

**RYE PLANNING BOARD
WETLANDS & SURFACE WATER OVERLAY
SUBCOMMITTEE
Wednesday, October 11, 2017
10:00 a.m. – Rye Town Hall**

Present: Patricia Losik, Sam Winebaum, Scott Gove, Rick Miller and Anne Decker

Others Present: Building Inspector, Peter Rowell, Planning Administrator Kim Reed, Jeff Nickerson and Sally Baybutt

I. Call to Order and Pledge of Allegiance

Chair Losik called the meeting to order at 10:00 a.m. and led the Pledge of Allegiance.

II. Review of Minutes 9/12/17

The following corrects were noted:

- Page 2, under Thoughts from Subcommittee, 4th sentence should read: **He knows that Hampton requires that granite monuments are placed at the edge of the wetlands and are shown on recorded plan;**
- Page 3, 2nd paragraph should read: **Chair Losik asked Member Gove if he is saying that the subcommittee can proceed with making proposed changes in the ordinance for the currently named assets so there is agreement and consistency with 483:B.**
- Page 3, last paragraph, 1st sentence should read: **Chair Losik stated that when the town is dependent upon a body (laws) which can be current and updated,**

Motion by Anne Decker to accept the minutes as amended. Seconded by Sam Winebaum. All in favor.

III. Buffers (RZO 301.8) - Monuments/markers - Update – NH HB486

Chair Losik stated that the subcommittee has a narrow charge before them for this session. It has come out of the advice and questions that have developed from Peter Rowell, Building Inspector. She continued that Mr. Rowell has asked the subcommittee to look at Section 301 as it relates specifically to 483-B S, Shoreland Protection Section of the State. Most recently Mr. Rowell noted that he knew the subcommittee was working on this issue and wanted to and commented that from an enforcement point of view it would be nice town's ordinances could mirror the

State's requirements for Shoreland Protection as much as possible. If they are the same or close, the applicant only needs to develop one plan that will satisfy both entities. The town can then enforce its buffer requirements in areas that the State does not control. She continued that at the last session Member Gove noted that there may be some issues that are less restrictive than the town ordinance as 301 was reformatted last year, and the prior year's work that was done, in relationship to the assets that are protected under 483-B, which is the Shoreland Water Quality Protection Act by the State.

Chair Losik noted that RZO 301 resources include tidal marshes, freshwater marshes, streams, ponds and wetlands. As it relates to the buffers, the buffer section includes tidal marshes, bays, estuaries, rivers, river tributaries, creeks, at a 100ft buffer (301.8), ponds; Eel Pond, Burke's Pond, Brown's Pond, East Rye Pond, at 100ft buffer. The wetlands buffer are for wetlands 100 contiguous acres or larger is a 75ft; however, 1 contiguous acre or larger in Berry's Brook Watershed is 100ft. She noted that 483-B basically deals with all of the surface waters; coastal waters which are subject to the ebb and flow. The DES also has a specific list of consolidated water bodies subject to 483-B. In Rye, the Eel Pond is named as a protected source. She continued that right now Section 301 does not have protections for surface waters, other than tidal marshes, bays, estuaries, rivers, river tributaries and creeks. The Town of Rye is protecting the tidal marshes and the creeks within those marshes. As it relates to Eel Pond, she sees that it sits in the Rye Beach Village District, subject to those rules. However, there could be some town impact particularly on the north and northwest as it relates to the buffer required by 483-B within the RZO at the 100ft.

Member Decker asked if the Rye Beach Village District has its own rules.

Chair Losik confirmed.

Member Decker asked if they have their own building inspector/code enforcement officer.

Mr. Rowell explained that in the Rye Beach Village District he typically only addresses building issues. He does not do any of the zoning. The district handles that themselves. He continued that he does handle floodplain issue. He issues building permits for all new construction but it is only for the for the structure itself, where the State Building Code applies. The district has no provision in their ordinance to enforce a building code but they do have Subdivision and Land Use Regulations.

Chair Losik noted the district also has an established Resource Protection Commitment; Section 8.

Member Winebaum asked if the Shoreland Water Protection Act covers everything within 250ft of the Atlantic Ocean or any waters in a tidal marsh.

Member Miller replied yes.

Chair Losik stated that the Shoreland jurisdiction specifically calls out all the headings of the resources; the assets that are protected under 483-B.

Member Winebaum clarified that essentially everything within 250ft of the Atlantic Ocean, or a tidal flooded by high tide, is subject to 483-B.

Chair Losik confirmed. She stated that the town ordinance does not include surface water. The old definitions were retained and under 301 that's "tidal marshes". That is where Mr. Rowell might have some challenges because those buffers are related to those assets.

Member Winebaum asked if it even mentions the Shoreland Water Quality Protection Act.

Chair Losik replied that it doesn't. She thinks the subcommittee needs to be clear about conforming the ordinance as it should be in terms of consistency with Shoreland Protection.

Member Miller stated he read 483-B very carefully. It would surprise him greatly if the Town of Rye could have anything less than the Shoreland Water Quality Protection Act. He does not think they can do anything different from that and have less buffer without running a foul with the State. It seems to him that it is a moot point that 483-B should take precedence over anything that has been passed by the Town of Rye.

Chair Losik stated that she would like to have a discussion with Mr. Rowell at this meeting. To her, this is a structural issue in 301. It would be a question to Attorney Donovan as to how fast to incorporate, in the buffer descriptions, the assets that have coordination with 483-B and bring in the appropriate reference to protect those assets.

Member Winebaum stated this has been in effect a long time but it has not been applied in Rye. In fact, the State really isn't super concerned outside of 100ft. There is a whole gray area that needs to be clarified for people.

Member Gove noted the State allows a 50ft buffer and then someone can build out from that but Rye does not allow that. The town is more restrictive in many aspects.

Member Winebaum stated he thinks there is confusion with upland wetlands and the shore. These should be separated. In the shore area the town has tons of construction within buffers.

Speaking to Mr. Rowell, Chair Losik asked him to bring them up to date in terms of what he is dealing with in the field and the confusion with 301.

Mr. Rowell stated that he tries to enforce what it written. He noted that the town does not enforce anything on any of the oceanfront. That extends into the harbors; Rye Harbor, Little Harbor and probably Witches Creek. If there is a tide that goes up and down, and does not run into a marsh, the town does not enforce its buffer protection on it. He continued the buffer description is fairly clear. It is the restrictions where there is a problem. The landowners all want a view and their lawns to run down to the edge. A ton of the buffers are already impacted. They are already cut and it becomes a struggle. He continued the Shoreland Protection Act has a point system where people can clear an area to get that view path. The town's buffer restrictions do not have anything permitted for that.

Chair Losik stated the town does not have any of the language. They do not have anything that really speaks to the restrictions or the abilities that may exist in those resources.

Mr. Rowell stated that a lot of times it is usually after-the-fact and they have to revegetate. The struggle is giving the residents a view but also protecting it. The town's ordinance doesn't seem to do that.

Chair Losik asked if it would be helpful if they can bring in within 301.8 the buffer applications for the assets in 483-B.

Mr. Rowell commented it would be helpful to be able to create a view path. He continued that he thinks they want to control more than the State does. The town wants to go out to 75 or 100ft appropriately but the State does not want to go out that far on the buffer. He explained the town wants to control the first 75ft, which is what they control now, except Berry's Brook and tidal is 100ft. He thinks they can keep that but put in some type of a system that would be more conducive to compliance. He noted the town would be more restrictive on the distance than the State. The State has a 50ft buffer on certain types of shoreland but the town should control more of the wetlands and depth.

Chair Losik stated 486 is before the House and it is unsure where it is going. That is going to deal with high value wetlands and buffers. This is a body of work that is developing.

Mr. Rowell pointed out the town's ordinance already spells out wetlands of high value.

Jeff Nickerson, resident, stated that his attorney looked at this. He felt that it is up to the town to prove whether it is a prime wetland or not. It just can't be concluded arbitrarily. It has to be concluded by a scientist.

Chair Losik stated that 486 is going to determine wetlands by an actual qualified wetland scientist. There is a whole list of criteria.

Member Decker stated that in regards to the State's proposal there was a letter from one of the Legislators saying that it was a good proposal but the problem is the State would be understaffed and under budget because there would be a need for a thousand more scientific wetland scientists. If the State can't set the mandate and afford it, how can Rye?

Sally Baybutt, 10 Berry Brook Lane, asked who is enforcing the rules.

Mr. Rowell replied the building inspector/code enforcement officer.

Member Decker commented the Conservation Commission does also.

Chair Losik stated that from the standpoint of the process the Planning Board goes through the proposal. The Board will look at various aspects of the plan in terms of wetlands, markers, soils, hydrology and studies. In terms of "on the ground" enforcement it is the building inspector.

Member Miller stated he has a letter from Assistant Commissioner Clark Freeze which brings up the point that if they change the regulations substantially they would not be able to enforce it because there is no provision for employing more enforcement agents for the State. Also, 486 was recently adjourned without scheduling a further hearing.

Chair Losik commented that she believes there is one October 18th, 10:00 a.m.

Member Winebaum stated a very significant issue for the shoreland is the Zoning Board of Adjustment and what they let people do on non-conforming lots. He continued that he found a form the State has which the subcommittee may want to consider. It says that if a property is non-conforming, and the owner wants to expand the structure or other various things, they have to fill out a form which demonstrates how they are going to otherwise improve the situation on the lot.

Chair Losik commented there is a fair amount of grandfathering language in 483-B.

Member Miller stated that 483 and 486 have the 50 point rule, which requires a property owner who is given an exception to do something to mitigate the consequences of the exception.

Mr. Rowell noted that the town is not dealing with all the coastal properties. That has been let go a long time ago. The State deals with that. All the properties are pretty much developed. There are not too many pieces that are in a natural state, unless it is owned by the State.

Chair Losik stated the sense of the committee last year in looking at all the other coastal and Great Bay estuary communities' ordinances, is was not an area that the committee felt comfortable taking on without the guidance of an expert. That is something that would need to be budgeted to have that assistance. Maybe as 486 does, or does not, come along, it would be something that could be done in the future.

Member Miller stated he does not see how they can move forward without asking Attorney Donovan to address the simple issue of whether or not 483 supersedes anything passed by the Town of Rye, unless the town's requirements are actually more stringent. The language in 483 and 486 says the municipalities can have more stringent rules if they can show that the wetlands that would be impacted are prime wetlands.

Chair Losik stated that within the 0-50ft waterfront buffer under 483-B, vegetation generally less than 3ft in height, rocks, stones and the root system must be left intact in the ground. The removal of branches for the purpose of providing views is limited to the bottom half of trees and saplings to help ensure the health of the tree and sapling. She noted there is language that is not included in the town's ordinance. She thinks this adds to confusion.

Mr. Rowell pointed out it is the part that talks about cutting.

Chair Losik noted that the town's ordinance thinning of existing brush and trees is permitted provided that there be no clear cutting and cutting of trees greater than 4.5 inches.

Mr. Rowell stated that number 5 needs to be cleaned up and more specific. He suggested putting in some type of a point system that mirrors the States.

Chair Losik asked if he had no issue applying this to all resources that are called out in 301.8, which means wetlands that are greater than an acre.

Mr. Rowell commented that since the inception of this ordinance the town has said they want to protect the wetlands with 75ft buffers for anything one acre or over and 100ft for certain wetlands. He thinks that is fine.

Chair Losik asked the subcommittee for their thoughts. She stated they would be looking at augmenting 301.8 B (5) with more restrictive State language adapted from 483-B.

Member Gove stated he does not agree. He thinks even on regular wetlands there should be a point system. He thinks the Shoreland Quality Protection Act makes perfect sense.

Speaking to Member Gove, Chair Losik clarified that he is saying he is not opposed to bringing in language of 483-B.

Member Gove confirmed.

Member Miller stated he is not opposed. He thinks a simple solution, after running this by Attorney Donovan, would be to make an amendment to the town's act saying that whenever there is a conflict RSA 483-B supersedes. That would make it very simple for the building inspector and would guarantee that the homeowners were complying with the State regulations.

Member Decker stated there is a part of her that wants the subcommittee to step away until the State finishes 486. It is a different aspect but they have more resources than the town does, which concerns her. However, she is fine with the point system and if it helps the building department that should be integrated into the town's.

Relating to 486:I (a), Chair Losik stated that waters and adjacent areas deals with tide, ebbs and flows. Small (b) is freshwater flows or stance. At the very end of 486.6, it states the law shall not apply to land subject to 483-B or prime wetlands in 482.15, which would be the prime wetlands greater than 2 acres. She stated that 486 has legislative intent to deal with a subset of assets that are not afforded much attention right now. She does not know that they would be losing anything by trying to integrate 483-B and at the right time 486.

Member Winebaum stated that the 483 FAQ might be included as an addendum for people so they can understand what it is. As far as the language, it probably needs to be reworked so when people first read it they get a clue as to what's required.

Member Miller commented that at the beginning of the town's regulations it should be stated that all of the below is superseded by 483-B. He thinks it would be so much easier for the building inspector to enforce the regulations of 483-B.

Chair Losik stated the town has different assets and that is where Attorney Donovan would be helpful.

Mr. Rowell stated it would be best if they incorporated into the body of the ordinance how the town wants the buffer to look. It should be more specific and spelled out.

Chair Losik stated she is hearing him say that 483-B cannot be incorporated because of the specific assets that are under the jurisdiction of 483, that are not currently in the town's 301, mainly the surface waters.

Mr. Rowell asked why they need to control filling stations and that type of stuff. It is already in 483-B and the State controls that. That is not a big issue for Rye. It is the vegetative buffer that should be looked at. He thinks they know where to enforce the buffer. What does the town want the buffer to look like?

Chair Losik stated she sees some other problem areas in what was put as permitted uses; 301.5. That language will need to be looked at and also the special exception language.

Mr. Rowell stated that they also need to spend time delineating the buffers. They need to be clearly and permanently marked on the ground.

Member Gove noted that Hampton requires monuments at the corner of the wetlands. He commented that the wetlands do change over time so the permanent markers may not be the answer.

Member Decker asked if they are talking about new property or all property.

Mr. Rowell explained that if the Zoning Board or Planning Board takes an action that has a wetland or if he is on the property investigating a violation of a wetland, that wetland should be delineated and the buffer is established it should be monumented at that time with something permanent. If the wetlands move, and the property owner feels too much of his land is in the buffer because the wetlands has shrunk, he can hire a new wetland scientist to delineate the wetland. He noted that properties change hands and people do not know there is a buffer requirement. There needs to be monuments so property owners down the road know that it is a "no cut" buffer.

There was some discussion on the types of markers that can be used.

Chair Losik stated that before the next meeting they will reach out to Attorney Donovan with to ask him questions. In the meantime, she would like the subcommittee to spend some more time on 483-B and the interplay with 301.8, 301.7 and 301.5. She asked the members to send any ideas they have to Planning Administrator Reed by October 23rd.

- **Next Meeting – October 25th, 10:00 a.m., Rye Town Hall**

Adjournment

Motion by Rick Miller to adjourn at 11:06 p.m. Seconded by Sam Winebaum. All in favor.

Respectfully Submitted,
Dyana F. Ledger