

Town of Kittery  
Zoning Board of Appeals  
July 22, 2008

Call to Order: 7:02 pm

**Members present:** Vern Gardner, Chairman; Craig Wilson, Brett Costa, Bob Kaszynski, Niles Pinkham, Thomas Battcock-Emerson

**Members absent:** Herb Kingsbury

**Staff:** Heather Ross, CEO; Jan Fisk, Recorder

Pledge to the Flag

**Minutes:** Minutes were not reviewed.

**Tom Emerson** inquired about the Eckel property. The CEO confirmed that an 80B complaint had been filed by the Town

**Chairman Gardner** voted to approve minutes of April 22 and May 13, 2008 with changes.

**Bob Kaszynski** suggested old business be moved to the end of the meeting to allow applicants and their representatives time to present at the beginning of the meeting rather than have to wait while the Board attends to administrative functions.

**PUBLIC HEARING**

**ITEM 1** - Steve Leonard for Jonathan Shafmaster requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 595B2B (Page 338), Title 16, Section 32, Subsection 580A (Page 335), and Title 16, Section 32, Subsection 580C (Page 335), of the Kittery Land Use and Development Code Zoning Ordinance in order to obtain approval where the ZBA is authorized to grant permission for a reasonable replacement of an existing non-conforming sign with a new code compliant sign. Located at 284 U.S. Route 1, Kittery, Map 31 Lot 6, in the Commercial 1 Zone. 31-6-08-18

**Jon Shafmaster**, Maine Gate Outlet Mall, stated he is petitioning for a 6' increase in the height of an existing sign which currently stands 11' high and the zoning ordinance allows a height of 20', requesting a total height of 17' which is 15% lower than what is allowed. Raising the height of the sign will make it more visible and the increase will result in no obstruction of site lines and is a plus for drivers.

Chairman Gardner opened the item to the public for comment. There being none, Heather Ross, CEO, noted that the applicant originally requested a new sign and Town counsel recommended that ZBA review the application for areas of nonconformance.

1. Title 16 Section 32, 580A (page 335) states: *All signs must be permanently installed on the premises of the activity to which the advertising message refers, except where Section 16.32.605 provides otherwise or upon approval by the town council.* The proposed sign is not located on the property, but on an adjacent piece of land owned by the state.
2. Title 16, Section 32.580C (page 335) states: *Except for signs authorized in Sections 16.32.605 and 16.32.615, freestanding signs erected after October 11, 1997 must be located at least thirty three (33) feet from the centerline of any U.S. or state numbered highway less than sixty-six feet (55) feet in width, and at least twenty (20) feet from the outside edge of the paved portion of any travel lane of any U.S. or state numbered highway which has both more than two travel lanes and a total paved portion in excess of*

*twenty-four (24) feet in width.* The sign currently is located approximately 16' from the outside travel edge of the road where 20 feet is required.

3. Title 16, Section 32.595B2b (page 338) states: *The development is allowed one freestanding sign not greater than one hundred fifty (150) feet in sign area.* The proposed sign is approximately 196 square feet total where 150 square feet is allowed.

There was discussion as to whether the applicant intended to replace the existing sign or to merely raise the existing sign.

**Jon Shafmaster** noted that the existing sign will be raised 6 feet using the two outside posts, but will use the single post if preferred by the ZBA. The State allowed placement of sign at the location in exchange for land, approximately 30 years ago.

**Craig Wilson** cited section 16.32.625 (page 338) for non-conforming existing signs; the sign may be continued and maintained, but may neither be enlarged nor substantially altered. The question should be if the raising of the sign by 6 feet is a "substantial alteration". I would not call this request a substantial alteration.

**Vern Gardner** asked if the applicant has any verification that the state allowed placement of the sign, as it is in the state's ROW.

**Craig Wilson** noted that the ZBA does not enforce state agreements and the applicant has been "at risk" for many years and will continue to be so, regarding the location of the sign.

**Niles Pinkham** noted that the sign was in existence prior to the current ordinance.

Discussion followed regarding sign visibility, ordinance date, and sign location on State property.

**Brett Costa** commented that the ZBA was reviewing an existing non-conforming sign and should review for height.

**Craig Wilson motioned** to grant approval for the existing sign on 284 U.S. Route 1, Kittery, Map 31 Lot 6, in the Commercial 1 Zone be raised per the application from its current height to 17'3". Per testimony of the applicant the existing sign will be used and the posts extended.

Bob Kaszynski seconded

**Motion carries unanimously**

**Chairman Gardner** noted that any persons aggrieved by this decision has 45 days to appeal to Superior Court. A building permit must be applied for and approved by the Code Enforcement Officer.

#### **Findings of Fact**

1. Applicant Steven Leonard representing Jon Shafmaster requests a miscellaneous appeal to increase the height of the existing, non-conforming sign located at 284 U.S. Route 1, Kittery, Map 31 Lot 6, in the Commercial 1 Zone.
2. This is a conforming lot with non-conforming buildings. The sign's non-conformity stems from three issues: sign is located 16 feet from the outside of the travel edge where 20 feet is required; size of sign is 193 sf at present where 150 sf is allowed; the sign is not located on the applicant's property.
3. The sign will not be replaced, but will be raised on the same supports approximately 6 feet from its present height.

**All members in agreement**

**Conclusion**

The Board finds that in accordance with 16.32.625 of the Kittery Land Use and Development Code, Non-conforming and Existing Signs, under (a), that raising of the sign 6' does not substantially alter the non-conforming sign.

**All members in agreement**

**ITEM 2** - James B. Bartlett for Keri J. Marshall requesting an Administrative Appeal to the decision of the Code Enforcement Officer in order to obtain a permit, after the fact, for reconstruction of a deck and replacement of a second deck with stairs. Located at 78 Chauncey Creek Road, Kittery Point, Map 45 Lot 65, in the Suburban Residential Zone. 45-65-08-19

**James Bartlett**, Attorney, representing Keri Marshall, summarized the chronology of activities at the property. In 2003, applicant applied for permits to renovate the interior of the property; in 2003 a permit was applied for to enlarge the decks and was denied in 2006; in 2003 a seasonal boat ramp and float permit was received; in 2007 a permit to install rip rap to prevent erosion was received. At the time of inspection for the rip rap installation, the CEO issued notice of violation when it was discovered that the old decks were removed and replaced. Applicant agrees that they were in violation of not receiving a permit, but not in violation of the set back or size. Both of the existing decks were rotting, dangerous and impacting the structure of the house, as provided by architectural and builder affidavits. Reasons permit were not obtained:

1. 2006 denial was based on request to increase the size of decks. In fact, decks were reduced in size, including landing and stair areas. Clients felt they were following the rules because they believed they were simply repairing a problem, and not expanding.
2. As NH residents, they did not understand they were required a permit for replacement of the rotted deck.
3. Clients needed safe decks to access their home.

Applicant is requesting an "after the fact" building permit for the work performed, but do not believe they are in violation of the code in regards to size and location.

**Chairman Gardner** opened the item the public. There being no public comment, the CEO read notes.

- This is a non-conforming lot with non-conforming structures located within the Kittery Point Village and Shoreland zones. Ms. Marshall filed an administrative appeal in response to a Notice of Violation and Order of Correction issued for her property on May 14, 2008. Citation was for two decks constructed on her property without building permits or Zoning Board review.

- Title 16 Section 20.020 Permit Threshold (page 262) states a permit shall be required if the activity triggers any thresholds as determined by the code enforcement officer. Those three that apply:

- #1. The fair market value of the work is greater than one thousand dollars (\$1000);
- #4. Construction of a building or expansion of a structure;
- #9. Involves an activity that requires inspection by the CEO to determine compliance with this title.

- Title 16 Section 32.490N2b (page 316) states: *Accessory patios or decks no larger than five hundred (500) square feet in area shall be set back at least seventy-five (75) feet from the normal high-water line of any water bodies, tributary streams, the upland edge of a coastal wetland, or the upland edge of a freshwater wetland sown on the official shoreland zoning*

*map. Other patios and decks shall satisfy the normal setback required for principal structures in the shoreland zone.*

- Title 16 Section 32.490K2 (page 310) states: *After January 1, 1989 if any portion of a structure is less than the required setback from the normal high water line of a water body or upland edge of a wetland, that portion of the structure shall not be expanded in floor area or volume, by thirty (30) percent or more, during the lifetime of the structure.*

- On August 29, 2006, Ms. Marshall applied to construct decks at her property. Her building permit application was denied on September 22, 2006 based on Title 16.32.490K2, the 30% rule and Title 16.32.490N2b, the required setback within the shoreland zone. Ms. Marshall did not appeal this denial.

- There are now two new decks on the property. The southwest side of the property has a 4'2" x 4'2" deck constructed 52' to the water where a 75' setback is required. The southeast side of the property has a 9'1" x 14'4" deck with an attached area of 4'1" x 4'7 1/2" that is 27' to the water where a 75' setback is required.

- The Order of Correction was to remove the decks constructed on the property.

**Brett Costa** asked if the new decks were within the footprints of the old decks and no closer than the old deck. The CEO explained that the SE side shows an additional 4'1" x 4' 7 1/2" area and the SW side shows 4'2" x 4'2" which is less in length than what was there previously.

**Craig Wilson** noted that the crucial issue is if there had been enlargement and this should be nailed down.

**Bob Kaszynski** inquired if the issue is the size of the deck or the setback. The CEO explained that there are three issues: the size of the deck, the setback and 30% rule, and the lack of a building permit.

**Tom Emerson** inquired how the Board did not wish to hear the Eckel property on May 13, currently in violation over 30 days.

**Peter Mahar** addressed the Board explaining that both decks were removed by hand because of the extreme deterioration and impact of original poor installation on the home's sills. The deck on the SE side is approximately 7-10 sf smaller. The bump-out is the stairs and other deck is a landing approximately 14 sf. All other work on the property received state and local permits, but did not think replacing a rotting deck would "come to this".

**Brett Costa** inquired if the \$1000 threshold is per deck or all construction.

**Vern Gardner** returned to Tom Emerson's question about the Eckel property. The difference is the Eckel property did not appeal and is still in violation.

**Craig Wilson** stated that the Board cannot hear anything on any matters on that property until the violation is taken care of. The current applicant is here on behalf of the violation. The violation is the act of building the deck without a permit. We're supposed to look at after the fact permits as if nothing was built and decide if we are going to give them a permit or not. If the decision is to give it to them, that would eliminate the violation.

**Vern Gardner** quoted Title 16.24.060D, D. *Outstanding Violations. No variance or special exception may be granted for premises on which outstanding violations of this title exist, unless the effect of such variance or special exception would remedy all such violations.*

**Tom Emerson** pointed out Title 16.16.050.F. *Appeal of Notice of Violation and Order* and inquired if the applicant appealed the notice within 30 days. The CEO confirmed that they had.

**Brett Costa** commented that perhaps the applicant is not questioning the violation notice, but are filing for a permit.

**Niles Pinkham** commented that the CEO was correct with the notice of violation, but somehow the Board needs to get around that if the decks are legal in their size and let them get their permit after the fact.

**Tom Emerson** suggested the Board modify the notice of corrective action. Applicant would then return for a miscellaneous appeal.

Discussion followed about how to formulate the continued review of this application given the deck sizes and shoreland zone.

**James Bartlett** suggested the ZBA continue the appeal under a specific timeframe, allowing the applicant to apply for a building permit, and when denied, return to the ZBA for review under permit denial.

**Tom Emerson** noted that the CEO did not take a position on the size of the deck in the notice of violation and can uphold the CEO's notice of violation that a permit was not obtained, and modify the notice of correction.

**CEO** noted that an extension was not in existence and may have been built at a later date without a permit as there is no application in the file. The 4'2" x 4'2" addition would be part of a future appeal.

**Craig Wilson** motioned to modify the CEO notice of violation, deny the administrative appeal and modify the order of correction for property located at 78 Chauncey Creek Road, Kittery Point, Map 45 Lot 65, in the Suburban Residential Zone.

Said modification shall be that instead of removing the decks within 30 days, the applicant may apply for a building permit to construct decks on the property within 30 days.

Tom Emerson seconded

Tom Emerson noted that ZBA agrees with CEO decision, but modifying that decision.

**Motion carries unanimously**

### **Findings**

James Bartlett appeared before the ZBA for Keri Marshall requesting an Administrative Appeal to the decision of the Code Enforcement Officer for property located at 78 Chauncey Creek Road, Kittery Point, Map 45 Lot 65, in the Suburban Residential Zone. This property is:

1. A nonconforming lot with nonconforming structures;
2. The home underwent extensive renovation in 2003; a boat ramp was constructed; in 2006 a building permit was denied for enlargement of decks on the property; in 2008 during inspection for the installation of rip-rap the CEO noted that the decks had been replaced and issued a notice of violation.
3. There was testimony that the decks were in dangerous condition from the builder and architect;
4. The applicant acknowledged that a building permit should have been obtained; that the larger deck was a reduction in size of 10 sf; the smaller deck was replaced by a landing and stairs

Brett Costa seconded

**Findings are accepted unanimously**

### **Conclusion**

The Board concluded that the proper action would be to modify the CEO's decision, specifically in terms of the order to remove the decks and modify that to have the applicant, within 30 days, seek to obtain a building permit for the decks. The Board did not make any findings about the decks as they exist today.

Bob Kaszynski seconded

**Conclusion is accepted unanimously.**

5 minute break

**ITEM 3** - Jackie Ellis requesting a Miscellaneous Appeal to the terms of Title 16, Section 28, Subsection 130B (Page 274), and Title 16, Section 32, Subsection 490K2 (Page 310) of the Kittery Land Use and Development Code Zoning Ordinance in order to expand an existing dormer on the west roofline. This increases the volume of the house by less than 2%. No changes are proposed to footprints of the buildings. Located at 6 Moores Island Lane, Kittery Point, Map 27 Lot 36, in the Kittery Point Village Zone and within the Shoreland Zone. 27-36-08-20

**Jackie Ellis**, owner, summarized her request to the ZBA. The current size of the dormer is 11 feet, requesting an enlargement to 20 feet.

**Ken Markley**, Easterly Survey, completed the survey noting the building covered 12% of the lot and the dormers do not exceed beyond the footprint of the building, equaling a 2% expansion. Owner wishes to replace old windows with energy efficient windows and noted that 30% is allowable and this expansion is less than 2%.

The item was opened to public. Being none, the CEO stated:

1. This is a nonconforming lot with nonconforming structures located within the Kittery Point Village and Shoreland zones. Ms. Ellis is proposing to expand an existing dormer.
2. Title 16.32.490K2 (page 310) states: *After January 1, 1989 if any portion of a structure is less than the required setback from the normal high-water line of a water body or upland edge of a wetland, that portion of the structure shall not be expanded in floor area or volume, by thirty (30) percent or more, during the lifetime of the structure.*
3. This application is for a volume expansion only. The volume increased is approximately 2% of the existing dwelling unit, an increase of 241.58 feet of volume.
4. The expansion is approximately 50' from a body of water on both sides.

**Brett Costa** noted that the boundaries of the gutter line are not affected.

**Bob Kaszynski** noted that the 9.5" is the increase in height. The CEO noted that there is also a vertical expansion.

**Tom Emerson** commented on additions to the side of the house that appeared to have been done later. Because it is a lifetime 30%, each subsequent expansion needs to be accounted for.

The CEO noted that the ordinance limits expansions after January 1, 1989 and there is nothing in the file indicating additions to this property after that date.

**Craig Wilson motioned** to grant Jackie Ellis a Miscellaneous Appeal to the terms of Title 16, Section 28, Subsection 130B (Page 274), and Title 16, Section 32, Subsection 490K2 (Page 310) of the Kittery Land Use and Development Code Zoning Ordinance for property located at 6 Moores Island Lane, Kittery Point, Map 27 Lot 36, in the Kittery Point Village Zone and within the Shoreland Zone to expand a dormer from 11 feet to 20 feet in width, resulting in a 2% increase in volume.

Bob Kaszynski seconded

**Motion carries unanimously**

**Findings**

1. The Board approved expansion of a dormer at property located at 6 Moores Island Lane.
2. Testimony that there currently exists 12% building coverage; 16% non-vegetative coverage; the dormer will expand from 11' in width to 20' in width, resulting in a 2% increase in volume.
3. The lot is non-conforming with a non-conforming structure in the Kittery Point Village and Shoreland Zone.
4. There is a 241.58 cubic volume increase and the building sits approximately 50' in both directions of a water body.

**Findings are accepted unanimously**

**Conclusion**

Under 16.28.130d *Non-conforming structures regulated within the shoreland zone*, 1(a) provides the power to grant an expansion for volume of 30 % and this expansion is less than 2% so the Board grants the appeal.

Bob Kaszynski seconded

**Conclusion is accepted unanimously**

**ITEM 4** - Robert and Laurie Wheeler requesting a Variance Appeal to the terms of Title 16, Section 32, Subsection 490N2a (Page 316) of the Kittery Land Use and Development Code Zoning Ordinance in order to construct two sheds, 12'x10' each. Located at 11 Trafton Lane, Kittery, Map 39 Lot 15, in the Rural Residential Zone and within the Shoreland Zone. 39-15-08-21

**Robert Wheeler** summarized his request to locate sheds on his property where they would be located less than 100 feet from the water.

Chairman Gardner opened the hearing to the public

**Stephen Hall**, Conservation Commission requested that the Board uphold the decision of the CEO as the sheds would be located within a shoreland zone.

CEO read:

1. This is a conforming lot with a conforming structure located within the Rural Residential and Shoreland zones.
2. Mr. Wheeler is proposing to construct two 10' x 12' sheds.
3. Title 16.32.490N2a (page 316) states: *Principal and Accessory Structures. All new principal and accessory structures (except certain patios and decks) shall be set back at least one hundred (100) feet, horizontal distance, from the normal high water line of any water bodies, tributary streams, the upland edge of a coastal wetland, or the upland edge of a freshwater wetland shown on the official shoreland zoning map*
4. The stream is a tidal stream, requiring a 100 foot setback. Applicant is requesting to install two sheds 60' from the setback where 100 feet is required.

**Craig Wilson** noted that this is a variance request and all four criteria must be met. In reference to section 16.04.050, since a building exists on the land, a reasonable return has been met; therefore, all required variance criteria cannot be met.

**Tom Emerson** applauded applicant's consideration of his neighbors, but agrees that the variance request does not meet the criteria needed for approval.

**Chairman Gardner** suggested the applicant consider a different location on the property for the sheds and return for a building permit, since the change in location may qualify as a significant change in the plan for a new permit application.

**Craig Wilson** motioned to deny variance appeal for Robert and Laurie Wheeler requesting a Variance Appeal to the terms of Title 16, Section 32, Subsection 490N2a (Page 316) of the Kittery Land Use and Development Code Zoning Ordinance requesting to construct two sheds, 12'x10' each located at 11 Trafton Lane, Kittery, Map 39 Lot 15, in the Rural Residential Zone and within the Shoreland Zone.

Niles Pinkham seconded

**Motion carries unanimously**

### **Findings**

1. Robert and Laurie Wheeler request to construct two sheds, 12'x10' located at 11 Trafton Lane, Kittery, Map 39 Lot 15, in the Rural Residential Zone and within the Shoreland Zone.
2. The property is a conforming lot with a conforming structure.
3. The sheds would be new construction, locating them within 60' of a tidal wetland where 100' is required
4. There is additional buildable area on the property

Tom Emerson seconded

**Findings are accepted unanimously**

### **Conclusion**

Under 16.04.050B2(b)(i) a hardship does not exist for the land in question, this Board found that the fact that a building is already on the property signifies that the property could have a reasonable return, therefore item #1 of the four items needed for a variance was not met, and each of the four have to be met for the variance to be granted.

Tom Emerson seconded

**Conclusion is accepted unanimously**

The Kittery ZBA meeting of July 22, 2008 concluded at 9:03 pm

Submitted by Jan Fisk, Recorder – *July 25, 2008*