

## Bart McDonough

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**From:** Ron Ledgett <rledgett@comcast.net>  
**Sent:** Wednesday, October 27, 2021 12:59 PM  
**To:** Bart McDonough  
**Cc:** Dutch Dunkelberger; Karen Kalmar; Adam Causey  
**Subject:** Re: Planning Board Meeting Agenda

Your reply confirms that these changes are substantive and therefore should not be made as part of recodification. This is a very sensitive area of the code with precedents and legal opinions.

No changes should be made to this existing code text without a careful and detailed analysis of consequences including review by the Town Attorney.

Any change to this section opens the door to misunderstanding, litigation and loophole hunting.

As requested previously please identify the origin of these changes. Your reply seems to be explaining the reason for these changes. Do you mean to defend the changes because they are intentional? If intentional, by whom?

Ron

Sent from my iPhone

On Oct 27, 2021, at 11:33 AM, Bart McDonough <BMcDonough@kitteryme.org> wrote:

Morning, Ron:

Below are my responses to each section you identified having missing language:

1. At line 280—you are correct that the language was deleted. It appears that the reason for its removal from that section of the code was due to the fact the section speaks to nonconformities. The old language that was deleted reads as follows:

*“All new principal and accessory structures, excluding functionally water-dependent uses, must meet the water body, tributary stream, or wetland setback requirements contained in § 16.3.2.17D(2). A nonconforming structure may be added to or expanded after obtaining a permit from the same permitting authority as that for a new structure, if such addition or expansion does not increase the nonconformity of the structure and is in accordance with § 16.7.3.3B(3)(e)[4] and [5] below.”*

As you can see the beginning of the paragraph speaks to new principle and accessory structures, excluding water dependent uses, which shouldn't be located in a section regulating nonconformance. In the new code format, a portion of the above clause now may be found in section 16.4.28.E(3)(a) as highlighted in yellow above with slightly different language that maintains the original intent, which is that all new structure must be conforming to base zone setbacks from the HAT.

As you have identified, the highlighted green section is also missing. This language appears to have been removed due to redundancy and repositioned in different sections of the code where appropriate. I direct you to section 16.1.8.C(4).b.i thru 16.1.8.C(4).b.iii which speaks to the different permitting scenarios that a nonconforming structure may be repaired/expanded. The tie-in to 16.1.8.C(4).b.i thru 16.1.8.C(4).b.iii occurs in 16.1.8.C(4).b.iii.e when it refers to those sections, which maintains the intent of the highlighted green section of the paragraph above. Again, the intent of the code highlighted in green above, in this case, has not change, only the syntax and so far as to where it is located in the recodified version.

2. I'm going to pair your questions about line [289] and [310] together as they are related. It appears that the deleted language from line [289] was transposed to its own section of 16.1.8.C(4).b.iii.e.4, starting on line 303. Here is how the current code reads:

*"If a legally nonconforming principal structure is located partially within 25 feet from the normal high-water line of a water body, tributary stream, or upland edge of a coastal or freshwater wetland, expansion of the footprint and/or height of any portion of the structure that is located within 25 feet of the normal high-water line of a water body, tributary stream, or upland edge of a coastal or freshwater wetland is prohibited even if the expansion will not increase nonconformity with the water body, tributary stream, or wetland setback requirement. Expansion of an accessory structure that is located closer to the normal high-water line of a water body, tributary stream, or upland edge of a coastal or freshwater wetland than the principal structure is prohibited, even if the expansion will not increase nonconformity with the water body, tributary stream, or coastal or freshwater wetland setback requirement."*

I interpret the above paragraph to mean that if a nonconforming principal structure ("NCPS") straddles the 25-ft. (qualifier) set back, then the accessory structure that is closer to the HAT than that of the NCPS cannot be expanded upon. Let's compare the above to the new language below which can be found on Line 303 -314:

*"Expansion of an accessory structure that is located closer to the normal high-water line of a water body, tributary stream, or upland edge of a coastal or freshwater wetland than the principal structure is prohibited, even if the expansion will not increase nonconformity with the water body, tributary stream or coastal or freshwater wetland setback requirement. All other legally existing nonconforming principal and accessory structures that do not meet the water body, tributary stream, or coastal or freshwater wetland setback requirements may be expanded or altered as follows:..."*

The new language does not have the 25-ft straddle qualifier and now prohibits outright the expansion of any accessory structure that is closer to the HAT than that of the NCPS. So, I concur with your interpretation that the intent of the ordinance has changed by making the opportunities to expand a nonconforming structure more limited.

To your question on why this change occurred, I am unsure of its original origin during the drafting process by our contractor. That being said, I am of the opinion that the change is a positive one as it further protects the shoreline by limiting the opportunities for nonconformities to expand. While the majority of this recodification process' spirit is of reorganization, there are instances where there are policy decision to be made by the Planning Board that will change the intent of the current code. This appears to be one of those instances and I encourage a discussion to take place when the Board is reviewing the proposed language.

3. Line 295: Language was removed due to redundancy. It does not change the requirement that the repair/expansion of a nonconforming structure needs to comply / be in conformance with all other zoning requirements, which is explicitly stated in 16.8.1.C(2).a
4. Line 314: again, redundant language removed similar to the deleted language that occurred on line 295.
5. Line 327-341: Language was removed to include all resource protection zones as defined in the current code under 16.3.2.19.A(2), which includes among other locations flood plains and areas of steep slopes. The way the code provision is currently constructed under 16.7.3.3.B(3)(e)[5][b] only qualifies those areas of Resource Protection that are 250-ft from the edge of a wetland, et.al.

I agree this is another deviation from the code's current intent. The modification's origin, again, I am unsure. Perhaps it came up during a workshop when the consultant was working with the Planning Board. That being said, I think it is a positive change as these properties and resources located within the RP zone may be more affected by climate change. Again, this is another instance of a policy change the Planning Board should discuss and give direction.

6. Temporary Housing standards can now be found in 16.5.28 of the recodified version.

I think I covered all your questions. Happy to discuss in further detail.

Best,

Bart McDonough  
Town Planner  
Town of Kittery  
200 Rogers Road  
Kittery, ME 03904  
Phone: 207.475.1323  
Email: [bmcdonough@kitteryme.org](mailto:bmcdonough@kitteryme.org)

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**From:** Ron Ledgett <[rledgett@comcast.net](mailto:rledgett@comcast.net)>  
**Sent:** Tuesday, October 26, 2021 4:33 PM  
**To:** Bart McDonough <[BMcDonough@kitteryme.org](mailto:BMcDonough@kitteryme.org)>  
**Cc:** Dutch Dunkelberger <[dutchdunkelberger@gmail.com](mailto:dutchdunkelberger@gmail.com)>; Karen Kalmar <[karen@kalhill.com](mailto:karen@kalhill.com)>; Adam Causey <[ACausey@kitteryme.org](mailto:ACausey@kitteryme.org)>  
**Subject:** Fwd: Planning Board Meeting Agenda

Page 17.7:7 should be 16.7:7

Sent from my iPhone

Begin forwarded message:

**From:** Ronald Ledgett <[RLEDGETT@comcast.net](mailto:RLEDGETT@comcast.net)>  
**Date:** October 26, 2021 at 3:56:58 PM EDT  
**To:** Bart McDonough <[BMcDonough@kitteryme.org](mailto:BMcDonough@kitteryme.org)>  
**Cc:** Ronald Ledgett <[RLEDGETT@comcast.net](mailto:RLEDGETT@comcast.net)>, Dutch Dunkelberger

<[dutchdunkelberger@gmail.com](mailto:dutchdunkelberger@gmail.com)>, Karen Kalmar <[karen@kalhill.com](mailto:karen@kalhill.com)>, Adam Causey <[ACausey@kitteryme.org](mailto:ACausey@kitteryme.org)>

**Subject: Re: Planning Board Meeting Agenda**

Bart,

I am comparing using [Kitteryme.gov](http://Kitteryme.gov) existing code 16.7.3.3, pages 17.7:7 through 16.7:13 with recodification code 16.1.8, pages 3 through 9 in the copy provided at by staff.

The changes listed in your PDF all appear to be incorporated in the existing code used for comparison on [kitterme.gov](http://kitterme.gov).

As previously reported, some of the text in the existing code is not included in the recodification code 16.1.8. Specifically,

at line 280 paragraph [2] on page 16.7:10 of the existing code is not included,

at line 289 the last eight lines of existing code are not include,

at line 295 the last two lines of existing text are not included,

at line 310 the designation of a separate paragraph 5 is eliminated and the text added to paragraph 4, changing the meaning of the requirement,

at line 314 the last two lines of existing text are not included,

at lines 327 through 341 some existing text is not included and some existing wording has been changed,

These omissions and changes are substantive. Again, for the record please identify the origin of these changes and how they got past the review process.

On the other section I am reviewing 16.2, while not complete there are text duplications and omissions in 16.2.4 Port Authority in both paragraphs A and B. Also, I have not found where existing code paragraphs 16.5.5 and 16.5.6 are located in recodification code.

Ron

On Oct 26, 2021, at 1:16 PM, Bart McDonough <[BMcDonough@kitteryme.org](mailto:BMcDonough@kitteryme.org)> wrote:

Good afternoon, Ron:

## Land Use Zone Regulations Chapter 16.4 — KK

**\*\* are the non formatting issues**

### **\*\*line 76: 16.4.6(4) Boundary Zone Line Interpretation:**

The last sentence of the current Code says: “In the Shoreland and Resource Protection Overlay Zones, boundary redefinition must be supported by documentation from “an appropriately licensed OR certified Maine State professional” **this has been changed** to “an appropriate certified Maine State professional”. Either way...

Which professionals are certified to challenge or redefine OZ-SL & RP zone boundaries? I’d suggest we name the trades applicable (i.e. licensed surveyor?, soil scientists?, other?). As it’s written now, you have to guess who that would be, and what kind of accreditation, licensing or certification would be pertinent. I hope it can be made clearer.

**Uses in zones are not alphabetized.** At the 1st KLIC meeting on the Recod I asked that zone-uses be alphabetized. I repeated my request over the years. I was told it was done, but it doesn’t appear to be. Having to read every single use to determine whether a specific use is permitted in its zone is vexing. The Recod was to make Title 16 easier to use. Alphabetizing the uses would’ve helped. In the current Code only the MU-N’s uses are alpha’d. It’s great... but in the Recod it’s reverted to higgledy piggledy. :(

### **Suggestions/Questions (SE= special exception from here on)**

**line 154** change to Subdivision, Major or Minor (this format is used elsewhere)

**\*\*lines 176, 324, 479, 600, 726, 811, 1140, 1296, 3213, 3709, 3996** Are unclear, please consider substituting “functionally water-dependent uses”; it’s defined.

**line 210-11** formatting error. The use “Individual Private Campsite” needs its own line.

**lines 214 -228; 506-517** the SE formatting should be consistent. Start list with “a” as is done @ line 235 for the OZ-RP’s SE section.

**\*\*line 732** (RV-OZ-SL) “Accessory Use and Building” is now the permitted use. It was changed from the zone’s previous “Accessory Buildings and Structures”. Should Acc. Buildings and Structures be changed to Acc. Use & Building wherever the former is found, given the definitions, or is there a reason for keeping it in some places?

**\*\*line 768** (R-RC) **adds** Dwelling, two family. Currently there’s no duplex option in the zone, just an option for an ADU. Would three housing units on lots in the Rural Conservation zone be in line with the purpose statement that says RC “require(s) special measures to ensure low-density development”? Might subdivisions be able to build three units per lot in a conservation zone?

**\*\*line 1144-1147,1300** The BL & BL1 gasoline spacing provisions aren't in the current online Code. Is it a new add or has it been enacted recently?

**\*\*line 1151:** In the BL and BL-1 zones, current OZ-SL rules limit dwellings to single-family or duplexes. They're both SEs. The new OZ-SL permitted dwelling use in BL is "Dwellings, if farther than 100ft from..." the resource. There is no mention of any dwelling types or number of dwellings in BL's SEs. Yet dwellings are called out in BL-1's SEs.

Perhaps this was just an oversight in BL? And, is much of the either BL zone in the OZ-SL? Haven't had time to look at Zoning map.

**\*\*line 1309:** Are these new BL-1 parking requirements? They aren't in the online Code. Please mention at meeting if newly enacted or are a proposed change.

**line 1431 BL-1 OZ-SL SE uses and in C zones:** Is "parking area" meant to replace "commercial parking lot or parking garage"? Does it infer garage? Does it need a def. in 16.3 ?

**\*\*MU** — Commercial parking lot or garage has been eliminated and not replaced with parking area. Reasoning?

**line 3500** — Gas station separation in MU is 2,000ft., so basically no gas stations past Lemont's?

**line 3510** — Nice title change. Parenthetically, I also appreciate the shift from elderly housing to age-restricted... for obvious reasons. :)

**\*\*Why** was grocery store/food store taken out of the MU-BI zone?

**line 4471** — "Buffers" are included in the MU-N "surface parking" section. There's no connection. Might it be separated out as #9, and change Open Space to 10, etc. to end (which is currently 11)?



## RECODIFICATION \_ POTENTIAL AREAS FOR TWEAKS:

- **Master site plan def** is unclear to me. It's in 16.3 defs and in 16.6.1. B @ line 22. The word "zone" is confusing. Don't we really mean all lots encompassed by the master plan? Or is it the whole the Land Use "zone"? (which would be odd) Clarifying language would help.
- **Waivers:** Performance Standards have recently been added to the waiver and modification authority which originally called out only "certain required improvements": **Why the change?** If the Board agrees that performance standards may be waived or modified :
- **a)** Please include a reference citation to Basis for Decision (now in 16.2 starting at line 675) and please add any additional criteria needed to guide the PB toward *consistent* reasoning and action. These older regs may be inadequate to meet the challenge for the many performance standards throughout T16.
- **b)** If there are some performance standards that should never be waived or modified, please name them.
- **c)** Also please include that waiving or modifying any standards based on consideration of cost is **not** permitted. It's in the current Code & it should be included with waiver authority, wherever it's listed. For the sake of fairness, applicants and Board alike should know what waivers and modification requests can be made, and what the Board is meant to consider before it makes a decision.
- **d)** As of now, waiver/modification authority is only in site plan and subdivision Recod chapters. Shouldn't they also be in new 16.5., 16.6, 16.7, and 16.8 for ease of use? Or, perhaps move the waiver authority (as 16.1.8.C) after the 16.1 Conformity sections, then Nonconformance would start as 16.1.8.D.? It might be simpler than having it everywhere.
- **Rules of Construction** (16.1.6 p.3, line 62) please add the word must to shall @line 62 and fix grammar. We use must and shall in many places; the intent is always: you've gotta do it.



## **FOR EASE OF USE**

- Will there be any indication of the actual number of the ordinance on a given page in the hard and e-copies? Many sections have been lengthened considerably (page-wise) and finding the Code citation will be very hard without a hint.

## **OTHER**

- Add “Dwelling, Cottage Cluster” to definitions (keeping the same format and naming strategy as for other dwellings). Delete Cottage Cluster in the “C”s.
- **16.8.10.C** (subdivision) Water supply (somewhere in line 1048 territory) really must have language that ensures that where there’s no town water line, a development SHALL NOT cause an adverse impact on water volume or quality on surrounding properties. Pre-existing neighbors can’t sue their water back into the ground.

## **Bart McDonough**

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**From:** Dutch DUNKELBERGER <dutchdunkelberger@gmail.com>  
**Sent:** Tuesday, November 2, 2021 4:46 PM  
**To:** Bart McDonough  
**Subject:** 16.8 Edits

Bart, here's what I have for Section 8 edits:

Line 71 -- paragraph refers to multiple zones, so should the reference, Sections 16.4.28-30

Line 170/171 -- the line should be "To request a preapplication conference, the applicant shall submit a brief narrative..."

Line 324 -- "regular mail" really?? Should be email to Town Staff members.

Lines 473, 484, 487, 567, 591, 596, 850, 878, 899, 1945 -- indent spaces not needed. While I'm on it, I don't like this format as it wastes a lot of paper space, making for a physically longer ordinance.

Line 574 -- Need to define "AADT"


Line 905 -- Need to define "visual access"

That's it.

Dutch Dunkelberger



204 note upon each application the date and time of its receipt.  
205 (3). Whenever the nature of the proposed structure requires the installation of a  
206 subsurface sewage disposal system, a complete application for a  
207 subsurface wastewater disposal permit shall be submitted. The application  
208 shall include a site evaluation approved by the Plumbing Inspector.

209 D. Exempt and non-exempt uses. 

*Included  
construction*

210 (1). Exempt uses and development not requiring shoreland development  
211 review by the Planning Board  
212 a. Proposed development of principal and accessory structures in  
213 compliance with §16.4.28.D, when not subject to Planning Board  
214 review as explicitly required elsewhere in this title, shall be  
215 reviewed and approved by the Code Enforcement Officer (CEO)  
216 prior to issuing a building permit, subject to, but not limited to the  
217 following requirement:  
218

i. The total devegetated area of the lot (that portion within the  
Shoreland Overlay Zone) shall be calculated by the  
applicant and verified by the CEO and recorded in the  
Town's property records.

*b*

(2). Clearing of vegetation for activities other than timber harvesting. These  
are subject to review and approval by the Shoreland Resource Officer or  
Code Enforcement Officer.

*c*

(3). Division of a conforming parcel that is not subject to subdivision as  
defined in §16.3.

*d*

(4). A permit is not required for the replacement of an existing road culvert,  
provided the replacement culvert is not:

- a. More than one standard culvert size larger in diameter than the  
culvert being replaced;
- b. More than 25% longer than the culvert being replaced; and
- c. Longer than 75 feet.

*e*

(5). When replacing an existing culvert, the watercourse must be protected so  
that the crossing does not block fish passage, and adequate erosion control  
measures must be taken to prevent sedimentation of the water in the  
watercourse.

*f*

(6). A permit is not required for an archaeological excavation, provided the  
excavation is conducted by an archaeologist listed on the State Historic  
Preservation Officer's Level 1 or Level 2 approved list and unreasonable  
erosion and sedimentation is prevented by means of adequate and timely  
temporary and permanent stabilization measure

245 E. Non-exempt uses requiring shoreland development review

246 (1). After the effective date of this title, no person may, without first obtaining