

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

**Wednesday, April 1, 2020
7:00 p.m. – Held via Zoom**

Members Present via Zoom: Chair Patricia Weathersby, Vice-Chair Shawn Crapo, Burt Dibble, Charles Hoyt, Gregg Mikolaities and Patrick Driscoll

Staff attending meeting at Town Hall: Planning/Zoning Administrator Kimberly Reed

I. CALL TO ORDER

Chair Weathersby called the meeting to order via Zoom at 7:06 p.m. and led the Pledge of Allegiance.

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 clicking on the following website address: www.zoom.com ID #944 303 134.

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 board at: town.rye.nh.us go to the Board of Adjustment page and click on the agenda for this meeting.

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. Chair Patricia Weathersby
2. Alternate Patrick Driscoll
3. Vice-Chair Shawn Crapo
4. Member Charles Hoyt
5. Clerk Burt Dibble
6. Alternate Gregg Mikolaities

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

II. BUSINESS

- **Election of Officers:** Chair, Vice-Chair and Clerk

Motion by Burt Dibble to nominate Patricia Weathersby as chair. Seconded by Charles Hoyt.

Roll Call: Shawn Crapo – Aye, Patrick Driscoll – Aye, Charles Hoyt – Aye, Burt Dibble – Aye, and Patricia Weathersby – Aye (*Alternate Gregg Mikolaities not seated for this vote.*)

All in favor. Motion passed.

Motion by Patricia Weathersby to nominate Shawn Crapo as vice-chair. Seconded by Burt Dibble.

Roll Call: Patricia Weathersby – Aye, Patrick Driscoll – Aye, Charles Hoyt – Aye, Burt Dibble – Aye and Shawn Crapo – Abstained (*Alternate Gregg Mikolaities not seated for this vote.*)

Vote: 4-0-1. Motion passed.

Motion by Shawn Crapo to nominate Burt Dibble as clerk. Seconded by Patricia Weathersby.

Roll Call: Patricia Weathersby – Aye, Patrick Driscoll – Aye, Shawn Crapo – Aye, Charles Hoyt – Aye and Burt Dibble – Abstained (*Alternate Gregg Mikolaities not seated for this vote.*)

Continuances:

Motion by Shawn Crapo to continue the applications of Cellco Partnership d/b/a Verizon Wireless to April 15, 2020. Seconded by Burt Dibble.

Roll Call: Patricia Weathersby – Abstained, Patrick Driscoll – Aye, Charles Hoyt – Aye, Burt Dibble – Aye and Shawn Crapo – Aye (*Alternate Gregg Mikolaities not seated for this vote.*)

Vote: 4-0-1. Motion passed.

Vice-Chair Crapo (as sitting chair for the Verizon applications) noted that the deadline for anyone wishing to submit written materials for the cell tower applications is Friday, April 10th. This will allow enough time for the materials to be distributed to the board and reviewed by the sitting members. The information on how to access the meeting via Zoom will be posted on the Town's website on the Board of Adjustment page.

Planning/Zoning Administrator Reed noted that Rob Patten is not able to sit for the Verizon application via electronically. She asked Member Dibble and Alternate Mikolaities if they are available for the 15th.

Member Dibble and Alternate both confirmed.

- **Approval of March 3, 2020 meeting minutes**
Tabled to the May meeting.

III. APPLICATIONS

Sitting for the following discussion on the rehearing request: Patricia Weathersby, Shawn Crapo, Patrick Driscoll, Charles Hoyt and Gregg Mikolaities

1. Request by Derek Durbin, Esq from Durbin Law on behalf of Pauline and Todor Simeonov for a rehearing of the ZBA Decision of February 5, 2020, granting the Administrative Appeal applied for by Matt and Natasha Goyette of 750 Brackett Road to the Building Inspector issuance of a permit for a stonewall at 720 Brackett Road, Tax Map 17, Lot 65.

Public hearing closed during Board discussion on the request.

Chair Weathersby noted that letters have been received from;

- Rye Conservation Commission;
- Matt & Natasha Goyette;
- Joel Feid; and
- Ann & Jonathan Fox

Referring to Attorney Durbin's motion for rehearing, Chair Weathersby stated that he felt there were a couple of grounds that the board made in error. He said the board acted unreasonably and unlawfully when they expanded the applicant's appeal. The applicant appealed under Section 301.3 and the board granted the appeal based upon the Simeonov's needing wetlands relief from 301.8. The fact that the grounds for the appeal by the Goyette's were different, than for what those the board granted the appeal from, was what he said was in error. The board went to 301.8 B(1) and (7) and reversed the issuance of the building permit by granting the appeal, instead of the grounds the Goyette's had filed on. Attorney Durbin also said the board acted arbitrarily and unreasonably when they defined words such as "silt fence" and "disturbance". Chair Weathersby opened discussion to the board.

Vice-Chair Crapo stated he does not feel the board made an error. It is well within the board's purview to review the entire letter. The letter of granting the permit is what is at appeal. What the board is supposed to determine is was done in error. The fact that a fence permit was issued for a stonewall, as well as, there were references to fill, he does not feel the board was capricious in their definitions. The board pretty well flushed out how those words were being interpreted. He does not feel the board was in error.

Chair Weathersby pointed out the Zoning Board of Adjustment is the final arbiter of what those definitions mean, as far as they apply to zoning. Defining those terms is the board's role. The board is the final authority to interpret the ordinance. She does not think the fact that the board did that is grounds for a rehearing. Concerning the argument of granting the appeal based on 301.8 B(1) and (7) rather than the section the applicant had referenced, she does not feel this was an error either. Statute 674:33(2) states; *The Zoning Board of Adjustment can reverse or affirm, wholly or in part, or may modify the order, requirement, decision or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.* Chair Weathersby continued the board is basically able to step into the shoes of the building inspector and modify any order that he may make.

Vice-Chair Crapo stated the letter for the appeal says they were not given an opportunity to speak. The minutes reflect, *other than one small error in the minutes that show fitting" instead of "footing"*, they had plenty of opportunity during that meeting to speak. The board did not curtail any discussion or stop speaking on the matter. The appeal says the applicant would have the board "turn a blind eye" to the fill in the buffer

issues. The board should not be turning a blind eye to anything. Vice-Chair Crapo noted the entire application was before the board that evening, whether the board opined the micro reference to the one zoning ordinance or by referencing other zoning ordinances, the board would be remiss in not paying attention to other issues.

Chair Weathersby stated the application that was before the board was an appeal application. It was not deciding, which the board did not do, whether a wall should be allowed in a wetlands buffer or not. What the board determined was that they needed to reapply and obtain a variance from the wetland buffer section of 301.8 B(1) and (7), so the board would have more information to make a determination about the wall. She thinks the board was clearly authorized to grant the appeal on that ground, based on the fact the board can modify orders of the building department.

Member Mikolaities stated he voted against it. In looking back at the meeting minutes, the board did not make an error; but he thinks he made an error in his vote. He was listening to the building inspector's testimony that a fence is a wall and a wall is a fence. He has since figured out that a wall is not a fence. Alternate Mikolaities reiterated that he does not think the board erred at all. He thinks that he made an error in his vote, to be clear going forward, with regards to a stonewall in a wetland buffer.

Member Driscoll stated he does not think the board made an error in their judgement. The board was thorough in their review. In no way does he feel the board made an error in determining the way they did that night.

Member Hoyt stated he stands by his decision he made at the March 4th meeting; however, he will not be supporting the request for rehearing.

No further comments were heard from the board.

Motion by Shawn Crapo to deny the request for reconsideration. Seconded by Charles Hoyt.

Roll Call:

- **Patricia Weathersby – in favor**
- **Patrick Driscoll – in favor**
- **Shawn Crapo – in favor**
- **Gregg Mikolaities – in favor**
- **Charles Hoyt – in favor.**

Vote: 5-0

Motion passed unanimously.

- 2. Celco Partnership d/b/a Verizon Wireless for property owned by the Town of Rye at 68 Port Way, Tax Map 23, Lot 1, requests variances from Section 505.6 A(4) for construction of a wireless telecommunications facility within 100' wetlands buffer; section 301.8 B(1) and 301.8 B(7) to construct a cell tower and compound within the wetlands buffer; and Section 301.8 B(5)b(2) for cutting trees greater than 4.5" in diameter, measured at a height of 4.5" above ground level, within the wetlands buffer. Property is in the Single Residence District. Case #47a-2019.**
To be continued to a date to be determined either April 15th or 29th.
 - *Continued to April 15th. (Please see minutes above.)*

3. **Cellco Partnership d/b/a Verizon Wireless for property owned by the Town of Rye at 68 Port Way, Tax Map 23, Lot 1**, requests a special exception from Sections 301.8 B(1) and 301.8 B(7) to construct a driveway within the 75' buffer to access wireless telecommunications facility. Property is in the Single Residence District. Case #47-2019.

To be continued to a date to be determined either April 15th or 29th.

- *Continued to the April 15th. (Please see minutes above.)*

ADJOURNMENT

Motion by Burt Dibble to adjourn at 7:35 p.m. Seconded by Shawn Crapo.

Roll Call: Patricia Weathersby – Aye, Shawn Crapo – Aye, Patrick Driscoll – Aye, Burt Dibble – Aye, and Charles Hoyt – Aye.

Motion passed.

Respectfully Submitted,
Dyana F. Ledger

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant: Rehearing Request by Derek Durbin, Esq on behalf of Pauline and Todor Simeonov.

Property: 720 Brackett Road, Tax Map 17, Lot 65

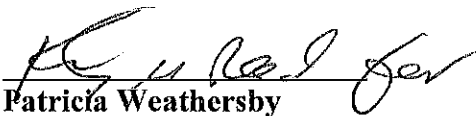
Application case: Case # 01-2020

Date of decision: April 1, 2020

Decision: The Board voted 5-0 to deny the request for rehearing and to uphold the Board of Adjustment's Decision of February 5, 2020 granting the Administrative Appeal applied for by Matt and Natasha Goyette of 750 Brackett Road.

The reasons for the decision include:

1. The Board did not act unreasonably or unlawfully in ruling that the building permit violated Zoning Ordinance sections 301.8B(1) and (7) when the appeal referenced only a violation of section 301.3. The Board may "step into the shoes" of the building inspector and "...may modify the requirement, decision or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the power of the administrative official from whom the appeal is taken." RSA 674:33II; RTC Code s.190-7.1(D) (formerly RZO s. 701.7) The Board made a decision that should have been made by the building inspector by determining that variances are required for a stone wall to be constructed in the wetlands buffer.
2. The Board did not act unreasonably or unlawfully when it considered sections of the Zoning Ordinance other than section 301.3 and defined terms such as "fill", "fence" and "disturbance". The Board found it necessary to review and define such terms to determine whether the permit, issued for a "fence" when a stone wall in the wetlands buffer was intended, was properly issued. Interpreting the terms of the zoning ordinance is one of the basic functions of the zoning board of adjustment in New Hampshire and no error was made the Board made such interpretations.


Patricia Weathersby
Chairman

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner: Cellco Partnership d/b/a Verizon

Property: 68 Port Way, Tax Map 23, Lot 1
Property is in the Single Residence District

Application case: Case #47-2019

Date of decision: April 1, 2020

Decision: The Board voted 5-0 to continue the application to Wednesday, April 15, 2020 to be held via ZOOM. Zoom ID will be posted on the agenda.

The Board requested that ALL submissions by both the applicant and the abutters be in writing no later than Friday April 10, 2020. All Submittals may be mailed to Planning & Zoning Administrator 10 Central Road, Rye NH 03870. Electronic Copies are also requested of each submission.


Shawn Crapo,
Acting 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.