2009 requiring a sprinkler system per code, and suggested that the Planning Board could have waived the requirement for a system during their review of the proposal. **Board Members** discussed the contradiction between the letter provided by Chief O'Brien and his subsequent statement that he would not object to not sprinkling the building. **Thomas Battcock-Emerson** suggested that it be made clear that no storage of machinery or vehicles and no electrical be installed in the building. **Craig Wilson** explained that Section 16.32.1040 does not allow the ZBA to waive the requirements of 16.32.1000, but rather the applicant is required to provide "...a concise statement of the grounds upon which the party contends the fire chief's determination to be in error". It is the applicant's responsibility to convince the ZBA that the chief's

decision is in error. He explained that it is the Planning Board, under 16.28.180, who may waive the requirements of Section 16.32.1000. **Ken Wood** explained that in discussions with Chief O'Brien, Norman Albert [and others] they understood that they could appeal this requirement to the ZBA. **Craig Wilson** explained the applicant needed a witness to make the case that the Chief's decision was in error, and he does not believe such a case has been made. These arguments should be made to the Planning Board.

The applicant chose to withdraw this Administrative Appeal.

Item closed.

ITEM 2 - RECONSIDERATION: Stephen Goodman for Travis Dennis and William Harlow 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 2 Zone.

Niles Pinkham removed himself from review of this item.

Chairman Gardner cited MRSA and explained the process the Board must follow to reconsider an item, based on criteria adopted by the ZBA in 2005 (the document, *Request for Reconsideration*, was provided to Members) stating, "...members of the ZBA...shall decide whether to reconsider the prior decision based upon the evidence and documents submitted."

Herb Kingsbury moved to reconsider the Board's decision of October 13, 2009 regarding the Special Exception Appeal to the terms of Title 16.12.110.C.2, for use of property located at 70 Route 236, Map 28 Lot 27, in the Commercial 2 Zone.

Bob Kazsynski seconded

Discussion followed regarding the standards for reconsideration, specifically:

- a. The new evidence or law that was not presented at the first hearing which could have altered the initial decision of the ZBA.
- b. There MUST be an explanation of why this new evidence or law was not presented at the first hearing.

Members discussed the new application and whether there is any new evidence compelling the Board to reconsider their earlier decision. **Brett Costa** and **Thomas Battcock-Emerson** stated they felt the criteria for reconsideration had not been met, as there was no new evidence or law before them.

Motion fails: 5 opposed; 1 approved (Kaszynski)

Reconsideration was denied.

The applicant addressed the Board regarding their efforts, stating they did not understand why they could not receive approval. **Craig Wilson** explained that the Board must follow the ordinance as law, and the applicant must comply with the code. He further explained that uses are not permitted if they are not listed as permitted or special exceptions. In this case, vehicle inspection service as a use is not listed, so it is not permitted. **Herb Kingsbury** asked if the applicant could re-apply for a used car lot, not a repair garage or inspection service. **Chairman Gardner** stated that the applicant could file another appeal as long as it differs substantially from the appeal currently before the Board. The **CEO** stated that staff members advised the applicant they could proceed, but were incorrect. Reports were received that the applicant was conducting business at the location, so she and the Town Planner went to the site on November 5 and delivered a letter to cease all operations.

Minutes

The minutes of October 13, 2009 were accepted unanimously as amended

Brett Costa provided Board members with the State statute regarding used car facilities and repair garages. The State requires a “repair department” be part of a used car business. Is a repair department, for in-house use only, the same as a repair garage that may be open to the public? **Bob Kaszynski** noted that a letter states the property had done light automobile repair, and wouldn’t this be a continued use. **Brett Costa** stated that there is a professional building next to the property under review, and the code states that this use is not permitted within 150 feet, thereby protecting their businesses.

There is currently one appeal scheduled for November 24, 2009.

The **CEO** presented new ordinance language proposed by the Planning Board regarding mobile homes, usually reviewed by the ZBA, that would allow the CEO to approve:

16.32.730.D.3.b. the replacement of a mobile home within a mobile home park may be located closer to a private road within the mobile home park than currently exists, provided it is located no closer to the front yard setback than the existing mobile home.

Chairman Gardner reminded the Board that the time for election of officers is approaching. Last year’s election was conducted at the November 25, 2009 meeting.

The meeting of November 10, 2009 was adjourned at 8:15 p.m.

Submitted by Jan Fisk, November 13, 2009