

Town of Kittery, Maine  
Zoning Board of Appeals  
December 8, 2009

Call to Order: 7:05 p.m.

**Members present:** Herb Kingsbury, Thomas Battcock-Emerson, Bob Kaszynski, Craig Wilson, Vern Gardner, Brett Costa

**Members absent:** Niles Pinkham

**Staff:** Heather Ross, Code Enforcement Department  
Pledge to the Flag

**Chairman Gardner** read each item on the agenda.

**ITEM 1** - William D. Howells requesting a Variance Appeal to the terms of Title 16, Chapter 12, Section 055E, Page 238-3 in order to divide one lot with 3 residences at 3 different addresses into 3 lots. Located at 9-11-13 Lawrence Lane, Kittery Point, Map 18 Lot 32, in the Kittery Point Village Zone.

**Dean Howells** summarized the property's history of ownership and development resulting in the current configuration. The division of the property would enable family members and descendants to retain clear use and ownership.

**Ken Markley**, Easterly Surveying, spoke in support of the applicant's request, noting that the properties have long been used as separate residences, including stone walls, gardens, natural vegetation, etc. While the proposed divisions may not meet today's ordinance requirements, the long existence of these roads, natural boundaries and buildings should inform the Board's consideration. Mr. Markley noted he had been retained by the Howells' to develop the conceptual plan presented for consideration.

**Chairman Gardner** asked if there was anyone present wishing to speak in favor or against this appeal request. There being none, the CEO provided:

1. This is a non-conforming lot with non-conforming structures located within the Kittery Point Village and Shoreland zones.
2. Mr. Howells is proposing to divide one non-conforming lot into three non-conforming lots.
3. Title 16.12.055.E requires a minimum lot size of 40,000 sf and a minimum street frontage of 150 feet.
4. The existing lot does not meet the minimum street frontage requirements. The proposed lots would not meet the minimum street frontage or lot size requirements.
5. The CEO also noted Section 16.28.170.B., *Contiguous Built Upon Lots. If two or more contiguous built upon lots or parcels are in single ownership of record at the time of adoption or amendment of this title and if all or part of the lots do not meet the dimensional requirements of this title, and if a principal use exists on each lot, the nonconforming lots may be conveyed separately or together, providing all state law and local ordinance requirements are complied with.*

Board members discussed the proposed graphic division. **Craig Wilson** suggested that the argument that the natural boundaries should be retained implies that further review of the property may lend itself to legal division. Each lot requires 150 feet of shore frontage, and the district standards for lot size, road frontage, etc. appear attainable. The applicants own additional parcels abutting the lots under review that could aid in the division. The applicant would need to successfully demonstrate that a division would destroy the existing properties. **Thomas Battcock-Emerson and Chairman Gardner** agreed that the ordinance does not support the division as proposed. **Craig Wilson** encouraged the applicant to more carefully review the standards.

**Bob Kaszynsky motioned** to grant a variance appeal to Title 16.12.055.E for Dean Howells in order to divide a single lot located at 9-11-and 13 Lawrence Lane, Map 18, Lot 32 into three lots.

**Thomas Battcock-Emerson seconded**

**Motion fails with 0 in favor, 5 opposed and 1 abstention (Brett Costa)**

**Appeal is denied**

Chairman Gardner advised the applicant that this decision may be appealed to Superior Court within 45 days.

### **Findings of Fact**

1. William D. Howells requesting a Variance Appeal to the terms of Title 16, Chapter 12, Section 055E, Page 238-3 in order to divide one lot with 3 residences at 3 different addresses into 3 lots. Located at 9-11-13 Lawrence Lane, Kittery Point, Map 18 Lot 32, in the Kittery Point Village Zone.
2. Ken Markley, representing the applicant, spoke about the variance, noting the natural boundaries presented by the existing configuration of homes and landscaping. There was no other testimony for or against this appeal.
3. This is a non-conforming lot with non-conforming structures located within the Kittery Point Village and Shoreland zones.
4. Mr. Howells is proposing to divide one non-conforming lot into three non-conforming lots.
5. Title 16.12.055.E requires a minimum lot size of 40,000 sf and a minimum street frontage of 150 feet.
6. The existing lot does not meet the minimum street frontage requirements. The proposed lots would not meet the minimum street frontage or lot size requirements.
7. Section 16.28.170.B Contiguous Built Upon Lots was reviewed and considered.
8. Lot in question is 140,000 sf and shore frontage of 450 feet. An argument to divide the lot and still meet ordinance requirements could be made, as there appears to be substantial property area available to work with.

**Herb Kingsbury motioned** to accept the Findings as read.

**Thomas Battcock-Emerson seconded**

**Motion carries unanimously**

### **Conclusion**

The applicant did not fully explore the possible division of lots that would create conforming lots, and does not meet State law and Kittery ordinance. Section 16.04.050.B.2.b.i., *Such hardship exists that the land in question cannot yield a reasonable return unless the variance is granted* could not be met.

**Brett Costa motioned** to accept the Conclusion as read.

**Herb Kingsbury seconded**

**Motion carries unanimously**

**ITEM 2** – Stanley Hodgdon for Stephen A. Hynes requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 32, Section 730D2, Page 343 in order to locate and relocate a mobile home at Site #8. Located at 6 Cutts Road Site #8, Kittery, Map 60 Lot 21-8, in the Mixed Use Zone.

**Stanley Hodgdon** summarized the appeal request.

There was no one present to speak for or against the appeal.

**Chairman Gardner** asked if there was anyone present wishing to speak in favor or against this appeal request. There being none, the CEO provided:

1. This is a non-conforming lot with non-conforming structures located within the Mixed Use zone.

2. Mr. Hynes has proposed to replace a mobile home.
3. Title 16.32.730.D.2 requires a 10 foot rear setback and a distance of 20 feet between units.
4. The proposed placement of the mobile home is less than the required setbacks, but no closer than what currently exists.

Board members discussed the request and agreed the location of the new mobile home is not more non-conforming.

**Thomas Battcock-Emerson motioned** to grant a Miscellaneous Appeal to Stephen Hynes in order to relocate a mobile home at 6 Cutts Road, Site #8, Kittery Map 60, Lot 21-8.

**Bob Kaszynski seconded**  
**Motion carries unanimously**

Chairman Gardner advised that this decision may be appealed to Superior Court within 45 days.

#### **Findings of Fact**

1. Stanley Hodgdon appeared for Stephen A. Hynes requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 32, Section 730D2, Page 343 in order to locate and relocate a mobile home at Site #8. Located at 6 Cutts Road Site #8, Kittery, Map 60 Lot 21-8, in the Mixed Use Zone.
2. There was no one present to speak for or against the appeal.
3. This is a non-conforming lot with non-conforming structures located within the Mixed Use zone.
4. Mr. Hynes has proposed to replace a mobile home.
5. The existing 7'1" rear setback and 14'11" separation between units does not conform with Title 16.32.730.D.2, which requires a rear setback of 10 feet and 20 feet between units.
6. The proposed placement of the mobile home is less than the required setbacks, but no closer than what currently exists.

**Herb Kingsbury motioned** to accept the Findings as read.

**Brett Costa seconded**  
**Motion carries unanimously**

#### **Conclusion**

Title 16.28.130, non-conforming buildings, authorizes the Zoning Board of Appeals to allow a building to be located closer than ordinance requirements if the nonconformity is not increased.

**Conclusion carries unanimously** (there was no motion or second)

**ITEM 3 -** Bud Fisher for Rosamond Halle requesting a Miscellaneous Appeal to the terms of Title 16, Chapter 12, Section 080, Page 240 in order to demolish the existing 26'4"x14'3" garage and build a new 24'x20' structure on poured slab. Located at 6 Thaxter Lane, Kittery Point, Map 64 Lot 24B, in the Rural Conservation Zone.

**Bud Fisher** summarized the appeal request, noting he is also a neighbor. The existing structure is not salvageable, and the applicant wishes to expand the structure and include a second story to be used by the grandchildren. **Stephen Hall** representing the Conservation Commission, opposes the appeal, noting the proposed structure will be located closer to a wetland and setback nonconformity would increase. The CEO provided:

1. This is a non-conforming lot with non-conforming structures located within the Rural Conservation zone.

2. Table 16.12 requires a minimum 50 foot setback for structures from waterbodies that are 1,0001 sf to one acre in size. The proposed construction appears to be located closer to an adjacent wetland.
3. Title 16.12.080 requires a minimum front yard setback of 40 feet and a minimum side and rear setback of 20 feet. The proposed construction does not meet the required setbacks, specifically the front yard setback is 21 feet and 18 feet and 14 feet for side and rear yard setbacks.

**Herb Kingsbury** opposed the appeal as all setbacks have been encroached upon. **Brett Costa** noted that the proposal encroaches into the wetland setbacks, and would not want to see any new construction located closer than the existing structure. **Craig Wilson** explained that existing nonconformities cannot increase, and he cannot support this proposal. **Thomas Battcock-Emerson** suggested that a 22 foot garage would allow the Board to consider the proposal, but a standard 24 foot garage would not work and could not be supported. **Mr. Fisher** commented that his client had not intended to use the building as a garage, but for boats and summer items. **Ken Markley** asked if the applicant should re-apply with a different proposal. **Chairman Gardner** explained they could withdraw and return with a new proposal that is substantially changed, and that could be difficult. The applicant withdrew the Appeal. **Craig Wilson** asked why the applicant could not amend the plan at this time, allowing for immediate modification and review of the plan. The applicant withdrew the withdrawal. **Ken Markley** stated the new proposal is to construct the largest garage allowed without being more non-conforming, resulting in a smaller square footage. Board members agreed to support the request if the applicant did not increase any nonconformity currently existing. **Mr. Hall** asked if the building is completely demolished, how can it then be rebuilt as a nonconforming structure? **Brett Costa** explained that approval is granted while the building still exists, and the Board has the authority to do so.

**Brett Costa motioned** to grant a miscellaneous appeal to the terms of Title 16, Chapter 12, Section 080, in order to demolish the existing 26'4"x14'3" garage and build a new structure on a poured slab, with said structure being no closer than the existing nonconforming setbacks and the existing conforming setbacks. Said property is located at 6 Thaxter Lane, Kittery Point, Map 64 Lot 24B, in the Rural Conservation Zone.

**Thomas Battcock-Emerson seconded**  
**Motion carries unanimously**

Chairman Gardner advised that this decision may be appealed to Superior Court within 45 days.

#### **Findings of Fact**

1. Bud Fisher and Ken Markley for Rosamond Halle requested a Miscellaneous Appeal to the terms of Title 16, Chapter 12, Section 080, in order to demolish the existing 26'4"x14'3" garage and build a new structure on a poured slab.
2. Property is located at 6 Thaxter Lane, Kittery Point, Map 64 Lot 24B, in the Rural Conservation Zone.
3. Stephen Hall, representing the Kittery Conservation Commission, spoke against the request, as the proposed structure was located closer to the wetland than previously existed. A letter from the Conservation Commission, dated December 5, 2009, was also presented to the Board.
4. This is a non-conforming lot with non-conforming structures.
5. Table 16.12 requires a minimum 50 foot setback for structures from waterbodies that are less than one acre in size, where 30 feet currently exists. The wetland to the west is greater than one acre, requiring a 100 foot setback, where 40 feet currently exists.
6. Title 16.12.080 requires a minimum front yard setback of 40 feet and a minimum side and rear setback of 20 feet. The proposed construction does not meet the required setbacks, specifically the front yard setback is 21 feet, with an 18 foot side yard setback and a 14 feet rear yard setback.

7. Following discussions with the applicant, it was agreed the structure will not be built as presented in the appeal to the Board. The structure will be built no closer than the existing nonconformities, or no closer than the required setback dimensions.

**Thomas Battcock-Emerson motioned** to accept the Findings as read  
**Bob Kaszynski seconded**  
**Motion carries unanimously**

### **Conclusion**

The Board has the authority under 16.28.130.D.1 to grant this appeal.

**Conclusion carries unanimously** (there was no motion or second)

**ITEM 4 - William Harlow** for Steven Goodman requesting a Special Exception Appeal to the terms of Title 16, Chapter 12, Section 110C2, Page 254 in order to submit application for a used car dealership/annex & sales on this property, with possible purchases also, only to be operated in commercial district zone C-2. Located at 70 Route 236, Kittery, Map 28 Lot 27, in the Commercial District Zone.

**Chairman Gardner** asked the Board if this appeal is significantly different from prior appeals and polled the Board. A simple majority concurred that the appeal is significantly different from prior appeals.

**Matt Howell, York Law**, summarized the prior appeals by the applicant and the appeal before the Board.

**Stephen Hall**, Kittery Conservation Commission noted that there was no information provided regarding proximity to a wetland. **Steven Goodman**, owner, stated the property abuts a wetland, but this application will have no impact on the wetlands. **Mr. Howell** stated there would be no changes to the footprints of the building, any changes to the property would be cosmetic and internal only, and they will not be repairing vehicles and utilizing fluids and oils that could impact the wetland. The CEO provided:

1. This is a non-conforming lot with non-conforming structures within the Commercial 2 zone.
2. Title 16.12.110.C.2 allows the use of the following businesses only with Special Exception ZBA approval:
  - a. Used car lot not connected with new car sales
3. The application submitted is for internet buying and sales of used cars.
4. There are no business permits for this property. An application is pending in the Code Enforcement office for an inspection station, which is allowed in this zone.

**Mr. Howell** stated the allegations the applicant has been conducting business at the site are incorrect. The cars on site are personally owned by the applicant and are not part of the sales inventory nor will be sold. **Thomas Battcock-Emerson** inquired about wetland impact given the type of business proposed. The auto repair portion is no longer part of the proposal, but wondered if there is anything in the proposed business that would go beyond simple auto sales. **Mr. Howell** explained that the State does not require work on cars be done on site, and the applicant has entered into an agreement with Two Sons on Rt. 236 to utilize their repair facility as needed. **William Harlow** explained that the used cars would be cleaned and detailed on site, but the agreement with Two Sons will support the mechanical needs of the business. **Craig Wilson** asked about buffering the adjacent properties and the wetlands. **Mr. Howell** stated that if the Board requested a landscape plan, the applicant will provide one to meet the ordinance requirements. **Brett Costa** stated he believed the applicant does not meet the ordinance requirements for this use. **Chairman Gardner** asked if there were any violations on this property. The **CEO** stated there was no formal violation, but the applicant was advised that having vehicles on the lot constitutes a business whether they are being worked on or not. Discussion continued regarding State licensing of a used car

facility. The CEO stated that the licensing department of the State advised her that an off-site repair or maintenance facility would not be considered appropriate for a used car business.

**16.24.060 Basis for decision.**

Board members agreed not to read Part A – Conditions.

[Each *Factors for Consideration* in Part B was read and voted upon individually. A ‘yes’ vote indicates agreement or support of the project by considering the factor as read, or with any conditions included.]

B. Factors for Consideration. In making such determination, the zoning board of appeals shall also give consideration, among other things, to:

1. The character of the existing and probable development of uses in the district and the peculiar suitability of such district for the location of any of such uses;

**Vote of: 4 yes; 1 no; 1 abstention**

2. The conservation of property values and the encouragement of the most appropriate uses of land;

**Vote of: 4 yes; 2 no; 0 abstention**

3. The effect that the location of the proposed use may have upon the congestion or undue increase of vehicular traffic congestion on public streets or highways; *Condition: No service or repair of any vehicle at any time on the premises.*

**Vote of: 4 yes; 2 no; 0 abstention**

4. The availability of adequate and proper public or private facilities for the treatment, removal or discharge of sewage, refuse or other effluent (whether liquid, solid, gaseous or otherwise) that may be caused or created by or as a result of the use); *Condition: The septic system shall be inspected and determined adequate.*

**Vote of: 4 yes; 2 no; 0 abstention**

5. Whether the use, or materials incidental thereto, or produced thereby, may give off obnoxious gases, odors, smoke or soot;

**Vote of: 4 yes; 2 no; 0 abstention**

6. Whether the use will cause disturbing emission of electrical discharges, dust, light, vibration or noise;

**Vote of: 4 yes; 2 no; 0 abstention**

7. Whether the operations in pursuance of the use will cause undue interference with the orderly enjoyment by the public of parking or of recreational facilities, if existing, or if proposed by the town or by other competent governmental agency;

**Vote of: 4 yes; 2 no; 0 abstention**

8. The necessity for paved off-street parking; *Condition: Parking is allowed only in designated parking areas or on existing impervious surfaces.*

**Vote of: 4 yes; 2 no; 0 abstention**

9. Whether a hazard to life, limb or property because of fire, flood, erosion or panic may be created by reason or as a result of the use, or by the structures to be used therefore, or by the inaccessibility of the property or structures thereon for the convenient entry and operation of fire and other emergency apparatus, or by the undue concentration or assemblage of person upon such plot;

**Vote of: 4 yes; 2 no; 0 abstention**

10. Whether the use, or the structures to be used therefore, will cause an overcrowding of land or undue concentration of population; or, unsightly storage of equipment, vehicles, or other materials; *Condition: A limit of 20 vehicles are permitted on site, including vehicles for sale or detailing and employees vehicles*  
**Vote of: 4 yes; 2 no; 0 abstention**
11. Whether the plot area is sufficient, appropriate and adequate for the use and the reasonably anticipated operation and expansion thereof; *Condition: No expansion is permitted.*  
**Vote of: 4 yes; 2 no; 0 abstention**
12. Whether the proposed use will be adequately screened and buffered from contiguous properties; *Condition: A professional landscape plan shall be prepared, providing adequate screening and buffering, and designed to mitigate runoff to the wetland area. Said plan shall be acceptable by the CEO and Town Planner.*  
**Vote of: 4 yes; 2 no; 0 abstention**
13. The assurance of adequate landscaping, grading, and provision for natural drainage; *Condition: A professional landscape plan shall be prepared, providing adequate screening and buffering, including a design to mitigate runoff to the wetland area. Said plan shall be acceptable by the CEO and Town Planner.*  
**Vote of: 4 yes; 2 no; 0 abstention**
14. Whether the proposed use will provide for adequate pedestrian circulation;  
**Vote of: 4 yes; 2 no; 0 abstention**
15. Whether the proposed use anticipates and eliminates potential nuisances created by its location;  
**Vote of: 4 yes; 2 no; 0 abstention**
16. The satisfactory compliance with all applicable performance standard criteria contained in Chapter 16.32.  
**Vote of: 4 yes; 2 no; 0 abstention**

**Chairman Gardner** asked if the Board wished to review 16.24.060.C. *Additional Special Exception Conditions*. Board members did not wish to avail themselves of any additional requirements as outlined in this section.

**Chairman Gardner** asked if the Board wished to review 16.24.060.D. Outstanding Violations. The **CEO** stated there was no notice of violation. When the applicant was told they had to remove vehicles on the property or a violation would be issued, the vehicles were removed prior to the last meeting, but some were returned. **Mr. Howell** stated the applicant was advised by office personnel that they could work on the property as long as the work did not exceed \$2,000. The **CEO** stated this information was in error as it is a commercial building, and electrical work was done.

**Chairman Gardner** read *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* and asked for a motion to grant or deny the appeal based on this section. **Mr. Wilson** noted that the CEO has stated that no violation has been issued and there are no outstanding violations. No motion was brought to the floor.

**Brett Costa** requested that, should this appeal be granted, the CEO be involved with the inspection of this property for the used car license.

**Chairman Gardner** announced that, based on the sixteen Factors for Consideration voted on by the Board, the Special Exception Appeal has been granted.

Chairman Gardner advised that this decision may be appealed to Superior Court within 45 days.

**Craig Wilson moved** to suspend rules and continue meeting beyond 10:00 p.m.

**Thomas Battcock-Emerson seconded**

**Motion carries unanimously**

### **Findings of Fact**

1. William Harlow requested a Special Exception Appeal to the terms of Title 16, Chapter 12, Section 110C2, for used car sales. The property is located at 70 Route 236, Kittery, Map 28 Lot 27, in the Commercial 2 District Zone.
2. Matt Howell, Attorney, represented his client and summarized the history of the application.
3. Stephen Hall of the Kittery Conservation Commission noted there was no mapping of the wetlands; owner Steve Goodwin spoke in support of the project, noting there would be no impact on the wetlands.
4. There will be no external changes to the building.
5. This is a non-conforming lot with non-conforming structures within the Commercial 2 zone.
6. Title 16.12.110.C.2 allows the use of the following businesses only with Special Exception ZBA approval:
  - b. Used car lot not connected with new car sales
7. The application submitted is for internet buying and sales of used cars.
8. There are no business permits for this property. An application is pending in the Code Enforcement office for an inspection station, which is allowed in this zone.
9. There will be no automotive service on site. Through an agreement, automotive service will be performed at Two Sons Service Station on Route 236.
10. The following conditions have been imposed on the appellant:
  - a. *No service or repair of any vehicle at any time on the premises.*
  - b. *The septic system shall be inspected and determined adequate by a certified septic system inspector.*
  - c. *Parking is allowed only in designated parking areas or on existing impervious surfaces.*
  - d. *A limit of 20 vehicles are permitted on site, including vehicles for sale or detailing and employees vehicles*
  - e. *No expansion is permitted.*
  - f. *A professional landscape plan shall be prepared, providing adequate screening and buffering, and designed to mitigate runoff to the wetland area. Said plan shall be acceptable by the CEO and Town Planner.*

**Herb Kingsbury motioned** to accept the Findings as read

**Bob Kaszynski seconded**

**Motion carries 5 in favor, 1 abstention (Brett Costa)**

### **Conclusion**

The Board, through Section 16.24.060.B.1-16, C. 1-6 and D, found the applicant to be in substantial compliance and the Special Exception Appeal was granted.

**Herb Kingsbury motioned** to accept the Conclusion as read

**Thomas Battcock-Emerson seconded**

**Motion carries 5 in favor, 1 opposed (Brett Costa)**

The Minutes of November 11, 2009 were accepted as amended (no motion or vote was made)

Election of Officers

**Herb Kingsbury motioned** to reappoint Vern Gardner as Chairman and Craig Wilson as Secretary

**Thomas Battcock-Emerson seconded**

**Motion carries unanimously**

The next ZBA meeting will be January 12, 2010

The meeting of December 8, 2009 adjourned at 10:12 p.m.

Submitted by Jan Fisk, December 14, 2009