

**TOWN OF KITTERY
PLANNING BOARD MEETING**

Thursday, November 17, 2005

Council Chambers

Meeting called to order at: 6:30 p.m.

Present: Chairman Russell White, Janet Gagner, Scott Mangiafico, Ron Ledgett, Doug Muir, Megan Kline, Ernest Evancic

Also Present: Planner Jim Noel, Attorney McEachern, Earldean Wells

1. ROLL CALL

Roll call noted.

2. PUBLIC HEARING: CONTINUATION, FIRST STEP LAND DEVELOPMENT, INC./THE BRIERS AT MEAD FARM SUBDIVISION. WHIPPLE ROAD. APPLICANT IS PROPOSING TO AMEND THE APPROVED SUBDIVISION PLAN WITH THE ADDITION OF A COMMUNITY PIER, DOCK AND FLOAT SYSTEM. MAP 17 LOT 43 ZONED URBAN RESIDENCE.

Chairman White notes there is a quorum present. He then introduces the application. *As a point of order, as Chair, he is going to solicit a motion to go into Executive Session pursuant to Title 1 MRSA section 42510 to discuss the alleged appearance of a conflict of interest.*

Mr. Mangiafico so moves.

Mr. Ledgett seconds.

All in favor.

The Board goes into Executive Session at 6:35 pm.

The Board returns and the meeting reconvenes at 7:23 pm.

Chairman White says that as to Board Member Ledgett, he has reconsidered his decision not to recuse himself and has decided to recuse himself from this item even though the Board voted at the last meeting as to his ability to proceed in this matter. Pursuant to the Bylaws, Chairman White will solicit a motion to reconsider the motion made with respect to Mr. Mangiafico at the last meeting. It must be done by any Board member who voted at the last meeting.

Mr. Evancic was not here at the last meeting.

Chairman White solicits a motion challenging Mr. Mangiafico's ability to remain on the Board for this item.

Mr. Muir says that at the last meeting, as he recalls, we had two motions, one to ask Mr. Ledgett to stay on and one to ask Mr. Mangiafico to stay on.

Chairman White says a challenge was made to Mr. Mangiafico and the motion was to resolve the challenge.

Mr. Muir asks for further clarification.

Chairman White says they were to resolve the issue of the challenge.

Mr. Mangiafico asks if the challenge was just made to him.

Planner Noel reads from the minutes that there was only one challenge with respect to Mr.

Mangiafico staying.

Chairman White is going from his recollection, rather than reading the minutes.

Chairman White is not hearing a motion to reconsider.

Mr. Muir would like to move to reconsider or issue a new challenge, but he is trying to understand what is required of him.

Chairman White says he would need to move to reconsider the vote with respect to Mr. Mangiafico at the last meeting.

Mr. Muir so moves.

No one seconds the motion.

Hearing none, the motion to reconsider fails.

Chairman White says that in that case, we will proceed with the main event, and ask the applicant to proceed.

Paul Hollis wants to thank the Board this evening for finally hearing the application. He thanks the Spruce Creek Association members for being here. Although they are on the other side, he appreciates their hard work. With him is Attorney John Bannon, Jim Nadeau and Peter Melende. They are available to answer any questions people may have during the presentation. Please stop them if there is anything that someone doesn't understand or that they need to explain further.

Mr. Nadeau asks that the lights be dimmed. He introduces himself and thanks the members of the public who are present for attending tonight. The presentation is somewhat technical, and hopefully not boring. For members of the public, he will provide copies of the presentation by e-mail to them if they give Planner Noel their e-mail address. Mr. Nadeau will forward it to them. He wants to introduce the Briers at Mead Farm for those who are not aware of what the development is like. It is bordering Route 103, 21 acres in size, comprised of 10 lots that average 2 acres each. At the time it was approved, the lots were four times larger in size than the minimum size allowed. What is at hand is some of the waterfront owners have agreed to waive their riparian rights in exchange for one single community pier. The plan for the pier was originally encouraged by Planner Noel at the time of the original subdivision application process. A review of the code was done to determine if they could do a community pier. The pier proposal was discussed with the Kittery Port Authority for guidance, as were the protective covenants, and maintenance of the pier. It was approved by the Kittery Port Authority twice. While that was going on, the applicant was also following state guidelines for permitting processes included in previous packages. There is some evidence that the Comprehensive Plan encourages public access to Spruce Creek. It does broaden the use of public access. What he is showing is the shore frontage of 556 feet. When he mentioned three lot owners waiving their riparian rights, this illustration shows the water frontage being waived. There are a couple threshold questions or issues that are pertinent to the application. The first one is that the community pier is a permitted use under the Land Use and Development Code. Both Attorney McEachern and Attorney Bannon have provided opinions to that effect. It is not a marina and is a permitted use. It meets the Land Use and Development Code and Land Use and Development Table. The pier is a permitted use by way of the Kittery Port Authority within parts of the shoreland zone that overlay the Urban Residential Zone. It also overlays the definition of pier, dock or wharf. He asks if there are any questions about that.

Mr. Muir says the lack of questions does not indicate agreement.

Chairman White says that the Board will just listen first.

Mr. Nadeau says that you need to look at whether it satisfies the relevant criteria of 16.32.490N3 and 16.32.850. He states what those mean and says they are very similar. He moves to the

review criteria which the applicant is required to meet. Section 490N3a and 350A he says are similar and he reads from them. The applicant did provide in April 2005 from soil scientist Joe Noel that there are no limiting factors that would affect the insertion of the pier. They have provided a soil erosion plan. Next go to section b and B. The location is not to interfere with recreational areas or beaches. There are none within close proximity to this pier. Next is item c and C. It shall minimize adverse effects on fisheries and maritime commerce. This is probably one of the more important sections. There is quite a bit of evidence to show that they more than exceed this. It will have no adverse impact on fisheries. They determined that two acres of navigable waters are gained as a result of the community pier rather than multiple piers. The next resource is a letter of October 24, 2005, from Rodney How of the Army Corps of Engineers. Mr. How is aware that the applicant intends it to be a common pier. The use of such is highly recommended. The effort serves to lessen the impact on aquatic resources and reduce the overall impact on navigation. This talks to this section of the code. On April 8, 2005, The Kittery Port Authority was asked to give input to the Kittery Planning Board relative to the plan application. Chairman Hall said it was noted that three riparian moorings were given up that could have occupied two acres. Take the Kittery Point Bridge and put it out in front – that is what is gained. He is reading from a study done in 1998 talking about essential fish habitat. The benefits of having community piers to protect essential fish habitat. New and expanding marinas and docks to reduce impact should place an emphasis on community piers to centralize vessel activity. The review criteria for 490N3d and 850D is that the facility be no bigger than necessary, a water dependent use, and consistent with the existing conditions. What are the dimensional requirements? Are there any other piers in the area at this size? There are twenty-two piers within 1,200' of the proposed pier. Many are the same length. It was determined at high water to have 8' of depth at high tide. The Army Corps of Engineers would prefer to have floats floating in the water at all times. If the float is sitting in the mud, they want protection for that float sitting on a mudflat. He wants to talk about the relevance of the requirements. They took a picture from the Route 103 Bridge and it shows the piers that have the dimensional characteristics of what we are talking about. It is a pier, ramp and float system, with the float resting in the water. There is a diagram that represents 566' with 3 piers similar to what is shown here and the proposed pier in a dimensional equivalent. This illustrates what this pier does relating to section D. 490N3e, f, and g do not apply because they talk of structures built on or over the pier, wharf or dock. N3h and i refer to permits from the Army Corps of Engineers and the DEP and those are valid. Under table 16.32.490(17)(A), a pier is a permitted use and reviewed by the Kittery Port Authority. It meets the review criteria of 490N3. It meets the design standards of the other. Conclusion. This was deemed a complete application in September 2005. They have met the standards for the use table and the relevant review criteria in 490N3 and 850. As was noted in the previous meeting, they have heard talk of this as precedent setting. It is not so. One community pier has been approved previously and that served a much more densely populated community than the Briers. That is Shepard's Cove. They think this serves a need and does so with minimum impact. Beyond that, one might ask what the benefits are. They have heard through correspondence and paperwork the opposition. This minimizes environmental impact to soil, shoreland and mudflats. This pier minimizes excess water disturbance according to the Kittery Port Authority and the Army Corps of Engineers. Unlike a lot of private individual piers, this will have restrictive covenants that will strictly regulate the use of the pier. Slips cannot be leased. There will be restricted hours, muted lighting, and a nonprofit entity will be responsible for the maintenance of the pier. It conforms

with the recent and unanimously approved Kittery Port Authority Community Docking Facility definition. It is consistent with federal and state agencies supporting community piers as a way to mitigate waterfront buildout. The picture gives a rough idea of the location of the Briers. The circle represents a 400' radius from the proposed location of the pier. They are required to notify abutters within 150' of the subdivision. There is only one abutter impacted within a 400' radius. It is very rewarding to see the number of individuals taking an interest in this application. He shows a blow up of the map that he just showed. There are approximately 22 piers in this location. He shows the railroad trestle. He has highlighted the piers in the vicinity and counts them aloud. There are 21 piers and one mooring. Within 566 feet, there are four individual piers. When people talk about the character, this is the kind of activity occurring in Spruce Creek, particularly those piers extending into the water to allow the float to hit the water. First Step requests the following: 1. That the Planning Board determine that the Briers Pier is a permitted use. 2. That the conditional items in the Kittery Port Authority permit be reviewed. One is lighting. 3. That the proposed pier covenants be reviewed and accepted or modified. 4. That the application be granted final approval. He has attached the covenants to the hand out. He will not read them aloud. He provides a picture of what Spruce Creek looked like with the railroad trestle. The new bridge aided boating access to Spruce Creek. He shows a picture of Spruce Creek and that's a massive body of water. Generally, it is about two miles in length, 50+ acres, consisting of 208 waterfront properties, 25% with piers, 22 piers within a 1/4 mile radius of Briers. That goes back to the slide shown with piers compacted in the Briers location. The area at Briers is deep water tidal. There are five nonconforming piers. Within a 1/2 mile from Briers, the character changes and the back creek changes as well. He asks for comments or questions.

An audience member requests that he go back to the picture of docks within 500' of Briers.

Mr. Nadeau says correction, that's 1,200'.

The audience member does not know that the information provided is correct because several do not have piers where piers are shown by Mr. Nadeau.

Mr. Nadeau says that they have similar dimensional qualities.

She asks what he means.

Mr. Nadeau thinks he has answered the question.

She says that he said he was taking questions from the audience.

Chairman White asks her to wait until later. She should bring her point up later and say her name and where she lives.

She asks if she can get the picture, too.

Mr. Nadeau says that anyone who wants a copy can get it via e-mail.

Mr. Muir would like to ask a question. Mr. Nadeau referred to the provision that the facility should be no longer than is necessary to carry on the activity. He used the word longer rather than larger. Mr. Muir is not sure if the word longer or larger is used in the Kittery Port Authority regulations. That seems like an important distinction. It is no longer, but it is larger than others because it will serve more boats.

Mr. Nadeau says that he is talking about N3d that says "no longer than".

Mr. Muir and Ms. Kline say larger.

Mr. Muir is looking at 490N3d.

Mr. Nadeau went to the website. He has a copy of that as well.

Attorney Bannon will freely concede that the terminology is "no larger", not "no longer".

Mr. Muir wants to make that note there because almost all of the presentation was centered on

the length and not on the width.

Mr. Nadeau thinks the issue is about whether this is a water dependent use. He asks if there is anything else.

Chairman White is sure there will be. Any Board member with an immediate question should feel free to ask it.

Mr. Nadeau will turn the presentation over to Pete Melende, an owner within the Briers.

Mr. Melende says that we are all residents here. He will be within short order. He owns Lot 6 and is in the process of building on it. He feels that we all have a common interest. It is worth having the Board take the time to think about this. One of the issues that has come up is precedent and how it will change the impact on this town. We are dealing with the demographics of Kittery. Every town in the York County area grew over the decade 1990-2000. Some grew more than others. Kittery grew 1.8%. York grew much more. Maine grew 3.8%. All of the towns in York County experienced larger population growth. Young adults are leaving this area and the elderly are flocking to it. York saw a substantial increase in the elderly in the last decade. They consume less.

Chairman White asks why this is relevant.

Mr. Melende says it is relevant because the character of Kittery has grown 1.8% in a 10-year time period. If you put that in perspective, when you talk of a community pier, this is a nine-boat pier. He feels that the Board should keep in perspective what it is and what Kittery has experienced in reality. There are two decisions to be made here. One decision is to support a community pier through the planning process. This is a nine-boat pier that will serve nine residents. If this were a popularity contest, it would not be approved because it's nine residents in the entire community. If the Planning Board does nothing, it will assure that there will be three piers of similar length and they will be relatively as large as this one. What he is trying to do is talk about the pier location and its physical association within Spruce Creek and Portsmouth Harbor. Not all piers are of the same length and size. Not all piers reach deep water at low tide. He shows the area that he is talking about from the Route 103 Bridge at high tide and low tide. He explains how a deep water pier works. There will be approximately a 10' tide and they have to allow for that. The next slide he shows is a picture taken at the other end of the 103 bridge and there is a marina of some substance that can accommodate more than nine boats that are over 20' in length. The next is a picture at the north side of the 103 bridge looking across. There are four piers, three active, one in disrepair, and all of some substance and length, 120'-140'. The next slide looks directly toward the area where Briers will be located. There are two existing deep water piers. If you look through where the trestle is, you will see that the channel at low tide is significantly narrowed. As you look out to Goose Point, at this time, there is one active boat, a lobsterman. He shows a picture of the railroad trestle. You are looking at the actual site for this, and although it is not very visible, there is a red marker there. You can see it highlighted in the actual photograph. You can see the 103 bridge in the distance. The red marker was flagged by the surveyors. Looking directly across into Barters Creek, you can see that it has a different character and nature at low tide. These are mid-tide piers that do not have access to deep water at low tide. This is more characteristic of what exists north of the railroad trestle. You can see the one in disrepair reaching the channel. Looking out from where the pier will be located, he tried to capture the aspect of Spruce Creek north of the trestle. It is a low tide picture. There is a significant mud flat environment on both sides of that channel. He thinks it comes out better on both pictures that we will get. It is basically a mud flat at low tide. He thought this helped to clarify some things for people here. Within a mile radius, you reach the

NH border and are just barely at Goose Point Road. At 1 and 1/4 miles, you hit Newcastle and are at the Kittery Town Treatment Point. At 2 miles, you are at Pierce Island and the Shepard's Cove Community Pier. At 2.5 miles, you are at Route 1 and open water in NH. He believes he is showing a reasonable representation of the Spruce Creek channel and mud flats. There is a difference between a deep water pier and a mid-tide pier. There is significantly more usage of your boat if you can reach deep water, to say nothing of the impact on the mud flats. Above the trestle, about 95% of properties can only make a mid-tide pier, so the piers tend to be shorter and smaller, with the exception of Shepard's Cove Community Pier. There are a number of nonriparian accesses. There are 150 intended residences there. At Barbers Creek, you also have that. The town mooring system is another way for that to happen. The value of certain piers in Spruce Creek does not offset the value of a town mooring. He wants to talk about the existing community pier at Shepard's Cove. They have a boathouse intended to store 20 boats, canoes and kayaks. The Shepards' Cove pier is of similar length and somewhat similar dimensions to the current proposal. Shepard's Cove is encouraging boat pick up at that pier. "Our private dock is an ideal spot to launch a canoe or kayak or to pick up guests," he reads from their literature. It is intended to be a very active pier. He shows pictures of the pier. The Shepard's Cove pier traverses some very environmentally fragile areas. The demand on the Shepard's Cove pier will likely exceed its capacity. He can envision people with a canoe or kayak moving off of it. That will not happen at the Briers. He shows the comparative size of the Briers Pier matched up to the Shepard's Cove Community Pier. Shepard's Cove is 132' and Briers is 150'. There are float systems extending out, but they provide organization to the boats there. He has a picture of the Shepard's Cove pier looking out onto low tide. If people are caught in low tide or there are too many boats trying to get out, there will be a problem. Within a 1/4 mile radius, there is a marina. The presentation was created to the best of their ability, he will not say this is an absolute census, but this was done through photos and inspection. There is an 80% chance there will be three piers on that location if this pier does not go in. He shows again what happened south of 103, the piers that exist, the piers on the north of 103, one visit more to the site. As for boating facts - 90% of Spruce Creek is a mudflat with 2' of water or less for a tidal cycle. 25% of the usable time between May and October can be used for boating there. He shows another picture of the two piers adjacent to the Briers pier. They will have a community pier serving nine boats. Doing nothing assures three piers of equal size and length will be built in that location, with no defined schedule for maintenance. He asks if there are any questions.

Chairman White says there may be later.

The applicant would like to make no further presentation at this time.

Chairman White opens the hearing to public comment. He asks if the person in the back has a point of order.

Ed Hanson lives on Goose Point. He would like to make a comment about the last presentation. He has lived there for 29 years. He appreciates the lecture, but the comparison between Shepard's Cove and this is a travesty. Shepard's Cove is for canoes and kayaks only and they can't leave their boats there. To compare the two is totally inaccurate. In 29 years on Spruce Creek, he can name at least seven people who have never put in a dock for one reason or another. Some did it because they did not want a boat, some because they kept it elsewhere. There is no guarantee those three waterfront lots will mean three docks. There might be.

Chairman White asks for a show of hands as to how many people want to make comments tonight.

Paul Cadigan, an attorney of Kennebunk, represents several people in opposition to this

application: Steve Boss, Gail Simonds, Lis Anderson, John Robinson. It seemed from first presentation that there were some conclusions he might take exception to. 16.04.060D1 talks about the Kittery Port Authority. It provides that the Kittery Port Authority shall provide advice with regard to the development of piers to the Kittery Planning Board. It does not say it will approve them. He would then point this Board to consider 070 which pertains to conflicts within the ordinance. In the event of a conflict, the most restrictive or that imposing the higher standard shall govern. He submits that a two-tier system of approval is more restrictive and this Board holds the true power of approval. 090F is also like this. When the Kittery Port Authority granted the second approval, it did say it was contingent on any governing bodies that may be required. The Kittery Port Authority does not determine the power of the Kittery Planning Board. The Kittery Planning Board does. On the question of whether the use is permitted, he refers the Board to Moyer v. ZBA, a 1967 case. The name by which an application is called has some evidentiary value, but it is not controlling. It is the nature of the activities or character that will settle it. He does not think the Board can look at the name, community pier, and see that it fits. If you look back through, you see that the applicant tried several names because the first few weren't fitting. This is small subset of community. If this is not a marina, this is a new use unlike anything this Board has previously approved. It does not conform to the ordinance or to the Comprehensive Plan. He would submit that the burden of proof is upon the applicant to establish the case before the Board. He did not get to look at every submission. The Board needs to look at whether the applicant has appropriate right, title, and interest, as it is not the owner of the lot that will support this water dependent use if approved. Before going to the Kittery Port Authority, the applicant published two sets of declarations, dated 4/1/03 and 5/03. Both preceded approval by the Kittery Port Authority. Both state that the declarant has obtained approval for a dock from the Town of Kittery. Further, under the Declaration, under Homeowners Association, it provides that the declarant is granted a perpetual easement in common to the access area leading to Spruce Creek and the Dock. Statements were made by the applicant that the dock was approved and he thinks that the applicant made certain contractual obligations to certain lot owners as result. Then there is the flurry of responses recently submitted by the applicant with respect to approvals by the DEP, etc. He believes the Board has received and reviewed them. He wants to draw the Board's attention to two parts. One is the Department of Conservation submerged land lease. It says that with respect to the activity to date, this constitutes a default under the lease terms because there has been no construction to date. It seems to be based on a sentence in the next paragraph. The applicant stated that they have been unable to construct the project due to circumstances beyond its control. The original approval by the Kittery Port Authority was back in September 2003, more than two years ago. Attorney Cadigan appealed the decision on behalf of his clients, and the suit was stayed by the court on 11/10/03 for the purpose of allowing the applicant to come to the Planning Board to complete the process. He thinks the applicant chose not to come. The second has to do with something given to the Kittery Port Authority the second time around. There is a question as to the location, the precise location of the proposed pier. The proposal approved by the Kittery Port Authority in 1/05 showed that the pier was going to be built off and coming off of a dividing line between lots. That has been pushed off. The Kittery Port Authority approval was for the application as submitted. The application asks for the exact positions of the proposed structure with dimensions from readily identifiable reference points. They had a specific location. The approval states that changes from the plan must be brought back to the Kittery Port Authority beforehand. Much has been said about a comparison with this project and Shepard' Cove. He

cannot agree more heartily with the first speaker. He would like to make specific points as to the comparison. Shepard's Cove was consistent with the existing use. It is located for the use of residents on a single waterfront lot that conforms to the requirements. It is commonly owned property, unlike here where there is an individual lot owner. This is not commonly owned property. Shepard's Cove is one float that provides for access to the water. No boats are to be moored at the float. There is a separate facility off the water for storage of boats. There are no special conditions for the Town. The Briers proposed pier is at the end of a right of way, you cross two waterfront lots to get there, and nonwaterfront lots have no rights to waterfront. It will have three 20' long by 4' long slip floats attached to a 60' long slip float. That is well more than double that which exists at Shepard's Cove. There will be nine boats more than 20' in length. This would be a special arrangement with deed restrictions and covenants which this Town has no authority to control. It would create a visual impact that is not in harmony with the Comprehensive Plan. 16.32.490N1 requires a conforming lot for all uses allowed for in the table. He submits that this proposed use is not adequately supported by the lot that it is intended to be built off of. He asks the Board to contemplate that. More specifically and to the heart, 16.32.490N3d, when it comes to reviewing, says that the pier shall be no larger in dimension than needed and consistent with the existing use in the area. Is this consistent? He knows that in earlier exchanges, the focus was on the size of the dock. Please focus on the dimension. This is creating something different from that which was previously approved. He will then ask some members of the public to make some comments as to whether there is compliance with 490N3d. Gail Simonds lives with her family on Goose Point. She is one of many residents on Spruce Creek who share concerns regarding this application. She rows most days year-round on the Creek and is familiar with the Creek. She strongly believes this is not in character with the other docks in the Creek. There has been much reference to the table of land uses. All land use activities need to conform to land use standards, particularly 490N3d. This states that they be no larger in dimension than necessary and consistent with the use and character. The Spruce Creek character has evolved over many years. There is a voluntary restriction as to the size of boats and docks. The Creek is shallow, more suitable for smaller boats. The Route 103 bridge makes it necessary. There are very few boats over 20'. Typically, there are 10'x20' floats. Larger floats on the Creek are 10'x40'. Their limited size determines their use. Most sit in the mud flats. Many on the Creek do not have a dock. This guarantees the greatest use by all Kittery residents. She has produced a photographic reference of how it currently exists. The photographs document the size of floats north of the 103 bridge.

The applicant has been provided with a copy of the photos.

Gail Simonds asks the Board to look at the drawing of the proposal overlaying a typical pier, ramp and float. It extends far beyond the water's edge at low tide. It is out of character in size with others in the area. Please address this issue of nonconformance with the Code.

Chairman White asks if she was saying this is a character issue.

Simonds says yes, particularly in size. If you look at float size, the largest floats are much smaller. It has nothing to do with the length of the ramp.

Attorney Cadigan next calls Phyllis Merikallio to talk about the community pier concept.

Ms. Merikallio says that she has passed out some diagrams to show the typical size and style of a dock. The piers have a short span. They have the usual 10'x20' float. She shows what that would look like. In theory, a communal structure causes less impact. That is why they recommend community piers that serve waterfront homes. This is based on the argument that one dock is better than three docks. This is not the dock before you. The developer is proposing

a structure to serve the six nonwaterfront lots along with the waterfront lots. There will be a series of floats and a finger slip arrangement. This is not the community pier concept recommended by these agencies. They are with respect to waterfront lots. The result is far more intensive than would otherwise be the case under the current regulations. She is not debating whether one is better than three. The issue is whether one should serve nine, including nonwaterfront lots. This is a private pier for the exclusive use of these residents. This is a commercial enterprise, nonprofit, and as part of its administration, it provides moorings for members. She feels this is a marina. This is a business and residents are purchasing a docking facility. As upland owners have paid a greater amount for their lots based on this, this would be a dockminium, which is illegal in the State of Maine. If the dock slips are in the purchasers' deeds, then they own them. Look at the size and scope and determine whether this is a marina or dockminium. She would encourage the developer to do a community pier serving the three waterfront homes. Otherwise, there should be three separate, individual piers.

Attorney Cadigan says that 16.28.210 and 16.36.070C1i both require that this proposal be in harmony with and conform to the Comprehensive Plan. He would submit this does not. He asks Sue Emery to come up and offer some points as to that issue.

Susan Emery, 27-year resident, member of the Comprehensive Plan Committee, member of the original Spruce Creek Steering Committee. She does not live on Spruce Creek. Everything that she will refer to is in the Comprehensive Plan. She is speaking to concerns regarding the scenic resources, marine natural resources. There has been a great deal of discussion regarding where Spruce Creek starts. The answer is based on the Comprehensive Plan and maps. She asks if the Board has them. It starts at Route 103 at the bridge. It does not start at the trestle. There is a summary of significant development constraints, Map 44. This is in a coastal wildlife concentration area. It is in within one of our class 1 scenic views. This view is viewed by one of our class 1 scenic roads. The next map shows the wildlife and fisheries habitat, marine resources, and scenic resources. They all start at the bridge, not the trestle. The first point she would like to cover is that the Comprehensive Plan says that the shoreline is the scenic resource to be preserved. The application is not consistent with Spruce Creek in general. It impacts the scenic view as discussed. Under scenic resources, scenic areas, Kittery is coastal community and much of its quality is ... – she reads from it. The entire shoreland of Kittery has been identified as a scenic area. It ranges from highly developed to somewhat developed to undeveloped, and all is important to the Town's visual environment. The following views and vistas have the greatest scenic value for the community: view 16 is this particular view. Why is this application not consistent with the scenic character of the area? Combination is the real factor: finger piers, nine large boats, the quantity of users, each house with the possibility of another home, kayak and canoe racks, golf carts, floats stacked up, day long use instead of working with the tides. It is the combination of all these factors. Some if you take them individually are real issues, but the real impact is the combination of all of this. What are the issues and implications? Maintaining scenic views will require that new development recognize and respect these resources. The view of Kittery shoreline from the water is key. Additional attention to this feature may be warranted. What are the goals and policies? The State goals are to protect the State's other natural resources, including, without limitation, scenic vistas and unique natural areas and to maintain the scenic beauty of the coast, to preserve the scenic quality, to maintain and enhance the high value scenic views from the public viewing sites. Spruce Creek is a marine estuarine resource. Under marine resources, section 13 references Spruce Creek. It is a significant estuarine resource area. At low tide, the clam flats are exposed. There

is habitat value. Why would this be a concern? This is a more intense use. This is also a marine resource. This would likely encourage more intense use of the lots behind the waterfront lots, increasing nonpointsource pollution. This runs counter to current local efforts to clean it up. As a marine resource, all these clam flats are exposed. The Maine Department of Inland Fisheries and Wildlife has identified several important areas not under direct state control, which include Spruce Creek, that are ranked as having regional significance. Spruce Creek from the trestle inward is considered an important wildlife concentration area. Look at the State goals. To protect the quality and manage the quantity of water resources. To protect the State's other natural resources including wetlands, etc. Look at the local goals. To protect the important aquatic and wildlife habitats. To preserve the waterfront by assuring that new development is aesthetically compatible. The Town will continue to protect coastal areas, including the shorelines of Spruce Creek, all identified by the Maine Department of Inland Fisheries and Wildlife as Class B. The Town will continue to guide new development away from sensitive waterfront areas through resource protection and shoreland zoning. The Town will do an independent assessment of the impact on wildlife and fisheries habitat and, if necessary, will mitigate the impact. She believes this proposal would encourage greater development of the back lots, drawing development toward this rather than away from it. The Kittery Port Authority will review regulations relating to speed, noise and wakes with respect to sensitive areas, including Spruce Creek. This proposal will bring in more speed and noise. She would like to throw out a thought for the Planning Board to consider. This is also a seal hollow area. That is in there too in this section of Spruce Creek. There needs to be a special type of criteria as far as what is allowed in Spruce Creek and Brave Boat Harbor from the natural marine resource perspective. She thanks the Board.

Chairman White asks that we take a short break at 9:18 pm.

The hearing reconvenes at 9:30 pm.

Attorney Cadigan says we just finished talking about the Comprehensive Plan. It is sometimes hard to visualize that. He will ask Lis Anderson to come up to supplement this discussion, keeping in mind the Comprehensive Plan.

Lis Anderson says there are many reasons she is opposed to this application, but she would like to address the adverse visual impact. It is declared that Maine's coastal wetlands have significance. The uses are causing rapid destruction of these resources. This is a habitat of regional significance. The Board should assure that new development is aesthetically and environmentally compatible. Based on studies performed by NOAA, the guidelines help to assess whether this is so. The proposed dock would be 150' long, with nine boats, and the possibility of golf carts, kayaks, dinghies, etc. It will ruin one of the scenic views - the trestle. It also creates a potential for severe congestion. The dock will dominate the landscape as it is so prominently situated. It will impact views from the Route 103 bridge. It is strikingly different in form and character from others. She feels the project does not meet the standards.

Attorney Cadigan says his part is just about done. When the applicant put on its presentation, the applicant said that the permit for community piers is obtained via the Kittery Port Authority. He is not sure that term exists within the context of the ordinance. He does not believe the Kittery Port Authority approval is adequate to allow for the construction of this proposed pier. It needs this Board's approval. This Board decides issues of use when it comes to plans. The first thing the Board must do is determine what this use is. He would submit that it is not defined within the context of the ordinance. Then the Board must look at whether it is allowed within the zone requested. Then the Board must look at the performance standard. It must be no larger

in dimension than necessary to carry on the activity and be consistent with the existing use and character of the area. Finally, it does not comply with the Comprehensive Plan. He is more than happy to answer the Board's questions, but he feels that Chairman White probably wants to proceed with further public comment.

Chairman White asks for other speakers on this plan.

Attorney Bannon feels to be fair the rebuttal will have to come last.

Lynn Roseoff lives on Tilton Avenue, on Spruce Creek, with a conforming dock. She would like to say as a neighbor that this is very akin to having a neighbor with cars in the driveway or garage. If you lived next door to someone with nine cars in the driveway, you would think you were living next to a commercial entity and this is what that feels like. This feels like a business. That's not what the Creek is about. Let's have three docks and the three boats.

Kate Johnston lives at 23 Bond Road in a house on the water without a dock. She is curious about the diagram put up with regard to the alleged 22 docks near the proposed dock. Five of those docks don't exist. So, there were a lot of statistics given out in both of those speeches. The data should be correct. If you have error like that, it is about 23% error, so that may skew some of points made. She was going through the DEP guide to better management practices. Page 2 at the bottom. Looking at marina - anything over five slips is considered a marina. The same is true with real estate - over four units is considered commercial in nature. She thought that would be helpful in determining what this use is.

Attorney Cadigan says that when the next person comes up, he would like to provide a written submission from some that did not wish to speak.

Paula Ledgett of Kittery Point would like to refer to her letter previously submitted. One of the questions when this all started 2.5 years ago is why marinas are prohibited in Spruce Creek in the Land Use and Development Code. She asked The Kittery Port Authority and Susan Emery. All she can think of, having spent 2.5 years involved in the Spruce Creek watershed issues, is that it has to be regarding intensity of use. She asks the Board to consider how this use is not as a marina. The intent of the marina prohibition is to protect the fragile estuary. Also, NOAA reported in 2003 the motorboat impacts. This pier will have potentially nine 24' boats. There will be increased vessels, erosion, resuspension of bottom sediments, disturbance of wildlife, and impacts of noise.

Susan Emery of Mitchell School Lane, Kittery Point, says that she is looking at 16.32.490N3d and she would concur with the person who said this would dominate the view. You need to look at the combination of all those factors as you are going forward. It will really dominate the view. It is to be no larger in dimension than necessary. Please consider this. Is it a permitted use? It is very frustrating. If it is, then what is it? The citizens need to know. If not, then the Board should determine a definition and hold a public hearing and see if the people want to have it. She does not think it is within the Kittery Port Authority purview to make this decision. What is it? Is it permitted? We need to determine from a public hearing if people want this type of use.

Attorney John Bannon would like to start out saying some things that might sound a little strange. He is from the firm of Murray, Plumb and Murray. When he was a little kid, he hated conflict. He hated when people could not agree. He hated when people were speaking in a loud tone. This drew him to the law because he knew that somewhere there had to be answers to what happens when people disagree. When people cannot agree as to what is right or wrong, all they have to fall back on is the law as it's written. You can't depend on what you want it to be. The only thing that you can depend on is to follow the law as it's written. The two resources that we have are the Land Use and Development Code and a number of, well four, decisions of the ME

Supreme Court that bear on this point. Before he gets to the decisions, he wants to address a couple issues that keep coming up, more as queries than as arguments. This is not a difficult question if you follow the law as it is written and not as you want it to be. He will not haul out a dictionary again. He hopes he already showed that this meets the definition of pier, wharf or dock. There have been allegations that it meets the definition of a marina. The answer as far as he can see is in the Land Use and Development Code definition of marina. It means a business establishment with frontage on navigable water and whose principal use is providing docking facilities for hire. There are critical clauses. It must be business establishment. The principal use must be as a business establishment and with the principal use of providing docking facilities for hire. The ordinance defines business, but only for the purpose of sign regulations, so you must look to the dictionary for the definition. Business is usually a commercial or mercantile activity engaged in for means of a livelihood. Under that definition, it is not enough that a corporation is involved here. It is a homeowner's association. The Board would need to find that its primary purpose is making a livelihood. No one is going to be looking to derive their livelihood from this pier. It also has to be the principal use. There may be some incentive in that lots are worth more. However, the principal use of the pier is not a business. The term "for hire" means payment for temporary use of something. There has been no suggestion that First Step intends to offer any of the spaces temporarily for anyone for any sum of money. It is impossible to find this is a marina under the ordinance. What is it? It's a pier, dock or wharf. Just because it's a particular type of something doesn't mean it's not that something. If you go with what you have, not with what you wish was there or what you expect would be there, you have to come to the conclusion that this is a permitted use. Whether we like it or not, if you go to the table of land uses in the shoreland zone and go down to section 17a, it tells you what land uses are permitted in the shoreland zone and in each portion that overlaps an underlying zoning district. We're in UR zone. Are they permitted? Yes, with a permit from the Kittery Port Authority. This may not be the best way to do things, but that's what the ordinance says right now and that's what we have to rely on.

Chairman White says that in that table, it seems to mix up the structures and uses. Is a pier a use? Is a pier a structure?

Attorney Bannon says that according to this ordinance, you look on the left and it says land uses. That's what it says. It classifies piers, wharfs, etc. as a land use.

Chairman White says that in A, it says structure.

Attorney Bannon says that A and B puzzled him a lot, too.

Chairman White says it says structures and uses.

Attorney Bannon says this ordinance views the pier as a land use. It considers structures extending over and above the water line as a land use.

Chairman White says that within 17A, it seems to say that there are structures and also uses and it seems to differentiate between the two. When you build a pier, you have an intended use for the pier.

Attorney Bannon says that it refers to piers, wharfs, etc. and other structures and uses extending over the water line. He admits that there is some ambiguity there, but he thinks it is quite clear that a pier, wharf, dock or bridge is a land use. This table is virtually identical to every table on this issue in all towns throughout the state. 17B is considered something different. He is concerned that it is near 10:00 pm and he is not finished.

Mr. Mangiafico moves to extend the meeting to 11:00 pm.

Mr. Evancic seconds for discussion.

Chairman White would says that a motion to adjourn is in order at any time. As practical thing, we should allow the applicant to finish the presentation, and then we can decide whether to deliberate.

All in favor.

Attorney Bannon hopes this will be helpful to the Board. The abutters, and he is using that term generically, have frequently brought up that some of the people who will use the pier are upland owners and not riparian owners. That has nothing to do with whether it is a permitted use. The form of ownership is not mentioned at all as criteria for determining whether it is a pier, etc. and that is also generally not pertinent under Maine law. If you want to make that distinction, you need it in the ordinance, and it is not there. Another person expressed concern that if the Board approves this, it will set a precedent, allow a large number of others, and cause congestion, etc. This is a legitimate concern. However, look at Hannon v. Board of Environmentally Protection, 832 A.2d 765. The DEP had turned down a dock application because it felt that the cumulative effect of approving it would be detrimental to the aquatic habitat. It was a legitimate concern. The Supreme Court said that you cannot turn down a particular application if it poses no risk or complies with the standard just because you are concerned that more will come or worse will come. If that is a serious concern, then if other applications come in, you can deny them. You cannot penalize the applicant for proposing a use that might encourage others to follow. It is the law and what we have to work with. You cannot deny an application based on what might come down the road. Look at its impacts. There has been some eloquent testimony as to whether the applicant has complied with the Comprehensive Plan. The Supreme Court has said on a number of occasions that the Comprehensive Plan is not enforceable. It cannot be turned into review criteria. If that weren't enough, there are two cases from the Maine Supreme Court that deal with exactly the language we are currently dealing with. In Stewart v. Town of Sedgwick, some abutters complained that although the applicant showed that the pier would comply with the regulations, the applicant had not shown compliance with the general objectives of shoreland zoning. The specific criteria the abutters complained about was visual access, conserving natural beauty and open space. Fortunately, some other board has been through this and you don't have to do it. The applicant does not have to show compliance with general standards. The Snyders were required to show that the proposed dock met the requirements. Why can't you judge a dock based on conformity with general standards? The general purposes if utilized as separate standards would likely be declared unconstitutionally vague. In Cosalta v. Georgetown, the town had an ordinance that contained a requirement to conserve natural beauty. The Supreme Court hardly ever invalidates ordinances. However, it stated that standards based on subjective visual impact go too far. It is an unmeasurable quality totally lacking in cognizable qualities. If you have a standard in an ordinance that allows someone to exercise a totally subjective standard, that is not sufficient guidance and not enforceable. So here again, as undoubtedly sincere as the neighbors are about their concerns, is that a criterion on which the Board can deny the application? No. There is also a suggestion by Ms. Merikallio, and he apologizes for mispronouncing her name, that the applicant could build a smaller structure and still accomplish a reasonable purpose. The Law Court said that the word "necessary" must be interpreted to mean just that. In that case, the neighbors contended that the applicant was required to show a need for the dock of this size. The Law Court said no. The issue is not whether the applicant had an alternative that was smaller. The issue is the dock should be no larger than necessary to carry on the activity and the activity intended is to serve the purpose of the dock. To the extent that it can being argued that the applicant could use a smaller facility, and he is not saying the

applicant is resistant to suggestions from the Board, the question is whether the dock is any larger than necessary to serve as a community pier for the subdivision. Finally, in terms of standards, this may be the most important point of all, what does consistency with the existing use and character mean? Another Board grappled with this before you guys. He wants to go through it using the language of the court. One of the litigants in that case had said that the criterion is just as vague as the previous language. What the Supreme Court can do is make limiting construction of vague ordinances and save them from being unconstitutional. Langteen v. City of St. George. The Law Court interpreted it as saying that it imposed a second criterion for judging the proposed size of the proposed wharf. That refers only to the dimensions of the wharf or the dock. It does not refer to aesthetic concerns or generalized feelings about what is appropriate in the area. There is some squabbling about the word consistent. He feels the neighbors feel that if this is larger than the docks in the area, it is not consistent with the docks in the area. That is not the way the Maine Supreme Court reads it. The Court construes the word consistent to mean “not conflicting or interfering with”. So, the second dimensional requirement is the proposed wharf may not be so large that it conflicts or interferes with the existing conditions. No matter how concerned one might be about the disparity between this dock and others in the area, in reviewing the presentations made on the applicant’s behalf, it is impossible to come to the conclusion that the proposed community pier conflicts or interferes with the existing conditions. It does not interfere with anything. Consistency does not mean “the same as”. It means “not detrimental to”. He respectfully submits that though this problem seems difficult, if you try to approach it from some general policy perspective or what is best for the neighborhood, two people will not come to a decision about that. Find out what the ordinance says and what the Supreme Court has said about it. You will then have no choice but to conclude that this pier satisfies the review criteria that it has to meet. It is a nine-boat pier, not Wal-Mart.

Chairman White asks if Attorney McEachern wants to add anything.

Attorney McEachern does not unless there are questions. His August 29th letter addressed the marina issue and permitted use and some of the standards. It addressed some of the cases that have been cited.

Mr. Mangiafico asks about whether Attorney McEachern’s interpretation of the section is the same as that of Attorney Bannon.

Attorney McEachern says it was the Law Court, not him. It was a decision involving the same language as our ordinance.

Attorney Cadigan asks to address the Board with respect to Attorney Bannon’s points. While the Law Court does decide cases, the Law Court does not always carve things in stone that are applicable in all situations. In the Lantine case - when it was talking about it, it said larger in dimension than necessary to carry on.

Attorney Bannon says that is not the language of the ordinance.

Attorney Cadigan says that applied to the case. These are very different circumstances than those addressed in Lantine. Also, Attorney Bannon is pointing to the ordinance and saying that we are stuck with the language of the ordinance. Under 16.04.060D, in talking about the Kittery Port Authority, it says it shall provide advice to the Kittery Planning Board. That is what the ordinance says. At the least, there is a substantial conflict between this and another provision of the ordinance. If that is the case, you need to determine which way to go. Go to 16.04.070, conflicts - where it says that in a conflict, the most restrictive governs. If you are bound by your ordinance, you need to look at all provisions that would be applicable to the case. He does not

believe the court would strike down every provision of the Comprehensive Plan. The cases cited were specific to specific towns and ordinances. They were not reviewing the Kittery Land Use and Development Code or Kittery's ordinances.

Susan Emery asks to provide one comment. As Chair of the Scenic Resources Committee, the section was done very objectively as part of the Comprehensive Plan. The consultant to the Committee said this section should hold up in court because it was done very objectively.

Mr. Mangiafico asks if on the map, it looks like a category 3 vista.

Ms. Emery says no.

Mr. Mangiafico says to look at it.

Mr. Muir thinks it has yellow and pink coloring on top of each other.

Ms. Emery says it is in category 1.

Mr. Mangiafico thinks that it is category 1 by the bridge, and then it switches.

Ms. Emery says the category 1 view is the view from the bridge. She approaches and shows Mr. Mangiafico.

Attorney Bannon says with regard to the alleged conflict between the provisions of the ordinance, the Kittery Port Authority does advise the Kittery Planning Board and also does have review authority regarding piers, wharfs, etc. Even if you thought there was something wrong with 16.32.490 and that you should not enforce it, the administrative body has no discretion not to enforce an ordinance, which is to say that you can't ignore it just because you don't like it.

Mr. Muir says that if there is another that conflicts, you have to also enforce that.

Mr. Mangiafico assumes he is saying that the Kittery Port Authority gives advice and that where a review is required, that review is to be completed.

Attorney Bannon is glad that Attorney Cadigan brought up the language in 419. He shows that the Board is not determining whether the dock is too large in the abstract. The Board is deciding whether it is too large for the intended purpose. The Lantines wanted deep water access for their pleasure boat. The intended purpose was that. Therefore, the way you would apply the ordinance is that the wharf may not be larger than necessary to carry on the activity of deep water access for the pleasure boat.

Earldean Wells provides a letter to the Chairman White for him to read. It is dated July 8, 2005, and is already in the record.

Chairman White reads the letter aloud. The Kittery Conservation Commission is aware that over time, several homeowner associations have dissolved and covenants have been abandoned. The Conservation Commission requests that if the Kittery Planning Board grants approval of this application, that it list as a condition of approval that if the homeowner's association dissolves, the pier, ramp and float will become public access, along with a right of way from the road to the pier. Chairman White says that we will now close the public hearing.

Mr. Mangiafico says that as a point of order, we are closing the public comment portion, not the public hearing.

Ms. Kline says that Comp plan shows a mooring field in this location. She knows that comments were made in the Kittery Port Authority minutes that the waterfront homeowners were giving up their mooring rights. With this being a mooring field on our map for the town, did the Kittery Port Authority look at the map and find out that this proposed pier is outside of the mooring area. How close is it?

Mr. Mangiafico says it is close. That does not mean these people would not be allowed a mooring. There was no conflict with the existing moorings. The proposed pier would be in the mooring area for Lot 3 if it asked for a riparian mooring. Lots 2,3,and 4 do not currently have

moorings associated with them and they would most likely be given those rights.

Ms. Kline asks if this was discussed at the Kittery Port Authority.

Mr. Mangiafico says yes. There could be the possibility of additional moorings going in that it would further impact. For a riparian rights mooring, it is required to be out in front of your property, as near as possible to it.

Ms. Kline wants to know if Chairman Hall has any comments.

Chairman Hall says Mr. Mangiafico said it right.

Mr. Muir moves that we adjourn.

Ms. Kline seconds.

3 in favor of adjourning - Ms. Kline, Mr. Muir and Mr. Evancic. 3 opposed - Chairman White, Mr. Mangiafico and Ms. Gagner. Motion fails.

Mr. Muir then jokes that he moves to stay in session.

Chairman White thought that although we will not finish our deliberations tonight, we can do our initial thoughts and structure things. Are there any issues with standing or waivers that we want to look at preliminarily? A standing question was raised at some point. The applicant is Paul Hollis. Does our ordinance require that the applicant be an owner of the physical property on which the pier is to be placed?

Mr. Mangiafico says that we just need an agreement that the person can negotiate on behalf of the applicant.

Mr. Muir would normally think that the association would be a legal entity.

Attorney Bannon says that it is possible for the association to be the applicant, but it does not own anything, so it could not be. To have standing to apply, the applicant must be the owner or the agent for the owner. He hopes that the Board has in the file a series of agreements from the riparian owners authorizing Paul Hollis to act on their behalf on this issue.

Chairman White remembers this was addressed previously. He asks if the Board wants to look at waivers.

Mr. Mangiafico says first is scale and he sees no problem with that.

Chairman White asks if we have a plan that shows the current location.

Planner Noel says it is dated August 22.

Mr. Mangiafico says that is really the only waiver he thinks.

Chairman White asks if there is any pavement here.

It is confirmed that there is not.

Ms. Gagner says that in her site walk, she noticed the material of the meandering way was more of a crushed stone than what was previously discussed.

Ms. Kline says the concern would be that it would expand their paved surface area?

Mr. Mangiafico says that the DEP permit is in the package. Is the idea to put mulch on top of what is existing?

Mr. Nadeau says that the final material would be a mulch type identical to that used at Shepard's Cove. The path is not in because it is not approved. The temporary path was used to gain access to construct the swales. The idea was to naturally vegetate it back. The applicant obtained a DEP permit by rule. First, the applicant was advised that he might need a NERPA permit. They don't because of the permit by rule. It works for the path and proposed dock. They would create a meandering path consistent with NERPA. They intend to use material that is identical to that used at Shepard's Cove.

Attorney Bannon says the stones are temporary.

Chairman White does not know what order folks want to go in. The Board will need to do a

careful review of the covenants and may have some questions about how they will be enforced. He would like to hear the applicant's reaction to the Kittery Conservation Commission proposal that was just read into the record.

Mr. Nadeau says that they have not seen that proposal. It sounded interesting. They would like a chance to review it and respond in writing.

Attorney Bannon would recommend to his clients that a provision dealing with what could happen if the homeowners association disappears is appropriate.

Chairman White asks about enforceability of the covenants. There is the intensity of use - nine boats with motors, the fire chief wants a 4" water main, so he has concerns re fires. How do you deal with that? We have approved lots of covenants over time. A couple years later, the covenants are broken. We are really struggling with that issue going forward- how to require mechanisms that require enforceability. Does the Town have standing to enforce the covenants?

Attorney Bannon says if the applicant gives the Town authority to do it, it does. This is typical of DEP projects. The covenants will allow for enforcement by the DEP. The Kittery Planning Board could choose a third party to do it. There is no problem with the Kittery Planning Board requiring a third party to do it.

Mr. Hollis says that the homeowners cannot change the covenants on their own. They need to go before the Board.

Mr. Mangiafico says that requirement was in the initial covenants submitted.

Mr. Evancic did not hear anything in the presentation about the three people that own the land on the water saying that they could not put a boat on the water. He did not hear a restriction on them.

Attorney Bannon says that each of those lot owners has waived that and ceded to Mr. Hollis all riparian rights. That should be in the file.

Mr. Evancic says that they are talking about nine boats out there. Can they do smaller boats also?

Mr. Hollis says that if they don't want to do a boat, they can substitute two canoes or two kayaks.

Ms. Kline says that a member of the public brought up a statement made that in Maine, a boating facility that serves five or more recreational boats is a marina if it is a commercial enterprise or club.

Attorney Bannon would prefer to address that in writing to the Board.

Chairman White asks if Attorney Bannon got a copy of that.

Ms. Kline says it is a manual on nonpointsource pollution in Maine.

Attorney Bannon is provided with a copy of that.

Chairman White says another general task for the Board is to look to review the covenants in conjunction with the letter from Attorney McEachern.

Attorney Bannon is not sure what is a club. If the association is a club, it will comply with the point source pollution regulations. It does not prohibit clubs. It just says they are required to do best management practices. If it is a club, then it will comply.

Chairman White asks if there is a right of way application as part of this package. Was the right of way granted? Was there a change? He remembers one right along the property line.

Mr. Nadeau says that is unchanged. The 30' access easement is to gain access to the water and pier.

Mr. Mangiafico says that was signed in 2002.

Chairman White recalls a question about that in a recent hearing.

Mr. Mangiafico says that was about the width.

Ms. Kline says that it looks like 30' have been cleared and it was supposed to be 6'-8' wide meandering path.

Mr. Nadeau says the photos represent the footpath access from the water to the stormwater management swale. To construct the swale, they needed to gain access to lots 4 and 3. If approved, they would transform it to a 6'-8' wide meandering path.

Attorney Bannon says the applicant would accept as a condition of approval a replanting plan for the path.

Mr. Muir would like to go back to standing. There is a provision that the pier system will be maintained by the Homeowners' Association. It seems to him that the applicant should be the owner of the pier system and not the owner of the lot where the pier is attached or his agent. How can we deal with the Association if it is not a party to these hearings?

Attorney Bannon says that association has not been created yet because it has not been approved. It could be a condition of approval. The person who has standing is the owner of the lot or his agent.

Mr. Muir says that puts the particular owner of the lot in conversation with us.

Mr. Hollis says that by owning the lot, a person becomes a member of the association. This is a chicken and egg problem. They have not created the association.

Attorney Cadigan says that the association was formed on 5/10/04.

Mr. Nadeau says that there are two things. The lot owners waived their riparian rights and in doing so, gave their right to do this. At the Kittery Port Authority, the applicant was requested to provide evidence that it had this authority, and again this was requested by the Kittery Planning Board. There is a succession of people granting authority to the company to do this. They were signed by the owners of record at that time. All the owners of record signed. In some cases, the owner may be the developer.

Mr. Muir asks if the Board is happy with that. The developer is making arrangements on behalf of an entity that exists but is not operating.

Mr. Mangiafico says that the developer came up with the covenants with the assistance of the Kittery Port Authority.

Chairman White asks if same association will now be involved.

Mr. Nadeau says they are identical.

Chairman White says that we are about to adjourn by rule, so we must continue with this at the next available hearing slot.

3. PLANNER'S TIME

N/A

4. OLD BUSINESS: UPDATE FROM MEMBER EVANCIC ON OPEN SPACE COMMITTEE, UPDATE FROM MEMBER MANGIAFICO ON THE PORT AUTHORITY. OTHER BUSINESS AT THE DISCRETION OF THE CHAIRMAN.

N/A

5. ADJOURNMENT

Meeting ends by rule at 11:00 pm.