

**Town of Kittery
Planning Board Meeting
August 12, 2021**

134 Whipple Road – Shoreland Development Plan Review

Action: Accept plan as complete, continue the agenda item to a subsequent meeting, schedule a public hearing and/or site walk, or approve or deny plan: Pursuant to §16.10.3.2 Shoreland Development Review and Article III Nonconformance of §16.7 General Development Requirements of the Town of Kittery Land Use and Development Code, owners Nicolas and Amy Mercier and agent Altus Engineering, Inc. requests approval to reconstruct and relocate a legally non-conforming structure on a legally non-conforming lot within the base zone setback of the Shoreland Overlay Zone located on real property with the address of 134 Whipple Road, Tax Map 10, Lot 6A, in the Residential-Urban (R-U) Zone and the Shoreland Overlay Zone .

PROJECT TRACKING

REQ'D	ACTION	COMMENTS	STATUS
NO	Sketch Plan	None	NOT APPLICABLE
NO	Site Visit	October 1, 2020	HLD
YES	Shoreland Development Plan Review Completeness/Acceptance	Scheduled for August 12, 2021	PENDING
NO	Public Hearing	TBD	TBD
YES	Shoreland Development Plan Review Plan Approval	TBD; may occur on August 12, 2021 if the Board decides not to schedule a public hearing and/or site walk	PENDING

Applicant: Plan Review Notes reflect comments and recommendations regarding applicability of Town Land Use Development Code, and standard planning and development practices. Only the PB makes final decisions on code compliance and approves, approves with conditions or denies final plans. Prior to the signing of the approved Plan any **Conditions of Approval related to the Findings of Fact along with waivers and variances (by the BOA) must be placed on the Final Plan and, when applicable, recorded at the York County Registry of Deeds. PLACE THE MAP AND LOT NUMBER IN 1/4" HIGH LETTERS AT LOWER RIGHT BORDER OF ALL PLAN SHEETS.** As per Section 16.4.4.13 - Grading/Construction Final Plan Required. - Grading or construction of roads, grading of land or lots, or construction of buildings is prohibited until the original copy of the approved final plan endorsed has been duly recorded in the York County registry of deeds when applicable.

Project Introduction

134 Whipple Road (“Property”) is located along the bank of the Piscataqua River within the Residential-Urban (R-U) zoning district and Shoreland Overlay Zone (OZ-SL-250). The property is a legally non-conforming lot, containing a legally non-conforming dwelling unit as the lot’s area is 13,381-sf (0.30-ac), whereas the Residential-Urban’s dimensional standard calls for 20,000-sf (0.45-ac) and the dwelling unit (1,358-sf; 10.2% devegetation) is positioned within the base zone setback (100-ft.) of the Shoreland Overlay Zone along with other accessory structures and impervious surfaces.

In addition to the Piscataqua River, directly abutting 134 Whipple Road is a vacant lot owned by the Town of Kittery and a lot containing a single-family dwelling unit. Likewise, in the general vicinity of the property, the lots are populated with residential dwelling units with the exception of a small-scale commercial fishing operation.

Between September and October of 2020, the applicant initially sought shoreland development approval to install a retaining wall to impede any further soil erosion and compromise to the dwelling unit’s foundation, which had incurred cracks in recent years. Before moving forward with the application, the Board wanted to conduct a site walk and to obtain an opinion from CMA Engineers, Inc on the cause of the foundation fissures. CMA opined that more evidence was needed in order to link the soil erosion to the compromised foundation, given that it was their opinion that water run-off from Whipple Road was the most likely cause of the foundation’s deterioration. After thoughtful consideration, the applicant has adjusted the plan for the lot and returns to the Planning Board with a new shoreland development plan that seeks approval to demolish, relocate, reconstruct and expand a legally nonconforming structure to become more conforming.

Staff Commentary and Analysis

Submission content

The shoreland development plan and application is considered complete and includes the information as required pursuant to §16.10.5.2.B. The Board at a minimal should accept the plan as complete and continue the application if there is a hesitation of the Board to move forward with a final vote.

Waivers

The applicant is not requesting any waivers from any review or ordinance standards.

Development standards

The application appears to meet all the applicable development and nonconforming standards as listed below with the following exception:

Noncompliant standards

1. §16.3.2.17.D(2)(b)—the constitution of the patio behind the house is unclear, and may not be permitted. If it were to consist of pavers or some other material that would make it a structure, it cannot be approved. However, if the applicant were to create a space that is devegetated in nature but not a structure, a space to congregate could be created in that intended space. The Planning Board should inquire into the materials planned to be used.

Compliant standards

1. §16.3.2.17.D(2)(a)
2. 16.3.2.17.D(2)(g)—applicant should clarify the width of the proposed stairs.
3. 16.7.3.3.A
4. 16.7.3.3.B
5. 16.7.3.3.C
6. §16.9.1.3.B(1)
7. §16.9.1.4.B

Planning Board Procedural Steps

After the Board has been presented with the application and deliberation exhausted, the following procedural sequence must take place:

1. Plan acceptance: Before the board can move on the application, a vote must occur to accept the plan.
2. Thereafter, the Board needs to determine if a site visit, public hearing, or both need to occur. If a site walk is necessary, the Board should consider scheduling it for the middle of next week. As regards the public hearing, if desirable, it should be scheduled for the September 9, 2021 meeting.
3. If a public hearing is not elected to take place, the Board should consider the following:
 - a. to move to continue the application to a subsequent meeting if more time for consideration is required by the Board,
 - b. approve with or without conditions, or
 - c. deny the application.

Recommended Motions

Below are recommended motions for the Board's consideration:

Motion to continue application

Move to continue the agenda item to the August 26, 2021 Planning Board meeting for a shoreland development application from owners/applicants Nicolas and Amy Mercier and agent Altus Engineering Inc. requesting approval relocate, reconstruct and expand a legally non-conforming structure on a legally non-conforming lot within the base zone setback of the Shoreland Overlay Zone located on real property with the address of 134 Whipple Road, Tax Map 10, Lot 6A, in the Residential-Urban (R-U) Zone and the Shoreland Overlay Zone.

Motion to schedule a site walk

Move to schedule a site walk on _____, 2021, on real property with the address of 134 Whipple Road, Tax Map 10, Lot 6A, in the Residential-Urban (R-U) Zone and the Shoreland (SL-OZ-250) Overlay Zone.

Motion to schedule public hearing

Move to schedule a public hearing on the October 8, 2020 Planning Board meeting for a shoreland development application from owners/applicants Nicolas and Amy Mercier and agent Altus Engineering Inc. approval to relocate, reconstruct and expand a legally non-conforming structure on a legally non-conforming lot within the base zone setback of the Shoreland Overlay Zone located on real property with the address of 134 Whipple Road, Tax Map 10, Lot 6A, in the Residential-Urban (R-U) Zone and the Shoreland Overlay Zone

Motion to approve

Move to approve the shoreland development application from owners/applicants Nicolas and Amy Mercier and agent Altus Engineering Inc. requesting approval to relocate, reconstruct and expand a legally non-conforming structure on a legally non-conforming lot within the base zone setback of the Shoreland Overlay Zone located on real property with the address of 134 Whipple Road, Tax Map 10, Lot 6A, in the Residential-Urban (R-U) Zone and the Shoreland Overlay Zone

M10 L6A

**Kittery Planning Board
 Findings of Fact
 For 134 Whipple Road
 Shoreland Development Plan Review**

UNAPPROVED

WHEREAS: Owners/Applicants Nicolas and Amy Mercier request approval for a shoreland development plan on a legally non-conforming lot with a legally non-conforming structure proposing to construct a 10.5' retaining wall comprising 259-sf located within the base zone setback of the Shoreland Overlay Zone located on real property with the address of 134 Whipple Road, Tax Map 10, Lot 6A, in the Residential-Urban (R-U) Zone and the Shoreland (SL-OZ-250) Overlay Zone.

REQ'D	ACTION	COMMENTS	STATUS
NO	Sketch Plan	None	NOT APPLICABLE
NO	Site Visit	October 1, 2020	HELD
YES	Shoreland Development Plan Review Completeness/Acceptance		PENDING
NO	Public Hearing	TBD	TBD
YES	Shoreland Development Plan Review Plan Approval	TBD; may occur on September 24, 2020 if the Board decides not to schedule a public hearing and/or site walk	TBD

And pursuant to the application and plan and other documents considered to be a part of a plan review decision by the Planning Board in this Finding of Fact consisting of the following (hereinafter the "Plan"):

1. Shoreland Development Plan Application, dated 7/22/21
2. Existing Conditions Plan, Easterly Surveying, Inc., dated 2/27/20, last revised 9/2/20
3. Shoreland Development Plan, Altus Engineering, Inc., dated 7/22/21
4. Architectural Elevations,

NOW THEREFORE, based on the entire record before the Planning Board and pursuant to the applicable standards in the Land Use and Development Code, the Planning Board makes the following factual findings and conclusions:

FINDINGS OF FACT

Chapter 16.3 LAND USE ZONE REGULATIONS

<p>16.3.2.17.D(1)(D)</p> <p>Standard: <i>The total footprints of the areas devegetated for structures, parking lots and other impervious surfaces, must not exceed twenty (20) percent of the lot area, including existing development, except in the following zones...</i></p> <p>Findings: 134 Whipple Road had a pre-existing, legally non-conforming devegetation rate of 24.6% and is proposing to reduce the rate to 24.5%.</p> <p>Conclusion: The standard appears to be met.</p> <p style="text-align: right;">Vote: ___ in favor ___ against ___ abstaining</p>
<p>16.3.2.17.D(2)(b)</p> <p>Standard: <i>Accessory patios or decks no larger than 500 square feet in area must be set back at least 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. Other patios and decks must satisfy the normal setback required for principal structures in the Shoreland Overlay Zone.</i></p> <p>Finding: The patio as proposed shall not consist as a structure and only as devegetative passive space, therefore, is not a patio as prohibited under this section.</p> <p>Conclusion: The standard appears to be met.</p> <p style="text-align: right;">Vote: ___ in favor ___ against ___ abstaining</p>

Chapter 16.9 DESIGN AND PERFORMANCE STANDARDS FOR NATURAL ENVIRONMENT

§16.9.1.3.B(1)

Standard: *The developer must:*

(a) *Select a site with the right soil properties, including natural drainage and topography, for the intended use;*

(b) *Utilize for open space uses those areas with soil unsuitable for construction;*

(c) *Preserve trees and other vegetation wherever possible;*

(d) *Hold lot grading to a minimum by fitting the development to the natural contour of the land; avoid substantial areas of excessive grade;*

(e) *Spread jute matting, straw or other suitable material during construction in critical areas subject to erosion;*

(f) *Construct sediment basins to trap sediment from runoff waters during development; expose as small an area of subsoil as possible at any one time during development and for as short a period as possible;*

(g) *Provide for disposing of increased runoff caused by changed land formation, paving and construction, and for avoiding sedimentation of runoff channels on or off the site;*

(h) *Plant permanent and, where applicable, indigenous, vegetation and install structures as soon as possible for the purpose of soil stabilization and revegetation;*

Finding: It appears that the proposed design of the dwelling unit and other permitted structures will not adversely impact the surrounding landscape and soils, nor increase runoff and soil erosion.

Conclusion: This standard appears to be met

§16.9.1.4.B

Standard: *All land uses must be located on soils upon which the proposed uses or structures can be established or maintained without causing adverse environmental effects, including, but not limited to, severe erosion, mass soil movement, improper drainage, and water pollution to surface water and groundwater, whether during or after construction.*

Finding: It appears that the proposed development may be supported by the existing and proposed soils nor will adversely impact the surrounding natural features

Conclusion: The requirement appears to be met.

Vote: ___ in favor ___ against ___ abstaining

Chapter 16.7 GENERAL DEVELOPMENT REQUIREMENTS Article III Nonconformance

16.7.3.1 Prohibitions and Allowances

Standard: *A. Except as otherwise provided in this Article, a nonconforming condition must not be permitted to become more nonconforming*

Finding: The proposed dwelling unit is becoming more conforming as it the distance from the H.A.T is no closer than previously existed (16.7.3.3.C), the proposed height is not increasing (16.7.3.3.B(3)(e)[5][a]), and the expansion (16.7.3.3.B(3)(e)[5][a]), of the dwelling unit is under the 30% permitted threshold.

Conclusion The requirement appears to be met.

Vote: ___ in favor ___ against ___ abstaining

Chapter 10 DEVELOPMENT PLAN APPLICATION AND REVIEW

Article 10 Shoreland Development Review

16.10.10.2 Procedure for Administering Permits

D. An application will be approved or approved with conditions if the reviewing authority makes a positive finding based on the information presented. It must be demonstrated the proposed use will:

Standard: 1. Maintain safe and healthful conditions;

Finding: The proposed development as represented in the plans and application does not appear to have an adverse impact.

Conclusion: This requirement appears to be met

Vote: ___ in favor ___ against ___ abstaining

Standard: 2. Not result in water pollution, erosion or sedimentation to surface waters;

Finding: Maine DEP Best Management practices will be followed for erosion and sedimentation control during site preparation and building construction to avoid impact on adjacent surface waters. An existing eroded slope will be revegetated.

Conclusion: This requirement appears to be met

Vote: ___ in favor ___ against ___ abstaining

Standard: 3. Adequately provide for the disposal of all wastewater;

Finding: The proposed development includes a wastewater disposal system (sewer connection)

Conclusion: This requirement appears to be met.

Vote: ___ in favor ___ against ___ abstaining

Standard: 4. Not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat;

Finding: The proposed development does not appear to have an adverse impact

Conclusion: This requirement appears to be met.

Vote: ___ in favor ___ against ___ abstaining

Standard: 5. Conserve shore cover and visual, as well as actual points of access to inland and coastal waters;

Finding: The application appears to improve the shore cover and points of access to coastal waters

Conclusion: This requirement appears to be met.

Vote: ___ in favor ___ against ___ abstaining)

Standard: 6. Protect archaeological and historic resources;

<p>Finding: There appears to be no archaeological and historical resources on the lot, thereby nothing to protect.</p> <p>Conclusion: This requirement appears to be met.</p>
Vote: __ in favor __ against __ abstaining
<p>Standard: 7. <i>Not adversely affect existing commercial fishing or maritime activities in a commercial fisheries/maritime activities district;</i></p> <p>Finding: The proposed development does not adversely impact existing commercial fishing or maritime activities.</p> <p>Conclusion: This requirement appears to be met.</p>
Vote: __ in favor __ against __ abstaining
<p>Standard: 8. <i>Avoid problems associated with floodplain development and use;</i></p> <p>Finding: The property is designated Zone A2 by FEMA Flood Zone standards and is defined as a Special Flood Hazard Area (SFHA) along the small portions of the lot abutting the highest annual tide. The proposed development is located outside the SFHA, yet future monitoring should take place as climate change affects the waterway and surrounding environment. In short, the proposed application does not appear to have an impact on the current floodplain or flood-prone area.</p> <p>Conclusion: This requirement appears to be met.</p>
Vote: __ in favor __ against __ abstaining
<p>Standard: 9. <i>Is in conformance with the provisions of this code;</i></p> <p>Finding: The proposed development complies with the applicable standards of Title 16.</p> <p>Conclusion: This requirement appears to be met.</p>
Vote: __ in favor __ against __ abstaining
<p>Standard: 10. <i>Be recorded with the York county Registry of Deeds.</i></p> <p>Finding: A plan suitable for recording will be prepared.</p> <p>Conclusion: As stated in the Notices to Applicant contained herein, Shoreland Development plans must be recorded with the York County Registry of Deeds within 90 days of approval prior to the issuance of a building permit.</p>
Vote: __ in favor __ against __ abstaining

NOW THEREFORE the Kittery Planning Board adopts each of the foregoing Findings of Fact and based on these Findings determines the proposed Development will have no significant detrimental impact, and the Kittery Planning Board hereby grants final approval for the Development at the above referenced property, including any waivers granted or conditions as noted.

Waivers: None

Conditions of Approval (to be depicted on final plan to be recorded):

1. No changes, erasures, modifications or revisions may be made to any Planning Board approved final plan. (Title 16.10.9.1.2)
2. Applicant/contractor will follow Maine DEP Best Management Practices for all work associated with site and building construction to ensure adequate erosion control and slope stabilization.
3. With the exception of the vegetation identified on the plan for removal, no vegetation will be removed without prior approval by the Code Enforcement Officer or the Shoreland Resource

Officer. Efforts to protect existing vegetation must be in place prior to grading or construction. The rock fill shall not replace existing vegetation.

4. Prior to the commencement of onsite construction, areas to remain undisturbed must be clearly marked with stakes and caution tape. All stakes, caution tape, silt fences, and other materials used during construction must remain until all onsite work is completed. Prior to removal, written permission to remove such materials must be given by the Code Enforcement Officer.
5. All Notices to Applicant contained herein (Findings of Fact dated 08/12/2021).

Conditions of Approval (not to be depicted on final plan):

1. Incorporate any plan revisions on the final plan as recommended by Staff, Planning Board or Peer Review Engineer, and submit for Staff review prior to presentation on final plan.

The Planning Board authorizes the Planning Board Chair, or Vice Chair, to sign the Final Plan and the Findings of Fact upon confirmation of required plan changes.

Vote: in favor against abstaining

APPROVED BY THE KITTERY PLANNING BOARD ON _____

Dutch Dunkelberger, Planning Board Chair

Notices to Applicant:

1. Incorporate any plan revisions on the final plan as required by Planning Board and submit for Staff review prior to presentation of final mylar.
2. Prior to the release of the signed plans, the applicant must pay all outstanding fees associated with the permitting, including, but not limited to, Town Attorney fees, peer review, newspaper advertisements and abutter notification.
3. One (1) mylar copy of the final plan and any and all related state/federal permits or legal documents that may be required, must be submitted to the Town Planning Department for signing. Date of Planning Board approval shall be included on the final plan in the Signature Block. After the signed plan is recorded with the York County Registry of Deeds, a mylar copy of the signed original must be submitted to the Town Planning Department.
4. This approval by the Town Planning Board constitutes an agreement between the Town and the Developer, incorporating as elements the Development Plan and supporting documentation, the Findings of Fact, and any Conditions of Approval.

Appeal of Decision:

1. Per Title 16.6.2.A - An aggrieved party with legal standing may appeal a final decision of the Planning Board to the York County Superior Court in accordance with Maine Rules of Civil Procedures Section 80B, within forty-five (45) days from the date the decision by the Planning Board was rendered.