**APPROVED MINUTES**

# TOWN OF KITTERY
# BOARD OF APPEALS

**November 14, 2006** **Council Chamber**

CALL TO ORDER:

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

BOARD MEMBERS PRESENT:

Vern Gardner, Herb Kingsbury, Niles Pinkham, Craig Wilson, Sarah Brown, Secretary, and Michael LaMarca, Chairman

ALSO PRESENT:

CEO Heather Ross, Recorder Chris Kudym, Charles Case, Sherry Walworth, Art and Christine Robichaud, Brad and Carolyn Morrison, Steve Taylor, David E. Chenell, Paul R. Bacon

Chairman LaMarca introduced the members of the Board, outlined the hearing procedure, led those present in the Pledge of Allegiance and read the Notice of Hearings. The Chair then informed those present that they had received a letter from the Howells requesting that their appeal be postponed until November 28, 2006.

PUBLIC HEARINGS:

1 Charlie Case and Sherry Walworth, Art and Christine Robichaud, and Brad and Carolyn Morrison requesting an Administrative Appeal to the terms of Title 16, Section 32, Subsection 1170 (Page 434) of the Kittery Land Use and Development Code Zoning Ordinance in order to reverse the Code Enforcement Officer's approval of a Minor Home Occupation due to (1) Code requirements not being met and an incomplete application being submitted <u>or</u> (2) a reconsideration by the ZBA of conditions A through H, as outlined by abutters and as deemed relevant by the Board, regarding property located at 7 Keene Terrace, Map 10, Lot 13, Kittery, zoned Urban Residential and Shoreland Zones.

2. David E Chenell requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 110.E 5 (Page 287) of the Kittery Land Use and Development Code Zoning Ordinance in order to add to and update outdated cabin at property located at 59 Old Post Road, Map 8, Lot 8, Kittery, zoned C-3.

3. Paul R Bacon requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490.K 2 (Page 380) of the Kittery Land Use and Development Code Zoning Ordinance in order to renovate an illegal four story 3-plex dwelling unit into a legal 2-plex dwelling unit by eliminating fourth floor, raising third floor ceilings, and making each unit similar in size and usefulness by adding dormers at property located at 17 Water Street, Map 1, Lot 47, zoned Kittery Foreside.

(4) The Home Occupation did not meet 16.32.1170.J and L or 16.32.1180.J and L for traffic and safety;

(5) The Home Occupation did not meet 16.32.1180.M, Neighborhood Compatibility; and

(6) The Home Occupation did not meet 16.32.1160, Purpose.

Mr. Case concluded by saying that, due to uncertainty and conflicting data, the abutters were alarmed about the possible size and scope of Mr. Mangiafico's fishing business. Mr. Mangiafico's intended investment business, he said, was a good example of a low impact business, however, the planned fishing ventures were not. The abutters were concerned that the CEO may not have had all the necessary information about these proposed businesses or the limitations on dock use and hoped the ZBA would overturn her approval of them.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of the application.

Steve Taylor from Badgers Island approached the podium saying he did not know any of the people involved in this issue but wanted to correct some misinformation he heard about commercial fishing. Mr. Taylor explained that you needed a Federal or State permit to do any type of fishing whatsoever and the permit Mr. Mangiafico had was for the lowest impact type of fishing you could get. With regard to tuna fishing, that was very common for people in Kittery and was extremely seasonal. Mr. Mangiafico had mentioned possibly doing commercial lobstering and Mr. Taylor said he was a commercial lobsterman and explained to the Board that in order to get a commercial license, you needed at least 200 hours on somebody's boat, then you were put on a waiting list and five people had to retire before one commercial license was granted, so Mr. Mangiafico would likely be a very old man before he got a license; the type of fishing Mr. Mangiafico was talking about was not going to impact anything.

Chairman LaMarca asked if there was anyone present who would like to speak opposed to the application.

Scott Mangiafico came to the podium and told the Board he looked at this as more abutters not getting along rather than having anything to do with the Code and, as Vice Chairman of the Kittery Planning Board and their representative to the Port Authority, he was very well aware of the Code and was not aware of any violations of it on his property, although he wasn't very happy with how it presently looked; he had been working on another property trying to put that on the market.

Mr. Mangiafico explained that he met extensively with the CEO, who diligently went over his application and the Code line by line, including whether or not it fit a minor home occupation. The abutters presently had a lawsuit against him trying to prohibit him from doing anything of a commercial nature on Keene Terrace. Although it was called commercial fishing, this was a home occupation and his property was a residence and would remain a residence.

After researching lobstering, he decided it wouldn't work; he looked into aquaculture but because of pollution decided against that. In speaking with the CEO, he said he detailed his present permits and everything he was planning to do. Mr. Mangiafico noted that his property was a legal nonconforming lot, which had grandfathered setbacks. He also stated that the type of traffic concerns expressed by the abutters referred to an aquaculture business, which was not even on the table.

Referring to issues with his pier, Mr. Mangiafico explained that it was an approved residential pier, with two floats on the side, being used for a residence and small home occupation, not a commercial pier, and also told the Board he was approved for a 12'x22' float.

Concluding, Mr. Mangiafico said this was a small operation and really not a Code issue; he was really not sure what the CEO would be presenting but would like to have the opportunity to answer any of the Board's questions as they came up.

Chairman LaMarca asked if there was anyone present who would like to speak about the application in any way and receiving no response, requested the CEO's report.

CEO Ross reported that this was a nonconforming structure on a nonconforming lot located within the Urban Residential and Shoreland Zones. On August 31, 2006, she issued an approval to allow both a fishing and investment business on the property as minor home occupations and that approval was based on several stipulations. The applicants were requesting that the Board reverse her decision to allow the home occupations and to limit any approval for the investment business.

Chairman LaMarca indicated that they had heard a lot of information that had nothing to do with the application, which was an Administrative Appeal. The Board needed to decide if, as alleged, the CEO made an error by approving the minor home occupations and that they could uphold, modify or reverse that decision.

Mr. Wilson thought what they were supposed to do was not question the CEO's judgment about a particular item but determine if she followed the rules. The Board might disagree with her judgment concerning, for example, the issue of safety but the question they had to determine was if the CEO looked at the facts and considered the issue.

Ms. Brown thought the Board absolutely had a right to modify and put conditions under any of the listed criteria and not simply check to see if the CEO did her job. She thought the Board should go over all of the criteria as if they were approving it and noted that she thought minor and major home occupations always had to come before the Board for approval. The CEO said, by ordinance, a minor home occupation came through her office; a major home occupation had to go through the ZBA.

Chairman LaMarca referred to 16.32.1170.A through L and listed each item for discussion.

A. Regarding the percentage of property used for business, the abutters indicated it was 89%, which Mr. Mangiafico refuted. The CEO stated that, in her judgment, the majority of the use was residential.

Messrs. Gardner, Kingsbury, Pinkham, Wilson and Ms. Brown noted they had visited the property.

The Chair requested a vote from the Board indicating that they did not have a problem with the applicant being a resident. The vote was as follows: 5/0/0, five in favor, zero opposed, one abstention, Ms. Brown abstaining. The Chair then requested a vote indicating a belief that, as described, this use was wholly an accessory use for the home occupation.

Mr. Wilson pointed out for the record his opinion that 89% of 100% being commercial was unrealistic and was persuaded by visiting the site and by testimony that it was an accessory use and not excessive either qualitatively or quantitatively

The vote regarding accessory usage was as follows: 6/0, six in favor, zero opposed.

B. Regarding number of workers, the Chair noted a stipulation on the approval of only one employee for the fishing business and no employees for the investment business. He then asked about contractors. The CEO replied that her approval may not have been explicit on that but covered one person working for the business, whether by contract or directly paid by the owner. The Chair asked the Board if they would be comfortable with stating, "only you, as the property owner, and no more than one employee or contractor are to be allowed to operate this business on this site." The Chair requested a vote on the amended language, which was as follows: 6/0, six in favor, zero opposed.

C. Regarding prohibited uses, the homeowner indicated that seafood processing and cleaning would occur mostly at the Portsmouth Co-op. The Chair requested a vote indicating the Board felt there was no issue with this item. The vote was as follows: 6/0, six in favor, zero opposed.

D. Regarding business hours, Ms. Brown thought they should insert a stipulation about no clients or customers. Mr. Wilson stated they could not put conditions that were contrary to the Code unless the home occupation person accepted those conditions. Chairman LaMarca stated they had already reduced his ability to have more than one employee or contractor on the premises and they were talking about business hours; he didn't believe it would be legal for the Board to put a stipulation like that on. The Chair then asked for a vote indicating a belief there was no problem with this item. The vote was as follows: 5/1, five in favor, one opposed, Ms. Brown opposed.

E. Regarding nuisances, the Chair thought they were probably referring here to the smell and indicated that a stipulation had been on the approval that all bait was to be kept indoors and refrigerated or otherwise stored to prevent offensive odors. The Chair explained that if the abutters felt Mr. Mangiafico violated any of these rules, they could file a complaint; the Board's job was to determine if the CEO took these rules into consideration when making her judgment. The Chair requested a vote indicating there was not a problem with this item. The vote was as follows: 6/0, six in favor, zero opposed.

F. Parking. According to a vote of 6/0, six in favor, zero opposed, the Board did not see a problem with this item.

G. Regarding outdoor storage, there was discussion about whether the term licensed motor vehicle included boats. The Chair stated he thought Mr. Mangiafico's use of the premises was allowed under this item and requested a vote indicating the Board felt there was no problem. The vote was as follows: 5/1, five in favor, one opposed, Ms. Brown opposed.

Regarding H., Business Conduct and I., Refuse, the Board indicated there were no issues by a vote of 6/0, six in favor, zero opposed.

J. Traffic. Ms. Brown indicated the difficulty she had driving in that area because of how tight the location was and expressed that this traffic/safety issue was the one that caused her to wonder whether or not this was properly looked at. The Chair believed the CEO considered this by restricting her approval to one employee and one extra vehicle, as well as the restriction of no incoming clients or customers. The Chair then asked for a vote to indicate that traffic would not be an issue. The vote was as follows: 4/1/1, four in favor, one opposed, one abstention, Ms. Brown opposed, Mr. Gardner abstaining.

K. Regarding retail sales, the Chair noted that selling fish from his home would be prohibited and Mr. Pinkham also thought that if Mr. Mangiafico got into the business of rehabbing boats, that was not part of the home occupation and would be an illegal procedure. Ms. Brown thought there was a lot of ambiguity in Mr. Mangiafico's application and was concerned about what he might decide in the future. CEO Ross explained that permission had been granted based on the specific information provided and applied only to those two businesses; if any changes occurred, Mr. Mangiafico would have to come back before the Board. The Chair asked for a vote indicating the Board had no problem with this item. The vote was as follows: 6/0, six in favor, zero opposed.

L. Regarding health and safety, Mr. Gardner said this issue bothered him a bit because he had problems turning his vehicle out of driveway, although this would not burden the area any more than it was. However, one of the things that bothered him was the entire home occupation thing. They lived in Kittery and had a lot of fishing, it was just the nature of their community, but a home occupation was not supposed to intrude upon a residential setting and he didn't know if this situation applied or not. He didn't see it as being so critical that he would not vote for it but wanted to bring those things up.

Mr. Pinkham wondered if there was a way for Mr. Mangiafico to move his Boston Whaler and trailer to another property and Mr. Mangiafico explained they were there temporarily and he had to wait until the ground froze in order to move them.

Chairman LaMarca asked for a vote indicating the belief that the approval of this minor use would not create a health or safety hazard. The vote was as follows: 4/1/1, four in favor, one opposed, one abstention, Ms. Brown opposed, Mr. Gardner abstaining.

Chairman LaMarca then asked for a moving of the application. Ms. Brown wanted to state for the record that she didn't really have an issue with all of the things associated with the fact that it might be unsightly or that there were too many things in the yard because she did think Mr. Mangiafico had the right to have all those things. She would be voting in favor of the application of the abutters solely on the safety and traffic issue. Following Ms. Brown's comment, Mr. Pinkham noted that if Mr. Mangiafico had an employee or anyone coming in on a regular basis, they needed to be educated in how to use their car mirror to safely egress the property.

Ms. Brown, as secretary, read the application as follows: Move the application of Charlie Case and Sherry Walworth, Art and Christine Robichaud, and Brad and Carolyn Morrison requesting an Administrative Appeal to the terms of Title 16, Section 32, Subsection 1170 (Page 434) of the Kittery Land Use and Development Code Zoning Ordinance be approved in order to reverse the Code Enforcement Officer's approval of a Minor Home Occupation due to (1) Code requirements not being met and an incomplete application being submitted <u>or</u> (2) a reconsideration by the ZBA of conditions A through H, as outlined by abutters and as deemed relevant by the Board, regarding property located

at 7 Keene Terrace, Map 10, Lot 13, Kittery, zoned Urban Residential and Shoreland Zones, with the additional stipulation under the fishing operation that only the property owner and no more than one employee or contractor are allowed to operate this business on site.

Chairman LaMarca said that a yes vote upheld the application and overturned the CEO's permission; a no vote would leave the CEO's permission in place with the added stipulation. The Chair then asked for vote from the Board.

*A SHOW OF HANDS RESULTED IN A VOTE OF 1/5, ONE IN FAVOR, FIVE OPPOSED, WITH MESSRS. GARDNER, KINGSBURY, PINKHAM, WILSON AND CHAIRMAN LAMARCA OPPOSED. APPLICATION DENIED.*

Chairman LaMarca informed the applicants that any interested party of standing had 45 days to appeal the decision of this Board at the York County Superior Court and that they would try to get Findings of Fact out within seven days of tonight's hearing.

*FINDINGS OF FACT*
*Application #1 – Case/Walworth*

1. *This appeal involved a nonconforming lot with nonconforming structure.*

2. *The applicants were looking for an Administrative Appeal regarding the CEO's decision to allow a Minor Home Occupation.*

3. *The Board heard testimony from both the applicants and the homeowner regarding what the home occupation was being used for and what was going on at the property.*

*CONCLUSIONS*

1. *The Board added a stipulation to the CEO's conditions of approval that, regarding the fishing operation, only the property owner and no more than one employee or contractor was allowed to operate the business on site.*

2. *After reviewing the criteria for a Home Occupation under 16.32.1170.A through L, the Board found by a vote of 1/5, with Messrs. Gardner, Kingsbury, Pinkham, Wilson and Chairman LaMarca opposed, that the CEO made an appropriate ruling and denied the application.*

*A motion to accept the Findings of Fact, as written, was made by Mr. Wilson, seconded by Mr. Kingsbury, with all in favor.*

2. David E. Chenell requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 110.E.5 (Page 287) of the Kittery Land Use and Development Code Zoning Ordinance in order to add to and update outdated cabin at property located at 59 Old Post Road, Map 8, Lot 8, Kittery, zoned C-3.

Mr. Chenell came to the podium and told the Board he wanted to update a 50-year old cabin and enlarge it going toward his property and not the property line.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of, opposed to, or about the application in any way. Receiving no response, the Chair requested the CEO's report.

CEO Ross reported that this was a conforming lot with nonconforming structures located within the Commercial-3 Zone. The C-3 Zone required a 50-foot minimum front setback and minimum 30-foot side and rear setbacks. Mr. Chenell was proposing to construct an addition onto a cabin located six feet from the side property line and 25 feet from the front property line. The proposed addition would extend no closer than what currently existed and Mr. Chenell owned the adjoining property.

Ms. Brown asked for the record the exact size of the cabin now and the exact size after it was redone. The CEO explained that it was an odd shape and referred to a submitted sketch.

Mr. Gardner had visited the property and asked if the CEO agreed with the stated 25 feet and she said she agreed it was probably correct.

Ms. Brown had also visited the property and confirmed that Mr. Chenell's plan was not to tear down the building.

Mr. Kingsbury asked if the cabins were rented seasonally. Mr. Chenell said they were all year-round rentals except this particular one that needed to be redone.

Mr. Wilson noted that the cabins did not have the square footage to be called a dwelling unit that could be leased or rented on a yearly basis and Mr. Chenell explained that there were no kitchens in the units, they were all definitely cabins that were rented at different rates throughout the year. Mr. Wilson said that based on the fact it would be no closer than what presently existed, he saw no problem at all with the application.

Ms. Brown asked about the cumulative effect of expansion over time. The Chair replied that if it wasn't in a wetland, he could keep expanding it until he reached the point of lot coverage.

Ms. Brown, as secretary, read the application as follows: Move the application of David E. Chenell requesting a Miscellaneous Appeal to the terms of Title 16, Section 12, Subsection 110.E.5 (Page 287) of the Kittery Land Use and Development Code Zoning Ordinance in order to add to and update outdated cabin at property located at 59 Old Post Road, Map 8, Lot 8, Kittery, zoned C-3. Construction shall be in accordance with a sketch submitted, dated and signed by David E. Chenell and Michael LaMarca, Chairman. A motion to approve the application was made by Mr. Gardner, seconded by Mr. Wilson.

*A SHOW OF HANDS RESULTED IN A UNANIMOUS VOTE IN FAVOR. MOTION PASSES 6/0. APPLICATION APPROVED.*

Chairman LaMarca informed the applicant that any interested party of standing had 45 days to appeal the decision of this Board at the York County Superior Court and that they would try to get Findings of Fact out within seven days of tonight's hearing.

The Chair further informed the applicant that this approval was not the granting of a Building Permit as he would still need to see the CEO for such Permit, it merely granted the CEO authority to issue the same.

*FINDINGS OF FACT*
*Application #2 – David E. Chenell*

1. *The applicant was looking to expand an existing cabin on site from approximately 398 square feet to approximately 625 square feet.*

2. *The expansion would be into the property and no closer to either of the existing property lines.*

*CONCLUSIONS*

1. *Based on 16.28.130, the Board found that this was a "no closer than" situation and voted 6/0 in favor of granting the application.*

*A motion to accept the Findings of Fact, as written, was made by Mr. Wilson, seconded by Mr. Pinkham, with all in favor.*

*Recess called: 9:30 p.m.*
*Back to order: 9:36 p.m.*

Chairman LaMarca noted that the following two applications appeared to be identical but had differences. The Chair said he would read the applications and then break with procedure by asking the CEO to explain them before the Board heard from the applicant.

3. Paul R. Bacon requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490.K.2 (Page 380) of the Kittery Land Use and Development Code Zoning Ordinance in order to renovate an illegal four story 3-plex dwelling unit into a legal 2-plex dwelling unit by eliminating fourth floor, raising third floor ceilings, and making each unit similar in size and usefulness by adding dormers at property located at 17 Water Street, Map 1, Lot 47, zoned Kittery Foreside.

4. Paul R. Bacon requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490.N.2.a (Page 388), Title 16, Section 32, Subsection 490.N.2.b (Page 388) and Title 16, Section 32, Subsection 490.K.2 (Page 380) of the Kittery Land Use and Development

Code Zoning Ordinance in order to restore original architectural features and reconstruct rotted decks at property located at 17 Water Street, Map 1, Lot 47, zoned Kittery Foreside.

CEO Ross explained that this involved the third floor having full dormers at the front elevation, new gables at the right, left and rear elevations, a deck on the third floor and also a second floor bay window coming out several feet, bringing it closer to the property line than what already existed. The CEO further explained that the applicant desired to have approval for both applications but decided to request permission for the first application, which, basically, needed review under the 30% rule, and if he was successful, would go on to request approval of the second application, which needed review for encroachment.

Paul Bacon introduced himself to the Board, saying he was a new resident of Kittery and that he had often driven by the subject property thinking he would like to refurbish it because he loved its shape. The building was rundown and had not been updated or maintained for a long time and he wanted to turn it back into a two unit while making every effort to maintain the architectural features of the building.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of, opposed to, or about the application in any way. Receiving no response, the Chair requested the CEO's report.

CEO Ross reported that this was a nonconforming structure on a nonconforming lot located within the Kittery Foreside and Shoreland Zones. The Kittery Foreside Zone required a 75-foot setback from water bodies and a ten-foot setback from front property lines; because this property bordered on two streets, it had two front property lines. Title 16.32.490.K.2 specified that after January 1,1989, any portion of a structure that was less than the required setback, that portion of the structure could not be expanded in floor area or volume by 30% or more during the lifetime of the structure. The volume expansions seemed to be getting no closer to the property lines or water body than what already existed; the second floor bay window area did extend closer to property lines than currently existed and she didn't know if that was an aspect the Board might want to ask the applicant to remove because she thought it would have to be a Variance. Another aspect was a covered side porch entry way shown on proposed drawings but not included in any of the submitted information for either appeal; anything other than a 3'x3' landing and stairs would require ZBA approval.

Mr. Kingsbury questioned Mr. Bacon about the layout of the house and if he was planning to use the basement. Mr. Bacon explained how he planned the split of the house and that the basement would be used for storage.

Mr. Gardner asked if space created by the top gable dormer above the ridge board would be used as an apartment and Mr. Bacon explained that it was attic space and necessary in order to carry the appropriate span for a ceiling for the third floor. Mr. Gardner then asked the applicant if he had started construction on the deck, noting he had driven by the property and saw what looked like new construction. Mr. Bacon replied that the proposed deck was not under construction. They ended up having to take down the deck that had been there because it was falling off the building making it too dangerous to work on and what was presently there as new timber was just staging.

Mr. Kingsbury asked CEO Ross if the entrance way facing the driveway would be a problem with the Code and the CEO replied that it met the ten-foot setback but not the 75 from the water; that was part of an expansion and would have to be reviewed by the Board either under this first application, which is what she recommended, or under the next.

Mr. Wilson asked CEO Ross if it was a 36" wide covered entry, would it be allowed? The CEO explained that NFPA regulations stated a minimum 36" squared landing so even if it didn't meet a setback, they would allow a 36" landing for safety reasons but once it was covered, it was considered a structure and needed to meet setbacks.

*Mr. Wilson made a motion to extend the meeting to 11:00 p.m., seconded by Mr Gardner, with all in favor.*

Chairman LaMarca said they would talk about the dormers and the bay window first and asked the Board if there were questions or concerns about the dormers.

Mr. Kingsbury asked if the dormers had a problem with the 30% rule and the CEO noted there wasn't a problem vertically and volume-wise they were at 9.6%, with a reduction in square footage.

Chairman LaMarca directed the Board's attention to the bay window, stating that the issue was the fact it got closer to the property line and the only way they could do that was with a Variance.

CEO Ross noted they had not received any volume specific calculations. Mr. Bacon explained that he had done the calculations of all floor space that existed on each floor, measuring wall to wall, and had used that number. He also wanted to underline the fact that they were eliminating the fourth floor so there was an overall reduction in floor space.

Chairman LaMarca explained to Mr. Bacon that the issue was he hadn't recorded the existing floor space calculations. The Chair said he would be willing to state his belief that the existing volume number was correct and would approve it if Mr. Bacon could provide the CEO with a written record indicating how he got those calculations.

Mr. Pinkham noted they still had 20% to play with but the Chair didn't see how they could approve the bay window because it got closer to the property line, which would necessitate a Variance. They could, however, approve a "no closer than" and Mr. Wilson agreed.

Addressing Mr. Bacon, Chairman LaMarca suggested he put a regular window in there rather than a bay window. If he left the bay window as it was, the Chair explained that the Board would not approve the application but if he stated he would put just a regular window there, then the Board would have no problem with it. Mr. Bacon said they didn't actually need the bay window so it was not a big issue.

Mr. Wilson asked CEO Ross if the applicant would be allowed to have a roof overhang and the CEO replied, yes.

Mr. Pinkham suggested they could put a two foot bay shape over the flat window and

Mr. Bacon said he didn't want to sacrifice the project for a bay window.

Chairman LaMarca noted for the record that the applicant wanted to modify the plan for a regular window and overhang not to exceed 24 inches over the window and Mr. Bacon said that was acceptable.

The Chair then turned the Board's attention to the side porch, noting that the issue was not the side property line but that the structure was within the 75-foot boundary line of the water and by adding an appendage on the side that created a new building façade that was closer to the water.

Mr. Pinkham said he understood the "no closer" rule to mean no closer than the closest part of the building and thought they were now interpreting it differently.

Mr. Mangiafico, a Planning Board member, spoke from the audience explaining that he had helped to write that section of the Code. He told the Board it meant you looked at each façade, with the new portion getting no closer than the closest point of the structure and it had been the Planning Board's intent to follow the DEP regulations in this.

Chairman LaMarca noted for the record that the DEP issued a profile of nonconforming structures in shore land zones dated October 20, 2003, which referred to the 30% expansion rule. It basically talked about what zones or areas you could and could not expand and that it was pretty clear.

Ms. Brown thought they should also note the language in their Code and the Chair referred to Title 16.28.130.D.1 on Page 340, which indicated that an addition or expansion should not get any closer than the existing closest distance of each of the structure's facades to the normal high water line of a wetland it fronted.

Ms. Brown was concerned about the Board increasing a nonconformity but Mr. Pinkham and Mr. Wilson pointed out that this was "no closer than." Mr. Wilson further said that in some instances the Code allowed for an increase in nonconformity.

Chairman LaMarca stated that what they were now looking at were the dormers and this landing because Mr. Bacon had changed the window; the Chair then requested a moving of the application.

Ms. Brown, as secretary, read the application as follows: Move the application of Paul R. Bacon requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490.K.2 of the Kittery Land Use and Development Code Zoning Ordinance be approved in order to renovate an illegal four story 3-plex dwelling unit into a legal 2-plex dwelling unit by eliminating fourth floor, raising third floor ceilings, and making each unit similar in size and usefulness by adding dormers at property located at 17 Water Street, Map 1, Lot 47, zoned Kittery Foreside. Construction shall be in accordance with a sketch, which eliminates the bay window and includes the side covered porch entryway, submitted, dated and signed by Paul Bacon and Michael LaMarca, Chairman. A motion to approve the application was made by Mr. Pinkham, seconded by Mr. Gardner.

*A SHOW OF HANDS RESULTED IN A UNANIMOUS VOTE, SIX IN FAVOR, ZERO OPPOSED. MOTION PASSES 6/0. APPLICATION APPROVED.*

Chairman LaMarca informed the applicant that any interested party of standing had 45 days to appeal the decision of this Board at the York County Superior Court and that they would try to get Findings of Fact out within seven days of tonight's hearing.

The Chair further informed the applicant that this approval was not the granting of a Building Permit as he would still need to see the CEO for such Permit, it merely granted the CEO authority to issue the same.

*FINDINGS OF FACT*
*Application #3, Paul R. Bacon*

1. *The applicant was looking to add roof dormers, an upper deck and a front porch to his property, which was a nonconforming structure on a nonconforming lot.*

2. *The applicant voluntarily removed a proposed bay window from the Water Street side.*

*CONCLUSIONS*

1. *After deliberation, the Board found, per 16.28.130, that the existing additions were no closer than what presently existed.*

*A motion to accept Findings of Fact, as written, was made by Mr. Gardner, seconded by Mr. Kingsbury, with all in favor.*

Chairman LaMarca noted that they needed to amend the Findings of Fact to reflect that Board approval was given pursuant to Mr. Bacon's confirmation of prior and present volume calculations and including the front porch.

2. *The Board also determined that the additions did not increase volume by more than 30% and voted 6/0 in favor of granting the application based upon accurate existing volume numbers being provided to the CEO.*

*A motion to amend the Findings of Fact to include Board approval being pursuant to applicant providing accurate volume calculations was made by Mr. Pinkham, seconded by Mr. Wilson, with all in favor.*

Turning the Board's attention to Mr. Bacon's second application, Chairman LaMarca indicated on the provided map the part Mr. Bacon wanted to expand.

Mr. Bacon wanted to make sure that the Board understood that the foundation already existed.

Chairman LaMarca asked if there was anyone present who would like to speak in favor of, opposed to, or about the application in any way. Receiving no response, the Chair requested the CEO's report.

CEO Ross reported that this was a nonconforming structure on a nonconforming lot located with the Kittery Foreside Zone. The Kittery Foreside Zone required a 75-foot setback from water bodies and a ten-foot setback from front property lines. Mr. Bacon was proposing to construct a bay window and two access level decks. Although there was a bay foundation, once it was torn down, it ceased to exist and setbacks were required. The decks he was proposing were on the first and second floor, expanding 30 feet from the water and so were closer than the decks already existing.

Chairman LaMarca stated that this was not a Miscellaneous Appeal but a Variance and wanted Mr. Bacon to understand that if something was removed by a willful act of an owner, then it was removed and gone forever and now that he wanted to replace it, he was actually getting closer to the water so, procedurally, it was a Variance.

Mr. Pinkham noted that the foundation was there, even though the bay window wasn't, and wondered if that allowed him do something on the first floor. The Chair said the question though, was what he was proposing to build bigger? Mr. Bacon replied that the decks were but not the bay window.

The Chair wondered if having a foundation there meant that encroachment went into infinity and Mr. Pinkham noted that if it was there, common sense would say it would be hard to sell.

Mr. Gerard Green came forward and told the Board that he was doing the building on the site and explained that it was a collection of octagonal things with fieldstone and brick on top. They tried to photograph the foundation for the bay window but couldn't get a clear picture because it was under the deck and had all been painted brown. When you went inside the building, he said, it was obvious where the foundation was and welcomed to the Board to come and take a look at it. Mr. Green said the point was that there was a foundation and a floor; now, could walls go on top of the floor? The Chair agreed that was the question.

Mr. Wilson said if it had a foundation and then it had a floor over it, it became a deck and could they expand a deck? Mr. Niles said he would think they could expand vertically, as long as it was no closer. The Chair said that would obviously have to be proven and all the applicant wanted to do was go straight up.

CEO Ross pointed out that, to her, there had been a porch on the house that had been taken down by a willful act of the owner and Mr. Wilson noted that you couldn't take a deck and put walls on it. Mr. Kingsbury stated you could tear down your house and rebuild it with a thousand stories.

Mr. Pinkham said they had previously allowed people to demolish and rebuild and Ms. Brown noted that the Code said they had a year in which to do that, people couldn't do it whenever they felt like it.

Mr. Bacon appealed to the logic of the request for the bay window; these were small units so it was difficult to have enough space to put a table in there and have eating space. The Chair explained that it wasn't just the boundary, it was the water.

Chairman LaMarca stated that they had two issues, the deck and then the dormer. The deck, he said, was not going to go.

Mr. Bacon noted there were decks and the CEO explained they were referring to the proposed decks not going any closer. Mr. Bacon asked if that referred to living space and the Chair replied that was not the issue at all.

Ms. Brown said they needed to have the exact specifications of the deck because that was what they would allow.

Scott Mangiafico interjected to help clarify and said he would initially have agreed about the deck issue but when the Planning Board redid that section of the Code, they talked about structures, not buildings. The foundation was a structure; the top over that was considered a structure, as long as it was not closer to the water. Under the old interpretation, you could never take a deck and put a roof on it. However, he said, when making the change, the Code spoke about structures because the Board wanted to be all-inclusive, so they might be able to do it.

Mr. Kingsbury noted he didn't think they were going to resolve this in nine minutes and the Chair said they needed more information; Mr. Pinkham asked if they could continue this until the next meeting?

Chairman LaMarca stated that the problem was they didn't know what was there now and in order for them to grant a Miscellaneous Appeal; there had to be something in the submitted material.

Mr. Bacon explained that the first floor still existed and the Chair replied that without a roof, it didn't count. If there were two decks, that meant the bottom was covered and that was part of the building; they needed to know exactly what was there. Mr. Bacon said there was one deck on the first floor, one on the second floor and they were on the plan.

Mr. Pinkham said they had to stipulate it couldn't be bigger than what was there and Mr. Bacon said he accepted that. On the second floor deck they had put new boards up for safety but, he said, three weeks ago that had been a deck.

Chairman LaMarca noted that since he took the second floor deck down, the first floor was no longer a covered deck .

Mr. Bacon said the original posts were still there and he had pictures showing what was there three weeks ago.

Mr. Wilson said he would contend that the deck over dormer wasn't a structure but was a deck and could not be expanded into a building and so there could be no extension of that bay and the decks could only be what existed there now. Mr. Kingsbury agreed, as did Mr. Gardner.

Chairman LaMarca said if Mr. Bacon could prove to the CEO the decks were there, the bay could be there. Mr. Wilson didn't agree.

The Chair asked that the application be moved and told Mr. Bacon that if he changed his appeal, he could come back before them.

Mr. Wilson said he would be amenable if Mr. Bacon changed his application to just the decks but no bay and Mr. Bacon said he would take the decks for tonight.

The Chair asked the applicant if he was saying he wanted to change the application by removing the bay and requesting the decks with the stipulation they not be any closer to the water than what was there now and Mr. Bacon applied in the affirmative.

Ms. Brown, as secretary, read the application as follows: Move the application of Paul R. Bacon requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490.N.2.a, Title 16, Section 32, Subsection 490.N.2.b, and Title 16, Section 32, Subsection 490.K.2 of the Kittery Land Use and Development Code Zoning Ordinance be approved in order to restore original architectural features and reconstruct rotted decks at property located at 17 Water Street, Map 1, Lot 47, zoned Kittery Foreside. Construction, with the stipulation that the new bay windows that were proposed are not included and that the decks shall be no closer than the decks that already exist, shall be in accordance with a sketch submitted, dated and signed by Paul R. Bacon and Michael LaMarca, Chairman. A motion to approve the application, with stipulations, was moved by Mr. Gardner, seconded by Mr. Wilson.

*A SHOW OF HANDS RESULTED IN A UNANIMOUS VOTE, SIX IN FAVOR, ZERO OPPOSED. MOTION PASSES 6/0. APPLICATION APPROVED.*

Chairman LaMarca informed the applicant that any interested party of standing had 45 days to appeal the decision of this Board at the York County Superior Court and that they would try to get Findings of Fact out within seven days of tonight's hearing.

The Chair further informed the applicant that this approval was not the granting of a Building Permit as he would still need to see the CEO for such Permit, it merely granted the CEO authority to issue the same.

*FINDINGS OF FACT*
*Application #4 – Paul R. Bacon*

1. *This application involved a nonconforming structure on a nonconforming lot.*

2. *The applicant was looking to replace two decks on the waterside of the structure.*

*CONCLUSIONS*

1. *Per 16.28.130, the Board found that he could replace the existing decks but not the bay windows contained in the original drawing and voted 6/0 in favor of granting the application.*

*A motion to accept the Findings of Fact, as written, was made by Mr. Gardner, seconded by Mr. Pinkham, with all in favor.*

ADJOURNMENT:

*A motion to adjourn was made by Chairman LaMarca, seconded by Mr. Gardner, with all in favor.*

*MEETING ADJOURNED: 11:00 P.M.*