

## **TOWN OF RYE – BOARD OF ADJUSTMENT**

**Wednesday, August 22, 2023**

**7:00 p.m. – Rye Town Hall**

***Members Present:*** John Mitchell, Chris Piela, Chair Shawn Crapo, Rob Patten, Sandra Chororos

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

### **I. CALL TO ORDER**

Chair Crapo called the meeting to order, led the Pledge of Allegiance, introduced Board members, and explained meeting procedures.

### **II. APPLICATIONS**

- 1. Leigh & Darren D’Andrea** for property owned and located at 0 Jenness Avenue, Tax Map 8.4, Lot 48 request variances from §190-2.4.C(1) for an overhang 23.66’, chimney 21.86’, deck stairs 15.84’, and deck 14.80’ from the rear boundary where 25’ is required; from §190-2.4.C(3) for steps and a paver pad 17.5’; a bioretention pond +/- 0 ft (Jenness Avenue side) and +/- 1 ft (Surf Lane side) from the front yard boundary where 23.5’ for Jenness Avenue and 8’ for Surf Lane is required; from §190-3.1.F, H(2)(a)(e)(f)(g) for tree removal, overhang 4.50’ house 5.73’, steps 12.35’, deck stairs 8.16’, and driveway 20’ from the wetland where 75’ is required; from §190-3.4.E for 17% dwelling coverage where 15% is required; from §190-6.1.A and from §190-6.1.B(1)(2), (C) for a 9,998 square foot lot area with 200’ of frontage on a nonconforming lot; and from §190-5.0C for 1 off-street parking space within the front setback where that is prohibited. Property is in the General Residence and Coastal Overlay Districts, and SFHA Zone AE(8). Case #06a-2023.

Chair Crapo explained the board would review the variance criteria first and have a second discussion after voting, if needed, on the special exceptions.

**Attorney Tim Phoenix** of Hoefle, Phoenix, Gormley & Roberts presented the application to the board on behalf of the applicants, all of whom were present at the meeting. Attorney Phoenix introduced **Mike Sievert** of Horizens Engineering, who conducted the technical work; **Robbie Woodburn**, who created the landscaping plan; **Steve Riker**, Ambit Engineering, who conducted the wetland work, and Jenn Ramsey, who was not present at the meeting, but whose house design was before the board.

Chair Crapo explained that Member Patten was not present for the previous application but watched video streaming of the meeting, so Attorney Phoenix wouldn't need to do his entire presentation from scratch. He suggested Attorney Phoenix outline any changes and modifications made since the last meeting.

Attorney Phoenix explained that he was before the board on May 3, 2023, and the application was continued a couple of times. He introduced the team, many of whom spoke at the last meeting. He reminded the board that at the last meeting, they heard his initial comments and a presentation by Mike Sievert on the site plan, a presentation of the landscaping plan by Robbie Woodburn, and a wetland review by Steve Riker. He noted that the wetland was determined a low-functioning values wetland. He explained that they broke before the board opened the hearing for public comment and before he was able to present the requirements for meeting the variance and special exception criteria.

Attorney Phoenix referred the board to a submitted zoning chart and explained that black indicates what was originally submitted and red indicates what was submitted as a result of the new zoning changes passed in March, originally noticed in November.

Attorney Phoenix cited a section of statutes that states if you've applied for a building permit before the first hearing public notice for zoning changes, you're grandfathered.

He cited a case not to get the building permit, but to get before the board with a team that could address the board's request for a peer review of Mike Sievert's work. He explained that they've also been before the Conservation Commission, who issued a letter dated April 3, 2023; the RCC wanted the house moved to 25' away from the wetland, which they think is unfeasible as it's a narrow lot.

Attorney Phoenix questioned whether the new statutory requirement for 25' from any isolated non-bordering wetlands and 75' from any wetland that is within 100' of another wetland would apply. The applicant's position is that this lot with the house on it is not going to exacerbate water problems. He stated they respect and understand the concerns of neighbors who deal with flooding, but the water problem is not caused by this lot and will not cause a problem once built. He explained that Mr. Sievert will address this and peer review is comfortable with it.

Attorney Phoenix explained that this lot generates 7% of the water that crosses it. Over 90% of the water that crosses this lot is from other lots or from the street.

Attorney Phoenix presented a chart created by Monica Kieser, which reviewed all decisions for relief at this property over the last ten years. He noted that a number of people in this area have done things on their lots over that time and it seems incongruous to say no to the last lot to be developed. He stated that he has documentation to show that between stormwater treatment and landscaping, building this house is not going to exacerbate water problems.

Attorney Phoenix explained that his submission dated 3/29 reviews the abutting lots. He stated this lot size is consistent with abutting lots and that Exhibit I lists coverage comparisons between lots; the average building coverage is 17% and lot coverage is 20%. He stated the applicant should have the right to build on their lot if they can demonstrate that they're not going to create additional water problems.

Attorney Phoenix asked if the board would like to address his position that the ordinances don't apply to the applicant.

Chair Crapo explained that the town's counsel, Attorney Maher, gave the guidance that merely applying for a building permit does not vest the rights under zoning.

Attorney Phoenix stated that he respectfully disagrees.

Mike Sievert, Horizons Engineering, explained that there has been no substantial change to the plans. He explained that previously they planned for infiltration based on a rain garden and pervious driveway, but this has been changed to an elevated deck. Aside from that, nothing else has changed.

Mr. Sievert explained that the review engineer requested an analysis response in the drainage report to show off-site drainage and how it was modeled. He explained that this information is contained in the latest report. The other change was in making sure they were routing the correct flow through the systems. He explained that they've enhanced the rain garden to show more detail and described sections parallel to Surf Lane, noting how the pipes work. He explained that design changes are minimal aside from some elevation and grading changes which were addressed in the drainage report.

Chair Crapo asked Mr. Sievert to explain the flow and value of the wetland in layman's terms. He asked for the grading and flow in the larger wetland as it relates to where the pipe comes in.

Mr. Sievert explained that they will collect roof and driveway runoff, treat it, and let it go through the ground or outlet.

Chair Crapo stated that Surf Lane has a massive crown to it, which drops off on the western side. He asked if the water flowing across the street was included in the stormwater model. He explained that in regular rainfall the water doesn't flow over. He asked at what level of the storm does the water come over.

Mr. Sievert explained that water isn't flowing across the street because of the crown. Referring to the plan, he explained that the watershed area in red highlights all sub-catchment areas offsite that are coming to this property.

Member Piela, asking Mr. Sievert about the treatment plan, asked what percentage of water retention is reliant on basin design versus planting plan.

Mr. Sievert stated this drainage system would take in 50-60% and the tree canopy would be the remainder; it would depend on the storm.

Member Piela asked for the definitions for groundcover, specifically, “woods, fair”.

Mr. Sievert explained the differences between “woods, fair”, “woods, good”, and “woods, poor”.

Member Piela, noting “woods, fair” was used in pre and post, asked how long before the planting plan is “woods, fair”.

Ms. Woodburn explained that it would be considered “woods, fair” on day one and as the canopy grows and the wetland plants grow more vegetation it will improve over time.

Mr. Sievert explained most of the water is coming down, getting caught in the swale, and coming through the wooded area.

Member Patten noted that along the lot line abutting 45 and 47 Surf Lane, it looks like there’s a ditch that runs along the same parallel direction as the lot line. He asked where the ditch is in relation to the plan and whether the ditch is going to be filled.

Mr. Sievert explained that there’s a small swale based on existing contours. He enhanced the swale by pulling back the contours, giving it a wider birth so water isn't channeling down the property line.

Member Patten and Mr. Sievert discussed the water flow.

Member Patten asked Mr. Sievert if there was any chance that the water would head to lot 45 or 47.

Mr. Sievert explained that their aim is to try to take flow away and bring it to the center of the yard, under the deck.

Member Patten asked if there was any way to point out the current ditch location on the plan.

Mr. Sievert stated what’s shown are 1’ contours and if he had a tighter contour it would show the ditch better.

Ms. Woodburn stated it’s not filled and it’s a little bit cut.

Mr. Sievert explained that he was going to add more volume to the lot by pulling up the swale and rounding it out, creating more area and volume for water to flow. He noted that the drainage report shows there’s flow off of the site at a ten-year storm, but 1” in a two-year storm. There’s no flow off of the site, the wetland area is deep enough to take that.

Member Piela observed that the basin location is critical to the flow of water coming off and because of current conditions the basin location has to be on that corner.

Mr. Sievert agreed that the basin location is critical for a number of reasons: it's the highest point, the best soil, and the highest and deepest groundwater.

Chair Crapo noted that it's on a corner, which typically gets buried in snow in the winter, and asked if the additional snow will have any positive or negative effect on the systems. He explained his concern is regarding a berm of snow up against the system. He asked if the pipe system would still work if rain or snow froze in the basin.

Mr. Sievert responded yes, the whole area is non-frost susceptible and it won't ever freeze. He explained that water could flow under and there's a swale to divert it.

Member Mitchell commented that it seems that the plan depends upon the town-owned pipe. Mr. Sievert agreed.

Member Mitchell asked why the pipe is in that location and where it goes.

Mr. Sievert explained that in the report the town engineer suggested the pipe needs to be cleaned out and it's at the edge of a wetland so it would need a wetlands permit. He explained they offered to give a town-owned maintenance easement.

Member Mitchell asked if it would be maintained by the town, which Mr. Sievert confirmed.

Chair Crapo asked Attorney Phoenix if he'd received the recommendations from Jason Rucker.

Attorney Phoenix responded that they've asked but haven't received them yet.

Mr. Sievert explained that he hadn't received anything from Jason Rucker. They got an engineering report, which concurs with everything they've done and states they agree with drainage and it's not going to negatively impact the site. They also stated the pipe must stay clear.

Chair Crapo summarized Mr. Rucker's conditions:

1. The applicant should clean the town-owner stormwater drain inlet pipe of debris and jet the existing pipe to ensure hydraulic capacity is maintained.
2. The applicant shall install a rip rap inlet improvement at the storm drain inlet to allow ease of observed inlet conditions and maintenance, also avoiding future vegetation growth from compromising the inlet capacity.
3. The applicant shall provide a legal maintenance easement to the town of Rye for the storm drain inlet.

4. The applicant shall submit to the town of Rye annual inspection and maintenance logs of the drainage structures and systems in place on the property, including but not limited to the bioretention cell, permeable pavers, grass ditches, and other drainage structures.

Attorney Phoenix stated it's unclear if the applicant is expected to clean and jet the pipe once and then it becomes the town's responsibility or if the applicant is expected to maintain it.

Chair Crapo stated his interpretation that the applicant will clean it out now and grant the town a maintenance easement in the event that they need to do something. But ultimately, it's on the applicant to keep up with the maintenance. He stated that the easement is "if needed".

Attorney Phoenix stated his only real concern is if the town pipe fails, it should be on the town. He also expressed concern regarding the potential expense of clearing debris from the town-owned pipe.

Chair Crapo read proposed condition four aloud and Mr. Sievert clarified information regarding the stormwater management plan. He explained that the pipe doesn't only exist for this lot, it exists for all of the lots going out to Cable Road.

Chair Crapo stated that the proposal for this site relies on that pipe.

Attorney Phoenix explained that the water created by this lot is 7% of the water going off the lot and 90% is coming from elsewhere.

Member Patten asked how the owner is expected to assess the working order of the drainage swales and asked to whom in the town they would report. He also asked what would happen if the property were sold or if they decided not to or forgot to do this. He asked if there is a mechanism in place to be sure this is being done.

Attorney Phoenix explained that the owner is responsible for it, but could hire someone qualified to do it and prepare a report on their behalf to submit. He noted that the board discussed porous pavement to be inspected, vacuumed, signed off on, and submitted to the town. He explained that the town could enforce this by sending a warning and a fine.

Member Mitchell expressed that he's had personal experience with the failure of a drainage design and that there was nowhere in town to seek relief unless he hired a lawyer. He noted that it's worth considering how this maintenance would be enforced and how the drainage might further contribute to flooding at Jenness.

Attorney Phoenix stated that his layperson's opinion is it's fine as long as it's working properly, and the peer reviewer agrees it's sufficient, and that no more water goes in than does today.

Member Piela asked if there is any evidence that the pipe off the property under Jenness is in good working order. He expressed concern regarding flooding and wondered if the pipe is

crushed off the client's property, and the pipe is critical to the bioretention pond's function, would the town have to repair the pipe in order for the project to move forward and whatever costs to that repair would be incurred by residents of the town.

Mr. Sievert stated he looked at the pipe and catch basin and there was nothing wrong. He stated the problem is that the drain system is constructed at elevation, so it's full of water most of the time. It's constantly full and relies on head pressure, which pushes water out. He explained if that were to be crushed, then it would back out to another relief point and would become a problem.

Chair Crapo discussed flooding at high tide and the potential risks to the drain system.

Attorney Phoenix stated that this lot is not what's causing water problems, it's the whole area. He stated this lot would be doing a favor by taking water flow and sending it away.

Chair Crapo noted that one of the requests is for lot coverage, so runoff comes into play.

He explained that the government wants more accountability for every drain and pipe and reporting on these structures will be partly on the Director of Public Works and the Building Department.

Mr. Sievert stated there's a flap on the end of the pipe so it won't back up into the system.

Member Piela asked if the catch basin would fill.

Mr. Sievert responded no, he provided calculations for that. He explained the system will be very easy to maintain.

Attorney Phoenix read aloud a letter from Sebago to share final comments regarding the stormwater-related model before a design-related comment. He also added that the lot has not been taxed by the town as an unbuildable lot. He explained that one year ago they didn't need any setback relief. Regarding comments about standing water, he stated water is not going to go through the pipe until it reaches the level of the pipe, which is not at the very bottom.

Ms. Woodburn addressed Member Piela's questions and explained that the plan hasn't changed since last time, it's just adjusted to show the contours. She reviewed the landscaping plan to remove invasives, remove 16 trees, add 25 trees, and 135 perennials in the wetland including no-mow fescue around the house and wetland in addition to lawn and foundation plantings. She explained all plantings around the wetland are native and many around the foundation are ornamental. She explained that the landscaping would provide screening, shade, and enhance the grounds, and it doesn't negatively impact the value of surrounding properties. She stated they're trying to replicate the canopy that's being taken away.

Member Chororos asked how many years would it take to equal the current water uptake of the current trees.

Ms. Woodburn stated there are many variables and she couldn't find exact evapotranspiration numbers.

Member Piela asked if the plan's dark green trees have more water retention than trees highlighted in the lighter color. Ms. Woodburn stated that she couldn't say, but explained that the colors on the left of the plan are existing and the colors on the right are existing plus proposed.

Member Chororos stated that what's missing is what's under the house.

Member Piela stated that the other 50% of the water retention plan is in comment #27: snow shall be stored a minimum of 5' from shrubs and trunks of trees. He asked Ms. Woodburn to explain the value difference between a tree, shrub, and ground cover. He explained there's a significant number of trees planted along Surf Lane and Jenness that don't have a lot of room measuring from the center of the tree.

In a discussion with Member Piela, Ms. Woodburn stated there is a difference between a tree, shrub, and groundcover, and when you measure the trees they're 15-18' from the edge of the road.

Member Piela, referring to point #27 stated, "Snow shall be stored a minimum of 5' from shrubs and trunks of trees" and asked how the board would guarantee that they don't get snow within 5' of trees and shrubs planted along the road. He asked if there would be a risk posed to the planting plan's viability if snow were against the trees and shrubs.

Ms. Woodburn stated there are 1-2 shrubs that fall into that category, not trees.

Member Piela asked if shrubs have less value for water uptake.

Ms. Woodburn confirmed and explained shrubs are smaller and different than trees.

Member Piela asked if there is any mitigation to protect those new trees along the road in the event of heavy snowfall.

Ms. Woodburn stated that she doesn't think a snow bank will come near the trees inside the property line, but agreed with Member Piela about the shrubs.

Chair Crapo stated his concern about Surf Lane: there is no way not to put snow from the driveway into the bioretention pond or on trees abutting the driveway. He asked for a remedy.

Ms. Woodburn stated the family uses this as a summer house; but, nonetheless, it has to be plowed or snow blown. She stated there are two trees near the driveway and that it's a pervious



drive which will melt a lot quicker. She stated that she doesn't feel concerned about snow on the driveway for those trees.

Chair Crapo asked if there is any buffer or excess built into this plan in the event of tree disease or loss of trees, or if there would need to be 1:1 replacement.

Ms. Woodburn stated that the trees will provide much more cover and uptake in ten years, but the board could place conditions for replacement. She stated that as the canopy grows, the owner would have the ability to take a tree down in the future if needed. She also clarified that there are a number of multi-stem trees that she's counted as single trees.

Mr. Sievert stated that this is modeled as "woods, fair" and it's taken die out into account.

Ms. Woodburn, in response to Chair Crapo's question, stated that "Woods, good" is attainable on this lot within 5-7 years, but it's very subjective; she stated that she doesn't know if she agrees with 50% because it's a guess.

Mr. Sievert explained that it depends on the intensity of the storm.

The board discussed trees and water uptake.

Chair Crapo summarized Sebago's recommendations.

Steve Riker, Wetland Scientist from Ambit Engineering stated that the wetland onsite haven't changed and no Sebago comments changed the function/values assessment in the packet.

Attorney Phoenix read aloud a part of the Ambit report for the board in a packet explaining that there is no significant impact on the wetlands.

Member Piela asked if the location of the drainage basin is concerning or a potential liability.

Attorney Phoenix, Chair Crapo, and Member Piela discussed the location and determined that the concern was not within the board's purview.

Attorney Phoenix reviewed information and changes submitted to the board. He discussed the contents of Mr. Marsden's denial letter and explained that the relief suggested doesn't make sense. He also reviewed abutter and RCC's input, and Mr. Riker's functions and values report.

Attorney Phoenix noted their response to the RCC concerns, explaining that they removed the footwash, generator, and impervious patio in favor of a deck. He also discussed the building permit, lot and dwelling coverage, parking, and special exception issues including the wetland, driveway, and lot size analysis.

Attorney Phoenix discussed variance criteria as they relate to this application.

Chair Crapo stated that enormous focus has been placed on the wetland and water issues. He pointed out there are several other variances requested and this is not the smallest house that could be proposed on this lot. He asked Attorney Phoenix to address the size of the house and the setbacks that are needed. He asked for more information about the driving factors in the setback dimensions.

Attorney Phoenix explained that the applicants are parents to four kids and while it would be a summer house, they want it to be their forever home and would need to be a reasonable size.

Chair Crapo stated that family size shouldn't be a reason to request a variance.

Member Piela discussed clean slate design and wondered why the applicant couldn't design the home to meet the setback criteria.

Attorney Phoenix stated that he understands the comment regarding family size, but it's what drives the ask. He stated that the hardship is the size of the lot and its limitations because of the wetland on it. He also noted that the home is in line with homes on similarly sized lots in this area.

Chair Crapo noted that the board didn't get a lot on the record regarding dimensions and invited the board to ask questions.

Chair Crapo explained that the board had received several letters from abutters, none of which were in support of this project.

Planning/Zoning Administrator Reed explained that there is a list of every abutter who's emailed or called, and some submitted multiple.

Chair Crapo stated that the board has read them and they'll make sure they're all in the record.

Chair Crapo opened to the public at 9:00 PM.

**Joe Milardo** of 42 Surf Lane stated that he submitted a letter and distributed a map to the board. He discussed trees on the lot and evapotranspiration, explaining that the trees on the lot are large, native, with a large canopy. He expressed that the landscape architect's plan will die in standing water. He also expressed concern about water runoff if trees are removed. He stated that he's been in public works since 1982 and doesn't think it's a good application for a bioretention pond.

Chair Crapo stated that he understood his comments, but the discussion has to return to whether zoning is satisfied. He noted that peer review came back in the applicant's favor, more so than he expected.

Mr. Milardo stated that he disagrees with the review and that flooding will be worse.

**Susan Ray** of 45 Jenness Ave., an abutter on the eastern side, stated that she submitted a couple of letters. She explained that she's lived in her home for 33 years. She described drainage in the video and stated that she sent a video showing the water flowing from the applicant's property, under the pipe, and into the culvert across the street, which now floods all the time. She described the flooded culvert, stating that it runs like rapids. She described the way the flooding will completely submerge her driveway and when the water freezes it poses a hazard. She wondered who polices this.

Regarding fill, Ms. Ray stated that the property was being filled in the middle of the night. She stated that when Peter Rothwell came to do an inspection on her house, he said the property was being illegally filled and asked her to call if she saw it happening.

Regarding the landscape plan, Ms. Ray stated that she doesn't want anything on her property to be touched or removed, including invasives. She discussed the flora and fauna on her property and explained that the current trees can withstand high winds. She expressed her concern regarding fallen trees with the landscaping changeover.

Chair Crapo stated that while they haven't had an official site walk, every board member has been to the property.

Ms. Ray stated that the hardship is self-imposed and cited a 7/7/21 ZBA meeting, quoting Attorney Hillbred regarding self-inflicted hardship. She also expressed that she wants to make sure the changes won't affect the sunlight in her house.

**Sharon Ashworth** of 45 Surf Lane spoke on behalf of her mother, Mariel Pattenson, also of 45 Surf Lane, an abutter to the property. Ms. Ashworth explained that it was determined 35 years ago that the lot was too wet to build. She also expressed concern that parts of the proposed house would be 3' from wetland and that it could set a precedent in the area. She also expressed that the building of the property would be a hardship on the neighborhood.

Ms. Ashworth stated that she didn't see a plan for the cleared lot or the concrete base. She discussed the testpits and the waterline, and wondered where water would be pumped, noting that water would flow towards her mother's property. She wondered what would happen in a rainstorm if the trees were removed, expressing concern that it would landslide toward her mother's house. She wondered where there was room for a yard or upland for trees and commented that it was a large house. She wondered what would happen if the owner were to sell the property and where the steps toward the wetlands were going. She stated that she doesn't understand the setup and worries about the deck in the back; if it were a rental, it could become a party spot.

Ms. Ashworth stated that Mr. Sievert explained that the test pits didn't look like soil from the property, but fill. She stated that there is proof dirt has been dumped onto this property, which is why the house can now be put on the property.

Speaking to the applicant team, Chair Crapo asked if they received approval, what would be the during-construction mitigation to prevent erosion while the trees are gone? Regarding wetlands, he asked if there are two different dimensional setbacks.

Attorney Phoenix stated that he believes it's more than 100' to the wetland. He stated that depending on the make-up of the wetland, it's between 75'-100'. He stated they need 75' because a home in that proximity needs 25', but if that wetland is within any other wetland, it goes to 75'. He stated there is a very small wetland within 100', so they need a 75' setback.

Mr. Sievert explained that they would use a silt sock or fence for mitigation. They would also suggest a construction fence along the wetland. He explained that the design doesn't have a basement, so there's not much digging and the crawlspace will be left open so water can flow. He stated they may use some posts and discussed the process of setting footings and building using mitigation.

Ms. Ashworth stated that she's concerned about digging that will disturb the roots of trees close to the line.

Chair Crapo noted the time is 9:35 PM and the board would likely not be able to hear any other applicants at the meeting.

**Motion by Chris Piela to continue applications 4 (Horn), 5 (Danielson), and 6 (Batal) to the September 6, 2023 meeting. Seconded by Sandra Chororos.**

**Vote 5-0-0** (J. Mitchell, C. Piela, S. Crapo, R. Patten, S. Chororos in favor)

Ms. Ray stated that it's under 100' to the wetland.

**Steve Wentzell** of 12 Surf Lane stated that he played on this lot as a child 60 years ago when it was very wet. He stated that it's clearly been filled in and somehow deemed buildable. He submitted pictures to the board showing the state of water in the neighborhood. He stated that it was out of control. He explained that they don't have an adequate water management process and it floods even in a small rainstorm.

He stated that after rain, a wide stream forms and runs through this property no more than 10' from one of the stakes with orange markings. He stated that he likes the idea of a retention pool, but what's described is a bunch of buckets. He stated that building this house is not going to decrease water on the property and the growth plan is not going to replace the absorption of the 100-year-old trees currently on the property.

Chair Crapo asked the engineering team for more details about the different kinds of ponds and pools and the materials used to create them.

Mr. Sievert gave the dimensions of the bioretention system: 50' long with an average of about 6.5' wide, and a total depth of 30" to the bottom of the crushed stone. The pond area is about 2' from the top of the grade.

Chair Crapo clarified that the neighbors would see a lawn depression, but below that would be lomb, fabric, and crushed stone.

Mr. Sievert confirmed there would be 12" of filter media and 12" of crushed stone.

The board discussed filter media and filtration.

Member Piela asked if the pipe connecting the bioretention pond to the wetland is a required feature of this design.

Mr. Sievert confirmed.

Member Piela stated that the board has a requirement for stormwater management and drainage per §190-5.7 regarding capacity for additional flow now and in the future. He stated the board would expect to have something from the director of DPW stating that this town-owned piping has the capacity to support an additional water feature.

Mr. Sievert explained that retention pond would also have an outflow. He stated the reason Jason Rucker didn't say anything is because the town engineer agrees with his report that there will be no increase in water or flow from this site. He stated that he understands there are a lot of flood problems, but this site development will not exacerbate the problem.

Chair Crapo clarified that the applicant cannot dig in the wetlands.

Mr. Sievert stated that if he could dig it deeper he would, but the pipes were already under water. He explained if he were to dig below 4' where the water table is, then the bio retention is already filled with water. He explained that he can only elongate, which is what he did with the design.

**Tom Hammer** of Portsmouth, representing the Danielsons, noted that the water table is essentially 3' below the grade and asked if the ground surface suggests that digging down 12" would hit water.

Chair Crapo clarified that the center of the crawlspace may be open, it's not a bathtub effect.

Mr. Hammer asked if the house would be on piers, noting that footings are different than piers. He stated if this is a foundation, it would displace over 6,000 gallons of water, he asked where that water would go.

Chair Crapo and Mr. Hammer discussed the differences between piers and footings and the potential for water displacement.

Mr. Sievert stated that he would be the structural engineer designing this. He explained that the area to the east is where the floodplain goes, and it can't be a closed system. He explained that the garage will be a slab at grade with a frost wall. The finished floor of the house is an elevation of 12, 2' above the highest point on the lot. The top of the foundation is at 11'.

In response to Chair Crapo's question, Mr. Sievert described a constructed floor as a wooden floor with a seal on top. He stated that he didn't know if there would be a crawlspace, but it would be right at the water table so nothing would be displaced.

Chair Crapo asked if, in a flood, the basement would act like a bathtub pushing water out and how they plan to capture displaced rain.

Mr. Sievert explained that the basement would not act like a bathtub because there's no basement and the crawlspace level will be shallow. There's no sump pump and it will be set to bleed out if there is a flood area. The area around the edge of the house will be left open for water to flow through.

Planning/Zoning Administrator Reed explained they are in a special flood-hazard zone so they cannot have a basement.

**John Tuttle** of 50 Jenness Ave. discussed parking and noted that every abutter on that street meets the parking requirement or has grandfathered use. He stated that nobody was granted a variance for a parking requirement. He described special conditions of abutters and that there is no relief for abutters; if the system floods it would turn into a civil battle. Regarding piping on Jenness Ave., Mr. Tuttle explained that when the Millers were doing construction, water was bubbling up through the grate system. Mr. Tuttle shared that Jack Duffy on Jenness Ave. stated the pipe in front of his house was dug out but never connected. Mr. Tuttle also explained that he went to Jason Rucker to request a bioretention basin to empty into the town system and was shot down. He noted that he offered to pay for a police detail and easement and was denied. He expressed that it isn't fair that he can't alleviate the water problems on his lot as well.

**Motion by Chris Piela to continue the application by Ed Farley for property owned and located at 472 Wallis Road to the September 6, 2023 meeting. Seconded by Sandra Chororos.**

**Vote 5-0-0** (J. Mitchell, C. Piela, S. Crapo, R. Patten, S. Chororos in favor)

**Kathy Nelson**, 51 Jenness Ave., explained that her parents purchased the property in the 1950s when it was a cottage on pilings. She explained that Rand Springs is where the water is coming from and it flows onto her property and goes to another lot on Surf Lane where there is a culvert. She expressed that 17 variances is a lot and shared her concern about her neighbors and how it will impact them.

**Dwight Tuttle**, 31 Breakers Ave and 50 Jenness Ave. explained that he thinks the engineers stated that 50% of the water off the roof dumps into the bioretention basin. He asked what happens to the other 50%. He stated that it's a wet lot and that he used to own 47 Surf Lane and would watch trucks drop soil on this property and spread it. He stated that Attorney Phoenix misled the board when he said there is 17% lot coverage, noting that some of the lots don't have any wetlands on them.

Mr. Sievert explained that the other 50% would be collected by the impervious area from the road. He explained that they would let one side of the roof flow onto the ground and into the wetland, balancing in a stone drip edge.

Chair Crapo asked if this would be an infiltration trench.

Mr. Sievert explained that it's a shallow stone trench and it can't infiltrate on that side by the wetland. He explained the balance of taking more impervious off Surf Lane than the impervious area of the roof on that side.

Mr. Tuttle asked which way the roof pitches.

Chair Crapo stated that it's a multifaceted roof: it's angled toward the wetland and toward Surf Lane and is multi-peak with different heights. He stated in general the ridge lines are parallel to Surf Lane.

Mr. Sievert showed the plan to illustrate the pitch of the roof and the flow of water.

Chair Crapo explained that in the original meeting, it was proposed that the east side is going to the drip edge and is not deep enough to be called an infiltration trench. He clarified that it's 2" of crushed stone, so it's not sheet-flowing across the lawn but would hit the drip edge and be graded down to the wetland. He asked Mr. Sievert if his understanding was correct.

Mr. Sievert confirmed and explained that that it would be sheet flow.

Chair Crapo asked if, in the calculation of lot coverage, wetlands should be discounted or counted and why.

Attorney Phoenix explained that lot coverage and building coverage are a requirement, but there's nothing in the ordinance that requires a deduction from the lot size the amount of wetland on the site.

Planning/Zoning Administrator Reed confirmed that this is correct. She explained that they tried changing this years ago, but at this point, sand and wetlands are still part of overall coverage. She clarified that the retention basin is also included in the coverage.

Attorney Phoenix explained that, regarding the distance to the larger wetland in the back, he confirmed with Steve that it's 94' from wetland to wetland, but it is over 100' from that wetland to the home. He's asking for relief because 75' is needed from wetland to wetland.

Mr. Sievert stated that the wetland is not impervious as it's not always ponding. He stated that a pond could be considered impervious, but not all wetlands are not considered impervious, only wetlands with a standing pool.

**Beth Tuttle** of 31 Breakers Road stated that the lot has challenges, and wondered what would be done if the engineered solutions don't work. She stated that there's hardship for the neighborhood and suggested that something is written into the deed.

Chair Crapo explained that the board doesn't have the prerogative to do a bond. He explained that he has first-hand experience as an abutter to another non-buildable lot that was filled and eventually granted relief to build with restrictions. He explained that this is a very complicated application, and it's important to discuss all questions. He stated that he doesn't think the board can do any kind of bond and that town counsel recommended whatever is decided is monumentalized onto a plan that is recorded and could be referenced in the registry of deeds in perpetuity. He explained that the board is allowed to grant relief and place certain conditions on that relief. He explained that they have discussed four conditions from DPW.

**Susan Shepcaro** of the Rye Conservation Commission referred to a letter the RCC wrote to the board regarding the property. She stated their primary concern is not with the size of the house but it's proximity to the wetland and the plan to cut all the trees. She stated that the proposed plantings are not going to match uptake or canopy for a number of years. She pointed out that a variance would be needed to remove the stumps as they're in the buffer, but must come out for construction, which is a concern for the RCC. She stated that the requested variances are not minor and the RCC can't recall an instance where so much of a project is so close to a wetland. She stated that while the RCC doesn't generally look at lot coverage, the entire project is in the buffer and they wanted to comment that wetland is not usable land. She stated that the house is way too big for the lot.

Chair Crapo discussed the requested parking variance with a member of the public.

Attorney Phoenix presented the applicant's rebuttal. He stated that, regarding the comment by Mr. Tuttle that he had misled, it was not his intent, and didn't think he did. As discussed, the ordinance doesn't take wetlands into account for coverage, he stated he believes he was accurate.

Attorney Phoenix stated that the water concerns presented by abutters describe what happens there currently and are not caused by this lot. He stated that those concerns have been addressed



and have left Sebago comfortable that Mr. Sievert's plan doesn't increase water runoff or further contribute.

Attorney Phoenix stated that it's unfair to assume the owners will not follow the requirements that are expected of them. He stated that they have offered to share maintenance reports, inspections, yearly reports, and beyond providing that, it's an enforcement issue. He stated that the D'Andreas intend to comply and if there's a problem then there's a method to have the problem taken care of and it's up to the town, not the property owner.

Regarding RCC comments, Attorney Phoenix stated that he respectfully disagrees. They have a top-notch landscape architect and structural engineer and are confident that what they will do will work. He stated that nothing that's been said has a valid scientific reason for the claim. He stated that if the house were made smaller it wouldn't change any of the things people are concerned with and one year ago they didn't have to worry about setbacks to the wetland.

**Leigh D'Andrea** thanked the board for their time. She explained that she grew up coming to Rye and discussed her desire to build the proposed structure on the lot for her family. She explained that their family sold a property on Park Ridge Ave. in order to be closer to Summer Sessions and they hope to move eventually move from Connecticut to retire in Rye.

**Heidi Milardo** of 42 Surf Lane reminded the board that the town voted on this wetlands setback. She asked if the board decides to let this pass, then what's the purpose of the wetlands setback.

Chair Crapo explained that there's case law to back that up. He explained that the town votes on ordinances and every person/lot in town has the right to ask for relief from a particular section to their lot.

Attorney Phoenix read from the case law and stated that, according to the simplex test, a self-created hardship doesn't foreclose a variance.

Chair Crapo closed to the public at 10:55 PM

The board discussed whether or not they would continue the meeting or deliberate.

Attorney Phoenix stated that he prefers not to have a bifurcated discussion. He asked if they don't conclude when they could schedule the conclusion.

Chair Crapo stated that when the board deliberates, procedurally they'll address dimensional variances, wetlands, and grouping or separating some.

Planning/Zoning Administrator Reed suggested a meeting on August 30, 2023 at 7:00 PM.

Chair Crapo clarified that he opened to the public and asked several times before closing to the public, so at the next meeting there will be no more submittals or input between now and the

next meeting. He clarified that abutters can attend. He described the procedure for the 8/30 meeting, the subject matter being the special exception. Chair Crapo reviewed the special exception criteria.

**Motion by Chris Piela to continue deliberations for application #1 to August 30, 2023. Seconded by Rob Patten.**

**Vote 5-0-0** (J. Mitchell, C. Piela, S. Crapo, R. Patten, S. Chororos in favor)

**Motion by Chris Piela to continue application #2 to August 30, 2023. Seconded by Sandra Chororos.**

**Vote 5-0-0** (J. Mitchell, C. Piela, S. Crapo, R. Patten, S. Chororos in favor)

**Motion by Chris Piela to adjourn at 11:05 PM. Seconded by Shawn Crapo. All in favor.**

Respectfully Submitted,  
Emilie Durgin

# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

**Applicant/Owner:** Leigh & Darren D'Andrea

**Property:** 0 Jenness Avenue, Tax Map 8.4, Lot 48  
Property is in the General Residence and Coastal Overlay Districts, and SFHA Zone AE(8).

**Application case:** Cases #06a-2023 and 06b-2023

**Date of decision:** August 22, 2023

**Decision:** The Board to continue the application to the August 22, 2023, meeting.

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Shawn Crapo, Chair