



**TOWN OF KITTERY**  
Planning and Development  
200 Rogers Road, Kittery, ME 03904  
Telephone: 207-475-1307 Fax: 207-439-6806

**TO:** PLANNING BOARD  
**FROM:** JASON GARNHAM, DIRECTOR OF PLANNING & DEVELOPMENT  
**SUBJECT:** PROPOSED FIRST TIME SEPTIC VARIANCE AMENDMENT TO TITLE 16: PUBLIC HEARING  
**DATE:** JULY 13, 2023

James and Tudor Austin are requesting a change to Title 16's land use ordinance, specifically to §16.8.10 D. which concerns first-time septic variances. The Town's current ordinance prohibits first time septic system variances sought to reduce setback distances. The State allows an applicant to apply for such a variance. The change proposed by the Austins would align Kittery's ordinance with that of the State by referencing the State's statute as the avenue by which an applicant could apply for such a variance. Please see the additional materials provided by the Austins as well as the letter from Kittery's Code Enforcement Officers.

In Kittery, a first-time septic system permit, which is the permit needed for property that does not have a septic system and is not replacing a septic system, must meet minimum setback distances from drinking water wells, wetlands and waterbodies, and if it cannot, the septic system is not allowed.

The Planning Board advises Town Council regarding proposed changes to Title 16, Kittery's Land Use Ordinances. The Board reviewed this proposal and voted to schedule a public hearing during the June 22, 2023 meeting. At this meeting the Board should hold a public hearing, discuss the implications of the proposed changes for future development in Kittery, and, if appropriate, vote on a recommendation to forward to Town Council.

Action:

1. The Planning Board should hear from the applicant and discuss the proposed amendment.
2. Open, hold, and close a public hearing.
3. If appropriate, vote on a recommendation for Town Council.

Motions:

***Move to open/ close Public Hearing.***

***Motion to recommend adoption of the proposed amendments by Town Council***

*Move to recommend adoption by Town Council of amendments to Kittery Town Code §16.8.10 D to allow first-time septic system variances as proposed by James and Tudor Austin in their petition submitted December 2, 2022 (or as amended).*

Staff Comments:

The proposed amendment would enable development of septic systems on certain properties located within Shoreland areas which may currently be undevelopable due to zoning restrictions.

Zoning ordinances are required by state law to be consistent with a comprehensive plan (MRS Title 30-A, Sec. 4352). The following **Goals and Objectives** from **Kittery's Comprehensive Plan 2015-2025** relate to this proposed amendment:

*Goal 2: To protect Kittery's Natural Resources including watershed, fresh water, wetlands and vernal pools, agricultural lands, forest resources, open space and recreation*

- Objective 2.1: Protect and preserve critical open spaces for passive recreation, visual impact and preservation of wildlife habitats, coastal (saltwater) wetlands, freshwater wetlands, and vernal pools
- Objective 2.2: Increase opportunities for recreation

*Goal 6: To protect the town's coastline, the working waterfront, and ENSURE APPROPRIATE access to and enjoyment of the water while protecting it from environmental impacts*

State of Maine Goal: To protect the State's marine resources industry, ports and harbors from incompatible development and to promote access to the shore for commercial fishermen and the public

- Objective 6.1. Increase access to the waterfront
- Objective 6.3. Protect marine resources

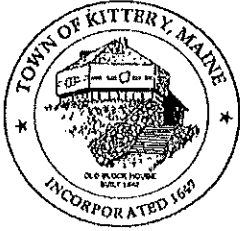
*Goal 8: Ensure that the Town's regulations support desired land uses*

Objective 8.1. Update Town code and apply land use regulations to guide desirable development in appropriate locations

- 8.1.3. Review and revise Town codes to account for the impacts of sea level rise and climate adaptation
- 8.1.5. Encourage the protection of open space and landscape features within developments and/ or in the no growth/ limited growth areas

Summary:

Town policies are mixed. Some prioritize preservation of natural resources and open space while others encourage activity in shore areas. Public health, safety, and environmental quality will be maintained via state and local permit processes which require adherence to specific standards. Staff find that the proposed amendment would not result in significant adverse impacts to public health and safety or the environment but could result in incremental development of shoreland or open space areas which policies generally discourage. Staff do not take a strong position in favor of or against the proposed amendment at this time.



**TOWN OF KITTERY MAINE**  
**TOWN PLANNING AND DEVELOPMENT**  
200 Rogers Road, Kittery, ME 03904  
Telephone: 207-475-1323 Fax: 207-439-6806

Office Use Only	Application Fee: <input type="checkbox"/> \$300.00	Date Submitted: _____	Amount Paid: \$ <u>300.00</u>
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APPLICANT INFORMATION	NAME	JAMES + TUDOR AUSTIN	MAILING ADDRESS	PO. Box 278 Kittery Point ME 03905
	PHONE	207-439-0593		
	CITY	207-475-4254		

Zoning Amendment Type	<input checked="" type="checkbox"/> Text	<input type="checkbox"/> Map
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COMPLETE ONLY THE APPLICABLE SECTIONS BELOW

**Amendment to Land Use Code (Text Change)**

The proposed amendment would be:  A new provision to the code  A change to the existing code

**NEW PROVISION TO THE CODE**

Provide proposed ordinance language and code section format and numbering in space below

SEE ATTACHED

Provide a narrative of why the proposed amendment would be beneficial for the Town in the space provided below. Include benefits and hardship this would address.

SEE ATTACHED

**ADDITIONS AND MODIFICATIONS TO THE EXISTING CODE**

Code section number to be amended

Proposed amendment language

SEE ATTACHED

Provide a narrative of why the proposed amendment would be beneficial for the Town in the space provided below. Include benefits and hardship this would address.

SEE ATTACHED

**Amendment to the Land Use Zoning Map**

Provide a narrative of the proposed change including benefits for the Town, compatibility to the abutting land uses and any supporting information. Also, attach a sketch of the proposed map change with this application.

## ADDITIONS AND MODIFICATIONS TO THE EXISTING CODE

Code section number to be amended: 16.8.10.D.(2)(b)[1]

### Proposed amendment language

"§ 16.8.10

Performance standards and approval criteria.

D. Sewage disposal.

(2) Subsurface wastewater disposal systems.

(a) The developer shall submit plans for subsurface wastewater disposal designed by a Maine-licensed site evaluator in full compliance with the requirements of the State of Maine Plumbing Code, Subsurface Wastewater Disposal Rules, and this title. Subsurface wastewater disposal systems (SWDS) must be constructed according to the approved plan.

(b) All first-time subsurface wastewater disposal systems must be installed in conformance with State of Maine Subsurface Wastewater Disposal Rules and this title. The following also apply:

[1] The minimum setback distance for a first-time subsurface disposal system may not be reduced by variance. For a site that does not meet the minimum first-time system setback distances in 10-144, Chapter 241, Table 7B, variances must be processed in accordance with Section 7(B) and submitted to the Maine Department of Health and Human Services for a final determination.

[2] Clearing or removal of woody vegetation necessary to site a first-time system, and any associated fill extensions may not extend closer than is allowed in the table in § 16.5.30, Minimum setbacks from wetlands and water bodies, for subsurface sewage disposal."

**Provide a narrative of why the proposed amendment would be beneficial for the Town in the space provided below. Include benefits and hardship this would address.**

Absolute prohibition of variance for first-time systems would appear to be inconsistent with current technology and unique characteristics of many potential building sites in Kittery (e.g. Wood Island). Consideration of setback limit reductions based on such technology and prospectively eliminate any need for overboard discharge systems.

10-144, Chapter 241, State of Maine, Subsurface Wastewater Disposal Rules, Section 7, Paragraphs B and C (encl 1) delineate the stringent process and criteria set by the Department of Health and Human Services. Engineered design review and reduction limitations to the established setbacks defined in Table 7B (encl 2) offer necessary protection to the environment.

While Local Plumbing Inspector (LPI) review & approval/denial is permitted by these rules with the same criteria, the current ordinance removes any allowance for such consideration. It is submitted that a reasonable compromise in allowing Kittery property owners to, at least, receive consideration of proposals by the LPI, and ensuring external review by the Department sets a fair basis for the owners and environmental protection.

**Enclosure 1, Austin Title 16 Amendment Request, 10-144, Chapter 241, State of Maine, Subsurface Wastewater Disposal Rules, Excerpt**

**SECTION 7 FIRST-TIME SYSTEMS**

**B. FIRST-TIME SYSTEM VARIANCE REQUESTS**

1. Requests for variance: Request for first-time system variance must include a completed application submitted to the Department by the applicant. The completed application must be on a form prescribed by the Department, signed by the LPI and Site Evaluator and accompanied by the appropriate application fee. First time system variances for depth to limiting factor less than nine (9) inches are not allowed.

2. Contents of applications: An application for a first-time system variance must include the following:

(a) permit to install a system or part of a system. It must include complete plans and specifications for the proposed system and other pertinent information as required on the HHE-200 and HHE-204 forms;

(b) Requirements that cannot be met: The application must indicate the section(s) and/or provision(s) of the rules for which a variance is being requested;

(c) Basis for variance request: The reason(s) why the condition(s) set forth in the Rules cannot be met as well as justification for the variance request. Justification must include a discussion of why the variance will not have an impact upon wastewater treatment, including how additional measures may be used to offset reductions to conditions required by the rules;

(d) No conflict with local ordinances: For variances that fall under this Section, the applicant shall provide statement(s) that the completed application has been reviewed and signed by the LPI and Site Evaluator(s) on the HHE-204 form, indicating that the application is complete and does not conflict with local ordinances.

(e) Additional engineering or measures: If pretreatment or additional measures are being proposed the application must show how the proposed system and measures meet applicable sections of the rules, including the pretreatment requirements found in Section 7.

(f) Other information: The Department may request additional information from the applicant for a first-time system variance request. If the applicant fails to provide additional information requested by the Department within 60 days of the request, the variance request will automatically be denied.

3. Municipal Review: This Section authorizes the municipality to review and make a final disposition of a request for a First-Time System Variance through the LPI. The intent of this Section is that all decisions regarding these First-Time System Variances for soil conditions be made at the local level, with no requirement for Department review. However, if a municipality so chooses, it may request, in writing, that the Department make final decisions regarding these First-Time System Variances. When so notified, the Department will review and make final disposition upon all First-Time System Variance requests within a municipality's jurisdiction.

(a) Soil conditions: For a site that does not comply with the minimum soil conditions in Table 4F, the LPI or Department will use the criteria contained in Tables 7C through 7M, to evaluate the potential for a variance, except that sites with less than nine inches over hydraulically restrictive horizon, seasonal water table, or bedrock, will not be considered.

(b) Setbacks: For a site that does not comply with the minimum first-time system setback distances in Table 7B, variances must be processed in accordance with Section 7(B) (Department review required).

4. Disposition by the Department: The Department may approve a variance, deny it, or approve it with conditions. The disposition of the variance request will be in writing and state the specifications and conditions of any approval or the reasons for denial. The conditions may include deed covenants, inspections and mandatory installation of a holding tank if the system fails in the future. The disposition of the variance request comprises authorization, but not an obligation, for the LPI to issue a permit for the subject system design, if approved, or prohibition for the LPI to issue a permit for the subject system design, if denied.

### **C. CRITERIA USED FOR APPROVAL**

1. An application, an HHE-200 Form, a Variance Request Form (HHE-204 Form) and Review Fee must be submitted to the LPI or Department, demonstrating the criteria set forth in this Section.
2. The applicant has demonstrated that there is no practical alternative for wastewater disposal, such as access to public sewer;
3. The applicant has demonstrated that there is no conflict with Shoreland Zoning;
4. The relative suitability of a proposed first-time disposal system is determined by the Department evaluating the potential for malfunctions, well contamination, groundwater contamination or impacts to waterbodies/courses associated with the proposed installation. Tables 7C through 7M will be used as guidance. The phrase "not permitted" means that a property meeting that designation in any Table in this Section is excluded from consideration for a First-Time System Variance. Slopes under the disposal area greater than 33 percent located outside the Shoreland Zone are not permitted. Applications that are determined by the Department to result in unreasonable threats to groundwater quality, drinking water wells, water bodies/courses and public health shall not be approved.
5. Minimum point value for sites within the shoreland zoned areas of major waterbodies/courses: Any proposed first-time disposal system located within the Shoreland Zone must score at least 65 points using Tables 7C through 7M to be considered acceptable, unless a local ordinance requires a higher minimum score. Applications that are determined by the Department to result in unreasonable threats to groundwater quality, drinking water wells, water bodies/courses or public health shall not be approved.
6. Owner's understanding: The owners' signatures affixed on the application for variance means that it is understood that the proposed system is not in total compliance with the Rules. The owner(s) signature also signifies that:
  - (a) The property owner is aware of the variance, its limitations and costs;
  - (b) The property owner is aware that additional engineering has been proposed to overcome limitations of the existing soils, such as increased separation distance for limiting factor, increased design flow, curtain drain, etc.
7. A deed covenant may be required by the Department for any property which obtains additional points for lot size prior to final approval of a First-Time System Variance. The covenant must stipulate that the subject property cannot be subdivided without prior approval from the LPI or the Department.
8. An 8-1/2-by-11-inch-sized map from the Maine Atlas or a U.S.G.S. topographic survey map must accompany each variance request and must indicate sufficient identification to locate the property.
9. A variance must not be approved for a lot that had a disposal site approved during Municipal or Department of Environmental Protection subdivision review unless the applicant can prove that the site requiring a variance will provide equal or better treatment of the wastewater than the previously approved site.

**Notes: If the disposal system application meets the requirements of the following note(s) a First-Time System Variance is not required.**

[a.] Potable water supply setbacks may be reduced, as prescribed in Section 7(A)(2).

[b.] Additional setbacks may be needed to prevent fill material extensions from encroaching onto abutting property.

[c.] All ground disturbance or clearing of woody vegetation necessary for the installation of a subsurface wastewater disposal system that occurs within 100 feet of the normal high water mark of a major water body/course must maintain a minimum setback of 75 feet from the normal high water mark of the major water body/course and also must comply with these Rules pertaining to work adjacent to or within wetlands and water bodies (for more details see Section 12).

[d.] May be reduced by Site Evaluator to 50 feet, pursuant to water tightness standards found in Section 6(H)(8) or tanks of monolithic construction.

[e.] All ground disturbance or clearing of woody vegetation necessary for the installation of a subsurface wastewater disposal system that occurs within 100 feet of the normal high water mark of a minor water body/course must maintain a minimum setback of 25 feet from the normal high water mark of the minor water body/course, except minor water courses located inside the Shoreland Zone which require a minimum setback for disturbance of 75 feet, and also must comply with these Rules pertaining to work adjacent to or within wetlands and water bodies (for more details see Section 12).

[f.] For sites with sustained slopes steeper than 3 feet horizontal to 1 foot vertical (33%) within 25 feet from a protected natural resource. If a sustained slope of 33% or greater exists less than 25 feet from a protected natural resource, it does not count toward the 25 foot setback. Sustained slopes greater than 3:1 may be part of the 75 foot setback but cannot be counted as part of the 25 foot setback (for more details see Section 12).

[g.] May be reduced to 15 feet, if the disposal area would be located down slope from the lowest point of the foundation footings.

[h.] All ground disturbance or clearing of woody vegetation necessary for the installation of a subsurface wastewater disposal system that occurs within 100 feet of the normal high water mark of a perennial stream must maintain a minimum setback of 25 feet from the normal high water mark of the perennial stream except those perennial streams which have a Shoreland Zone or those located inside the Shoreland Zone of another major waterbody/course which require a minimum setback for disturbance of 75 feet, and also must comply with these Rules pertaining to work adjacent to or within wetlands and water bodies (for more details see Section 12).

[i.] The setback may be reduced to 25 feet if the stormwater structure has an impervious liner and the fill extensions do not encroach onto the stormwater structure.



Enclosure 2, Austin Title 16 Amendment Request, 10-144, Chapter 241, State of Maine,  
Subsurface Wastewater Disposal Rules, Excerpt

TABLE 7B  
Setback distances for first-time systems

Site features vs. disposal system components of various sizes	Disposal Fields (total design flow)			Treatment Tanks (total design flow)		
	Less than 1,000 gpd	1,000 to less than 2,000 gpd	2,000 gpd or more	Less than 1,000 gpd	1,000 to less than 2,000 gpd	2,000 gpd or more
Wells with water usage of 2000 or more gpd or public water system wells	300 feet	300 feet	300 feet	150 feet	150 feet	150 feet
Potable Water Supply	100 feet [a]	200 feet	300 feet	50 feet	100 feet	100 feet
Water supply line	10 feet	20 feet	25 feet	10 feet	10 feet	10 feet
Water body/course, major [f] [h]	100 feet [c]	200 feet [c]	300 feet [c]	100 feet [d]	100 feet [d]	100 feet [d]
Water body/course, minor [e]	50 feet [e]	100 feet [e]	150 feet	50 feet	50 feet	50 feet
Drainage ditches	25 feet	50 feet	75 feet	25 feet	25 feet	25 feet
Slopes greater than 3:1	10 feet [f]	18 feet [f]	25 feet [f]	N/A	N/A	N/A
No full basement [e.g. slab, columns, posts]	15 feet	28 feet	40 feet	8 feet	14 feet	20 feet
Full basement [below grade foundation, frost walls]	20 feet [g]	30 feet	40 feet	8 feet	14 feet	20 feet
Property lines	10 feet [b]	18 feet [b]	20 feet [b]	10 feet	15 feet	20 feet
Burial sites or graveyard boundaries, measured from the toe of the fill extension	25 feet	25 feet	25 feet	25 feet	25 feet	25 feet
Stormwater infiltration systems	100 feet	200 feet	300 feet	100 feet	100 feet	100 feet
Wetponds, retention ponds, and detention basins (excavated below grade); Soil filters, underdrained swales, underdrained outlets, and similar structures	50 feet [i]	100 feet [i]	150 feet [i]	50 feet [i]	50 feet [i]	50 feet [i]
Stormwater detention basins (basin bottom at or above predevelopment grade)	25 feet	50 feet [i]	75 feet [i]	25 feet	25 feet	25 feet



**TOWN OF KITTRERY**  
**Code Enforcement Officer**  
200 Rogers Road, Kittery, ME 03904  
Telephone: (207) 475-1308 Fax: (207) 439-6806

January 4, 2023

To: Dutch Dunkelburger, Planning Board Chair  
From: Kearsten Metz, Code Enforcement Officer

RE: First-Time Disposal System Variance Amendment

Dear Mr. Dunkelburger,

I am writing at the request of the Planning Department to clarify the changes proposed with the First-Time Disposal System Variance Amendment. Please note that all supporting documentation has been included.

The current ordinance reads as follows: *Chapter 16 §8.10 (D)[2] In no instance may a primary or reserve disposal area be permitted on soils or on a lot requiring a first-time system variance request per the State of Maine Subsurface Wastewater Disposal Rules.* This current language restricts parcels that are unable to meet the current first-time system requirements from installing a non-conforming system.

The proposed amendment to this ordinance would allow first time system variances for parcels that are unable to meet the State of Maine Subsurface Wastewater Disposal Rules. The State rules use a point system to quantify the potential impacts of the issuance of the variance. This system mandates that any proposed system outside of the Shoreland Zone must score a total of 50 points, and systems within the Shoreland Zone must score a total of 65 points. Any system variance scoring lower than the minimum or falling in a “not allowed” category in the scoring matrix would be denied. The proposed ordinance is less stringent than our current ordinance, but the State’s guidelines still provide restrictions to protect the local resources.

In final review, the amendment proposed loosens the restriction first time system variances for subsurface wastewater disposal systems in the Town of Kittery. If the restriction is removed the minimum State of Maine Subsurface Wastewater Rules would still apply . Please let me know if you have any questions or concerns in regards to this matter.

Sincerely,

Kearsten Metz  
Code Enforcement Officer