

## **TOWN OF RYE – PLANNING BOARD**

**Tuesday, July 11, 2017**

**7:00 p.m. – Rye Junior High**

***Members Present: Chairman Bill Epperson, Pat Losik, Mel Low, J.M. Lord, Jerry Gittlien, Jeffrey Quinn, Selectmen's Rep Priscilla Jenness and Alternates Katy Sherman and Anne Richter-Arnold.***

***Others Present: Attorney Michael Donovan, Planning Administrator Kimberly Reed and Selectman Phil Winslow (sitting as the Selectmen's Representative on 421 South Road.)***

### **I. Call to Order and Pledge of Allegiance**

Chairman Epperson called the meeting to order at 7:00 p.m. and led the Pledge of Allegiance.

### **II. Designation and appointment of alternates**

- None

### **III. Approval of the June 13, 2017 and the Work session of April 25, 2017 meeting minutes (Moved to the end of the meeting)**

**Motion by J.M. Lord to hear the applications in the following order; Eversource, Wentworth by the Sea and South Road. Seconded by Pat Losik. All in favor.**

**Motion by J.M. Lord to continue the application of the Housing Partnership to the August meeting. Seconded by Pat Losik. All in favor.**

### **IV. Submittal of Applications for Determination of Completeness Not a public hearing. – Action Required:**

- A. Major Site Development Plan by Eversource for property located on Lafayette Road, Tax Map 10, Lot 4 for the West Rye substation project which consists of the rebuild of the existing substation in its original location as well as expanding it approximately 21 feet to the north and 14 feet to the south. This project will replace outdated transformers. Property is in the Commercial Zoning District. Case #08-2017.**

**Jim Bolduc, TRC Environmental, representing Eversource, spoke to the Board in regards to the rebuild and expansion of the existing substation off Lafayette Road. The project consists of the removal of the existing substation and transformer. Construction will consist of a new substation, in the same footprint as the existing, with a 21ft addition to the north and 14ft addition to the south.**

**Mike Busby, engineer for Eversource**, noted that two existing transformers will be replaced that feeds west Rye and Route 1 south. The existing transformers are exceeding their load capacity during summer peak periods. The transformers are outdated and parts are no longer available for them. The transformers are being replaced to get rid of the capacity issue, age issue and to allow other substations to tie in this substation, which will allow for backup during power outage situations.

Chairman Epperson asked if the transformers will be smaller in size.

Mr. Busby explained that it is one larger transformer that has a larger capacity.

Member Gittlein asked when construction would begin. He also asked if there will be a loss of power during construction.

Mr. Busby explained there will be no loss of power. Everything will be transferred to other circuits temporarily during construction. The intent is to have the substation in service by the middle of December.

Chairman Epperson asked if there is any additional security being provided for the new site.

Mr. Busby replied there will be new fencing surrounding the substation and it will be locked. He noted that the existing fence and structures there today do not meet today's requirements. The new substation and fencing will meet all existing requirements. There will not be any security cameras at the site.

Chairman Epperson asked if they have seen the Department Head's checklist.

Mr. Bolduc replied "yes". He stated that he has the updated plans showing the contours of the stockpile. In regards to the engineer's comments regarding stormwater, he noted that this has been taken care of. As far as cleaning up the site, in the note section it talks about cleaning up the site during and post construction. There are going to be two poles removed from the site and three additional poles added adjacent to Lafayette Road.

Chairman Epperson asked about the old poles that are still on Washington Road.

Mr. Busby explained that all of Eversource's wires have been transferred. Notices will be sent to any third-party attachments. As soon as the parties transfer off, the poles will be removed.

Referring to the fencing, Member Losik asked if the fencing is also around the buffer with the Greenland neighbor.

Mr. Busby replied "no". The fencing is only around the actual equipment.

Member Losik asked if there is an existing containment berm. It is noted on the plan that there will be a containment berm.

Mr. Busby replied "no". Right now, it is just crushed stone.

Chairman Epperson asked if there was a basin to keep a spill from going into the ground.

Mr. Busby replied there is a membrane so if it was ever ruptured it would be pumped out.

Member Losik asked if two dumpsters were being removed.

Mr. Busby explained that there was an area onsite that was used as a lay down area for a project on Washington Road. There was a lot of stuff on site. A lot of the things were stored there temporarily and have been removed. He noted that when the project is done there will not be any dumpsters.

Member Losik asked if the lot is impervious or pervious.

Mr. Bolduc replied pervious.

Chairman Epperson stated that the Board has seen all the documentation. As far as he is concern, it is complete.

**Motion by J.M. Lord to declare the Eversource application complete. Seconded by Jerry Gittlein. All in favor.**

**Motion by J.M. Lord to take jurisdiction on the Eversource application. Seconded by Pat Losik. All in favor.**

**Public Hearing:**

Chairman Epperson opened to the public for comments or questions.

**Steven Borne, 431 Wallis Road**, asked about solar panels on properties contributing to the grid.

Mr. Busby answered Mr. Bourne's question. (inaudible)

Hearing no further questions, Chairman Epperson closed the public hearing at 7:20 p.m.

**Motion by Mel Low to approve the application from Eversource. Seconded by Jerry Gittlein. All in favor.**

- B.** Major Subdivision, Lot Line Adjustment (Lots 15-4 and 16) and Conditional Use Permit by the Housing Partnership for Property located 0 Airfield Drive, Tax Map 10, Lot 15-4 for construction of a residential development consisting of a mixture of single-family and multi-family dwellings with a portion being dedicated as Workforce Housing. Property is in the Commercial Zoning District. Case #07-2017.

- *Continued to August meeting. Please see motion above.*

V. Public Hearings on Applications:

- A. Major Site Development Plan by WBTSCC Limited Partnership for property owned and located at 60 Wentworth Road, Tax Map 24, Lot 61-26 to replace an existing 50' golf net and nine (9) 50' wood poles with a ninety 90' golf net and nine (9) 90' steel poles. Property is in the Single Residence District. Case #06-2017.

Chairman Epperson explained that he asked for a continuance on this at the last meeting because Attorney Donovan was not present and he needed his expertise on what some people felt was a flaw in the process for the zoning.

Attorney Donovan stated that he was asked to summarize the evolution of Zoning Amendment 2017-03. Attached to the memorandum of June 6<sup>th</sup>, was approximately 17 pages of all the Planning Board records on that zoning amendment. He continued that the zoning amendment made the height limitations of the zoning ordinance applicable to structures. Prior to this amendment, there were no height limitations on structures, only on buildings. The zoning amendment also exempted three types of structures, including protective netting around golf courses. He continued that the first amendment was drafted and sent to the Board on September 22<sup>nd</sup>. This amendment did not include the exemption for protective netting around golf courses. This was added by the Board, and the minutes all clearly indicate this, in the version of the amendment that was prepared for public hearing on December 13<sup>th</sup>. The Board moved this version to the ballot. He stated that what has happened, and what people take issue with, is the wording on the ballot (explanation) did not mention the exemption of protective netting for golf courses. Some folks have suggested that the Planning Board was trying to "hide the ball" on this. That is not the case. Over the years, the practice has been that when the zoning amendments are finalized and sent to the town clerk by the Planning Board, he helps the town clerk draft the ballot wording for the amendments. The ballot wording, under State law, does not have to include the entire text of any zoning amendment. He continued that he is the one that prepared the ballot wording that people have taken an issue with. In hindsight, the explanation probably should have been changed to make it clear there were exemptions or the exemptions should have been listed in the ballot wording. He commented that he was trying to keep the amendment brief and to the point. In his opinion, the purpose of the zoning ordinance was to make the height limitations applicable to structures and that is simply what the ballot wording said. He reiterated that in hindsight, it should've been done a little differently. However, this is not the fault of any Board member or staff person. This is something he did and may have been an oversight on his part.

Attorney Donovan stated that it does not really matter in terms of the net proposal in front of the Board at this time. He does not believe it would be invalidated because the statutes clearly allow for a topical summary on the ballot. The full text has to be available at the polling site. The full text was available for months on the town warrant, online and in the meeting minutes. However, even if someone challenged zoning amendment 2017-03 and it was determined to be invalid, the Town would be back to where it was in 2016, with no height limitations on structures. Either way, there is not a problem with the 90ft height, in the sense of non-compliance with the zoning ordinance.

Chairman Epperson commented that he thinks the Board has a good idea of the issues. He asked Mr. Diodati if he would like to go over his proposal again.

**Robert Diodati, Wentworth by the Sea Country Club General Manager**, stated that this is the fourth time they have appeared before the town on this item. At the meeting in May, members of the public were saying that the nets were not necessary. He provided the Planning Board with a table showing the



trajectory in ball flight from golf balls. He continued that they know the 90ft nets are necessary. They also have the right to do this with the easement the Wentworth has with the property owners, subject to Board approval. The netting height is reasonable. The nets will be somewhat above the current tree line but that does not make them an unreasonable height. He explained that the plan is to alter the location of the poles, inward towards the center of the range, to eliminate the need to remove any trees.

Chairman Epperson asked if this is on the submitted site plan.

Mr. Diodati replied "no". He continued the poles are going to be in the exact same location east/west but will be farther south by about 10ft.

**Corey Colwell, MSC Engineering**, explained the plan was filed a couple of months ago. There would be very little difference on the plans.

Chairman Epperson clarified that the 10ft is away from the property as it exists today and the reason for that is to not cut down any trees.

Mr. Colwell confirmed.

Chairman Epperson asked if a new revised site plan will be submitted.

Mr. Colwell confirmed.

Mr. Diodati stated that they are going to show the Board some equipment to show how it has changed over the last 15 or 20 years. It is their contention that this is why golf balls are flying higher and further than when the nets were installed, even with the extensions. He continued that they do not think golf course equipment will change in the coming years, by leaps and bounds, as it had in the 90's and early 2000's. He also noted that the Club only uses low compression golf balls, which fly at approximately 90% of the distance in height of a regular range ball. That is done to mitigate the potential of any hazard. The trajectory report that has been submitted is based on regular golf balls.

Chairman Epperson commented that the 90ft height being proposed could be shorter based on the golf balls.

Mr. Diodati explained that based on the data the driver and the nine-iron would both go 33 yards, which is 99ft. Reducing this by 10% gives the 90ft needed. He stated that the nets are going to be very expensive but it is the right thing to do. He stated that there were three incorrect public statements made at the May meeting. Mrs. Bishop from the Ice House had said that she feels that the current net height is safe and the current extensions were added as a result of a customer being hit by a ball. He pointed out that this is not correct. The extensions were added in 2003. The customer that she was speaking about was in 2004. Mrs. Bishop also said that since the extensions were added balls do not go over the nets so higher nets are not necessary. That is not true. There was a broken window on the top floor of the Ice House's storage building. A ball clearly went over the net. Early this summer an employee of the Ice House had a back window on their car broken by a ball. The notion that balls do not go over the net and it is plenty high is not true. He stated that the proposal maximizes the protection of the Ice House customers and helps reduce the risk of liability for the Ice House owners. He continued that Attorney McEachern said that Louis Georgopoulos told him that balls do not go over the net near his house since the Club raised the nets, which was in 2003. He does not doubt that Mr. Georgopoulos told Attorney McEachern that;

however, he was mistaken. There will be public comment from players that have indeed hit shots over the net near Mr. Georgopoulos' house. The members of the Club do not want balls flying over the net. They do not want to do property damage or injure a person. He stated that he wanted to make certain to mention the importance of this Club in the community. There are 490 members who live in Rye. The junior programs are exploding at the Club. This comes at a time when Rye is losing school age children. He thinks the Club is an important participant in holding the community together. Many jobs are provided at the Club to Rye residents. The Club is important to the community and this should be considered when deciding on something that is so very important to the business.

Member Quinn asked what will change on the golf course for its members by raising the height of the net. Will any restrictions be relaxed that are there now?

Mr. Diodati stated that they could and that is very important to their business; however, it is still primarily a safety issue. Members are almost afraid to use the range because they do not want to do harm to anybody. The higher nets would give them a sense of security in practicing. He continued that if they get the new nets they would be able to relax some restrictions and they may do that. That decision has not been made yet.

Member Low stated that he has been on the Board longer than anyone. He approved the tennis Club, additional parking and everything the Wentworth has asked for; however, he is against this. The property is located in a Single-Family District. He suggested that they bring in a picture showing the poles with 90ft netting on it so the Board can get a visual display. He commented that if he lived in the abutting house he would fight against this.

Mr. Diodati stated that they heard that suggestion about the pictures and they are going to show those. He continued that the golf course has been there for 120 years, long before the homes. The Wentworth also has an iron clad easement that gives broad rights to operate as a golf course, including the installation of poles and netting. There is no height limitation on that. He stated that they are going to show photos, looking through the almost completely transparent netting, from the side of the property owners and the golf course side that will show it is not that visible.

Member Low asked if the golf course sold the building lots.

Mr. Diodati explained this pre-dates the current ownership golf club but yes. The lots went with the easement.

Member Low stated that easement was formed for the golf course.

Mr. Diodati stated it is very clear in the easement that the Wentworth is allowed to install poles and netting.

**Attorney Tim Phoenix, representing the Wentworth**, stated that the owners knew about the easement when they bought their properties.

**Gordon Swennes, Wentworth by the Sea Golf Professional**, showed the Board a mid-90's driver compared to a current driver. He noted that the current driver is much bigger. With that change, the ball goes farther. When the ball goes farther, it also goes higher. Technology has allowed the ball to travel

farther and travel higher. He does not want to be giving a lesson and have the ball go over the netting and hurt someone on the other property. The Club is trying to do the right thing by keeping everyone safe.

Mr. Colwell stated that at the last meeting some members of the Board requested a photograph showing what the proposed net would look like. (He showed a photograph taken from the course showing the existing and proposed net.) He continued that they measured the highest trees in the area of the proposed nets. The highest trees are about 80ft tall. The nets that are being proposed are 90ft tall. The nets would extend approximately 10ft above the existing tree line.

Member Gittlein pointed out that this is above the tallest trees. The other trees are shorter.

Mr. Colwell stated that the average height of the trees is about 75ft. The net will be about 10 to 15ft above the trees.

The Board reviewed photos taken from various angles showing the existing poles and netting.

Member Quinn asked if the proposed net is the same material as the existing net.

Mr. Colwell replied "yes" it is very similar.

Member Lord asked if a master plan has been done for the golf course.

Mr. Colwell replied that there has never been a master plan to his knowledge. The changes to the property have been done incrementally.

Member Lord stated that he is surprised there is not a master plan. It seems to be a piece meal operation. (inaudible)

Mr. Diodati stated that 15 years ago the range was sufficient. He has been working for the Club for over 18 years. The golf Club has been there for over 120 years. Over that time period, the popularity of golf has gone up and down. He continued that there have been discussions about long term planning; however, the business changes from one decade to the next. The Club reacts to how the business changes.

Attorney Phoenix stated that when the driving range was installed there was a master plan to locate it where it is. They protected themselves, via an easement, so that anybody who would be affected by the look of the nets, the flight of golf balls or anything like that, knows that it is coming. (He read from the easement.) "The golf course has the right to, in its absolute and sole discretion, determine the placement of poles, hanging of nets, fencing or other such improvements that the holder of the easement, in its sole discretion determines from time to time, desirable to prevent damage from golf balls and to prevent unauthorized access onto the course." This was dated May 6, 1986. He stated that the owners of property around it knew, or should have known, it was there. He asked the Board to start from the view of property owner's rights. The Wentworth has the right to own and operate their property in accordance with the law, which includes the regulations and ordinances of the town. It has already been established that no zoning relief is needed. To the concern that this is in a RS District, it does not matter because they do not need zoning relief. As to the height, it is his opinion that the Club has the right to allow, and the members have a right to use, any and all clubs they can use if it is reasonable possible and safe. They determine that it is not always safe in 2017 to use larger head golf clubs so they want to raise the net.

There has to be an awfully good reason not to allow this. He stated that in March 2017 the Board granted the relief, 6 to 1, without much trouble. The reason this is before the Board is because of two technical issues and some post decision activity that Attorney Donovan has already addressed. First, the notice of the public hearing was not given in a timely enough fashion because the date of the hearing was moved forward, which meant the normal notice was insufficient. Also, Mr. Colwell filed for a Minor Site Plan, which was filed with the town and accepted. Attorney McEachern brought up the fact that it should have been a Major Site Review. The Minor Site Review has been withdrawn and a Major Site Review has been filed. The reason a Major Site Review is needed is because the town's ordinance says if there is more than 400sf of disturbance it is a major. There will be more than 400sf disturbed because the poles need a 10x10 subsurface base. The application is before the Board again on a technicality; however, the same factors that applied when it was approved 6 to 1, apply now. He continued that the other thing that happened was the challenge to the ordinance and whether it was put on the ballot correctly. Attorney Donovan has clearly addressed that this had nothing to do with the Planning Board. If anything, it was an oversight. Also, like Attorney Donovan said, if the 2017 ordinance is applied the nets are exempted. If the 2016 ordinance is applied, it does not apply to the nets in the first place. There was the issue about sight. The photographs clearly show that the net is nearly invisible, unless someone is looking for it. Most of it is already there for people to look at. The people who are behind the net, did so with their own knowledge and at their own risk that something would happen if the golf course felt it was in the best interest of its members and public safety.

Attorney Phoenix stated that Jason Bastille is the superintendent and has been with Wentworth over 20 years. Mr. Bastille has said that there has been less than a handful of issues with birds flying into the existing net. If a bird is flying into the net it is because they cannot see it. One of the complaints is the net is a visual obstruction. Given the historical evidence that this has happened once or twice, the bird issue is not a problem. It has to be considered how many birds are effected by the nets, versus how many people and properties are affected by it. One of the suppliers of the netting has suggested that birds are not negatively affected by the nets; however, people are affected by flying golf balls. It is reasonable to weigh the effect of birds and the neighbors against the rights of the property owners and the protection of the public and personal property. The Land Development Regulations state that the purpose is to "Promote the health, safety, general welfare and prosperity of the town and its residents". The Wentworth has no financial incentive to go through the expense of putting up nets just for the sake of doing it. It has to be assumed that they reasonably believe it is necessary for the protection of their members and the protection of their property. He stated that when the owner's rights are balanced, the ordinance which requires no variance, the issue of safety, the view which is almost invisible and the easement that the property owners knew about, against the complaints that it is going to be too high, the Board has to come down on the side of the landowner and approve the application. Plain and simple, the height is reasonable.

Chairman Epperson opened to the public for comments or questions.

**Jane Holway, Washington Road**, stated that the virtually invisible net is going to extend 10 to 15ft about the tree line. The virtually invisible net is going to trap innocent birds, probably endangered birds.

**Keith Malinowski, Ice House**, stated that he has owned the Ice House for 38 years. The original easement was a 30-page deal. There were such things as golf ball air rights, which he would not agree to. (He gave a brief history of his negotiations with Peter Weeks to purchase the Ice House property.) The property went to closing and that is how he came to own the Ice House with all the easements. He continued there are 17 houses built there now. There is a pool and tennis courts. How much more?

Which house is going to have a 90ft net by it? Some of the neighbors do not care because they are members; however, he does care. He thinks it is unsightly and 90ft is not needed. In looking at the golf ball trajectory, it does not say anything about slices. They are not all range balls. He finds all different kinds of balls.

Chairman Epperson stated that when this conversation started many months ago, his overarching concern was for the Ice House's customers primarily. He asked if the history with negotiation with the golf course is overarching the concern for the customers.

Mr. Malinowski stated that he thinks there is an area in there that they can come to an agreement to. He thinks it is 70 or 75ft. He does not think 90ft is necessary.

Chairman Epperson stated that if someone were to get hurt really bad by a golf ball in the Ice House parking lot, the first person they are going to sue is the owner of the Ice House. They are then going to sue the Wentworth by the Sea Country Club. If nothing was done at the Planning Board, they are going to sue the Board. He continued that he is a little bit confused by the reluctance to allow for protection.

**Jonathan Hickson, 106 Wentworth Road**, stated that he is a direct abutter of the golf course. He definitely sees it as a safety issue if the nets are not allowed to go higher. One time on his property, he found 30 or 40 golf balls just walking around for 10 minutes. Most were range balls but they varied in size and shape. There are golf balls in the back. As far as safety, it is really important that the nets go up. He noted that he looks directly into the nets every day. The poles and the net can barely be seen. He reiterated that it is really a safety issue if the nets are not allowed to go up. He will be very upset because it will really affect his property.

**Dan** (inaudible), **member of the Wentworth**, stated that he is a customer of the Ice House and visits neighbors along that road. He thinks for the safety of everybody the nets would really be worthwhile. If pointed out that the trees are at a certain height now; however, he assumes they are still growing. In due time, they will be as high as the nets, if not higher.

**Paul McEachern, representing Louis and Freda Georgopoulos**, stated that he has the highest respect for Attorney Donovan and he believes everything he said. The only problem is that the warrant article was two sentences long. The first sentence restricted the height of structures to 35ft. The second sentence said it was okay to have golf course netting. In order to simplify it for the ballot, the second sentence was deleted. The explanation on the ballot led the voter to believe that there was a limitation on structures of 35ft and no exemption for golf course netting. He continued that he would like to submit a handout to the Board. He continued that he has read a little about the most exciting thing in golf these days. It is the new venues that require 90ft nets. They are basically entertainment venues that are being built all over the country and they are very popular. It is hard for him to conceive that the Wentworth is going to invest in nine 90ft high steel stanchions and have them placed in concrete abutments for the safety of one or two neighbors who happen to believe it is necessary, who are also members of the golf club. The Georgopoulos do not feel they need a 90ft fence in their backyard to keep them safe. In fact, since it has been increased to 50ft there have not been any balls in their yard. He continued the golf course would like people to believe that the arch is continuous for the length of the range. It isn't. The ball goes up in the air and comes down. Mr. and Mrs. Georgopoulos are at the very end. The easements that have been discussed, do not relieve the Planning Board of its responsibility of deciding whether or not this is reasonable under all the circumstances. He suggests to the Board that this is the beginning of



the exciting market for golf courses of these venues that attract people year-round. The issue for the Board is to consider if this is reasonable in a single residence neighborhood.

Chairman Epperson asked if there was a possibility to taper the nets. Have 90ft across the front and taper to 50 or 75ft at the end.

Mr. Diodati replied that it goes down on the last pole to 50 or 60ft.

Mr. Colwell pointed out on the plan the area where it is tapered.

Chairman Epperson asked if the net could go from 50ft to 75ft and then to 90ft.

Mr. Diodati explained that the area is a short range. The net is only 175 yards away. He would not be comfortable with less than 90ft. It would probably be okay at 75ft. He noted that they certainly do not want to expend all this money to do the nets and end up short.

Referring to Attorney McEachern's comments, Attorney Phoenix stated that the Club would be fine with a stipulation that the use is only from dawn to dusk, no lights, and that there would be no multi-tiers in perpetuity.

Attorney Donovan asked about additional limitations relative to the season. Some of the pictures show year-round facilities.

Mr. Diodati stated that what Attorney McEachern showed was Topgolf. It is the "hottest" thing in the industry right now. It is a five or six-million-dollar investment and 18 acres are needed to do it. That is not the intention of the Wentworth. As Attorney Phoenix has said, they would agree to a stipulation that says "dawn to dusk" and "no two-tiers". There are no plans for that whatsoever. As far as winter usage, there are no plans right now for winter usage; however, this may be something that might come back to the Board. This is the number one thing that clubs are doing for survival in the changing industry to improve their practice facilities. He noted that it was asked at one of the meetings what other clubs have 90ft nets. There are 90ft nets at The Woodlands in Falmouth, Maine. The golf club is similar to the Wentworth and there are houses in the area. There is also a range on Route 1. The Pease Golf Course is also looking to put higher nets in for the same reason the Wentworth is; for protection. It is not unheard of.

**Mark Galvin, 17 Heather Drive**, stated that he hopes the Planning Board would agree that the zoning ordinance does not allow a 90ft net by right. The plan still has to meet all the zoning requirements and the Land Development Regulations. (He read from Section 611.2) He continued that 90ft poles exposed above the tree line do not fit with natural environments. He is particularly concerned about this because he owns property on Martha's Vineyard and there is a driving range there that managed to get permission to put nets up above tree lines. It is the biggest eyesore. Not just to the next-door neighbor, but to people who are distant from it and have the view above tree line. He continued that he holds no ill will towards the Wentworth for trying to do this. He has a huge issue with the Town of Rye, specifically the Planning Board and the building inspector, because the town will not stand up and fight for its citizens and follow its own rules. He noted that under Section 403.2, the site plan has to cover the entire parcel being developed. This site plan does not cover the entire parcel. There are other issues on this parcel.

Chairman Epperson stated that it was waived on record.



Mr. Galvin stated that it can be waived if it can be shown that it is an unnecessary hardship. He continued that this is not an unnecessary hardship in this case. He stated that this is in the wetland district. It is in the flood zone. Very quick research shows it is all hydric soils. He suggests that there may be permits needed that may or may not have been applied for. It is pretty clear, under permitted use in the wetlands, that nothing can be done within 75ft of the wetlands, one contiguous acre or larger in size. He suspects the wetland is more than an acre or close to it. He noted that they cannot even get an exemption if economic advantage alone deems to be the reason. In regards to the warrant article, he surveyed his neighbors and they said that they had voted for it because they did not want the 90ft golf netting. The reason the warrant article passed is because people specifically did not want anything that tall in the Town of Rye. He thinks the idea for a master plan by the Wentworth is a good idea. The nets are not being done because technology changed recently. This is being done as a business interest. It is at odds with the residents in the Single Residence Zone and all the citizens in the Town of Rye, who realize they had no protection of such a ridiculous thing going up in their fair town. He thinks there are a lot of reasons why the net should be kept below the tree line. His opposition would drop as soon as the net was dropped below the tree line.

**Steven Borne, 431 Wallis Road**, stated that he thought he was voting to keep structures below 35ft. He misread the warrant article. He thinks going up another 35ft is unreasonable. He thinks it can fall in the category of being excessive.

Referring to the renderings showing the proposed netting, **Victor Azzi, Old Ocean Blvd.**, asked where the view point is taken from. Is it from the ground? Or from an area above?

Mr. Diodati stated that he was taking the pictures from the cart path.

Mr. Azzi asked the diameter of the poles.

Mr. Colwell explained that at the top is 16 inches and the column is 3ft in diameter. The pole itself is 24 inches at the base.

Mr. Azzi noted that the columns are 17ft into the ground and there are 9 of them. He asked how they are going to get 9 of these into the ground with about 1000sf of disturbance. This is multiple square feet of disturbance in the wetlands.

Mr. Colwell explained there is a 3x3ft column that is actually pushed into the ground. It is not excavated. The column would be pushed into the ground to a maximum depth of 17ft. The column is filled with concrete and there is a 10x10 concrete pad at the top. The only disturbance is about a 3ft hole.

Mr. Diodati pointed out that this is not in the wetlands or wetland buffer.

Referring to Sheet C-2, Attorney Donovan stated that it shows the poles are close to the wetlands. He asked if the poles are moving 10ft further south.

Mr. Diodati confirmed. This is to avoid removing trees and it wouldn't require that every pole be moved.

Mr. Azzi commented that by moving further away from the trees it is moving even closer to the wetlands. Attorney Donovan stated it is the other way around. It is moving further.

Mr. Colwell pointed out on the plan the edge of the wetlands and the poles for the netting.

Speaking to the applicant, Attorney Donovan asked if the poles, which are on the edge of the wetlands, would be installed without construction equipment disturbing the wetland.

Mr. Colwell explained that the first operation that takes place is the contractor goes in and places a silt sock around the wetlands. This prevents silt from eroding into the wetlands and tells the contractor this is the limit. There will be no construction in the wetland by placement of the silt fence around it.

**Jerry** (inaudible) **561 South Road, member of the Wentworth Country Club**, stated that he has hit the ball over the net. He has hit balls over the net and over the trees into the back of the Ice House and the Hickson property. He is not trying to do this. He is terrified of hitting the ball into Mr. Hickson's house or into the Ice House and hitting a little girl in the head.

Addressing other members of the Wentworth in the audience, Chairman Epperson asked if this is pretty much what the golfers wanted to say. He asked if there was anything different.

**Keith** (inaudible), **82 Liberty Commons**, asked if the 90ft height would set a precedence for future things. He asked why the net cannot be closer to the golfers. If the net were back further, he does not think the neighbors would object as much.

**Meg Bishop, daughter of the owners of the Ice House**, stated that she did not say the balls never go over the net. The balls do go over. She and her husband met with Mr. Diodati in February regarding this proposal and he said that right now they do not allow wood on the days the Ice House is open. In the previous meeting, she may have stated that the balls go over the net on the days that they are off. She continued that they do not have an issue with the current net right now. It blends into the environment and can't be seen on most days. The issue is with the 90ft height and being above the tree line. It is going to be seen from the road and be an eyesore. She commented that one of the employee's cars did get hit. She is concerned for the customers. Balls are now flying over the net and her customers, employees and family are in danger. She noted that Google Earth will show that the golf course has been over developed over the years and pushed towards the Ice House.

Mr. Galvin stated that there are significant wetlands and significant hydric soils, according to the Town of Rye's GIS Data Maps, in that area. He has lived there for a long time and has a lot of wetland issues from the golf course. He asked if the Board has the signature of the wetland scientist on the drawing attesting to the fact that it is a complete drawing of the wetland and the flood zone. The Wentworth has brought on this overdevelopment themselves. There should be a good record in the Town if they have brought a site plan to the Board every time.

Referring to the ordinance, **Peter Crawford, 171 Brackett Road**, stated that one issue that did not come out is the explanatory text that specifically said that an applicant had come in requesting a 90ft structure. He cannot imagine what that 90ft structure was if it wasn't this particular net. The applicant was in prior to the drafting of this ordinance. He asked if there was another structure the ordinance could have been referring to.

Speaking to Mr. Crawford, Chairman Epperson pointed out that he (Mr. Crawford) was at the meeting for the discussion on the proposed ordinance. He asked if he had asked questions about that, as he was the only one present from the public.

Mr. Crawford stated that the issue is what was in the minds of the voters. It was said that an applicant came in for a 90ft structure and the ordinance was going to be changed.

Chairman Epperson stated that it can be seen in the minutes that the whole discussion was around the safety of the people at the Ice House and also the abutters. That is the only thing it was about; the safety of the people directly abutting the driving range. He pointed out that he is talking about the discussion the Board had and he (Mr. Crawford) was part of the discussion.

Mr. Crawford commented that this was before all this opposition. He is going to support the people of the Town. He continued that existing and manmade environment cannot be affected unless it is done with the least possible disturbance. Having it above the tree line is not the least possible disturbance. The trees are 75 to 82ft, knock off 10% for the height of the ball and knock off a little bit more because pros are not using this driving range, the ball is not going to go to 90ft, especially at the far end. If it could be at the 75 to 82ft, with the tree line, that might be good enough. He suggested that an expert should look at the trajectory to see where a golf ball, being hit by an amateur golfer, would end up at the net. He suspects it would be no higher than 75 to 82ft.

Mr. Diodati stated that he would hate to be the person who got hit with the few balls that go over 85ft. He noted that he had an installer from Sports Turf Co. look at the property who said that the existing poles will not suffice. The contractor said it would be very dangerous to only increase the height by 10ft. This would be doing the job insignificantly. The contractor recommended that the job be done properly with the increase to the 90ft poles. He commented that he has had two contractors look at this.

Chairman Epperson asked if both contractors had access to the trajectory report.

Mr. Diodati confirmed.

**Jerry Quirk, 561 South Road**, commented that amateur versus pro does not affect distance.

Referring to the warrant article, **Sally King, 535 Wallis Road**, commented that she personally saw it as protection.

Speaking to Mr. Colwell, Member Losik asked how the wetlands that are depicted on the plan came to be.

Mr. Colwell explained that the wetlands were delineated with a flag by a certified wetland scientist. The wetlands were survey located and the location is shown on the plan.

Member Losik asked where the signature on the plan is located.

Mr. Colwell replied that he would be happy to provide that stamp.

Referring to the question about the wetlands, Member Losik stated that under 301.1, these are general guides that approximate the delineation of the wetlands. They are not site specific. She pointed out that it is good to know that the plan is by a certified wetland scientist.

Mr. Colwell stated that an on-site investigation always trumps a GIS Map. It is the same thing as comparing a tax map a boundary survey. A tax map is a guide. A boundary survey is precise.

Attorney Phoenix stated that he has been before the Board on many occasions. The Wentworth has no financial incentive to do more than what they need to do; however, they do have an obligation to their members to use the club and they have a moral obligation to protect the public. Renderings and photographs have been shown to the Board. It has been admitted by some that it is hard to really see it. He suggests that this is true whether it is above the tree line or not. There was a complaint about waivers. It is not necessary to go through the expense of everything when it is not necessary. In this case, the Board found very quickly that it was not necessary. He continued that the reference to the ordinance that talks about the "least disturbance" is talking about site disturbance. This is disturbing about 900sf and most of it is underground. Overall, the rights of the owner to use the property has to be balanced. The right to use the property is established by the ordinances. Relief is not needed under any zoning ordinance. Safety is an issue. It has been demonstrated that this will be providing safety and to not do this is not safe. He pointed out that nobody has provided any expert opinions against this. A view has been provided that shows it can be seen through. An easement has been provided that the neighbors are subject to and is subject to the Planning Board's review. It is clear that the Board is compelled to find this is reasonable and the property owner's rights trump.

Attorney McEachern stated that it is true that it has been an inconvenience to the applicant. It has also been an inconvenience to his clients who have had to appeal to Superior Court to have the Board's last decision reversed. The Board now has a chance to really examine this and it is a question of reasonableness. If it is built, it will be a monument to this Board. If it is down to the tree line, it would be another matter.

Attorney Phoenix stated that if it is built lower it is a monument to the Town and this Board if someone does get hurt by a ball flying over it.

Chairman Epperson closed the public hearing at 9:25 p.m.

Member Lord stated that at the last meeting he heard Mrs. King talk about 'Fly Away of East Coast'. He looked that up and there are 350 birds that fly up and down the coast. Although the fence will be visible in the daytime, at night it will be completely invisible. He thinks it should be lowered to 75ft to be with the tree line. He thinks it is very out of character. In this mind, it comes down to business risk assessment. On the site plan, they are protecting the right side. On the left side, is the parking lot and tennis courts and the 90ft net is not being put there. Obviously, there is a risk assessment to the parking lot, the cars and people on the tennis courts. He assumes that someone could make the same business risk assessment on the other side. Maybe the risk could be lowered by limiting what is done on the range, the drivers that are used and the hours of operation. There are a number of things that could be done to get them where they want to be.

Chairman Epperson asked if he is suggesting some conditions of approval.

Member Lord stated that he would support it at a 75ft height, not at 90ft. He would have S-1 and S-2, foundation plans, be stamped by a N.H. Licensed Engineer. The wetland scientist should stamp and sign the plans. Also, a note should be added that Best Management Practices will be used around the wetlands.

Speaking to Member Low, Chairman Epperson asked how he feels.

Member Low commented that he gave his vote.

Member Quinn stated that he would vote in favor of this request at 90ft. He pointed out that he would like it as low as possible but it has been demonstrated by the people in the business that safety and property protection is probably the most paramount.

Member Losik stated that she agrees with Member Lord in terms of the aesthetic value. She looks at that area as one of the most pristine visual areas in the region. Aesthetically, she can understand the point of the neighbor objecting to something that high. In looking at the picture with the pole at 90ft, she is visually offended by the height of the net. In terms of conditions, the other one that needs to be added is "dawn to dusk", "no lights", in perpetuity. On the safety side, someone swinging the other way may be an issue. The net is way lower than the tennis building. She struggles with the safety issue. As a Board, they want to meet the safety perspective. She reiterated that she struggles with the height. She could go with 80ft.

Chairman Epperson stated that from the very beginning the overarching issue for him has been the safety issue; the ball going over the netting and going into the Ice House. He does not see any reason why this could not start at 90ft, go to 75ft in the back and leave the last one at 50ft. He does not know if any relief would be needed from the Louis Georgopoulos in regard to whether he was willing to accept liability for something that was not 90ft and is only 75ft at his property line. Beyond that, the condition of approval from dusk to dawn is appropriate. The seasonal use is appropriate. No disturbance of the wetlands while under construction is reasonable. The stamp on the sheets is also reasonable. He is for it if they can go 90, 75 and 50 as a compromise to the folks in the area.

Member Gittlein stated that he is leaning towards something under 90ft. He would agree to the conditions. He would like 75 or 80ft.

Referring to the cell tower off Grove Road, Selectman Jenness stated that it towers above the trees. At the time, there were comments from people that "it sticks out like a sore thumb". There was a historic group that viewed it from the Philbrick Farm and that comment was made again. Someone that was there said "well after a while, if it is built, you won't even notice it". While it offended her at the time, she has found that she passes it all the time and hardly notices it anymore. She wonders how much of that will take place with the netting. The bottom line for her is that safety trumps everything. She agrees with the conditions.

Speaking to Attorney Phoenix, Chairman Epperson stated that it seems that the vast majority of the Board would like to see something around 80ft. He thinks the easiest way out of this is to compromise at 80ft.

Attorney Phoenix asked how the members of the Board feel about starting at 90ft and going down.

Mr. Diodati showed on the plan the progression from 90ft down to 50ft. He stated that he thinks they can live with that because if the balls go over they will be in Mr. Georgopoulos' yard, not at his house. The last section really does not protect his house as much as it protects his yard. He noted that there are no customers sitting at picnic tables past the last two poles. It could taper down from there.

Member Gittlein asked for the location of the Tee.

Mr. Diodati pointed it out on the plan.

Member Gittlein asked how high the balls could fly.



Mr. Diodati noted that the back of the range is about 180 yards. At 180 yards, the ball could be pretty close to the highest at flight.

Member Lord read from Section 611.9. He still thinks it should be 75ft. In looking at the drawing, he does not think the 90ft fits the rural character of Rye. He continued that if anyone had a question on what they were voting for, to put it above the tree line would be doing everyone in this town a disservice.

Mr. Diodati pointed out that this application went before the Board and was approved even before there was the town warrant voting. Even if the ballot had said this will excluded 90ft golf netting, this was applied for under the original ordinance. Whether voters misunderstood or not, should not dictate how the Board votes on this. He stated that they would go lower at the very end where there is less of a chance of property or personal injury; however, 75ft does not solve the problem as a business owner. Not next to the Ice House or the Hickson's house. Past the Georgopoulos house, yes, it can be lower.

Member Quinn stated that Selectman Jenness is absolutely right. Things that are new are going to be noticeable for a while when they first go up. He thinks this is going to disappear over time. He appreciates the attempt to make a compromise; however, the grade goes downhill. To shorten the poles, is unnecessarily adjusting what is a reasonable request of the golf course.

Chairman Epperson stated that if the Board could have another conversation about this at a later date, they could come up with a compromise that would work for everyone.

**Motion by Bill Epperson to continue the application until the August meeting. Seconded by Jerry Gittlein. All in favor.**

- B. Major Subdivision, Lot Line Adjustment and Conditional Use Permit by the Housing Partnership for Property located 0 Airfield Drive, Tax Map 10, Lot 15-4 for construction of a residential development consisting of a mixture of single-family and multi-family dwellings with a portion being dedicated as Workforce Housing. Property is in the Commercial Zoning District. Case #07-2017.

- *Continued to the August meeting. See motion above.*

**Note: Priscilla Jenness recused herself from the following application. Selectman Phil Winslow was seated.**

- C. Major Subdivision, Lot Line Adjustment and Conditional Use Permit by Harbor Street Limited Partnership of Stratham NH for properties located at 421 South Road Tax Map 4, Lots 25, 27, 31 & 32 for a 22 Lot subdivision. Properties are in the Single Residence District and within the Aquifer and Wellhead Protection District. Case #13-2016.

**Attorney John Kuzinevich, representing the applicant,** spoke to the Board. He stated that he is going to be arguing the waiver requests for Lot 12. He is going to argue them separately because if the Board grants one, it does not need to grant the second one. He continued that the waivers both deal with Lot 12 and with designated leachfield area. The first waiver being requested is from 603.3A, which requires 4,000sf of designated leachfield area. Referring to the plan, he stated that in looking at Lot 12, the entire



colored area constitutes 4,000sf of designated leachfield area. However, because of a small ledge outcropping, there is a choice of seeking a waiver to the 4,000sf or a waiver to the 75ft distance buffer down to 55ft. If the pink colored area could be chopped off, it would be a useable lot. Otherwise, the buffer would need to be reduced to maintain the 4,000sf. He stated that the 4,000sf was an arbitrary doubling of a 2,000sf. If it is a bad perking soil, 2,000sf should be doubled to protect in the event of a failed leachfield. That is not really needed anymore. The most modern practice is to rebuild the leachfield in the same location so multiples are not needed. In the calculations that were previously submitted, Lot 12 would be sized for a four-bedroom house. A traditional stone and pipe leachfield is 1,000sf. That means there are three additional leachfield for extra protection. The system could fail three times and it would still accomplish the purpose of the regulations. He continued the Septi-Tech Systems have been granted permission by DES to reduce the size of leachfields to 25% of what would be required of a traditional leachfield. That means the leachfield on Lot 12 is 250sf. If the waiver is granted, 3,400sf of designated leachfield area would allow the replacement of the leachfield 13 times. Even in the most conservative reading of the Rye regulation, it is only required to have enough area to replace the leachfield 3 times. This meets the spirit of the regulation by providing the protection. (He read from the second page of the Septi-Tech System owner's manual.) He noted that not only are they are putting on more layers of protection than are required by the regulation, they are putting in a treatment system that just about ensures that a replacement leachfield will never be needed.

Attorney Kuzinevich stated that in the package he submitted to Board, a representative from Septi-Tech talked about the performance of the systems. Most importantly, she said that out of all 3,500 Septi-Tech Systems, installed to date, there has not been a single leachfield failure.

Chairman Epperson stated that there is a subdivision in Town that has five of them installed right now. Three of them are out of sync.

Attorney Kuzinevich pointed out that this is an operations and programming issue. This is not a leachfield failure. He noted that Septi-Tech did not know the systems were in operation and did nothing to verify their performance. Every lot that is closed on Septi-Tech and the homeowner will be sent notices. Normally, the inspections are at a year of operation. It has been discussed with Septi-Tech that three months of operation is the magic number for the biology to develop to get optimum treatment. Mr. Falzone is going to pay for a complimentary inspection at the three-month period and willing to make this a condition to avoid the initial startup problems. He continued this is very simple. There is a hardship if the lot cannot be used. They are requesting a very minor waiver that has no impact on anything.

Chairman Epperson asked Danna Truslow to speak in regards to her documentation on the systems that were not working correctly.

**Danna Truslow** stated that for several years the Marjorie Way Subdivision has had some requirements to monitor and report the results of the sampling of the septic systems that were required by condition of approval in 2011. There were a number of conditions of approval for the subdivision because it is located in the Aquifer Protection Zone and very close to the Garland Well. Because Septi-Tech Systems have been proposed for other subdivisions, she has been looking for the data for a long time to see how they are functioning and how the condition of approvals are functioning, to see what kind of compliance there has been. After getting some information from the applicant for the Marjorie Way Subdivision and from the manager of Septi-Tech, she put together a matrix on how the conditions of approval were being met. She continued that there was not good communication about what was required. Septi-Tech Systems were installed at all five sites but only a few of the systems had the denitrification systems turned on so they

were not functioning properly. There was also no compliance about the sampling being done on a regular basis. There was not complete follow through on the maintenance agreement that needed to be in place as a condition of approval. For the systems that had the denitrification systems working, the nitrates were at levels that were appropriate. Once Septi-Tech was notified, they immediately went to the subdivision and did some evaluations. They will also be retesting several systems. She stated that there really needs to be good follow through if there are going to be conditions of approval on subdivisions. She reiterated there needs to be oversight and follow through. In these sensitive areas, this is what is guaranteeing that the approval that is being given to subdivisions is evaluated over time.

Chairman Epperson stated that this is something that could happen and would be a disaster. He continued that the Town chased that homeowners' association for a couple of years to get that information. It wasn't until Mrs. Truslow pressed the association that it was forthcoming. When the homeowners' associations are formed, they really need to be followed up on.

Attorney Kuzinevich stated that besides the initial inspection, Mr. Falzone is going to hire an independent third party to follow up and monitor the testing. The data will be delivered to the Town. The homeowners' association will have a requirement that they continue with a third party for follow up inspections. He thinks these would be proper conditions for the subdivision approval, as opposed to the waiver. These are operational problems not a failed leachfield problem.

Attorney Donovan suggested that the Board hear both waiver requests.

Attorney Kuzinevich stated that the second waiver request is for the buffer from any kind of ledge or rock, within 24 inches of the surface, be reduced from 75ft to 55ft. If it is reduced to 55ft, the 4,000sf of leachfield could still be maintained. He noted that the primary designer of all these regulations, William Evans, NH DES, is present if the Board would like to ask him some questions. He continued that the buffer is most important downgradient, side gradient a little bit and upgradient not at all. The area they are seeking for a reduction in buffer is side gradient. Ledge probe 21 is what really caused the problem. However, the depth to bedrock was still 18 inches. He continued the actual septic system will be designed near test pit 21. Test pit 21 is down at the bottom. There would need to be 13 leachfield failures before getting to the area to which the waiver is being requested. He thinks this request is very reasonable.

Attorney Donovan stated that he understands upgradient and downgradient. He asked what a side gradient is.

Attorney Kuzinevich explained that if the water flow is to each side it would not be expected to be commingling of groundwater with the septic water.

Attorney Donovan asked if this depends on the arrangement and the layout of the leachfield itself.

Attorney Kuzinevich replied that it is the groundwater to be most concerned about. The regulations do not have any requirements for surface grading or contours.

Referring to the sketch of the ledge probes, Attorney Donovan commented that he believes it is ledge probe 20, not 21, that has the issue. The edge of the crosschecked DLA is at 80ft elevation and the ground level elevation at ledge probe 20-JN is at 80. That means the ground is level in that 55ft. That is not upgradient or downgradient.

Attorney Kuzinevich explained that it is downgradient/upgradient of groundwater, not surface flow.

Chairman Epperson asked how they determine groundwater in this area.

Attorney Kuzinevich replied that it is based on the groundwater studies that were previously submitted by Tim Stone.

Attorney Donovan asked if the groundwater is going the other way in this area.

Attorney Kuzinevich confirmed.

**William Evans, Former NH DES Engineer**, stated that it needs to be known where the groundwater flux is moving, which is the groundwater flow with respect to the landscape. It can be different sometimes than the surface elevations of the ground. Groundwater has a directional flow on all landscapes. The other concern is the breakout from leachfields. The effluent that is renovated and treated in the field needs to have a place to move and stay subterranean. In the case of the Septi-Tech System, the effluent quality is extremely high. It is just being done in a more compact manor. He continued that a conventional leachfield could actually be put here today. The State has some technologies that are out now that are doing passively renovation which is quite substantial.

Attorney Kuzinevich stated that the plan that was submitted has a page that shows the groundwater flow with arrows through the designated leachfield area. The crosshatched area is off to the side of the direction of the groundwater flow. The water is going to flow away from test pit area 21 and there will not be a breakout condition.

Attorney Donovan stated that the vectors are surface drainage vectors that are shown on the plan.

**Tim Stone, Stonehill Environmental**, (representing the applicant), stated that on Lot 12 the groundwater flow is to the north on this site. It has been very consistent during the 9 months of monitoring. It is side gradient at TP-20. It is not in the line of flow. (He reviewed the flow on the plan before the Board.) He noted that the flow is north to the side. Where the waiver is being requested, the flow has been consistently side gradient.

Selectman Winslow asked how the flow would change if there was a 100-year storm.

Mr. Stone stated that there may be some temporary change in flow direction during a massive storm. There may be more issues with septic fields in low lying properties where it would be entirely flooded. However, there is a lot of grade to this site and the groundwater flow is very consistent. He reiterated that there may be some temporary change in flow direction but overall it is going to remain the same.

Member Losik clarified that she thinks it is being said that the groundwater, as it relates to the flow for the septic, is different than what is seen in the drainage study.

Mr. Stone explained there are a lot of similarities between the drainage study and groundwater. If the groundwater flow and surface water flow is overlaid, there will be slight variations but in most cases, it will be very similar.

There was review of the plan showing the groundwater flow on Lot 12.

Mr. Evans stated that there is a surface water regime and a groundwater regime. The surface water regime will respond to the onsite drainage structures, ditches and other things that are installed around homes and driveways. The groundwater itself will primarily stay the way the groundwater is now. It may be recharged during a storm event to some extent. A lot of the surface water, as part of good design, is moved away from the leachfield area so it does not impact the area.

Chairman Epperson asked if this could impact the recharge of the Aquifer artificially.

Mr. Evans commented only in a storm event. It will end up back in the Aquifer anyways. He continued that it is a good thing to recharge an Aquifer. It is very important to put this water back into the Aquifers in New Hampshire. It is what provides drinking water. The water is renovated, treated and nature takes up any contaminants in the groundwater. Soil is an amazing treatment component to a leachfield. The water put out for leachfields ends up recharging the Aquifers. Onsite leachfields that are properly functioning and operating, act in a good way to recharge the drinking water supplies.

Selectman Winslow stated there is 45 acres to work with on this site. It seems that in laying out the process a lot configuration could be developed that would not require a waiver. He challenges the applicant to consider that. In this particular case, it is "quibbling" over a corner. He asked why they could not reconfigure the acreage.

Mr. Evans stated that the 4,000sf was a number that was established in the early days of the rule as a guide.

**Joseph Falzone, applicant**, stated that he was asked in the very beginning to use advanced systems on all the lots. A leachfield of 250sf is being installed. The water is being treated that is coming out. This is all at \$10,000 more per lot. He commented that he did not have to do that. He did it because the Board said it would be the right thing to do. He continued that the Board asked and he has already reconfigured the plan. He is not going to reconfigure the plan again. If the Board denies the waiver, he is going to go to court and the Board can risk what that will do to the Town. He stated that he has done everything that has been asked of him and more on that site. He is not reconfiguring anymore. It is not reasonable to ask for this to be done.

Attorney Kuzinevich stated that when he got involved he asked the engineers if they could reasonably reconfigure the designated leach area. It just was not feasible. When talking about reconfiguration, it is talking about redrawing the subdivision, as opposed to dealing with a minor non-impact issue.

Member Low stated that the Board is here to protect the residents of the town. There is water leaching from the Coakley Landfill into Bailey's Brook. The residents are dealing with quite a few young folks in town with cancer. The Board has to protect the individuals too. The Board has to defend the town's population.

Attorney Kuzinevich commented that he agrees. He pointed out that according to the regulations there only has to be protection of 3 leach field areas. If this waiver is denied, the Board is effectively quadrupling the expressed requirement of the regulation.

Member Low stated that he is not saying he is going to deny the waiver. He is saying they are here to protect the population. He noted that the Board has received a lot of petitions to turn the development down.

Speaking to Danna Truslow, Member Losik asked her to comment on the difference between septic flow and surface water flow.

Mrs. Truslow stated that surface topography dictates how surface water flows. (inaudible) The groundwater flows in more of a general pattern. In this area, where it is shallow groundwater, it is more of an approximation of the surface topography. Other surface things can modify groundwater flow as well. It really depends on the site.

Attorney Donovan stated that they are looking at the groundwater contour maps. (He pointed out an area on the map to Mrs. Truslow.) He explained that if the leachfield is located in the requested area, there is 55ft up to the ledge. (He pointed out the direction of the groundwater flow.) He asked if the flow could have a wider band and reach 55ft.

Mrs. Truslow reviewed groundwater flow on the plan for Lot 12. She noted that this is one of the places where there might be some seasonal variation; however, the groundwater flow should be toward the northerly direction.

Attorney Donovan commented that the leaching would not get out 55ft into the ledge outcropping.

Mrs. Truslow stated there is no guarantee. If the ledge is fractured it can get into the fractured bedrock and flow. She thinks overall the groundwater flow direction is away from that bedrock outcrop. She continued that when the arrows were drawn on the plan there was some idea of where the leachfields were sited. She believes that when the map was generated it was assumed the leachfield was a little further south than the current suggested area.

Chairman Epperson read from Section 306.10 regarding the requirement of the use of septic systems of high performance in the Wellhead Protection Area. He pointed out that the septic systems are actually required.

Attorney Donovan stated that statutes in the Rye Regulations regarding waivers require that before the Board grants a waiver there must be a finding that there is unnecessary hardship. He asked the Attorney to address how not granting the waiver is an unnecessary hardship.

Attorney Kuzinevich stated that not granting the waiver constitutes an unnecessary hardship because effectively it takes away a lot. It takes away a good amount of land that could otherwise be developed. The subdivision has been reconfigured several times from 22 lots down to 17 lots. They are seeking a waiver for this lot and are still in front of the Zoning Board for Lot 2.

Attorney Donovan commented that it has been denied.

Attorney Kuzinevich commented that they have just received the decision but have not taken any action for reconsideration yet.

Attorney Donovan stated that in reading the minutes he thought that the Notice of Decision was going to be drafted for review at the next Zoning Board meeting.

Mr. Falzone noted that they received the Notice of Decision.



Attorney Kuzinevich stated that 22 lots down to 17 lots and to maybe 15 lots, changes the economics of doing the development. If Mr. Falzone cannot develop this lot it does not reduce the infrastructure, or drainage structure. It is the same amount of roadway. It just becomes a total hardship. To try to reconfigure now would become uneconomic. It would take too much time and start a year long process. In thinking about unnecessary hardship, it needs to be balanced with exactly the kind of waiver that is being requested. They have not tried to go in and get the last inch out of every lot. This is one lot and one waiver being requested. It would be different if they were asking the Board for an outlandish waiver. This is about as minor as it can get. Couple that with losing the lot is really unnecessary.

Chairman Epperson stated that in the beginning there were 22 lots and every single piece of property was proposed for development.

Attorney Donovan stated there is a whole body of law in New Hampshire on necessary hardship. He continued there were about 200 ledge probes and test pits. There is high ledge and outcroppings all over the place that originally affected all 22 lots. He asked what is different about this lot versus the rest of the property.

Mr. Falzone stated that the town's regulations are for pipe and stone. The State changed the regulations for size of fields when an advanced system is used. He stated that he can go out and knock 6 inches off that rock and have the 24 inches witnessed by the town's representative.

In terms of what is unique about the lot, Attorney Kuzinevich stated that in going through the process this is the last remaining lot in the configuration. This is talking about a very small failure. Effectively, they did not try to get waivers of the 4,000sf or any of the other buffers. That is what happens in coming down to the last lot. Right now, without the waiver, they would be denied reasonable use of a developable piece of property that otherwise meets all the other regulations. He is trying to keep this in perspective of how minor this is and non-precedent setting.

Chairman Epperson commented that it is precedent setting. He pointed out the Town has the right to have more restrictive septic setbacks than the State. The Town has elected to do that.

Attorney Kuzinevich replied they are still bound by rationality. He continued they have tried to respect the town's position by Mr. Falzone redesigning to otherwise meet the 4,000sf requirement. Finally, it gets to the last developable land. Mr. Falzone does have the right to reasonable use of a property. Without the reasonable use, it is an unreasonable hardship.

Member Lord stated that he has asked the developer and the engineer repeatedly to put all the ledge probes and test pit information on the plots. It was asked of them at the April 26<sup>th</sup> meeting and it is still not on there. (inaudible) The requested information is not on the plans. He does not know how he can make a decision.

Mr. Falzone stated that Sebago Technics has signed off on every test pit for every lot.

Member Lord stated that he is not questioning the test pits. He is questioning the rationale of the Board trying to make a decision about requested information that has not been put on the plans.

Member Losik commented the Board still has issues. It was requested two times for all the test pits and ledge probes to be shown on the development plans. She understands that Sebago has all the information;



however, the Board is trying to understand this resource. The Board can only understand it by having vast information available. She commented that there have been inconsistencies time after time and there still are.

Mr. Falzone replied this is why he has paid for the Board's experts to report back to the Board.

Member Lord stated that they have asked repeatedly for the information to be on the plans. Repeatedly, the engineers said they were going to do it. To this date today, the Board still does not have the information. He asked why the individual ledge probe and test pits are not on each individual plan as requested.

**Scott Olson, Beal's Associates**, stated that he can verify that every single test pit and everything that was done on that property is within the lot development plans.

Member Lord noted that they are missing the test pit information and ledge probe delineations on the plans. That was specifically asked for.

Mr. Olson stated that to put the ledge probes and test pits on the plans would actually make them unreadable.

Member Lord replied that he disagrees. Going back to the minutes of April 26<sup>th</sup>, it shows that Member Losik specifically asked for that and it was agreed to. He continued that he specifically asked for it to be on the plans and it was said that the information would be on the plans for May 9<sup>th</sup>. It never was put on the plans.

Mr. Olson commented that there was some miscommunication. He thought it was only the symbols and numbering that was being requested. The symbols and data was supplied to the town witness.

Chairman Epperson opened to the public for comments on the waiver.

**Bob Seiner, 399 South Road**, spoke to the Board.  
*(Please see comments attached)*

**Vicky Irwin, 11 Fern Ave.**, stated that anything that threatens the quality of water in Rye should not be approved.

**Peter Crawford, 171 Brackett Road**, asked why the lot and waiver are coming up at this late date.

Chairman Epperson explained that they were still waiting for the information on the test pits. Hearing no further comments, he closed the public hearing at 11:05 p.m.

Member Lord stated that he struggles with it. He comes back to the basic premise that it is very difficult for the Board to determine whether or not this is even needed based on the information on the plans. Without the test pit information that is seemingly lacking, he does not know that they can make a good decision. In regards to hardship, he does not know he can get there because it has not been shown to the Board that it is not doable. It has been two months since the Board has asked for information to review these adequately. His vote is no.

Member Low stated that he is not an engineer. He would probably go with a waiver because if this went to court the Town would probably lose.

Member Quinn stated that he is inclined to deny the waiver. The reason for that is because economic advantage is driving whether Lot 12 is used or not used. The town needs to have some kind of benchmark in place for DLA's. The town happens to have 4,000sf. That may not be to everyone's liking but that is what he has to work with. He would deny the waiver.

Member Losik stated she is uncomfortable with granting the waivers for several factors. She knows Marjorie Way is a different situation but there are some similarities which could happen. All controls possible could be put in but it still might end up in the same place. She looks at the challenges of this resource and the Aquifer and Wellhead Protection District, the site conditions of impermeable substrata, rock and seasonal high water; it is just pervasive over the whole site, except for some small areas in the whole development. An engineered response to those challenges do experience failure rates; technologically, mechanical, electrical or otherwise, and then non-tech factors. It boils down to the HOA and the homeowners being good stewards. The other piece that comes into play is the resources that are there. There may be a great HOA setup but they can fail. The other non-tech factor is that as these developments come to the Planning Board with more challenges the conditions of approval get to be more robust and there is the responsibility of the municipality. It is resources again. It is people, time and a lot of different factors. In looking at the high-tech systems, these very same systems, where three of the five did not meet the nitrate standards and is in an area that is close to the Garland well, makes her nervous. In talking about replacement, it was stated that 4k is not bound by rationality. She remembers the Board had a discussion relative to a development on South Road which was a different type of high tech system. During the months that this was ongoing, it came up about when people had to replace these systems. It is okay if people have a lot of money in the bank but what if they don't? What happens to the person who is struggling that decides to go to the State and get a permit for a traditional system. The 4k's are there because the Town wants them. Technology may prove otherwise but the Town still wants those protections. The Town particularly wants them in the Aquifer and Wellhead Protection Area. There is a reason why the Town is more conservative but that is the town's choice. She stated that she is concerned about the precedent this would set, especially in the Aquifer and Wellhead Protection District. She commented that the data still rests with the developer and his team to get the information to the Board in a great form. It has really been difficult. She noted that it has been said that if ledge is fractured it still can get into the bedrock flow. There is some possibility of flow consistent with the drainage study that was done, which gives her pause because from that area, that is being requested, the relief in the DLA size for the distance from the surface to bedrock could go into that. That developed area buffer that goes right into Lot 9 makes her nervous. She continued that she does not feel the unnecessary hardship has been met, given the robust development that could still exist on the property. She does not see it as being a total wash in terms of the economics.

Chairman Epperson stated that for all those same reasons it is a no for him.

Member Gittlein stated this particular lot is a perfect example of the fragile area that this developer has decided to develop. He feels very reluctant to grant waivers so these issues are solved. He is a no.

Selectman Winslow stated that he keeps going back to the initial feeling that there are 45 acres to work with. He cannot understand why they cannot come up with a configuration that would not require waivers. He agrees with Member Gittlein that the land area is very fragile. He does not think it is appropriate to grant a waiver in this case. He cannot vote for this waiver.

Chairman Epperson stated that it sounds like it is a “no” 6 to 1.

Attorney Donovan suggested that a motion be made to deny both waiver requests and the Board ask him to prepare a Notice of Decision, relative to the waiver denial, for review at the next monthly Board meeting.

**Motion by Pat Losik to deny the waivers requested to Section 303.3A, to allow a designated leachfield Area (DLA) of 3,400sf where 4,000sf is required and to Section 603.3 A (1)(c), to allow the DLA to be within 55ft of ledge with 18 inches of surface. Seconded by Jerry Gittlein. All in favor.**

- D. Major Site Development Plan by Eversource for property located on Lafayette Road, Tax Map 10, Lot 4 for the West Rye substation project which consists of the rebuild of the existing substation in its original location as well as expanding it approximately 21 feet to the north and 14 feet to the south. This project will replace outdated transformers. Property is in the Commercial Zoning District. Case #08-2017.

- *Addressed above*

**Note: Priscilla Jenness was reseated for the remainder of the meeting. Phil Winslow was excused.**

#### **VI. New Business**

- a. Stephen Carter request to become an Alternate

Stephen Carter spoke to the Board in regards to his interest in becoming an alternate on the Board.

**Motion by Bill Epperson to accept Stephen Carter’s application to become an alternate on the Board for a three-year term. Seconded by Jerry Gittlein. All in favor.**

- b. Approval of Line of Credit Extension for the Meadows at Rye, 561 South Rd Subdivision

**Motion by Jerry Gittlein to approve the line of credit extension for the Meadows at Rye. Seconded by Pat Losik. All in favor.**

#### **VII. Pay Escrows**

- a. Attorney Mike Donovan in the amount of \$1,654.80 from the Harbor Street-421 South Rd Escrow

**Motion by Pat Losik to pay Attorney Donovan in the amount of \$1,654.80 from the Harbor Street Escrow. Seconded by Jerry Gittlein. All in favor.**

**VIII. Communication**

- a. Appoint Phil Winslow as Rye's RPC rep to the Selectmen for another term.

The Board agreed to the reappointment of Phil Winslow to the RPC as representative for the town. A letter will be sent to the Selectmen for official appointment.

**IX. Other Business**

Attorney Donovan stated that next month the Board will be looking at the South Road application and there needs to be a decision. The Board could decide to hold the meeting earlier. He noted that he will not be at the meeting in August. He reiterated the Board needs to make a decision to approve or deny the application. After the decision is made, the Board should ask him to write up the Notice of Decision for review at the September meeting.

The Board discussed setting up a meeting for July 18<sup>th</sup> for the South Road application.

**Motion by Bill Epperson to continue the Falzone application to Tuesday, July 18<sup>th</sup>, provided the applicant is available and all abutters are notified; if the applicant is not available the application will be continued to the August meeting. Seconded by Jerry Gittlein.**

**Vote: 6-0-1. Abstained: Priscilla Jenness.**

**Adjournment**

**Motion by Mel Low to adjourn at 11:35 p.m. Seconded by Pat Losik. All in favor.**

*\*All corresponding paperwork and documents may be viewed at the Building Department, Rye Town Hall.*

Respectfully Submitted, Dyana Ledger

June 6, 2017

Rye Planning Board

Rye Town Attorney

10 Central Road, Rye, NH 03870

Re. Proposed Major Subdivision at 421 South Road, Rye NH

Dear Ladies and Gentlemen,

My name is Bob Siener. I live at 399 South Rd and I am an abutter to the above referenced proposed subdivision. I have several concerns that I wanted to address to the board members.

1. The current proposed location of the main road entrance named Francis Path is within 50'0 of my property boundary. At its closest point, near road station marker 4 +00, the distance is approximately 13'0. Because road center markers are not confirmed, this distance could be closer to my property boundary. I am very concerned that since the road will be elevated up to 9'0 above grade due to existing site conditions, there will be extreme runoff of water, road salt, gasoline drippings and other toxic materials onto my property.
2. Because this development will not be allowed to use blasting in any way, this road will be constructed using other methods, including rock hammering. Because the road is so close to me, this will cause hardship in the form of noise, vibrations and other disruptions to my house and property. I feel this is an unfair hardship to me.
3. The proposed new intersection of Francis Path and Woodland Road will be a dangerous one as this is already a poorly designed intersection. Poor visibility and increased traffic to this area will have dire consequences especially during the Summer months with the increased beach traffic.
4. I respectfully ask that the road center line be moved away from my property line to a minimum of 50'0.
5. There will no hardship inflicted upon the developer if this waiver is denied and this lot is not developed. There are 16 other prospective lots in this subdivision to make money on.
6. The developer is asking for a waiver on the DLA size for lot 12. I respectfully ask that you deny this waiver as the available area for this DLA will be further reduced if the road Francis Path gets moved closer to lot 12.

Thank you

Bob Siener

399 South Rd

Rye, NH

Ms Chairman and members of the Zoning Board of Adjustment, my name is Bob Siener, 399 South Rd.

As I understand it, the applicant is applying for a variance to construct a driveway for a house on a lot that doesn't actually exist yet. As detailed at the last ZBA meeting, the location of this proposed house is directly adjacent to a vernal pool and wetlands. This area has been designated as a "no disturb zone". The exact boundaries of these sensitive areas are still being determined due to conflicting drawings, and poor site markers. I personally saw a vernal pool marker located 10 to 15 feet inside of the high-water mark on the site walk conducted on May 25<sup>th</sup>, 2017.

The applicant has made presentations regarding the proposed septic design and has touted how the specialized design is designed to significantly reduce nitrate from the effluent from the septic to the septic leach fields. These systems if properly installed and monitored will offer more protection to the surrounding sensitive areas. These designs are similar to those present at the subdivision located on Marjorie Way here in Rye. There was a recent review submitted on June 12, 2017 by Dana Truslow, the town's hydrologist, of these systems which will shed some light as to how they are performing. The Marjorie Way subdivision had very specific conditions of approval when it was approved and a Homeowners Association was created to make sure these conditions were followed. The applicant wants a similar Homeowners Association for his proposed subdivision.

The results of this review showed the following:

1. 3 of the 5 lots in the subdivision exceeded the proposed nitrate concentration limit. **60% of the subdivision.**
2. 2 of the 5 lots did not have the Denitrification system functional at the time of startup. This was due to poor communication between the homeowners and the septic installer.
3. The required homeowner's association was established much too late and they were not diligent in enforcing the septic conditions of approval required by the planning board.



4. There was no constant communication between the town and septic installers to insure all the conditions of approval were being met. There was also no payment system in place to insure enforcement.

My point here is that, preventing any negative environmental impact to these sensitive areas next to this proposed house will be largely dependent on self-regulation by the homeowner's association and also for the abutters within and outside the proposed development, an added extremely onerous task. It is not reasonable to for the town to add this type of regulation to the already long list of responsibilities the town's inspectors already have. If the town was to assume this responsibility, who pays for this?

As Marjorie Way subdivision shows, the difficulty of maintaining and monitoring this type of septic system and the failures that can result **do not guarantee** adequate protection of the town's water and wetlands...and are thus "contrary to the public interest."

This is a bad location for a house lot. The owner and the applicant can proceed for approval of 8 other proposed house lots on this property. He is adding this lot purely for economic gain. **Denying this variance WILL NOT CAUSE UNNECESSARY HARDSHIP** to the applicant.

I respectfully ask the members of the ZBA board to deny this variance from section 301 for the reasons I have just stated.

**Shari R. Cohen**

399 South Road, Rye, New Hampshire 03870

attachment  
July 11, 2017  
P.B

July 11, 2017

To: The Rye Planning Board and Rye Town Attorney

On May 31, 2017, I went to the Rye town hall to meet with the building inspector, Peter Rowell. I asked Mr. Rowell what he observed on the property of the proposed development at 421 South Road that provided him evidence to corroborate any vandalism to test pit flags, survey hubs and/or roadway stations. He looked puzzled. I told him that we, the abutters to the proposed development, have been told (and scolded) on several occasions at Planning Board meetings, and on an official site walk, that he had visited the site with Mr. Falzone for the express purpose of investigating this allegation.

Mr. Rowell then offered that he had only ever been to the property two times, at a much earlier date, and that his visits had nothing to do with concurring vandalism. Mr. Rowell added that he never even heard of this accusation, but that such vandalism and mischief is not uncommon on development sites.

This is pertinent as it relates to this boards' weighing of information and testimony brought forward by the developer; this is not the first incident of their presenting misinformation. If the Board so desires, I will provide further examples of falsehoods presented by the developer and his team during this (and a previous) approval process. I request that unsubstantiated information provided by Mr. Falzone, Harbor Street Limited Partnership, and their hired experts as fact, needs to be qualified with evidence before being accepted and acted upon.

Sincerely,

Shari Cohen

**From:** Bob Siener [<mailto:fotmbb@comcast.net>]

**Sent:** Friday, July 7, 2017 1:46 PM

**To:** 'Bill Epperson' <[billepperson@comcast.net](mailto:billepperson@comcast.net)>; Kim Reed <[KReed@town.rye.nh.us](mailto:KReed@town.rye.nh.us)>

**Cc:** 'Shari Cohen - NRCS, Dover, NH' <[shari.cohen@nh.usda.gov](mailto:shari.cohen@nh.usda.gov)>

**Subject:** Regarding abutter accusations

Hi Bill,

My girlfriend, Shari Cohen, current and 20-year Rye resident, recently had a conversation with Peter Rowell, the Building Inspector, about his interactions with Joe Falzone.

Specifically, she asked Peter if he recalled meeting Joe Falzone on the site of the proposed development at 421 South Rd to observe and talk about the accusations of abutters vandalizing and moving existing site markers. Peter commented to her that he did not remember having any conversations with Joe regarding this matter. He also did not remember observing any vandalism on the proposed site. Peter told Shari that he thinks he has been out at the 421 South Rd proposed development site 2 times, but it was quite a while ago and had nothing to do with vandalism. (Peter did say however, that such vandalism is common on development sites.)

Shari asked Peter if he would be willing to go on record with a statement documenting these comments by way of responding to an email she would write reiterating their conversation. His response to her was that he "was not in the business of making statements or writing letters for citizens" – a surprising response to say the least, given that Peter is a town employee whose job is to serve the residents of Rye. Peter did say he would issue a statement if requested by the Planning Board.

I believe this statement is relevant due to character issues of the developer, and it is also relevant as evidence that Mr. Falzone's allegations against abutters are false. I respectfully ask that the planning board formally address this issue with Peter Rowell and asks for a written statement of his interaction with Joe Falzone concerning abutter vandalism. To date, Mr. Falzone's allegations have been accepted as fact simply because he says that the Building Inspector corroborated the vandalism, but this never happened.

Thank you

Bob

Bob Siener  
399 South Rd  
Rye, NH 03870  
[fotmbb@comcast.net](mailto:fotmbb@comcast.net)

Attachments P.B  
7-11-17

Daniel Fujimoto  
20 Prospect Street  
Charlestown, MA 02129  
July 11, 2017

Ms. Reed  
Rye Planning & Zoning Administrator  
Rye Town Hall  
10 Central Road  
Rye, NH 03870

Dear Ms. Reed:

I hope this letter finds you well, and enjoying another great summer on the seacoast! I am a Boston resident, with a place in Rye, and love spending as much time as possible in Rye!

My wife and daughter (age 10) have been members at Wentworth by the Sea Country Club for six years, and enjoy the club tremendously. I am a passionate golfer, really enjoy the facilities, with one exception. When I took the tour of the club over 6 years ago, I asked the head professional why it was "Irons Only" on the range, and he mentioned that was the policy because of the length of the practice range nets with the surrounding homes and Ice House. When practicing on the range, I notice at times my own practice shot or others will unintentionally travel over the nets into backyards and into the Ice House, and this is with all types of Iron shots. Unfortunately, amateurs tend to "slice" the ball, which means for right-handers the ball will go high and right. This concerns me greatly, especially because my family likes to enjoy an ice cream at the Ice House too!

Every year Wentworth reaches out to its members for feedback and suggestions, and not a year has gone by where I (and others) have asked for higher nets around the practice range due to the safety concerns we all have for the surrounding homes and Ice House patrons. I was VERY PLEASED to hear that this year we may have the chance to increase the height of the practice round nets. I am unable to attend the Town Hall planning meeting tonight, but wanted to share my opinion with you on this matter. I implore the Town of Rye to consider Wentworth's request to increase the height of the practice range nets to adequately protect the surrounding homes and Ice House. As a point of reference, I have played many private and public golf courses around the seacoast and nationally, Wentworth is the only club that comes to mind that has this type of restriction (limited height nets / Irons Only) policy for its practice range.

If you have any questions, please contact me by phone at 617-970-8045 or by email at [dfujimoto@atlasfinancialconsulting.com](mailto:dfujimoto@atlasfinancialconsulting.com). I appreciate your time in considering Wentworth's request.

Sincerely,

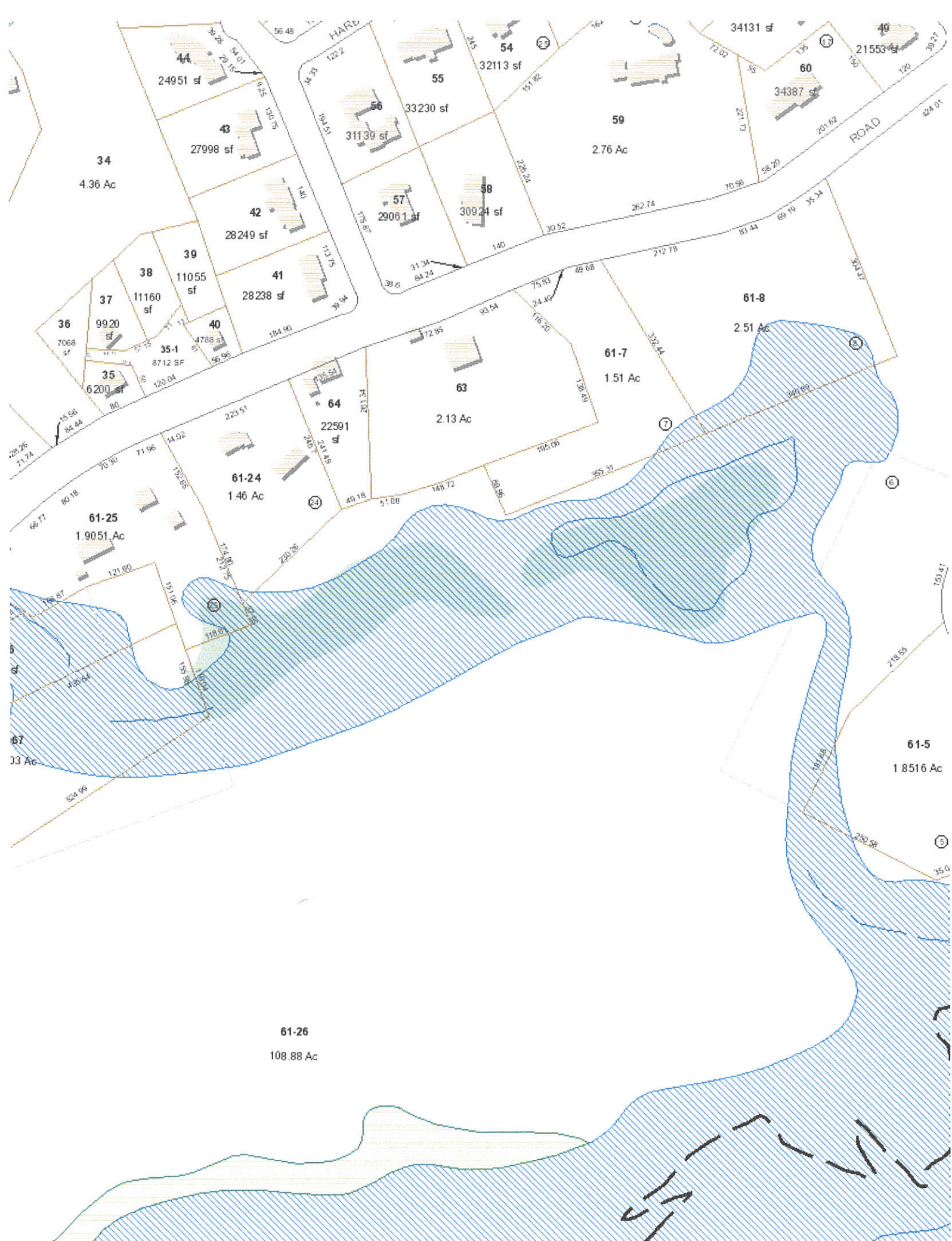
*Daniel Fujimoto*

Daniel Fujimoto

CC: Robert Diodati, Vice President/General Manager – WBTSCC

Gordon Swennes, PGA, Director of Golf/Head Golf Professional - WBTSCC



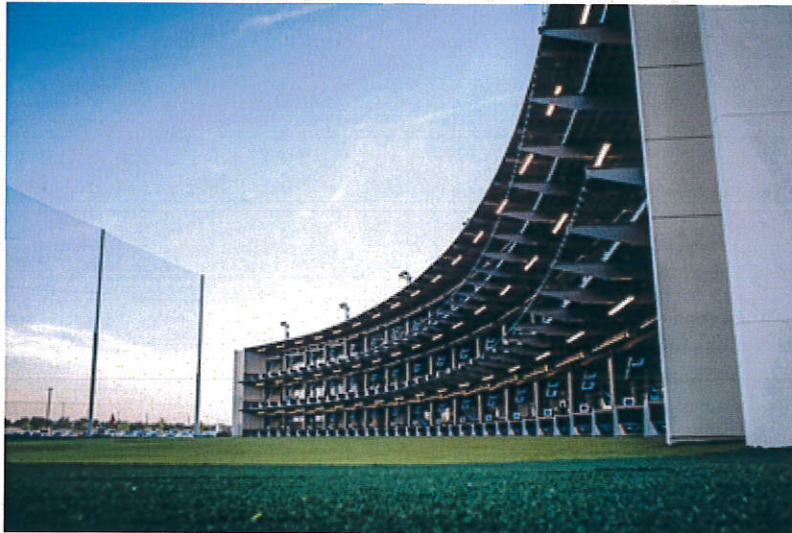




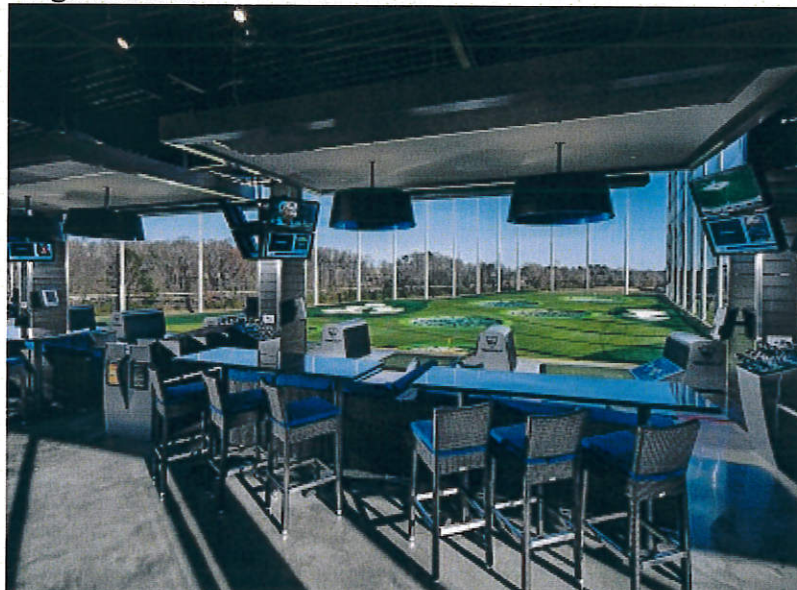
West Chester



Unk.

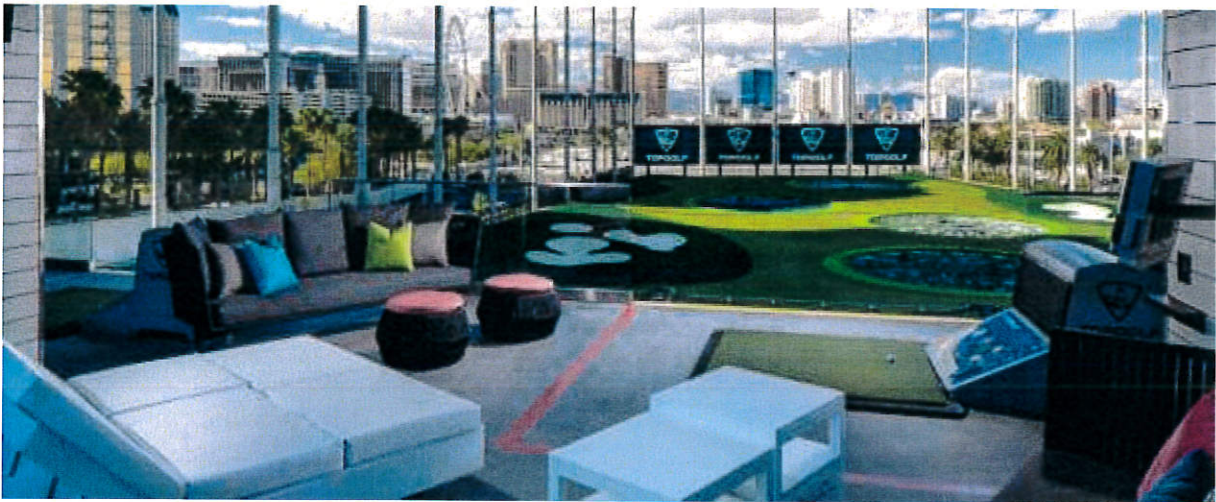


Virginia Beach





## Las Vegas



July 11, 2017

To: Rye Planning Board  
Re: Proposed Major Subdivision at 421 South Road  
10 Central Road  
Rye, NH 03870

Dear Chairman Epperson and Members of the Board:

I write to ask that you deny the application for a major subdivision at 421 South Road. I believe that the following findings by the ZBA regarding proposed Lot 2 apply to numerous other proposed lots and therefore disqualify those lots from being developed as well:

1. The ZBA denial of an exemption for proposed Lot 2 states that the lot "consists primarily of wetlands, a vernal pool and associated buffers and at least the buffers will be likely utilized by the proposed homeowners during normal use."

It further states that "construction of the home and septic system will involve additional fill, grading and other construction activities" and that such use and development "have the potential to detrimentally affect the quality of wetlands, vernal pool and aquifer due to potential inadequate maintenance, runoffs, pets and nonadherence to subdivision conditions designed to protect the wetlands and vernal pool."

These concerns can and should be applied to the entire development. A majority of the proposed lots contain wetlands and vernal pools, which are a dominant feature of this extremely environmentally sensitive property. This requires squeezing home sites onto the land in ways which raise significant issues in terms of town ordinances regarding wetlands and their buffers,

Also, as bedrock sits as little as two feet below the surface on many of the home sites, virtually every home will be "mounded up" from foundation slabs laid on top of it. The "additional fill, grading and other construction activities" indicated in the ZBA denial of the exemption for Lot 2 will be necessary to build nearly all of these homes.

In addition, as on Lot 2, these lots will require "subdivision conditions" to protect the wetlands with significant risk of "nonadherence." "Nonadherence" to the stringent conditions on any part of this property poses a clear threat to the town's wetlands and aquifer.

As one member of the Planning Board has indicated, finding suitable home sites and placing other features of the subdivision requires "threading the eye of a needle." Proposed Lot 2 is just one of many such cases and many such threats.

The entire development will be subject to “belts and suspenders” – deed restrictions, advanced septic systems of unproven reliability, no disturb zones, homeowner’s association regulations regarding everything from leaf disposal to lawn irrigation to low nitrogen and phosphorus fertilizers and perhaps even garbage disposals – which will place an undo burden on the town to enforce and provide town residents with little legal protection for remedy should they fail.

2. The ZBA denial of a variance for Lot 2 states that granting it “would allow for further development of the land...which will alter the essential character of the locality,” that it would “threaten public health, safety and welfare,” that “the value of surrounding properties will be diminished,” and that “the gain to the general welfare of the public of protecting its wetlands, aquifer and neighborhood” outweighs all other concerns.

The same concerns are true for the majority of the proposed lots, as the entire property falls within the town’s wellhead protection district, which exists to protect “the health, safety, and welfare” of the public with regard to water.

The wellhead protection district is not “arbitrary,” as it has been described by one of the developer’s experts, but part of a well-established entity in the Town of Rye, one allowed by state law, sanctioned by the New Hampshire DES, and regularly reviewed, expanded and approved by town officials and voters. To approve a development which cannot guarantee the continued safety of that district would be directly counter to those legal actions by the state, the town, and the town’s residents.

Respectfully,

Jeff Ross  
333 West Road  
Rye, NH 03870



**MICHAEL L. DONOVAN**

**Attorney and Counselor at Law**

52 Church Street  
PO Box 2169  
Concord, NH 03302-2169

Tel. (603) 731-6148  
Fax: send a pdf  
[mdonovanlaw62@gmail.com](mailto:mdonovanlaw62@gmail.com)

**SENT BY E-MAIL AND USPS**

May 12, 2017

John Kuzinevich, Esq.  
71 Gurnet Road  
Duxbury, MA 02332

Re: Proposed Stoneleigh Preserve Subdivision/Rye, NH

Dear Attorney Kuzinevich:

This responds to your May 11, 2017 letter to me. Even though your request was made of me rather than of a town employee, the town will treat it as an RSA Ch. 91-A right-to-know request.

As we discussed when you called me on May 5, I assisted the Rye Planning Board during 1988 in preparing the Land Development Regulations adopted on September 20, 1988.<sup>1</sup> That effort consolidated the former subdivision regulations and the former site plan review regulations into one set of regulations; re-codified the regulations; and updated them.

As we also discussed, that was almost 30 years ago. I do not have any personal records relating to that effort. I suspect the town does not have much. In those days the planning board had no staff.

Pursuant to your request, I have asked Planning and Zoning Administrator Kim Reed to do the following:

1. Copy the subdivision regulations which were in effect prior to September 20, 1988 and mail them to you.
2. Review the planning board's files to try and find any records that may be there from the 1988 effort. If she finds anything we will provide copies to you.
3. Create a pdf of any minutes of planning board meetings during 1988 which involved the preparation of the new regulations. As you probably know, minutes of municipal boards are supposed to be kept on file with the municipal clerk. However, I have found in Rye that the further back in time one goes, the

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<sup>1</sup> Your letter incorrectly states that I was a law student at the time. I was a member of the NH Bar, having been admitted in October 1986.



John Kuzinevich, Esq.  
May 12, 2017  
Page 2

more sparse the minutes on file with the clerk are. She will forward me the pdf and I will forward it to you electronically.

Ms. Reed tells me that she believes she can complete her search of the records by the end of next week.

When we spoke on May 5, I encouraged you to get the waiver requests filed as soon as possible in order to allow adequate time for board members and me to review it. You said you would do that. I am disappointed, however, that you have chosen to hold back your expert opinions on the unreasonableness of the subject regulations until the next hearing, which is 3+ weeks away. As the one who prepared the regulations in 1988, that will not give me an adequate time to respond.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'M. L. Donovan', with a stylized flourish at the end.

Michael L. Donovan

Cc: (By E-Mail Only)  
Rye Planning Board  
Peter Loughlin, Esq.

John Kuzinevich

Attorney at Law

71 Gurnet Road  
Duxbury, Massachusetts 02332

Telephone: 781 536-8835  
Mobile: 508 245-2105

Email: [JKUZ@comcast.net](mailto:JKUZ@comcast.net)

May 11, 2017

Michael L. Donovan  
72 North Main Street  
PO Box 2169  
Concord, NH 03302-2169

Re: Stonleigh Preserve

Dear Michael:

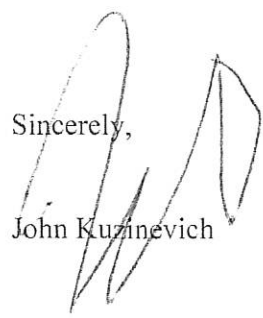
It was a pleasure speaking with you last week about the history of Rye LDR 603.3 A 1. c. From our conversation, I understood that you had some role in its implementation while a law student.

As you are aware, we have not been able to reconstruct the original intent and goal of this subsection and our experts share the opinion that it serves no engineering purpose. We also have been unable to find similar regulations in other towns. Therefore, I am requesting that you assemble any papers, notes or meeting minutes which may shed light on its purpose. If there are only a few pages, I ask that you send them to me, otherwise, I will review any files at the town hall. Please give me a call at your convenience to coordinate this request.

Thank you.

Sincerely,

John Kuzinevich



John Kuzinevich

Attorney at Law

71 Gurnet Road  
Duxbury, Massachusetts 02332

Telephone: 781 536-8835  
Mobile: 508 245-2105

Email: [JKUZ@comcast.net](mailto:JKUZ@comcast.net)

May 10, 2017

To The Chairman and Members of the Rye Planning Board:

Re: Request for Waiver

Dear Chairman and Members:

Please be advised that I represent Harbor Street Limited Partnership.

On September 16, 2016, Harbor Street Limited Partnership submitted a plan for subdivision approval to the Board, entitled Stoneleigh Preserve, South Road, Rye, prepared by Beals Associates, PLLC. Pursuant to Land Development Regulations Section 900 Harbor Street Limited Partnership requests waivers from Section 603.3 A of the Land Development Regulations which requires 4,000 square feet of DLA or, alternately, from Section 603.3 A 1. c which prohibits any area of the DLA from being within 75 feet of soil where bedrock or impervious substratum within 24 inches of the surface.

These waiver requests are being sought only for only one lot -Lot 12- of the proposed subdivision. All other lots meet the terms of the Rye Land Development Regulations. Without a waiver, Lot 12 cannot be developed. As discussed below, the requested waivers fully meet the spirit of the regulations and strict conformity would pose an unnecessary hardship to the applicant. See LDR Section 900. The request for the waivers are in the alternative; either waiver if granted, would allow compliance with the other section for which a waiver was alternately sought.

As presently configured Lot 12 has 3,400 square feet of DLA meet the 75 foot setback. Due to other ledge on the lot, it is impossible to expand the DLA to 4,000 square feet. The only possible area for expanding the DLA to obtain the required square footage would place the DLA 55 feet from where a ledge probe found ledge with only 18 inches of soil covering it. Plans depicting the current configuration of Lot 12 and the configuration of lot 12 with a waiver from the setback are attached.

The specific waivers requested are:

- (1) a waiver of Section 603.3 A to allow a DLA of 3,400 square feet, or
- (2) a waiver of Section 603.3 A 1. c to allow the DLA to be within 55 feet of ledge within 18 inches of the surface.

Pursuant to Section 900, the Board may grant waivers when strict conformist would pose an unnecessary hardship and the waiver would not be contrary to the spirit and intent of the regulations. Each requested waiver meets these standards and will be discussed separately.

#### Request 1: 3,400 Foot DLA

1. Strict conformance would pose an unnecessary hardship and waiver would not be contrary to the spirit and intent of the regulations. As noted above, due to the location of ledge on Lot 12 and surrounding lots, the lot could not be developed without this waiver. This constitutes an unnecessary hardship.

The 4,000 square foot requirement was enacted to provide a reserve area in the event a leachfield failed. This 4,000 square foot requirement was based upon the use of a traditional septic systems. At the Board's suggestion, the Developer has agreed to require advance performance "SeptiTech" septic systems which include pre-treatment tanks upstream of the DLA. These systems only require a 600 square foot leachfield. In addition, NHDES allows a 75% reduction in DLA size (based on pipe and stone leach beds) with these systems. See attached NH Technical Application Bulletin. (Please note that the requested waiver is only for DLA area. No waiver is sought for any required vertical separation.) Thus, even with a reduction in DLA to 3,400 square feet, there would be a reserve sufficient to account for six systems failures which is both unrealistic and provides far more protection than is required by the Regulation. Thus, there is no rational reason to not grant the waiver when no functionality or protection will be lost through the waiver.

2. Specific circumstances relative to the subdivision or conditions of the land in such subdivision indicate that the waiver will properly carry out the spirit and intent of the regulations. The intent and spirit of the ordinance is to provide a reserve area in event of system failure. The use of advanced performance systems allow a smaller area and thereby a small reduction of DLA has no negative impact.

Further, justice is served by granting the waiver. The Board encourage use of the systems proposed by the Developer. It would be inconsistent and unjust if the Board encouraged these systems and then strictly applied regulations designed for old style, non- performance systems.

#### Request 2: 55 Foot Buffer

1. Strict conformance would pose an unnecessary hardship and waiver would not be contrary to the spirit and intent of the regulations. Again, as noted above, due to the location of ledge on Lot 12 and surrounding lots, the lot could not be developed without this waiver. This constitutes an unnecessary hardship.

To evaluate whether or not this hardship is unnecessary requires a determination of the purpose of the regulation. This is somewhat difficult as after diligent evaluation as well as searching for similar regulations in other municipalities, the Developer cannot determine the rationale for the regulation. Indeed, it appears that there is no scientific or engineering evidence that the buffer accomplishes anything and yet it is a major impediment to lot development. To be enforceable, a regulation must have a rational

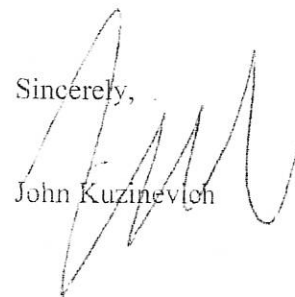
purpose. Thus, it is unclear that this regulation is even enforceable. At the next hearing, the Developer will present expert opinion concerning the lack of purpose of this regulation.

Assuming arguendo that the regulation is enforceable, the requested waiver is de minimus according to its terms. There is only a shortfall of six inches of cover at the controlling location. There can be no showing that this is significant. Likewise, the request is only for a twenty foot reduction in buffer. Again this appears insignificant.

2. Specific circumstances relative to the subdivision or conditions of the land in such subdivision indicate that the waiver will properly carry out the spirit and intent of the regulations. The waiver sought is de minimus and does not appear to materially impact any concern for health or safety.

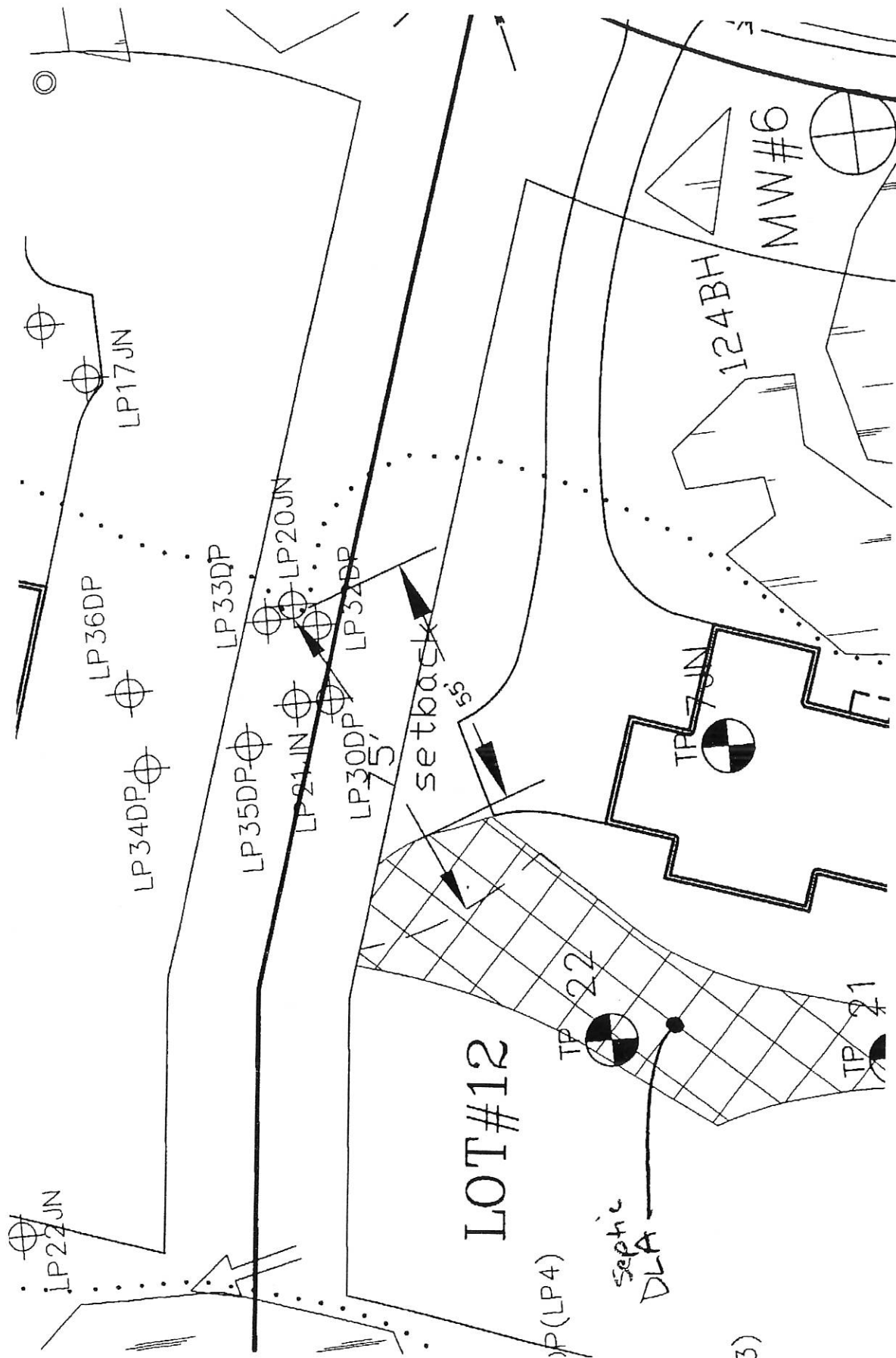
Relative to both requests, the Developer will present expert opinion and further detail of the grounds of this request at the next hearing. At which time, the Developer respectfully requests the Board to grant one of the waivers.

Sincerely,

  
John Kuzinevich







**TEST PIT & LEDGE PROBE SUMMARY TABLE**  
**STONELEIGH SUBDIVISION - SOUTH ROAD - RYE - NEW HAMPSHIRE**

(Excavator test pits & excavator ledge probes were conducted on April 20, 2017 by Christian Smith, P.E. of Beal Associates, PLLC & witnessed by Joseph W. Noel)

TEST PIT #	DEPTH TO BEDROCK (Inches)	DEPTH TO SEASONAL HIGH WATER TABLE (Inches)	MINERAL RESTRICTIVE LAYER	SOIL SERIES	COMMENTS
TP23JN	43	26	No	Newfields	~35 feet to the south is a somewhat poorly drained swale that cannot be in 4K area
TP24JN	None to 62	32	No	Newfields	No bedrock observed to 62"
TP25JN	30	None Observed	No	Chatfield	Bedrock Ranged from 30" to 36"

LEDGE PROBE #	DEPTH TO BEDROCK	COMMENTS
LP7JN	None to 39"	Stopped excavation @ 39" - no bedrock to 39"
LP8JN	None to 37"	Stopped excavation @ 37" - no bedrock to 37"
LP9JN	21"	Chatfield Soil Series ~43 feet off property line & ~75 feet from property corner
LP10JN	26"	Chatfield Soil Series - 4K setback for Lot 17 should be from this point
LP11JN	8"	@ Road Station 6+00 4K setback (75 foot measurement)) should be from TP 13. Refer to note on TP23JN regarding somewhat poorly drained swale east of TP14
LP12JN	30"	Chatfield Soil Series - Near TP3JN 4K setback (75 foot measurement) should be from just southwest of TP3JN and south of LP12JN - soil map needs to be revised
LP13JN	30"	Chatfield Soil Series - This observation and LP3JN should be in a Chatfield Map Unit not as shown on the soil map
LP14JN	None to 34"	Stopped excavation @ 34" - no bedrock to 34" 4K setback is not necessary from this observation
LP15JN	29"	4K setback (75 foot measurement) is met from this observation. Soil map should include LP15JN, DP(LP7) & DP(LP8) in a Chatfield Map Unit or a 127BH map unit
LP16JN	None to 34"	Stopped excavation @ 34" - no bedrock to 34", 4K setback (75 foot measurement) should be from 124BH soil boundary
LP17JN	4"	Bedrock @ or near surface - Problem for 4K setback requirement on Lot 13 - soil map needs to be revised
LP18JN	14"	Hollis Soil Series - Problem for 4K setback requirement on Lot 13 - soil map needs to be revised
LP19JN	25"	Chatfield Soil Series - soil map needs to be revised
LP20JN	18"	Hollis Soil Series - soil map needs to be revised
LP21JN	30"	Chatfield Soil Series - soil map needs to be revised
LP22JN	None to 36"	Stopped excavation @ 36" - no bedrock to 36"
LP23JN	2"	Bedrock ranged from 2" to 22" - Problem for 4K setback requirement on Lot 13 - Hollis to Chatfield Soil Series - soil map needs to be revised
LP24JN	21"	Chatfield Soil Series - Problem for 4K setback requirement on Lot 13 - soil map needs to be revised
LP25JN	18"	Bedrock ranged from 18" to 27" - Problem for 4K setback requirement on Lot 13 - Hollis to Chatfield Soil Series - soil map needs to be revised
LP26JN	27"	Chatfield Soil Series - 4K setback requirement (75 foot measurement) should be from this point
LP27JN	52"	Stopped excavation @ 52" - no bedrock to 52"

NH-881 - South Road, Rye, NH

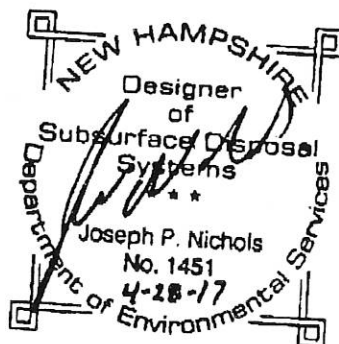
Test Pits - Conducted by Joseph Nichols of Beals Associates, PLLC. - #1543

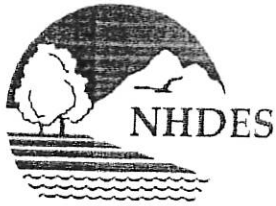
Witnessed by Dennis Plante

4/28/17

Ledge Probes

DP30 - 32"  
DP31 - Not performed  
DP32 - 32"  
DP33 - 24"  
DP34 - 38"  
DP35 - 26"  
DP36 - 29"  
DP37 - 36"  
DP38 - 32"  
DP39 - 24"  
DP40 - 30"  
DP41 - 25"  
DP42 - 24"





The State of New Hampshire  
**DEPARTMENT OF ENVIRONMENTAL SERVICES**

**Thomas S. Burack, Commissioner**



November 24, 2015

Tracey Rioux, Manager of Operations  
SeptiTech®  
69 Holland Street  
Lewiston, Maine 04240

Subject: SeptiTech® Recirculating Trickle Filter Wastewater Treatment System  
Request to waive Env-Wq 1014 (specifically 1014.04 & 1014.05)  
Request to waive Env-Wq 1008.05

Dear Ms. Rioux:

The New Hampshire Department of Environmental Services (DES) has reviewed the waiver requests noted above, as submitted by SeptiTech® a subsidiary of Bio-Microbics, Inc. (SeptiTech®) by letters dated November 13, 2015 (including supporting documentation and data). Specifically, SeptiTech® has requested (1) waivers of Env-Wq 1014.04 and 1014.05 to allow for a 24-inch (2-foot) separation distance from the bed bottom (or 18-inches from the bottom of the 6-inch specified sand layer) of an effluent disposal area (EDA) to impermeable substratum, bedrock, and seasonal high water table; and (2) a waiver of Env-Wq 1008.05 to allow a 75% reduction in minimum separation distances for nitrate setbacks.

By letter dated January 13, 2005, DES granted SeptiTech® an approval for its Recirculating Trickle Filter Wastewater Treatment System, which included a waiver to allow up to 75% reduction in EDA sizing. This decision was based on effluent quality testing data submitted with the waiver request.

By this letter, DES **approves** the SeptiTech® request to allow the installation of an EDA to disperse effluent from its Recirculating Trickle Filter Wastewater Treatment System with no less than 24 inches (2 feet) of separation distance from the bed bottom of the EDA to the seasonal high water table, bedrock or any impermeable substratum, **subject to the following:**

The reduction in vertical separation distance cannot be universally applied in conjunction with a reduction in bed size. The approvable percent reduction in bed size (if any) and/or the approvable reduction in vertical separation (if any) depend on both site-specific conditions (primarily soils and hydrology) and the selected dispersal technology (conventional pipe and stone, chambers, or other approved technology). As such, any application for construction approval using the SeptiTech® for which both a reduction in vertical separation and a reduction in bed size are being requested must include documentation of a mounding analysis for the specific site conditions that demonstrates the required vertical



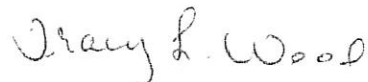
separation distance of not less than 24 inches will be maintained with the requested reduction in bed size.

DES does not grant SeptiTech® requested waiver to allow a 75% reduction in the nitrate setback allowance to property lines as listed in Env-Wq 1008.05. DES currently is reviewing the implications and ramifications of reducing nitrate setbacks to property lines, and is not issuing any waivers for nitrate setbacks to property lines at this time.

All conditions associated with previous approvals granted to SeptiTech® still apply (see letters dated December 21, 1998, February 5, 2001, and January 13, 2005).

If you have any questions, please contact me at 603-271-2001 or at [tracy.wood@des.nh.gov](mailto:tracy.wood@des.nh.gov).

Sincerely,



Tracy L. Wood, P.E.  
Administrator  
Wastewater Engineering Bureau

CC: Rene Pelletier, P.G., Assistant Director, Water Division  
ITA Committee, DES

*Peter J. Loughlin*

ATTORNEY AT LAW

LEONARD COTTON HOUSE • STRAWBERRY BANKE  
144 WASHINGTON STREET  
P.O. BOX 1111  
PORTSMOUTH, NH 03802-1111

TELEPHONE 603-431-6466  
FAX 603-436-4079

E-MAIL  
[peter.loughlin@pillaw.com](mailto:peter.loughlin@pillaw.com)

June 30, 2017

William Epperson, Chairman  
Rye Planning Board  
Rye Town Hall  
Central Road  
Rye, NH 03870

**RE: STONELEIGH SUBDIVISION - 421 SOUTH ROAD  
ADDITIONAL PROTECTIONS FOR WHITE CEDAR SWAMP**

Dear Chairman Epperson & Members of the Planning Board:

At the April 26<sup>th</sup> work session, Danna Truslow introduced a report entitled, "Meta-Analysis of Nitrogen Removal in Riparian Buffers," published on June 27, 2007. On page 1176 of that report, the following statement appears:

Regardless of width, buffer integrity should be protected against (1) soil compaction (e.g. vehicles, livestock and construction of impervious surfaces) that might inhibit infiltration or disrupt water flow patterns; (2) excessive leaf litter removal or alteration of the natural plant community (e.g. raking, tree thinning, introduction of invasive species that might reduce carbon rich organic matter from reaching the stream; and (3) practices that might disconnect the stream channel from the flood stream incision (hard drainage surfaces and drain tiles) and thereby reduce the spatial and temporal effort of soil saturation.

Consistent with this recommendation, Harbor Street proposes the following language be added to the deeds for Lots 4, 5, 6, 7 and 8:

THERE SHALL BE A BUFFER ON LOTS 4, 5, 6, 7 AND 8 OF THE  
STONELEIGH PRESERVE SUBDIVISION PLAN AS DEPICTED ON

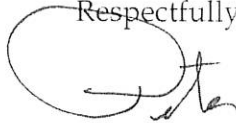
William Epperson, Chair  
June 30, 2017  
Page 2

THE LOT DEVELOPMENT PLANS FOR THAT SUBDIVISION. IN THIS BUFFER, NO MOTOR VEHICLES, OTHER THAN THOSE ESSENTIAL FOR FOREST MAINTENANCE CONSISTENT WITH THIS RESTRICTION, SHALL BE PERMITTED. ANY USE THAT WOULD RESULT IN SOIL COMPACTION IS PROHIBITED AS IS THE CONSTRUCTION OF ANY IMPERVIOUS SURFACE. LEAF LITTER REMOVAL OR ALTERATION OF THE NATURAL PLANT COMMUNITY (E.G. RAKING, TREE THINNING, INTRODUCTION OF INVASIVE SPECIES, OR ANY OTHER ACTIVITY THAT MIGHT REDUCE THE FUNCTION OF THE UNDISTURBED BUFFER AREA) IS PROHIBITED.

I realize that Michael Donovan will be asked to work with Harbor Street to perfect the language of any buffer protections, however, this language is offered for the Board's consideration at this time.

With this letter, I am enclosing Subdivision Site Plans showing the proposed buffer around the White Cedar Swamp.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. Loughlin", enclosed within a large, hand-drawn oval.

Peter J. Loughlin

PJL/dea

Enclosure

Cc: Kimberly Reed

Michael Donovan, Esq.

Harbor Street Limited Partnership

Falzone\2017-06-30 Ltr to Epperson Re Protections for WCS

PREPARED FOR:  
WNRV LLC  
7B EMERY LANE  
STRATHAM N.H. 03885

BEALS ASSOCIATES PLLC  
100 MONTELEONE AVENUE, SUITE 100  
HOUSTON, TEXAS 77002  
PHONE: 713.555.1111 FAX: 713.555.1112

DATE:	SINGLE REVISION:
NOV 10, 2004	NOV 10, 2004
NOV 10, 2004	NOV 10, 2004
NOV 10, 2004	NOV 10, 2004
NOV 10, 2004	NOV 10, 2004
NOV 10, 2004	NOV 10, 2004

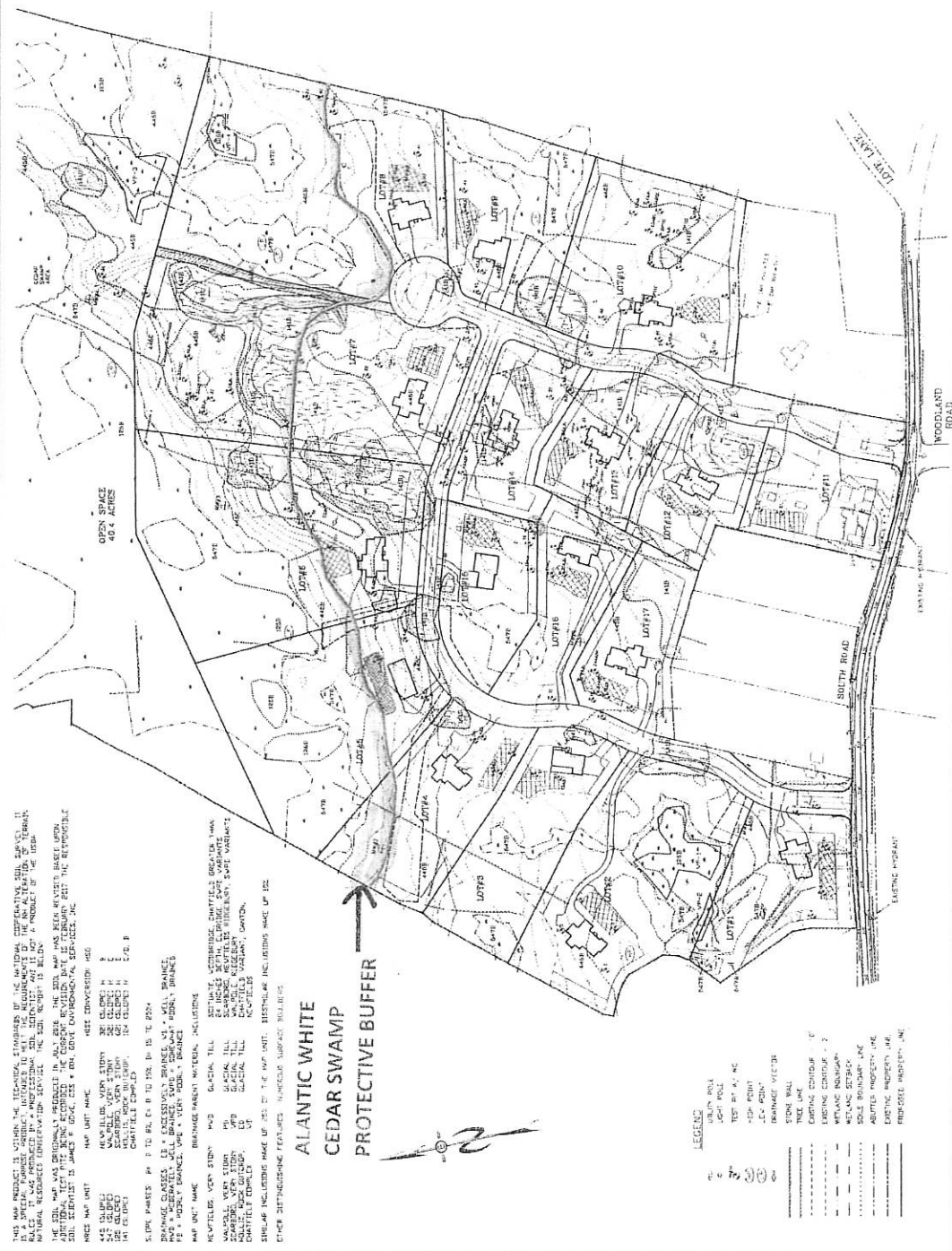
NOTES:  
1. THE SUBDIVISION MAP IS A PRELIMINARY MAP AND DOES NOT CONSTITUTE A GUARANTEE OF THE ACCURACY OF THE INFORMATION CONTAINED HEREIN.  
2. THE SUBDIVISION MAP IS A PRELIMINARY MAP AND DOES NOT CONSTITUTE A GUARANTEE OF THE ACCURACY OF THE INFORMATION CONTAINED HEREIN.  
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APPROVED TOWN OF FRY PLANNING BOARD	
COMMISSIONER:	2004
PLAN AND ZONING AND LAND USE:	2004
ENGINEER:	2004
EXHIBIT DESIGN AND CONSTRUCTION:	2004
REVISION:	2004

SUBDIVISION SITE PLAN  
FOR  
STONELEIGH PRESERVE  
SOUTH ROAD  
FRY, NH

DATE: JUN 20, 2004	SCALE: 1" = 100'
FILE: No. 10041	SHEET NO. 1 OF 2



THIS MAP PROJECT IS A PRELIMINARY MAP AND DOES NOT CONSTITUTE A GUARANTEE OF THE ACCURACY OF THE INFORMATION CONTAINED HEREIN.  
THE MAP WAS PREPARED BY BEALS ASSOCIATES PLLC, A PROFESSIONAL ENGINEERING FIRM, AND IS SUBJECT TO THE REVIEW AND APPROVAL OF THE TOWN OF FRY PLANNING BOARD.  
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# *Peter J. Loughlin*

ATTORNEY AT LAW

LEONARD COTTON HOUSE • STRAWBERRY BANKE  
144 WASHINGTON STREET  
P.O. BOX 1111  
PORTSMOUTH, NH 03802-1111

TELEPHONE 603-431-6466  
FAX 603-436-4079

E-MAIL  
peter.loughlin@pjllaw.com

May 10, 2017

## VIA EMAIL

Kimberly Reed, CFM  
Planning & Zoning Administrator  
Rye Town Hall  
Central Road  
Rye, NH 03870

**RE: STONELEIGH SUBDIVISION - SOUTH ROAD**

Dear Kim:

On May 4<sup>th</sup>, you asked me to confirm that Stoneleigh agreed to continue the public hearing from the May to the June Planning Board meeting. You also asked if it would be possible to ask for a site walk on May 9<sup>th</sup> and then continue it to a site walk date prior to the June meeting. I confirmed the continuation of the Stoneleigh Subdivision public hearing to the June meeting of the Planning Board with a site walk during the week of June 5<sup>th</sup>. As a result, Joe Falzone contracted with Doucet Survey to stake the center line the week of Memorial Day so that the stakes will be in place during the week of June 5<sup>th</sup> for a site walk.

I realize that several abutters desire to have the Board view conditions after the very heavy rains that we have had in recent weeks. The reason that Stoneleigh agreed to a site walk during the week of June 5<sup>th</sup> is because of the lead time necessary to have the center line staked. While a second site walk is somewhat unusual, Stoneleigh agreed to it to give the Board a chance to view the property since changes have been made to the plans since last fall.

Whether we continue to have heavy rainfall for the rest of the month is somewhat beyond the control of Stoneleigh and is not particularly relevant. Consistent with the Town's requirements, the borders of the vernal pools and



Kimberly Reed  
May 10, 2017  
Page 2

wetlands soils were identified and jointly agreed to by Gove Environmental Services, Inc. and West Environmental. The entire subdivision was then designed based upon those agreed upon locations. As you know, wetland boundaries are not determined by the level of water on any particular day but reflect "an area that is inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions." If the application of state or local regulations depended upon water levels on any particular day of the year, no landowner, or regulator, could have any certainty concerning the development of real estate.

On a personal note, I would point out that I have had a tree farm on the edge of a wetlands area on a 7 acre parcel in Portsmouth since 1981. During the past two weeks, water levels in certain locations have been as high as they have ever been and I have had to wear rubber boots in areas where that is generally not necessary. Fortunately, over the years I have learned that areas that are high and dry in August may not be suitable for planting Christmas trees, while areas that may have somewhat difficult access in early spring may be perfectly suitable for planting.

Sincerely,  


Peter J. Loughlin

PJL/dea

Cc: Harbor Street Limited Partnership  
Michael L. Donovan, Esq.

Falzone\2017-05-10 Ltr to Reed Re June Site Walk & PB Hearing

# RYE PLANNING BOARD

*10 Central Road Rye, NH 03870 (603) 964-9800*

## Notice of Decision

**Applicant:** The Housing Partnership

**Owner:** Rickert Inv Real Estate LLC

**Property:** 0 Airfield Drive, Tax Map 10, Lot 15-4  
Commercial District

**Case:** Case #07-2017

**Application:** Major Subdivision, Lot Line Adjustment (Lots 15-4 and 16) and Conditional Use Permit by the Housing Partnership for Property located 0 Airfield Drive, Tax Map 10, Lot 15-4 for construction of a residential development consisting of a mixture of single-family and multi-family dwellings with a portion being dedicated as Workforce Housing. Property is in the Commercial Zoning District. Case #07-2017.

**Date of Decision:** Tuesday, July 11, 2017

**Decision:**

<input type="checkbox"/>	Approved
<input type="checkbox"/>	Conditionally Approved
<input type="checkbox"/>	Denied
<input checked="" type="checkbox"/>	Continued

*The application was moved to the August 8, 2017 meeting.*

7/13/17  
Date

  
\_\_\_\_\_  
William Epperson, Chairman  
Rye Planning Board

# RYE PLANNING BOARD

*10 Central Road Rye, NH 03870 (603) 964-9800*

## Notice of Decision

**Applicant/Owner:**

WBTSCC Limited Partnership

**Property:**

60 Wentworth Road, Rye, Tax Map 24, Lot 51-26  
Property is in the Single Residence District

**Case:**

Case #06-2017

**Application:**

Major Site Development Plan by WBTSCC Limited Partnership for property owned and located at 60 Wentworth Road, Tax Map 24, Lot 61-26 to replace an existing 50' golf net and nine (9) 50' wood poles with a ninety 90' golf net and nine (9) 90' steel poles. Property is in the Single Residence District. Case #06-2017.

**Date of Decision:**

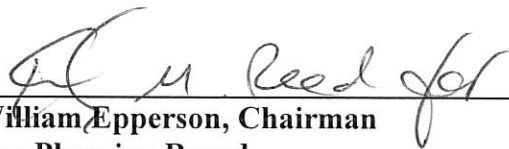
Tuesday, July 11, 2017

**Decision:**

  x   Continued

**The Planning Board voted to continue this application to the August meeting.**

7-13-17  
Date

  
\_\_\_\_\_  
William Epperson, Chairman  
Rye Planning Board

# RYE PLANNING BOARD

10 Central Road Rye, NH 03870 (603) 964-9800

## Notice of Decision

**Applicant:** Jim Bolduc, Project Manager/Senior Wetland Scientist  
TRC, 670N. Commercial Street, Suite 203, Manchester NH

**Owner:** Eversource, Attn: Natacha Morales  
13 Legends Drive, Hooksett, NH

**Engineer:** Leidos, Nicholas Lehnert  
39500 Orchard Hill Place, Suite 200 Novi, MI

**Case:** Case #08-2017

**Application:** Major Site Development Plan by Eversource for property located on Lafayette Road, Tax Map 10, Lot 4 for the West Rye substation project which consists of the rebuild of the existing substation in its original location as well as expanding it approximately 21 feet to the north and 14 feet to the south. This project will replace outdated transformers. Property is in the Commercial Zoning District. Case #08-2017.

**Date of Decision:** Tuesday, April, 11, 2017

**Decision:**

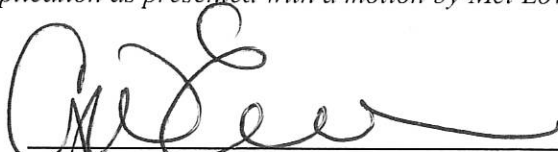
<input type="checkbox"/>	Approved
<input checked="" type="checkbox"/>	Conditionally Approved
<input type="checkbox"/>	Denied

*The application was accepted as complete with a motion by JM Lord, seconded by Pat Losik and a unanimous Board vote moved for a public hearing on its merits.*

*The Board voted unanimously to accept jurisdiction over the application with a motion by J.M. Lord, seconded by Pat Losik.*

*The Board voted unanimously to accept the application as presented with a motion by Mel Low, seconded by Jeffery Quinn.*

7/13/17  
Date

  
\_\_\_\_\_  
William Epperson, Chairman  
Rye Planning Board

# RYE PLANNING BOARD

*10 Central Road Rye, NH 03870 (603) 964-9800*

## Notice of Decision on Waivers

**Applicant:** Harbor Street Limited Partnership of Stratham NH

**Property:** 421 South Road Tax Map 4, Lots 25, 27, 31 & 32 for a 22 Single Residence District

**Case:** Case #13-2016

**Application:** Major Subdivision, Lot Line Adjustment and Conditional Use Permit by Harbor Street Limited Partnership of Stratham NH for properties located at 421 South Road Tax Map 4, Lots 25, 27, 31 & 32 for a 22 Lot subdivision. Property is in the Single Residence District and within the Aquifer and Wellhead Protection District. Case #13-2016.

**Waiver Request(s):**

1. Section 603.3 A which requires 4000 square feet of DLA
2. Section 603.3 A 1.c which prohibits any area of the DLA from being within 75 feet of bedrock or impervious substratum within 24 inches of the surface

**Date of Decision:** Tuesday, July 11, 2017

**Decision:**

<input type="checkbox"/>	Approved
<input type="checkbox"/>	Conditionally Approved
<input checked="" type="checkbox"/>	Denied

The Planning Board denied the waiver by a 6 to 1, for the following reasons:

### Unnecessary Hardship.

There is no unnecessary hardship to the applicant in complying with the applicable LDR's.

1. The hardship does not arise from special conditions of Lot 12 that distinguish it from other land in the area proposed to be subdivided. Surface bedrock and shallow bedrock exist throughout the entire proposed subdivision as evidenced by the fact that almost 200 test pits and ledge probes were required to review compliance with the DLA requirements.

Originally 22 lots were proposed. Some lots were eliminated because they could not comply with the DLA requirements.



2. Economic advantage alone is the reason for the requested waiver because the same infrastructure construction will be required for a 17 lot subdivision as for a 16 lot subdivision. Thus, the reason for the waiver is to gain \$300,000 to \$400,000 from sale of the additional lot.
3. The hardship is self-created by the applicant who designed the street configuration and lot layout resulting in the configuration of Lot 12.
4. When questioned about unnecessary hardship at the July 11, 2017 hearing, the applicant's attorney responded that compliance with the regulations "takes away a lot" and "changes the economics of the subdivision."

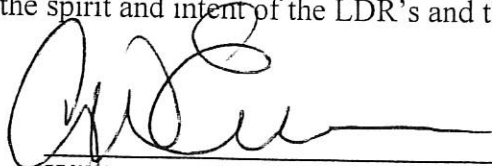
Spirit and Intent.

Granting the waivers would be contrary to the spirit and intent of town regulations.

1. Municipalities may regulate septic systems more stringently than the state. The requirement that 4000 sf of a lot have soils suitable for leachfield disposal means that only 6% of the 66,000 sf minimum lot area must have suitable soils. This is not unreasonable. Under the applicant's reasoning only 500 sf (<1%) of a lot would have to have suitable soils for leachfield disposal in order to provide for a replacement system.
2. As indicated by review of the septi-tech systems in the Marjorie Way subdivision, there is no guarantee that the septi-tech systems will function as designed or that homeowners will provide the required inspections and maintenance. A homeowner with a failed septi-tech system may not be able to afford the expensive replacement and may want to pursue a traditional system.
3. Enforcement against failed or non-compliant septic systems is difficult, particularly where owners cannot afford expensive replacements, as evidenced by the town's ongoing efforts at 204 Locke Road and 1677 Ocean Boulevard. Except in rare circumstances DES does not pursue enforcement and defers to municipalities. In most circumstances the town cannot order a property with a nonconforming system to be vacated because the sanitation statutes prohibit that unless there is a clear and imminent danger to the life or health of occupants or other persons.
4. It appears that the usable DLA may be less than the 3400 sf represented due to the narrow tapers at each end.
5. Proposed Lot 12 is within the Wellhead Protection Area. A waiver to DLA requirements would set a precedent contrary to the spirit and intent of the LDR's and the Rye Zoning Ordinance.

7/15/17

Date



William Epperson, Chairman  
Rye Planning Board

# RYE PLANNING BOARD

*10 Central Road Rye, NH 03870 (603) 964-9800*

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**Decision:**

<input type="checkbox"/>	Approved
<input type="checkbox"/>	Conditionally Approved
<input type="checkbox"/>	Denied
<input checked="" type="checkbox"/>	Continued

*The application was moved to the July 18, 2017 meeting at the Rye Town Hall.*

7/13/17  
Date

  
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William Epperson, Chairman  
Rye Planning Board