

**APPROVED**

**TOWN OF KITTERY  
BOARD OF APPEALS**

**December 13, 2005**

**Council Chamber**

**CALL TO ORDER:**

Chairman LaMarca called the meeting to order at 7:00 p.m.

**BOARD MEMBERS PRESENT:**

Brett Costa, Vern Gardner, Herb Kingsbury, Niles Pinkham, Janice Muir, Secretary and Michael LaMarca, Chairman

**ALSO PRESENT:**

CEO Heather Ross, Recorder Chris Kudym, Edward L. Hill, Dennis Marquis, Kathy Davis, Michael Langardner

Chairman LaMarca led those present in the Pledge of Allegiance. The Chairman then outlined the hearing procedure and read the Notice of Hearings.

**PUBLIC HEARINGS:**

1. Edward L. Hill requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 150.E.2 (page 2) to change an existing three car garage into a separate, single residential unit at property located at 14-16 Walker Street, Map 4, Lot 115, Kittery, zoned Kittery Foreside.

Chairman LaMarca told Mr. Hill the Board had his material but, if he wished, he was welcome to make a presentation. Mr. Hill said that basically they were trying to make their three family house a two family in order to make it more habitable. He said there would be no change in the footprint; they simply would be moving one family into the garage they wanted to remodel.

Chairman LaMarca asked if there was anyone present who wanted to speak in favor, in opposition or in any way about this. Receiving no response, the Chair requested CEO Ross' input. CEO Ross said this property was located within the Kittery Foreside Zone. She said that under the new regulation, there was a 5,000 square foot requirement per dwelling unit; this property contained 8,712 sq. ft. The Hills have been occupying the three family dwelling with one of the units connecting to another one and they wanted to move one of the families out to the garage. Because of the new zoning regulation, the unattached garage would be counted as a second building, making it nonconforming. CEO Ross said that prior to the new regulation, what they wanted to do would have been okay. She said that the Building Permit files in her office show the property had always been taxed as a three family.

Chairman LaMarca said he had no issue that it was always a three family but it seemed pretty black and white that their hands were tied because 16.28.120.B. said you could not extend use to another building. Mr. Pinkham asked when the zoning requirement had gone into effect and CEO Ross said September 6; Mr. Hill had not applied until after that change. Mr. Hill explained they had not received notification of the zoning change and that they had these plans back in the

summer. Chairman LaMarca said that if, prior to the zoning change they were conforming, this could have been done without even coming before the Board and CEO Ross said their records indicated the notification had gone out to the prior owner.

Ms. Muir said she apologized but the Board had to follow the Ordinance; if there was something in there that said he could do that, it would be fine, but the Ordinance was rather clear. Mr. Hill asked if there was any gray area since they never received notification. He said as soon as they bought the property, they had these plans and he had spoken with Jim Noel back in July and Mr. Noel never mentioned this to him. Mr. Hill said this wouldn't be an issue if they had put their application in just a couple of weeks earlier. Mr. Gardner said that the public notice covered the gray issue. Chairman LaMarca said he felt bad, that Mr. Hill kind of got caught up in the fact that the old owner didn't tell him, but the regulation was pretty black and white and even though it went into effect a short time ago, the Board couldn't do whatever they wanted.

Chairman LaMarca asked if there were any other questions and then asked for a motion to be made. Ms. Muir, as Secretary, read as follows: move that the application of Edward L. Hill to appeal the terms of Title 16, Section 12, Subsection 150.E.2 be approved to change an existing three car garage into a separate, single residential unit at property located at 14-16 Walker Street, Map 4, Lot 115, Kittery, zoned Kittery Foreside, construction to be in accordance with a plan submitted and signed and dated by Edward L. Hill and Michael LaMarca, Chairman. The Motion was made by Mr. Costa and seconded by Mr. Pinkham.

Chairman LaMarca asked for a show of hands vote. Due to a vote of 0/6, zero in favor/six opposed, the Motion failed and the application was denied.

Chairman LaMarca told the applicants he was sorry and informed them that they or any interested party with standing had 45 days to appeal the decision of the Board in York County Superior Court and Findings of Fact would go out to them within seven days.

2. Dennis Marquis, on behalf of Kathy Davis, requesting a Variance under Title 16, Section 12, Subsection 70.E.2 (page 2) to demolish an existing garage and build a new garage on new foundation and concrete slab at property located at 44 Woodlawn Avenue, Map 16, Lot 160, Kittery, zoned Village Residential/Urban Residential.

Chairman LaMarca invited Mr. Marquis to take the floor. Mr. Marquis said that as the application stated, they wanted to take down an existing garage and construct a new one and, although his application requested a Variance, it was really a Miscellaneous Appeal. The Chair acknowledged the change. Mr. Marquis said their desire was to upgrade the structure to better use.

Chairman LaMarca asked if there was anyone who would like to speak in favor, in opposition or in any way about the application. Receiving no response, he asked for the CEO's input. CEO Ross said this was a nonconforming lot with a nonconforming building located in both the Urban Residential and Village Residential zones. She said Mr. Marquis proposed to demolish the existing 12'x6' garage and construct a new 26'x14' garage using a new foundation and concrete slab. Although nonconforming due to a rear setback of eight feet where 15 feet required within the Urban Residential Zone, the new garage would be no closer to the property line than the existing garage. The CEO said that in the Village Residential Zone, the rear setback could go as low as three feet.

Mr. Gardner wondered if it would be a problem if the garage was moved to the other side of the house and CEO Ross said that it would since that would put the garage in the Urban Residential Zone, which required front setbacks of 30 feet and rear and side setbacks of 15 feet. Mr. Gardner

was concerned about how close it was to the corner and Mr. Pinkham pointed out that the driveway was there and so nothing was changing. Mr. Gardner's main concern was that they would be making something more nonconforming. Mr. Marquis said that moving it to the left where there was a ten-foot setback would put it really close to the house and make getting in and out difficult. Mr. Gardner said the question he had was the setback from road was 15 in that zone, the side was ten feet and if the garage were moved forward, it would be more conforming. Mr. Marquis said but then your vehicle would be sticking out in the road. Mr. Gardner said he was thinking about how much less snow he would to remove and Mr. Pinkham said somebody might end up with a double cab pick up truck trying to fit in there.

Chairman LaMarca said he looked at this as a "no closer than" and Mr. Costa said the side still met setbacks.

Ms. Muir, as Secretary, read as follows: move that the application of Dennis Marquis, on behalf of Kathy Davis, requesting a Miscellaneous Appeal under Title 16, Section 12, Subsection 70.E.2 be approved to demolish an existing garage and build a new garage on a new foundation and concrete slab at property located at 44 Woodlawn Avenue, Map 16, Lot 160, Kittery, zoned Village Residential/Urban Residential, construction to be in accordance with a plan submitted and signed and dated by Dennis Marquis and Michael LaMarca, Chairman. The Motion was made by Mr. Costa and seconded by Mr. Gardner.

Chairman LaMarca asked for a show of hands vote. The Motion was unanimously passed by a vote of 6/0, six in favor, zero opposed, and the application approved.

Chairman LaMarca informed the applicants that any interested party with standing could appeal the decision of the Board within 45 days at the York County Superior Court and that Findings of Fact would be out to them within seven days. The Chair further informed the applicants that this approval was not a granting of a building permit for which they would need to see the CEO but merely gave the CEO authority to issue said permit.

Chairman LaMarca then said the Board had received a request to speak with Mr. Langardner. Mr. Langardner came to the podium and addressed the Board saying that their plans to build Robert's Maine Grill had been approved last in March but since then, there had been a lawsuit. That lawsuit, he said, had been settled between himself and Ray Gagner, Sr. but part of the settlement impacted the building construction. Mr. Langardner said many of the changes were very subtle involving square footage and making the building smaller and much of that the CEO could approve, however, two particular issues needed to be passed by the Board in order to keep their original approval. He said he had sent Chairman LaMarca a letter and included some drawings that described those changes.

Mr. Langardner said the first of the two changes involved shifting the position of a staircase, a fire exit on the north side of the building 2' x 5/8" which did not involve enlarging the staircase, just shifting it. The result was no more square feet; it didn't bring the building any further into noncompliance or closer to the wetlands. The second change, Mr. Langardner said, was an addition. Because they made the building smaller, they also wanted to add a vestibule, which they had given up before.

Chairman LaMarca asked the CEO for her input. CEO Ross said this was a modification to an approved plan and part of the agreement with the Gagners. Chairman LaMarca asked if the Board had any questions and Mr. Gardner asked if the other parties had been advised of this meeting because, from a procedural standpoint, he wanted to make sure it wasn't being done in an ex-parte manner. CEO Ross said that, although no notice had been sent out, what was being presented had

been agreed upon by all the parties and approved by the Court. Chairman LaMarca said he agreed that they didn't want to get themselves in trouble but he thought that they could address that issue in letter format. The CEO said the Gagners had offered to hire their own building inspector to make sure construction met the requirements.

Mr. Kingsbury said he wasn't sure what it was since it wasn't a variance or a miscellaneous appeal and CEO Ross said it was a modification. Chairman LaMarca said they had worked with modifications before and it was not the same as an appeal; he didn't have a problem with it and knowing the history of the parties was confident of their dealings but did think that if it passed, they should include in their findings language indicating that approval was based on the court approved agreement. Mr. Gardner said he thought it should follow the same procedure as the original and simply modify that Appeal. Chairman LaMarca said they were not granting a new Appeal, they would be granting a modification under the original Appeal. Mr. Gardner said it was still a concern to him that the other side had not been notified, however, whether or not they agreed to it, it was the Court's decision and asked the CEO if the Town had a copy of that Decision which they could make part of their record. CEO Ross said she could put a copy of the Court Decree in the file and Mr. Gardner agreed as long as the Town was completely protected. Chairman LaMarca said he saw no problem with that.

Chairman LaMarca said what they were going to vote on, based on all the information presented, was approving an Amendment to the Building Permit allowing the Applicant to move the staircase and add a vestibule based on plans dated November 28, 2005. The Chair said he didn't believe anyone present had voted in opposition last time so they were all eligible to vote on this item. Ms. Muir, as Secretary, read as follows: move that the application of Michael Langardner to request an Amendment to the Building Permit to move the fire escape stairs on the north side of the building eastward by 2' 6 5/8" and also to put in an addition of a 67 square foot vestibule on the front the building according to plans dated November 28, 2005, construction to be in accordance with a sketch submitted and signed and dated by Michael Langardner and Michael LaMarca, Chairman. The Motion was made by Mr. Gardner and seconded by Mr. Costa.

Chairman LaMarca asked for a show of hands vote. The Motion was unanimously passed by a vote of 6/0, six in favor, zero opposed, and the modification approved.

Chairman LaMarca informed the applicant that any interested party with standing could appeal the decision of the Board within 45 days at the York County Superior Court and that Findings of Fact would be placed in the Town's file. The Chair further informed the applicant that this approval was not a granting of a building permit for which he would need to see the CEO but merely gave the CEO the authority to amend the existing permit.

Chairman LaMarca told the Board they were going to allow CEO Ross to leave and then told the CEO that the Board was going to vote on new Rules of Engagement and that he would get with her next week to talk about what to do with them.

#### FINDINGS OF FACT

##### 1. Edward L. Hill

1. This was a nonconforming lot with a newly nonconforming building.
2. This applicant wanted to move an apartment out of a three family dwelling, combine two of the units in the main house and move one unit into a detached garage.

CONCLUSIONS

1. After discussion and based on 16.28.120.B, the Board denied the Appeal.
2. Although the applicants were within the dimensional setbacks, what they wanted to do was relocate one apartment into a detached garage and the Ordinance specifically stated you could not extend use into other buildings on the lot.

FINDINGS OF FACT

2. Dennis Marquis, on behalf of Kathy Davis

1. This was a nonconforming lot with a nonconforming building.
2. The applicants wanted to demolish a 12'x6' garage and replace it with a 26'x14' garage.

CONCLUSIONS

1. The rear setback on the old garage was eight feet and remained eight feet on the new garage where 15 feet was required.
2. The Board found that, based on 16.28.130, that the building was no closer to the rear setback than it was before and approved the application.

FINDINGS OF FACT

Michael Langardner

1. This was a request not on the Agenda that the Board heard regarding an amendment to an appeal.
2. The applicant wanted to amend an appeal regarding his restaurant construction in order to move a fire escape staircase 2' 5 6/8" and to build a 67 square foot vestibule.

CONCLUSIONS

1. This modification would be based on a Consent Order issued by Superior Court Judge Arthur Brennan and an Agreement by all parties.
2. A copy of said Consent Order will be placed into the permanent record of the Zoning Board.
3. The Board voted unanimously to grant this Amendment.

Chairman LaMarca then directed the Board's attention to the "Rules of Engagement" they had gone over a few weeks ago, saying he wanted to discuss and approve them. He said he met with the Town Attorney who had made a few suggestions.

**POSTPONING AN APPEAL**

1. Chairman LaMarca said this was intended to make sure someone couldn't postpone the night of the meeting because they could tell how the Board was going to go; they didn't want that to

happen. The reasons for postponement were listed as either sickness of the applicant or witnesses needed to make the case, or a change in the facts or details that weren't available at the hearing.

2. Before we hear anything, the Chair said, they can cancel, postpone or whatever they want; this would apply more to once it was here and we've started - that's what this is really more about, they have to ask for it before testimony. Once it's started, it will go through to the end.

3. Here is something we discussed - lack of a full Board is not an excuse. What we decided was if there were five or less members, there had to be a good reason, having two people gone from the Board was not itself a reason.

Mr. Kingsbury said it should be five or fewer members and Mr. Gardner said that No. 2 stated that prior to testimony beginning, they could show up and see five, not have begun their testimony and then walk out the door. Chairman LaMarca said they had to ask, if they didn't ask for a postponement and they came for a meeting, they were on the Agenda.

Mr. Costa said the way they had done it before was that prior to the reading of the list, requests for postponement could be heard but once it was read on the docket, they were on. If they showed up at the beginning, before the docket, someone walked up and said they wanted to postpone. There was further discussion as to when requests for postponements should be made. Chairman LaMarca did not believe people would be inclined to interrupt proceedings before their turn. Mr. Gardner asked if that meant someone who came and was on the list, had their appeal read and then went to the podium, they could get a postponement? Chairman LaMarca said they would have to ask for it.

Mr. Kingsbury said they had to allow a postponement and Chairman LaMarca said the members of the Board would vote on it and just because someone asked for one didn't mean they would get it. Mr. Kingsbury suggested that the last two sentences of No. 3 should be made a paragraph by themselves in order to make the procedure for granting a postponement clear.

Mr. Gardner wondered if the public should be advised that when a postponement was requested, that meant the Board would vote on it. Chairman LaMarca asked why anyone would think it would be automatic. He said they could make a change in the paragraphs and adopt the document as changed and he would agree they could adopt it by having No. 3 say that the lack of a full Board was not an excuse but if the applicant could specifically explain why they needed to wait for a more populated Board, they could request a postponement. The next paragraph could then start with the Members of the Board would vote on whether or not to grant the postponement; then No. 4 would become No. 5.

Mr. Gardner wondered if the second sentence of No. 2 that talked about once the process had begun should be more general and Chairman LaMarca suggested they use the words once testimony had begun and Mr. Gardner agreed. Chairman LaMarca said applicants had to ask prior to testimony. He then said what he was going to do was, if they adopted these, he would give a copy of the changed language in his handwriting as well as a new one to be filed in the Town Offices.

Ms. Muir said she agreed with Mr. Gardner that the most important thing was that people understood what the process was and she thought it was very understandable from what was written. Chairman LaMarca then asked for a motion to adopt, as amended.

Mr. Kingsbury moved to adopt the Kittery Zoning Board of Appeals Rules for Postponing an Appeal, as Amended, seconded by Ms. Muir. A voice vote was taken, with all in favor. Motion passes 6/0, Rules were adopted, as amended.

**APPEALS OF A SIMILAR NATURE WITHIN ONE YEAR OF DENIAL**

Chairman LaMarca said this did not refer to a reconsideration. This rule applied to applicants who had come before them and were denied but they come before them again. The Chair said that some of this was already contained in the Code.

1. Applicants had one year from the time of a prior ZBA denial to file an appeal only if the project was sufficiently altered or changed to address the reasons for denial of the original appeal.
2. This rule makes it clear that the request must be in an original format and have the words **PRIOR ZBA DENIAL** written boldly on the front.
3. This rule says the applicant must indicate in writing the changes that address the reasons for the Board's original denial.
4. There should be no oral comment except by members of the ZBA who will be deciding if the needed changes are being adequately addressed and they may ask anyone in attendance any questions related to the changes but no one shall have the right to speak.
5. This rule states that a Board member who previously voted in the negative must make a motion to hear the new appeal. If, after discussion, no member makes such a motion, the Board's prior decision stands and the new appeal is not heard. If a motion is made to rehear, then it must have four "yes" votes to pass and if it passes, the Board will hold the hearing on the appeal at that meeting. Chairman LaMarca explained that originally they had said a majority of the people who voted "no" on the first appeal would have to vote "yes," but the Town Attorney had said once a motion was made, the whole Board was allowed to vote.

Mr. Costa said if someone significantly changed the plan, they ultimately had the right to be reheard. Chairman LaMarca said that was a request for reconsideration but in order to have an appeal of a similar nature, you had to change something. Mr. Costa said if they changed it, then the whole part of someone who voted no had to make a motion shouldn't be there. Chairman LaMarca said the Board had to decide if it was significantly changed. As with the people with the garage, he said, had to wait a whole year before they could bring another request for the garage on the property unless they addressed why the Board said no. Mr. Costa said that voting as to whether it was significantly changed should not have anything to do with whether you could vote on it. Chairman LaMarca said that applied only to making the Motion but the entire Board voted on the plan. Mr. Kingsbury said if you couldn't convince someone in the majority, it wasn't going to get passed.

Ms. Muir addressed the Chair and said, another thing, you said No. 5 was right out of the Code. Mr. LaMarca said, no, from Roberts Rules. Mr. Costa said that if a plan had been significantly changed, then whether you voted for or against it didn't matter, it was a clean slate and the whole Board looked at; although it was the same application, it wasn't the same application. Chairman LaMarca said that was right, but the reason that Roberts Rules did this was to prevent a minority voter from forcing a vote on something that would not be voted on - so what they're saying is if you want to do something like this, someone who was in the majority had to make the motion so someone in the minority couldn't drive things. Mr. Costa said if no one made the motion, he didn't agree with that because if four people were on the Board and two people voted no, the applicants come back to have the Board reconsider, now say there are five people, two people missing, one of whom voted no, that means only one person could vote to hear the plan, it should be voted on itself not be fueled by the vote of someone who voted no. Chairman LaMarca said that could technically happen and Mr. Costa said it happened with Meeting House Village, there was evidence he hadn't had before and nothing was changed, that was the difference but if someone significantly changes their application and somebody who previously voted no had the power to stop it from being heard, he didn't agree with that. Mr. Gardner said he supported his position. Mr. Costa said you're putting

into the hands of someone who voted no. Mr. Gardner said from a technical standpoint, he was absolutely correct. Mr. Costa said the Motion should be decided if it the plan had significantly changed. Chairman LaMarca said he would agree with that but he thought it should be motioned for consideration by someone who voted no and he believed Mr. Costa was confusing two things, they weren't talking about the vote of the person who said no because no matter who made the motion, the entire Board voted.

Chairman LaMarca asked for a vote from all those in favor of allowing anyone on the Board the ability to make the motion to hear an appeal of a similar nature rather than just someone who voted in the negative. The resulting vote was 4/2, four in favor (Board Members Costa, Gardner, Kingsbury, Pinkham), two opposed (Board Members LaMarca, Chairman, Muir, Secretary).

The language in No. 5 was changed by crossing out the words in the first sentence "who voted in the negative on the first appeal."

6. This rule applied to the order in which a rehearing would appear on the Agenda.

Chairman LaMarca asked for a motion to accept, as amended. Mr. Kingsbury moved to adopt the Kittery Zoning Board of Appeals Rules for Rehearing Appeals Within One Year of Denial, as Amended, seconded by Mr. Gardner. A voice vote was taken, with all in favor. Motion passes 6/0, Rules were adopted, as amended.

#### REQUEST FOR RECONSIDERATION

Chairman LaMarca directed the Board's attention to the document concerning requests for reconsideration, saying this was almost identical to the last one.

1. The State Rule says they have ten days to request it.

2. The only difference in the application, which was not changed in anyway, was to have the word "Reconsideration" prominently written on the front of it.

3. Chairman LaMarca said the legal advice he received was to include a stipulation that any interested party had to have attended the first hearing either personally, through a representative, or have commented in writing; there could be no new interested party.

4. This item stated that an applicant must present writing and/or documents that followed the two standards by which the Board would decide whether or not to rehear the appeal:

a. New evidence or law that could have altered the Board's decision;

b. There must be an explanation of why this new evidence or law was not presented at the first hearing.

Chairman LaMarca said that the Board would decide whether or not it knew about the new evidence or law being presented and that would be good enough.

5. This item was the same – no oral comments.

6. Per previous discussion, language was changed taking out wording referring to the need for a motion being made by a Board Member who had previously voted in the negative.

7. This item was the same.

8. This item states that all hearings being reconsidered would follow the same rules and procedures as the original.

Discussion followed concerning the uses of either a reconsideration and a rehearing within one year and the fact that Meeting House Village had come before the Board four times. Chairman LaMarca then asked for a motion to accept.

Mr. Pinkham moved to adopt the Kittery Zoning Board of Appeals Rules for Request for Reconsideration, as Amended, seconded by Mr. Mr. Costa. A voice vote was taken, with all in favor. Motion passes 6/0, Rules were adopted, as amended.

**APPEAL PROCEDURES LIST**

Chairman LaMarca said that the last one was fairly simple and this list was posted in the room potential applicants came to get an application. He said that 90% of them were taken directly from the Code so they couldn't change them if they wanted.

1, 2, 3, 4 and 5 came from the Code.

6 did not come from the Code but was added to the list

7 was added to the list.

8, 9, and 10 came from the Code.

11 was in the Code with the exception of how the materials were distributed. Mr. Kingsbury said he read it that they stopped by Town Hall to see if anything had shown up. Chairman LaMarca said that abutters had up to five days before the hearing for submissions. There was further discussion about how distribution could conveniently be made.

12 was something they had always allowed but, under no circumstances, would written materials be accepted.

13 indicated that correspondence from other Town Boards could be presented up to and including the hearing but, in addition, any such correspondence should be copied to the CEO for inclusion into the record. There was discussion concerning the use of e-mail and how information was received. Chairman LaMarca said he would include in this item that the correspondence would first of all go, in written form, to the CEO for inclusion into the official record and then to the Chairman who would forward all correspondence to the members of the Board.

14 was read by Chairman LaMarca and discussion followed concerning possible problems.

Ms. Muir moved to approve the Kittery Zoning Board of Appeals Appeal Procedures List, seconded by Mr. Kingsbury. A voice vote was taken, with all in favor. Motion passes 6/0, List was adopted.

Chairman LaMarca thanked the Board and said he would rewrite the documents to include the changes and get a copy to everyone. After some discussion, Ms. Muir suggested that a type of file be set up in the room where applications were obtained so that the appropriate set of rules were made available to any potential applicant.

Mr. Costa made a motion to adjourn, seconded by Mr. Pinkham.

*MEETING ADJOURNED AT 8:49 P.M.*