



Town of Kittery, Maine

Conservation Commission

200 Rogers Road, Kittery, Maine 03904

Date: July 12, 2023
To: Kittery Planning Board Members
From: Kittery Conservation Commission
Re: Proposed Amendments to Title 16.8.10.D

As we have mentioned in the past, when the State of Maine established Conservation Commissions throughout our state, the charge was to Preserve and Protect the natural features of Maine. However, Conservation Commissions were not given the authority to make legally binding decisions – that power was given to Planning Boards. The Conservation Commissions, however, were given the charge of being advisors to Planning Boards.

As we know, 16.8.10.D(2)(b)[1] establishes that the minimum setback distances in the Code for a first-time subsurface disposal system are exactly that, minimum requirements, as is very common in Town Codes. The very nature of well thought out Codes may not allow certain structures or systems in the best interest of the community and/or natural resources in the Town.

The proposed code change essentially (1) reduces or removes reasonable minimum requirements for first-time subsurface disposal systems, and (2) it also replaces local best management practices and control by giving the State the ability to determine what is best for Kittery.

Kittery chose to have its ordinance stricter than the State of Maine for valid reasons. Not all towns in Maine have water bodies like we have here in Kittery, and the Town has chosen to take the initiative and lessons learned from systems that didn't meet the current minimum requirements.

Kittery is a seaside community with difficult problems concerning our waterbodies, wetlands, and vernal pools due to earlier development. The Town is still working since 2008 to clean up Spruce Creek through the Spruce Creek Watershed Restoration Project but one thing we learned was that septic systems too close to water ways often contributed to the problems. We have seen what disregarding our natural resources has meant to our current residents. The current Kittery Comprehensive Plan reflects our community's lessons learned and their desires for our Town.

What benefits to the community and the Town's natural resources does this proposed change provide? If there are new subsurface disposal system technologies to consider, then let's verify that they are possible solutions for Kittery to consider and update the land use ordinance appropriately.

This is not a relatively new ordinance; it has existed for a while and with good reason. If new technologies could change the original reasoning, then let's review the minimum requirements and if appropriate, include the technology in the specific requirements in the Code rather than use the method of a variance.

We need to provide our town with best protection and practices against damages to our rivers, creeks, ponds, wetlands, vernal pools, and ground water that provide well water to so many properties in Kittery. Damaging natural resources usually in turn damages other community and private properties.

Therefore, the Conservation Commission respectfully requests that the Planning Board consider our recommendation that title 16.8.10.D(2)(b)[1] remain as is and, if necessary, review the minimum requirements while considering any new verifiable technology, experience, and best management practices.

Kittery Conservation Commission

July 11, 2023

Kittery Planning Board
200 Rogers Road
Kittery, Maine 03904

Dear Kittery Planning Board,

Please do not recommend changing section 16.8.10 D concerning first time septic variances. Kittery's more restrictive septic ordinance was put in place for very good reasons.

We as a town are much more familiar with Kittery's particular environmental issues and concerns than the State is. The state's laws apply to the entire state and are not necessarily what is best for Kittery.

The town is allowed to have zoning that is more restrictive than the State.

The Comprehensive Plan reinforces the need for stricter septic ordinances in our fragile coastal area.

Septic systems this close to the water are accidents that will happen, particularly when you add climate change into the mix.

Kittery is wise to be proactive and get ahead of the inevitable.

Please do not be pushed around by private/personal agendas. Taking the easy way out and letting the State decide is not in Kittery's best interest. We need to put the environment ahead of financial interests.

This request seems like a step in the wrong direction with efforts underway to address climate change and protecting "our" environment.

Respectfully submitted,

Debbie Driscoll
Kittery Resident
Former Planning Board Member

Jason Garnham

From: jeffkc533@gmail.com
Sent: Thursday, July 13, 2023 11:12 AM
To: Jason Garnham; Kathy Connor; Maxim Zakian
Cc: Jeff Clifford
Subject: Item 3 - Public Hearing for Proposed Zoning Amendment

Dear Kittery Planning Board members,

I am unable to attend this evening's Planning Board meeting, but offer the following comments in opposition to the Proposed Amendments to Title 16.8.10.D in Item 2:

- A proposed amendment to LUDC requires that the applicant "provide a narrative of why the proposed amendment would be beneficial for the town...". The amendment application submitted does not demonstrate a "benefit" to Kittery, but does speak of "compromise".
- Prohibition of variance for new (or first-time) systems has been part of Kittery's LUDC since 2005 (or earlier). The LUDC language regarding prohibition of variance has been slightly modified during several amendments to the LUDC. However, the intent has remained the same, thereby demonstrating that both the Planning Board and the Town Council have confidence that the current prohibition of variance is in the best interest of Kittery.
- The Staff Comment Summary points out the amendment "could result in incremental development of shoreland or open space areas which [Kittery's Comprehensive Plan] policies generally discourage."
- While the State's statutes have an avenue for such a variance under the State of Maine, Subsurface Wastewater Rules, the variance review by state staff would typically be site specific to the individual property and not take into account cumulative impacts to the natural resources in Kittery and the stresses they are under. Effluent from most subsurface disposal systems receiving a variance will flow to Spruce Creek, Piscataqua River, Brave Boat Harbor, or York River, all watersheds which have experienced, and will continue to experience, significant development pressure and the associated environmental stresses to water quality. Allowing a reduced setback via variance to these waterbodies, as well as fresh water wetlands, has no benefit to Kittery. The cumulative effect of multiple variances granted over time will likely have a negative impact to the water quality, certainly it would not improve water quality.
- While there have been improvements in on-site wastewater treatment systems, there are persistent constituents such as pharmaceuticals, nitrates, PFAS, to name a few, that will still be present in the subsurface system effluent. Reducing the setback would only lessen the travel time in the buffer and the ability of the soil to help breakdown these chemicals.
- The proposed amendment to the LUDC would modify Par. 16.8.10-D.2.b.1. Would the amendment also apply to Par 16.8.10 -D.2.d.2, which also states that first-time subsurface disposal systems may not be reduced by variance in the case of unimproved lots created after April 26, 1990?
- To the best of my knowledge, there is no documentation that the Kittery Land Issues Committee has endorsed this amendment.

Thank you for your consideration of these comments in opposition to the proposal.

Jeff Clifford

27 Miller Road



Policy Regarding the Department's Review of Variance
Requests and the use of Advanced Treatment or Advanced Tertiary
Treatment on Marginal or Failing Sites
Policy SSW-002-2017

This policy is intended to provide clarity and certainty for property owners, Site Evaluators and Local Plumbing Inspectors regarding the Department's variance review process in general (all Department level variance requests) and the use of advanced treatment systems to overcome technical difficulties on sites with marginal or failing conditions.

The intent of Maine statute is clear, the Department is charged with writing regulations (rules) for the design and location of subsurface wastewater disposal systems and municipalities are charged with administering and enforcing those rules through their Local Plumbing Inspector. To that end, the Department has been drafting and redrafting the Subsurface Rules since 1974, and towns have been administering the rules locally. The rules, including criteria for "First Time Systems", "Replacement Systems" and "Expansions", are used by LPI's to evaluate system designs provided by SE's. The standards in the rules are the limits of the authority for LPI's. Designs that include criteria that exceed the limits outlined in the rules require a "State Variance".

Historically it has been assumed that the Department (i.e. the State) is limited to the same criteria found in the rules used by LPI's when it reviews a variance application. In reality the Department has the authority to evaluate a variance request based on a review of the potential impacts to public health and the environment. The criteria found in the rules, specifically Sections 7 and 8, may be used by the Department as guidance. The Department has expertise not available at the local level that can be utilized to evaluate more complex designs and the methods and devices proposed to mitigate for local site limitations. For example, the Department can evaluate the local surficial geology to determine the likelihood of a proposed disposal system impacting a well on a neighboring property or a protected natural resource. The goal of both the rules as implemented at the local level and the Department's reviews is to ensure the protection of public health and the environment. Meeting the criteria found in the rules is considered adequately protective of public health and the environment allowing decisions to be made at the local level without any further review being required. The Department has the expertise and authority to consider designs, methods and devices that exceed the limits found in the rules and determine on a case-by-case basis the potential impacts to public health and the environment.

Definitions:

For the purpose of this policy the following terms are defined. All terms defined in the Subsurface Wastewater Disposal Rules, 10-144 CMR 241, shall be applicable when used in this policy.

Advanced Tertiary Treatment: An advanced wastewater treatment system approved for use in Maine by the Department that the Department has determined will reliably and consistently discharge wastewater that is sufficiently treated to require no further treatment in either a septic tank or disposal field.

Advanced Treatment: An advanced wastewater treatment system approved for use in Maine by the Department that reduces the effluent strength of discharges, but may require additional treatment by other system components to meet the standards in the rules. Proprietary devices for use in disposal fields are not considered advanced treatment.

Marginal or Failing Sites: For the purpose of this policy a marginal or failing site is a property that must meet first time criteria in the rules and requires a variance for one or more criteria found in the rules that the Department determines may result in a malfunction as defined or a disposal system that will not be adequately protective of public health and the environment.

Department Variance Reviews:

The Department shall review all variance applications submitted by the LPI as quickly as practical. When additional time is required the Department shall promptly notify the applicant and LPI. In all cases the Department shall strive to complete the variance review within 30 days. When additional information is required the review period may be extended by the Department.

The Department shall evaluate variance applications using the criteria found in the rules as guidance.

All variance requests must demonstrate to the satisfaction of the Department that there are no alternative locations that could *reasonably* meet first time criteria. Meeting first time criteria, including for replacement systems, should always be the goal of the Site Evaluator.

Variance requests for replacement systems that cannot meet first time criteria must also demonstrate to the satisfaction of the Department that the replacement criteria found in Section 8 of the rules cannot be *reasonably* met or exceeded.

Variance requests must demonstrate to the satisfaction of the Department that the variance(s) requested are the minimum possible that can *reasonably* be implemented on the subject property.

The Department shall utilize information regarding local surficial geology, the type, location and construction of drinking water wells in the vicinity of the proposed disposal system location, the proximity of sensitive natural resources and any other information required to evaluate the potential impacts which may result should the variance be approved.

The Department may require additional information be provided by the applicant when not readily available through state government. For example, well construction information may be required if this information is not available at the Maine Geological Survey.

The Department may require design alterations or the inclusion of advanced treatment or advanced tertiary treatment when it determines additional effluent treatment is required to provide adequate protection of public health and the environment.

The Department shall approve variance applications that demonstrate to the satisfaction of the Department that the variance request has no reasonable alternatives, has been minimized to the greatest extent practical by the Site Evaluator, and the Department determines that the design will be adequately protective of public health and the environment.

Department Reviews of Variance Requests on Marginal or Failing Sites:

A wise man (who shall remain nameless) once stated at a M.A.S.E. annual meeting that “not all variances are created equal”. The Department concurs. A variance request for a setback reduction between a water tight tank and a foundation wall does not include the same risks as reducing the setback between a disposal field and a drinking water well. The Department shall review variance applications with the relative risks associated with the proposal being the focus.

For the purpose of this policy marginal or failing sites shall include locations with proposed systems that are required to meet first time criteria, require a Department variance, and:

- Cannot meet the minimum depth to limiting factor(s) requirements found in the rules; or
- Cannot meet the design requirements found in Table 4F in the rules; or
- Cannot meet applicable setbacks to drinking water wells as required in the rules; or
- Cannot meet applicable setbacks to protected natural resources as required by the rules; or
- Cannot meet applicable setbacks to property lines from disposal areas as required by the rules, or
- Cannot meet applicable slope requirements as required by the rules, or
- Cannot achieve a score of 65 points or greater using Tables 7C-7M in the rules when the disposal field would be located within the Shoreland Zone..

For review of variance requests on marginal or failing sites the Department must receive a complete application from the LPI that includes:

- A completed and signed HHE-200; and
- A completed and signed HHE-204; and
- Written confirmation from the LPI that all applicable local and state Shoreland Zoning requirements are met; and
- A statement from the Site Evaluator verifying that the proposed design and system location is required by site conditions and that no more compliant location with reduced variance requirements can be reasonably identified and developed; and
- A description from the Site Evaluator of the site limitations and the design elements included to overcome those limitations.

Approval of variances for marginal or failing sites shall require:

- Department verification that no reasonable alternative exists; and
 - For systems proposed outside the Shoreland Zone:
 - Advanced treatment is included in the design; and

- The Department after evaluating the proposed design makes a determination that no unreasonable risks to public health or the environment shall result.
- For systems proposed in the Shoreland Zone:
 - Advanced tertiary treatment is included in the design, and
 - A maintenance contract that ensures the advanced tertiary treatment system is inspected and serviced as recommended by the manufacturer; and
 - The Department after evaluating the proposed design makes a determination that no unreasonable risks to public health or the environment shall result.

Special Considerations:

The Department will evaluate variance applications for marginal or failing sites on a case-by-case basis.

It is incumbent on the Site Evaluator to demonstrate to the satisfaction of the Department that native soils can a) handle the hydraulic load anticipated and b) when advanced treatment systems are utilized (not advanced tertiary treatment systems) the native soils can provide any necessary treatment required to ensure proper functioning of the system and protect public health and the environment.

The Department recommends that the applicant and Site Evaluator request a pre-application meeting with the Department to review the proposed design prior to submitting a formal application to the town.

A lack of information required for the Department to make an informed decision may result in denial of the variance application. The Department must have the information required to evaluate the surficial geologic and hydrologic conditions on the subject property. If the required information is not available within existing state government resources the applicant shall provide it to the Department at their expense. Providing data and information in no way guarantees Department approval.

Local requirements more stringent than the rules always prevail.

In no instances shall a variance for a marginal or failing site be approved for a system that requires disturbing the Shoreland Zoning protective buffer required by the state or local Shoreland Zoning ordinances. For major expansions with existing disposal system components located inside the buffer, further encroachment or disturbances inside the buffer shall not be approved.

A variance approval by the Department in no way compels local approval. The LPI makes the final determination.

The site must not be a lot approved during subdivision review by either a municipality or the Maine department of Environmental Protection.

The lot must comply with the Maine Minimum Lot Size Law and relevant regulations.

The Department may consult with other state agencies, public water suppliers, municipal officials and other entities that may help the Department make appropriate and informed determinations.

Nothing in this policy shall prevent the Department from requiring additional information from applicants nor compel the Department to approve variance applications. Department determinations shall be made on a case-by case basis using the information available and shall be based entirely on the evaluated risks to public health and the environment.