

**TOWN OF RYE**  
**BOARD OF ADJUSTMENT**  
Wednesday, March 1, 2017 – 7:00 p.m.  
Rye Town Hall

***Members Present: Chair Patricia Weathersby, Vice-Chair Paul Goldman, Clerk Burt Dibble, Patrick Driscoll, Shawn Crapo and Alternate Charles Hoyt.***

***Others Present: Planning/Zoning Administrator Kimberly Reed***

**I. Call to Order and Pledge of Allegiance**

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

Chair Weathersby announced that this is the last meeting for Vice-Chair Goldman as he has decided to not run for re-election. She thanked him for his 13 years of service on the board.

The board members wished Vice-Chair Goldman the best in his future endeavors.

**II. Approval of Minutes of February 1, 2017**

**Motion by Burt Dibble to approve the minutes of February 1, 2017 as amended. Seconded by Shawn Crapo. Vote: 3-0-2 Abstained: Paul Goldman and Patrick Driscoll**

**III. Applications:**

**Note: Shawn Crapo was recused for the following application and was seated with the public.**

**Members sitting for case: Patricia Weathersby, Paul Goldman, Burt Dibble, Patrick Driscoll and Charles Hoyt.**

- 1. Stephen C. Brown, Trustee, SKRJ Realty Trust of 21 South Main Street, Rochester NH for property owned and located at 0 Big Rock Road, Tax Map 8.1, Lot 45 & Tax Map 5.2, Lots 79, 80 to re-subdivide 11 small non-conforming lots on the old recorded Myrica by the Sea Plan to create two new non-conforming lots and therefore requests Variances from Section 204.3F for lot #1 to have 31,395 sq. ft. of lot area and 38.86' of frontage where 44,000 sq. ft. of lot area and 150' of frontage is required; lot #2 to have 31,121 sq. ft. of lot area and 51.92' of frontage where 44,000 sq. ft. of lot area and 150' of frontage is required and from Section 202.13 for less than 30,000 sq. ft. of contiguous upland soil for each lot. **Property is in the General Residence and Coastal Overlay District. Case #02-2017.****

**Attorney Tim Phoenix, representing the applicant,** spoke to the Board. He explained that the deed is 11 lots that was part of the Myrica by the Sea Subdivision. The original 11 lots were made of 9 lots and 2 lots on the side. (He pointed this out on the plan for the Board.) The lots were originally serviced by a paper street called Thompson Court that was never built. After a paper street is not built within 20 years, it reverts to the owners on either side. The Town treated the property as 11 lots for a long period of time on its tax records. In 2010 or 2011, it was changed to 9 small 5,000sf lots on one tax map and the 2 lots off to the side are two others. He continued that in 2001/2003, a family by the name of DeGloria owned the lots. The DeGlorias asked for relief to put a home on the lot. There was also a NH Department of Environmental Services (NH DES) reclamation requirement issued that was never followed up on. He noted that more recently the DES has determined a closure on this issue. The reason that he brings up the DeGlorias is because there has been talk of the history of people doing things wrong, water issues and tax assessors changing things. All of those things happened before Mr. Brown came along. Mr. Brown bought the lots after the DeGlorias and after the tax assessor came along. Apparently, the lots were deemed unbuildable on the tax records and that was changed to buildable. He commented that he can say from personal experience that these are not the only lots in Town. The assessor changed lots all over Town. There are a handful. He stated the tax assessor's determination of whether a lot is buildable or not buildable, is not determinative of whether or not a lot can be constructed on. Tax assessors do things for tax assessing purposes. If a lot is determined to be wet or have problems that make it difficult to build, they may mark it as unbuildable so its valuation is less so the owner would get the benefit of lower taxes. The other side of that coin is to change it to buildable to increase the tax base for the Town. The tax assessor does not have the tools, information or expertise to determine whether or not a lot is actually buildable. That determination is based upon the building code, zoning ordinance, subdivision regulations, site review regulations and State regulations, such as DES. He urged the Board to consider that what the assessor calls this lot is totally irrelevant. The past is totally irrelevant. What matters is the status of the lot today, Mr. Brown's ownership and his efforts to develop the lots. He commented that there are not too many lots left in the Myrica Subdivision to be developed. Many homes have been built in that subdivision on very small lots. Some probably were built with variances; with setbacks that do not meet the code today and coverages that do not meet. The reason that has happened is because the Myrica lots were created before zoning. When zoning came along, people were stuck with lots that did not meet the requirements, the Town had to work around it and be reasonable in allowing people to build on the lots. People who are present at the meeting have had this happen to their lots and Mr. Brown is entitled to the same.

He stated that in 1970, a former owner by the name of Margolskee, received a variance to build on the 2 lots. The intent was to put one house on the 2 lots and access the lots over Thompson Court. He believes that Thompson Court was considered frontage for those 2 lots. He continued that when there is a paper street, the settled law is the property owner whose deed references a street constituting boundaries of a lot, owns the lot of the underlying street. It conveys an easement to those property owners to access those lots. When Thompson Court lost the ability to be built and became a paper street, the owners of the lots did not lose the right to access them. He continued that the applicant was before the Board last fall in an effort to ummerge the 11 lots,

which is pending in court. In conversations with Attorney Donovan (Town Counsel), it has been agreed that if this is approved the court case will be withdrawn.

Referring to the minutes of September 7, 2016, ZBA Meeting, Attorney Phoenix read:

*Attorney Donovan stated the town's rights to the paper street expired 20 years after the Myrica-by-the-Sea Plan was recorded, which would have been in the 1940's when the rights expired. When the 20 years pass, by law the owners of the abutting lots own in Fee up to the center line of the paper street, in this case Thompson Court. However, the owners of those lots retain a right-of-way over Thompson Court to access their land; a private right-of-way. The owner could then go in and build Thompson Court as a private street if it was needed to access some of those small 11 lots. They had the right to use that access.*

He stated that according to the Town's Attorney, and the law that he has cited, Mr. Brown has the right to apply to the ZBA for Section 601 variances to build on nonconforming lots for the lots as shown on the tax maps, without having to get planning board approval. Mr. Brown has vested rights to access those lots over the paper street called Thompson Court and to access the other lots over Big Rock Road. He pointed out that RSA 674:39-2, says that "*once substantial completion of a subdivision has occurred, the rights of owner or owner's successor in interest shall vest, and no subsequent change in the subdivision regulations, site plan regulations or zoning regulations, except impact fees shall operate to affect such improvements*". The case *Morgenstern vs. Town of Rye*, 2002, involved a lot which was platted on a Subdivision Plan approved by the planning board on December 18, 1967. At the time the subdivisions plan was approved the lot conformed to the zoning ordinance. Later increases in minimum lot size requirements made the lot nonconforming at the time Morgenstern applied for a Section 601 variance. In that case, they sought ability to build on a lot that needed zoning relief and was denied. At the Supreme Court, Morgenstern successfully argued that the trial court erred when it considered whether he alone, rather than the original developer, had incurred substantial construction costs or substantial liabilities. The Supreme Court found that the position of the original developer, those rights vest. This case found that those rights transferred to subsequent owners. Mr. Brown has the same right to develop as the original developer of Myrica by the Sea had when there was no zoning.

Chair Weathersby asked if he is implying that present zoning is not applicable.

Attorney Phoenix stated that he thinks there is a very strong argument that it doesn't apply if the lots are going to be developed just as they are today; however, that is not what is happening. They are approaching to develop it in a different fashion, which requires it to go before the Board.

(Attorney Phoenix reviewed the lots on the tax map for the Board. He pointed out the lots in the area that are substandard in lot size and/or road frontage.) He stated that they are asking for 2 lots of approximately 30,000sf. One of which will have about 38ft of frontage and one will have about 50ft of frontage. This is comparable to other lots in the area. They are taking the 2 lots

that have no frontage and creating a line that gives them frontage and turns them from 10,000sf approximately to 30,000sf approximately. The other lot is going to have less frontage and it is also going to be in the 30,000sf area. He continued that one of the variances that is needed is for upland; lot 1 is at 29,000sf of upland. He stated they are not trying to develop the lots as they were because they think this proposal is a more reasonable standard. It is his understanding that if they went to develop the lots as they were, using Thompson Court, it would not have to go to Planning Board. One of the added benefits of what the applicant has agreed to do is, not only is variance relief needed, but also subdivision review is needed. The things the Planning Board reviews will be vetted again by the Planning Board.

Attorney Phoenix stated the Coastal Zone Overlay allows lots in this area to be as small as 7,000sf, even though the underlying is an acre. Unfortunately, the Coastal Zone does not technically apply to the situation because it applies to lots that presently exist in their configuration. Since that is being changed by creating this lot line adjustment and doing this subdivision, it doesn't apply. He continued the requirements of that are well taken. It is in the Coastal Zone and these lots will actually comply better with the zoning requirements than the lots that are there. Those requirements are; building on lots of less than 7,000sf is prohibited. He noted that they have a 10,000sf lot going to approximately 30,000sf and a 50,000sf lot going to approximately 30,000sf. The second requirement; for lots 7,000sf or larger, the lot shall not be materially smaller than developed lots in the surrounding area. These lots are larger than many of the lots in the surrounding area. Third requirement; the development of the lot shall not create drainage problems for adjacent properties and streets and shall not worsen existing drainage problems. The lot shall have frontage on a street. Presently, the bottom two lots do not have frontage on a street. This is being created to make it more compliant with the Coastal Zone Overlay. Sufficient sewage capacity shall be available. There is town sewer and town water in the area. He stated that there are not too many lots left to develop in that area. The effect of adding two more homes to the sewage capacity isn't the precursor to adding more and more later on.

Attorney Phoenix stated that in addition to his original submission on December 9<sup>th</sup>, he submitted an additional letter and some information on December 29<sup>th</sup>. The town records were reviewed to see what other things in the past have been submitted in the Myrica area where variances were granted. (He reviewed the information on variances granted.)

**Corey Colwell, MSC Engineering**, stated these are 11 lots in Myrica by the Sea. The town recognizes them, at least on the tax map, as 3 separate lots. He noted that they are going from the 3 lots down to 2. He continued that he has heard discussions and seen correspondence in regards to wetlands and the DES involvement. In 1999, a wetland scientist did some work on the site for Mr. DeGloria and had the wetlands mapped, which was actually bigger than what is now shown. He noted they had a wetland scientist delineate the wetlands by today's standards and he came up with the wetland area in the middle. (He pointed this out on the map for the Board.) The area represents 2,662sf. In addition, a certified wetland and soil scientist was hired to do a high intensity soil survey of the entire property. That high intensity soil survey revealed 2,662sf of poorly drained soils, which is in compliance with the wetland scientist who delineated the



wetlands. There are two scientists who are in agreement that these are the only wetlands on the property.

Referring to the Topographical and Soils Plan, Mr. Colwell stated that the wetland represents about 5% of the lot with 95% of the lot being well drained or moderately drained soils. (He reviewed the drainage pattern on the plan for the Board.) He stated that there are 7 different drainage patterns coming onto the lot from adjacent property. The proposal is to grade the property such that the drainage runs into a raingarden. There will be four separate raingardens on the property. A raingarden is an engineered storm water management tool that collects the storm water and allows infiltration into the ground. It has an outlet in the case of a major storm event to prevent flooding. The introduction of those four raingardens is going to capture the storm water coming onto the site, allow infiltration and the plants at the top of the raingarden make it look like a landscape bed. He continued that the lot currently has 0% impervious on it. With the houses and driveways, it would be introducing more impervious area. It will create more runoff; however, all of that will be diverted into the four raingardens. Even with the new buildings, walkways and associated pavement, the storm water runoff to adjacent properties is being reduced. He commented that raingardens are a unique tool to capture and manage the storm water and allow it to infiltrate into the ground. He noted that the surrounding sites to the property have been built up and the water is being channeled onto this site. This site is a low point for that storm water but that can be fixed by constructing the raingardens.

Vice-Chair Goldman asked what happens to the wetlands during a storm event.

Mr. Colwell explained the wetlands is storage. He continued the wetland could grow. Probably over time it would; however, if the trees were left on the property it would probably stay the same. Trees as they get bigger and bigger evapotranspire more water than anything else. During the development, the cutting of trees and the pervious area are introduced. Those two things have to be offset. That is why the raingardens are being proposed. He continued that nothing happens to the wetlands when the raingardens are introduced. The wetland no longer stores all of the water. The wetland is probably going to remain the same. He does not think the wetland is going to change at all, whether they build or not.

Member Dibble asked where the discharge from the raingardens goes to.

Mr. Colwell pointed the area out on the map for the Board. He explained that each raingarden has an exit for a sudden storm event. The raingarden is what stops the water from running on the surface.

Chair Weathersby asked about the maintenance of a raingarden.

Mr. Colwell explained the main maintenance is keeping the raingardens from getting clogged and keeping the plants healthy. Unhealthy plants should be replaced and debris should be raked out.

Member Dibble asked if the wetland area ever dries out.

Mr. Colwell replied that he has seen wetlands decrease in size and disappear. He does not think that is the case here. He thinks the wetland is going to remain for a long time.

Member Dibble asked if the wetland has ever been referred to as a vernal pool.

Mr. Colwell replied it is not a vernal pool. This has been verified by both scientists.

Chair Weathersby asked for a review of where the houses will be located. She asked if the sizes and locations are "set in stone".

Mr. Colwell stated that they have oversized the houses. They have put significantly large homes on the plans and used those calculations of impervious area. (He pointed out the proposed location of the homes on the plan.) He noted that the houses are very large, have a very large footprint, large garage and long driveway to get to them. The reason this was done was to take an even more conservative approach on the drainage. His professional opinion is there will be less impervious area than what has been accounted for.

Vice-Chair Goldman asked if the driveways will be impervious or pervious.

Mr. Colwell replied that they are impervious.

Member Driscoll asked what the effect would be if a pervious driveway was used. He asked if the pervious driveway would change it to the equivalent of a poorly drained soil.

Mr. Colwell replied it would have no effect on the soil. If the driveways were pervious, it would have an even further reduction in storm water runoff onto the adjacent properties.

Chair Weathersby asked if the driveways would act as conduits for the water, given the slope of the lots.

Mr. Colwell pointed out that the storm water is going to funnel off the driveway into the raingarden. There are going to be raingardens at the end of both driveways to intercept the sheet flow.

Member Driscoll asked if the proposed houses abide by the setbacks.

Mr. Colwell confirmed.

Chair Weathersby asked if his calculations take into account that the lots will be cleared of trees.

Mr. Colwell confirmed. The key is not so much the infiltration. It is channeling the storm water to the raingardens. He pointed out that the numbers do not include infiltration into any other area in the site, which would give even better numbers.

Vice-Chair Goldman asked if the numbers would be better if there were additional raingardens on the back side of the property.

Mr. Colwell confirmed.

Chair Weathersby stated that in 2002/2003, when this was before the Board, there was 12,000 or 15,000sf of wetlands and now there is 2,000. She asked how the reduction in the size of the wetlands be explained.

Mr. Colwell stated that in his opinion the original soil scientist erred. He noted that there was a report put out by DES that said 12,000sf of restoration. That was an error. There was a woodchip pile and a brush pile that got put in the wetlands. The restoration said to remove the woodchips and the brush. It talked about a 12,000sf wetland. When the wetlands scientist on his staff went out he gave him a copy of that delineation. He noted that he was expecting a wetland similar to the 1999/2000 wetland. When it came back significantly less, he said that a third opinion was needed. That is when the other soil scientist was hired. He commented there is no difference in the site. He believes it was an error.

There was some discussion on the raingardens.

Attorney Phoenix stated that the parcel is relatively low and all the water from the things that everyone has done in the past is what is causing this to happen. It is coming off other developed lots. Today, if some of the surrounding lots were not developed and someone went to develop it, they would have to demonstrate through a plan that they were not going to increase the storm water onto this lot. There is roof and driveway runoff from some of the surrounding homes dumping onto this lot and leaving it to Steve Brown to remedy the situation. He continued that there a couple of important things that have happened since the DeGloria's proposal. One is the size of the wetland. The size of the wetlands has been shown to now be under 3,000sf. Whether the 12,000sf was a mistake or whether it dried up, he is not sure; however, the issue is what it is today. It is the effect of that change that is important. When DeGloria developed his lot, there was at least a 12,000sf wetland, which required a wetland buffer. This wetland does not require any buffer because of its size. It changes the developability of the lot wetland wise from when the DeGlorias tried to develop it. (He reviewed the criteria for granting the variances.)

Chair Weathersby opened to the public in favor of the application. No comments from the public were heard. She opened to the public in opposition.

**Robert Constantino, 32 Powers Ave**, submitted a photo of the wetland as it currently exists. He noted that the photo shows visible water that is on the property. The photo was taken in the

late spring two years ago. He continued that he observed in December, an engineering company on the property. He thought they were doing a perk test. He noted that it was an extreme drought situation on the day they were on the property. They were measuring the wetland at a time when it was historical dry in the area. (He submitted a photo of his backyard.) He noted that the photo of his backyard shows what happens in a typical rain event. One of his concerns is that their mitigation system is going to be in this area. When those raingardens get overwhelmed, he does not understand where the water would go. There is no place for the water to go. He commented that if the pictures show what it is in a drought, he does not know what it would be in a hurricane or some other serious event.

Member Hoyt asked if the drought would have an effect on the testing.

Mr. Colwell explained it would have no effect on identifying the wetlands. There is a three-prong approach to identifying the wetlands. It is identified by the presence of wetland plants, soils have to be wet and damp, and there has to be the presence of water. Wetland cannot be determined by looking at a site. Auger borings are used. The scientist has to go down at least 16 inches. If "rust" stains are seen within 15 inches of the soil surface, that is an indication of wetlands. The reason for the three-prong approach is so wetlands can be determined any time of the year. He reiterated that the wetlands were delineated in the summer of 2015.

Speaking to Mr. Constantino, Member Driscoll stated that the applicant's representatives have said that the improvements to the lot would help the drainage situation, which would help the situation that is shown in the photos. He asked if he does not believe the scientists' reports.

Mr. Constantino stated that when it was explained as to how the system would work it was specifically mentioned that the drainage systems would have some form of capacity. When that capacity is breached, there would be a place for that water to flow. They did not explain where the water was going to go. If the raingarden breaches, where is the water going to go? His concern is that the water is going to be worse than what is there now. He noted that there is a degree of maintenance that is required with the raingardens. He has no confidence that the person who builds the house cares any reasonable rate about the maintenance because from their perspective, they are up hill.

**Sharon Constantino, 32 Powers Ave**, stated that granting the variance could negatively affect their property value. It has been very dry over the past couple of years. She cannot believe how the water that is there has negatively affected their yard.

**Lee Snodgrass, 33 Gray Court**, stated that he has been in Rye for about 15 years and during that time he has seen water come into his basement. Recently, he received a variance for a garage addition. The effort to make sure the water did not penetrate anyone else's yard but his own yard was unbelievable. He noted that his house happens to be opposite of Mr. Constantino's house and he is very concerned. He continued that he has a big problem with the drain outlet and is concerned with the maintenance going forward. He stated the he agrees that Mr. Brown has the right to develop that property if it is possible.

Member Driscoll asked if he had a wetland scientist for the proposal on his house.

Mr. Snodgrass explained he had a wetland scientist come out and test the soils. The wetland scientist said it was okay. He probably could have just gone ahead; however, he decided to address the water coming off the roof.

**Richard Brady, 24 Cable Road**, stated that he is not an abutter but is close. He pointed out that there is a pond that is fed by all the water flow that is being discussed. The pond supports wildlife. The raingardens will effectively dry that pond out.

**Deb Crapo, Big Rock Road**, submitted a packet to the Board. She stated that the lot is not buildable. In 2014, the assessor at that time broke all the rules in town and changed that non-buildable lot, which means it never paid buildable tax. The lot has always been non-buildable. Part of the problem is oversight in this town. No one has overseen anything. She reiterated that it has always been taxed as non-buildable lots. A perk test would not pass due to wetlands. Septic systems could not be installed. Bill Jenness was the man who did the test pits with the people who owned it at the time. Mr. Jenness was the building inspector. He said that if it can't perk, a septic system cannot be put in. That is why it is non-buildable. In 1984 to 1992, the sewer was ordered to be put in parts of Rye and Rye Beach. It was ordered by the federal government and the State for raw sewage and overloaded septic systems. The federal government said they would give a subsidy for the town to do it. People at town meeting voted "yes" in 1992 when there was 10 days left before losing the money. The town officials and Hampton sewer said "no non-buildable lots, as of 1992, would ever be allowed to hitch up to the sewer". The people did not want any non-buildable lots to tie into the sewer. She noted that in 1983 she tried to buy the lots. At the time, she could not get a loan on a non-buildable lot. (She read from the listing for the lots when they were for sale.) She commented that every bit of the property lies within the buffer for wetlands. She stated that everything she is saying is in the records. She is being honest with the Board. The records have what she is saying in it. Showing pictures to the Board, she stated that this is what the wetlands looked like on Big Rock Road until they were filled in with woodchips. (She reviewed the photos for the Board.) She stated that what Mr. DeGloria did to the land has everything to do with this case. Mr. Brown decided to buy the property under "buyer beware". Many other builders were turned down on this property. (She continued to review the pictures of the area for the Board.) She reiterated that all of the records are available. She noted that Thompson Court could not be used for frontage for any house there. It was only going to be used when it went to Gray Court. There is a letter from DES. In 2015, right after the assessor changed the property and Mr. Brown bought it, it changed from \$466 per half year to \$2,229. All of a sudden, it was taxed higher. She noted that there is a letter from 2009 to Rosario DeGloria, which is in the file, that the buyer could have looked at but is ignoring, from the Town of Rye Office of Selectmen. (She read the letter for the Board. She also read a letter from Eben Lewis, NH DES.)

Chair Weathersby asked where the woodchips were located on the lot.



Mrs. Crapo stated the woodchips went every place they could possibly be put. All the trees that were cut down were chipped and put in. Wetland plants would not grow on them. She commented that there are a lot of people in the town that will come forward to testify to this. She reiterated that 0 Big Rock Road never paid full taxes until it was changed. Attorney Phoenix's opening to the Board was "this is buildable lot". The only thing the tax assessor did was changed it to possible buildable lot. She noted that they have been turned down four times for the 11 lots. They are trying to make it look more palatable by reducing it to 2 lots. They have said they are going to put giant houses there that would reduce everyone's property values. The oversight in this whole entity has been negligent.

*Chair Weathersby called for a 5 minute recess. The meeting was reconvened at 8:50 p.m. and reopened to the public.*

**Shawn Crapo** stated the landowner had explicit notice that there were many issues with the lot. There is a full bankers box, and a half, on just this file. All the previous history came from that file that it was not buildable and has been the recipient of water. Tonight, it was demonstrated that it was mostly rainwater and surface water. There is a river that runs under this neighborhood called Philbrick's River. There are subsurface issues here. There is a high water table that has nothing to do with how much rain is falling at any given moment. It has been argued that the Board should wipe the issues with Mr. DeGloria right off the table. If this was to be done, it would be ratifying the fact that the previous owner took the 12,000sf of wetlands. The section that goes towards Thompson Court is the 10,000sf that has conveniently disappeared. He pointed out that there is a letter from Jeffrey Orchard who helped mitigate the wetlands violations. Mr. Orchard walked the lot with Corey Colwell. They ratified the 2001 delineation of that wetland. The woodchips are basically in the 10,000sf area that is now supposedly not wetlands. Standing in front of the lot, it looks like someone blasted everything. That is exactly what happened over the July 4<sup>th</sup> weekend, with trees and skidders, to dry up the land to get ready to build a house. At that time, the proposed driveway went right through there. There was a driveway proposed right up along side Thompson Court. He stated that he brought up the fact that the driveway would produce a dam for those lots. He asked Mr. Colwell if that was the only configuration for the lots. Mr. Colwell replied "yes". Additionally, at this meeting, the Board was told about the "two poor little lots that would be stranded off to the left side" because they are supposed to be accessed by Thompson Court. A previous owner kind of landlocked those. The neighborhood should not have to suffer for that. If this Board decides to proceed towards some sort of approval, there should be enough evidence to show that this should get continued to have the town have a peer review of the hydrology studies. The current and previous Public Works Directors acknowledged that this land has huge hydrological impacts to this neighborhood. He has witnessed plenty of times when there is 2ft of water on that lot. That is going to go right over the 1ft berm that was going to keep it from backflowing. He commented that all of the homes in this area are given a plus for the fact that they look out on tranquil woods, not on a home behind them. The two proposed driveways are also on a hilly section of road on the downslope. Trying to fit two driveways in the small area that does not even have the frontage for one driveway cannot fly. In going through the criteria, there is absolutely going to be diminishing of property values. There is no hardship outweighed by the benefit of not allowing

homes here. If homes are allowed and other homes are messed up by the water, then they have lost in that balancing test. He does not see how this can overcome the hardship test and the requirements to meet the variances.

**Tom Ferrin, 37 Gray Court**, stated that they have heard tons of evidence that this is a non-buildable lot. He asked if there is a process that they go through in that decision being made.

Chair Weathersby explained that how the Tax Assessor's Office classifies the property is beyond the Board's knowledge and purview. Whether the lot is classified as buildable or unbuildable does not affect the Board's decision. The Board's decision is based on the size, shape and the uplands. The Assessor's Office saying it is buildable does not mean the Board is going to say it is buildable.

**Karen Ferrin, 37 Gray Court**, stated that if the lot is unbuildable there would be no discussion.

Chair Weathersby stated they can still come to the Board and then get a change at the Assessor's Office.

Chair Weathersby read a letter received from **Kay Ruma, 6 Big Rock Road**. She also read a letter from the **Director of Public Works, Dennis McCarthy**.

Attorney Phoenix stated that he would like to draw the Board's attention back to the reason they are before the Board. He understands fully the concerns of the neighbors about the water and hydrology. It has been well documented. The test for developing a lot is that the conditions existing on the lot cannot be increased. Technically, houses on this lot can be built with the amount of flowage and water coming off of it now but that is going to be taken care of. Not one but two wetlands scientists have confirmed this wetland delineation. The neighbors are not experts in what is a wetland and what is not a wetland. Whether the wetland shrunk because of something Mr. DeGloria did or not, he does not know but they are before the Board to talk about the lot today. Mr. Brown bought the lot and is entitled to the protections of the law to develop under the requirements of the zoning ordinance, building code and subdivision regulations. He continued that they are before the Board to determine whether the variance requirements are met. It is not the situation on the ground. It is the variances. All that is needed is frontage variances, lot size variances and slight upland variances. That is what they are present to discuss. All the concerns over water aren't those variances. The water will be addressed by experts. The water issues have been well documented, and the laypersons response to it, is not proper evidence to base a decision on. It has to be based upon the expert evidence. He continued that to his knowledge they have the right to hook up to water and sewer. The reason this was determined to be an unbuildable lot years ago, was because there was no town water and sewer at the time. If Mr. Brown has difficulty hooking up to water and sewer, then no matter what the Board does he will not be able to build there because he won't have water and sewer. That is a discussion for the Planning Board and the Sewer Commission for another day and time. Right now, those issues are not relative.

Mr. Colwell stated that the biggest contention seems to be the wetland in the area. He noted that he is not qualified to delineate wetlands. He is not a wetland nor a soil scientist. When he worked with Mr. DeGloria it was to locate the wetland flags by the soil scientist who delineated them. He continued that he has given his opinion on where the 10,000sf went. He thinks the soil scientist made an error. Mr. Brown has hired two wetland scientists. He commented that he is sure that if the neighbors wanted to hire their own wetland scientist, Mr. Brown would let them on the property to delineate the wetlands. He reiterated that Mr. Brown has done it twice and that is why they feel comfortable with the wetlands shown on the plan.

Mr. Colwell continued that he also wants to bring out the facts about the violation from 2000. He has a letter from DES and the restoration plan that really sheds a lot of light. David Price wrote a letter to Mr. DeGloria on October 3, 2002. The letter stated that DES received a restoration plan for the property to remove fill, specifically woodchips, placed in the wetlands and restore 300sf of wetland, with appropriate grading and planting, and remove the tree slash. Total amount of area to be restored within the wetland jurisdiction is approximately 12,000sf. He continued that he wanted to show the Board a copy of the restoration plan. He has circled in red the 300sf of woodchip deposit. The remaining 12,000sf just had slash in it. The order was to remove the 300sf of woodchips and remove the slash, meaning tree brush, from the remaining wetland. He pointed out that this was done.

Member Hoyt asked who Mr. Orchard is.

Mr. Colwell explained he was the soil scientist that was hired by Mr. DeGloria to delineate the wetlands in 2000.

Member Hoyt asked if woodchips would dry up the wetlands.

Mr. Colwell noted that to dry up the wetlands it would also take soil fill. Upon DES's inspection, there was no observance of soil fill. There was a clear report that it was woodchips and slash in the wetlands. He continued that when Mr. Brown bought the property, it was bought with the knowledge there was a wetland violation. The wetland violation was the woodchips and the slash. Mr. Orchard has since retired. He stated that he was able to find Mr. Orchard and speak with him. Mr. Orchard confirmed that the violation was woodchips and slash, which Mr. DeGloria took care of in the past. He continued that he drafted Eben Lewis a letter and asked him to look at the property to see if there were any remaining violations. Mr. Lewis drafted a letter February 5, 2016 to Mr. Brown. (He read the letter for the Board.) The purpose of Mr. Lewis' site visit was to determine if there were any remaining violations on the property.

Chair Weathersby clarified that the woodchips were supposed to come out and the wetlands were to be restored.

Mr. Colwell confirmed.

Chair Weathersby pointed out that it is being said that this is not wetland so it could not have been restored.

Mr. Colwell explained the restoration was two fold; remove the woodchips and remove the slash.

Chair Weathersby read from the restoration plan. She commented that it should have been restored as a wetland and now it is being said that it is not a wetland.

Mr. Colwell stated the removal of the slash and the chips would allow the vegetation to come back up. The plan was to remove fill, specifically woodchips, placed in wetlands and restore 300sf of wetland with appropriate grading and plantings and remove the slash from the wetlands on the property. It was to remove the chip and slash and within the 300sf area, restore the wetlands.

Member Hoyt asked if this was done.

Mr. Colwell confirmed. He commented that according to Mr. Lewis it was.

Chair Weathersby asked who the wetlands consultant was that supervised the restoration activity.

Mr. Colwell replied Mr. Orchard.

Member Hoyt asked what happened to the missing 10,000sf of wetlands.

Mr. Colwell stated the he cannot say why two scientists differ. He pointed out that as a safety factor they wanted a second opinion because it was such a drastic change.

Member Goldman stated that it really bothers him that there is a delta of 10,000sf difference between competent registered scientist who are supposed to understand this. Is it not possible that whatever was done, altered the characteristics enough relative to the way they are tested, so the two scientists happen to come to the same conclusion with each other? If everything was really restored to wetlands then it should have been bigger than 2,000sf.

Mr. Colwell stated the restoration references a restoration plan done by Jeff Orchard. Nowhere on the restoration plan does it show any plantings or grading or talk about restoring the 12,000sf.

Mr. Crapo stated that on January 25, 2016, Mr. Colwell's company wrote Mr. Lewis a letter stating that the previous owner of the property, Mr. DeGloria, says that all restoration of the property has been completed; however, it is understood that DES has no record of this completion. He continued that the town did not follow up. DES cannot have open files for so long so they closed it. Attorney Phoenix has said that all that is before the Board is the variances on their face valuations. There is virtually no way the variance being requested can be evaluated and balanced against the tests without the entire scope of things. He still questions whether they can be evaluated without proper house plans because it is dealing with runoff and storm water

management with fictitious homes. This was crafted in a way so that they can “cut bait” tomorrow and sell the lots or get the approval for two homes.

Attorney Phoenix stated there is no question that Mr. Brown is seeking approvals to build two houses on 2 lots. The applicant is seeking a subdivision to create 2 lots out of 3 or 11 and the variances that are associated with the creation of those lots. What Mr. DeGloria did or did not do is not relevant. He understands Member Goldman’s puzzlement about the delta. However, two unrelated scientists, one of whom is in no way connected to Corey, came to the same conclusion now. The issue is where the wetland is now. What is the situation with water flowing over that site now? Mr. Colwell has submitted a drainage plan that demonstrates that the water that is going to come off that lot and goes onto the neighbors’ side, is going to be less than present conditions as a result of what he is doing. He also understands the concern of the outfall; however, that outfall does not come into effect unless the raingarden fills up. If the raingarden was not there, all the water would be going onto the neighbors’ lot in the first place. He asks the Board to consider the variance request in light of the relief being requested. There is expert testimony saying that the wetland is under 3,000sf today. That drives what can be done on that lot, which is to create two lots. In regards to the size of the house, they are only talking about the subdivision right now. Mr. Colwell oversized the house showing the biggest house that can be built on the lots while still meeting the requirements. To build a smaller house would make it only better. To penalize the applicant now about that is unreasonable and unfair.

In regards to the question on whether any investigation was done in the missing 10,000sf area, Mr. Colwell stated the answer is yes.

Vice-Chair Goldman asked if there is that delta and it is so far unexplained, might there be soil or hydrology or physical characteristics of the land that would cause a dynamic of more wetland reappearing than what was discovered by the two soil scientists who most recently tested it; thereby, giving a whole different problem to the situation. How stable is the current situation?

Member Hoyt asked if the wetlands could have moved.

Mr. Colwell replied no.

Speaking to Mrs. Crapo, Member Hoyt asked if she has proof of the fill being brought to the property. He asked if the fill could have moved the wetlands.

Mr. Crapo stated it is hard to know because the owner brought in skidders.

Chair Weathersby stated they should let Mr. Colwell talk about the soils at the front near Big Rock and how stable that area is.

Mr. Colwell read from a report prepared by Chris Danforth in December of 2015. He explained that Mr. Danforth is saying that if the area in the front was at one time wetland and was filled, after the filled layer there would be a very noticeable dark hydric layer. In all of his probes in



this area, he did not find that. That lead Mr. Danforth to believe there was never any wetland in the area.

Member Hoyt stated that all the science that is being given to the Board is indicating that there were no wetlands in that front area because of the test of the borings. He asked if there are other samples or diagrams of the borings.

Mr. Colwell commented that there are not drawings but there are field notes in the Board's packets.

There was discussion on the testing that was completed on the soil.

Speaking to Mrs. Crapo, Chair Weathersby stated that she walked the property, one time specifically after a rain storm. She did see water; however, it was not the kind of water that is seen in the pictures. She asked if her opinion is that there is less water over the last few years.

Mrs. Crapo explained that because of the drought she has not seen as much in the last three to four years. She continued that the DPW, Police and Fire Department have had to come down many times to move trees across the road and put up road blocks on either side of that lot because it was so full of ice. That was up until about four years ago. There has been a drought since then but it is coming back.

Mr. Constantino stated that he is not an expert but he tracks the weather and rainfall rates. The area has been in a drought for a number of years. He finds it hard to believe that the wetlands are not impacted by a drought condition. If there is not a lot of rain there will not be a lot of runoff.

Mrs. Constantino stated that they both work from home and look out the windows all the time. They have a different perspective on the land. Out of 365 days in the year, 300 there will be water. If a house or two gets built and five years from now there is a lot of rain, what is going to happen when the owners says the driveway is failing, the foundation is cracking and the house is sinking because of the wetland? She reiterated that they see the land every day. They know this land.

Mrs. Crapo stated that the property is fed from inland streams, Philbrick's Brook and another brook that comes down.

Mr. Crapo stated that Attorney Phoenix is arguing that the wetlands is not even an issue for this meeting. He is arguing that it is because of the whole totality of the situation. If the wetland was disregarded, what is before the Board is the subdivision of the land, which would create building envelopes in those proposed areas delineated on the drainage plan. Regardless of the wetland issues, that would put homes in people's backyards. That would diminish the property values of those homes. At a minimum, it fails that test.

In regards to the drought and how it may affect the wetland size, Mr. Colwell stated that there are three prongs that determine a wetland; hydrology (presence of water), hydric soils and wetland plants. The hydric soils, or the signs of water in a hydric soil, remain hundreds of years after it's there. When the water rises to the soil, the minerals would leave a rust. The rust would not disappear in five years. This is what the scientists look for in the soil. The evidence of water coming up in the soil remains for dozens even hundreds of years. In looking at what determines a wetland, they look at the three parameter approach. If one of the three is not present, it is not a wetland. A drought situation would have nothing to do with whether it is a wetland.

Chair Weathersby closed the public hearing at 11:10 p.m.

Speaking to the representatives for the applicant, Chair Weathersby asked how long the driveways will be to the garage. She asked if there will be a need for any fill, culverts or supports for the driveways.

Mr. Colwell replied that fill will be needed. Both driveways will require about a foot of fill.

Chair Weathersby asked if it could be tapered. She is concerned about a fire truck coming in the driveway. It is only 12ft wide because there is little frontage.

Mr. Colwell explained the fill is a foot. To get it to existing grade there needs to be a 3 to 1 slope. Beyond the pavement, at another 3ft, it is at existing grade. He continued the driveways are sloped from Big Rock Road towards the raingarden. It starts at elevation 25 and the top of the raingarden is at elevation 21. There is a 4ft drop from the beginning of the driveway to the raingarden. The length of the driveway for the lot to the north is about 150ft. The driveway is 125ft on the lot to the south.

Chair Weathersby asked if the driveways, grading and raingardens are going to be completed under Mr. Brown's ownership.

**Stephen Brown, applicant**, commented that he has not decided yet.

Chair Weathersby asked if there is a house type plan for the lots.

Mr. Colwell replied no.

Chair Weathersby asked if the drainage analysis would alter depending on the shapes of the roofs and which way they angle.

Mr. Colwell replied it would. (He reviewed the flow of the roof runoff on the plan for the Board.)

Chair Weathersby asked if the water table is known. She asked if the houses are going to have basements.

Mr. Colwell replied that he does not know where the water table is. He does not know if basements are planned or not. He would assume that basements are planned.

Chair Weathersby pointed out that the wetland is a couple of feet from the corner of the house. She asked if this is a concern.

Mr. Colwell replied that perimeter drains are wonderful devices. The drain could be brought to the back of the lot where the lot slopes down and it could be diverted back towards the wetland.

Chair Weathersby asked what the potential effects on the wetland area are from having houses, pavement and activity so close.

Mr. Colwell explained the raingardens are designed to help offset that. All the rainwater that leaves the driveway and the rooftop is designed to get into the raingardens. That may have to be manipulated on the type of house that is built. By getting all the rainwater into the raingardens, the water is filtered and cleansed. Eventually, the water is going to seep into the wetland but by the time it passes through all that soil, it is more clean then it is by being direct runoff.

Member Hoyt asked if the raingarden, that is next to Mr. Constantino's house, could be designed so the water would divert away from his fence and go directly to raingarden P-3.

Mr. Colwell replied no because the abutting lot is higher in grade. He noted that no matter how much water comes out of that outlet it is less than it is today.

Member Hoyt asked if it is being made better with the design than it is right now.

Mr. Colwell replied yes. The drainage study speaks to that.

Mr. Crapo stated that most of the presentation on the raingardens is based on the raingardens infiltrating the water back into the soil. However, it was just testified that they do not know where the water table is. He does not know how any of the calculations could have been done, as to how much water could be put into the raingarden, if it is not known where the water is on the ground.

Mr. Constantino asked how they can make projections. How can they make an assumption that it is going to get better when the raingarden is put in? There is no proof of that.

Speaking to Mr. Colwell, Chair Weathersby asked him to speak to where he got the numbers.

Mr. Colwell stated that his response would be to hire an expert to do the same analysis. This is the type of work that his company does. He continued that Mr. Crapo raised a good point about the soil and not knowing where the water table is. He continued that based on the wetland

scientist that was hired the soils is a moderately well drained soil. These are the results of a qualified soil scientist.

**Bill Sloan, Gray Court**, spoke to the Board about the water runoff and conditions in the neighborhood as it adversely affects his property.

Chair Weathersby reclosed the public hearing at 11:25 p.m.

Member Driscoll stated that he sees it as a very complicated parcel of land. His struggle is that there is a very concerned neighborhood. They seem to have their fair points but there are not any solid numbers on what they are saying. It is all based off photos. It is all based off experience. It is all based off "so and so wasn't honest". He commented that he is sure they feel that way. On the other side, there is a proposal and they seem to have done their due diligence with wetland scientist but how does the Board verify that. In other projects, the Board would be able to use the Conservation Commission. The Board would be able to use their own reference to check on that system. He does not feel comfortable going forward with two lots on that one piece of land without having something to check the wetland scientist and what is there.

Member Hoyt commented peer review.

Member Driscoll noted that some stuff like that would help him out. He continued that he knows it is a structured system that the wetland scientists abide by. However, there is enough discrepancy for him to question it and want to see something from an independent source. He understands that the neighborhood may not want to chip in and hire a wetland scientist or the owner may not let them onto the property. There are some issues here that need to be resolved before he can get behind this and approve what is in front of him. He stated that he understands there is emotion here and a lot of people have left the meeting that were part of defending this; however, there is a process. The Board is spending their time and values. He feels the public did not conduct themselves well on that side in their proposals, respect for the Board and the process. He pointed out that there were interruptions and speaking out of turn, which made it harder to hear this application.

Member Dibble stated that he completely understands all the water issues. He does not think that just because the wetlands became 3,000sf, from 12,000sf, it is gone. He believes it is part of the reflection of the dryness of the season. Predicting what is going to happen in the future, by putting improvements on this land and expecting them to be durable, is going to be very difficult work. Any disturbance of the water in this neighborhood is going to affect the neighbors. With all of that being said, he believes the water issues are not a part of what the Board is being asked to look at. He continued that neighborhoods change. They have to honor property owners who want to match what is in the neighborhood, or sometimes neighborhoods get bigger dwellings. He believes this is a situation where the housing is already too congested. Adding more buildings is not in keeping with the spirit of the zoning ordinance or the character of the neighborhood. If this is subdivided and there is a threat of new houses being built, it will negatively affect the property values of the abutters. Speaking strictly to the issue of variances

for lot lines, not to what the houses might or might not look like or what the water might or might not do, he thinks the project has a negative effect on property values.

Vice-Chair Goldman stated that he understands exactly where Attorney Phoenix is coming from with regard to what the Board would normally focus on. He thinks there are extenuating circumstances here that are different than a lot of other cases the Board has faced. This is a lot more complex. He thinks the water issue is a bigger issue in this case than it has been in a lot of the other situations the Board has handled. He understands where Attorney Phoenix is coming from. He understands the presentation. He understands what Attorney Phoenix is asking the Board to focus on. However, there are too many disconnects or unanswered questions that impact a lot of people who have shown there are water issues, which are real problems for them. He also agrees with the point that was put forward by Member Dibble that property values would be impacted. If there hadn't been such written testimony and such public outcry, public testimony, he probably would have been able to more clearly focus on just the question of variances. He thinks that the approval of variances leads into all the other systemic issues that have to be dealt with that he does not have a lot of confidence in right now. He would not be in favor of the proposal.

Member Hoyt stated the nagging question that is constantly in his mind is, where did the 10,000sf of wetlands go? He continued that he believes in the science behind making this work. He believes that Mr. Colwell and his team of experts can make this land very viable lots for houses to go on. He truly believes that Mr. Colwell can make this work. It would probably even be better than what is there now. The abutters all have water problems. That is going to be there whether this is developed or not. If it does get developed it might be better. He continued that what he has a problem with is it is being "shoehorned" into the neighborhood. There are going to be houses in the abutters' backyard. He stated the he agrees that a person has the right to develop their land. It's a right as a homeowner. The neighbors all did it. They all bought these wet lots and built their homes. There are moisture problems with all the lots. He has seen the area and has grown up there. The neighborhood has water problems. He is convinced the engineering would fix those problems over what it there now.

Chair Weathersby stated that she thinks they are all troubled by the disappearing wetlands. One possibility would be to continue that until the Board has additional wetlands delineation, by a certified specialist who would pay particular attention to the area that used to be wetlands and is no longer. The exact amount of the wetlands affects the viability of the raingardens and how much uplands there is, which is one of the variances. There a two qualified people who are saying these are the wetlands but there is a whole nagging question. It was clearly more wet before

Member Hoyt commented that this is not known. He noted that he wanted to know if there was fill because that would change the wetlands. All the water is doing is going from the high areas to the low areas and across everyone's property. It is wet. He continued that the applicant should be allowed to develop the lot. It is his right as a property owner. However, the property has been designed to be "shoehorned" into that area. He is struggling to get onboard with the



project. He wants to get onboard because he believes in science; however, there is so much opposition.

Vice-Chair Goldman stated that had the plan been a little different, maybe if it was only one house.

Member Driscoll agreed. If it had been for one buildable lot, not two. They would not be coming to the Board for upland soils, if the soil scientists are right. He continued that he is not even considering that. He is only considering the frontage because that is the only requirement they do not meet if it is one parcel.

Chair Weathersby stated that her concerns are similar to what has been shared. She thinks that trying to put two lots in there is asking too much of the land. Regarding frontage, she knows that 150ft is not reasonable for that neighborhood; however, most of those lots have 70 or 80ft. She is concerned about the frontage. It's creating these little slices and back lots that open up, which the frontage requirements are designed not to do. She would go much less than 150ft but to go less than 39ft is a lot. She continued that she is very reluctant to do something that is 39ft of frontage. They need to get driveway, sewer, and water lines in such a narrow space. The upland is a new ordinance as of five years ago. That is relatively new to prohibit people from building on wet lots. She does think that the raingardens can really help with some of the water that is passing through the property. She is concerned about the maintenance of them. It is creating a very heavy maintenance situation on the lot. With this lot, this hydrology and this configuration, getting the two houses and all the associated infrastructure that goes with them, is asking too much of this lot.

Member Hoyt stated that he would be onboard with one lot.

Member Dibble commented that is not what is before the Board.

Attorney Phoenix stated that it was mentioned that another wetlands delineation might help. Mr. Brown would be willing to stipulate to that; however, he only wants him to offer to do so if it is going to lead to the possibility of an approval. If the scientist agrees with everything that Mr. Colwell has said, would that change anyone's opinion?

Vice-Chair Goldman stated there are three things besides the water. He heard from more than one person on the Board the question of property values. He heard another parameter that had to do with frontage and two houses versus one.

Chair Weathersby stated that she is going with the assumption that what has been depicted in Mr. Colwell's plans is the status on the lot. Even with less than 3,000sf of wetlands, it determines where the houses have to go and where the raingardens have to go. Even with this scenario, she thinks that what is proposed is asking too much of that lot. The lot won't support that and it will have a detrimental effect on the neighborhood. That is her personal opinion. She thinks the sense of the Board is to vote.

Attorney Phoenix noted that it is the effect of variances on property values not the effect of a house. The house is permitted if it meets the setbacks and coverages.

Member Dibble asked if they are deliberating on what is before the Board, having a discussion about an altered plan or whether additional information is needed.

Chair Weathersby stated they are deliberating on what is before the Board. If someone feels strongly that their decision would be altered if the wetlands were different than what they are depicted on the plans, then they should speak up.

Member Dibble stated there are huge water problems. He does not think what is before the Board has anything to do with the water.

Chair Weathersby noted that she does not hear anyone saying that they want to have the wetlands delineated again for the sake of the variances being requested.

Member Hoyt stated he believes in the science. They had two scientists. They would not cover up or lie about the results because they would lose their licenses.

Member Driscoll commented that even if this is it, they are still short on the upland soils. They are still coming in on the upland soils.

Speaking to Member Hoyt, Vice-Chair Goldman stated that the water and the size of the wetlands may or may not be a primary issue to anyone on the Board. However, what bothers him is that there should be a root understanding of what happened the first time around and it should be explainable. The 10,000sf that is missing should be explainable. If someone is a good scientist or engineer, they ought to be able to figure that out.

Member Dibble stated that he agrees with Member Hoyt that the engineering is sound. He believes in the raingardens. He believes they are going to decrease the amount of outflow off this property onto adjacent properties. It won't be much but it will help in a difficult neighborhood. This does not change the basis of his opinion.

Member Hoyt stated that he thinks this lot is developable but not in the way it was presented.

Chair Weathersby called for a vote to Section 202.13 for less than 30,000 sq. ft. of contiguous upland soil for each lot:

**1. Granting the variance would not be contrary to the public interest?**

Patrick Driscoll – No

Paul Goldman – No

Charles Hoyt – No

Burt Dibble – No  
Patricia Weathersby - No

**2. The spirit of the ordinance is observed?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**3. Substantial justice is done?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**4. The values of surrounding properties are not diminished?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

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

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Patrick Driscoll – No

Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**7. The proposed use is a reasonable one?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**8. Therefore, literal enforcement of the ordinance would result an unnecessary hardship?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

Chair Weathersby called for a vote to Section 204.3 F for lot #1 to have 31,395sf of lot area, where 44,000sf is required:

**1. Granting the variance would not be contrary to the public interest?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**2. The spirit of the ordinance is observed?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**3. Substantial justice is done?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**4. The values of surrounding properties are not diminished?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

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

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**7. The proposed use is a reasonable one?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**8. Therefore, literal enforcement of the ordinance would result an unnecessary hardship?**



Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

Chair Weathersby called for a vote to Section 204.3 F for lot #2 to have 31,121sf of lot area, where 44,000sf is required:

**1. Granting the variance would not be contrary to the public interest?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**2. The spirit of the ordinance is observed?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**3. Substantial justice is done?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**4. The values of surrounding properties are not diminished?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

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

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**7. The proposed use is a reasonable one?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**8. Therefore, literal enforcement of the ordinance would result an unnecessary hardship?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

Chair Weathersby called for a vote to Section 204.3 F for frontage on lot #1 to be 38.86ft:

**1. Granting the variance would not be contrary to the public interest?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**2. The spirit of the ordinance is observed?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**3. Substantial justice is done?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**4. The values of surrounding properties are not diminished?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

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

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**7. The proposed use is a reasonable one?**

Patrick Driscoll – No  
Paul Goldman – No

Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**8. Therefore, literal enforcement of the ordinance would result an unnecessary hardship?**

Patrick Driscoll – No  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

Chair Weathersby called for a vote to Section 204.3 F for lot #2 to have frontage of 51.92ft:

**1. Granting the variance would not be contrary to the public interest?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**2. The spirit of the ordinance is observed?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**3. Substantial justice is done?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**4. The values of surrounding properties are not diminished?**

Patrick Driscoll – Yes  
Paul Goldman – No

Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

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

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**7. The proposed use is a reasonable one?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**8. Therefore, literal enforcement of the ordinance would result an unnecessary hardship?**

Patrick Driscoll – Yes  
Paul Goldman – No  
Charles Hoyt – No  
Burt Dibble – No  
Patricia Weathersby - No

**Motion by Burt Dibble to deny the application of Stephen C. Brown, Trustee, for property owned and located at 0 Big Rock Road, to re-subdivide 11 small non-conforming lots on the old recorded Myrica by the Sea Plan to create two new non-conforming lots with variances as advertised. Seconded by Paul Goldman.**

**Vote: 5-0.**



**Note:** *Charles Hoyt left the meeting and Shawn Crapo was seated for the following application.*

***Members seated: Patricia Weathersby, Paul Goldman, Burt Dibble, Shawn Crapo and Patrick Driscoll.***

- 2. Pepperdog Realty Trust, Charles Moore & Michelle Tyminski, Trustees for property owned and located at 12 Robin Road, Tax Map 20.2, Lot 111,** request Variances from Section 603.2 to tear down and existing building and replace with new; from Section 204.3C for structure in the front setback where 14.7' exists, 14.7' is proposed and 20.95' is required; and from Section 202.5 for a septic system 10' from the property line where 20' is required. Applicant requests relief from the Building Code section 7.9.2.5 for septic system 10' from property line where 20' is required. **Property is in the General Residence and Coastal Overlay District. Case #08-2017.**

**Michelle Tyminski, applicant,** presented and reviewed the application/proposal for the Board. She noted that they are requesting a betterment of the property. They were before the Board in October for a shed. They have found that it will cost more to renovate the property than to tear down and rebuild.

Member Driscoll stated that he remembers there were multiple outbuildings on the property.

Ms. Tyminski stated that they have taken care of those. They have received a variance for a shed. Once the house is taken down that will be installed. The other sheds are now gone.

**Charles Moore, applicant,** noted that the entire corner of the house is decayed. He also noted that the neighbors have written letters of support. They are very happy with the work that has been done so far on the property.

Chair Weathersby noted that it is a two bedroom septic, two bedroom house with study. She asked if NH DES approval has been received for the septic.

Ms. Tyminski stated that the Town of Rye has said that the variance is needed first before the septic permit can be applied for. Eric Weinrieb, Altus Engineering, has designed the site plan.

Chair Weathersby noted the letters received in support from:

- **Paula & James Mahoney, 32 Fairhill Ave.**
- **Maureen Vaughn, 9 Robin Road**
- **Joseph & Beverly Parent, 8 Robin Road**

- **Evan Cerasoli, 2 Guzzi Drive**

Member Driscoll asked about the parking.

Ms. Tyminski stated that the parking permit has been issued by the DPW Director. The parking is the way the DPW Director has written it on the plan.

Chair Weathersby closed the public hearing on Thursday, March 2<sup>nd</sup>, 12:20 a.m.

Chair Weathersby called for a vote on variances to Sections 603.2, 204.3C, 202.5:

**1. Granting the variances would not be contrary to the public interest?**

Patrick Driscoll – Yes  
Shawn Crapo - Yes  
Paul Goldman – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

**2. The spirit of the ordinance is observed?**

Patrick Driscoll – Yes  
Shawn Crapo - Yes  
Paul Goldman – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

**3. Substantial justice is done?**

Patrick Driscoll – Yes  
Shawn Crapo - Yes  
Paul Goldman – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

**4. The values of surrounding properties are not diminished?**

Patrick Driscoll – Yes  
Shawn Crapo - Yes  
Paul Goldman – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Patrick Driscoll – Yes  
Shawn Crapo - Yes  
Paul Goldman – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Patrick Driscoll – Yes  
Shawn Crapo - Yes  
Paul Goldman – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

**7. The proposed use is a reasonable one?**

Patrick Driscoll – Yes  
Shawn Crapo - Yes  
Paul Goldman – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

**8. Therefore, literal enforcement of the ordinance would result an unnecessary hardship?**

Patrick Driscoll – Yes  
Shawn Crapo - Yes  
Paul Goldman – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

Chair Weathersby called for a vote for building code relief to 7.9.2.5 and 7.9.3.1:

- Would enforcement do manifest injustice and would be contrary to the spirit and purpose of the building code and the public interest?

Patrick Driscoll – Yes

Shawn Crapo - Yes

Paul Goldman – Yes

Burt Dibble – Yes

Patricia Weathersby – Yes

**Motion by Burt Dibble to approve the application of Pepperdog Realty Trust for variances and relief from the Town of Rye Building Code for property at 12 Robin Road as voted.**

**Seconded by Paul Goldman.**

**Vote: 5-0.**

- 3. 99-100 Franklin Street Realty Trust, John J. Madden, Trustee for property owned and located at 371 and 365 Sagamore Road, Tax Map 19, Lot 63, request Variances from Section 500.1 to allow for parking spaces of 10'x16' where 10'x18' is required; and from Section 500.3 for 5 parking spaces located within the front yard area and 1 space located within the 10' southerly setback. Property is in the Business District. Case #09-2017.**

- **Withdrawn by applicant.**

- 4. Emil R. & Debra S. Uliano for property owned and located at 394 Wallis Road, Tax Map 18, Lot 86, request Variances from Section 603.2 and 603.1 for demolition of an existing shed and replacing it with an expansion of a non-conforming building; from Section 203.3B to replace an existing shed with a garage in the side setback where currently the shed is 8' from the side property line and the proposed garage will be 10' where 20' is required. Property is in the Single Residence District. Case #10-2017.**

- **Continued to April 5, 2017**

#### **ADJOURNMENT**

**Motion by Patricia Weathersby to adjourn at 12:23 a.m, Thursday, March 2, 2017.**

**Seconded by Paul Goldman. All in favor.**

ZBA FINAL Minutes 3-1-17

Respectfully Submitted,  
Dyana F. Ledger



attachment minutes  
3-1-17

February 17, 2017

Joseph & Beverly Parent  
8 Robin Road  
Rye NH 03870

Town of Rye  
Zoning Board of Adjustment  
Rye Town Hall  
10 Central Road  
Rye NH 03870

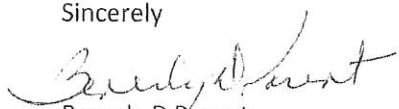
**Re 12 Robin Road**

Dear Board Members

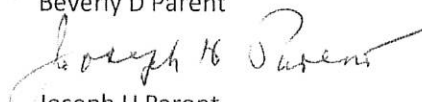
We are direct abutters to 12 Robin Road, and are enthusiastic supporters of the proposed project to demolish the existing dwelling and the building of a new home in its place. We have reviewed an image of the proposed house and its placement on the lot and are confident it will be tastefully done and will enhance the appearance of the neighborhood and have a positive effect on property values. The new owners have already made a significant positive effect on the area by the removal of unsightly rotting sheds and abandoned equipment and with a new home on the property it will be a welcome improvement which has been long overdue.

We have also read the variances being requested by the trustees of the Pepperdog Realty Trust and have no objection to them.

Sincerely



Beverly D Parent



Joseph H Parent

February 17, 2017

Joseph & Beverly Parent  
8 Robin Road  
Rye NH 03870

Town of Rye  
Zoning Board of Adjustment  
Rye Town Hall  
10 Central Road  
Rye NH 03870

**Re 12 Robin Road**

Dear Board Members

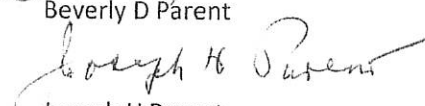
We are direct abutters to 12 Robin Road, and are enthusiastic supporters of the proposed project to demolish the existing dwelling and the building of a new home in its place. We have reviewed an image of the proposed house and its placement on the lot and are confident it will be tastefully done and will enhance the appearance of the neighborhood and have a positive effect on property values. The new owners have already made a significant positive effect on the area by the removal of unsightly rotting sheds and abandoned equipment and with a new home on the property it will be a welcome improvement which has been long overdue.

We have also read the variances being requested by the trustees of the Pepperdog Realty Trust and have no objection to them.

Sincerely



Beverly D Parent



Joseph H Parent

Evan D. Cerasoli

2 Guzzi Drive  
Rye, NH 03870

February 20, 2017

RE: 12 Robin Road  
Rye, NH 03870

To whom it may concern,

This letter is sent in support of the proposed house construction for the above referenced property which is approximately one block from my home.

Michelle Tyminski and Charles Moore have sent me copies of the plans for their proposed home. My wife Katie and I are very pleased with these plans and see this new construction as being a great addition to the neighborhood. We fully support their plans and wish them the best of luck.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Evan Cerasoli".

Evan Douglas Cerasoli

Maureen Vaughan  
9 Robin Road  
Rye, NH 03870  
201-562-4421

January 22, 2017

Michelle Tyminski & Charles Moore  
121 Parsons Road  
Rye, NH 03870

Dear Michelle and Charles:

Thank you for your recent letter updating me on you house plans and Happy New Year to you. I think the new home looks great and I fully support it.

Again, thank you for purchasing in the neighborhood and I look forward to getting to know you both in the future.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Maureen Vaughan', written in dark ink.

Maureen Vaughan

To: Rye, NH Board of Adjustment

From: Paula and James Mahoney, 32 Fairhill Ave, Rye

Re: Michelle Tyminski and Charles Moore Property at 12 Robin Road, Rye

Please accept our support for the tear down and rebuild of 12 Robin Road. That house was a terrible eye sore in our neighborhood. Michelle and Charles have cleaned up the yard and attempted to consider renovation. They worked very hard to remove siding in a safe manner only to find out that the cost to renovate was too great.

Their proposed plans are modest and will enhance the neighborhood and the value of our homes. I hope you will grant the necessary variances.

Thank You.

Paula and James Mahoney



March 1, 2017

To: The Zoning Board of Adjustment, Town of Rye, NH  
The Selectmen, Town of Rye, NH  
The Town Administrator, Town of Rye, NH

From : Kay Ruma  
6 Big Rock Road  
Rye, NH 03870

Re: Application of Steven C. Brown on the ZBOA Agenda  
for March 1, 2017. Case Number: 02-2017. This letter is to  
note that I object to any variances being issued for the  
unbuildable lot at 0 Big Rock Road.

Here is what I know:

1. Between 1986 and 1992 I hired counsel from Exeter for my mother, Mary F. Dahlen and other abutters of 0 Big Rock Road, Rye, NH to question the construction of an 11 lot subdivision on that property. Since the land was determined at that time to be wetlands the request to build was denied and the property was declared UNBUILDABLE on the Rye tax cards.
2. In 2015/16 it was discovered that a questionable maneuver was performed on the tax card by the Rye Assessor, who changed the tax determination on the card for 0 Big Rock Road from: UNBUILDABLE to BUILDABLE. The person in question clearly broke protocol and due process as I understand it.
3. For the Town of Rye to now uphold this "Switcheroo"

as valid and grant variances for this property does not, in my opinion make it acceptable or right.

It is simply compounding a prior injustice and should make each citizen of Rye wonder who they can trust or what documents they can trust as far as Town of Rye governance is concerned.

4. There are sewer issues that compound the aforementioned difficulties which should be explored.

Kay T. Ruma

## Kim Reed

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**From:** Kim Reed  
**Sent:** Wednesday, March 1, 2017 10:23 AM  
**To:** 'Burt Dibble'; 'Charlie Hoyt'; 'Gregg Mikolities'; 'Patrick Driscoll'; 'Patty Weathersby'; 'Paul Goldman'; 'RJ Lincoln (rj.lincoln@cpmginc.com)'; 'Shawn Crapo'  
**Subject:** 0 big rock road

From: bruce valley [brucevalley@earthlink.net]  
Sent: Monday, February 27, 2017 12:33 PM  
To: Jane Ireland  
Cc: Kim Reed; Joanne Drewniak  
Subject: Comments on Unimproved, Previously-unbuildable, Big Rock Road Property

To : Rye Selectmen  
ZBA

Info : Town Property Assessor

Subject : Comments and a Question regarding Unimproved, Previously-Unbuildable, Big Rock Road Property

My family has owned and occupied the residence at 11 Big Rock Road from December 1948 to the present.

Having grown up on Big Rock Road (formerly Grove Road), I am familiar with its seasonal water flows. It came as no surprise, years ago, that the vacant lot across the street was declared unbuildable by both the Town of Rye and DES due to water flows and inherent wetness. That area has always been boggy, even during summer's dryness. In the neighborhood, it has always been known that there is spring water flowing year round from an area known as Philbrick's Spring, located on once vacant land just west of Mary Philbrick's home on Cable Road in the vicinity of where the Pine Road extension was finally joined to Cable Road. In periods of rainfall or snow melt, this water overflows and follows its ancient path towards the Atlantic, crossing the back and side yard lawns at 11 Big Rock Road, then water falling onto the road itself, and finally flowing into the unimproved area across the street, where it remains, being unable to cross the built up land on both sides of Ocean Boulevard or on Cable Road or Grey Court. As a boy, I often skated in winter on tree-studded ponds west of Mary Philbrick, in the boggy area across the street, and in my own back yard. As the quickest path to Carberry's/Philbrick's Store on 1A (now Rye General Store) was through that area, I know well that it was impossible to complete that route and return with dry shoes and socks -- unless you walked atop the stone wall that ran through the property, which at certain times of the year was necessary.

This personal history strongly suggests that the original decision by both the town assessor and DES to declare this unimproved property as "permanently unbuildable" due to water flows was, in my view, correct. Water flows seldom change. They are what they are. I am aware that successive owners of the property have now endeavored to render the property buildable -- by cutting trees down and using wood chips as fill -- or by other darker stratagems. It is to this latter effort that I address my question to the selectmen and the ZBA. On information and belief, the previous town assessor was given notice for subjectively altering property assessments on whim -- or worse -- rather than in accordance with accepted standards and regulations. Some unknown number of Rye properties were adjusted in this manner, one of them being the unimproved property across from 11 Big Rock Road. As a result, this unbuildable property became either buildable or possibly buildable as improperly altered by the fired assessor, who is also known to have been a friend or associate of the current property owner. A period of many months have now ensued in which various abutters have unsuccessfully sought remedial action from the Town of Rye out of reasonable concern for the negative impact on their own properties from any building up of that previously-unbuildable property with fill and then improving it with some number of structures. On the evidence, the fate of this unimproved property and of those town

**From:** Dennis McCarthy  
**Sent:** Monday, February 27, 2017 11:31 AM  
**To:** Patricia Weathersby  
**Subject:** RE: Big Rock Road

Patty-

The lot in question is receiving stormwater runoff from the surrounding areas and is of critical import to the hydrology of the area. Any development of the site will require a very thorough hydrologic study of the site and surrounding areas. No improvements have been made to the receiving existing state and town closed drainage system, which is currently overloaded, nor is any study contemplated at this time.

-Dennis

**From:** Patricia Weathersby [<mailto:pattyandbobw@msn.com>]  
**Sent:** Monday, February 27, 2017 11:20 AM  
**To:** Kim Reed <[kreed@town.rye.nh.us](mailto:kreed@town.rye.nh.us)>  
**Cc:** Dennis McCarthy <[DMcCarthy@town.rye.nh.us](mailto:DMcCarthy@town.rye.nh.us)>  
**Subject:** Big Rock Road

Hi Kim,

In looking over the materials for the SKRJ Realty Trust application (0 Big Rock Rd.) I note that in 2003 then DPW head Bud Jordan had major concerns about water on the site. He stated the water on the site flows into a State catch basin which can hardly handle the water and recommended an easement for a pipe and a catch basin to take care of some of the water and copper (coffer?) dams for the water to slow it down.

Do you know or could you check with Dennis McCarthy whether DPW feels there continues to be an issue with water on that site and if he know if town/state/others have taken any remedial action re water/wetlands affecting the site since 2003?

Somehow the present amount of wetlands now appears to be much less.

Thank you.  
Patty

# LOTS OF MYRICA AND SURROUNDING AREA

Rye Tax Maps 8.1, 5.2,  
8.4, and 5.3