

October 17, 2019

Mr. Adam Causey, Director
Kittery Planning and Development
200 Rogers Road
Kittery, ME 03904

Re: Nonconforming structures
within shoreland setback

Adam:

You have asked for an opinion on an issue relating to the expansion of nonconforming structures located within the shoreland setback. More specifically, you inquire that when a structure located within the shoreland setback straddles a setback line within the Shoreland or Resource Protection Overlay Zone, do the structure expansion limitations applicable to the more restrictive portion of structure govern the expansion of the entire structure.

BACKGROUND

Currently, Sec. 16.7.3.3B(3) (e) [3] addresses "expansion of any portion of a structure that is located within 25 feet of the normal high-water line of a water body" and prohibits the expansion of that portion of the structure that lies within the 25-foot setback. The Ordinance allows the expansion of that structure subject to the limitations to the remaining portion of the structure lying outside the 25-foot setback.

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Sec. 16.7.3.3B(3)(e)[5] addresses the expansion of a nonconforming "structure" located within 100 feet of the normal highwater mark and limits the expansion of the footprint and height as set forth in B(3)(e)[5]. Unlike 16.7.3.3B(3)(e)[3], this section speaks in terms of the nonconforming "structure" located within the 100' setback area. This apparently has raised a question whether an expansion of a structure straddling these setback boundary lines requires the entire structure expansion to be governed by the more restrictive setback limitation.

DISCUSSION

Shoreland Resource Officer's
Interpretation

I have met with Jessa Kellogg who has served as Kittery's Shoreland Resource Officer and who, in that capacity, has been legally charged under our Shoreland Ordinance with interpreting and enforcing the provisions of the Ordinance under her jurisdiction.¹ Jessa's interpretation of the Ordinance issue here has been that expansions of nonconforming structures

¹I am informed that Jessa no longer serves in the capacity of Shoreland Resource Officer. She now works with the Kittery Public Works Department.

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straddling setbacks beyond the 25' setback allow for an expansion of a nonconforming structure provided each portion of the structure meets the Ordinance limitations in each portion of the structure location. This is and has been her consistent interpretation since 2015 when the DEP's Guidelines for Municipal Shoreland Zoning were issued. Moreover, there has been no appeal taken by anyone from this interpretation. It has also been specifically supported by three successive DEP Shoreland Zoning Administrators who have agreed with Jessa's interpretation and application of the Town's Ordinance in this respect.

CONCLUSION

The Code Enforcement Office is charged with the legal responsibility of interpreting and enforcing all relevant provisions of our Ordinance falling within its jurisdiction. In this case, while serving as Kittery Resource Officer within the office of the Code Enforcement Officer, Jessa had the authority to make this interpretation and application. Moreover, no such appeal was ever taken from this consistent interpretation and application. Also, as noted above, this interpretation was supported by successive DEP Shoreland Zoning Administrators and

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has been the consistent interpretation of the Ordinance in this regard for over the past four years. Thus, as the acting Shoreland Resource Officer, when viewed within Jessa's then-existing authority to interpret the Ordinance, I find her interpretation reasonable, enforceable, and consistent with the overall intent of the Ordinance. As such, I take no legal issue now with that interpretation and application.²

Should you have any questions with regard to this, don't hesitate to get a hold of me.

Best regards,



Duncan A. McEachern

DAMcE/cn

Copy to
Mr. Jamie Steffen
Ms. Jessa Kellogg

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²I understand that the portion of our Ordinance relative to this area is presently being amended with suggested language prepared for consideration by the Planning Board. If so, it may present a timely opportunity to also include the words "structure or portions thereof" or other similar language to affirm the existing interpretation and application in this regard.