

**TOWN OF RYE – BOARD OF ADJUSTMENT
MEETING**

**Wednesday, September 1, 2021
7:00 p.m. Rye Public Library**

Members Present: Chair Patricia Weathersby, Chris Piela, Patrick Driscoll, Burt Dibble, Sandra Chororos and Michael Brousseau

Present on behalf of the Town: Planning/Zoning Administrator Kimberly Reed

I. CALL TO ORDER

Chair Weathersby called the meeting to order at 7:02 p.m. and led the Pledge of Allegiance.

II. BUSINESS

Seated for voting: *Patricia Weathersby, Chris Piela, Patrick Driscoll, Burt Dibble and Sandra Chororos*

- **Approval of the August 4, 2021, Meeting Minutes**

Motion by Burt Dibble to approve the minutes of August 4, 2021 as amended. Seconded by Chris Piela. All in favor.

Continuances:

Motion by Patrick Driscoll to continue the application of Domenic and Phyllis Martignetti for 4 Breakers Road to the November meeting. Seconded by Burt Dibble.

Member Dibble asked if they are confident the applicant will be ready in November.

Chair Weathersby stated that the applicants have asked for November, so it appears they are confident. If they ask for a continuance in November, they should probably reapply as they filed in July initially.

Vote: All in favor.

Planning Administrator Reed noted that Charles and Lyndsay Beynon have requested a continuance. An abutter has expressed concerns about the structure and notified the Conservation Commission. The Commission has held a site walk. The applicants have decided to review the proposal and possibly move the structure.

Motion by Patricia Weathersby to continue the applications of Charles and Lyndsay Beynon for 30 LaMer Drive to the October meeting. Seconded by Chris Piela. All in favor.

Chair Weathersby noted that a request to be continued was received from O'Connor Family Trust for 92 Old Beach Road. The applicants are requesting the continuance for more time to prepare renderings and other information for the application.

Motion by Patricia Weathersby to continue the application of O'Connor Family Trust for 92 Old Beach Road to the October meeting. Seconded by Patrick Driscoll. All in favor.

Motion by Patricia Weathersby to continue the application of Barbara A. Miller Trust for 22 Jenness Ave to the October meeting. Seconded by Chris Piela. All in favor.

Speaking to Planning Administrator Reed, Chair Weathersby asked if she has heard from the Snows (1 Clark Road, application #12).

Planning Administrator Reed stated that Chris Snow said that he spoke with Suzanne McFarland (Conservation Commission Chair) about the proposal and showed her the property with the pond, etc. He thought Suzanne had no objections. He did not realize the application was on the agenda and asked that the application be postponed to October.

Chair Weathersby explained that the situation with 1 Clark Road is that they need wetland buffer relief. The procedure is that they go before the Conservation Commission before submitting the application to BOA, so their application is technically incomplete. It sounds like they chatted with the chair of the Conservation Commission, but that doesn't really satisfy the process. Chair Weathersby commented that they should probably continue so proper procedure can be followed and the Conservation Commission has a chance to weigh-in.

Karen Oliver, Conservation Commission Member, noted that she had some communication with Suzanne McFarland. The applicant is looking to connect the side steps and front steps. Mrs. McFarland did not think that was within the wetland buffer. She thought the house was further away from the wetland buffer, but that needs to be confirmed by the survey and building inspector.

Motion by Patricia Weathersby to continue the application of Christopher and Melissa Snow for 1 Clark Road, so they can determine if they need to go before the Conservation Commission. Seconded by Chris Piela. All in favor.

III. APPLICATIONS:

- 1. Steven & Denise Manseau for property owned and located at 117 Wentworth Road, Tax Map 24, Lot 36** request variances from §190-2.3.C(2) for a workshop/shed 2.6' from the side boundary where 20' is required, from §190-2.3.C(3) for a workshop/shed 20' from the south corner front boundary and 4.2' from the east corner

front boundary where 40' is required; and from §190-2.3.C(5) for dwelling coverage of 19.04% where 12.7% exists and where 15% is allowed and for lot coverage of 62.5% where 62.7% exists and 30% is allowed. **Property is in the Single Residence District. Case #21-2021.**

Note: *190.2.3.C(5) for dwelling coverage is not needed, as the dwelling is not expanding.*

Denise Manseau, applicant, addressed the Board. She explained that in order to provide accurate information on the building area coverage requested at the June meeting, Eric Salovitch from Northern Survey was retained to complete a survey of the property. She continued that living without a garage or basement is difficult, as they need a workshop and have equipment that needs to be stored. The location of the proposed structure will be approximately 95' from Wentworth Road and will not be in view of the public or private homes. The proposed workshop will be constructed in materials and trim that will complement the existing cottage on the property, as well as surrounding properties. The spirit of the ordinance is observed because post-construction, the dwelling coverage will be 62.5% which is less than the current coverage of 62.7%. This is achieved by placing the structure impermeable area and the removal of existing paving stone and gravel, as well as the current old shed. The existing shed on the property is 2.1' from the side line. The proposed workshop will increase the side line setback to 2.6'. She noted that her property was developed in the 1950's. All the cottages in the area have small lots with non-conforming cottages and non-conforming outbuildings. With this proposal, every effort was made to make the property less non-conforming.

Chair Weathersby clarified there is electricity and heat, but no plumbing.

Mrs. Manseau confirmed.

Referring to the plan, Member Driscoll asked if the trees that are marked are being removed for the new outbuilding.

Mrs. Manseau confirmed. She pointed out that the old shed is being removed, along with the paving stone behind it.

Chair Weathersby asked the height of the building.

Mrs. Manseau replied 18.6'.

Chair Weathersby asked if there is any intention of selling artwork from the property.

Mrs. Manseau replied no.

Chair Weathersby noted that a letter was received in support from Edwin Harding of 119 Wentworth Road. She opened to the public for comments.

Attorney Mark Beliveau, representing the Ford Family at 125 Wentworth Road, spoke to the Board. He asked if the Board has a copy of the agreement, between the Fords and Manseaus, that was submitted.

Chair Weathersby confirmed.

Attorney Beliveau stated that the Fords support the application. If the Board is inclined to grant the variances, they ask that the conditions set forth in the agreement be incorporated into the decision.

Speaking to Mrs. Manseau, Chair Weathersby asked if she is agreeable to include the conditions set forth in the agreement with Pat Ford III.

Mrs. Manseau confirmed.

Hearing no further comments from the public, Chair Weathersby closed the public hearing at 7:30 p.m.

Referring to the 2.6' sideline setback where 20' is required, Member Chororos stated this is a pretty dense location and this is a two-story structure, which is a significant difference. The structure will be right up against the property line. She pointed out that this would be the Fords' property and they are okay with the proposal. Her concern is that there is a big difference in the side boundary. To her, it would be fairly imposing.

Chair Weathersby pointed out that the Ford home is back a bit and this is in the area of their driveway.

Attorney Beliveau noted that the Manseaus have been great to work with. In the agreement, they have agreed to do some plantings and have consistent colors. The Fords certainly support the proposal.

Chair Weathersby commented that she agrees it is close. Typically, if there is another structure close by, the buildings shouldn't be too close together for light, safety, access, etc. This really isn't the case here. She is a little more concerned with the lot coverage. She is encouraged that it is going from 62.7% to 62.5%; however, it is still a lot of lot coverage. She pointed out that it is a pretty big structure. It is basically the size of a one car garage that is two-stories high. This is what she struggles with. She wonders if it could be a bit smaller or even a one-story. There was a discussion at the first meeting about the uses for the building and she would like to support that; however, this is her struggle.

Member Piela asked if the shed is going to be taller than the house.

Mrs. Manseau replied yes.

Member Piela stated that at the first meeting, the Board was concerned about lot coverage and they didn't have the exact numbers. Now, they have the exact numbers and the applicant has

reached an agreement with the abutters. He continued that he has been down there and it is very dense. It would be tight to put that structure anywhere. It is going to require significant variances. He is inclined to be favorable to the proposal, given the fact the Fords are in favor.

Member Driscoll commented that the one thing that carries weight for him is this is such a dense, unique neighborhood. He does not think it changes much about the feeling or the use of the neighborhood. It is tucked away on the lot. He was hoping to get some insight from the other abutters. The abutters on lot 37 seem to be affected, especially since the workshop is going to be somewhat close to where their house is located. However, the Board hasn't heard anything from those abutters and the applicant seems to be reasonable. It seems like the existing shed is being used for the same use.

Chair Weathersby pointed out that the Board received a letter from Mr. Harding, who is closer to the workshop.

It was noted that a letter of support from Bonnie Dridi, 115 Wentworth Road, was also received.

Regarding the lot coverage, Chair Weathersby pointed out that it's being improved.

Referring to the agreement with the abutter, Member Brousseau asked how those conditions will be codified so a subsequent owner doesn't breach them.

Chair Weathersby explained that the conditions in the agreement will be added as conditions of approval to granting the variance for the shed. Those will go with the land, so anyone purchasing that property would have to comply with the conditions. She asked the Board if anyone has any objections to the agreement, dated May 28, 2021. She read from #3 on the agreement:

- a. The workshop shall never be connected to water or septic/holding tank/sewer.
- b. The workshop shall never be converted to or used for residential purposes.
- c. The HVAC unit shall be tucked under the stairwell (as shown on plans).
- d. The workshop shall be the same color as the house at 117 Wentworth Road.
- e. The peak of the roof of the workshop shall be no higher than is necessary to allow the Manseaus to be able to stand up in both floors.
- f. There shall be no more than two exterior lights on the workshop, one at each doorway. The lights shall be down turned and shielded.
- g. The workshop shall be located fully on Manseaus' property with a minimum setback from the common boundary with Ford of 2'6".
- h. 3 or 4 mature (e.g. 4-5 feet +/- when planted) evergreen trees/plants that will grow and fill in the area between the workshop and Ford property shall be planted, watered and cared for by Manseaus. The evergreens may be planted on Ford property up to five feet from the common boundary. Manseaus and Ford will work together to identify the exact location for each evergreen and the type of evergreen. The evergreens will be planted as soon as reasonably possible.

Member Driscoll asked if the Board is okay with putting conditions that aren't necessarily included in the ZBA purview. The two that stand out are the color of the house and the condition that the evergreens may be planted on the Ford property. Those seem like a gray area.

Chair Weathersby commented that the wording could be changed slightly, if approved by the Board. She understands the concern on the color. The neighbors want it to be uniform looking and not an eyesore. It is almost a planning board issue about the down turned lights and the HVAC location. She thinks in the notice of decision, "Manseau" and "Ford" would be changed to "property A" and "property B".

Member Driscoll stated that having a condition where the applicant is allowed to go on neighboring property seems risky.

Member Dibble commented that Member Driscoll raises a good point. If the plantings are planted and are there for 20 years, it creates an adverse possession matter. It feels to him that the Board should not be authorizing people to do things on other people's property. He continued that the Board frequently conditions plantings; especially, in wetland zones in accordance with the Conservation Commission. He thinks going off the property gets out of the Board's realm.

Chair Weathersby commented that she tends to agree. She commented this doesn't mean they can't work it out between themselves.

Member Dibble noted that the Board should not be involved in that discussion.

Chair Weathersby opened to the public for Attorney Beliveau to comment.

Attorney Beliveau stated that he thinks it can be included. The Board is hearing from an abutter that is concerned about the small setback. To mitigate the impacts of the small setback, the Fords would like a buffer. The Fords will support the project, as long as there's a buffer. He thinks the condition could be restated to say that the Manseaus will work with abutter Ford to establish a satisfactory buffer. He commented that aesthetics is clearly within the purview of zoning, as are buffers, as they go to property values. He thinks it would be helpful to include it as a condition. He reiterated that it could be wordsmithed so it is more general in nature.

Chair Weathersby suggested the wording; "The Manseaus will work with the Fords to develop a satisfactory buffer between the workshop and the Ford property".

Member Dibble asked what would happen if it doesn't work out.

Chair Weathersby noted that the Fords will complain and the building can't be built.

Member Dibble commented that it asks the Board to endorse something they have no control over.

Chair Weathersby stated that she thinks there should be something because the buffer is important, as it is really close to the side boundary.

Member Dibble stated that he likes the solution of letting this be a private arrangement between the Manseaus and the abutters.

Chair Weathersby asked the Board if they are all in agreement that a-g (under #3 on agreement between Manseau and Fords) should be added.

The Board agreed.

Referring to h., Chair Weathersby asked the Board's opinion if it should be included and in what form.

Member Dibble – Should not be included

Member Chororos – Should not be included

Member Piela – “The Manseaus will work with the Fords to establish a satisfactory buffer”

Chair Weathersby – “The Manseaus will work with the Fords to establish a satisfactory buffer”

Member Driscoll – likes; “3 or 4 mature evergreen trees/plants that will grow and fill in the area between the workshop and the Ford property shall be planted.”

Member Piela commented that he can be convinced to go with Member Driscoll's suggestion.

Chair Weathersby agreed. She reviewed h; “3 or 4 mature (e.g. 4-5 feet +/- when planted) evergreen trees that will grow and fill in the area between the workshop and Ford property shall be planted.

Member Brousseau suggested keeping “The evergreens will be planted as soon as reasonably possible”.

It was the consensus of the Board to keep that sentence.

Chair Weathersby called for a vote to the request for a variance from 2.3.C(2) for the 2.6' side boundary; 2.3.C(3) for the 20' south corner front boundary and 4.2' for the east corner front boundary; and 2.3.C(5) for lot coverage of 62.5%:

1) The variance is not contrary to the public interest?

Burt Dibble – Yes

Sandra Chororos – Yes

Chris Piela – Yes

Patrick Driscoll – Yes

Patricia Weathersby – Yes

2) The spirit of the ordinance is observed?

Burt Dibble – Yes

Sandra Chororos – Yes

Chris Piela – Yes

Patrick Driscoll – Yes
Patricia Weathersby – Yes

3) Substantial justice is done?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

4) The values of surrounding properties are not diminished?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

5) There are special conditions of the property that distinguish it from other properties in the area?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

6) There is no fair and substantial relationship between the general purposes of the ordinance provisions and the specific application of those provisions to the property?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

7) The proposed use is a reasonable one?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

8) Therefore, literal enforcement of the ordinance would result in unnecessary hardship?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

Motion by Burt Dibble to approve the application of Steven and Denise Manseau for property owned and located at 117 Wentworth Road, as applied for with the exception of §190-2.3.C(5,) subject to the conditions as outlined in the agreement between the Manseau and Ford Family with the exception that paragraph h. shall read “3 or 4 mature (e.g.4-5 feet +/- when planted) evergreen trees/plants that will grow and fill in the area between the workshop and Ford property shall be planted, watered and cared for by Manseaus. Manseaus and Ford will work together to identify the exact location for each evergreen and the type of evergreen. The evergreens will be planted as soon as reasonably possible.”
Seconded by Sandra Chororos.

Chair Weathersby pointed out that the ‘h’ language was different.

Member Driscoll commented that Alternate Dibble struck the worst sentence and kept everything else. He is okay with the way the motion was worded.

Chair Weathersby asked if the Board wants the Manseaus to plant, water and care for them.

The Board was fine with the motion.

Vote: All in favor.

- 2. Domenic Martignetti & Phyllis Martignetti 68 Manchester St. Nashua NH for property owned and located at 4 Breakers Road, Tax Map 8.4, Lot 68 requests a variance from §190-2.4.C(2) for an platform deck 8’ from the side boundary where 20’ is required; and from §190-2.4.C(1) for a platform deck 8’ from the rear boundary where 30’ is required. Property is in the General Residence, Coastal Overlay District and the SFHA, Zone AE (8). Case #33-2021. (Requested a continuance)**
 - *Continued to the November meeting.*

Note: Patricia Weathersby recused herself from the applications for 261-279 Pioneer Road. Michael Brousseau was seated and Patrick Driscoll stepped in as chair.

Sitting for application: Patrick Driscoll, Chris Piela, Burt Dibble, Sandra Chororos and Michael Brousseau

3. **Arthur G. Pierce Rev. Trust & Sharon Pierce Rev. Trust, Arthur & Sharon Pierce, Trustees of 24 Colony Cove Road, Durham NH for property owned and located at 261-279 Pioneer Road, Tax Map 24, Lot 117** request variances from §190-5.3.C(2) for a condominium conversion of 4 units having 580sq.ft, 580 sq.ft, 530 sq.ft, and 530 sq.ft where each is required to have a minimum of 600 sq ft. of floor area and from §190-5.3.C(7) as the amount of land designated as common area is less than 90% of the area of the parcel not designated for buildings and individual unit owner's vehicles and does not meet the minimum lot area and frontage requirements. **Property is in the Single Residence District. Case #34a-2021.**
4. **Arthur G. Pierce Rev. Trust & Sharon Pierce Rev. Trust, Arthur & Sharon Pierce, Trustees of 24 Colony Cove Road, Durham NH for property owned and located at 261-279 Pioneer Road, Tax Map 24, Lot 117** request a special exception per the Rye Zoning Ordinance §190-5.3.A for 8 apartments in existing 4 buildings. **Property is in the Single Residence District. Case #34a-2021.**

Attorney Bernie Pelech, representing the applicants, presented to the Board. He noted that one of the four duplexes was built in the 1940's, one in the 1960's and two in the 1970's. He couldn't find anything in the building inspector's records about how those were built on the 1.4-acre lot; However, the duplexes have been on the tax cards during that entire period of time. Mr. Pierce acquired the property in 1976 and nothing has changed in all the years. The four buildings remain as they were and there are no plans to change any of them at this point in time. He noted that Mr. Pierce is in his 80's and this being done for estate planning. Mr. Pierce owns the units and maintains them himself. As a result, due to his age, he would like to convert them to condominiums. Some long-term tenants residing at the property have expressed an interest in purchasing their unit.

Attorney Pelech stated that variances are needed for two issues. First, two of the units are 580sq.ft. where 600sq.ft. is required. This is about 20sq.ft. lacking in what is required. The other two units are 530sq.ft. This is 70sq.ft. short. It would not be practical and variances would be required to expand one of the duplexes by 40sq.ft. and the other by 140sq.ft. The second variance being sought is because the property does not comply with lot size or frontage and the common area is less than 90% of the lot size. In taking the lot size of 62,740sq.ft. and deducting the building footprints and parking areas, it brings it to a common area of roughly 85%. The lot size cannot be increased and it has existed for over 70 years. (He submitted a plan to the Board prepared by Ross Engineering showing the location of the existing septic, manholes and water lines.)

Referring to the plans by Ross Engineering, Attorney Pelech stated that it shows the highest observable tide line and the 100' buffer. At the present time, there are three storage sheds on the property, two of which are within the 100' buffer. One of them is canvas and that will be removed from the 100' buffer, as he could not find a permit for that canvas structure. The storage shed closest to Pioneer Road, was permitted and it is not in the buffer. For the one that is closest to the highest observable tide, and within the 100' buffer and the 75' buffer, no records could be found at all in the building inspector's office. The shed that's there was built by Mr. Pierce to replace one that had been there since 1950. He went to the building inspector in 1977

and asked if it could be replaced because it was decrepit. The building inspector at that time, gave permission for it to be done. Attorney Pelech pointed out that this was done before there were any wetland ordinances. Just like the duplex that is within the 100' buffer, it predates the wetland ordinance being enacted, as does the parking areas. At this point in time, they cannot be forced to demolish or remove the structures, including the duplex, shed or parking area. The parking area was there in 1976 when Mr. Pierce bought the property and has remained in the same location since that time. He reiterated that they will be happy to remove the one canvas shed that is in the buffer, as it is not permitted. However, the other sheds are grandfathered, as they predate the ordinance.

Attorney Pelech reviewed the criteria for granting the ordinances.

- The variances are not contrary to the public interest because granting the variances will not substantially alter the characteristics of the neighborhood nor threaten public, health, safety and welfare. Also, the spirit and intent of the ordinance is observed. Not a single thing is going to change on this property. Everything will remain the same, except for the canvas shed being removed. It does not substantially alter the characteristics of the neighborhood by simply having the units under separate ownership, rather than the ownership of Mr. Pierce. It's not going to threaten public, health, safety or welfare because nothing is changing other than the form of ownership.
- Substantial justice will be done by granting the variances. This is where the Board will weigh the hardship upon the Pierces, if the variance were to be denied, against some perceived public interest. The buildings are fifty plus years old. They each contain two units. Four of those are slightly less in square footage than what is required. If a variance were to be denied, the hardship upon the Pierces is not outweighed by some benefit. The units have been there for over fifty years at their present size with no problems whatsoever. People have lived in the units with no complaints for over fifty years. Requiring the units to be 600sq.ft. in size would cause a substantial hardship for the Pierces. Also, the lot cannot become any larger. The amount of common area cannot be increased to 90% because a building would have to be demolished or parking would have to be removed. As far as trying to comply with the 90% rule or lot size and frontage, it's impossible without variances being granted. The lot cannot get larger in size and cannot gain more frontage. It has been that way for seventy years.
- The values of surrounding properties will not be diminished because nothing is changing, except for the ownership. Studies have shown that when a property converts from a rental property to a condominium unit, there's a pride of ownership and people are inclined to take better care of the property, whether it be the common area or unit itself.
- There are special conditions with regards to this property. There are four duplexes on a substandard sized lot, which have been there for seventy years. People have lived in the eight units for over fifty years. It's a unique lot because most of the lots surrounding have single-family residences.
- There is no fair and substantial relationship between the general provision of the ordinance, as it relates to this particular piece of property. This property has existed as is for seventy plus years and has functioned fine.

- The proposed use is reasonable, as condominium conversion is allowed by special exception. These are legal dwelling units. The use is not changing, only the form of ownership. Therefore, the unique characteristics of the property and given that the eight existing dwelling units cannot be changed, variances are required for this conversion.

Acting Chair Driscoll stated there are four that are under the 600sq.ft. He asked how they got the square footage numbers. He asked if someone went into the units to measure.

Attorney Pelech confirmed. He explained that Ray Bisson from Stonewall Survey did the floorplans and the measurements.

Acting Chair Driscoll asked how the current tenants use the parking spaces and how the spaces will change.

Attorney Pelech replied that currently there are over 16 spaces. The spaces for 261/263 are separate and have frontage on Pioneer Road. There are four parking spaces right in front of the building. Turning into the driveway, there is parking in front of each building. There is also a large parking area at the rear of the property.

Acting Chair Driscoll asked if the parking will remain the same if it goes to condos.

Attorney Pelech pointed out that Attorney Donovan has reviewed the condo documents and the plans. He's made a couple of suggestions and the documents have been revised to comply. The new condo docs will probably assign parking spaces, so each unit has at least two parking spaces.

Acting Chair Driscoll asked Attorney Pelech to speak to the septic system upgrade.

Attorney Pelech stated that he has submitted an existing location plan showing the locations. Alex Ross of Ross Engineering has designed proposed septic systems. The septic systems that exist have all been tested and are functioning well. As a condition of going to the Planning Board, Attorney Donovan wants to see proposed systems for each of the current septic systems, which has been designed by Alex Ross. The proposed systems will have pre-treatment and are much more efficient than what exists there now.

Acting Chair Driscoll asked for a copy of the designs.

Planning Administrator Reed noted that she has not received anything from Alex Ross.

Attorney Pelech commented there could be a condition that these be submitted. He will provide these to Planning Administrator Reed.

Member Piela asked if valves for the water lines are noted on the plans.

Attorney Pelech replied that Mr. Ross said the water lines are included. The lines are noted with 'w'. Those have been verified with the City of Portsmouth Water Department, which is the water service provider.

Member Piela asked if additional meters will be required.

Attorney Pelech pointed out that the City of Portsmouth may require individual meters for each unit.

Acting Chair Driscoll noted there was some question as to whether the Board can even grant a variance for 5.3.C(2) for the condo conversion because it conflicts with The Condominium Act. He asked Attorney Pelech if he has looked into this.

Attorney Pelech asked for clarification.

Member Brousseau explained that the N.H. Supreme Court has ruled that the 600sq.ft. minimum floor area required by the Rye Zoning Ordinance, 190-5.3.C(2), conflicts with The Condominium Act. It is illegal for the ZBA to enforce that. He noted that this information came from Attorney Donovan.

Speaking to Attorney Bernie Pelech, Acting Chair Driscoll asked if he is fine to move forward without a vote on that variance.

Attorney Pelech replied it's fine.

Acting Chair Driscoll stated that where this is a tight lot, he wants to make sure there will be a successful septic.

Attorney Pelech replied that the septic designs have been done. There were suitable areas for all leach fields found. Someone for the town witnessed the test pits for the new septic areas. Suitable leaching areas were found for four separate systems. He continued that the total coverage of the four structures and the parking area is 8,500sq.ft. The lot size is 62,740sq.ft. That equates to approximately 85% where 90% is required. The 2-acre lot size cannot be met and the frontage cannot be met either. This is the way it has been since the 1950's.

Acting Chair Driscoll noted that some emails came in from the Conservation Commission. He asked for an update.

Attorney Pelech replied that they were not required to appear before the Commission. This is something that came about after this application was submitted to BOA. He noted that they are happy to work with the Conservation Commission. They will be happy to delineate with posts and placards the 100' tidal setback. Other than the grandfathered structures, they will be sure that nothing else is placed in there. If there is anything in there now, which is not permitted, it will be removed.

Acting Chair Driscoll commented that test pits are really to see if the soils can hold a septic leach field. It doesn't tell where and how large a leach field can be.

Attorney Pelech noted that he will provide the test pit logs.

Referring to test pit #1, Acting Chair Driscoll pointed out that it looks like it is really close to one of the wetland setbacks.

Hearing no further questions from the Board, Acting Chair Driscoll opened to the public for comments in regards to the variance request.

Karen Oliver, Conservation Commission Member, noted that RCC also abuts this property, so they are also speaking as an abutter. She continued that she was surprised there was not a site walk with RCC, given the nature of the property. Certainly, the buffers need to be marked. Also, it is believed that there is a dumpster within the 100' buffer. There are also sheds in the buffer. Even though those have been there awhile, the wetlands have been there a lot longer and the hope is that they will be continue to be there. RCC's mission is to protect those wetlands. It is also believed that part of the parking and pavement is within the wetland buffer. To the extent that there is going to be disturbance in the buffer, RCC feels they should be able to weigh-in. There isn't anything allowed within the 100' wetland buffer. She does not know what is in the buffer because there is no delineation. To the extent it is in the buffer, the Conservation Commission's job is to make a recommendation on how the work will be handled. Certainly, there will be a ton of disturbance having to do with septic. In terms of things being grandfathered, these kinds of applications are exactly the time for wetland protections to be brought into today's modern-day things. The Conservation Commission would like the opportunity to ask questions and to walk the property. Regardless of whether this can be done, RCC feels that eliminating the violations at this point is a minimum; taking the dumpster out, marking the buffer area, etc., to protect what is there at this point.

Attorney Pelech stated that they can't do much about the buildings that have been there for 50 to 70 years. If the dumpster has to be relocated, it will be. The applicants have offered to delineate the 100' wetland buffer, so there is no further encroachment. However, there is not much that can be done about removing the existing paving and parking because they would not have the required parking. They certainly don't want to have to tear down some of the buildings that were built before there were wetland ordinances. Most of the construction occurred, almost all of it, before there were any wetlands ordinances. He reiterated that they will work with the Conservation Commission and there is no objection to a site walk. He commented that this has to be approved by the Planning Board, so the Conservation Commission can certainly weigh-in before then. RCC's concerns really don't have anything to do with the variance that is before the Board.

Mike Theil, 34 Brackett Road, stated that he owns a property across the marsh from the property. He is far enough away from the property, so it does not impact him in any particular way. He has some familiarity with another condominium project that raises some issues. His concern is whether this is an appropriate property for condominiums. There are three entirely different types of buildings on the property. He is concerned that the property will not be managed in a way that is effective and provides the appropriate maintenance for the property.

The single ownership sort of forces maintenance. He questions whether maintenance would happen, if the type of ownership were to change. He commented that he believes a couple of units on the ground floor of those buildings are actually in a flood zone. He is also concerned about the septic systems because of Berry's Brook and the wetlands.

Referring to Attorney Pelech's comment about not being able to change the pavement, Ms. Oliver noted that the Conservation Commission may recommend permeable pavement. RCC does not try to stop development. They try to protect the wetlands. Even if the pavement stays in the same place, there are recommendations and concerns RCC would have and would like to speak on.

Hearing no further comments or questions, Acting Chair Driscoll closed the public hearing at 8:40 p.m.

Member Piela stated he is looking at the year built for units 3 and 4, which is 1970. Those were clearly built after the one building/one lot rule from 1969 and this is in a single residence district. This brings up the question of whether these are legal dwellings, which is part of the prerequisite for a condominium conversion. He thinks they should discuss 190-5.3.C(1); "The dwelling units which are subject to the request of condominium conversion must, at the time of request for condominium conversion, exist as legal dwelling units pursuant to the ordinances of the Town of Rye. The burden shall be on the petitioner to demonstrate that the units sought to be converted have legal status." This calls into question the legal status, in his mind. It could be said that it's been a duplex for the last 50 years and the conditions aren't changing; however, it's something that should be discussed.

Acting Chair Driscoll stated that he has heard from this Board and the building department that things were not well documented previous to that. In some aspects it's tough for applicants to find things that the Town did allow at some point. To him, this is a gray area, but it's a good discussion to have. On this case, he gives the benefit to the applicant when it is that far back in time. It doesn't look like these were converted any time recently.

Member Piela stated that his second thought is regarding 190-5.3.C(7) addressing LCA land coverage requirements. He tends to agree it would fall under the 600sq.ft. rationale. If the Board was to hold fast to the 90%, it would probably not be defensible in court. He agrees with the guidance the Board was given that a vote is not required.

Planning Administrator Reed asked for clarification.

Member Piela explained that the size of the units, under 190-5.3.C(2), conflicts with The Condominium Act. Also, 190-5.3.C(7) which is the amount of land designated as common areas is 90%. The Board has been advised that the same rationale would apply for both of those. He agrees with the advisement.

Planning Administrator Reed asked if he is saying that the size and the LCA variances are not required.

Member Piela confirmed.

Member Dibble stated that as an additional matter, he thinks they would be remiss if they did not have the current evidence of the boundary of the wetlands flagged on the property, before this is dealt with. There isn't any evidence about how the lines on the plan were delineated. At the very least, a soil scientist needs to put marks in the ground.

Acting Chair Driscoll stated that this would be relevant to the special exception. If the Board finds that they can't vote or the applicant does not meet the vote on the variances because of what's there, they can't put conditions on something they are not voting on. However, he thinks this could be tied in to the special exception.

Member Piela agreed it should be tied into 190-5.3.A.

Acting Chair Driscoll re-opened the public hearing to Attorney Pelech.

Attorney Pelech stated that he has no problem continuing the action on the variance and the special exception and taking a site walk with the Board. The 100' buffer will be delineated on the ground and the septic plans will be submitted to the Board.

Acting Chair Driscoll explained that the advice the Board was given is that variances are not needed. The variances would not be continued, as they would just be thrown out. The Board would only be dealing with the special exception. He asked Planning Administrator Reed how to proceed.

Planning Administrator Reed explained that the Board should take a vote that the variances are not needed due to the Supreme Court ruling, so that will be clear for the record. As for what Member Dibble stated about the wetland boundaries, the Board could require it; however, this applicant is going to also go before the Planning Board. She pointed out that this applicant has not come before the Board for 3.1, which is wetlands relief. If a motion is made that the variances are not needed, what is before the Board is a special exception. She cautions the Board on putting conditions on special exceptions, especially when this application is not asking for wetland variances.

Acting Chair Driscoll clarified that if the Board is going to continue the application for more information for the special exception and septic, it could be suggested to the applicant that it might be beneficial for them to coordinate with RCC before they come back.

Planning Administrator Reed agreed. She pointed out that if this Board wants to do a site walk, that can be done as well.

Member Dibble asked if there would be an issue with continuing this application in its entirety.

Acting Chair Driscoll replied that he does not want to waste the time that was already spent on the variances. The Board has counsel on the variances and they have discussed the issue. He thinks this has been well covered.

Member Dibble commented there is work to be done on the land. The applicant now knows there are some things that need to be done. If the whole project is continued, they get to come back at a later time when everything is ironed out.

Member Piela stated that he tends to agree with Member Dibble. If the entire application is continued, it gives Attorney Pelech the opportunity to investigate and present an opinion in regards to the variances. It gives the applicant the time to put together the other information that the Board is seeking. He thinks this would be the most expedient way to untangle this.

Acting Chair Driscoll commented that he is fine with that, if everyone else is. He continued that he will let Attorney Pelech speak to the special exception. However, in what has been heard so far and the take on the application as a whole, there is not enough information on the septic designs for him to vote on the special exception. He would personally like to see a bit more insight from the Conservation Commission. The verbal from prior Building Inspector Jenness in regards to the shed being okay, puts it into enough gray area that having RCC's input on the whole project would be beneficial for that portion.

Attorney Pelech stated that he has been practicing law for 42 years. The records in the inspection department in the Town of Rye were dismal. In fact, about 20 years ago, he was involved in a case for the Town of Rye and no one could find any records. He had talked to Bill Jenness' wife Priscilla and she said there's a whole bag full of 3x5 cards in the safe in the Town Clerk's Office. The cards go back to the 30's and 40's. He is not sure where those cards are now or if they still exist.

Acting Chair Driscoll commented that it doesn't make sense to track them down.

Attorney Pelech noted that he will request a continuance to next month. He understands the Board is looking for test pit designs and septic locations, along with test pit logs. Also, Member Dibble and RCC would like to see the 100' wetland buffer staked on the ground, which can be done. He is not sure if he can find any more information about the existence of what's out there.

Acting Chair Driscoll explained that there is enough question here that he would like to hear what the Conservation Commission says about the proposal. The Conservation Commission has been very reasonable in the past about what they are trying to do with people of the Town to get their projects done.

Acting Chair Driscoll reclosed the public hearing at 8:58 p.m.

Motion by Burt Dibble to accept the request from Attorney Pelech that this application be continued. Seconded by Michael Brousseau. All in favor.

5. **Charles M. and Lyndsay A. Beynon for property owned and located at 30 LaMer Drive, Tax Map 13, Lot 44** request an Administrative Appeal from the Building Inspector's June 28, 2021 letter which refers to a swingset/play system as an accessory building pursuant to §190-3.1.G(3) and §190-3.1.H. **Property is in the Single Residence District. Case #35a-2021.** (*Requested a continuance*)
 - *Continued to the October meeting.*
6. **Charles M. and Lyndsay A. Beynon for property owned and located at 30 LaMer Drive, Tax Map 13, Lot 44** request variances from §190-2.3.C(1) for a swingset/play system 10+/- from the rear property boundary where 30' is required and from §190-3.1.H(2)(g) for a swingset/play system in the 100' wetlands buffer. **Property is in the Single Residence District. Case #35b-2021.** (*Requested a continuance*)
 - *Continued to the October meeting.*
7. **Matthew & Susan O'Connor Family Trust, Matthew & Susan Trustees of 15025 Alfata Drive, Pacific Palisades CA for property owned and located at 92 Old Beach Road, Tax Map 8.4, Lot 119** requests a variance from §190-2.3.C(2) for a patio, grill and outdoor kitchen 9'+/- from the right side property boundary where 20' is required and from §190-2.3.C(5) and 190-3.4.E for lot coverage of 5,404 sq. ft. where 4,567sq.ft (15%) is allowed. **Property is in the Single Residence District and Coastal Overlay District and SFHA, Zone VE(14). Case #36-2021.**
 - *Continued to the October meeting.*

Note: *Patricia Weathersby was reseated as chair for the remainder of the meeting. Michael Brousseau was unseated.*

8. **Mario A. Ponte & Paula M. Parrish of 200 High Street, Exeter, NH for property owned and located at 1627 Ocean Blvd, Tax Map 13, Lot 23** request an administrative appeal from the building inspector's June 10, 2021 letter denying a Building Permit to demolish and reconstruct existing multi-family residence and to replace the existing septic system stating variance relief from the ZBA is required because the proposed building would not be located in the exact location of the existing nonconforming residence. **Property is in the General Residence, Coastal Overlay and SFHA, Zone AE. Case #37-2021.**
9. **Mario A. Ponte & Paula M. Parrish of 200 High Street, Exeter, NH for property owned and located at 1627 Ocean Blvd, Tax Map 13, Lot 23** request variances from §190-3.1(H) for a septic tank 19.5', a generator pad 20.0', a residence 31.0', and septic tank 76.9' from the wetlands where 100' is required; from §190-2.4(C).(2) for a house 9.4' from the NE side boundary and 10.6' from the SW side boundary where 20' is required; from §190-2.4(C)(1) for a septic tank 9.5' and a generator pad 20.0' from the rear boundary where 30' is required; from §190-3.4(E) for dwelling coverage of 22.2% where 15% is allowed and §190-3.4.(D) for a building height of 33.25' where 28' required. **Property is in the General Residence, Coastal Overlay and SFHA, Zone AE. Case #37-2021.**

Attorney Eric Maher, representing the applicants, spoke to the Board. He stated that the subject property is a .21-acre lot on Ocean Blvd. It's abutted to the rear by Awcomin' Marsh and faces the Atlantic Ocean across the street. Presently, there is a multi-family dwelling unit on the property. There are two apartments, as well as an efficiency. There are six bedrooms, four full bathrooms and two half baths. The septic system was approved back in 1982 by DES. Exhibit C in the Board's packets is a copy of the approval for the construction and operation. DES noted that because of the unique limitations of the property, it authorized the construction of a septic system for a four-bedroom structure, notwithstanding that it has six bedrooms. Even though it is lawful, the septic system on site is sub-adequate. The existing structure is situated to the rear of the lot. It's located 18.1' from the tidal wetlands. The septic tank is 73' from the wetlands and the leach field is 80.6'. The house sits 6.6' from the northeasterly side line and 9.9' from the southwesterly side line. The structure does conform with the front setback. He continued that the dwelling coverage is at 22.3% where 15% is required. In terms of impervious lot coverage, it's presently at 51.8% largely due to the driveway, which takes up almost the whole front of the lot. The structure's height from grade is 35.79' where 28' is required. The use is a pre-existing nonconforming use, being a multi-family residential use in a zone where a single-family home is allowed as a matter of right.

Attorney Maher continued that the proposal that was submitted to the building inspector is more conforming in all ways than what is presently on the site. (He pointed out on the plan the building envelope for the lot.) He noted there is no meaningful way to improve this lot and rebuild this home in a way that is going to cure all nonconformities. As proposed, the residence would move 13' closer to the front boundary. The front setback would be about 31' from Ocean Blvd. The septic tank would move from 73' to 76.9'. The leach field will be going from 80.6' to 101.3', so it will actually be located outside the 100' wetland buffer. There would be minor improvements in terms of the side setbacks. It will be going from 6.6' to 9.4' to the north and 9.1' to 10.6' to the south. The dwelling coverage would go from 22.3' to 22.2'. This is a very minor improvement but it is certainly not becoming worse. The impervious lot coverage will be going from 51.8% to 29.1%. Instead of having a crushed gravel driveway, as what presently exists, there will be techo-block permeable pavers. The pavers are specifically designed for percolation.

Attorney Maher stated that the building inspector ultimately determined that because of the change in the actual footprint for where the building is going to be located, variance relief would be needed and the pre-existing nonconforming provisions in the zoning ordinance do not apply. He and his clients respectfully disagree with that assertion. He directed the Board's attention to §190-6.3.B, which allows for a pre-existing nonconforming structure to be rebuilt upon the destruction by any cause. If possible, the replacement of the structure shall conform to the requirements of the zoning ordinance, which cannot be done in this case. It goes on to say that a variance would not be needed if the change would make the replacement less nonconforming. In this case, the applicants are not seeking to increase any nonconformity or expand any nonconforming use. In all regards, it is going to be more conforming than what the present structure is. As part of the proposal, a deficient septic system would be replaced with a new system, which will be installed by Advanced Onsite Solutions. This will be a vast improvement over what is presently on the property. Because this would be improving the nonconformities in all respects and replacing the current structure with a more conforming residential structure, he

does not believe any variance relief is required and the building inspector should have granted the building permits.

Chair Weathersby noted that the house proposed is certainly a different size and shape than the existing house.

Attorney Maher agreed.

Chair Weathersby also noted that the house is in a different location. She asked if they are adding any additional areas within the setbacks that didn't exist before. Will structure bulk be added in areas where it may have been conforming and now it will be less conforming?

Attorney Maher stated that in looking at the actual site plan itself, he believes they are not putting more area within the nonconforming setback areas. Looking at the plan, there are very straight edges on both sides of the structure within the side setback. In pushing the home forward, it actually reduces the amount in the setback.

Tom Emerson, Architect, stated that in terms of volume, it's increasing because the building is being raised to meet flood plain code. There will be a garage and some storage area underneath the building. In terms of its actual bulk, it's more than what is there now because currently there's a house with two-stories on top of a basement. He pointed out that the proposal is very similar to the house to the north, which has also been raised up.

Attorney Maher pointed out that a lot more is being fit into a much smaller footprint. The height of the structure is actually decreasing, as well. He continued that the new height measured from grade is 33.25'. The existing structure is 35.79'. The new structure is going to be shorter by about 2'.

Chair Weathersby clarified that the applicant is putting building area in an area where a building doesn't exist presently. In one degree, its adding building area in a setback. She explained that they are addressing whether the building inspector was correct in saying the variances were needed. Are the nonconformities all around improving? She thinks a lot of the nonconformities are improving. However, space is being added in buffers that presently don't have building in it.

Attorney Maher noted that space is also being removed. He thinks the spirit and intent is to allow for redevelopment/reconstruction on a pre-existing nonconforming lot, so long as its being improved to the existing nonconformity. He pointed out that the amount of building is not being increased in total within the side setbacks. The amount of building is not being increased in total for the rear setbacks.

Chair Weathersby stated that she would agree if one was being improved and the other was staying the same. However, one area is being improved and its being pushed out in the other direction.

Attorney Maher commented its being pushed out in a way where there is space. Its not going into the front setback. Presently, the structure is about 18' from the wetlands and its being moved.

Chair Weathersby commented that even though it is not in the front setback, where the new building will be located will be filling in areas that are in the side setbacks. She thinks they have to go the variance route.

Attorney Maher explained that because its being moved forward, areas are being filled in that presently don't have encroachment, just like encroachments are being removed on the rear setback. Encroachments are also being removed on the side setback. In terms of total amount of structure within the setbacks, its being reduced. The structure is being elongated on the vertical aspect, but being shrunk on the horizontal. Even though a portion of the structure is being introduced into the side setback that does not presently exist, a portion of the structure is being removed which presently exists and encroaches in the side setback. He looks at it from a balance sheet analysis. On the balance sheet, in terms of encroachments on both side setbacks, there will be a reduction.

Member Driscoll stated that the way he understands Rye's Zoning, the proposed upper level far corner of the building would be outside the existing building envelope.

Attorney Maher commented that the approach that a lot of other municipalities have taken is to look at it from a 2-dimensional standpoint.

Chair Weathersby stated that she thinks they have always determined that if there is new building area going into a setback that doesn't presently exist, it's not a decrease in the nonconformity and a variance would be needed. She opened to the public on only the issue of whether the building inspector erred in requiring variances.

Mario Ponte, applicant, stated that he wanted to keep the structure where it is currently located because one of the attractions is that it's set back from Ocean Blvd. However, the Conservation Commission would rather see it away from the marsh. He reiterated that he would much rather have it built on the same footprint that it is now.

Hearing no further comments, Chair Weathersby closed the public hearing at 9:29 p.m. She asked the Board their thoughts on the administrative appeal that the building inspector erred in requiring zoning variances.

Member Driscoll commented that he thinks the building inspector was correct.

Member Piela stated that he looks at the setback distances in the proposed area of the coverage. It looks like it's improving in all accounts. He also looks at 190-6.3.B where the last sentence says "unless the replacement would make the replacement less nonconforming". He has a hard time arguing that these changes are making the entire structure less nonconforming than what exists there today. However, he certainly sees the logic to the interpretation that the Board has

had in the past that structure is being added inside a buffer, which would make variances being required.

Chair Weathersby noted that in the future, it would be interesting to have different attorneys' views of that last sentence (190-6.3.B).

Member Dibble stated that he reads the ordinance the same way Member Piela does. It's a substantial improvement.

Member Chororos commented that she concurs with Member Piela.

Member Brousseau stated that in using the balance sheet, if there is a reduction and not an increase, it makes sense.

Chair Weathersby asked Member Piela to restate his position.

Member Piela stated that his position is that the changes being made would make the replacement less nonconforming. The replacement structure is less nonconforming than the current structure based on the balance sheet. Also, he does not see a difference in bulk. As he looks at the dwelling coverage square footage, it's very similar. He thinks that the building inspector made an error because the proposed structure is less nonconforming than the existing structure.

Chair Weathersby called for a vote on the factors for an administrative appeal:

- **Has there been an error in any order, requirement, decision or determination by an administrative official in enforcement of any zoning ordinance adopted pursuant to RSA 674:16?**

Chris Piela – Yes

Burt Dibble – Yes

Sandra Chororos – Yes

Patrick Driscoll – No

Patricia Weathersby - No

Motion by Chris Piela to grant the administrative appeal for Mario A. Ponte and Paula M. Parrish of 200 200 High Street, Exeter, NH for property owned and located at 1627 Ocean Blvd, Tax Map 13, Lot 23 from the building inspector's June 10, 2021 letter denying a Building Permit to demolish and reconstruct existing multi-family residence and to replace the existing septic system stating variance relief from the ZBA is required because the proposed building would not be located in the exact location of the existing nonconforming residence. Seconded by Burt Dibble.

Vote: 3-2 Opposed: Patrick Driscoll and Patricia Weathersby

Motion by Patricia Weathersby to continue the variance request of Mario A. Ponte and Paula M. Parrish to the October meeting to allow for the appeal period to run. Seconded by Burt Dibble. All in favor.

- 10. Joel & Lauren Feid for property owned and located at 705 Brackett Road, Tax Map 17, Lot 34-02** request a variance from §190-3.1 (H)(2)(a) & (g) for a deck 63.5' from the wetland boundary where 75' is required. **Property is in the Single Residence District. Case #38-2021.**

Joel Feid, applicant, presented to the Board. He noted that they are requesting a variance for the extension of an existing deck 63.5' from the wetland boundary where 75' is required. This will add approximately 158sq.ft. of additional deck including steps. He has met with the Conservation Commission and has included their letter acknowledging the general support of the request. There is also abutter support from Matthew and Natasha Goyette of 750 Brackett Road, and Chris and Susan Reaney of 691 Brackett Road. He continued that the extension will be built on a maximum of three footings. He noted that he has submitted a plan showing the existing deck with the proposed extension. The extension will be constructed with composite decking material, similar to the current deck. There will also be three steps off the deck to the rear of the property.

Member Driscoll asked if there has been consideration to keeping the steps where they are currently located and just squaring off the deck to reduce the number of footings within the buffer.

Mr. Feid replied that the backyard is a play area for his children. It creates more visibility to have that somewhat open. Initially, it was going to be 10' wide steps, but it really reduced the amount of railing, so they were reduced to 6' steps.

Chair Weathersby opened to the Rye Conservation Commission.

Karen Oliver, RCC, noted that the Commission has sent a letter to the Board, which is dated August 30th. She continued that it looks like Mr. Feid has already gotten the permit for the playground set.

Mr. Feid commented that he got the impression from Mike's letter (Mike Garvan RCC Member) that the Commission thought the swing set was recently put up. He noted that the swing set was put up in April. He contacted the building inspector in March and asked if it needed a permit and he said "no". Referring to RCC's letter, he noted that the salt marsh hay has been addressed and installed on August 8th. There's a second bed that has not been addressed, but the plan is to remove the mulch and put the salt marsh hay down. Based on Mike Garvan's wording, it seemed like he thought the swing set was put in in-between the RCC doing a site walk and Mike Garvan doing a drive-by. However, the installation of the swing set goes back to April.

Ms. Oliver stated that she will stand by the idea that the play structure was properly permitted. RCC would just like the play structure to be properly permitted in whatever it's supposed to be; whether it be a special exception. RCC would request those two conditions (shown in RCC letter).

Chair Weathersby asked how it would be properly permitted, if the building inspector told him he didn't need a permit.

Ms. Oliver stated that it's definitely a structure. RCC has another case right now where there is a structure in a buffer zone. Speaking to Mr. Feid, she asked if the play structure is within the 75' wetland buffer.

Mr. Feid noted that the whole rear of the property is within the buffer.

Ms. Oliver commented that if the building inspector okayed it then it's okay. She asked if there could be some clarity around how that happened.

Member Driscoll stated that in town, there is some confusion as to whether a play set is a permanent structure. There's nothing very clear on it. He looked into the zoning and it says anything that is going to sit there for more than six months. A play set does sit there for more than six months so there is potential that permitting will be needed for play sets where this has not happened in the past. He thinks this is in a limbo right now. He thinks there will be some clarity over what happens with playsets in the near future.

Chair Weathersby agreed. It seems to fit the definition of structure and probably should be permitted. She noted that playsets are getting bigger and the wetlands are becoming more precious. She commented that the Board will ask for clarity from counsel as to whether play structures need to have permits.

Ms. Oliver stated that for clarity moving forward, if it is going to be okay for the building inspector to okay a structure in the buffer, this is something the Conservation Commission would want to be told about and involved in.

Chair Weathersby explained that if it's a structure in the buffer, the building inspector should not be granting a building permit. It would have to come for a variance.

Member Driscoll commented that this would be the case whether it be in the buffer or the setback.

Chair Weathersby agreed.

Speaking to the applicant, Member Piela clarified that there are no trees being removed. It looks like lawn is just being taken out.

Mr. Feid confirmed. He pointed out that the Conservation Commission liked the idea of reducing the lawn area.

Chair Weathersby asked if he is okay with replacing the bark mulch.

Mr. Feid confirmed.

Chair Weathersby noted that two letters of support have been received from the Goyettes and Reaneys. The Board has also received a letter of opposition from Pauline Simeonov. Chair Weathersby pointed out that the letter identifies the Simeonov property as being across the street

and lower in grade. Ms. Simeonov notes in her letter that there has been a considerable negative effect on her property, since the Feid's built their house. A wetland scientist for the Simeonov property confirmed that by increasing the impermeable surfaces on the Feid's lot and cutting trees, they are impacting the wetlands and pushing water off his land onto the abutters. The letter also notes that the development happened incrementally over four years and is no longer optimally managed by the stormwater management plan. Ms. Simeonov states in the letter that impermeable surfaces have increased and more trees have been cut. Chair Weathersby summarized that Ms. Simeonov is saying that the development of the Feid property has impacted her property.

Speaking to the applicant, Chair Weathersby asked what is going to be under the deck.

Mr. Feid explained there is crushed stone under the existing portion of the deck. The new portion will be just be lawn per the Conservation Commission. He continued with reviewing the variance criteria:

- The variance is not contrary to the public interest because it's a minimal extension of the deck to square off the shape, consistent with others in town. It will have a more functional shape. The deck does not threaten the public health, safety or welfare. Part of the deck already exists.
- The spirit of the zoning is observed because the variance request will not violate the basic zoning objective to a marked degree. Many homes in the area have square or rectangular decks.
- Substantial justice is done because there is no public benefit by denying the request. The request for relief is minimal and supported by abutters that have the most visibility to it.
- The values of surrounding properties are not diminished because this is a minimal extension of the deck to square off the shape, which will be consistent with others in the neighborhood.
- There are special conditions of the property that distinguish it from others in the area because although the lot is 1.98-acres, the lot is essentially cut in half due to a seasonal stream.
- There is no fair and substantial relationship between the general ordinance provisions and the specific application of the provision to the property. Wetland setback requirements are intended to protect the wetlands and minimize surface alteration. Because the location is a minimal extension of an existing deck, the corner in question would reduce existing lawn area and there are also numerous native plantings between the deck and the buffer.
- The proposed use is reasonable because this is a minimal extension of a deck.
- Literal enforcement of the ordinance would result in unnecessary hardship because extending the current deck is the most logical option. An alternative would be a paver patio, which would require significantly more surface alteration. The extension requires the maximum of three footings.

Chair Weathersby closed the public hearing at 9:58 p.m.

Member Dibble commented that as he remembers, decks are considered impervious. He is not sure if this makes a difference here.

Chair Weathersby explained that open decks are considered for lot coverage. Decks have been done with gravel underneath, so that would be impervious. This is on dirt/grass and there are slats.

Member Driscoll commented he is in favor. He is a little concerned about the incremental changes that have happened on the property. From a zoning perspective, he thinks about whether he would have approved the initial application if the deck was this large. From visiting the site, he does not see any change that it would have on the property or on the wetland. There is no visibility to the neighbor. The abutter who is opposed, cannot see the current or proposed deck. The amount of water that's moving on the lot is not going to affect the abutting property with this change.

Referring to Member Dibble's comment, Chair Weathersby noted that under Rye's definition for impervious coverage, which is taken from NH RSA from Shore and Water Quality Protection Act, decks are indeed impervious.

Member Piela agreed with Member Driscoll. This seems like a minimal and reasonable ask. There are special conditions due to the fact that the entire backyard is in the wetland buffer. The representative from the Rye Conservation Commission does not seem to be opposed to this project. In his opinion, it's a reasonable ask.

Member Chororos agreed.

Chair Weathersby agreed. It is not a large addition to the deck. It really improves the functionality of that space. She does not think it's going to have any runoff issues nor effect property values or wetland quality. She can support the request.

Chair Weathersby called for a vote on the request for relief to 190-3.1.H(2)(a) & (g) with the condition that all bark mulch in the 50' wetland buffer is removed and replaced with marsh hay or another native ground cover. She recommended that they leave the issue of the special exception for the playground set alone at this time.

1) The variances are not contrary to the public interest?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

2) The spirit of the ordinance is observed?

Burt Dibble – Yes
Sandra Chororos – Yes

Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

3) Substantial justice is done?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

4) The values of surrounding properties are not diminished?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

5) There are special conditions of the property that distinguish it from other properties in the area?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

6) There is no fair and substantial relationship between the general purposes of the ordinance provisions and the specific application of those provisions to the property?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

7) The proposed use is a reasonable one?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

8) Therefore, literal enforcement of the ordinance would result in unnecessary hardship?

Burt Dibble – Yes
Sandra Chororos – Yes
Chris Piela – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

Motion by Chris Piela to approve the application of Joel and Lauren Feid for property located at 705 Brackett Road, Tax Map 17, Lot 34-02 for a variance from §190-3.1 (H)(2)(a) and (g) for a deck 63.5' from the wetland boundary where 75' is required, with the condition as stated by the Rye Conservation Commission that all bark mulch in the 50 wetland buffer will be removed and replaced with marsh hay or another native ground cover. Seconded by Sandra Chororos.
All in favor.

Note: Burt Dibble recused himself for the following application. Michael Brousseau was seated.

- 11. Seacoast Property Holdings, LLC, Wendy Cabral of 3710 Buckeye Street Suite 100, Palm Beach Florida for property owned and located at 55 Harbor Road, Tax Map 9.2, Lot 2 requests an equitable waiver of dimensional requirements for a generator installed 8.9' from the side boundary where a variance was granted for it to be located 10' from the side boundary on 4-3-2019. Property is in the Single Residence, Coastal Overlay and SFHA Zone. Case #39-2021.**

John Chagnon, Ambit Engineering, representing the applicant, spoke to the Board. He explained they are asking for an equitable waiver of dimensional requirements for a generator that was installed at 55 Harbor Road. The project was introduced to the Board in April of 2019. It did require some variances, which were granted and included a side setback of 10' for the generator. As construction went on, it was found that the generator on the initial plan was a bit smaller than the generator that was installed. The builder asked Ambit to prepare a plan. The setbacks to the dwelling were maintained but the setback to the property line was slightly compromised. The generator was installed and the as-built survey showed that the 10' was violated. He noted that the abutter who is affected on that side has written a letter stating that they have no problem with the Board granting this request.

Chair Weathersby opened to the public.

Karen Oliver, RCC, stated that the Conservation Commission feels this is de minimis and is not an issue.

Hearing no other comments from the public, Chair Weathersby asked the Board if they have any questions.

Member Driscoll asked if the larger generator needs to be tested more often. He also asked if it is potentially louder than the original generator that was proposed.

Mr. Chagnon replied that he does not know the specifics of the generator; however, it is probably very similar.

Joe Tucker, builder, stated that it is negligible. The generator exercises once a week for 15 minutes. He noted that it is well hidden with plantings and shrubs on the neighbor's side, as well as from the road.

Chair Weathersby explained that equitable waivers are a bit different. There are certain criteria that must be met and if everything is satisfied it gets granted. She called for a vote on the criteria:

- **The violation was not noticed or discovered by owner, former owner, owner's agent or representative, or municipal official, until after the structure in violation had been substantially completed or until after a lot or other division of land in violation had been subdivided by conveyance to bonafide purchaser for value?**

Sandra Chororos – Yes
Chris Piela – Yes
Michael Brousseau – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

- **The violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation or bad faith on part of any owner, owner's agent or representative, but was instead cause by a good faith error in measurement or calculation made by owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing the permit over which the official had authority?**

Sandra Chororos – Yes
Chris Piela – Yes
Michael Brousseau – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

- **The physical and dimensional violation does not constitute a public or private nuisance nor diminish the values of other properties in the area nor interfere with or adversely affect any present or future permissible uses of such property?**

Sandra Chororos – Yes
Chris Piela – Yes

Michael Brousseau – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

- **Due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained it will be inequitable to require the violation to be corrected?**

Sandra Chororos – Yes
Chris Piela – Yes
Michael Brousseau – Yes
Patrick Driscoll – Yes
Patricia Weathersby – Yes

Motion by Patrick Driscoll to grant the equitable waiver of dimensional requirements for the property located at 55 Harbor Road. Seconded by Chris Piela. All in favor.

- 12. Christopher & Melissa Snow for property owned and located at 1 Clark Road, Tax Map 19, Lot 90** request variances from §190-6.3A for expansion of a non-conforming structure; from §190-2.3.C.3 for steps and a deck 29+/- from the front boundary where 34' is required; from §190-2.3.C.5 for a building area of 17+/- % where 15% is allowed; and from §190-3.1.H for steps and a deck 65' +/- from the wetlands where 75' is allowed. **Property is in the Single Residence District. Case #40-2021.**

- *Continued to the October meeting.*

- 13. Barbara A. Miller Trust of 2007, Barbara Miller, Trustee for property owned and located at 22 Jenness Avenue, Tax Map 8.4, Lot 54** requests variances from §190-6.3.B to raze an existing structure and replace; from §190-2.4.C(1) for a patio 6.1' and house overhang 15.5' from the rear boundary where 25.4' is required; from §190-2.4.C(2) for an A/C Unit 18.7' from the right boundary where 20' is required; from §190-2.4.C(3) for a walkway 17.3' and house overhang 21.2' from the front boundary where 25.7' is required; from §190-2.4.C(5) and §190-3.4.E for dwelling coverage of 24% where 15% is allowed and for lot coverage of 26.7% where 30% is allowed. **Property is in the General Residence and Coastal Overlay Districts. Case #41-2021.**

- *Continued to the October meeting.*

IV. OTHER BUSINESS

Chair Weathersby noted that the Board has received a couple of complaint letters. The McLaughlins, who are abutters, wrote in regards to 63 Old Beach Road. They criticized the Board's decision based on the process and substance. They disagree with the variance that was granted for the setbacks. They did not feel there was hardship. They noted that the Board voted

on all the variances collectively, instead of individually. They also did not like the fact that a wetland expert was not consulted. Chair Weathersby stated that this was run by counsel. In his opinion, the concerns failed to meet the criteria for a motion for reconsideration of the Board's decision. She appreciates that the McLaughlins took the time to write in to the Board with their complaints and they're duly noted. She pointed out that there are still a couple of days to submit a formal motion for reconsideration, should they wish to, that would meet the statutory criteria for a motion for reconsideration. She asked Planning Administrator Reed to reach out to the McLaughlins.

Chair Weathersby noted that the Board received a letter concerning 31 Perkins Road. They were also complaining about the Board's decision. Chair Weathersby commented that one thing that bothered her is that they made an allegation in the letter that one of the people who gave testimony about renting the house never rented from them. This makes her think that the Board should ask more questions about the rental time period, etc. She pointed out that the letter was received well past the 30-day period for appeal. It certainly doesn't constitute a notice of reconsideration. She thanked them for the correspondence. She reminded everyone that if there are concerns about what the Board has done, it should be put in a proper motion for reconsideration and be submitted within 30-days of the original decision.

No further business before the Board.

Adjournment

Motion by Patricia Weathersby to adjourn at 10:17 p.m. Seconded by Chris Piela. All in favor.

Respectfully Submitted, Dyana F Ledger