

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

**Wednesday, November 3, 2021
7:00 p.m. – Rye Junior High School**

Members Present: Chair Patricia Weathersby, Vice-Chair Shawn Burt Dibble, John Mitchell, Sandra Chororos, and Kevin Maley

Also Present on behalf of the town: Planning/Zoning Administrator Kim Reed

I. CALL TO ORDER

Chair Weathersby called the meeting to order at 7:00 p.m. and led the Pledge of Allegiance.

Seated for meeting: Patricia Weathersby, Shawn Crapo, Burt Dibble, John Mitchell and Sandra Chororos

II. BUSINESS

- Approval of the October 6, 2021 Meeting Minutes

Motion by Shawn Crapo to approve the minutes of October 6, 2021 as amended. Seconded by Burt Dibble. All in favor.

III. APPLICATIONS

1. **Domenic Martingnetti & Phyllis Martignetti, 68 Manchester St., Nashua, NH for property owned and located at 4 Breakers Road, Tax Map 8.4, Lot 68, requests variances from §190-2.4.C(2) for a 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, Zone AE (8). Case #33-2021.**
 - Request a continuance to December.

Motion by Shawn Crapo to continue the application of Domenic and Phyllis Martignetti for 4 Breakers Road to the December 1, 2021 meeting. Seconded by Sandra Chororos. All in favor.

2. **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 swing set/play system as an accessory**

Vice-Chair Crapo stated that he looked at the definition and it definitely does not meet the Town's definition of building because it's not designed to house someone or something. Yes, it is a structure. It's material, erected and in place. He does not think that referring to it as an "accessory building" is appropriate.

Chair Weathersby noted that the Board has heard from the Rye Conservation Commission on this point. She asked if RCC would like to speak on the issue of whether this is an accessory building.

Mike Garvan, RCC Member, stated that the Rye Conservation Commission is strongly opposed to this structure because of its location. He is not sure that RCC has a strong opinion on whether it's a building or structure. However, the manufacturer describes it as club house and the room in question as a playhouse. It's certainly a large building with a room that was intended for play for children.

Chair Weathersby opened to the public for comments in regards to whether the playset is an accessory building.

Barbara Dallmeyer, 20 LaMer Drive, commented that the structure was stated as a swing set. It kept morphing until it had two large tubes with a picnic table inside. It's a "monster" in the marsh.

Hearing no further comments, Chair Weathersby closed to the public at 7:34 p.m. and opened to the Board for deliberation on whether this is an accessory building. She noted that an accessory building, according to the Rye's definitions is; *"A subordinate building on the same lot whether attached or unattached to the principal dwelling or principal building thereon."* This brings it back to the definition of a building; *"Any structure, either temporary or permanent, having a roof or other covering and designed or used for the shelter or enclosure of any person, animal or property of any kind."*

Member Mitchell stated it's a big mistake to start calling swing sets/play structures accessory buildings. It will be going down a deep hole. It is what it is. It's not an accessory structure. The nature of a swing set is that they're typically temporary, as it's usually taken away once the kids are older. It leaves no trace. In his mind, in talking about an accessory structure it's something that provides shelter and is a completely different focus compared to what is here. He continued that there is no foundation, no fill, no excavation and it leaves no trace when it is dismantled, regardless of the size.

Vice-Chair Crapo stated that when the Board is charged to look at the variance criteria, one of the things they look at is whether it is the spirit of the zoning. Is it in keeping with the spirit and intent of the zoning? Here, the only word that might possibly apply is "enclosure". However, it is not a full enclosure. The nature of today's safety requirements has driven some of these to be larger. There is also a regulation in town on the number of accessory buildings a property can have. There is a contradiction in the residential zoning. The use cannot be ruled out, but it could be limited by the number of structures on the property. He thinks to start calling this a structure is really a slippery slope because a Coleman tent could fit that definition, as well.

Chair Weathersby commented that it's clearly a structure.

Vice-Chair Crapo noted it's whether or not this is a "building". If this is called a "building" then someone's tent needs to be called a "building" because it's the same definition. It's going down a slope that was not intended by the drafters of the zoning. Is it large? Is it bigger than a lot of play structures? Yes. He pointed out that there is some disruption of the earth because it's anchored and dug in like a fence post, which would be allowed at the edge of this property in the buffer. Someone represented that it's in the marsh; however, the yard is not in the marsh.

Member Dibble stated that he is inclined to think that things of this nature were not in the minds of the creators of the ordinance. The bottom line is that the spirit of the ordinance does not include structures or constructions of this sort. He doesn't think the ordinance was meant to apply to things of this sort.

Chair Weathersby stated that in reading the definition, the accessory building would have to be designed for the shelter or enclosure of any person and used for that. Clearly, it's designed and used for the kids to go in and out. Its primary purpose isn't to shelter or enclose the kids. It's not primarily being used to enclose or shelter them. Chair Weathersby noted that it sounds like the Board is in agreement that it is not an accessory building, as the Building Inspector stated in his letter.

In regards to the June 28, 2021 letter, the Building Inspector referred to this play system as an accessory building, she polled the Board:

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

Burt Dibble – Yes; John Mitchell – Yes; Sandra Chororos – Yes; Shawn Crapo – Yes; Patricia Weathersby – Yes

Motion by Shawn Crapo to grant the Administrative Appeal requested by Charles M. and Lyndsay A. Beynon. Seconded by Burt Dibble. Vote: 5-0. All in favor.

3. **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 swing set/play system 10+/- from the rear boundary where 30' is required and from §190-3.1.H(2)(g) for a swing set/play system 18' from the wetland boundary. Property is in the Single Residence District. Case #35b-2021.**

Attorney Chris Mulligan noted that this play system has not been permanently anchored and there has been no disturbance of the wetlands buffer or the property, in terms of digging, trenching or grading for the installation. He continued that the Beynons' primary concern is the safety and well being of their children. The only compliant areas where this could be sited is in front of the house or to the right of the garage. Even then, there is a very limited envelope that would be compliant. No matter where this ends up being sited, it is going to need some relief from the Board, in terms of setback variances. The desire of the Beynons is to have it as far away from the road as possible, so that drove the decision to locate it in the back corner of the

property. It also happens to be the flattest part of the lawn. There is some fairly significant topography moving away from the street towards the marsh. The flat area is important because otherwise, the Beynons would be in a position to request relief to do some grading and some physical disturbance to the property itself. He pointed out the entire backyard is essentially in the wetlands buffer, so the Beynons do not think that would be appropriate. It is very common to see play sets in rear yard setbacks. The reason is to generally maintain as much open space and useful backyard as possible. It's very common to see these pushed off to the side or rear of the property. The Beynons wanted to keep as much open space as possible for their kids to play. Locating the unit somewhere in the middle of the backyard would spoil that possibility.

Attorney Mulligan continued that in order to grant the variances from the rear 30' setback and the 100' wetlands setback, the Board needs to find that specific criteria are satisfied.

- Granting the variance will not be contrary to the spirit of the ordinance, nor will it be contrary to the public interest. The test is whether or not granting the variances would substantially alter the character of the neighborhood or threaten the health, safety or welfare of the public. The essential character of the neighborhood remains entirely unchanged. This is a residential use in a residential neighborhood. There's no change in the residential use as a result of the relief being requested. Children playing within a rear yard setback or a wetland setback is not unusual, nor is it considered a threat to the health, safety or welfare of the public. There is no conflict with any purposes of the ordinance, let alone an undue conflict and a conflict in a marked degree to the basic zoning objectives.
- In regards to substantial justice, the Board is charged with balancing the hardship to the applicant, which must outweigh any benefit to the general public for requiring strict compliance with the ordinance. Given the unique characteristics of the property and the fact that there is no reasonable place to site the play set without getting some relief from the Board, substantial justice tips in favor of the applicant. The existing dwelling has been permitted by this Board, substantially within the wetlands buffer. The additional intrusion into the wetlands buffer is de minimis. The opinion of Wetland Scientist Marc Jacobs is that any wetlands impact is negligible. The purpose of rear setbacks is to promote light and air, and adequate space in between structures. There is nothing being developed to the rear of the house where there is marsh. So, those concerns are not germane. Substantial justice would be done by granting the variance. There is no benefit to the general public that would outweigh the loss to this applicant if the variances were to be denied.
- The values of surrounding properties will not be diminished by granting the variance. What is being proposed is a common accessory use to a dwelling use. It's not something that someone would be surprised to see in a residential zone. The use of the rear yard by the Beynons' children for recreation is not in any way prohibited, even though it's within the 100' setback. The values of surrounding properties will not be negatively impacted in any way by the setback relief being requested.

- There are special conditions of this property that distinguish it from others in the area such that the strict terms of the zoning ordinance presents an unnecessary hardship. It's an irregular shaped lot. It's a pre-existing non-conforming lot. It's deficient as to frontage and lot size. Relief was granted to replace the previous house, which was non-conforming. The other special condition is that practically the entire backyard is within the 100' setback of the wetlands. There's no portion of the rear yard that wasn't already unnaturally disturbed to begin with.
- It's a reasonable use. It's a residential use in a residential zone.
- There is no fair and substantial relationship between the purpose of the ordinance and its application to this particular property. There is no adjacent property to the rear, as the property abuts the marsh and it will not be developed. A certified wetland scientist has opined that the impact of the play set on the wetlands is negligible. He has also said that siting it anywhere else on the property would have the exact same impact, which is virtually none.

Attorney Mulligan stated that he would like to address a couple of items that he expects will be heard from members of the public regarding this application. One is that the color of the slides is inappropriate. As shown in the pictures, the color of the slides is bright yellow. This was recommended to the Beynons by the manufacturer. The alternative is a deep forest green, which essentially becomes super-heated in the sun and could have a negative effect.

Chair Weathersby commented that the color of the slides has no bearing on the variances.

Referring to the size and height of the play set, Attorney Mulligan stated that it might be due to safety and it might just be the natural progression and evolution of things getting bigger. That's why the size seems to be a bit of a problem for some people. At the site visit conducted by RCC, members of the public were invited. There was some feedback from the public that the play set was actually too far from the house and the parents wouldn't be able to get to that area fast enough. This was presented to the Board in RCC's recommendation letter. He commented that this has nothing to do with wetlands protection or whether or not setback relief is appropriate. He would ask the Board to disregard this. He continued that when variances were granted for the construction of the dwelling, the RCC required a 15' vegetative buffer which the Beynons installed and have maintained. This isn't a situation where his clients are ignoring their responsibilities as members of the community and abutters to the wetlands. Recommendations were made and were made conditions of approval and the Beynons have complied with them.

Attorney Mulligan stated that another item that may come up is the fact that the Beynons installed the play set without the benefit of getting a building permit. The issue came to a head in September when an applicant was before this Board seeking wetland relief for a deck. At that case, it came out that there was a play set in the wetland buffer on that property and the property owner was told by the building inspector he didn't need a permit. Attorney Mulligan stated that he understands that RCC's position is that they are not apples to apples and you can't draw precedent. However, the fact that Rye's building inspector was confused about whether this required a permit should mitigate what the Beynons did without a permit. He thinks the Board

should be mindful that other people in the community aren't required to obtain permits, go before the Conservation Commission and accept their feedback, and invite the public onto their property to discuss how they would like to provide recreational opportunities for their children. He thinks this plays into why his clients weren't very interested in having a second site walk with RCC.

Chair Weathersby commented that Vice-Chair Crapo has suggested that the color of the slides could go to the diminution of value of surrounding properties, so it may or may not have bearing.

Attorney Mulligan stated that the property that would be affected would be the property to the rear, which is the wetlands. He does not see how the value to the wetlands would be negatively impacted by the slides being yellow versus green. The purpose of going with the yellow is for safety.

Chair Weathersby commented that she does not have a copy of Marc Jacobs report.

A copy of the report dated October 26th was submitted to the Board.

Referring to the photos submitted with the application, Vice-Chair Crapo asked how long ago the pictures were taken. He also asked how long the structure had been in use when those were taken.

Attorney Mulligan replied the photos were taken in July and the structure went up in April.

Alternate Maley stated that there was mention of a grade change from the house to the rear of the property. He asked what it is from the back of the deck to the play set.

Corey Colwell, TF Moran, stated that he did the permitting on the house in 2017. The height of the finished floor was established significantly higher than the back marsh with quite a slope in the yard. There's at least a 6' drop from the floor to the back of the yard. He continued there are two areas on the lot that are flat. One is in the front yard and the other is in the area of the play set. All other areas of the property have some type of slope. That is why the area was chosen for the play set. Mr. Colwell noted that the finished floor elevation is 18.1' and the back of the property is at elevation 8', so there is a 10' drop.

Referring to the plan, Alternate Maley asked about the dashed line on the plan that delineates the area of the play set.

Mr. Colwell pointed out that the dashed line shows the outer limits of the end of the slide, the structure with the roof and the cross member that holds the swings. This represents the footprint, as if the children were swinging. It's not a representation of the structure itself. It's the area of the ground for which someone on the structure may cover in movement.

Alternate Maley asked the square footage.

Attorney Mulligan replied that the square footage of that area is 545sq.ft. The actual square footage of the floor of the lemonade stand is only about 55sq.ft.

Referring to the 545sq.ft., Chair Weathersby asked how much of it is in the landscaping area.

Referring to the 2017 landscaping plan, Mr. Colwell noted that it shows a meandering landscape line. The Conservation Commission asked for a buffer that averaged 15'. It could go down to as narrow as 5', as long as the average was 15' across the back of the property.

Chair Weathersby clarified that the March 1, 2017 plan shows a landscaped area that is not what was installed.

Mr. Colwell agreed. He pointed out that no portion of the play system is within the 15' buffer.

Chair Weathersby stated that it looks like the front boundary is 300' or so. She understands that most of the lot is in the wetland buffer; however, it's really close to the tidal wetland and it's in the setback. She asked why it could not just be moved forward.

Attorney Mulligan stated that the property is a trapezoidal shape and does not give a lot of room. He reiterated that the location was chosen because it was the flattest part of the property for safety purposes. Also, there is not a whole lot of useful area for playing ball because it's so steep to the 15' vegetative strip. It's desirable to leave the area wide open. He continued that a member of the public has submitted photos that show flooding in this area. He feels this is misleading because that was flooding of a king tide during a 100-year storm, which is not normal or common. The Board shouldn't make determinations based on a 100-year flood event. The other suggestion the Board will hear is that there's a visual impact with this structure from across the marsh. To the extent that's true, re-siting the structure where the Conservation Commission would prefer is up the hill a bit and closer to the home. This would only make it more visible from across the marsh. He does not believe that's a valid criticism of this particular location.

Vice-Chair Crapo referred to the corner of the house structure that is closest to the structure in question. He commented that it seems like there was a dip in this area (walk-out basement). He asked if there were plans that showed this. He was looking at the plans to see if it could be moved closer. These plans look like there's a dip in part of the back yard, which might be for a walk-out.

Mr. Colwell replied that anywhere else, other than the front yard, is going to require excavation to create a level spot and probably some type of retaining wall. The existing location of the play set is the only flat area on the lot that didn't require excavation.

Chair Weathersby noted that in looking at the topo, it looks like around the back deck is 14' in elevation, not 18'.

Mr. Colwell explained the finished floor elevation is 18.1'. The ground off the back of the deck at the bottom of the stairs is 14'.

Chair Weathersby clarified the land at the back of the house is at 14' and goes down to 8', which is a 6' drop between the swing set and the house.

Mr. Colwell confirmed.

Member Dibble asked how high off grade the floor of the house is in the back by the porch.

Mr. Colwell replied it's 4' above.

Chair Weathersby asked if the applicants consulted with any neighbors on LaMer before putting the swing set in its present location.

Attorney Mulligan replied it is his understanding that they spoke with the people at 10 LaMer, which is to the east on the same side of the street.

Chair Weathersby opened to the public in favor of the application. Hearing no comments, she opened to the public in opposition.

Linda Cavanagh, 35 LaMer Drive, stated that she and her husband are abutters to the Beynons and owners of several acres of adjacent marshland. She asked if they were supposed to receive a copy of the report that the Beynons had done by the consultant with regards to the soils and the impact to the marsh.

Chair Weathersby explained they would just receive an abutter's notice.

Ms. Cavanagh stated that they were not privy to that report.

Chair Weathersby replied neither was the Board, until right now.

Ms. Cavanagh stated that in the Board's packets is a letter from her and her husband. The letter talks about the hardship and how that also relates to the public. She continued that her property has been in the family for over four generations and over 120 years. She has great respect for the importance of the marsh and continues to be a good steward of the land. More than anything, she believes that people who are fortunate to have the property that they own, they need to be champions and protect the marsh above their own interests. Regulations that protect the marsh are in place for the public good. Exemptions to those regulations should only be given when it is in the best interest of the public good. Every exemption granted removes protection of the marsh and its effects are cumulative when additional exemptions are made. Placing a commercial grade playground a few feet from the marsh is not in the public good and is only serving the desire of the owner not to have it closer to their house. Having previously gone through the variance process to build their house, the applicants were fully aware that their property is fully

protected under the wetland buffers. Taking into consideration her letter and all the points in the Rye Conservation Commission letter, she believes the Board's decision should be to not allow the play structure to be located on the border of the marsh.

Barbara Dallmeyer, 20 LaMer Drive, stated that she is an abutter and was not asked about the swing set construction. It morphed up to 545sq.ft. and is in the wetlands. She didn't give any written permission to have the structure put at that location. She had no idea the swing set would morph into that size, so she did say "yes". She reiterated it is in the wetlands. She took that picture and it wasn't that long ago. It was high-tide and during a nor'easter. When the tide comes in at high-tide, it looks like a big lake. The tide does come into the tidal marsh. It looks like a lake and it is wet. She noted that the structure is across the marsh and can be seen from Route 1A. When she looks out at the marsh, she is drawn to a huge neon yellow tower. She would have liked to have more of a say.

Vice-Chair Crapo stated that oftentimes, to help ease the strain of generators to the abutters, the Board will require plantings around it. It seems to him that the issue is that its in the view overlooking the marsh. He asked if there would be a difference of opinion, or more of an acceptance, if the Board conditioned any approval with the planting of Conservation approved plantings to provide screening to block this. His guess is "no" because the plants would be rather tall and probably block more of the view. He continued that potentially some plantings could be installed to block the view of this.

Ms. Dallmeyer replied the plantings would be quite high.

Chair Weathersby asked if it would help if something was planted to block the structure from view.

Ms. Dallmeyer stated that she was told it's within the 100' tidal buffer zone. It's in the water. It's where animals live.

Vice-Chair Crapo commented that it keeps being referred to, by people who are opposed, as a commercial grade structure. He asked what the evidence is that proves its commercial grade. He looked at the advertisement and the only reference to "commercial" is the commercial grade hangers for the strength of holding the chains for the swings. It appears to be residential quality.

Ms. Dallmeyer replied it's big. It's like a tiny house.

Vice-Chair Crapo noted that he would like to clarify for the record that he does not believe it's a commercial structure.

Ms. Dallmeyer commented it looks commercial.

Gerald Clinton, 1535 Ocean Blvd, asked to speak.

subject to tidal flooding and storm flooding. It's also in the restoration priority area and the protection priority area, as shown on the maps developed by the U.N.H. Extension and the Nature Conservatory. RCC just wants it to be further back. He noted that when RCC was at the site walk, they reviewed areas between 50' to 75' that would be absolutely suitable and get it well out of the wetland. There would still be good sight lines for the Beynons to observe their children playing. It would probably require some excavation. However, the Conservation Commission decided that they would rather see that disturbance, 75' away from the Awcomin' Marsh, rather than having the structure 18' from the marsh.

Chair Weathersby asked if this is in the flood storage area.

Mr. Garvan confirmed. He noted that it is also in the floodplain.

Chair Weathersby noted that letters of opposition were received from:

- **Barbara Dallmeyer, 20 LaMer Drive**
- **Philip and Ligia McAuley, 10 LaMer Drive**
- **John and Linda Cavanagh, 35 LaMer Drive**

Received in support:

- **Colleen Harmon, 1242 Ocean Blvd (No standing)**
- **Matthew Madara, 11 McLaughlin Drive (No standing)**

It was also noted that a letter was received from the Rye Conservation Commission with their recommendations; dated October 27th. (Mike Garvan submitted a letter dated November 2nd to the Board. The Board reviewed the letter.)

Referring to the photo, Vice-Chair Crapo noted that it is still fairly well grassed around the play set. Over time, there may become compacted spots where the grass may go away; such as, under the swings or the end of the slides. On other conservation plots throughout the Town, walking trails are maintained and promoted for people to enjoy. He is trying to understand how the slight compaction that might develop over time from a handful of kids using it might be different than the constant use of the trail network that is in similar wetlands.

Mr. Garvan stated that there are not a lot of trails initiated in the wetland buffer, right next to the marsh. There are some older trails that were existing, which was mentioned in the wetlands scientist's report. There has been a lot of development around the marsh; however, most of that occurred well before the ordinances, certainly before wetland ordinances. He would say a well-travelled trail would impact it more than children playing. However, there is still 54sq.ft. of impermeable playhouse and that will definitely have an impact.

Attorney Mulligan stated that people had said that this is a commercial grade structure, which it is clearly not. The literature from the manufacturer indicates that if this is used in a commercial application in any way, it would void the warranties. The structure is made of cedar and doesn't have pressure treated or composite lumber. With respect to the concern of the 54sq.ft. of impervious surface of the floor on the enclosed structure, that can be removed. If that is a

concern, a condition of approval could be to remove that and that would be acceptable. It would no longer be impermeable.

Vice-Chair Crapo pointed out that there is a roof. Just changing the floor might not change the runoff.

Attorney Mulligan commented that the opinion is that the impact is negligible and it can be made even more so.

Chair Weathersby noted that the Board requires that the applicant have all materials submitted 7 days prior to the meeting, not on the day of the meeting. The Board needs to decide if they are going to accept Mr. Jacob's testimony and report or if it should be continued for more information. She commented that she is really frustrated this wasn't in 7 days beforehand according to the rules. She asked the Board if they would allow the report and testimony.

Planning Administrator Reed noted that the report was submitted to her by email; however, it was in the spam folder. It was submitted by email well within the week. She also has Mr. Garvan's letter, which was received yesterday.

Chair Weathersby confirmed there was no procedural error and Mr. Jacobs could move forward.

Marc Jacobs, Certified Wetland and Soil Scientist, stated that in an ideal situation, there would be at least 100' of naturally forested buffer adjacent to Awcomin' Marsh. Unfortunately, that's not the case and there has been some development. The Conservation Commission is particularly concerned about the flooding issue as they identify in the November 2nd letter. The area floods periodically. It's within the 100-year floodplain. The Commission states in their letter that frequent flooding saturates the ground and frequent foot traffic will compact the soils. He is not sure how the Commission has arrived at the conclusion that the area floods frequently. It floods periodically; however, statistically speaking a 100-year storm only happens every 100 years. With climate change, those storms are happening more frequently, but they still don't happen frequently as indicated in the Conservation Commission's letter. He continued that presumably the concern is that the flooding of the area surrounding the swing set will somehow adversely affect the marsh. He submits there are thousands of recreation areas and recreational fields that are situated in floodplains around this country for that reason. When the floods come up, it probably has a greater impact on the infrastructure than it does on the adjacent floodplain once the water recedes. Any impact from an occasional flood is going to be minimal on that structure. That structure is very solid and is not going to go anywhere. There's going to be minimal impact to the structure and no impact to the adjacent marsh.

Mr. Jacobs continued that additionally there seems to be some concern over the 54sq.ft. impervious area associated with the swing set. He assumes that concern is associated with the infiltration of runoff and stormwater that would be precluded from that 54sq.ft. area. He would submit to the Board that if infiltration is the concern, the small amount of runoff that is going to be generated from that impervious area is going to penetrate the ground immediately adjacent to

that small footprint and infiltrate into the soil, just as it would if the swing set weren't there. A 54sq.ft. impervious area associated with a swing set has a deminimis impact. Finally, the Conservation Commission rightfully raises a concern about the potential of soil compaction. The swing set has been there since April and there hasn't been any soil compaction to date. The concern of compaction is associated with the limiting of infiltration of rain water and stormwater runoff. The two potential areas of compaction would be associated with the foot of the slide and the area under the swings. Those areas are so small that even if they became compacted over time it wouldn't eliminate the potential for the surrounding areas to absorb the water and have it infiltrate into the soils. The real impact to the saltmarsh is associated with the loss of the buffer originally by the construction of homes. Situating a swing set between the home and the saltmarsh, with a direct footprint of 54sq.ft., is negligible and will have a deminimis impact on the saltmarsh.

Chair Weathersby stated that it was said that it's a deminimis impact; however, it does have an impact of some degree. She asked if it would be better for the wetland if this swing set wasn't there.

Mr. Jacobs replied the impact can't be measured.

Chair Weathersby asked if it would be better if there was less human activity in that corner so close to the wetland.

Mr. Jacobs stated that in an ideal world, there would be at least a 100' naturally vegetated buffer.

Chair Weathersby asked if he feels the 15' vegetative buffer is insufficient.

Mr. Jacobs replied he thinks its fine. He thinks a lot of other things would have to change.

Referring to the 54sq.ft. impervious area, Member Mitchell asked if there is a way to measure recovery time. If it were taken away, how long would it take for that area to recover.

Mr. Jacobs explained that recovery would commence immediately. Full recovery would probably take a month. The vegetation that's underneath the area that's covered by the impervious part of the swing set would revegetate in a month's time. Any compaction associated with the foot traffic would likely go away by the time the vegetation was able to extend roots back down into the soil. That would help to recreate structure and porosity, which would help with re-infiltration of the water.

Chair Weathersby asked if the seeds underneath the impermeable areas and compacted soil would still come back in a month if it was removed 20 years from now.

Mr. Jacobs confirmed. He stated that it's been advocated to move the swing set roughly 50' from the marsh. His professional opinion is that it would have the exact same deminimis impact at 50' from the marsh as it does at 18' from the marsh.

Hearing no further public comments, Chair Weathersby closed the public hearing at 9:05 p.m. and opened to the Board for deliberations for the play system to be located 9.6' from the rear boundary, where 30' is required, and 18' from the wetland boundary.

Vice-Chair Crapo noted that the request is under (g), which is all other uses are prohibited. Under (c), uses permitted by Section 3.1.E are permitted *"provided there is no surface alteration by the addition of fill, excavation or dredging"*. In looking at 3.1.E, which says *"permitted uses in tidal marshes and freshwater marshes"*, not the buffer, in the marsh. It talks about passive recreation. Number (7) says; *"the following structures are permitted in tidal wetlands: fences, footbridges, catwalks, and wharves provided said structures are so constructed on posts or pilings as to permit the unobstructed flow of the tide, do not obstruct navigation on the tidal creeks, and preserve the natural contour of the tidal marshes."* He noted that it doesn't talk about runoff or impervious, but it contemplates structures which would have water falling around them in the marsh. This is in the buffer.

Chair Weathersby commented that water would pass under; fences, footbridges, catwalks, and wharves on posts and pilings.

Vice-Chair Crapo noted the other area talks about paths, etc. This is where he is having trouble talking about the de minimis compaction that may surround this structure. There are plenty of other sanctioned uses that occur in the buffers and even in the wetlands that may be contradictory to the proposed request of the Board to place restrictions here.

Chair Weathersby asked his thoughts on why this needs to be in the rear setback.

Vice-Chair Crapo stated that any other place would require digging, grading and leveling. As the zoning contemplates, that is said to be not allowed. There are plantings that will mature that will provide some buffer. He is not sure if a judge is going to find it reasonable to force this thing 20' away. He personally thinks a big driving factor here is not even the wetlands, as it is the view and the fact that a petition was circulated calling it a commercial structure.

Chair Weathersby asked if it should be allowed anywhere on this lot in the tidal buffer.

Vice-Chair Crapo commented he thinks yes. They are allowed an accessory use to a building.

Chair Weathersby commented not in the tidal buffer.

Vice-Chair Crapo replied perhaps not in the tidal buffer, but they have the right to come and request a variance. Criteria has to be demonstrated as to why there should be an exception.

Member Chororos stated she is looking at this from the hardship perspective. These individuals have chosen to live in a sensitive habitat. It is fairly easy for them to potentially move this structure out of the wetlands buffer. Leaving it where it is sets an unfortunate precedent by ignoring the wetland ordinances, which are in place for a reason.

Vice-Chair Crapo commented that one of the ideas seems to be that the Board might grant some type of relief with them being asked to move the structure.

Chair Weathersby replied the Board is only dealing with the swing set in this location. If this is denied, they can come back with the swing set in another location and the Board will deal with that then.

Member Mitchell commented he is trying to look at this from all perspectives. He appreciates the science behind it and the abutters' opinions. He usually gives a lot of weight to abutters and the Conservation Commission. Those are all very important opinions. In this case, he has a hard time not looking at it as a kids' play structure. In talking about what's detrimental to the area, mowing lawns is more detrimental than kids playing out there for an hour and a half. It is far more detrimental to be out there with a lawn mower for an hour and a half and is much more disruptive. He can't get away from the fact that it's really not a permanent structure. He thinks a property owner has the right to have a place for their children to play in their own backyard. He thinks there is a bigger issue here and it's really a loss of view, more than anything else. In regards to moving the structure closer to the house, Member Mitchell pointed out there is an underground propane tank in the yard. Also, if this is a view issue, it won't change the view at all but will create hardship for the owners of the property by having to move it. They will lose play area for the kids because of the way the land is sloped.

Member Dibble stated this is very troubling in a lot of ways. At the end of the day, it's relatively simple in his mind. Troubling to him because the owners had to know that there were wetland setback issues here. They probably had to be knowledgeable about the rear yard and side yard setback. He found himself wondering why this isn't an application for an equitable waiver. The second issue is that he didn't see a good grading plan. He doesn't know how big the level area is and whether the swing set could be moved back a few feet. It looks like it would only require a few feet to get in the side and rear yard boundaries. He is very sensitive to the view issue. However, the Board has historically taken the position that people are not entitled to views unless it's in the deed. He can't make his decision on the bases of view. He finds the soil science reasonably convincing. He is not entirely convinced that if the structure was taken down 20 years from now that spot of land would recover in four weeks. It might take some loam and seeding to recover and that's an invasion of the marsh. He thinks the hardship that would result for the owners in having to move it is exceeding the benefit of getting it moved.

Chair Weathersby stated that she is looking at this application, as she believes the Board needs to, which is they don't get credit for it already being there. The Board needs to look at this as they are coming in for a variance to place a swing set in that location. She doesn't give them credit for having it there already. She commented that she loves seeing kids outside and getting exercise. She is so in favor of play sets generally. However, she is also in favor of enforcing setbacks and protecting the marshes. She doesn't think it needs to be there. There are other locations on the property that will need much less or no relief. It's a very valuable marsh. It's not just a small, isolated wetland. It's one of the nicest and largest wetlands in the Town. It's

also in the flood storage and floodplain. It's a special marsh. It can be somewhere else and not have these implications. In regards to the rear setback, they have a very large lot with other locations for it to go. She feels that although there will be a minimal impact, there will be an impact on the wetland. In her mind, there is certainly an impact on one or two neighbors with regard to diminution of property value. It's a very self-created hardship. She continued that she sat on the house application and it took several meetings. There was a lot of discussion about the wetlands and protecting the wetlands. The owners are very aware of those issues. She feels as though they put this down there because it was convenient and out of their view of the marsh. The ordinances are in place to protect the natural resources. She doesn't think that putting this there is going to ensure the protection of the natural resources, nor is there any hardship for not enforcing the rear setback.

Referring to Member Dibble's comments, Vice-Chair Crapo pointed out that the Board has discussed view in the past. It only comes into play when it's within the setbacks. When it's in the buildable area, unless someone has a deed restriction, then it is off limits. Vice-Chair Crapo continued that his observation here is this is at the lowest point. Most of the views on this side of the marsh, might be more affected by moving it uphill and into the building area versus putting it in the lower corner.

Chair Weathersby commented she disagrees.

Vice-Chair Crapo continued that he also disagrees with the analysis that it is more detrimental to abutting property values where it is proposed versus somewhere else in the yard. He thinks it will then be more in view. It would put it more in the abutters' view than at a lower elevation. He thinks a reasonable judge would grant some credit towards the hardship for the fact that this is already there. He thinks that there is a general lack of knowledge that a permit is needed for a play structure in the yard.

Chair Weathersby commented that it's a structure in the setback and within the wetland buffer and a permit is needed.

Member Mitchell stated he agrees with Vice-Chair Crapo. This is going down a "slippery slope". He doesn't believe it was the intent of these codes and regulations to be regulating children's swing sets. This is a lot of wood, but the part that is actually on the ground is very minimal.

Chair Weathersby explained that under Rye's ordinance it's a structure. A structure needs a building permit. They are asking for relief from the wetland buffer and the rear setback.

Member Mitchell commented that he doesn't think that the intent, with the way this is written, is that it would cause harm.

Chair Weathersby pointed out that the ordinance, as written tonight, says a permit is needed.

Member Mitchell asked Vice-Chair Crapo about his points about the dock or boat launch.

Vice-Chair Crapo explained that in looking at the notice, the Board is considering 3.1.H(2)(g), all other uses prohibited. Then under 3.1.H(2)(c), uses permitted by 190-3.1E are permitted, provide that there is no surface alteration by the addition of fill, excavation or dredging. Referencing back to E, it lists uses within the actual tidal marsh and freshwater marsh. This is considering something in the buffer. The rules for that references some things in the actual wetland itself.

Chair Weathersby noted that it references things that are allowed in the wetlands itself. If it's allowed in the wetland itself, it's allowed in the buffer. She thinks it's clear that a play set is not permitted. However, Vice-Chair Crapo is making the analogy to other activities; such as, *"footbridges, catwalks, and wharves provided said structures are so constructed on posts or pilings as to permit the unobstructed flow of the tide, do not obstruct navigation on the tidal creeks, and preserve the natural contour of the marshes."*

Member Mitchell asked a question in regards to the floor of the play structure.

Chair Weathersby re-opened the public session for Member Mitchell's question about how the swing set is attached to the ground and whether the floor is on the ground.

Attorney Mulligan noted that the floor is raised off the ground.

Member Mitchell asked if it's attached to the posts.

Attorney Mulligan confirmed.

Chair Weathersby clarified that what's on the ground are the posts for the structure.

Attorney Mulligan confirmed.

Member Mitchell clarified that those are not in fittings. There just on the ground.

Attorney Mulligan confirmed.

Chair Weathersby asked how high the floor is from the ground.

Charles Beynon, applicant, replied about 4".

Mike Garvan, RCC, pointed out that under Section E there cannot be a structure or sign larger than 4sq.ft. This is a structure that has at least 54sq.ft. of impervious and it's at least 545sq.ft. of used space.

Chair Weathersby reclosed the public hearing at 9:32 p.m.

Hearing no further comments, she called for a vote on variance relief to §190-2.3.C(1) for a swing set/play system 10+/- from the rear property boundary where 30' is required:

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

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

2) The spirit of the ordinance is observed?

Burt Dibble – No
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

3) Substantial justice is done?

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

4) The values of surrounding properties are not diminished?

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

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

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

- 6) **There is no fair and substantial relationship between the general purpose of the ordinance provision and the specific application of that provision to the property?**

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

- 7) **The proposed use is a reasonable one?**

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

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

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

Chair Weathersby called for a vote on variance relief to §190-3.1.H(2)(g) for a swing set/play system 18' from the wetland boundary:

- 1) **Granting the variance is not contrary to the public interest?**

Burt Dibble – No
John Mitchell - Yes
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

- 2) **The spirit of the ordinance is observed?**

Burt Dibble – No
John Mitchell – No
Sandra Chororos – No
Shawn Crapo - Yes
Patricia Weathersby – No

3) Substantial justice is done?

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – No
 Shawn Crapo - Yes
 Patricia Weathersby – No

4) The values of surrounding properties are not diminished?

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – No
 Shawn Crapo - Yes
 Patricia Weathersby – No

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

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – No
 Shawn Crapo - Yes
 Patricia Weathersby – No

6) There is no fair and substantial relationship between the general purpose of the ordinance provision and the specific application of that provision to the property?

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – No
 Shawn Crapo - Yes
 Patricia Weathersby – No

7) The proposed use is a reasonable one?

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – No
 Shawn Crapo - Yes
 Patricia Weathersby – No

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

Burt Dibble – Yes

John Mitchell - Yes
 Sandra Chororos – No
 Shawn Crapo - Yes
 Patricia Weathersby – No

Motion by Patricia Weathersby to deny the variances for the rear property boundary and wetland boundary relief as advertised. Seconded by Sandra Chororos.

Vote: Burt Dibble – No; John Mitchell – No; Sandra Chororos – Yes; Shawn Crapo – No; Patricia Weathersby – Yes

Motion failed.

Motion by Burt Dibble to approve the application of Charles M. and Lyndsay A. Beynon for property located at 30 LaMer Drive for variances from §190-2.3.C(1) and §190-3.1.H(2)(g) as advertised. Seconded by John Mitchell.

Burt Dibble tabled his motion to grant.

Motion by Patricia Weathersby to continue the Sagamore Group for 15 Sagamore Road, and BSL Rye Investors, LLC for 295 Lafayette Road to the next meeting. Seconded by Burt Dibble. Vote: 5-0. All in favor.

Chair Weathersby called for a recess at 9:50 p.m.
 The meeting reconvened at 9:59 p.m.

Chair Weathersby announced there is a board consensus to hold another meeting on November 17th for the Sagamore Group and Benchmark.

Referring back to the vote on the variance request for the play set on 30 LaMer Drive, Vice-Chair Crapo stated that after consulting with counsel, unrelated to this application, it was said that of the eight criteria, if any one of them fail, there cannot be an approval of the application.

Burt Dibble withdrew his tabled motion. John Mitchell withdrew his second to the motion.

Motion by Shawn Crapo to deny the request for the variances from the rear setback and the setback for the wetland boundary based on the failure to satisfy the criteria. Seconded by Sandra Chororos. Vote: 5-0.

Motion to deny passed.

4. **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 September 14, 2021 letter denying a 5' fence within the 100' wetlands buffer per 190-3.1.H(2)(a)(c). Property is in the Single Residence District. Case #48-2021.**

Attorney Chris Mulligan, representing the applicants, spoke to the Board. The applicants submitted a request for a building permit to install a 5' fence 1' in from the boundary. A denial letter was received from the building inspector on August 14th. The Building Inspector was claiming in his letter that the installation of a fence was not permitted under Section 3.1.H(2)(a), (c) and (g). Those provisions provide that "surface alteration by the addition of fill, excavation or dredging is prohibited. Uses permitted by 3.1.E are permitted, provided there is no surface alteration by the addition of fill, excavation or dredging." In looking at 3.1.E(7), it specifically permits within the tidal wetlands the following: fences, footbridges, catwalks and wharves. This is a fence. It's specifically permitted within the wetland itself under Section E(7). It is therefore, specifically permitted in the wetlands buffer under 3.1.H(2)(c), provided there is no surface alteration by the addition of fill, excavation or dredging. He noted that there is not going to be any fill, excavation or dredging. The fence posts are going to be dug by hand. There is no basis for applying the restriction in Section (2)(a) to this application. It's a straightforward application. There's a specific use that is permitted, fences, and it's called out in the ordinance. He respectfully submits that the denial of the building permit was an error.

Member Chororos asked the location for the fence.

Attorney Mulligan reviewed the location on the plan for the Board.

Hearing no further questions from the Board, Chair Weathersby opened to the public in favor of the administrative appeal. Hearing no comments, she opened to the public for comments in opposition to the administrative appeal for the fence.

Barbara Dallmeyer, 20 LaMer Drive, submitted a handout to the Board.

Speaking to Mrs. Dallmeyer, Chair Weathersby asked her to speak to the issue of the fence, not the past history. A building permit for the fence was denied and the Beynons are saying it was wrongly denied. That is the issue.

Mrs. Dallmeyer commented that she wants to talk about where the fence will be located.

Vice-Chair Crapo asked if she is suggesting there may be a dispute over the actual placement of the property line.

Mrs. Dallmeyer commented that she does not want it in the 20' setback.

Vice-Chair Crapo pointed out that setback restrictions do not apply to fences.

Mrs. Dallmeyer stated there's a problem with the property line. She's making a contention to have this fence not go within the trees and the house.

Chair Weathersby asked if she is saying that she doesn't want the fence to go where it is intended to go.

Mrs. Dallmeyer confirmed.

Chair Weathersby explained that is not an issue right now before the Board. The Board is just determining whether the Building Inspector erred when he said they couldn't get the permit. She pointed out that a property owner has a right to put a fence on their property within 1' of the shared boundary. She noted that this concern would be something to bring to the building inspector.

Vice-Chair Crapo noted that any property owner has the right to put up a fence 1' away from their property line. In this case, their proposing 1' off. The question is whether or not the Building Inspector properly or improperly denied that request. He asked Mrs. Dallmeyer if she is saying there's a dispute as to where the property line is measured. If they're going to go 1' in, the placement can't be stopped unless they're measuring improperly.

Speaking to Mrs. Dallmeyer, Chair Weathersby asked if she disputes the boundary line.

Mrs. Dallmeyer replied she didn't.

Chair Weathersby asked if she does now.

Mrs. Dallmeyer replied yes.

Chair Weathersby noted this is something that needs to be brought to the Building Inspector's attention. The Board is going to vote on whether he erred on denying the permit based on other grounds.

Linda Cavanagh, 35 LaMer Drive, asked for clarification on the location of the fence.

Attorney Mulligan reviewed the location.

Dana Heaney, 25 LaMer Drive, stated that his concern is the fence itself, not where it might be. He is hoping this will be built to code.

It was noted that it's an iron fence.

Mike Garvan, RCC, stated that the Conservation Commission received an email from Corey Colwell saying that they submitted an application for a wetland permit for the fence in the buffer with the full understanding that this must be reviewed by RCC. Mr. Garvan asked if this is superseded by the fact that they don't need to get a permit.

Chair Weathersby explained they do need a permit. The Building Inspector denied it based on a certain section of the zoning ordinance, which they are now challenging. If the appeal is granted, they will then apply for the building permit and they will get the permit. RCC will not have an opportunity to weigh-in, but they can always challenge the building permit.

Mrs. Cavanagh asked if they will need an approval from the State for the wetlands.

Corey Colwell, TF Moran, explained that RCC will get a review for the simple reason that this requires a wetlands permit. Any wetlands permit is first filed with the Town Clerk and is then forwarded to the Conservation Commission for the opportunity to weigh-in on the permit. If they get a building permit from the Building Inspector, they won't get a chance there but they will under the State permitting process.

Vice-Chair Crapo pointed out there are two photos for reference. One of the analyses, under the section being considered, is perhaps the Building Inspector made a determination on little to no excavation. One of the photos has granite posts and the other has simple metal. He asked if it's going to be granite posts every 8'.

Mr. Colwell explained the granite posts are just for the gate. Everything else would be the posts shown in photo 2. (He pointed out the location on the plan where two gates are going to be located.) It was noted that the gate against the house is in the buffer.

Member Chororos asked if the granite posts would require excavation.

Vice-Chair Crapo stated that the ordinance allows fences, so obviously the posts have to go into the ground somehow. The ordinance doesn't have a definition for excavation. The question is whether digging for a fence post, which is for an allowed use, rises to the level of excavation that is prohibited.

Chair Weathersby asked the dimensions of the granite post.

Mr. Colwell replied 8" x 8".

Attorney Mulligan stated that if the interpretation of the ordinance is going to be that digging to install fence posts constitutes excavation, there is no way any meaning can be given to the provision in the ordinance that permits this in the wetlands itself. It's identified as a permitted use in Section E(7). If a fence is going to be installed, it has to have posts. If that rises to the level of excavation, which is not defined in the ordinance except for earth excavation which references back to the statute. That state statute has to do with commercial excavation. It has nothing to do with what is being discussed here. The ordinance has to be interpreted in such a manner that whole sections are not just thrown out.

Chair Weathersby stated that she agrees based on normal fence posts. A typical fence is absolutely allowed in the wetlands and wetlands buffer, in her opinion. What she is struggling with are the 8" x 8" granite posts, which is different than the typical fence post. The granite posts would require a bigger excavation project.

5. **The Sagamore Group, LLC owned by Split Rock Cove Family Trust of 2019 for property owned and located at 15 Sagamore Road, Tax Map 24, Lot 22, request variances from §190-2.2.D(1) for four residential buildings on a lot where three exist and one is permitted; from §190-2.2.J(1),(2) for 40' between commercial use and the residential district line where 50' is required; from §190-2.3.A(1) or four single-family dwellings in a Single Residence District where one is permitted; from §190-2.3.C(5) for overall impervious coverage of 24% where 15% is allowed; from §190-6.3.B for removal of one commercial structure and three residential structures, two of which are located in the commercial zone, replacing with two commercial buildings entirely in the commercial zone and four residential buildings located within the residential zone; §190-7.1.B for change to boundary line by no more than 50' where the boundary line divides a lot and single ownership. Property is in the Commercial District. Case #45-2021.**
- *Continued to the next meeting.*
6. **BSL Rye Investors, LLC d/b/a Benchmark Senior Living for property owned and located at 295 Lafayette Road, Tax Map 10, Lot 3, requests an administrative appeal from the building inspector's September 7, 2021 decision that a bioretention pond is a structure requiring relief from §190-2.11.C(3); and from the building inspector's measurement of grade. Property is in the Commercial District and Aquifer Wellhead District. Case #46a-2021.**
- *Continued to the next meeting.*
7. **BLS Rye Investors, LLC d/b/a Benchmark Senior Living for property owned and located at 295 Lafayette Road, Tax Map 10, Lot 3, requests variances from §190-2.11.C(3) for a bioretention pond, where the center of the berm is 10' from the existing front boundary where 60' is required; from §190-2.11.C(&) for a building height of <37.03' – 42.03' where 35' is required. Property is in the Commercial District and the Aquifer Wellhead District. Case #46b-2021.**
- *Continued to the next meeting.*
8. **Susan Mesiti Family Trust for property owned and located at 1182 Ocean Blvd, Unit 3, Tax Map 17.3, Lot 032-003, requests a variance from §190-2.3.C(2) for a generator 1' from the left side boundary where 20' is required. Property is in the General Residence, Coastal Overlay District, SFHA, Zone VE(14). Case #47-2021.**
9. **Penacho Family Trust for property owned and located at 1182 Ocean Blvd, Unit 1, Tax Map 17.3, Lot 032-001, requests a variance from §190-2.3.C(2) for a generator 1' from the left side boundary where 20' is required. Property is in the General Residence, Coastal Overlay District, SFHA, Zone VE(14). Case #48-2021.**



Joseph Menard, representing both applications for 1182 Ocean Blvd, noted that he will address the applications together. He explained that the lot is about 13,900sq.ft. in size. The property is part of a three-unit condominium development. There's a back house and two in the front on the ocean side and a detached garage at the rear of the structure. The bulk of the lot falls within the 100-year flood elevation; elevation 16. The houses and the majority of the land are below that elevation, except for an area along the lot line. The owners of units 1 and 3 would like to install a generator. The generator footprint is about 26" x 28" in size. The denial from the Building Inspector is for a number of things. The first one is 190-2.3.C(5), which deals with impervious coverage. The property right now is about 72% impervious. It's about 10sq.ft. between the two generators. In order to offset that, the proposal is to remove 10sq.ft. of a boardwalk that's on the north side of unit 3, so there will be a wash to the impervious coverage and it will remain the same. The second reason for denial deals with buffer restrictions.

Chair Weathersby noted that the lot coverage was not noticed because of the proposal to compensate for the coverage. The only thing the Building Inspector denied the application on was the side setback relief.

Mr. Menard confirmed. He continued that the bulk of the issue with this lot is that the majority of the land is below base flood elevation, except for the area of the lot along the lot line. He noted that the neighbor to the north has their generator located on the other side of the property line about the same distance from the boundary. The proposal is to install two generators, both above base flood elevation 16. There will be an underground conduit that will go to each structure. A shoreland permit has been filed with the State, under the permit by notification process. (He pointed out the highest observable tide line on the plan, along with the 100' setback. He also pointed out the 150' shoreline setback.) He noted that the generators fall within the 100' to 150' setback.

Vice-Chair Crapo asked if unit 2 has been consulted about the projects, so there will only be one disturbance of the earth.

Mr. Menard replied that unit 2 has been consulted and they do not want a generator.

Member Chororos asked how the generators will be anchored.

Mr. Menard explained the generators will be above base flood elevation. The generators will sit on the ground. He further explained the generators are one-piece units and sit on the ground on a footing that's part of the footprint. There's no need for a concrete pad.

Member Mitchell asked about the 10' piece of deck being removed.

Mr. Menard replied this is a boardwalk for access to the east side of the unit. It's a wooden boardwalk over the sand that will be pulled up.

Member Dibble asked the source of fuel that will be used.

Mr. Menard replied propane. (He pointed out the locations of the propane tanks on the plan.)

Chair Weathersby asked if this has been discussed with the neighbors.

Mr. Menard confirmed.

Referring to the retaining wall on the property, Member Mitchell asked if there will be any problem, as it has a pretty good lean to it.

Mr. Menard commented that he is not looking to replace any of the improvements that are already on the property. There is no plan at this time to do any repair or replacement of the wall.

Chair Weathersby opened to the public for comments.

Member Chororos asked if RCC had to weigh-in on this.

Chair Weathersby noted that they don't for the Board's purposes, but they would if there is a shoreland permit involved.

Mr. Menard explained it's a permit by notification, which is an expedited permit with the State. Generally, as long as it's less than a 1500sq.ft. area of disturbance with less than 900sq.ft. of impervious coverage, it goes through as a permit by notification. In this case, the whole impact is under 500sq.ft. between both generators.

Chair Weathersby noted that letters have been received from **Mark Rudick, 1182 Ocean Blvd, unit 2**, in support of the request. Hearing no further comments, she closed the public hearing at 10:49 p.m.

The Board had no issues with the requests.

Chair Weathersby called for a vote for variance relief to §190-2.3.C(2) for Susan Mesiti Family Trust (Unit 3):

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

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

2) The spirit of the ordinance is observed?

Burt Dibble – Yes
John Mitchell - Yes

Sandra Chororos – Yes
 Shawn Crapo - Yes
 Patricia Weathersby – Yes

3) Substantial justice is done?

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – Yes
 Shawn Crapo - Yes
 Patricia Weathersby – Yes

4) The values of surrounding properties are not diminished?

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – Yes
 Shawn Crapo - Yes
 Patricia Weathersby – Yes

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

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – Yes
 Shawn Crapo - Yes
 Patricia Weathersby – Yes

6) There is no fair and substantial relationship between the general purpose of the ordinance provision and the specific application of that provision to the property?

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – Yes
 Shawn Crapo - Yes
 Patricia Weathersby – Yes

7) The proposed use is a reasonable one?

Burt Dibble – Yes
 John Mitchell - Yes
 Sandra Chororos – Yes
 Shawn Crapo - Yes
 Patricia Weathersby – Yes

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

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

Motion by Shawn Crapo to grant the relief requested by Susan Mesiti Family Trust for 1182 Ocean Boulevard, Unit 3, as requested. Seconded by Burt Dibble.

Vote: 5-0 All in favor.

Chair Weathersby called for a vote for variance relief to §190-2.3.C(2) for Penacho Family Trust (Unit 1):

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

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

2) The spirit of the ordinance is observed?

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

3) Substantial justice is done?

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

4) The values of surrounding properties are not diminished?

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

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

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

- 6) **There is no fair and substantial relationship between the general purpose of the ordinance provision and the specific application of that provision to the property?**

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

- 7) **The proposed use is a reasonable one?**

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

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

Burt Dibble – Yes
John Mitchell - Yes
Sandra Chororos – Yes
Shawn Crapo - Yes
Patricia Weathersby – Yes

Motion by Shawn Crapo to grant the relief requested by Penacho Family Trust for 1182 Ocean Boulevard, Unit 1, as requested. Seconded by Burt Dibble.

Vote: 5-0 All in favor.

IV. Other Business

There was some discussion about enforcing the idea of no additional information submitted to the Board after 7 days prior to a meeting. Chair Weathersby noted that the Board has to vote to accept something submitted beyond the 7 days by an applicant. Sometimes there may be some leeway. She pointed out that the Board allows materials submitted from non-applicants after the 7 days. She also pointed out that if the Board feels that they need more time to review something

that was allowed to be submitted after the 7 days prior to the meeting, they should ask for the application to be continued for more time to review the material.

Adjournment

Motion by Patricia Weathersby to adjourn at 11:03 p.m. Seconded by Burt Dibble. All in favor.

Respectfully Submitted,
Dyana F. Ledger

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner:

Charles M. and Lyndsay A. Benyon

Property:

30 LaMer Drive, Tax Map 13, Lot 44
Property is in the Single Residence District

Application case:

Case #35b

Date of decision:

November 3, 2021

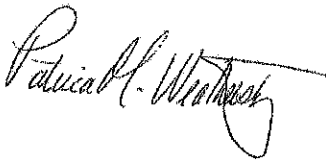
Decision:

The Board voted 5-0 to deny the relief from the following sections of the Rye Zoning Ordinance:

- §190-2.3.C(1) for a swingset/play system 10+/- from the rear boundary;
- §190-3.1 H.2(g) for a swingset/play system 18' from the wetland boundary.

The reasons the variances were denied include:

1. A majority of the Board found that granting the requested rear setback relief would not observe the spirit of the zoning ordinance.
2. A majority of the Board found that granting the request for relief from the requirements of the Wetlands Conservation District would be contrary to the public interest and would not observe the spirit of the zoning ordinance.
3. The play system is proposed to be located less than 10 feet from the rear setback and 18 feet from the wetland. There are other locations on this over one-acre lot where the set could be placed requiring less or perhaps even no relief.
4. Although the harm to the wetlands from the placement and use of the play system is relatively minor, it can be eliminated by locating the system further away from the wetland.
5. Any hardship is self-created by the applicants.



Patricia Weathersby, Chairman

Note: This decision is subject to motions for rehearing which may be filed within 30 days of the above date of decision by any person directly affected by it including any party to the action, abutters and the Rye Board of Selectmen; see Article VII, Section 703 of the Town of Rye Zoning Ordinance. Any work commenced prior to the expiration of the 30 day rehearing / appeal period is done so at the risk of the applicant. If a rehearing is requested, a cease and desist order may be issued until the Board of Adjustment has had an opportunity to act on the rehearing request.

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

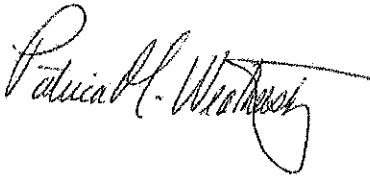
Applicant/Owner: BSL Rye Investors, LLC d/b/a Benchmark Senior Living

Property: 295 Lafayette Road, Tax Map 10, Lot 3
Property is in the Single Commercial District and Aquifer, Wellhead District.

Application case: Case #46a and 46b-2021

Date of decision: November 3, 2021

Decision: The Board voted 5-0 to continue the application to its November 17, 2021 meeting.



Patricia Weathersby, Chairman

Note: This decision is subject to motions for rehearing which may be filed within 30 days of the above date of decision by any person directly affected by it including any party to the action, abutters and the Rye Board of Selectmen; see Article VII, Section 703 of the Town of Rye Zoning Ordinance. Any work commenced prior to the expiration of the 30 day rehearing / appeal period is done so at the risk of the applicant. If a rehearing is requested, a cease and desist order may be issued until the Board of Adjustment has had an opportunity to act on the rehearing request.

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant: The Sagamore Group, LLC

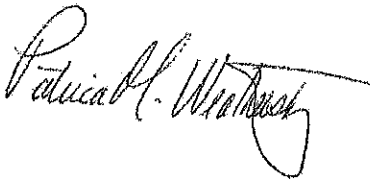
Owner: Split Rock Cove Family Trust of 2019, JP & Gail Nadeau Trustees of 507 State Street, Portsmouth NH

Property: 15 Sagamore Road, tax Map 24, Lot 22
Property is in the Commercial District

Application case: Case #45-2021

Date of decision: November 3, 2021

Decision: The Board voted 5-0 to continue the application to its November 17, 2021 meeting.



Patricia Weathersby, Chairman

Note: This decision is subject to motions for rehearing which may be filed within 30 days of the above date of decision by any person directly affected by it including any party to the action, abutters and the Rye Board of Selectmen; see *Article VII, Section 703 of the Town of Rye Zoning Ordinance*. Any work commenced prior to the expiration of the 30 day rehearing / appeal period is done so at the risk of the applicant. If a rehearing is requested, a cease and desist order may be issued until the Board of Adjustment has had an opportunity to act on the rehearing request.

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner:

Domenic Martingnetti & Phyllis Martignetti
68 Manchester ST. Nashua NH

Property:

4 Breakers Road, Tax Map 8.4, Lot 68
Property is in the General Residence, Coastal Overlay District and
the SFHA, Zone AE (8)

Application case:

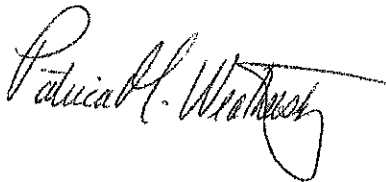
Case #33-2021

Date of decision:

November 3, 2021

Decision:

The Board voted 5-0 to continue the application to the December 1, 2021
meeting.



Patricia Weathersby, Chairman

Note: This decision is subject to motions for rehearing which may be filed within 30 days of the above date of decision by any person directly affected by it including any party to the action, abutters and the Rye Board of Selectmen; see *Article VII, Section 703 of the Town of Rye Zoning Ordinance*. Any work commenced prior to the expiration of the 30 day rehearing / appeal period is done so at the risk of the applicant. If a rehearing is requested, a cease and desist order may be issued until the Board of Adjustment has had an opportunity to act on the rehearing request.

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner:

Susan Mesiti Family Trust

Property:

1182 Ocean Blvd, Unit 3, Tax Map 17.3, Lot 032-003
Property is in the General Residence, Coastal Overlay District
SFHA, Zone VE (14).

Application case:

Case #47-2021

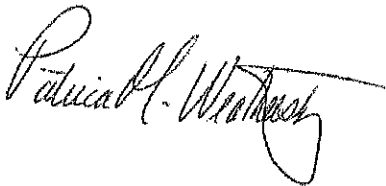
Date of decision:

November 3, 2021

Decision:

The Board voted 5-0 to grant the following variance relief from the Rye Zoning Ordinance:

- 190-2.3.C(2) for a generator 1' from the left side boundary.



Patricia Weathersby, Chairman

Note: This decision is subject to motions for rehearing which may be filed within 30 days of the above date of decision by any person directly affected by it including any party to the action, abutters and the Rye Board of Selectmen; see *Article VII, Section 703 of the Town of Rye Zoning Ordinance*. Any work commenced prior to the expiration of the 30 day rehearing / appeal period is done so at the risk of the applicant. If a rehearing is requested, a cease and desist order may be issued until the Board of Adjustment has had an opportunity to act on the rehearing request.