

**RYE PLANNING BOARD  
WETLANDS & SURFACE WATER OVERLAY  
SUBCOMMITTEE  
October 25, 2017  
10:00 a.m. – Rye Town Hall**

*Members Present: Patricia Losik, Scott Gove, Sam Winebaum, and Anne Decker*

*Others Present: Kimberly Reed, Planning & Zoning Administrator and Jeff Nickerson, Resident*

**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 – October 11, 2017**

The following corrections were noted:

- Page 1, last paragraph, 3<sup>rd</sup> sentence should read: **She continued that Mr. Rowell has asked the subcommittee to look at Section 301 as it relates specifically to 483-B, Shoreland Protection Section of the State RSA's.**
- Page 1, paragraph 3, 4<sup>th</sup> sentence should read: **Most recently Mr. Rowell noted that he knew the subcommittee was working on this issue and wanted to comment that from an enforcement point of view it would be nice if town's ordinances could mirror the State's requirements for Shoreland Protection as much as possible.**
- Page 2, 1<sup>st</sup> paragraph, 3<sup>rd</sup> sentence should read: **She continued that at the last session Member Gove noted that there may be issues that are less restrictive than the State in 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.**
- Page 2, paragraph 2, 2<sup>nd</sup> sentence should read: **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.**
- Page 2, paragraph 2, 4<sup>th</sup> sentence should read: **The wetlands buffer which applies to wetlands 1 contiguous acres or larger is 75ft; however, for wetlands 1 contiguous acre or larger in Berry's Brook Watershed the buffer is 100ft.**

- Page 2, paragraph 2, last sentence should read: **However, there could be some town impact particularly on the north and northwest as it relates to the buffer required by 483-B and within the RZO at the 100ft.**
- Page 2, 5<sup>th</sup> paragraph from bottom, 4<sup>th</sup> sentence should read: **He continued that he does handle floodplain issues.**
- Page 2, 4<sup>th</sup> paragraph from bottom should read: **Chair Losik noted the district also has an established Resource Protection Purpose; Section 8.**
- Page 3, 1<sup>st</sup> sentence should read: **Mr. Rowell stated that he tries to enforce what is written.**
- Page 4, 3<sup>rd</sup> paragraph should read: **Chair Losik asked if it would be helpful if they can bring in the buffer applications for the assets in 483-B within 301.8.**
- Page 5, 3<sup>rd</sup> paragraph, last sentence should read: **It says that if a property is non-conforming, and the owner wants to expand the structure or do various other things, they have to fill out a form which demonstrates how they are going to otherwise improve the situation on the lot.**
- Page 7, 4<sup>th</sup> paragraph, last sentence should read: **What does the town want the buffer to look like?**
- Page 7, last paragraph, 1<sup>st</sup> sentence should read: **Chair Losik stated that before the next meeting they will reach out to Attorney Donovan to ask him questions.**

**Motion by Sam Winebaum to approve the minutes of October 11, 2017 as amended.  
Seconded by Anne Decker. All in favor.**

### **III. Discussion of Committee Findings**

Chair Losik stated that on the table is basically the charge from the building inspector's office on whether they can bring in some 483-B protection into the town's ordinance to diminish the controversy the department might have when looking at wetland resources and buffers. She continued it sounds simple but she thinks they are finding it is a tall order because the wetlands are complicated. RSA 486 is before them. She has an idea that they should be talking to Representative Mindi Messmer.

**Jeff Nickerson, 189 Washington Road**, noted that Representative Messmer is a licensed hydrologist and is one of the authors of this Bill. They have discussed this and he thinks they are going to find that a 25ft buffer is more than enough for a "No Cut" zone versus the 75ft. He continued that Representative Messmer has very interesting input that is based on scientific fact versus theory and heated passions.

Chair Losik suggested tabling the substance of 486 for the time being. She thinks they may want to reach out to Representative Messmer to get a global sense of that process. The subcommittee should know what her sense is for the prognosis for that Bill because that may be a tack that they take.

Chair Losik noted that the subcommittee has a copy of New Castle's ordinance. They had a wetlands study done for their town in 2005, which is incorporated into their ordinance. They also

brought 483 Community Shoreland Protection Act language into that. She continued they are having difficulty though because they brought the wetland resources in along with the tidal. There are the resources that are discussed under 483-B, which are not in Rye's ordinance right now, and also the non-shoreland assets, which includes wetlands and other areas. She asked the members to take some time to review New Castle's ordinance. She noted that she and the Planning Board Chair of New Castle have exchanged emails. They are going to set up a conversation so she can understand what issues New Castle is having around the wetlands.

Speaking to Chair Losik, Mr. Nickerson stated that he would hope that they would also compare the demographics and the topology of the two towns. Half of Rye is wetlands and this impacts so many different residents in town.

(Chair Losik passed out maps to the subcommittee from the National Wetlands Inventory off the town website.) Chair Losik stated that in 301 there are two criteria for identifying the town's wetland resources. Under the definition of district are the actual names of the resources: (301.1A) tidal marshes, freshwater marshes, streams and ponds, and (301.1B) wetlands. The actual delineation of wetlands, according to Rye's ordinance (301.2), must be done by looking at vegetation, soils and wetland hydrology. She stated the map shows all the zoning districts and the wetlands per the National Wetlands Inventory. Mapping is at a less detailed level and delineation is going to be by the actual testing to the soils, the vegetation and the hydrology. Although there are mapping references, they do not necessarily reflect the boundaries accurately. This is important for the subcommittee to keep in mind.

Member Winebaum stated that it was found out last year in the discussions that the actual wetland has to be delineated. The ordinance, in one or two sentences, is trying to cover very different kinds of assets; the shoreland type assets and the uplands. It is really inadequate for both. Those need to be treated separately.

Referring to the charge of the subcommittee, Chair Losik stated what she has heard from the building inspector is in essence adopt the language of 483-B into the town's ordinance. The problem is that 483-B is primarily law that covers shorelands. The town ordinance currently has tidal marshes, freshwater marshes, streams, ponds and wetlands. In thinking about tidal marshes, it also includes bays, estuaries, rivers, river tributaries and creeks. Under 483-B, it covers coastal waters subject to the ebb and flow. What is specifically named in the town by the State is Eel Pond.

Member Winebaum asked if they have any other coastal waters in Rye that would be impacted by 483-B.

Chair Losik explained the common assets that are shared between the town ordinance and the State are the tidal marshes, creeks and Eel Pond. She continued that Brown's Pond and East Rye Pond are not so named by 483-B. There is a DES list of water bodies which are listed by town. Under Rye, the asset that comes under Shoreland Quality Protection Act is Eel Pond, 27.9 acres.

Mr. Nickerson stated the districts maintain their own setbacks and do that in conjunction with the State. The Bill that Representative Messmer is working on to pass addresses this issue. That is

what the DES will stand behind. If the town tries to go on its own and brings someone to court, they are going to have to spend time, money and will not win anyways.

Chair Losik commented this is the prospect of 486, which has to be tabled right now because there is no answer as to when this might be before the town. The discussion is going to be limited to whether 483-B should be incorporated into the town's zoning ordinance. If the subcommittee wants to expand the definition of the assets, they do not need to start in 301.8A they probably need to go back to 301.

Mr. Winebaum stated he sees assets that are affected by the Shoreland Protection Act. The assets that are seen as having great significance can be in one bucket and other wetlands could be in a different bucket. He is in favor of coordinating that with State law and recommendations. The town does not have to be stricter in terms of distances. He suggested less buffer, smaller wetland and proper protection of the smaller buffers by ordinance and enforcement.

Member Decker pointed out the enforcement is going to be extremely expensive. The only way she can see it being enforced is for new properties or properties that are asked to rezone. She thinks it is a moot point.

Member Gove stated they have an initial charge and they should limit it to that. He will be frustrated if they end up with nothing again at the end of this because they tried to make it so broad.

Member Winebaum stated that right now the town has an ordinance that is so broad it has had literally decades of lawsuits and all kinds of confusion.

Chair Losik stated the town's ordinance with respect to 483-B is too narrow because they are not including the most significant asset. She continued the piece of legislation in 486, solves a lot of these issues in a pragmatic sense. It makes it workable because it is looking at the functions of wetlands, carves out the most valuable and still speaks to the tidal resources, which are important from a protection standpoint. It takes up a little bit of the dredge and fill in 482. It works with the RSA's that are there. The problem is they do not have it yet.

Member Decker asked if this should be tabled until the spring.

Chair Losik stated that to Member Gove's point, to come away with nothing, is a disservice to the process.

The subcommittee reviewed the document from Chair Losik regarding the language for the proposed ordinance, which was under much scrutiny in 2015.

Mr. Nickerson suggested looking at the Planning Board's charter for the subcommittee.

Chair Losik explained the charter was to look at Shoreland Protection as it relates to the issues the building inspector has spoken about at the last two meetings.

Mr. Nickerson commented anything that was mentioned at the last meeting are big holes. He thinks they need to reach out to Representative Messmer and see if she can expound upon the state of 486.

Chair Losik agreed. She continued that right now the question is whether this subcommittee is willing, wishing and needing to move to a change in the structure of the ordinance to bring 483 in. Right now, what they have is, the State comes in for the 483-B assets. There is no town process for those 483-B assets. The town has no jurisdiction because those assets are not protected in the town's 301. The town has protections around their so-noted resources. The only place there is overlap is in the tidal marshes and Eel Pond, and the town is less restrictive than the State which they cannot be.

Mr. Gove noted the town cannot be less restrictive than the State. They can be more restrictive but not less.

Member Winebaum stated the ordinances really need to be rewritten in their entirety.

Chair Losik stated the question is should they bring 483-B in. Do they change the identification of the assets? Once this is done, they are then bringing in the major resource, tidal waters, such as oceanfront and harbor. They will be brought under the town jurisdiction and will also be connected to 483-B through the town ordinance. She continued the building inspector was asking to make the laws of 483-B apply to the Town of Rye. What that is doing is bringing it into, what the town defines as wetlands, which is not the purview of 483-B.

Member Gove asked what would be advantageous for the subcommittee to accomplish given the confusion and knowing there is not much time.

Chair Losik stated there is an awful lot of work in a very complex area.

The subcommittee briefly reviewed New Castle's ordinance.

After discussion, Chair Losik asked if the subcommittee is in favor of changing the definition of the town's resources to include all surface waters under the town's existing RZO.

Member Decker replied that she is not in favor of including surface waters.

Member Gove stated his "knee jerk" is no. He asked if "all surface waters" could be something a half acre in size. Do they have to be connected to a tidal marsh?

Chair Losik replied yes; ebb and flow of the tide. She noted that Eel Pond and the surface waters is under the State purview but not on the local level. The building inspector has stated that these are not his concerns. As informal as it may be, there is a process for enforcement when there are major issues around the shoreland assets. The building inspector is asking if there can be consistency with the requirements of 483-B applying to the assets that are already so defined in the Rye Zoning Ordinance, which are the wetlands.

Member Gove pointed out that the State is less restrictive because the town is saying 100ft and they are saying 50ft. He asked how people will react to being less restrictive than the current ordinance.

Chair Losik commented that she is hearing that the consensus is that the subcommittee is not prepared to restructure the definition under 301.

Member Winebaum commented he is in favor of it. However, there is an issue with the other kinds of wetlands that may actually be less sensitive now are still at 100ft. The ones that are 1 acre or more. He pointed out that 1 acre or more, compared to many towns, is a very large wetland.

Chair Losik noted the proposed ordinance in 2015 also had a throughway to permitted uses. There is also going to be 483-B language in permitted use. It is in the wetland and the buffer. She thinks the building inspector would like to see a systematic process and that would simplify his work.

Mr. Nickerson stated he thinks the whole process needs to stay as it is right now until this is discussed with Representative Messmer. There are a lot of people that are frustrated with the continued changes to the rules on wetlands.

**Next Steps:**

- Members read New Castle's ordinance – consider language that may work for Rye's ordinance.
- Chair Losik will speak with the New Castle Planning Board Chair in regards to the issues they are having with wetlands
- Next meeting – to discuss whether or not to incorporate 483-B into the zoning ordinance at this time.

**IV. Next Meeting:**

- **Wednesday, November 8<sup>th</sup>, 9:00 a.m.**

**Adjournment**

**Motion by Anne Decker to adjourn at 11:06 a.m. Seconded by Sam Winebaum. All in favor.**

Respectfully Submitted,  
Dyana F. Ledger