

Town of Kittery
Zoning Board of Appeals
September 9, 2008

Call to Order: 7:02 pm

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

Members absent:

Staff: Heather Ross, CEO; Jan Fisk, Recorder

Pledge to the Flag

PUBLIC HEARING

ITEM 1 - Robert F. Libby for Donna and Ted McGarry requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490K2 (Page 310), and Title 16, Section 32, Subsection 490N2A (Page 316) of the Kittery Land Use and Development Code Zoning Ordinance in order to square off 1st floor, add to 2nd floor, install new roof, and bring building to code. Located at 11 Badgers Island West, Kittery, Map 1 Lot 24, in the Badgers Island Zone.

Robert Libby presented a summary of the request on behalf of the applicant, Donna McGarry.

Chairman Gardner asked if there was anyone wishing to speak in favor or against this item.

There being none, the **CEO** provided the following information:

1. This is a conforming lot with a non-conforming structure located within the Badgers Island and Shoreland Zones.
2. Mr. Libby is proposing to:
 - Construct an addition to the first floor;
 - Demolish the covered porch and construct an addition of the same size;
 - Demolish the existing second floor;
 - Construct a new second floor;
 - Demolish sunroom and construct a deck over the existing basement area.
3. Title 16.32.490N2a requires a minimum 75' setback from the high water mark on Badger's Island.
4. The sunroom for the house is currently 14'6" from the high water mark. This is the closest point of the house to the high water mark.
5. Title 16.32.490K2 states that after January 1, 1989, any portion of a structure less than the required setback can be expanded no more than 30% of the floor area or volume during the lifetime of the structure.
6. Mr. Libby is proposing to expand the structure less than 30% in both floor area and volume.

The **Kittery Conservation Commission** provided a letter stating:

KCC has concerns as it appears from the plans that the applicants will be making this structure more nonconforming. KCC respectfully requests that the Code Enforcement Officer's building permit denial be upheld unless or until the structure will be in conformance.

Herb Kingsbury questioned that it appeared there was an extension in an area that had not been previously occupied by structure. **Donna McGarry** approached the Board to illustrate the areas that are proposed to be new construction and areas that will be removed. The **CEO** clarified the

areas under review: the sunroom, existing on the water side, will be demolished and made into a deck area; the small jog out will be a new addition; the covered porch area will be demolished and included as part of the living area; a second floor addition

Robert Libby drew the plan on the white board to better illustrate the plans for additions and demolitions. The jog out is the only new structure added, 4' x 6', that will square off the house area.

Brett Costa stated he felt that this was a classic "no closer than" example.

Craig Wilson supported Mr. Costa's summary and further reviewed the 30% rule for expansion in reference to 16.28.130D (page 275) regarding nonconforming structures within areas regulated by shoreland zoning.

Bob Kaszynski inquired about the business at the property, noting that commercial fisheries/maritime activities have no minimum setback. **Donna McGarry** stated that there is a lobster business at this location, part of which is in the house.

Craig Wilson inquired about the difference between the calculations presented by the applicant versus those measurements on the tax card. In order to determine the 30% rule for expansion, an accurate base number must be established. The **CEO** stated that to figure volume you use the entire interior of usable living space. **Craig Wilson** suggested that the **CEO** confirm the volume calculations do not exceed 30% prior to issuing a building permit. **Donna McGarry** stated that once these expansions are done, they will not be making any further expansions to the structure.

Robert Libby confirmed that the design proposed is for the Colonial style, and that John C. Danielson, Architects, provided the original measurements. **Brett Costa** noted that the swap of deck to livable space and vice versa could actually reduce the volume calculations. The **CEO** noted that the basement area is livable space and is included in the calculations.

Brett Costa motioned to grant approval for a miscellaneous appeal to Donna and Ted McGarry requesting a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490K2 (Page 310), and Title 16, Section 32, Subsection 490N2A (Page 316) of the Kittery Land Use and Development Code Zoning for property Located at 11 Badgers Island West, Kittery, Map 1 Lot 24, in the Badgers Island Zone in order to add a 4'x6' addition to the first floor and transform an enclosed porch to living space, demolish a sunroom and place a deck in its exact location, and add a second floor living space with new roof. There shall be one condition on the approval, that the applicant re-visit the volume and square footage calculations and present to the Code Enforcement officer to confirm that the expansion is not greater than 30% as specified in 16.28.130.

Craig Wilson seconded.

Motion carries 6 – 1 with Herb Kingsbury abstaining

Chairman Gardner reminded the applicant to pursue all required permits with the **CEO** and that appeals may be made within 45 days of approval.

Findings of Fact:

1. Bob Libby, on behalf of the applicant, and Donna McGarry requested a Miscellaneous Appeal to the terms of Title 16, Section 32, Subsection 490K2 (Page 310), and Title 16, Section 32, Subsection 490N2A (Page 316) of the Kittery Land Use and Development Code Zoning Ordinance for property located at 11 Badgers Island West, Kittery, Map 1 Lot 24, in the Badgers Island Zone.

2. Property is a conforming lot with a non-conforming structure located within the Badgers Island and Shoreland Zones.
3. Proposal to add a 4' x 6' new addition to the water side of the house to square off the house; to enclose an existing porch on the same side and convert to living space; to remove an existing sunroom and convert to a deck; and add additional living space to the second floor.
4. The current closest point of the house is 14'6" to the high water mark where a 75' setback is required.
5. No addition will be closer than the existing footprint of 14'6".
6. The CEO received calculations from the applicant stating that the volume and square foot expansions will not be more than 30%. The Board requests that the calculations be reviewed and checked by the CEO. These calculations are based on the "Colonial option" as presented in the application.
7. The Conservation Commission presented a letter dated September 7, 2008 requesting that the building permit denial be upheld until the structure is in conformance.

Brett Costa motioned to approve the Findings

Niles Pinkham seconded

Findings of Fact accepted unanimously

Conclusion

The Board has the authority under 16.28.130 Nonconforming Buildings D.1. Expansions in that the expansions and enlargements in question shall be no closer than the existing encroachment on the shoreland zone setback and will not exceed the 30% lifetime expansion.

Bob Kaszynski motioned to accept the Conclusion

Tom Emerson seconded

Conclusion is accepted unanimously.

ITEM 2 - Alan E. Shepard for Samuel Reid requesting an Administrative Appeal to the decision of the Code Enforcement Officer to issue building permit #08-233 issued 7/1/08. Located at 70 Pepperrell Road, Kittery Point, Map 26 Lot 22, in the Kittery Point Village Zone

This item was withdrawn by the applicant.

Non-Agenda Item:

Members discussed a letter dated September 3, 2008 received from Town Attorney Duncan McEachern in response to a memorandum dated August 27, 2008 sent to Town Manager Jonathan Carter from Earldean Wells, Chairman of the Conservation Commission, requesting that the Town Council consider the actions of the Zoning Board of Appeals in granting a wetland setback reduction for Robert Harris at their August 12, 2008 meeting. Chairman Gardner asked if the Board wished to re-consider their findings in this matter. Craig Wilson stated that once the property in question had been accepted to be a grandfathered lot, the decision of the Board was on firm ground. Chairman Gardner stated he wanted the Board to be fair and to respect the opinions of an authority (*Conservation Commission*) in the community. Craig Wilson noted that

the Board's obligation, first and foremost, is a legal obligation and that their decisions are discharged legally. Chairman Gardner asked if there was a consensus or opposition to re-consider their decision. Bob Kaszynski stated he was not in favor of re-considering the decision. Tom Emerson stated that unless the Board is presented with new information or something that was not considered or a legal opinion that the Board should not have performed the action, he would be inclined not to re-consider. Herb Kingsbury declined to comment as he was not present at the meeting. Brett Costa concurred, not to re-consider. Chairman Gardner concurred and noted that the 10 day appeal had come and gone and that the Conservation Commission could have appealed within that 10 day period and did not do so. Tom Emerson noted that the attorney for the applicant made a compelling case that this was a separate lot and the separation got lost in the process. The crux of the decision was made based on this being a separate lot. It is important that the Board consider what the Commission has to say. However, some of what was presented in the letter is not germane to the review. For example, tonight's item that the Commission requested be denied until the structure be brought into conformance is not part of the discussion. There is a methodology within the code that allows a 30% expansion – that is compliance – the Board is not required to make the structure conform to current zoning. Brett Costa noted that the Board must work with the facts as presented, not wishes or feelings. Niles Pinkham spoke to the charge of intimidation presented in the letter and did not understand the charge. He spoke with *Anne Borden* after the meeting regarding the retaining walls and stated that she agreed with the Board and that she wanted the Harris' to be able to build their house. Chairman Gardner reiterated Attorney McEachern's opinion that the ordinance needs to be amended to address the issue of wetland variances. Craig Wilson noted that the Board determined that the Old Homestead was a non-conforming lot of record and that "relaxation of yard or other requirements" shall be obtained only by miscellaneous appeal. The ordinance anticipates that there may be a relaxation of other requirements, and certainly wetland setback is an "other" requirement. Brett Costa noted that the Board cannot relax "area" or "frontage", but everything else falls under "other".

Niles Pinkham asked if the Board could take a presentation under advisement and make a final decision at a following meeting. Chairman Gardner stated that was absolutely allowed. Further, Duncan said that if the Board had gone to him for another opinion it would have been just that, another opinion and that sometimes Boards or Committees latch on to his (*Attorney McEachern*) opinion and substitute that for discussion and Board decision.

Minutes

All minutes pending review were postponed to the October 14, 2008.

The Kittery ZBA meeting of September 9, 2008 adjourned at 8:02 pm

The CEO stated there will be no meeting on September 23, 2008. The next ZBA meeting will be held on Tuesday, October 14.

Submitted by Jan Fisk, Recorder
September 10, 2008