

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

**Wednesday, January 6, 2021
7:00 p.m. – via ZOOM**

***Members Present:* Chair Patricia Weathersby, Vice-Chair Shawn Crapo, Burt Dibble, Gregg Mikolaities, Patrick Driscoll and Chris Piela**

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

I. CALL TO ORDER

Chair Weathersby called the meeting to order at 7:01 p.m. via Zoom teleconferencing.

Statement by Patricia Weathersby:

As chair of the Rye Zoning Board of Adjustment, I find that due to the State of Emergency declared by the Governor as a result of the COVID-19 pandemic and in accordance with the Governor's Emergency Order #12 pursuant to Executive Order 2020-04, this public body is authorized to meet electronically.

Please note that there is no physical location to observe and listen contemporaneously to this meeting, which was authorized pursuant to the Governor's Emergency Order. However, in accordance with the Emergency Order, I am confirming that we are providing public access to the meeting by telephone, with additional access possibilities by video and other electronic means. We are utilizing Zoom for this electronic meeting. All members of the board have the ability to communicate contemporaneously during this meeting through this platform, and the public has access to contemporaneously listen and, if necessary, participate in this meeting by dialing in to the following phone number: 646-558-8656 or by clicking on the following website address: www.zoom.com ID #827-6692-9392 Password: 123456

Public notice has been provided to the public for the necessary information for accessing the meeting, including how to access the meeting using Zoom telephonically. Instructions have also been provided on the website of the Zoning Board of Adjustment at: town.rye.nh.us go to the Board of Adjustment page and click on the agenda for this meeting. If anyone has a problem, please call 603-379-0801 or email: Kim Reed at KReed@town.rye.nh.us.

In the event the public is unable to access the meeting, the meeting will be adjourned and rescheduled. Please note that all votes that are taken during this meeting shall be done by roll call vote.

Roll call attendance of members:

1. Patricia Weathersby
2. Shawn Crapo
3. Burt Dibble
4. Patrick Driscoll
5. Gregg Mikolaities
6. Chris Piela

(Each board member confirmed that there were no others present with them in the room.)

Note: *The request for an administrative appeal was taken out of posted agenda order. The item was posted as a joint meeting with the Board of Selectmen and Zoning Board of Adjustment. Burt Dibble recused himself from this matter.*

Sitting for the administrative appeal request:

Patricia Weathersby, Shawn Crapo, Patrick Driscoll, Gregg Mikolaities and Chris Piela

1. **Trustees for the Rye Public Library, 581 Washington Road, Tax Map 12, Lot 43,** request an administrative appeal per RSA 674:33, RSA 676:5 and ZO §190-7.1 of Section 13 of the Board of Selectmen's decision dated 11-10-2020 regarding whether 500 Washington Rd, LLC must comply with zoning requirements.
Property is in the Single Residence, Business District and Aquifer Wellhead Protection Overlay. Case 303-2021.
No public comment will be heard on this matter.

Chair Weathersby noted the Board of Adjustment has received the appeal by the Trustees. The Board has also received the objection to the appeal from the Board of Selectmen. The Board of Adjustment has received opinion from its legal counsel concerning this matter; particularly, the matter of whether or not the Board of Adjustment has subject-matter jurisdiction to hear the appeal.

Vice-Chair Crapo stated he has read the analysis and he concurs that the Board does not have jurisdiction at this time.

Chair Weathersby explained that the Selectmen and 500 Washington Road, LLC entered into an agreement in November that was called 'Amendment to the Contract for Property Exchange/Swap'. In that agreement, it was indicated that the proposed project with 500 Washington Road, LLC for the former Parsonage property complies with zoning requirements, as to setbacks and parking, and does not require site plan approval. In her opinion, and that of the BOA's counsel and the other parties, the language in that agreement does not constitute an administrative decision sufficient to trigger jurisdiction of the Board of Adjustment. By law, the Zoning Board of Adjustment's appellate jurisdiction pertains to alleged errors in administrative decisions, which are decisions made by administrative officials in enforcing the zoning ordinance. An administrative decision is a determination made by an administrative official who, in the Town of Rye, has the responsibility to issue permits under the zoning ordinance or has the responsibility to enforce the ordinance. The Selectmen can enforce the ordinance pursuant to Section VIII of Rye's Zoning Ordinance; however, the statements that were in that

agreement are not an enforcement matter but more of a permitting nature. Further, the statements made by the Selectmen in that agreement do not appear to be binding determinations that no planning board or zoning board approvals will be required. Elsewhere in the agreement, it was agreed that 500 Washington Road, LLC must obtain all permits required. The agreement also noted that the Selectmen have no control or authority over the land use boards and no requirement for approvals are being waived. Chair Weathersby stated the challenged statements seem to be more of the conceptual nature non-binding opinion and don't constitute a sufficient determination that is appealable to this Board. She thinks the statements in the amendment to the property exchange/swap agreement do not constitute a decision of an administrative official, as that term is defined by statute. Therefore, the Zoning Board of Adjustment doesn't have jurisdiction to hear the applicant's administrative appeal. However, at such time as any appeal is timely filed after the issuance of a building permit or another decision by the building inspector or other duly authorized administrative official of the Town, concerning this project, she believes the Board would have jurisdiction to the extent that the permit issuance or the decision pertained to the construction, interpretation or application of the Rye Zoning Board of Adjustment. She noted it is just not ripe yet for the Board of Adjustment to be hearing this. It does not mean the Board never will. However, at this time, it is her belief and legal counsel's opinion that the Zoning Board of Adjustment does not have jurisdiction over the statements made in that agreement.

Chair Weathersby continued that she understands there is now an agreement with the Board of Selectmen and the Library Trustees that the Board of Adjustment does not have jurisdiction over this appeal. She asked if there was anyone present from either of those bodies who would like to confirm.

Karen Oliver, Library Trustee, stated that what was cited was what she understood to be the agreement.

Chair Weathersby asked for the thoughts of the BOA members or for a motion to dismiss the appeal of the Trustees of the Rye Library for lack of jurisdiction, without prejudice.

Motion by Shawn Crapo to dismiss the appeal of the Trustees of the Rye Public Library for lack of jurisdiction, without prejudice. Seconded by Chris Piela.

Roll Call: Gregg Mikolaities – Yes; Shawn Crapo – Yes; Patrick Driscoll – Yes;

Chris Piela – Yes; Patricia Weathersby – Yes

Motion passed

Chair Weathersby noted that two of the Selectmen were going to attend the meeting, so it had to be noticed as a Selectmen's meeting. The BOA minutes of this meeting will serve as the Selectmen's minutes also on this matter. She asked if anyone from the Board of Selectmen would like to speak on this matter.

Planning Administrator Kimberly Reed stated that she received a text from Town Administrator Becky Bergeron stating that the Select Board in full will not be attending this evening's meeting.

Town Administrator Becky Bergeron, on behalf of the Board of Selectmen, (by text), noted that the Select Board concurs with the understanding of the dismissal.

Note: *Burt Dibble was reseated.*

II.

BUSINESS

- Approval of the December 2, 2020 Meeting Minutes

Motion by Shawn Crapo to accept the minutes of December 2, 2020 as amended. Seconded by Burt Dibble.

Roll Call: Gregg Mikolaities – Yes; Shawn Crapo – Yes; Patrick Driscoll – Yes; Burt Dibble – Yes; Patricia Weathersby – Yes

Motion passed

- Resignation of Frank Drake, Alternate

Chair Weathersby thanked Frank Drake for his many years of service to the Board and wished him well.

Continuances:

Motion by Patricia Weathersby to continue the application of Drew Pierce for the Kehas Family Living Trust at 2257 Ocean Blvd to the February meeting. Seconded by Gregg Mikolaities.

Roll Call: Gregg Mikolaities – Yes; Shawn Crapo – Yes; Patrick Driscoll – Yes; Burt Dibble – Yes; Patricia Weathersby - Yes

Motion passed

III.APPLICATIONS

1. Request for rehearing and reconsideration of the Board of Adjustment's September 23, 2020 denial of variances for property located at 4 Washington Road, Tax Map 13, Lot 40. **Case #35-2020.**

Public hearing closed during Board discussion on this request.

- **Withdrawn**

2. **Craig & Denise Benson, Trustees, K&L Realty Trust for property owned and located at 0 Merrymeeting Lane, Tax Map 15, Lot 18, request a special exception pursuant to §190.3.1.H.2(f) and §190.3.1.G(2) for a driveway in the wetlands buffer. Property is in the Single Residence District and Wetlands Overlay District. Case #45a-2020.**

3. **Craig & Denise Benson, Trustees, K&L Realty Trust for property owned and located at 0 Merrymeeting Lane, Tax Map 15, Lot 18, request variance from §190.3.1.H.2(a), (b), and (g) for a new house with an eave 14.1', a wall 17', a septic**

system 66' and a pervious driveway 15' from the wetlands where 100' is required and from §190.3.1.H.2(e) for cutting trees greater than 4.5" in diameter within the wetland buffer; and relief from Building Code §35-14.B(2): D(1) for a septic system 66' from the wetlands where 75' is required. **Property is in the Single Residence District and Wetlands Overlay District. Case #45b-2020.**

Attorney Tim Phoenix, representing the applicants, presented to the Board. He noted that the plan shown on the screen is a revised plan that was submitted a few weeks ago. Jim Gove has located and delineated two functioning wetlands, which are shown on the revised plan as 'Wetland A' and 'Wetland B'. The red line shown on the plan is a wetland delineation line from 1985. It is not exactly where Wetland B starts, but is in that general area. The wetland across the street has also been found, which is at the end of a culvert. The far lower left of the plan shows the 100' delineation of that wetland. He continued that the proposal is for a two-story home with a 2,880sf footprint with about 4,900sf of total living space. The lot, which has existed at least since 1985, is subject to covenants that require the house to be of a certain size. The size of the proposed house is in keeping with that. The homes in the neighborhood range from about 3400sf to 8800sf, with the average being 5300sf. The Conservation Commission has inspected the site and issued minutes from the site walk. The Commission did not support the application; however, he feels strongly the applicants are entitled to this relief. He noted that while the Conservation Commission did not support it, there is no evidence provided that would support their non-support, while there is evidence supporting the granting of the variances. He pointed out that a DES Subsurface Permit is needed.

He explained that the issue is the distance from the closest wetland to the house. (He pointed out the location of that wetland on the plan.) That wetland, which either didn't exist or wasn't known back in 1985, is close to the house. The 100' setback or 75' setback takes the whole lot out of upland that is not in the buffer or wetland. There is no way to build a home on this lot without the relief being requested. Relief is needed because the house is between 14' or 17' and the septic is 66' from the wetland. He pointed out that the house is between the septic and the wetland. Also, the driveway is going to be 15' away. He also pointed out that trees are going to be cut for construction of the home. He asked Jim Gove to address the wetland issues.

Jim Gove, Gove Environmental Services, presented photos of the property on the screen which showed Wetland A. He explained this is one of those particular wetlands that has hydric soils, but fairly marginal hydric soils. It doesn't have a real strong plant community, but it does have a plant community. It is still wet, even though there are Pines and Oaks in this wetland area. This wetland area really doesn't function much like a wetland. It is essentially wet in the springtime and is saturated to the surface. However, the rest of the time, it looks pretty much like an upland. (He presented a photo showing the upland that lies in-between Wetland A and the larger wetland to the rear; Wetland B. He also presented a photo showing Wetland B.) He noted that Wetland B has a lot of water. It has clear evidence of roots that are shallow and a much denser vegetation. The vegetated community is in fact all wetland species. This wetland functions a lot more like a wetland. It has flood storage, nutrient trapping, sediment retention and wildlife habitat. It is a large wetland that extends further and further way. He continued that Wetland A, which lies directly adjacent to the house, does not have a lot of function. Wetland B, which lies well away from the house to the rear (north) of the property has multiple functions and provides

a lot of wetland wildlife habitat. He does not believe the house will be a detrimental impact to Wetland A because essentially its functions are very low. The major function it does have is that it has some storage of water, but only in the springtime. It really does not have a lot of wildlife habitat and does not have the strong plant community. Whereas, Wetland B is clearly a wetland that has a high function in value.

Attorney Phoenix pointed out they are here to determine the variances needed for this house vis-a-vis a wetland. There is no setback or coverage relief necessary. The question becomes a balancing of the property rights of the Benson Family to develop and utilize their property against the relative harm to the public; meaning, is there harm to the wetland. He asked Bob Baskerville to discuss the best management practices for construction and the practices to provide stormwater treatment.

Bob Baskerville, Bedford Design and Consultants, stated that test pits were done and witnessed by the Town in May and both were adequate. A full septic system was designed that meets all State requirements. Everything has been “tucked in” as tight as possible to pull the house as far forward as possible. He noted there is one area of hardwoods on the lot, in which most is Pine. This is right in front of the garage. That area of hardwoods will be saved. He continued that a pervious pavement driveway has been designed. The site from the road, goes down at a very mild grade. There is not a lot of cut or fill needed. The drip edge around the building has been designed to take 100% of the flow from the roof. He commented that a maintenance plan has been submitted for all the stormwater management practices.

Speaking to Mr. Gove, Vice-Chair Crapo stated it was said that between the two wetlands it was more wet in the spring. He asked if either of the wetlands involve or qualify as a vernal pool, which will require added protections.

Mr. Gove explained that Wetland A is absolutely not a vernal pool. It does not have enough standing water during the springtime to qualify at all as a vernal pool. This is true throughout its extent. He noted that his evaluation was not done in the spring. However, it is his belief that moving further back into Wetland B, there will be a place that will have enough water (18” of standing water) to have some vernal pool activity. It is not along the boundary of Wetland B. The vernal pool activity would be to the north of the Wetland B delineation.

Referring to the plan on the screen, Attorney Phoenix pointed out another wetland of 5,000 to 6,000sf. He noted that any water in Wetland A that is trying to make its way to Wetland B would have to go around that upland, giving more area and distance for treatment.

Attorney Phoenix reviewed the criteria for granting the variances:

- ***The variances are not contrary to the public interest and the spirit of the ordinance is observed. Will granting the variances unduly and to a marked degree conflict with the ordinance such that it violates the ordinances basic zoning objectives? The purpose of the ordinance is to lessen congestion in the streets:*** this is a house lot and has always been a house lot. It has always been known that someone would be building a single-family home on this lot. It is not going to create congestion in the streets. ***Secure safety***

from fire, panic and other dangers: This will be a brand new to-code home with best management practices used during construction. There will be stormwater treatment going forward, towards a wetland that has very low function and values. It is not going to create problems with fire, panic and other dangers. **Promote health and the general welfare:** for the same reasons, the primary wetland will be fully protected. The closest portion of the house is about 115' away. **Promote adequate light and air:** This is a very large lot. There is plenty of distance between this home and any other home surrounding it. **Prevent the overcrowding of land:** This will be a single-family home. **Avoid undue concentration of population:** Again, this is a single-family home. **Facilitate provision of solid waste, water, sewage, recreation facilities and use of natural resources and public requirements:** The design meets all the zoning and building code requirements, with the relief being asked for today. **Assure proper use of natural resources and other public requirements:** Balancing the rights of the Bensons to use their property, where these protections are in place and the highly functioning wetland being so far away, this is clearly met.

- **Will granting the variance alter the essential character of the locality?** It does not. These variances allow a home to be built outside of wetland, with proper protection in place for the wetland. The locality is a number of larger homes on that particular street. **Does it threaten the public health, safety or welfare?** The expert opinion of Jim Gove is that it will not. There is also the expert opinion of Bob Baskerville that extra protections are in place.
- **Will granting the variance diminish surrounding property values?** This lot has existed since at least 1985. Other people have built around it. It has always been known that someone would put a home on the lot. With the protections of the wetlands, the home is not going to diminish surrounding property values.
- **Special conditions exist that distinguish the property from others in the area.** It is a large lot for Rye. Most of it is wetland or wetland buffer. Those factors limit where a house can be located and eliminates the possibility of putting a house outside the buffer. Those combined create special conditions.
- **There is no fair and substantial relationship between the public purposes of the ordinance and its application in this instance.** The purpose here to protect the wetland. As Jim Gove has said, the wetland is protected. There is no reason to apply the strict requirements of the ordinance with respect to the buffer.
- **The proposed use is reasonable.** It is a residential use in a residential zone, so the use itself is reasonable.
- **Will substantial justice be done by granting the variance? If there is no benefit to the public that would outweigh the hardship to the applicant, this factor is satisfied? Any loss to the applicant, not outweighed by a gain to the general public, is an injustice.** If the variances and other relief is denied, the Benson Family will have a lot that they cannot put a house on. The parcel will be nearly valueless, compared to its value as a house lot.

Comparing that to the harm to the public if this is granted, it is almost non-existent. Where the wetland within 100' is very low functioning and procedures are being put in place to capture stormwater and direct it from the wetland, there is little to no harm to the public. For all those reasons, it is felt the Bensons are entitled to those variances.

Attorney Phoenix reviewed the special exception requirements for a driveway within the wetland buffer.

- ***The proposed use is not injurious nor detrimental to the neighborhood.*** A pervious driveway is being installed. Rainwater is going to go through it and have a chance to be treated or directed away from the wetland.
- ***The proposed use is in harmony with the general purpose and intent of the ordinance and in accordance with the general and specific rules therein.*** The purpose of the ordinance is to protect the wetland. The number of feet away is somewhat arbitrary. It is in many places 75' to 100'. For the reasons stated in the variance argument, this requirement is met.
- ***Due to existing conditions, no alternative route is feasible.*** There is no way to put a driveway on this lot without it being in the buffer.
- ***The use has to be essential to the productive use of the land not so zoned.*** The only way the upland can be used is with the special exception the variances that have been requested.
- ***To a maximum extent practicable, the construction will have the least possible detrimental impact on the wetland.*** The interpretation of Jim Gove's commentary and report definitely leads to that conclusion.
- ***No alternative feasible route exists which does not cross or alter a wetland.*** The driveway is not crossing or altering a wetland. It is in the wetland buffer.
- ***Economic advantage alone is not sufficient reason.*** Economic advantage alone is not the issue. The issue is the right to use one's property and the right for the Benson Family to have a home for their daughter and her family to live in.

Attorney Phoenix stated that because the Conservation Commission did not support it, the Bensons would be willing to include native plantings near the wetlands, if that is deemed reasonable by the Board.

Mr. Baskerville noted that the Benson bought this lot in May of 1993. They have owned the lot for over 27 years. They had just not gotten to the point where they wanted to build on it yet.

Chair Weathersby opened to the Board for questions.

Member Mikolaities asked Attorney Phoenix to speak about the protective covenants for the size of the house. He asked if this is a lot of record from 1985.

Attorney Phoenix explained it is a lot of record from 1985 or 1986.

Mr. Baskerville noted that the Planning Board signed it in 1987. The plan is dated 1986.

Referring to the covenants, Chair Weathersby pointed out that in Section C it says that dwellings shall have a minimum of 3200sf. It also says it is supposed to be a traditional colonial design and has certain construction requirements.

Member Mikolaities stated that it looks like the slab is going to be set on existing grade.

Mr. Baskerville explained the building is raised up a little in the front. There will be a walkout in the back, so there is a basement. It will be grade level excavation.

Member Mikolaities commented it is tough to see where the Wetland A line is. He asked if there are any recommendations for delineating that so there aren't any encroachments in the future.

Mr. Gove stated that a lot of places have monumentation along the boundaries and that might be appropriate here. He thinks that will go a long way for making sure there is no encroachment, especially during construction.

Attorney Phoenix noted that he is sure the Bensons would agree to place that monumentation.

Vice-Chair Crapo commented that the neighbor's backyard looks to be close to the Wetland B boundary. He asked what happens in the area between Wetland A and Wetland B.

Mr. Gove explained that at the time he did the wetland delineation, he did not know where the boundary was, so the wetland flags went on to the abutter's parcel. The wetland starts very close to the road and is relatively narrow at that point. It continues in a northerly direction and blends in with the corner of the Benson parcel to Wetland B. There is very little transition from Wetland A, on the neighbor's parcel, to Wetland B.

Vice-Chair Crapo asked about the flow of the water.

Mr. Gove explained the water from the road through the abutters parcel, flows to the north right into Wetland B. The wetland to the rear of the Benson property, some of it goes to the east and swings around the wetland to the north. The other side of Wetland A swings to the west, around the wetland and to the north.

Vice-Chair Crapo asked if the water coming from the curbside of the Benson parcel flows directly towards the north. He asked if the proposed home is going to act like a dam.

Mr. Gove replied no. He explained it is setup so it actually drains in two directions; one side goes to the east and one side goes to the west. On the abutter's parcel, there is a lower trough

that goes from the road to the abutter's parcel and to the north to Wetland B. That point of Wetland A drains into that trough and goes north to Wetland B.

Mr. Baskerville noted that right in front of the lot is an existing town catch basin. There is a very shallow swale along the front. Any water in the front goes to that catch basin in the front.

Mr. Gove pointed out that the catch basin outlets on the other side of the road, on the south side of Merrymeeting Lane, and drains towards Craig Benson's pond.

Member Driscoll asked if it would make sense to try to drain the water towards the front of the house.

Mr. Baskerville explained the front of the house is slightly raised. It will go down to a flat area above the septic system. That area drains towards the road side swale and goes to the catch basin. There shouldn't be any runoff from the roof that doesn't get absorb in the trench. The very small area in the front would drain towards the catch basin. He further explained the back of the house daylight at the basement level, which is about 8' below the front of the house. Everything there is very level with the wetland, so it should all get infiltrated behind. That all flows toward Wetland A. He noted the flows are being kept where they were before the development.

Member Driscoll asked if there would be any substantial benefit in shrinking the house and moving it further away from Wetland A.

Mr. Gove stated that if this was a higher functioning wetland it would make sense to move it further away. He does not think there will be any additional benefit by moving it a few more feet away. It is such a low functioning area that it is not going to be negative nor positive for this particular wetland area.

Member Driscoll stated that in reading the Rye Conservation Commission's letter and hearing what is being said, it is at opposite ends. He asked Mr. Gove to speak to the Conservation Commission's letter and why there is such differing opinions.

Mr. Gove stated that on the site walk with the Conservation Commission, he was trying to explain to them that Wetland A is such a low functioning area that it will not be detrimentally impacted by a house nearby. What he heard from the Conservation Commission was that it was not so much of a concern about the function of this wetland. His impression is that they were more concerned about the precedent of supporting something so close to the wetland boundary.

Referring to Wetland A, Chair Weathersby commented it is being said that it has little function and little value. She asked why this type of wetland would be protected by the State if that were true.

Mr. Gove replied it is actually a delineation issue. First, are there hydric soils? In this case, there happens to be clay soils. In the upland, it is sand over clay and down in the wetlands it is clay much closer to the surface; so, it meets the hydric soil criteria. The second issue is whether

it has a dominance of wetland vegetation. It barely has a dominance of wetland vegetation. The third issue is whether it has any evidence of wetland hydrology. There are some water-stained leaves and pockets along that area. He continued it is a delineation issue, not so much a function and value issue. It had to be delineated as a wetland, even though it has low function and value. Moving to the back in the area of Wetland B, the hydric soils, vegetation and hydrology are much more robust. He commented that Wetland A made the delineation criteria.

Chair Weathersby clarified it made the delineation criteria and the State and Town say that soil conditions meeting that criteria are to be protected.

Mr. Gove agreed.

Chair Weathersby clarified that back in 1986, the wetland line was basically the edge of Wetland B.

Mr. Gove confirmed.

Chair Weathersby asked what has caused the wetlands to expand.

Mr. Gove explained it is not so much that the wetland has expanded. The delineation criteria have changed. At the point this was delineated, Red Maple Swamps were identified as wetlands. It was strictly upon a dominant and strong plant community. It was essentially those areas with very poorly drained soils with a strong dominance of wooded swamp. Moving forward in time, there have been at least four different delineation manuals that have come out, since 1986. More areas that were once defined as uplands are being taken as wetlands. Not because they have changed, but because the delineation criteria have changed.

Chair Weathersby asked if the delineation criteria have changed because these areas are deemed more sensitive.

Mr. Gove replied not more sensitive, but because a lot more study has gone into it. Before the issuance of the 2012 delineation manual that is used today, a whole lot of study was put into it. The new parameters have incorporated more areas that back in 1987 were not protected as wetlands.

Chair Weathersby asked if there is any reason to believe that the Wetland B types of soils will gradually move closer into the Wetland A area, closer to the home.

Relating to this particular issue, Member Dibble stated there is a reference to taking down somewhere between 10 and 50 trees. It would seem to him that taking down a lot of trees between the road and Wetland A, and taking away all that transpiration, that Wetland A would be getting wetter.

Chair Weathersby asked how many trees are coming down that are 4.5" and what affect it will have on the wetland. She also asked if there is a reason to think that Wetland A and Wetland B boundaries will change.

Mr. Baskerville noted that he counted the trees that would be removed and his count was closer to 70.

Vice-Chair Crapo asked if these are trees that are 4.5" and larger in caliber.

Mr. Baskerville confirmed. He stated there is very little brush, but there are a lot of trees that are just over that 4.5" caliber and they grow very close together in some spots. There is a handful of mature trees. Even in the wetland there are a lot of trees. It is a very wooded site.

Mr. Gove stated he will answer the question of whether Wetland B is going to start encroaching towards Merrymeeting Lane. He pointed out that there is climate change. With climate change, there are temperature issues going on but there is also extreme weather. He continued that there has been no evidence of Wetland B getting larger from 1987 to now. He pointed out that he cannot guarantee that it is not going to start moving. However, there is enough slope to that land that it will probably never get beyond the "upland island". In regards to cutting of the trees, Mr. Gove stated there is no question that it will have an impact upon the hydrology. Various things have been done here to try to mitigate and infiltrate some of the stormwater to help with the fact that some of the trees are being removed. There are a lot of trees that will be left to act as "pumps" in the area of Wetland A.

Member Dibble asked where the catch basin is located in relation to the septic system.

Mr. Baskerville noted it is just 35' away, which is the State minimum to the catch basin.

Member Dibble asked if there will be any danger of infiltration away from the septic field to the catch basin, as the nature of the land is prone to wetness.

Mr. Baskerville replied he feels very confident there is no impact to that catch basin. The stonewall in front is being relocated, as part of installing the septic system. There are good quality soils and a decent water table in this area. He does not think that catch basin sees much flow. He did not see any drainage path into that swale.

Referring to the screened porch end of the house, Vice-Chair Crapo noted there is a proposed propane tank. However, the generator and a/c are all proposed to be on the side closest to the wetlands. He asked why those could not be somewhere on the larger part of the lawn area between the screened porch and the wetland. The generator being on the edge of the wetland, on the opposite side of where the tank will be located, does not add up to him.

Brendan McNamara, architect, stated that they could move the generator to the northeastern location where the propane tank is located.

Chair Weathersby asked why the house has to be almost 5,000sf. She pointed out it can be 3,200sf and still meet the covenants of the area. This is so close to the wetlands and it is a pretty big ask to have 5,000sf of living space. Having a smaller house would have a reduced environmental impact.

Mr. McNamara explained the house is for a young couple that are starting a family, who both work out of the house. The size is generated by the split level of the garage, which is in the basement. As a result, there is more house available above the basement area. The footprint is the second smallest of the houses that are in the neighborhood. The overall interior living space is actually the third smallest. The house is in the nature of the neighborhood and nature of the use intended by the applicants. He further explained the house has been elongated in the east/west direction to feed into the available space from the two setbacks. That is also the reason why the garage is in the lower level, so it could maintain less impact onto the contours and region around the wetland.

Chair Weathersby asked the Rye Conservation Commission to give their thoughts.

Danna Truslow, Conservation Commission Member, stated the Rye Conservation Commission does not support this project. Every part of the buildable area is within the 100' wetland buffer and this property is in the Berry's Brook Watershed. She continued the distinction between Wetland A and Wetland B is fairly arbitrary. The whole of Wetland A drains towards Wetland B and its contiguous; hydrologically connected. She does not think it is correct to say they are not part of the same wetland. There is mapping from UNH and Nature Conservancy showing this as a flood storage area in an area of water table rise. There will be some encroachment as the environment changes and there is more rainfall and saturation in this area. For those reasons, the Commission feels it is not a project they would recommend or support.

Speaking to Mrs. Truslow, Vice-Chair Crapo asked if it is the Commission's assessment that nothing should be built here because of current regulations.

Mrs. Truslow stated that at the site walk it was asked if the applicants would consider a smaller home with less impact and there were a few things discussed. However, there wasn't any change to the proposal. She thinks it was understood that they really weren't interested in making any changes to modify the impact. Without the Commission seeing a new design, it would be hard for her to represent the Commission to say another project would be acceptable. She reiterated that there was talk about making this a smaller project.

Chair Weathersby asked for Mrs. Truslow to speak in regards to why this parcel being in the Berry's Brook Watershed is important.

Mrs. Truslow explained there are larger wetland buffers. That has the 100' wetland buffer, as opposed to 75'. Its an area that has higher wildlife and hydrologic value. It drains towards to Seavey Creek, out to Witch Creek and Little Harbor. It is part of a larger watershed area that has been designated as a fairly important watershed.

Hearing no further questions from the Board at this time, Chair Weathersby opened to the public.

Referring to the plan on the screen, **Amos Rogers, 37 Olde Parish Road**, stated that the property to the right is his property. The area on the plan that looks like a "slice of pizza" are wetland that are part of his property. That is natural area. Between that area and the driveway of

the house is his landscaped yard. That area is fairly wet and remains wet most of the year. He asked if there is any protection that none of this will cause that wetland area to encroach further towards his property, particularly on the landscaped area. If this was to happen, what recourse would he have to try to remedy the situation?

Attorney Phoenix explained that post-construction water leaving the site can't exceed pre-construction water by volume or velocity. The stormwater management plan would ensure that water is not going to increase onto abutter's property.

Mr. Baskerville stated that a storm that puts an inch on the property, will put an inch on the property before the house is built and an inch after the house is built. It doesn't really change the amount of stormwater that comes down. Right now, the water that comes down might be pulled in by the trees. All of the water coming off the house will drain to the northeast. It should not drain to the southeast. It should have no effect on the hydrology to the abutter's property. Delineation lines change in time, due to regulations and climate change. He does not see anything with this house design that will have an impact. He would suggest that they stake the property line to make sure the construction people don't venture onto the abutter's property.

Referring to the area that Mr. Rogers was referencing on the plan (triangle "pizza slice"), Chair Weathersby commented that it does not appear that this area is marked as part of Wetland A.

Mr. Gove explained there is a portion of upland; it then goes to wetland and to the abutter's property, which is upland for the house and landscaping.

Speaking to Mr. Gove, Chair Weathersby asked if in his mind the triangle piece is upland and Mr. Rogers is saying it is wet. (The corner of the "pizza slice") She commented there seems to be a difference of opinion.

Mr. Gove replied it is clearly upland in that corner, then it goes to wetlands and back to uplands.

Speaking to Mr. Gove, Vice-Chair Crapo asked if he is saying there is only a corridor of wetland going across the abutting property.

Mr. Gove explained there is a corridor that goes from Merrymeeting Lane towards the corner of the Benson property. That corridor is draining north toward Wetland B.

Speaking to Mr. Rogers, Vice-Chair Crapo asked if this corresponds with his observation and knowledge of the property. He pointed out that on the plan he can see a driveway, landscaped yard, wetland valley and back up to uplands in the "pointy" corner of the lot.

Mr. Rogers replied he thinks that is fairly accurate. He asked if he has any remedy a year or two years from now, if there is encroachment and there starts to be standing water in his landscaped yard.

Attorney Phoenix explained that a complaint could be filed with the Town with the Building Inspector's Department and the Town would investigate. If they agreed there was a problem,

they would issue an order to stop. Or, the abutter could negotiate with the neighbor to resolve any concerns. If that didn't work, it could be addressed by the courts.

Mr. Rogers stated that earlier there was some discussion about moving the generator and a/c units to the southeasterly end of the house. He would respectfully ask that this not be done. It would put it in the closest proximity to his house and property. Where they are proposed now, they face into the wooded area and will not bother anybody.

No further questions or comments were heard from the public.

Attorney Phoenix commented he would like the Board to note that the house will be built along the front of Merrymeeting Lane. It is not excessively deep. Making it smaller is generally going to require bringing it in from the sides and there would be little change in the distance from the back of the house to the wetland. With due respect to the Conservation Commission, he pointed out that they did not give any reasons in their report; other than, they didn't like it. As Mr. Gove has said, their major concern was precedence. He respectfully does not believe that outweighs the property owners' rights to own and utilize their property just like all the neighbors have. With protections in place by the design, stormwater and infiltration trench, together with the low functioning resource of Wetland A to a place that is over 100' away from the house, they respectfully request that the Board grant the relief requested despite the position of the Conservation Commission.

Mr. Baskerville added that he was hired before Mr. McNamara for this project. Originally, he put in a rectangular traditional colonial, which had the house 7' or 8' away from the wetland. By changing the design and shape of the foundation, Mr. McNamara doubled the distance. Due to the way the house is laid out, the size of the house could substantially be reduced but it would only give 18" to 2'. It would still be relatively the same distance from the wetland, while doing a tremendous amount of harm to the livability of the house. He noted they have done their best to keep the distance from the back corner of the wetland very level, so that any water gets treated before it infiltrates.

Vice-Chair Crapo commented there is a proposed construction silt fence going along the edge of the wetland in the back. Where it hits Mr. Rogers' land, he wonders if the applicants would agree to continue the silt fence along that property line, especially in the area of the "tight point" (shown on the plan).

Mr. Baskerville replied he would have no problem recommended that the silt fence be extended along the property line; 2' off the property line.

Mr. Gove agreed this would be a great idea.

Hearing no further questions, Chair Weathersby closed the public hearing at 9:03 p.m.

Vice-Chair Crapo commented he is not sure how the rest of the Board feels about the concern he had with the generator. Does the Board want to make a condition on the relocation of that or

consider it where it is? He also thinks there should be a condition on extending the silt sock or construction barrier along the Rogers' boundary.

Member Dibble asked if there is some concern with the generator being a hazard to the land.

Vice-Chair Crapo pointed out it is run by a motor and has oil. Its proposed placement is right against that silt sock, which is right against the wetland. It appears there are other alternatives to place it farther from the wetland.

Speaking to Vice-Chair Crapo, Member Dibble asked if it would make him happy if the generator were placed on a slab wide enough to reveal any petroleum leakage. He thinks they can condition propane and that represents no hazard to the land.

Vice-Chair Crapo pointed out the motor will still have oil. With this sensitive wetland issue, the placement could probably be more buffered to the wetlands.

Member Dibble commented he certainly thought there were problems with this project other than the generator.

Chair Weathersby noted they will put that up as a potential condition. She asked Vice-Chair Crapo his overall sense of the project.

Vice-Chair Crapo stated it is a pretty sensitive and overall damp area. He has been on several of the properties in this area. They range from wet to nice upland landscaped yards. He knows it is possible to have some separation in that area. He is still thinking on whether the size is justified in this location. It is a lot of record. However, prior wetland considerations are what allowed it to be created as a lot, not current wetland considerations.

Member Dibble stated this project strains the land. One of the issues that seems very important is the delineation issue. The delineation of the wetland has expanded with time. He is sensitive the Berry's Brook issue. This will have some potential impact. He can't help but think this land is going to become wetter with time. He is also sensitive to Mr. Rogers' comment that if that low spot gets wetter, there is no place for that water to go. It's a low spot that is going to turn into something bigger. He is sensitive to the observation that this is a smaller footprint in a neighborhood of larger footprints. There is an argument to be made about the usability of the property and the interest of the owners. On the other hand, it is four-bedrooms and that introduces the question of size. He thinks what has happened here is that a nice piece of property was purchased a long time ago and circumstances on the land have changed. It is really a difficult decision for this Board.

Member Mikolaities stated he is sensitive to the wetlands and the tree clearing. He likes the slab on the existing grade, limiting the disturbance. The house is probably a little too big for that lot. However, he does not really have a problem with this. He would like to see some type of tree clearing plan. Secondly, he would like to see some type of wetland protection. In taking a look at this through Google Earth, there is a lot of green area and a lot of trees. It is not really a dense development, nor is there any way to get denser out there. The only downside is that it is a little

too big. He also thinks parking two cars in a garage versus having them outside is more environmentally friendly also. He reiterated he does not have a problem with this, with a few conditions.

Member Driscoll stated the Board has come to rely on the Conservation Commission's letters and recommendations through the applications. However, he feels it should be the responsibility of the applicant. When the Conservation Commission didn't come up with a plan, it would've been on the applicant to come up with some sort of proposal as to how they were going to limit the effect of the landscaping and the house onto the wetlands. Not having that is a bit of concern for him. He thinks Member Mikolaities brought up a good point about the tree plan. He thinks this should be a buildable lot. Whether this house is too big or not is something he is looking forward to discussing with the Board; weighing the covenants requirements and the neighborhood feel of how beneficial it would be to have a smaller house and smaller septic. He keeps going back to how they are satisfying the hardship.

Vice-Chair Crapo stated that in looking at the deed, it says "not to exceed two- and one-half stories". He is not sure if the garage under is interpreted as part of a story or not, as well as there are certain restrictions on the type of home. He suggested continuing this for clarification and analysis on that. At the same time, they could have a site walk to view some of the issues. The trees that are going to be taken down could be flagged and the Board can get a view of the impact.

Chair Weathersby commented they could continue the application and have a site walk.

Alternate Piela commented that the covenants say "the location shall be a minimum of town requirements". He is not sure how that would be interpreted for building location.

Speaking to Attorney Phoenix, Chair Weathersby asked if this proposal has been discussed or approved by the homeowners' association.

Attorney Phoenix replied he does not know if there is a review board for the association. He is not aware of this plan being reviewed by anyone on behalf of the association.

Denise Benson, applicant, commented there isn't an association.

Vice-Chair Crapo stated the covenants have been presented as part of the reasoning for some of the variance requests and the size. To that extent, he was saying that the Board may need to get some weigh-in on whether or not there needs to be strict adherence to the covenants and whether that can drive some of the request for relief.

Attorney Phoenix noted that it appears the original architectural committee was the original developers. Assuming the applicants have to comply with that, until it is known whether this can be built, it makes no sense to go to them for approval.

Craig Benson, applicant, stated those covenants were created to build a neighborhood around. The people who built within the neighborhood all built within those specifications. To build

something that does not match those specifications would not be in the best interest of the neighborhood.

Chair Weathersby reclosed the public hearing. She stated that Alternate Piela actually raises an interesting point about the location meeting the minimum requirements of the Town of Rye. She thinks it would meet the Town's requirements if they were granted variances. She continued that she has trouble with this application. She is very concerned that 70 trees of 4.5" in diameter have to be removed for the house to be built. She is concerned about the effect it will have on the wetland becoming wetter. This is a very large house within 14' to 17' of the wetland itself. Conditions may change with the removal of the trees and there is climate change with weather extremes. She is not sure whether a smaller house would work or not. If the house were smaller, there would be additional buffer available to handle the environment around it. This lot could not be created today as a buildable lot. There are insufficient uplands on the lot. She looks at the Town's regulations of having 44,000sf of uplands and 30,000sf of contiguous uplands as guidance and this lot falls pretty far short. She is also concerned there is a lot of snow storage close to the wetlands itself. The Berry's Brook Watershed is of particular importance and requires even larger buffers; yet, this is within 17' of the wetland itself even though it is supposed to have a 100' buffer. She thinks that because of the sensitivity of the Berry's Brook Watershed and that it has been deemed so important and hydrologically connected with the other wetlands around, this deserves some special attention and protection. People have decided that Wetland A is worthy of protection. That was a change and that thought was created, maybe even since the Bensons bought it; but that is the case, and lots change. Just because someone owns a piece of property, it does not mean that they can build what they want on it forever based on conditions that were there at the time of purchase. There is a risk by not improving a property year after year because regulations change. She agreed they do not have a real plan to protect the wetlands. There is no talk about plantings and no fertilizer. For all those reasons, she is feeling that perhaps this lot should not be built on at all, or if it could be built on, it should be something that is much more sensitive to the conditions of the lot. This lot is now too environmentally sensitive. The whole lot is in the buffer or the wetlands. What they are asking for is too much and is detrimental to the environmental conditions of the Town and the wetland.

Member Dibble stated he feels some sensibility towards Vice-Chair Crapo's recommendation. He did not appreciate the complexity of the wetland issues before tonight's hearing. There has been additional testimony from a neighbor that didn't come to light prior. He does not know whether a visit to the site would influence his thinking; however, it might have value.

Vice-Chair Crapo pointed out that in the deed there is also a section that deals with density of trees. He is not sure the tree cutting follows along with that or not.

Attorney Phoenix commented the applicants would agree to a continuance for a site walk and to address some of the issues that have been raised.

There was discussion on whether to continue for a site walk.

Vice-Chair Crapo commented he thinks the site walk would be valuable. They could see the limits of the building. It may or may not look more or less egregious against the wetland.

Chair Weathersby noted the ground will be at best frozen, at worst under snow. It will be flagged as to where the wetlands are and the edges of the house. She is not sure a site walk in January is helpful. She polled the Board in regards to whether the application should be continued for a site walk.

Vice-Chair Crapo is a yes.

Member Mikolaities replied not for him. However, he would agree with a continuation to get more information on a tree cutting plan and buffering. He would like to see more detail on the plans and a few more topo shots. He thinks the plans are lacking in detail.

Member Driscoll agreed there is not enough detail showing how they are going to protect the wetlands with the build. If the Board was to vote on this tonight, he would not be in favor mainly because of that. He would love to see a smaller house there. That's where he goes back and forth with hardship. Unless he sees more detail and he's happy with the details on how they are going to protect the wetlands and still be able to manage the needs of both. He does not need a site walk, but he would need more information to be in favor of this application, as long as he was okay with the information that comes in.

In regards to a continuance, Member Dibble stated he is persuaded by all the points of view. There are some conflicts about what can be built there and that has not been flushed out very well. He also feels strongly about the seeing something done about the impact on the wetland. He is in favor of a continuance.

Chair Weathersby stated that it sounds like the majority of the Board favors a continuance. The Board requests that the building and the wetlands be staked off. The Board wants information on how the wetlands are going to be protected, if this moves forward. Information on the status of the covenants is also requested. Are they still in effect? Is there any way to request an exception or an amendment to them? The Board would also like the trees that are coming down marked and a plan.

Member Driscoll asked if the property line between the Rogers' property and this lot is clearly defined.

Vice-Chair Crapo commented that he agrees with Member Mikolaities about seeing more topographic representation. He thinks that would help the Board to understand the flow of water.

After discussion, it was agreed to hold a site walk on Saturday the 16th and 9:00 a.m.

Motion by Burt Dibble to continue the application for a site walk on Saturday, January 16, 2020 and for information that has been requested, which is to be submitted a week before the February meeting, in which the application will be added to the agenda for further consideration. Seconded by Shawn Crapo.

Roll Call: Burt Dibble – Yes; Shawn Crapo – Yes; Patrick Driscoll – Yes; Shawn Crapo – Yes; Patricia Weathersby – Yes

Motion passed

4. Marc Grondahl Revocable Trust of 2006 for property owned and located at 314 Brackett Road, Tax Map 19, Lot 136, requests a Special Exception from §190-3.1.H.2(f) and §190-3.1.G(2) for a driveway in the wetlands and in the wetlands buffer. **Property is in the Single Residence District and Wetlands Overlay District. Case #01-2021a.**

5. Marc Grondahl Revocable Trust of 2006 for property owned and located at 314 Brackett Road, Tax Map 19, Lot 136, requests variances from §190-3.1.F(2) for the removal of 43 trees from the wetland buffer and 8 trees from the wetlands to construct a driveway; and from §190-3.1.H(2)(a) and (e) for surface alteration and cutting live trees with diameter in excess of 4.5” in the wetland buffer. **Property is in the Single Residence District and Wetlands Overlay District. Case #01-2021b.**

Attorney Monica Kieser addressed the Board. She explained the project has been submitted to the BOA in the past. What is being presented now is a slight variation of what was submitted last year. The lot is approximately 3.8-acres. There is an upland buildable piece of land in the back that is fully compliant in terms of setbacks and wetland buffers. There is 124’ of frontage on Brackett Road. The issue is the wetland between Brackett Road and the upland. Relief is needed for access through the small area of wetland and wetland buffer to the buildable area. It will be accessed by a stone and gravel driveway. In order to create the driveway, trees will need to be cut and there will be surface alteration. She continued that the current plan is essentially the product of a settlement agreement with the Rye Conservation Commission. Some native plantings have been added along the driveway on either side. Some riprap has been added to the culvert area, as there is a storm drain that goes under the driveway. There is also a significant donation of land that is going to be given to the Conservation Commission. DES approval has been received for this project, along with an amended approval to reflect the revisions made through working with the Conservation Commission. She pointed out that the travelled portion of the driveway will be 12’ wide.

Chair Weathersby asked if the driveway will be paved.

Brian Pratt, Fuss & O’Neil Engineering, stated the intent is for a gravel driveway. This does not prevent the future owner from paving it.

Member Dibble clarified it will be impervious.

Attorney Kieser replied that she believes gravel driveways are considered impervious under Rye’s Zoning Ordinance. At this time, it is not designed to be a pervious driveway. She does not believe the plan has any coverage issues, at this point.

Chair Weathersby asked if the driveway will only service this lot, as Mr. Grondahl owns some property behind this parcel.

Attorney Kieser explained that part of the resolution that has been reached with the Conservation Commission is that Lot 140 (parcel behind the lot in question) would be merged into Lot 161. Lot 140 does not have any frontage and would provide some additional privacy for Lot 161. She further explained there is a piece that will be conveyed to the Conservation Commission and will merge with another lot that is abutting that parcel. (She pointed out the location of the lots on the plan.) She continued that the proposed plan for Lot 136 is for a single-family residence. There is a note on the plan that says this lot will not be subdivided, which was also an element of the agreement with the Conservation Commission. The septic approval is for a single-family, four-bedroom home.

No further questions from the Board were heard at this time.

Attorney Kieser noted that a driveway permit is also needed from the Town of Rye. The applicant did have a driveway permit over a year ago; however, it has since expired. The permit was granted to construct a driveway in accordance with the proposed plan, provided that any wetland board and land use board approvals that are needed are received. She stated that relief is needed for the special exception under Section 3.1.G(2) and 3.1.H.2(f) for a driveway in the wetland and wetland buffer. This is an existing lot of record that already has a woods road on it. In order to construct the driveway, 43 trees would need to be removed; roughly 27 in one area and 18 in another area. Variance relief is also needed for surface alteration and cutting of live trees in excess of 4.5" in the wetland buffer, which is under Sections H.2.(a) and (e). Relief is also being requested from Section 3.1.F(2) for removal of the trees in the wetland and wetland buffer.

Attorney Kieser reviewed the criteria for the special exception.

- ***The use is not injurious nor detrimental.*** The crossing has been located in the best possible place, as close to the side line as possible in order to minimize the impact to the wetland. The access is to a permitted single-family home.
- ***In harmony with the general purposes and intent of the ordinance.*** Given that the intrusion into the wetland is minimal, is accompanied by a robust planting plan and other mitigation efforts that have been accepted and approved by DES and the Conservation Commission, it is sited in the most appropriate location.
- ***No alternative route is feasible.*** The driveway is coming off the only frontage for the lot for access. It is essential to the productive use of the land.
- ***It is essential to the productive use of the land, not so zone.*** It is a single-family residence zone. The buildable area could not be accessed without the driveway.
- ***To the maximum extent practicable such construction will have the least possible detrimental impact.*** No alternative route is feasible which does not cross or alter a wetland.
- ***Economic advantage is not alone deemed sufficient reason for the exception.*** It is simply one-single buildable lot. In order to put a single-family home on the lot a driveway is needed. There is no way to put a driveway on this lot to access that area without seeking this relief.

Mr. Pratt explained it is a 500' driveway with access off Brackett Road. There is an existing woods road in the same location. The driveway was kept as close to the property line to the

south as possible, in order to maximize the buffer and minimize the wetland impact. There is a 20' setback from wetland impacts to property line, so that is the reason the driveway bumps out into the wetlands a bit. However, the impact is still under 1900sf so this qualified as a minimum impact expedite. The proposal was submitted to the DES Wetlands Bureau and the permit was approved. There is over 2-acres of contiguous upland in the back. It is definitely a suitable area to put a home. There are acceptable areas for a septic system. An approval for the septic system was received from DES Subsurface Bureau. There were concerns from the Conservation Commission related to floodplain. The floodplain is elevation 9 and the site sits at elevation 23. This lot doesn't have any danger of flooding and does not have any adverse impact to the floodplain. He noted that 24 shrubs are being planted along the perimeter of the driveway within the wetlands. That will help filter and create a stable side slope. The size of the driveway has been minimized. The driveway will be 12' wide which is the minimum that is acceptable for a driveway. There will be a 3 to 1 side slope to help minimize the impact to the trees. It is the only feasible route. The driveway is right at the edge of the wetlands. These are relatively low value wetlands.

Luke Hurley, Gove Environmental, stated that he delineated the wetlands approximately two years ago. It is pretty standard wetland. It is a combination of scrub shrub and some slight forested community. The area that is being impacted is a very small percentage of the total wetland area. The bulk of the wetland is off to the northeast. It is under 1900sf of a wetland that is probably a couple hundred acres. It is all part of the Parsons Creek wetland system. In looking at it in terms of a percentage of what is being impacted versus the whole system, it is less than a fraction of a percent. The proposed location follows the existing woods road and really is the least impacting alternative. This is a standard wetland crossing project.

Attorney Kieser pointed out that in terms of what was previously approved by DES versus this plan, which was also approved as an amendment, it offers specific additional plantings at the request of the Conservation Commission. This is even better than what was previously approved.

Speaking to Mr. Hurley, Chair Weathersby asked if it is better for the wetland if the driveway remains unpaved.

Mr. Hurley replied he does not think so. Sooner or later, it is going to become packed gravel, whether its due to the process of construction or just over time with vehicles travelling over it. Alternation of Terrain looks at crushed gravel the same as pavement. They consider them both impervious. The runoff may be a little bit slower because gravel is a little bit bigger, as opposed to pavement where it is just going to run off. As far as oil from vehicles, he does not think there would be that much from a single-family home. It is not going to infiltrate into pavement that much, as it might into gravel. However, over time when it becomes packed, there is no infiltration through the gravel.

Mr. Pratt agreed that there would not be much difference between gravel and pavement.

Chair Weathersby asked if a driveway this long and narrow needs fire department approval.

Mr. Pratt explained that the fire department just needs a suitable turnaround at the end of the driveway, which has been provided.

Member Driscoll commented that one of the DES requirements is that work shall be done during low flow and in the dry only. He asked what this means.

Mr. Pratt explained this is a standard condition. It basically says that an eye needs to be kept on the weather report. If there is a storm coming of a half inch or more, they would not be working on the driveway on that day.

Member Driscoll pointed out that one of the restrictions says “erosion control shall remain until the area is stabilized”. He asked how involved the engineers will be during the construction to make sure all the requirements are fulfilled; before, during and after, until it is stabilized.

Mr. Pratt explained that for a single-family home, generally they do not get very involved. The permit is handed over to the contractor and they sign it. The contractor has to submit a notice of start and a notice of termination with photos. Generally, the engineering firm is not involved, unless the owner asks for them to be involved. For small projects like this the contractor usually just handles it and submits the completion application to DES.

Member Driscoll clarified that DES does not come out to inspect. It is based off photos that the contractor provides.

Mr. Pratt explained the only time DES would come out for something like this is if there was a complaint from someone. They are pretty much self-policing on these minimum impact expedited permits.

Member Driscoll asked if a contractor is lined up.

Mr. Pratt replied no. He explained they are getting the permits. Mr. Grondahl does not intend to build a home on the lot. The lot is going on the market. The contractor for the person who buys the land will be bound by the conditions of the permits. Any reputable contractor should be able to follow these conditions.

Vice-Chair Crapo commented the driveway crossing is necessary to get to the upland. There is a representation of where a house could be built. He asked what the tolerances are for the size of the house.

Mr. Pratt replied there is plenty of space for a larger house. The house model that was used was a standard 40 x 30 box with a 24 x 24 garage. That is a pretty good size house. He noted there is the ability to shift the house back. It really comes down to the style house that the person wants to build.

Vice-Chair Crapo asked if there is flexibility in the size of the septic.

Attorney Kieser stated the septic is for a four-bedroom home. This is a single residence so they are not going to be able to do much more. There is also going to be a deed restriction that it not be subdivided. What is before the Board is the driveway. The representation is so the Board can see that given the location of the buffers. There is ample opportunity to put a reasonably sized house at the end of the driveway. If someone would like a differently shaped house, there is certainly room.

Chair Weathersby commented that a condition, if this gets approved, could be that the building be compliant under Rye's Zoning Ordinance, or at least as to wetland buffers. They are asking for wetland relief and if they come back and ask for more wetland relief, it might have changed the Board's opinion on the first one.

Attorney Kieser pointed out that what is shown is within all the appropriate wetland, front, side and rear setbacks. If someone wanted to build a bigger single-family house, she thinks they would have the right to do that because it is a permitted use. They would have to make a specific showing to the Board about why they need what they need. They would have to ask the Board anyways.

Chair Weathersby noted the Board has received two letters from the Rye Conservation Commission; August 20, 2020 and January 4, 2021. The January 4th letter discusses the settlement and the land that is going to be conveyed to them. She asked RCC if they have any comments.

Danna Truslow stated they want to underline the additional plantings and there is also a culvert crossing beneath the driveway. The Commission has asked for some additional erosion control (riprap) on the downstream side, which has been added. In addition, the parcel will protect a considerable amount of downstream wetland. The Commission is comfortable with the project as submitted.

Chair Weathersby commented that if this is approved, there will be a condition that they put in the riprap and plantings as shown on the plan.

Mrs. Truslow stated that when the Commission did their site walk, it was pointed out that there is a large area that has been highlighted for flood control. That is a lot of the area that is in the agreement to be conveyed to the Commission. That will protect a large area that is adjacent to some already protected land, so that is a positive outcome.

Chair Weathersby opened to the public for other comments.

David Chapin, 290 Brackett Road, pointed out that his property abuts to the north. He commented that is a very narrow strip of land to build a driveway on. All the runoff is going to go onto his property, which is mostly wetlands (marsh). Even though the marsh in general is very big, the runoff from this driveway is going to have to go through all the marsh on his property to get to the larger marsh. That is all very unstable and saturated land. He pointed out there is a culvert under Brackett Road that is right next to where this driveway is proposed. The mouth of this driveway on Brackett is in a flood zone.

Mr. Pratt stated he disagrees that it is a narrow strip of land that the driveway is going through. The frontage is 125' wide and a typical right-of-way is 50'. The driveway has been kept as far away from Mr. Chapin's land as possible. There is a culvert pipe that crosses under Brackett Road that outlets to a stream channel, which flows through the property and out to the marsh. The driveway is going to be crowned so only 6' of gravel is going to flow in that direction, which is an absolute negligible amount of flow. The other half is going to flow to the south and will swale down to the wetland crossing. From there, it is going to go out into the wetlands and out to the big marsh. In his opinion as an engineer, this is going to have zero impact to the abutter's land.

Chair Weathersby commented that a fair number of trees are being cut. The concern is that this will cause the area to be wetter.

Mr. Pratt stated they are going to have a stabilized gravel surface with grass side slopes. They are going to be vegetated and stabilized. Twenty-four additional shrubs are being planted in the wetland area to help provide stabilization. It's a really minimal area. It is 12' of pavement and for the most part there is still a buffer to the wetlands that will remain. He reiterated that it will not have an adverse impact. He commented it is still a floodplain in that area so during large events it may back up. However, it is not going to back up over the driveway. There is a culvert that would allow that water to continue to back up slightly across the other side of the driveway. There will not be any change to that flood elevation.

Mr. Hurley agreed. He commented that they are planting a significant number of shrubs in the wetland area. This is something where trees will be taken up and there will be some replanting. When trees are taken out, they no longer suck up the water and it gets wetter. But here, there will be the planting of a significant number of shrubs which will still provide that uptake for seasonal high groundwater. He does not see any difference in regards to there being any excess water flooding. The area where the crossing is proposed slopes to the north. That is naturally where the water is going anyway. There is so much flood storage potential in the wetland that whatever is going to be coming off the site, with the proposed driveway and house, is going to be "drop in the bucket" of what that wetland can handle. He does not see an impact to anything out there because of this driveway. There will be a net change but it is so small it will almost be immeasurable.

Hearing no further comments from the public, Chair Weathersby asked Attorney Kieser to complete her presentation.

Attorney Kieser reviewed the criteria for the special exception and the variances.

- ***It is not contrary to the public interest and the spirit of the ordinance is observed.*** The special exception for access for these specific reasons are permitted. A single-family home is also permitted. The fact that a variance is needed to effectuate the special exception does not change the fact the special exception is entirely permitted, based on the findings that have been given. This proposal because of the variance elements that have been incorporated and the consideration of the Conservation Commission does not in a marked degree conflict such that it violates the basic ordinances objectives.

- ***It is not going to diminish surrounding property values.*** This is a lot of record in a single-family zone. One might anticipate that a single-family home will be built there. The way this is being constructed, the distance from Mr. Chapin and the other abutter and the plantings, minimize any impact to them. To the extent there is any impact, it is the impact of a change, not a diminishment of property values.
- ***Special conditions exist that distinguish the property from others in the area.*** The location of the wetlands and the shape of the lot create special conditions.
- ***No fair and substantial relationship exists between the general purposes of the ordinance and the specific application.*** With the plantings, culvert and riprap, steps have been taken to effectuate the purposes of the wetland protection ordinance. There is a big portion of land that is going to be preserved as part of this overall proposal.
- ***The proposed use is reasonable.*** If the use is permitted it is deemed to be reasonable, so this has been done.
- ***Substantial justice will be done by granting the variances.*** If there is no benefit to the public that would outweigh the hardship to the applicant, this factor is satisfied. For the reasons submitted, there is no public benefit from denial. However, the hardship to the applicant would be significant. In conclusion, because this driveway placement minimizes impact to the wetland, is accompanied by the native plantings and is necessary to undertake the use permitted by special exception, it has been approved by DES and the Conservation Commission, there is no gain to the public from denial. There would be a significant loss to the applicant if denied.

Vice-Chair Crapo commented that oftentimes the Board conditions an application “as presented”, as far as building plans. He wonders if it is acceptable to condition this that the hammerhead needs to stay, which would eliminate the fire department turnaround.

Attorney Kieser stated that they have to go back for a driveway permit because the original one has expired. A plan will have to be submitted to public works. It will look like at this plan and will be approved for a permit that is in accordance with this plan.

Vice-Chair Crapo asked how utilities, other than water, are getting to the house. Are those going under the driveway? Is the culvert design appropriate or is there a potential to need relief for pole mounted utilities?

Mr. Pratt replied the Town is going to require underground utilities. The underground utilities are only down about 24” so there is no concern with the culvert. He noted there only needs to be 5’ of separation between the water line and underground electric. There is no concern about separation.

Member Driscoll commented that he does not have any issues given the information he has heard and what is proposed in the packet. He does think that is a very dangerous outlet for the edge of the driveway. He asked if that is something they should be considering.

Chair Weathersby explained that the driveway permit the Public Works Director will issue requires the driveway to be so many feet from an intersection. The driveway also needs to have

a certain amount of sight clearance. The sign-off from the Fire Department will be needed for the hammerhead on a very long driveway. She commented it is not really the Board's issue.

Vice-Chair Crapo pointed out that the driveway approval has already been received once. He does not think that anything has changed legislative wise which would change the Public Works Director's analysis.

Chair Weathersby read the requirements listed in the Driveway Regulations. She noted they will need to adhere to all the requirements in Rye's Driveway Regulations.

Vice-Chair Crapo asked if the Board looks at this in terms of practicality. The Public Works Director could re-look at this and say it is within 100' of the intersection.

Attorney Kieser commented they would have to go to the Planning Board for a waiver.

Member Driscoll pointed out that he would be mindful of this concern, as it does not sound like the applicant is going to be the end user.

Hearing no further questions, Chair Weathersby closed the public hearing at 11:00 p.m.

Referring to the driveway location off Brackett Road, Member Driscoll commented he does not think that is a great spot. However, in looking at the application on its merits and what they are applying for, it's well thought out and they are trying to take care of all the considerations. He understands the concerns of the abutter. However, in looking at the width of the lot, what they have done and the fact that it seems to pass the common-sense test to him, he does not see an issue with what they are asking for.

Member Mikolaities stated he does not have a problem with the application. They have DES and Conservation approval. He agrees there should be some language for no further zoning relief. He is okay with the application.

Chair Weathersby suggested a few possible conditions of approval. She has some concerns about the number of trees being cut. She appreciates all the plantings. She thinks the abutter's concerns have been adequately addressed by the applicant's team. She suggested the following conditions:

1. Any building and septic system would comply with the zoning ordinance without requiring variance relief.
2. Riprap and plantings are installed as per the plan.
3. No subdivision of the land.
4. The driveway is to service only this lot.
5. A driveway permit is needed.
6. Mitigation package of donating the land to RCC is fulfilled.

Vice-Chair Crapo asked if they can be that restrictive. Can it be said "no future relief" or is an applicant always entitled to ask for relief.

Chair Weathersby stated that she thinks they can condition the approval that any home and septic system constructed on this property to be compliant with the provisions of the zoning ordinance without relief.

Vice-Chair Crapo stated he would support that condition and something to represent that this is the driveway proposed. A final design might move the hammerhead a foot or two. Someone might propose to eliminate the hammerhead and get a variance against the criteria for one and create an unsafe situation.

Chair Weathersby suggested the condition say they need to obtain a driveway permit for the driveway per this plan.

Member Dibble commented he does not have any problem with the plan. It is well thought out and well represented. He believes that it does minimal to no impact on the wetland. He likes the idea that there is going to be a good septic system right at the end of Parsons Creek.

Alternate Piela commented the proposal makes sense to him. He agrees with Member Driscoll that it passes the common-sense test.

Chair Weathersby reviewed the conditions:

1. Riprap and plantings be installed per the plan and be maintained.
2. The building and septic system will comply with the zoning ordinance without further relief.
3. No subdivision.
4. Road will service only this lot.
5. A driveway permit will be obtained for the driveway as represented per the plan.
6. The mitigation to which they have agreed to convey to RCC will be conveyed.

Attorney Kieser stated she does not know that the Board can say no one can ask for relief again in the context of approving this plan.

Chair Weathersby stated this is asking for relief that affects the wetlands. If someone wants to come back for relief for dimensional requirements, she does not have a problem with that. If it helps, she would amend her suggested condition to say; "the building and septic system shall not require any relief from the wetlands section of the zoning ordinance". She commented that she believes this is enforceable.

Vice-Chair Crapo asked if they could add that it be conditioned on a single-family residence. He noted that the intention is that the Board does not want to see project creep down the road.

Chair Weathersby stated she is going to go back to tying it to the relief requested here, which is wetlands. If someone wanted to put in a duplex, she would not have a problem with that, as long as it did not encroach into the wetlands buffer.

Vice-Chair Crapo replied as long as it is a use that would not intensify the harm to the wetlands by crossing it at the driveway. A single-family residence implies a certain amount of trip ends

on a traffic study. It would be a more intense use, which would go back to the runoff from vehicles. Vehicles going up and down the driveway all day puts the wetland at more risk.

Chair Weathersby polled the Board in regards to the conditions:

- 1. Riprap and plantings to be installed per the plan and maintained.**
- 2. The building and septic system to comply with the wetland section of the zoning ordinance.**
- 3. Only a single-family residence to be built.**
- 4. No subdivision.**
- 5. Road will service only this lot.**
- 6. A driveway permit be obtained for the driveway substantially as per the plan.**
- 7. The mitigation to which they have agreed to convey to RCC will be conveyed.**

The Board agreed to the proposed conditions.

Chair Weathersby called for a vote on the Special Exception request to §190-3.1.H.2(f) and from §190-3.1.G(2):

- Due to existing conditions, no alternative route is feasible?**

Gregg Mikolaities – Yes
Shawn Crapo – Yes
Patrick Driscoll – Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

- It is neither injurious nor detrimental to the neighborhood?**

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

- Is it in harmony with the general purposes and intent of the zoning ordinance and in accordance with the general and specific rules contained within the zoning ordinance?**

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

Chair Weathersby called for a vote for variances to §190-3.1.H(2)(a) and (e):

1) Granting the variances is not contrary to the public interest?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

2) The spirit of the ordinance is observed?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

3) Substantial justice is done?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

4) The values of surrounding properties are not diminished?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

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

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - 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?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

7) The purposed use is a reasonable one?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

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

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

Chair Weathersby called for a vote for variances to §190-3.1.F(2):

1) Granting the variances is not contrary to the public interest?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

2) The spirit of the ordinance is observed?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

3) Substantial justice is done?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

4) The values of surrounding properties are not diminished?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

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

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - 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?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

7) The purposed use is a reasonable one?

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

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

Gregg Mikolaities – Yes
Shawn Crapo - Yes
Patrick Driscoll - Yes
Burt Dibble - Yes
Patricia Weathersby – Yes

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

Shawn Crapo - Yes
Gregg Mikolaities - Yes
Patrick Driscoll - Yes
Chris Piela – Yes
Patricia Weathersby – Yes

Motion by Burt Dibble to approve the application of Marc Grondahl Revocable Trust for property owned and located at 314 Brackett Road for variances to Section 3.1.F(2) for the removal of trees and Section 3.1.H(2)(a) and (e) for surface alteration and cutting of trees within the wetland buffer with the conditions;

- 1. Riprap and plantings to be installed per the plan and maintained.**
- 2. The building and septic system to comply with the wetland section of the zoning ordinance.**
- 3. Only a single-family residence to be built.**
- 4. No subdivision.**
- 5. Road will service only this lot.**
- 6. A driveway permit be obtained for the driveway substantially as per the plan.**
- 7. Completion of the agreed upon transaction with the Rye Conservation Commission regarding the transfer of adjacent acreage.**

Seconded by Gregg Mikolaities.

Roll Call: Gregg Mikolaities – Yes; Shawn Crapo – Yes; Patrick Driscoll – Yes; Burt Dibble – Yes; Patricia Weathersby – Yes

Motion passed.

Motion by Shawn Crapo to grant the Special Exception as advertised and requested with the following conditions;

- 1. Riprap and plantings to be installed per the plan and maintained.**
- 2. The building and septic system to comply with the wetland section of the zoning ordinance.**
- 3. Only a single-family residence to be built.**
- 4. No subdivision.**
- 5. Road will service only this lot.**
- 6. A driveway permit be obtained for the driveway substantially as per the plan.**

- 7. Completion of the agreed upon transaction with the Rye Conservation Commission regarding the transfer of adjacent acreage.**

Seconded by Burt Dibble.

Roll Call: Gregg Mikolaities – Yes; Shawn Crapo – Yes; Patrick Driscoll – Yes;

Burt Dibble – Yes; Patricia Weathersby – Yes

Motion passed.

- 6. Trustees for the Rye Public Library, 581 Washington Road, Tax Map 12, Lot 43, request an administrative appeal per RSA 674:33, RSA 676:5 and ZO §190-7.1 of Section 13 of the Board of Selectmen's decision dated 11-10-2020 regarding whether 500 Washington Rd, LLC must comply with zoning requirements. Property is in the Single Residence, Business District and Aquifer Wellhead Protection Overlay. Case 303-2021.**

- *Taken out of posted agenda order, please see above.*

- 7. Drew Pierce of Seacoast Modular Homes, Inc for the Kehas Family Living Trust for property owned and located at 2257 Ocean Blvd, Tax Map 5.3, Lot 7, requests an equitable waiver of dimensional requirements pursuant to §190-7.1 for a newly built home with a height of 30.29'. Property is in the General Residence, Coastal Overlay and SFHA Zone. Case #04-2021.**

- *Request from applicant to be continued, motion above.*

- 8. Dava & Alan Singer for property owned and located at 18 Park Ridge Ave, Tax Map 19.4, Lot 10, request a variance from §190-8.1; from §190-2.4.C for a new deck 1.94' from the rear setback where 30' is required and from §190-2.4.C(2) for a new deck 15.6' from the left side boundary and 14.7' from the right side boundary where 20' is required. Property is in the General Residence, Coastal Overlay District. Case 305-2021.**

Motion by Shawn Crapo to continue the application of Dava and Alan Singer to the February meeting. Seconded by Burt Dibble.

Roll Call: Burt Dibble – Yes; Shawn Crapo – Yes; Patrick Driscoll – Yes;

Gregg Mikolaities – Yes; Patricia Weathersby – Yes

Motion passed

Adjournment

Motion by Burt Dibble to adjourn at 11:37 p.m. Seconded by Gregg Mikolaities.

Roll Call: Burt Dibble – Yes; Shawn Crapo – Yes; Patrick Driscoll – Yes;

Gregg Mikolaities – Yes; Patricia Weathersby – Yes

Motion passed

Respectfully Submitted, Dyana F. Ledger