

**RYE PLANNING BOARD  
RULES AND REGULATIONS COMMITTEE  
MEETING**

**Monday, November 8, 2021  
8:30 a.m. – Rye Town Hall**

*Present: Patricia Losik, Kevin Brandon and Kim Reed*

*Also Present from the public: Dominique Winebaum*

**Call to Order**

Chair Losik called the meeting to order at 8:35 a.m.

**1. Review**

**a. Proposed Zoning Amendments for discussion and schedule public hearing:**

**• 2022-06: Housing Appeals Board**

PROPOSED ZONING AMENDMENT 2022-06  
Re: Housing Appeals Board

(Note: New language ***emboldened and italicized***. Deleted language ~~struck through~~).

Amend the following sections of the Rye Zoning Ordinance to indicate that appeals may be taken to the Housing Appeals Board, in addition to the superior court.

§ 190-3.4, F. [13] (Redevelopment of Tourist Accommodation Sites).

.... shall be taken to the Superior Court ***or the Housing Appeals Board***, not to the Board of Adjustment.

§ 190-3.6, I. (Conditional Use Permits in Aquifer & Wellhead Protection District).

.... and then to the Superior Court ***or the Housing Appeals Board*** (but not to the Board of Adjustment).

§ 190-4.1, K. (Planning board decisions on Retirement Community Developments).

.... taken to the Superior Court *or the Housing Appeals Board*, not to the Board of Adjustment.

§ 190-4.2, I. (Planning board decisions on Multifamily Developments).

.... shall be taken to the Superior Court *or the Housing Appeals Board*, not to the Board of Adjustment.

§ 190-4.3, K. (Planning board decisions on Conservation Land Developments).

.... shall be taken to the Superior Court *or the Housing Appeals Board*, not to the Board of Adjustment.

§ 190-5.6, G. (Planning board decisions on accessory apartments).

.... may be filed with the Rockingham County Superior Court *or the Housing Appeals Board* within 30 days .....

§ 190-5.8, E. (3). (Planning board decisions on small wind energy systems).

.... may be taken to the Superior Court *or the Housing Appeals Board* as provided by statute RSA 677:15.

§ 190-7.3 (Appeals of ZBA decisions).

...and to appeal to the Superior Court *or the Housing Appeals Board* in accordance ....

§ 190-9.3 (Severability of Growth Management Ordinance provisions).

Should any part of this ~~article~~ *chapter* be held invalid or unconstitutional by a court *or by the Housing Appeals Board*, such holding shall not.....

§ 190-10.2 (Severability of all zoning ordinance provisions).

Should any part of this ~~article~~ *chapter* be held invalid or unconstitutional by a court *or by the Housing Appeals Board* or authority of competent jurisdiction, such holding shall not....

#### Explanation

The Legislature amended the statutes to establish the Housing Appeals Board effective July 1, 2020. Appeals of land use board decisions involving housing development may now be taken to the superior court or to the Housing Appeals Board.

The Committee reviewed Proposed Zoning Amendment 2022-06.

Chair Losik noted that the Planning Board discussed at a meeting in August that the language needs to be changed in the zoning to allow the language for the Housing Appeals Board in addition to the other court options available.

Chair Losik opened to the public for comments. Hearing none, she closed to the public at 8:41 a.m.

**Motion by Kevin Brandon to move Rye Planning Board Proposed Zoning Amendment 2022-06 to the Rye Planning Board November 9<sup>th</sup> meeting. Seconded by Pat Losik. All in favor.**

- **2022-07: Driveway Setbacks**

PROPOSED ZONING AMENDMENT 2022-07  
Re: Driveway Setbacks

(Note: New language *emboldened and italicized*. Deleted language ~~struck through~~).

Amend Section 190-11.1 Word usage and definitions in the zoning ordinance so users are made aware that driveways are subject to a 10ft. setback from an abutting property line, as follows:

STRUCTURE: Any temporary or permanently constructed, erected or placed material or combination of materials in or upon the ground, including, but not limited to buildings, mobile homes, radio towers, sheds and storage bins, storage tanks, portable carports, swimming pools, tennis courts and parking lots. The following are structures but are exempt from the dimensional requirements unless covered in other parts of the ordinance and codes.

[Amended 2001: 3-12-2013]

- (1) Subsurface waste disposal facilities (see §190-2.2.E and Building Code, §3535-15B)
- (2) Fences and stone walls (see §190-5.10)
- (3) Driveways (***But*** see Chapter 202, Land Development Regulations, ***Appendix E: Driveway Regulations, Driveways may not be constructed within 10 ft. of an abutting property line.***); and
- (4) Fuel storage tanks (see NFPA requirements).

DRIVEWAY: A private way for vehicles which provides entrance, exit, access to or from land in Rye to/from a public street. ***Driveways are regulated by the Rye Planning Board Land Development Regulations. A permit is required. Driveways may not be constructed within 10 feet of an abutting property line.***

### Explanation

*The amendment puts users of the zoning ordinance on notice that driveways are regulated by the separate planning board land development regulations and that driveways may not be located within 10 feet of an abutting property line.*

Chair Losik noted that this amendment is in regards to the discussions throughout the Rules and Regs season. It was actually a comment raised by Mrs. Winebaum to Chair Weathersby (ZBA Chair) in regards to a particular matter that occurred at the Zoning Board. What has been discussed in general is the need to have consistency in the zoning ordinance with the driveway regulations (LDR Appendix E). It was discussed with Attorney Donovan where the contents of Appendix E could be put because it was noticed that some towns have a separate driveway ordinance. The discussion was that in Rye the driveway regulations rest with the Planning Board.

Planning Administrator Reed noted that Attorney Donovan pointed out that the RSA's state that the driveway regulations sit with the planning board. (RSA 236:13-5)

Chair Losik pointed out that it further says the planning board delegates the administering of the regulations.

Planning Administrator Reed noted that the planning board delegates to the DPW.

Chair Losik stated that Planning Administrator Reed made the suggestion that the easiest way to incorporate the driveway regs was to incorporate it in Rye's word usage and definitions (190-11.1). It's in the structure definition and they are now subject to a 10' setback from an abutting property line. Also, the language included by Attorney Donovan in item 3; Driveways (***But*** see Chapter 202, Land Development Regulations, ***Appendix E: Driveway Regulations, Driveways may not be constructed within 10 ft. of an abutting property line.***) **Chair Losik continued they are also proposing to amend the definition of driveway.** DRIVEWAY: A private way for vehicles which provides entrance, exit, access to or from land in Rye to/from a public street. ***Driveways are regulated by the Rye Planning Board Land Development Regulations. A permit is required. Driveways may not be constructed within 10 feet of an abutting property line.***

Planning Administrator Reed commented that she thinks this is clear. She has forwarded it to Chair Weathersby and she said it looked fine.

Member Brandon stated he is fine with it because it makes it abundantly clear that a driveway can't be anywhere within 10' of an abutting property line.

Chair Losik opened to the public.

Mrs. Winebaum agreed.

Chair Losik closed to the public at 8:46 a.m.

**Motion by Kevin Brandon to move Rye Planning Board Proposed Zoning Amendment 2022-07 to the Planning Board Meeting scheduled for November 9<sup>th</sup>. Seconded by Pat Losik. All in favor.**

- **2022-08: Bio-Retention ponds in the setback**

PROPOSED ZONING AMENDMENT 2022-08  
Re: Bio-Retention Ponds in Setbacks

(Note: New language ***emboldened and italicized***. Deleted language ~~struck through~~).

Amend Section 190-11.1 Word usage and definitions of “Structure” to clarify that bio-retention ponds and similar drainage facilities are structures (and therefore must comply with setback requirements), as follows:

STRUCTURE: Any temporary or permanently constructed, erected or placed material or combination of materials in or upon the ground, including, but not limited to buildings, mobile homes, radio towers, sheds and storage bins, storage tanks, portable carports, swimming pools, tennis courts and parking lots. ***Bio-retention ponds, detention ponds, rain gardens and similar drainage facilities are structures.*** The following are structures but are exempt from the dimensional requirements unless covered in other parts of the ordinance and codes.

- (1) Subsurface waste disposal facilities (see §190-2.2B and Building Code, §35-1.5B);
- (2) Fences and stone walls (see §190-5.10);
- (3) Driveways (see Chapter 202, Land Development Regulation); and
- (4) Fuel storage tanks (see NFPA requirements).

*Explanation*

*The amendment clarifies that drainage facilities such as bio-retention ponds are structures and must, therefore, comply with setback requirements.*

Chair Losik stated this is something that was discussed with Attorney Donovan. This is to amend the language to 190-11.1 to include; ***Bio-retention ponds, detention ponds, rain gardens and similar drainage facilities are structures.*** She continued this is saying they are subject to the dimensional requirements and not exempt. They must comply with setback requirements.

Planning Administrator Reed noted this is because of two recent subdivisions that were before the Planning Board. The Zoning Board questioned one of the recent applications before the Board and asked why this came up. The reason is that Attorney Donovan has said that detention ponds and rain gardens are structures. It was not clear in the zoning, so this just makes it clear.

Chair Losik asked Planning Administrator Reed to ask Attorney Donovan to review the definitions in 202-1.13. She noted that there is a definition of stormwater infrastructure. Her question is whether Attorney Donovan is comfortable with that definition staying as is with the language of swales and outfalls. She suggested that the structure definition in the LDRs be amended to conform with zoning.

Chair Losik opened to the public.

Mrs. Winebaum stated that rain garden and swale are part of best management practice. She noted that she and her husband installed a swale. All the runoff from the roof is collected in the swale, which is along the road. On the left of their driveway is a swale that collects a lot of water. Public Works Director Dennis McCarthy said this is what people should be doing to help with flooding and stormwater runoff. The reason the swale was installed is because the approval for the abutting property wasn't done properly. All the water was running onto her lot, which at the time, had a u-shaped driveway. They got rid of the u-shaped driveway, put in a circular drive and the swale. She continued that people may just want to build a rain garden. That's a simple landscaping practice. She is concerned that people are going to need variances for those beneficial structures, so it may discourage them. She understands why the issue is being addressed for the bio-retention ponds. However, this is a bit of a double-edged sword.

Chair Losik stated that in thinking about the stormwater infrastructures conveyances those probably occur in many cases within a setback. Sometimes its actually moving water on the property to a leaching catch basin. She asked Mrs. Winebaum if she is saying that she would not want swales to be subject to the setback requirements.

Mrs. Winebaum replied she is just concerned. She continued that they could have a campaign for people to build rain gardens in Rye to help with stormwater runoff. Typically, those are built in certain places to collect the water and often it could be within the setback. She noted that the installation of the swale helped them get a variance for the garage because they had a stormwater management plan.

Chair Losik asked if she is suggesting that bio-retention ponds and rain gardens of a certain size be exempt.

Mrs. Winebaum replied she can see bio-retention ponds as structures and they should be examined more carefully.

Chair Losik stated this may be a question for DPW. From a land development perspective, the Board sees some pretty large rain gardens in developments to deal with stormwater management. A question for DPW is if everyone starts putting in rain gardens near the street in the setbacks, does that create issues from a public works standpoint? In certain cases, it might actually impede the flow of water.

Member Brandon stated that they could probably drive around and find very affirmative examples of the benefits that would lead to not want to discourage some of these structures, but it's situational. He would go back to DPW and ask what margin they want to encourage. Every

situation is going to be different. Some people are not going to take it upon themselves to go through the expense and work. Incrementally, there may be development next to a property that mitigates the desire or amplifies the desire to do something. He commented they don't want to discourage.

Chair Losik pointed out that there can be an increase in flow to adjacent properties when changes are made to a property. She reiterated that a question to Dennis McCarthy would be "what is reasonable" and "what is attainable?" She thinks that input would be great.

Hearing no further comments, the public session was closed at 9:01 a.m.

**Motion by Kevin Brandon to move Rye Planning Board Proposed Zoning Amendment 2022-08 to the November 9<sup>th</sup> Planning Board Meeting. Seconded by Pat Losik. All in favor.**

- **2022-09: Amend definition of structure to define retaining walls**

#### PROPOSED ZONING AMENDMENT 2022-09

Amend Section 190-11.1 Word usage as follows (Note: New language ***emboldened and italicized***. Deleted language ~~struck through~~).

- 1) Amend the Definition of Structure found at §190-11.1.B as follows:

**STRUCTURE:** Any temporary or permanently constructed, erected or placed material or combination of materials in or upon the ground, including, but not limited to buildings, mobile homes, radio towers, ***retaining walls***, sheds and storage bins, storage tanks, portable carports, swimming pools, tennis courts and parking lots. The following are structures but are exempt from the dimensional requirements unless covered in other parts of the ordinance and codes.

[Amended 2001; 3-12-2013]

- (1) Subsurface waste disposal facilities (see §190-2.2.E and Building Code, §35-15B);
- (2) Fences and stone walls (see §190-5.10);
- (3) Driveways (see Chapter 202, Land Development Regulations); and
- (4) Fuel storage tanks (see NFPA requirements).

- 2) Add the following two definitions to Section §190-11.1B:

***RETAINING WALL:*** *A structure for holding in place a mass of earth or the like, as at the edge of a terrace or excavation. A retaining wall is designed, and constructed, to resist the lateral pressure of soil or other material, when there is a desired change in ground elevation.*

***STONE WALL: A fence built of rough stones, may or may not be filled together with mortar.***

*Explanation*

*The add a definition of retaining wall and clarify it as a structure subject to dimensional requirements.*

Chair Losik explained this adds the definition of retaining wall to structure. Mrs. Winebaum has also brought up stone walls. This is delineating between a stone wall and a retaining wall. Stone walls have certain protections under the State. While all the concerns around stone walls haven't been addressed, this is pulling them out, along with retaining walls, into two separate definitions.

There was discussion about defining fences. It was agreed the reference should be to "Fences and walls" (190-5.10) with "Stone walls" called out separately. It was also agreed to add a definition for fences and walls. Planning Administrator Reed agreed to work on amending the draft for the Planning Board meeting.

Chair Losik opened to the public for comments.

Mrs. Winebaum stated that she has seen a few cases before the ZBA. One was relating to swing sets and fences, same applicant. She pointed out that residents don't know that a swing set is a structure. She suggested adding that in structure because it's not a known fact. She continued that the ZBA deliberated for a long time in regards to a fence in the wetland buffer. The deliberation went back and forth. One sixteen-year member of the ZBA said "our zoning needs the biggest overhaul in the world". The ZBA finally decided the iron fence with big posts, which required excavation, didn't require a variance because it wasn't a structure. It's still very ambiguous for residents who want to build a stone wall or fence in the wetland buffer. It's not a structure, but it depends on the interpretation.

Chair Losik commented that they have advice in regards to some of the items that have been raised through a confidential legal memorandum. The Planning Board is aware of and have looked at these issues, as they relate to wetlands. The Board discussed the fact there's the definition of alteration of terrain that cannot happen in the buffer language and in the permitted uses that is consistent language. The Planning Board is comfortable with that right now. She agrees that today they are talking about swing sets, but tomorrow it could be something else. From a legal perspective view, these are structures and it's covered. She is not sure that they should expand structures this year. The Town has a new law firm and they will be reviewing the zoning and land development regulations. Areas that are not clear, she is sure they will have recommendations. The Board is looking forward to that input, as it can get very muddy when people don't understand the zoning. The Planning Board has expressed that the recent LDR rewrite has been made more robust and zoning hasn't caught up in areas. There are also some structural changes that could be made in zoning. She thinks this is good information; however, she would tend not to add more to structures right now.

Mrs. Winebaum replied that she is not saying they need to add more. They just need to clarify that swing sets are structures. Somewhere that word should be inserted in the definition of



structure to raise awareness. It's unfair for residents who are being denied a permit, as it is ambiguous, and then they have to go before the ZBA with a team. The building inspector shouldn't be denying those until the issue is resolved clearly.

Speaking to Member Brandon, Chair Losik asked what he thinks about adding swing sets to structures.

Member Brandon stated he is not sure he sees a reason for it now.

Chair Losik commented that the Town will benefit by the additional legal review. She thinks there may possibly be more changes and more assets added to structures. There may be some other things that are missing. Based on the recommendation to the Planning Board, right now, they feel they are on solid ground in terms of the wetland's ordinance, particularly the buffer. The Board also understands the view is that while every structure can't be identified, certain assets are structures by the definition. However, that's a legal determination. She is reluctant to add more now when there's going to be another review.

Member Brandon agreed.

Mrs. Winebaum stated that from what she understands, swing sets are already a structure.

Chair Losik pointed out they are not called out as a structure.

Mrs. Winebaum commented she is totally confused from watching the ZBA meeting. From what she understood, she felt that a swing set was a structure. In looking at the ZBA agenda, it's under the dimensional requirements. She's not asking to add them. She thought they were part of the definition.

**Motion by Kevin Brandon to move Rye Planning Board Proposed Zoning Amendment 2022-09 to the November 9<sup>th</sup> Planning Board Meeting per Kim Reed's amendments. Seconded by Pat Losik. All in favor.**

- **2022-10: Correct a wetlands reference**

#### PROPOSED ZONING AMENDMENT 2022-10

Amend Section 190-11.1 190-3.1, B.(1) to correct a reference:

**~~§190-11.1~~** 190-3.1, B.(1)

The precise location of wetlands shall be delineated on the basis of hydrophytic vegetation, hydric soils and wetlands hydrology in accordance with the techniques outline in the *Regional Supplement to the Corps of Engineers Wetlands Delineation Manual: Northcentral and Northeast Region*. The hydric soils component of delineations shall be determined in accordance with the manual Field Indicators for Identifying Hydric Soils in New England (Versions 4, April 2019), published by the New England Interstate Water Pollutions Control Commission.

### Explanation

An amendment to Rye Zoning Section §190-3.1, B.(1) was adopted on 7-13-21. An incorrect reference to §190-11.1, Article XI Definitions was made. This amendment corrects the referencing under Rye Zoning Section §190-10.0, B: where a previously adopted amendment has resulted in an incorrect reference to another zoning section, the Planning Board may make the corrections after a public hearing pursuant to RSA 675:3, without putting the corrections on the Town warrant and ballot for approval.

There were not questions or comments from the committee or public regarding proposed amendment 2022-10.

**Motion by Kevin Brandon to move Rye Planning Board Proposed Zoning Amendment 2022-10 to the November 9<sup>th</sup> Planning Board Meeting. Seconded by Pat Losik. All in favor.**

- **2022-01: Multi-Family Developments reduce # of dwelling units**

#### PROPOSED ZONING AMENDMENT 2022-01

Re: Multi-Family Developments

(Note: New language ***emboldened and italicized***. Deleted language ~~struck through~~).

Amend Sections 190-4.2, C (4) to reduce the number of dwelling units allowed in a multi-family dwelling from eight (8) to five (5) as follows.

Number of dwelling units. A multifamily dwelling shall not have more than ~~eight~~ ***five (5)*** dwelling units. A multifamily development shall not have more than 40 dwelling units. The subdivision of land shall not be used to circumvent the 40-unit limitation.

### Explanation

Limiting the number of dwelling units in a multi-family dwelling to five (5) rather than allowing up to eight (8) is more in keeping with the rural character of Rye. The NH Workforce Housing Act requires municipalities to provide reasonable opportunities for multi-family housing, which the Act defines as a building containing five or more dwelling units.

Chair Losik explained that the proposal is to reduce the number of dwelling units allowed in a multi-family dwelling from eight to five. She pointed out that at Washington Green (1244 Washington Road) there are four units per building. The proposal for the former Hector's site is for three dwelling units. She continued that at least five have to be allowed. When this was first brought to Attorney Donovan, his thinking was that eight would allow for garden style

apartments. Rye has moved as a community to more individualized units where there are no housing units above another unit. They really function as standalone small homes.

Chair Losik opened to the public for comments. Hearing none, she closed to the public at 9:36 a.m.

**Motion by Kevin Brandon to move Rye Planning Board Proposed Zoning Amendment 2022-01 to the November 9<sup>th</sup> Planning Board Meeting. Seconded by Pat Losik. All in favor.**

- **2022-02: Multi-Family Development increase spacing from 25' to 35'**

PROPOSED ZONING AMENDMENT 2022-02  
Re: Multi-Family Developments

(Note: New language ***emboldened and italicized***. Deleted language ~~struck through~~).

Amend Sections 190-4.2, C (8) to increase the required building spacing from 25' to 35' as follows.

All buildings including parking structures and accessory buildings shall be separated by at least ~~25'~~ **35'**.

Explanation

Increasing building spacing will allow for more open space around dwellings and thereby providing residents of multi-family dwellings developments with increased enjoyment of their environs.

Chair Losik explained this is to increase the space between buildings from 25' to 35' for multi-family dwellings. This is something that the Board wrestled with for the development at 1244 Washington Road. The 25' feels like an imposition, particularly when talking about the limited common use areas and uses of that.

Chair Losik opened to the public. Hearing no comments, she closed to the public at 9:37 a.m.

**Motion by Kevin Brandon to move Rye Planning Board Proposed Zoning Amendment 2022-02 to the November 9<sup>th</sup> Planning Board Meeting. Seconded by Pat Losik. All in favor.**

- **2022-03: Workforce Housing increase the percentage from 20% to 30%**

Chair Losik explained this is to increase the percentage of workforce housing in a development from 20% to 30% and to delete the density bonus provision of Section 190-4.2(C)(7). In the projects that have been before the Board, there has been no take up of the utilization of the density bonus. The Planning Board had a discussion in January of 2020 about moving the needle

from 20% to 30%. The Board ended up not moving that proposal forward. During that discussion, Mike Garrepy of Tuck Realty Corporation was in the audience and he opined, as did a realtor representing a property owner. They had concerns that due to the acquisition and construction costs that moving off 20% would be difficult. The note that Mr. Garrepy made was that every workforce housing unit that is built is a loss. He also noted that the price is fixed by the State based on the demographic area. The ability to make up that loss and make a profit on the market units still works (with the 20%) in terms of the math.

Chair Losik explained that with workforce housing, there's a subsidy which makes it work. The subsidy is a lower market rate of the unit. To meet the number for a median income family of four, which she believes is \$106,000 for the Rochester/Portsmouth area as of early 2021. Of that, no more than 30% can go towards principal, interest, insurance and real estate taxes. This is talking about \$30,000 per year, so this is saying about \$400,000 roughly. The market may be \$600,000. She continued the acquisition of the land cost is what it is. It's fixed. There are then development and construction costs. The State has sat with this law for a while, since 2010. They're trying to figure out why there hasn't been more take up and why it's short by 20,000 units in N.H. In looking at the subsidy, how does that really get paid for? It's going to be made up by the other units. In a 20% workforce housing with a subsidy of \$200,000., the amount of 3.6 million amongst the other units.

Chair Losik pointed out that the only place in town for workforce housing is in the commercial district. The question is whether this is the now the time to make this change. In the Master Plan (5A), the number for workforce housing was 1,500 and the Town can't get to 1,500. How does the Town move the needle off 20%? It doesn't seem that density is of interest, but the Planning Board talks a lot about density. If they're saying they really want more units, are they saying they have to move off of density or the qualitative differentiation.

Member Brandon commented it's both because it's all grounded in math and individual decisions. He suggested looking at the projects that are happening now before moving this to the Planning Board.

It was agreed to table this as more work is needed before moving it to the Planning Board.

- **2022-04: Detached dwelling units**

Chair Losik stated that DADU needs more work. There are areas that probably have to be addressed at some fundamental level. She noted that they haven't really dealt with connected structures in either ADU or DADU. There are a lot of connected structures in Rye where the outbuildings may not be heated. How are those going to be addressed? Some communities address when there is no shared heated wall or shared door to get to that space. In looking at 190-5.6(C)(5) there's an issue because it's only including the reference to the building area in dimensional requirements. She thinks that if they are going into DADUs they should be thinking about dimensional requirements. In talking about using external accessory structures, lot area,

yards, corner clearance and height may matter and come into play. She continued it's not clear how to address this for existing non-conforming lots.

Chair Losik talked about things that the City of Portsmouth is doing with accessory dwelling units and with short-term rentals.

After discussion, it was agreed to table 2022-04 because more work and information is needed.

- **2022-05: Parking requirements for ADU's**

It was agreed to table 2022-05 because more work and information is needed.

**2. Other**

*None*

**Adjournment**

**Motion by Kevin Brandon to adjourn at 10:03 a.m. Seconded by Pat Losik. All in favor.**

Respectfully Submitted,  
Dyana F. Ledger