TOWN OF RYE
BOARD OF ADJUSTMENT

Wednesday, April 5, 2017 – 7:00 p.m.
Rye Town Hall

Members Present: Chair Patricia Weathersby, Shawn Crapo, Burt Dibble, Patrick Driscoll, Tim Durkin and Charles Hoyt.

Others Present: Zoning Administrator Kimberly Reed

I. Call to Order and Pledge of Allegiance

Chair Weathersby called the meeting to order at 7:09 p.m. and led the Pledge of Allegiance.

Chair Weathersby welcomed the newest board member Tim Durkin.

II. Election of Officers

- Chair

Motion by Burt Dibble to nominate Patricia Weathersby as chair. Seconded by Patrick Driscoll. All in favor.

- Vice-Chair

Motion by Patricia Weathersby to nominate Shawn Crapo as vice-chair. Seconded by Patrick Driscoll. All in favor.

- Clerk

Motion by Patrick Driscoll to nominate Burt Dibble as clerk. Seconded by Shawn Crapo. All in favor.

III. Approval of Minutes: March 1, 2017

Motion by Burt Dibble to continue the approval of the March 1, 2017 minutes. Seconded by Tim Durkin. Vote: 4-0-1 Abstained: Shawn Crapo

The following case was taken out of posted agenda order.

Note: ***Shawn Crapo recused himself for the following request for rehearing. Charles Hoyt was seated.***

- Petition by Stephen C. Brown, Trustee, SKRJ Realty Trust, for a Rehearing and Reconsideration of the Rye Board of Adjustment's March 1, 2017 denial of Mr. Brown's Variance request for the properties located at 0 Big Rock Road, Tax Map 8.1, Lot 45 and Tax Map 5.2, Lots 79 & 80. **Public hearing closed during Board discussion on the request.**

Chair Weathersby stated that the rehearing request was received from Mr. Brown, via Attorney Phoenix, on March 24th. The Board also received a follow up from Attorney Phoenix concerning the alleged negligent Notice of Decision. The Board received letters of objections from Robert Constantino, Robert and Sharon Constantino, Kay Ruma and Debra Crapo. She continued that concerning the Notice of Decision being deficient based on state statute RSA 676:3, which requires the Board to issue a final written decision including the written reasons for the disapproval. The Notice of Decision included the specific votes but did not include the specific reasons. In preparing the Notice of Decision, she felt that she understood why she voted the way she did and felt that most of the Board did. These reasons were because of the diminution of surrounding property values, the shoehorning of the two house lots into that space (overcrowding), the negative effects on the existing character of the neighborhood and the frontages were woefully short. However, she was not sure after that meeting that those were everybody else's reasons. She stated that she made a decision to let the minutes speak for themselves. That may or may not have been an incorrect decision because she did not know about the statute that says the reasons need to be written for disapproval. She noted that she has asked Attorney Donovan if a revised Notice of Decision can be issued if the Board agrees on what the reasons for denial were; however, she has not heard back. That may be a possibility of getting around that piece.

Member Durkin asked what has been the past practice.

Chair Weathersby replied that usually they list the reasons for a denial. The meeting went on for a long time. She thinks Attorney Phoenix is right that there was a lot of focus on the wetlands; disappearing wetlands and why the wetlands were not the same as they were earlier, which was not particularly relevant to the variances that were requested. The Board was trying to understand it because clearly there were water issues on the lot. One of the variance requests was for a lot that would have a building envelope that was very close to the wetland, which isn't a jurisdictional wetland so the buffers do not apply. She thinks the Board went a little too deep with that and spent a lot of time on things that weren't 100 percent applicable to the variances that were requested. She continued that things got a little muddy in her opinion. She was not completely sure the members of the board were all unanimous in the reasons for denial so she did not write them up.

Chair Weathersby reviewed a memorandum which was received from Attorney Donovan in regards to her question concerning the Notice of Decision. *(Chair Weathersby had not seen this memorandum before the meeting.)*

Chair Weathersby stated that concerning her question on whether or not a revised Notice of Decision can be issued, that is probably not possible. If the Board wants to add written reasons for denial, a motion for rehearing could be granted for that limited purpose. At the rehearing, the record from March 1st would be incorporated into the rehearing with very limited testimony. Nobody would be allowed to repeat what has already been said. The Board can revote and summarize the reasons for the denial. The Board could also put on the record tonight the reasons for denial. That would get the reasons clearly into the record. She suggested that the Board revisit this after they decide whether or not to have a rehearing on more substantive matters.

Member Driscoll clarified that Attorney Donovan says the safer play is to grant the motion for a rehearing for the limited purpose of hearing argument.

Chair Weathersby confirmed.

Member Driscoll stated that this is what he would be in favor of; in reading through Attorney Donovan's recommendations. He thinks it is a good idea to take a conservative approach.

Chair Weathersby commented that it depends also if the Board thinks a rehearing is needed for any other reasons. There could be a rehearing with all the testimony incorporated and a decision could be issued, which would basically be the same. It essentially just extends things. They would have the right to apply for another rehearing. The process would be correct. She continued that the Board should talk about whether or not a rehearing should be granted for any other reasons. If so, the case would start over with a blank slate and whatever decision was made would have written support for it.

Member Hoyt stated that unless the applicant comes before the Board with a different application, he thinks there would be no reason to have a rehearing. The Board listened to the case and weighed it out. Unless the applicant has a different set of drawings and a new application, he would have no reason to bring it right back again. The Board took a long time, read the research and saw the site. Unless there is new evidence that the Board deliberated with false pretenses, he does not see the need to come back to it.

Member Dibble stated that as he thought about Attorney Phoenix's letter, there were two principal issues. One is that the Board wandered off into a discussion concerning water issues, which had nothing to do with what the application was about. The other was that the Board did not provide written notice of the nature of their decision, as is required. It is his understanding, procedure to grant a rehearing is to recognize that there is information that was not testified to, there is new information to introduce, or there is a flaw in some way in which the Board explained their positions, the positions were not made clear or in some other way would make the decision improper. He rethought his own considerations and he thought he made himself very clear. His concerns about this application were the impact that it would have on the neighborhood in terms of property values. There was good testimony that putting houses in back of houses on adjacent empty lots would impair the property values of those properties. He also spoke to his concern of having two very narrow driveways come out onto Big Rock where there are already a number of driveways in that neighborhood. He felt it represented a significant

safety issue. To speak directly to the water matter, he thinks the video record will show that he said several times during the hearing, "I think we need to focus on the fact that this is not about the water". There were a lot of neighbors, letters and concerns about the water. There was a long and technically very sound presentation about water presented by the engineer. He thinks all of those things tended to distract the Board's attention from what the business was.

Member Dibble stated that it has been the procedure of the Board to make assessments about the nature of property value impacts based on its own judgement and experience. The Board has not historically asked for testimony from brokers, realtors, or other people knowledgeable about property values, in arriving at those opinions and decisions. Frankly, he has never been comfortable about that. When applicants come before the Board, if they want to raise concern about impact on property values one way or the other, some evidence should be presented. He reiterated this has not been the Board's procedure. The Board did not try to adhere to any such procedure in this decision. He is prepared to reaffirm the decision as it was made. He is a proponent in doing whatever needs to be done legally to correct matters in the most straightforward way possible.

Speaking to the Board, Chair Weathersby asked if anyone voted on the variances based on water concerns. She thinks most of the members had wetland and drainage concerns about that lot. However, when it came to voting for the variances requested, were the decisions based at all on concerns of wetlands and drainage?

Member Hoyt replied that his answer would be "no". Those were not his concerns at all. He was convinced the engineers had made the situation even better. He based his decisions on other reasons.

Member Driscoll stated the primary reason for his decision was based on the frontage and access.

Member Dibble stated he fundamentally agrees with Member Hoyt. He thinks there was satisfactory evidence that the engineering proposals actually improved the water situation on the property.

Chair Weathersby pointed out that she said, (and it is listed in the minutes), that she was going on the best assumption that the science is going to work. Even given that, the project just didn't really work for her. It didn't satisfy the variance criteria. There was a diminution of the surrounding properties. There was overcrowding of the land, even though so many of those lots in that subdivision are small at 7,000 – 10,000sf. These lots are much larger but they are not right along the street and matching every other property. The lots are shoehorned in behind other houses with long driveways. It fills up that neighborhood in a way that she thinks is inappropriate. She thinks it does cause overcrowding and it changes the essential character of that neighborhood. She also has serious concerns about properties that have 30 feet of frontage, particularly the one lot with less than 40ft of frontage. Those were her reasons. She still has concerns about the water and whether the water issues will be addressed if this gets approved. She would like more information about water in the neighborhood as a whole. The Board heard concerns from people not wanting the water to escape the raingardens and flood their land. There were concerns that the pond was going to dry up. She commented that it went both ways.

There is clearly water flowing through this area. Even though the wetland on the property itself wasn't a jurisdictional wetland, she wishes she had heard more about whether it is part of an integral hydrology of the neighborhood. With that said, that was just of interest. That was not something that went to why she voted against the variances that were requested.

Member Durkin stated that he read through all the information. He also had the opportunity to walk the property, which was helpful given all the precipitation in the last few days. While he completely agrees with Attorney Phoenix that the wetlands are not part of the Board's decision making, there are some obvious concerns and he understands why the neighbors are bringing those up. In regards to the frontage, in looking at the lot, he does not understand how the lots are going to be situated to provide for the two driveways. Not having participated in the last meeting, he would agree with that concern.

Referring to Attorney Phoenix's letter, Chair Weathersby stated that other reasons include the onsite drainage; the stormwater issues are not a basis for denial. She thinks the Board agrees that this was not a basis for denial. If the Board had serious concerns about that, they would have taken him up on his offer for peer review. She certainly would have made that request. She does not think the drainage and stormwater issue on that lot were the basis for anyone's denial. The second point is the size and effect of the onsite wetland is not a reasonable basis for denial. The variance is not related to the wetland. Again, the Board had the whole discussion about how big the wetland really was and it was a bit of a red herring. The Board spent far too much time on it. However, she does not think the fact that the wetland had shrunk, or some people did not believe the wetland had shrunk, was the basis for denial. She believes that the wetland was as represented. That is not why she voted against it. The wetland that is there in a smaller state, in her opinion, is related to the upland request. One lot did not have sufficient upland because of that wet area. She does see it related in that fashion. She did not think it was sufficient upland for the lot.

Member Dibble stated that part of the reason for the crowding issue is, to utilize the uplands, the proposed buildings had to be moved to the edge of each property, which made them crowd the adjacent parcels a little bit more. In that way, it is remotely related but he still stands on what he said. It is a matter of variances not water.

Chair Weathersby asked if he is asserting that setback relief was needed for the building envelopes. She does not think that was presented.

Member Dibble replied no. It just makes buildings closer in an already tight neighborhood.

Referring to Attorney Phoenix's letter, Chair Weathersby stated that the third point is that the ZBA unreasonably failed to consider Brown's variances in the context of the surrounding neighborhood. She pointed out that this goes to the small lots in the area and the Myrica by the Sea Subdivision. She disagrees with this statement. The lots are larger. The Board acknowledged that they are larger than the typical lots. The Board was also made aware they are larger than the typical lots. She still thinks that putting the two houses back in there creates overcrowding in that area. She continued that Attorney Phoenix's letter notes that some lots have less frontage. She commented that most of the lots have more frontage but there are a

number at 50ft. She asked the Board if anyone feels that it was not taken into account that other lots in the area had less or similar frontage.

No comments were heard.

Chair Weathersby stated that frontage requirements exist for a reason; safety and to give sufficient space for all the things that need to get in to the front of a lot. She particularly felt that the one that was going to be under 40ft was woefully inadequate. She continued that Attorney Phoenix's next point was that Mr. Brown's vested rights to develop at least two lots from 11 deeds, or three from the town records, were erroneously not factored into the ZBA denial. Attorney Phoenix suggests that there is an absolute right to have at least two lots. She takes issue on that. She is not sure this has been established. She thinks his reliance on the Morgenstern Case is somewhat misplaced. It is a different situation. After Myrica was laid out, it was developed by many developers. It was not just a single developer. The Myrica-by-the-Sea Subdivision was done pre-zoning. It was not substantially completed by the developer. It was sold off and developed by many individuals. She is not sure there is a vested right to build two houses. She thinks that is in contention.

Member Durkin asked if the vested rights would be part of the deed for the property. It sounds like it is making the case that these lots are grandfathered in some way.

Member Driscoll asked why they would need to go to the Board if this was the case.

Chair Weathersby explained that the Board heard testimony that there was a right to have at least two lots on the property because the rights had vested from substantial completion of Thompson Road going through. Attorney Phoenix went through that analysis and believes Mr. Brown has a right to put two houses on what were originally 11 lots. Attorney Phoenix is saying that the Board failed to consider that. She continued that she disagrees that he has the right to build two houses. What was proposed is two houses in very different locations than where he alleges he has the right to build two houses. Essentially, he is asking that the property be treated like one big parcel and divide it into two. She thinks that what he is asking for is different. Even if there was a right to build two houses, and he is asking to build two houses that does not mean the Board has to say this is a better situation. The Board would have to look at whether what he is offering to do now make sense and satisfy the variance criteria. She does not think that they did.

Member Driscoll stated that it was not just two different lots. It was two different access points to two different lots. This gets back to the frontage issue for him.

Chair Weathersby stated that another point raised by Attorney Phoenix is that the Board incorrectly considered the effect of the project, rather than the variances and denying each variance. He noted the Board needs to determine the effect of granting variances not the effect of the project when considering the analysis. Attorney Phoenix asserts that had the Board looked at whether the granting of the variances satisfies the criteria, it would have come to a different result. Attorney Phoenix noted that ZBA members expressed concerns about the houses and not just the lot configuration; overcrowding, diminishing of property values, etcetera. She comes back to the fact that he is asking for building lots. Even throughout the rehearing request, he

talks about development and the right to develop. The clear reasons the variances were being requested were to have two building lots. They had building envelopes drawn on them. It is hard to consider the variances without the reason for them. If it was presented that the land was going to be left vacant, she might have voted differently and attached a condition that the land forever remain vacant. That is not what is being asked. They are asking for lots that Mr. Brown clearly intends to develop or sell to others as building lots. She is not sure that they can consider granting a variance without the reason that they are being asked for.

Member Dibble stated that he believes this is fundamentally correct. He believes that everyone knows that he is an ardent preservationist and conservationist. He would have plenty of that kind of reasoning to make a decision in this case. He tried to avoid that to make a decision and just focus on the land, the narrow driveways, the limited amount of upland and the nature of the property being created. He thinks it is the nature of the land that allows for a certain amount of upland. The notion that it is going to be developed results in the adverse consequences. He does not think the hardship of the land can be separated from the adverse consequences.

Chair Weathersby stated that it does not make sense that the Town would have a requirement of 44,000sf of upland soil on a lot that was being subdivided so that the lot can remain vacant. There is a reason for the upland soil. There is a reason, in other cases, for a wetlands buffer. It is because there is going to be a change in use to that property. All these things relate to the use for that district. These were clearly presented throughout the presentation as building lots. It is the granting of the variance meeting those criteria but understanding the implications of the variance being granted in a certain use district and what that means. That is how she was looking at it. It sounds like this is how the Board was looking at it. The Board looked at it as granting a variance in the context of the use district that the property is situated in. She pointed out that Mrs. Crapo's letter also speaks to this concept being discussed.

Referring to Attorney Phoenix's letter, Chair Weathersby stated the last point is that the rehearing is justified because the Board did not provide adequate factual and written reasons to support the decision. She noted that Attorney Phoenix is correct. They weren't written. The Board did not follow the letter of the statute. She asked if it is the general sense of the Board to **not** grant a rehearing on the substantive issues of the application.

- **Charles Hoyt – Yes, Patrick Driscoll – Yes, Tim Durkin – Yes, Burt Dibble – Yes, Patricia Weathersby – Yes**

Regarding cleaning up the Notice of Decision, Chair Weathersby stated that the Board can grant the motion for a rehearing for that limited purpose. It would be for the May meeting. The record from March would be incorporated into the hearing. No one would be allowed to repeat what is already in the record. The Board would revote and summarize the reasons for the denial. There would then be a Notice of Decision that would state those reasons. That applicant would have another opportunity to file for a motion for rehearing before they appealed to the court, if they so desired. If the Board does not want to go that route, it could be put on the record tonight the reasons for denial. The reasons would clearly be in the record. Town Counsel Attorney Donovan indicates that the first option is probably better; however, if the outcome is not going to change it will only delay matters for the applicant.

Patrick Driscoll made a motion for rehearing for the limited purpose of addressing F, which is "rehearing is justified because the ZBA did not provide adequate, factual and legal reasoning and support for its decision". Seconded by Patricia Weathersby. Vote: 4-0-1 Abstained: Tim Durkin

- Rehearing to be scheduled for the May meeting.

Note: ***Shawn Crapo was reseated. Patrick Driscoll recused himself from the following application. Charles Hoyt was seated for Patrick Driscoll.***

1. **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.**

Emil Uliano, III, representing the applicants, presented to the Board. The proposal is to demolish an existing 12x23 shed, which is 8ft from the side property line. The shed will be replaced with a 24x24 two car garage and slightly shift it over so it will be 10ft from the side property line. The garage will meet all other setback requirements. He noted that it is a long skinny lot like a lot of the lots along Wallis Road. Both abutting properties on the left side have outbuildings. The abutting property on the right side has a two-car garage and three other outbuildings. This would not be out of character to have an outbuilding or a garage on the lot.

Member Hoyt asked if there will be a driveway going to the structure.

Mr. Uliano explained that currently half the driveway is paved and half is gravel. The plan is to have a paved driveway leading to the garage.

Chair Weathersby noted that although the lot is thin, it is long. It does not look like there will be any issues with extending the driveway, as far as lot coverage and impermeable surface. She pointed out that the application requested a variance from 603.1. The legal notice says 603.2 as well. She asked if someone said this was needed. She does not think 603.2 is needed. (She reviewed the Building Inspector's letter.) She noted that the letter says that both are needed.

Member Crapo stated that it looks like a complete demolition and replacement.

Chair Weathersby agreed. That would be for 603.2, tear down and rebuild. She opened to the public speaking in favor or opposition of the application.

No comments were heard.

Speaking to the Mr. Uliano, Chair Weathersby asked if they have heard any feedback from the abutters.

Mr. Uliano replied that the abutter on the left is fine with the proposal. The abutter just wanted to see where it was going to be staked out and that has been done. There have been no other comments.

Chair Weathersby closed the public hearing at 8:34 p.m.

Member Crapo stated that looking at the photo showing the existing shed to the proposed photo, it is evident that it is encroaching. It is a tasteful replacement. The current shed is very obsolete and unsafe structure. He supports the application.

Member Durkin commented that is he was an abutter he would certainly support it also. It is a reasonable request.

Chair Weathersby agreed. She continued that the setback on the right side is being met. The setback is being improved on the opposite side. It is certainly going to be more useful and in much better condition. It is a very reasonable request and she supports it.

Member Hoyt stated that it is tastefully done. He likes the look of the garage. He is in favor.

Chair Weathersby asked if the Board is in agreement that a variance is needed from 603.2 and not 603.1.

The Board agreed.

Chair Weathersby called for a vote on variances to Sections 603.2 and 203.3B:

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

   Shawn Crapo – Yes
   Tim Durkin - Yes
   Burt Dibble – Yes
   Charles Hoyt – Yes
   Patricia Weathersby - Yes

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

   Shawn Crapo – Yes
   Tim Durkin - Yes
   Burt Dibble – Yes
   Charles Hoyt – Yes
   Patricia Weathersby - Yes

3. **Substantial justice is done?**

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

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

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

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

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – 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?**

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

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

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

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

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

Motion by Burt Dibble to approve the application of Emil R. and Debra S. Uliano, for property owned and located at 394 Wallis Road, from Section 603.2, for demolition of an existing shed, and Section 203.3B to replace the existing shed with a garage as advertised. Seconded by Charles Hoyt. All in favor.

Note: ***Patrick Driscoll was recused for the following applications, which were heard together. Charles Hoyt remained seated for Patrick Driscoll.***

2. **Manuel & Carol Barba for property owned and located at 740 Washington Road, Tax Map 11, lot 103** requests an Administrative Appeal from the Building Inspector's 11-1-2016 Notice of Violation of Rye Zoning Ordinance Sections 203.1 A for a second dwelling on one lot and from Section 301.8B(1), 301.8B(2) & 301.8B(7) for a dwelling within the 75' wetlands buffer and from Rye Building Code Section 7.9 for the unit not having a pressurized water system connected to an individual sewerage disposal system. **Property is in the Single Residence District. Case #04-2017**

3. **Manuel & Carol Barba for property owned and located at 740 Washington Road, Tax Map 11, lot 103** requests variances from Section 203.1A for a second detached dwelling on the property and from Section 301.8B (1), 301.8B (2) & 301.8B (7) for second dwelling within the 75' of the wetlands buffer; and Building Code Relief from Section 7.9 for effluent of second unit not be connected to an individual sewerage disposal system. **Property is in the Single Residence District. Case #06-2017.**

Attorney Monica Keiser, Hoefle, Phoenix, Gormley & Roberts, representing the applicant, spoke to the Board. She requested that the Board consider the variance request before the administrative appeal. It the variances are granted the administrative appeal would be withdrawn without prejudice.

Building Inspector Peter Rowell stated that the administrative appeal should be handled first. He has basically said that this is an illegal building. If the Board agrees and the administrative appeal is not successful, then this will all go away.

Speaking to the Building Inspector, Chair Weathersby clarified that if the Board agrees and finds the building to be illegal, they could then ask for the variances. If the variances are addressed first and were granted, it would then be in compliance and the appeal would be moot.

Member Crapo stated that if the variances were denied, there is still the administrative appeal. If the Board disagrees with Mr. Rowell that is basically saying that they are not in violation. He asked if this would mean they could continue with no variances. He asked how they can decide

on a variance if it is not known whether a variance is or is not needed. He thinks this is something that should have been requested a long time ago so the Board could have posed this question to counsel. Presenting the request at the start of the presentation is really untimely.

Attorney Tim Phoenix, Hoefle, Phoenix, Gormley & Roberts, explained that the request and applications were submitted on, or about, the same time. He does not think it is wrong in any way to say this is how we would like to proceed. He has come before the Board, on more than one occasion, with an administrative appeal and a request for variance. The argument is that if the variances are granted, it makes it easier because the Board does not have to overturn something the Building Inspector has determined. If the requirements are met for a variance, everything else is moot. The Board has to look at things for a variance as though it is not there. He thinks it is easier to go for the variances because if they are granted the appeal is moot. If they are not granted there is still the underlying argument that it has been there since the 30's and it is a prior non-conforming situation which can continue.

Chair Weathersby pointed out that a good part of the material that was submitted goes through the history and whether it was grandfathered. That would not pertain to a new variance request. If the Board is going to go that route, the administrative appeal needs to be done first.

Attorney Phoenix explained the typical variance request for after-the-fact is to pretend it wasn't there. This is different because it has been there since the 20's and 30's. The situation when Mr. Barba bought the lot was that it had been used and was being used as a residence. That situation where he bought the property in reliance on the history of it, is what creates part of the hardship of why it should be able to stay.

Chair Weathersby stated that she is starting to be convinced the administrative appeal should be done first.

Member Durkin agreed. In reading the packet, the confusion is whether the second dwelling is a legal use.

Chair Weathersby stated that if the appeal is granted and the Board finds that Mr. Rowell was in error then the variances are not needed. The opposite is also true. She suggested that the Board hear the administrative appeal first. She asked Attorney Keiser to proceed with her presentation.

Attorney Keiser stated there are a lot of materials before the Board. This is an interesting property. It is a 4.2 acre lot with an old farmhouse and barn in front close to Washington Road. On the back of the property is a little cottage. The cottage is part of a series of structures that were erected in the 20's or 30's that somebody lived in up until 1960. For some time, this was the state of affairs on Washington Road. When the Hunter's Run subdivision went in, the structure was represented on some of the plans. The structure was there. She thinks that Mr. Rowell agrees that the structure was there. She continued that the use was also well established prior to zoning and continuing up through to 1960. The subdivision went in around 1986. There was evidence that was submitted that indicates the structure was being lived in at that time as well. What is remarkable, is that there is some indication that the Town accepted assertions of non-conforming use. In other words, the Town accepted information submitted in 1991 that

showed the cottage had been there and someone had been living in it. The Town appeared to accept that without incident. There was a corresponding revision to the tax card in 1986, which appeared to amend it to increase the square footage associated with the property. There were amendments to the tax card indicating the existence of a cottage that was "nanny quarters" and the like. There were revisions to the tax card that this was a use reversed in 2006 as a result of an appeal. In 2003, there is a letter, from then Building Inspector Susan Labrie, responding to an inquiry from an abutter who was concerned. Susan Labrie's letter explained that the cottage had been there for a long time and the use may continue. She noted that this information is in the Town file. When the owners who had the property in 2003 were planning to sell they engaged an attorney to write an opinion letter about the status of the cottage. That letter is in the Town file as well. From the 1930's and 1940's to 2006, the cottage has existed and been lived in. In 2006, Mr. Barba purchased the property in reliance on the information that he was able to obtain. Mr. Barba would also assert that he had a conversation with Inspector Labrie about the use being able to be continued, as long as it was not expanded in any way. She continued that their position is that because of this history and its documented use, the structure can live as it is in perpetuity without any upgrade or changes because that is the essence of the prior non-conforming use section of the zoning ordinance. The requirements for Mr. Barba are that he has reasonably relied on the information in the town file. She thinks they can demonstrate, based on the information in the town file, the issue of this cottage being a lawful prior non-conforming use is certainly material. They can establish that the representation was made by the Town. It is fair to say that a buyer is going to review that and not be in a positon to say "that's not true". They can rely on what is available. Was Mr. Barba's reliance on this representation reasonable? Did he rely upon it to his detriment? She would submit that any new purchaser should be able to rely upon any information in the town file and the tax assessor records to evaluate the purchase of a property. This is a situation that the reliance, given the action that is being faced now, is to his detriment. Specifically, in Mr. Barba's case he is a disabled veteran. He has a significant medical issue, which makes employment difficult. One of the family's considerations when purchasing this property was if they were going to be able to afford it. The cottage significantly factored into the decision to purchase this property. If the income is potentially lost, that would certainly be a determent to Mr. Barba.

Attorney Keiser stated that they understand there is a concern about the septic situation at the property being old and of an unidentifiable origin. She continued that they are willing to look at that. The Board can consider the health and safety of others in their decision. It would be something that Mr. Barba would take on at a significant expense and it is not something that could be renovated tomorrow; however, he has engaged MSC Engineering to draft a septic design. She noted that this is not part of the variance request because they did not have it until recently. She continued that there is a septic proposal and they are certainly willing to address the concerns that may exist and make it better for the people surrounding the property.

Member Crapo stated that it seems the applicant would love to have everything grandfathered and allowed to be in perpetuity because it existed. But at some point, building codes, decay and changes are going to catch up with that. At some point, it either had been improved or needs to be improved. Therefore, the wording of how something can continue to be grandfathered, if it is not expanded or improved on, is lost. There is a request for a waiver for a sewage disposal

system but in reality, there cannot be a dwelling without that. There is a myriad of rub that trumps grandfathering.

Chair Weathersby stated that in the Notice of Violation there are three items. One was the sewer disposal system. It was found that sewage for this dwelling was going into a cesspool, which does not provide waste water treatment required by State law. The second item was the second dwelling on a lot where only one is allowed. The other item was the wetland buffer. The restricted uses for both the dwelling and the 75ft setback from the wetlands buffer. She asked if it is being contended that the Notice of Violation is wrong on all three of the items.

Attorney Keiser stated that if she relies on the argument that this is a non-conforming use, then yes. She thinks there are rules that will allow replacement of the septic for a dwelling that has history of a non-conforming use. The question would be whether replacing would be expanding. She would argue not. If this all existed prior to the building and zoning code, she would argue it is fine the way it is. She just thinks that practically speaking some modifications could be made.

Attorney Phoenix stated there is a distinction that needs to be made between the use of the property historically, when there weren't septic systems as they are designed today. They believe the record clearly shows the structure has been used as a dwelling continually since the 20's or 30's and the town has established a pattern of not responding to arguments that it is permitted by grandfathering, and/or sending letters that it is permitted followed by later letters saying that it is not. The septic system in particular is not proper. Corey Colwell, MSC Engineering is available to speak about the septic that has been designed. The septic system needs to be replaced and Mr. Barba is willing to do it. Mr. Barba's issue is finances. He will need some time to implement a decision that would require the septic system to be put in. It is a fair compromise considering legally the septic system is grandfathered.

Member Durkin asked how much time would be needed.

Manual Barba, applicant, stated that he was hoping for 9 months. He is looking at next fall before next winter.

Attorney Keiser stated that what is there could be a little more elegant. What is there is being pumped by someone.

Mr. Barba noted that the system was inspected and the inspector said the system was perfectly fine in terms of it being operational.

Attorney Keiser commented the design that Mr. Colwell has come up with is about $15,000. The representation that Mr. Barba makes in his variance request is that he can get to that but he certainly cannot get to that with the deprivation of the rental income.

Member Crapo stated that it was said that the use is allowed to continue. In his mind, he is separating the word "use" as being a dwelling from septic. He does not think septic is a use. A cesspool is a grandfathered use. He thinks there are two different analysis that need to be done.

He asked what the main dwelling has for a septic system. He asked if that could be connected into.

Corey Colwell, MSC Engineering, explained that the main structure is right on Washington Road. The cottage is all the way to the back of the property. There is several hundred feet between the main structure and the cottage. It cannot realistically be tied in to the front septic system. They have to be two separate systems.

Member Crapo asked if a pump could be used.

Mr. Colwell stated that it could be used but it is not the preferred method. The preferred system would be to put the cottage separate from the house. In the event of failure, it becomes the other person's fault.

Member Crapo noted that this is not a condo situation. There is one owner who is responsible. Also, this would bring the whole wetlands issue out of play because the existing system is in the highland.

Mr. Colwell stated the wetlands do not really effect the system other than the tank. The leachfield is completely out of the 75ft buffer zone. The only portion of the system within 75ft is the sealed tank and the sealed pipe from it to the leachfield. He continued it is more than 50ft; however, it is not more than 75ft.

Chair Weathersby stated that the State has laws about effluent disposal systems; how to upkeep them, what happens when they are in failure and defines failure. She asked if it is being asserted that the cabin does not need to meet current State law because it is grandfathered.

Attorney Phoenix stated that Mr. Barba had the system checked and it is functioning. His working knowledge from working with the Town is that if there is an old system, it can be continued to be used, as long as it is not in failure. If something were to happen, the Building Inspector would require a statement from an inspector saying that it is functioning and/or have a backup design ready in case it does fail. In this situation, that is all being preempted. He continued that this situation has been going on for 80 years. Waiting 9 months until Mr. Barba can get the money in place is not that long in the grand scheme of things. He is willing to replace the system. He noted that the septic system itself requires variances unless the Board can say that since the grandfathered permitted old use is being replaced a variance is not needed. If it is the standard manor, the location of the septic system would need variances. The applicant would have to come back so they have to preserve their rights until they get the final approval to do it.

Chair Weathersby noted that the dwelling was built in the 20's or 30's. Mr. Harry Green lived there until the 1960's. She asked how they know it was occupied from 1960 to 1986, besides Attorney Griffin saying so.
Attorney Keiser stated that she spoke with Attorney Griffin who put her in touch with Paul Chisholm. Mr. Chisholm wrote an affidavit, which was submitted with the file. Mr. Chisholm came to own the property in 1991. It is her understanding that there was a bunch of information

presented by Lucy Chisholm about that time frame. She pointed out that Attorney Griffin wrote two letters. One in 1991 and another in 2005.

Chair Weathersby stated that in the 2005 letter Attorney Griffin states the owner indicated that she had done research and the second unit had been used continuously until 1989. She is trying to pinpoint if at some point the structure was vacant for enough period of time that the grandfathered rights were abandoned.

Mr. Barba stated that he spoke with Mr. Philbrick who does pumping in the area. He had stated that he had been pumping that cottage since the early 70's.

Attorney Keiser stated that if the assertion that it was lived in up until 1989 and the Chisholms then purchased the property and started renting it continuously, then the gap is not significant enough. What is difficult to know, is what was going on with the property 30 or 40 years ago.

Chair Weathersby stated that it is the applicant's burden to prove that this has been a continuous use. There are people from the neighborhood that have lived there for this many years. She does not see an affidavit from them.

Attorney Keiser replied this is a fair point. The fact is that information has been submitted to the Town and accepted. People have relied on that.

Chair Weathersby clarified that it is being said that Mr. Rowell is wrong by saying this is not a permitted dwelling. This is being based on this being a grandfathered pre-existing use before zoning and is allowed to continue.

Attorney Keiser confirmed.

Member Crapo asked if the structure still has knob and tube electric.

Attorney Keiser replied that she did not know.

Member Crapo commented it should have been updated and there are no records of building permits.

Mr. Barba stated that there are no records of anything being done. He continued that the electrical is all up to date. The use of town water is locked and will not be released until there is an occupancy permit. That was locked in 1991. It seems that sometime around 1986, someone did something and the tax information was updated.

Attorney Keiser stated this is where an after-the-fact variance would come in. The owner has come into possession of something that he does not have the proper information about. There are several comments in the file about work to the main house; however, there is no work identified for the cottage.

Referring to a photo, Chair Weathersby asked the date of when it was taken.

Attorney Keiser replied that she does not have the date.

Chair Weathersby stated that the cottage looks different than what it does today. The picture does not show the dormer off the back.

Attorney Keiser commented that she is not going to disagree. There is probably stuff in the cottage that was not there in 1930 or 40. All she can represent to the Board is that Mr. Barba did not make those modifications. He came into possession of the cottage the way it is.

Chair Weathersby opened to Mr. Rowell.

Mr. Rowell stated that this issue has been coming up consistently, in front of the Board of Selectmen, since 1991. After the last complaint was filed, the Board of Selectmen came to him and said it had to be straightened out. He told the Selectmen that he would research the file. If he could find evidence that the cabin pre-existed zoning, in the form that it is in now, he would grant them a certificate of occupancy. If evidence could not be found in the file, he was going to write a notice of violation saying the cabin did not predate zoning in the condition it is in now and it is an illegal structure. He continued that he reviewed the file. The photo that was submitted by the applicant is probably a mid-1960's photo. Mr. Harry Green passed away in 1960. If he occupied the cabin, at that point in time it became vacant. Referring to the photo, he noted that the cabin they are saying was occupied had no windows, only one up high, and had no chimney, which would show it had no type of heating unit. He was told that this was a tool shed. The cabins in the back show a chimney on one. That might be where Mr. Green lived in the 20's and 30's. This throws another twist into the issue.

Mr. Rowell continued that the next picture shows the back of the cottage. The photograph that is dated 9-03-2015 is pretty much what the cabin looks like today. Obviously, there were major changes made to the dwelling between the 60's and what is there today. The record does not show any building permits for any of the changes. This makes is difficult to know if what is in the building is safe or when the changes were made. If building permits had been applied for they would have had to address the septic system. He continued that in 1986, the owner of the property subdivided into Hunter's Run. The recorded plan does not show the cabin. The cabin does show up on the topography plan. It does not show it as a dwelling. It shows it as a cabin. His feeling is that when the property was subdivided, the Planning Board would have called it out as a dwelling and put it on its own parcel. Two dwelling units on that parcel was a violation of the zoning ordinance at that time. He noted that a water line was installed to the building when the subdivision was going in. When the building inspector, at that time, found out about it, he wrote a letter and it was turned off. This is another indication of the building inspector saying this is not a dwelling unit. There should not be water to it.

Member Durkin asked about the letter of April 8, 2003 saying that the dwelling unit is a legal use and may continue indefinitely.

Mr. Rowell noted that a couple of years later another complaint came up and it kept on going back and forth. That is how the building official felt at that time. He stated that he did not feel

comfortable that the dwelling unit had been there and predated zoning. He felt that he would make his argument, the attorneys can make their arguments and the Board can make the determination whether it is a dwelling unit or not. He commented that septic system is not a legal septic system. It never was a legal system. It's a cesspool. There is a pipe that comes out and runs into wetland. It has probably been like that forever. He reiterated that Mr. Green probably lived out in the back for some period of time. He does not feel this makes it a grandfathered dwelling unit. Also, with the subdivision of Hunter's Run the dwelling unit would have been put on its own lot. He noted that the town was issuing permits back in 1953. There is no trail showing the changes to the dwelling unit between the 60's and current.

Member Hoyt asked if he has been in the building.

Mr. Rowell stated that he has been in the basement to inspect the pipe coming out of the back. The plumbing coming out of the basement is fairly recent. It is PVC pipe. If the plumbing had been installed in the 40's or 50's it would be cast iron.

Referring to the photo of 2015, Member Hoyt stated that it looks like a new structure. It is a completely different building compared to the photos of the 1960's.

Member Crapo asked if the records for the property show a septic plan. He is looking at the tax card that says in 2001 install septic.

Mr. Rowell explained the tax card primarily covers the front structure. The front structure did have a new septic system installed about that time.

Member Crapo asked how Mr. Barba's deed reads and the deed before that. He asked how the deed refers to the structure.

Mr. Rowell stated that he did not research this. Often times, the deeds do not list the structures.

Member Hoyt stated that if it is determined to be grandfathered it would have to be determined how to bring it up to today's code. He is sure there are many violations structurally, electrically and with plumbing. That will open up another body of conversation. If it is going to be allowed to be rented and remain in perpetuity, it has to be considered if it is a viable structure to pass today's codes.

Chair Weathersby stated that she thinks their argument is that they do not have to because everything preexists.

Member Hoyt stated that the Board should not allow that because of people's rights live in safe buildings.
Speaking to Mr. Rowell, Member Crapo asked if there are life safety codes that would restrict even a grandfathered dwelling to be currently occupied by a human being.

Mr. Rowell commented that other than the septic, he did not inspect any other life safety codes. He reiterated that it is the Board's job to say whether the structure is grandfathered.

Member Durkin asked the measurements of the structure.

Attorney Keiser replied that she is not sure.

Mr. Colwell noted that the structure is 14x20.

Attorney Keiser stated that a building inspector can say that a structure is a legal dwelling unit if they feel comfortable doing so. That is exactly what Susan Labrie did in 2003. She said it was a dwelling unit, it was legal, and it was grandfathered and could continue in its present use. In 2003, that was the decision of the town. In 2006, it was sold to Mr. Barba.

Chair Weathersby asked if it is being said the Mr. Rowell is wrong because Ms. Zarlengo (Labrie) already decide this or is it being said the Mr. Rowell is wrong because it is grandfathered.

Attorney Keiser stated that she is saying the Ms. Zarlengo (Labrie) made a determination that her client relied on to his detriment. That is the essence of the municipal estoppel argument.

Mr. Barba stated that he spoke to Ms. Zarlengo (Labrie) in 2008 about the structure. She had stated that as long as no changes were made, it was fine the way it was. He commented that this is what he relied on.

Attorney Phoenix summarized that there is evidence that shows the building was occupied from the 30's or 40's up until the 60's and 80's. It is a little scratchy from there. In the late 80's early 90's, Attorney Griffin dealt with then Building Inspector Bill Jenness who said this is permitted and nothing was done about it. It then it happens a second time. The third time, Susan Zarlengo (Labrie) says this is okay and can be used. Mr. Barba comes along and buys it after all that has happened and with the Town taking no action on the history of use. Mr. Barba was then issued a formal letter that says he can't do it anymore. He continued that they believe it is grandfathered. They appreciate the issue with how the Board and Mr. Rowell are supposed to deal with something that has no records; however, this has nothing to do with Mr. Barba. Mr. Barba did not build it, did not expand it or put the septic system in. He moved there with records that show it is okay and it has been the same way ever since. He relied upon that when he bought it in order to have the rental income to keep the house. After all that, to take it away from him is unreasonable and unfair. Especially when the septic system can stay for now the way it is but he is willing to address it at a significant cost to him. He asked the Board to keep these things in mind going forward.

Member Crapo asked if it has been rented for the whole time Mr. Barba has owned the property.

Mr. Barba confirmed.

At 9:40 p.m., the Board recessed. The meeting reconvened at 9:55 p.m.

Chair Weathersby opened to the public in favor of the application.

Hearing none, she opened to the public in opposition.

Dennis Doyle, 27 Hunter's Run, abutter, stated that he was the first one to live on Hunter's Run. He bought his property in 1988. The cottage was not occupied. It was never occupied until the farm was foreclosed on. The bank owned the property for a year or so and they sold the property to Chisholm. He continued that he was the one who wrote the letter to Priscilla Jenness. He met with Building Inspector Bill Jenness, he agreed and that is when the water was turned off.

Chair Weathersby asked if the rentals started once the Chisholms bought the property.

Mr. Doyle replied yes. He commented that he is not sure how someone would get to the cottage before Hunter's Run was developed. It is way down before the cul-de-sac on Hunter's Run. There is no access to it.

Member Dibble asked how it is accessed today.

Mr. Doyle replied Hunter's Run.

Arthur Ditto, 6 Fern Avenue, abutter, stated that there have been comments that the septic system is functioning properly. If that is the case, he would expect to see some certification in writing. He doubts that someone would certify in writing that the septic is functioning properly. A cesspool will not treat waste. The waste is just pumped into the ground and leached out. This is a rental property. There is some implied expectation that the facility is up to code. If someone got hurt, they are going to go after the Town for allowing this rental unit to exist. There may be some type of liability for the Town if it is allowed through it being "grandfathered". The other concern is that the location of the property and cesspool is within the Rye Water District Wellhead Protection Area. It is also in the Town's Aquifer Protection Zone. Neither one of those zones allow this type of septic system to exist today. He noted that he is a commissioner for the Rye Water District. He is not sure the State would even allow this now that it is known to exist. There probably should have been a Cease and Desist Order to discontinue use on this facility until it was brought up to code.

Member Crapo asked if the proposed septic is in the Wellhead Protection Zone and potentially the State would not issue a permit if the applicant applies for the septic.

Mr. Ditto explained that the State would not allow the current cesspool to continue to be used now that it is known to exist. The Wellhead Protection Area has many houses with compliant systems. Last year, the Town voted in a Pump-Out Ordinance for the Parsons area because of leaching going into Parson's Creek. Where this system is located, there is a stream that goes through the property, under Hunter's Run and daylights out at Rye Harbor. This contamination is going directly into the stream and groundwater.

Chair Weathersby asked when he purchased his property.

Mr. Ditto replied that he purchased his property in 1979 and built his house in 1982. At the time, he did not know the cottage was in existence. He noted that grandfathered implies there is a continued use. It seems there has been enough breakage in use to come to the conclusion that it wasn't continuously occupied. When it is not continuously occupied the grandfathered issue goes away.

Chair Weathersby asked if there are any other people who would like to speak to the application.

Jaci Grote, representing the Conservation Commission, pointed out that the commission submitted a letter to the Board. She would like to be sure this is considered.

Chair Weathersby noted that the Board has the Conservation Commission's letter and the minutes of the site walk.

Member Durkin asked if there is evidence that the dwelling was occupied before 1988.

Mr. Barba reiterated that Mr. Philbrick had confirmed that he pumped for whoever lived there. That is one reason that he knows someone was in there. There were people across the street who knew a person who lived at the property.

Member Durkin commented that other than Mr. Philbrick saying that he pumped there is really no evidence.

Mr. Barba commented he has no other evidence.

Attorney Keiser stated that the Chisholm affidavit states that when the development went in the developer's son was living there. There is a deed from the bank for 1991. The Chisholms bought the property from bank.

Chair Weathersby reviewed the letter and site walk minutes from the Conservation Commission.

Regarding Member Durkin's comment about occupancy in the 80's, Attorney Phoenix stated that he does not have any direct evidence but there is a letter from 2005 from Charlie Griffin who is writing to the owners at that time. (He read this letter to the Board.) This letter indicates that it was continued to be used and then the Town did not do anything. Anybody would assume that it is okay. He noted that water was run to the cottage. At the time it was done, in the late 80's, it was seen as a dwelling unit, otherwise water would not be needed. The bottom line on the septic is this is a reasonable place to put it given the circumstances. If nothing was here, a new dwelling and septic would not be going in this location. It is because it has been there for so long, without any action by the Town against it, it really has to stay.

Member Crapo noted the developer would have done the water. In laying out the water pipe down the road, the developer would have run a lateral to this place. No one is saying by them doing that it makes it legal.

Mr. Colwell explained the developer lays the lateral but the Town has to turn it on. The Town is the only one who can turn it on. The developer lays the pipe and makes the connection. The connection has to be inspected by the water department.

Chair Weathersby commented that the water was turned on but then turned right off.

Mr. Barba stated it remained on from 1987 to 1991.

Attorney Keiser pointed out that the cottage was separately metered.

Referring to the plan, Mr. Colwell stated that he highlighted the wetlands and the 75ft wetlands buffer. The leachfield is out of the 75ft buffer. The septic tank is 50ft but within that 75ft buffer; however, the tank is a sealed component. The pipe from the tank to the field is mostly within the 75ft buffer as well. Most of it is beyond the 50ft buffer. It is also a sealed component. If the septic tank is moved outside the 75ft buffer, the tank would be so deep that pumping becomes a problem because it'll be 3 or 4ft under the ground. Pumping of the tank is one of the critical components of septic maintenance. It is more practical and better to have that tank at grade, such that regular pumping activity can take place. He continued that to put the tank outside the 75ft buffer would require crossing the existing driveway with the pipe from the house to the tank. The pipes are pretty shallow and not to be driven over. If that was done, the pipe would probably be crushed. For those two reasons, the tank was left in the 50ft buffer. He noted the system is adequately designed for two bedrooms. It is an enviro septic system. It is a pump system. It is gravity to the tank and pumped up to the leachfield. He reiterated the components within the 75ft buffer are sealed. There was a concern of the Conservation Commission that the system should be on a required pump and maintenance schedule. He does not disagree. The best routine for a system is maintenance and pumping at least once per year. He does not think Mr. Barba would have any objection to having the system pumped once per year. The system is very adequate and better than the cesspool. If the house does not receive an occupancy permit the system is not going to go in. It will remain as is.

Chair Weathersby asked if the tank could be located outside the buffer, if it was not for the driveway in its present location.

Mr. Colwell explained it could be outside the buffer; however, it is not the best location because the tank would be about 2 to 3ft below grade. The tank would not be easy to access for pumping.

Member Crapo stated that unless this is going to be continued to get evidence on the occupancy possible continuance or break, he is seeing it split as a use where people slept and lived and as a building use. There is evidence in the pictures that the building changed. The building broke its chain of grandfathering. The building inevitably expanded. Whether a use was grandfathered in as a dwelling for living purposes, he is leaning towards favoring, except it is not known whether there was a break. At least on the building and septic issues, he sees they are on the variance analysis. He thinks it is beyond any grandfathering on those.

Member Hoyt agreed. This is a case where he agrees with the proponents of the project and agrees with the people who are against the project. It is a tough case. What bothers him is the

structure is what it is, it presents a hardship to the owner of the land if he is denied to be able to rent it. Yet, there could be some code violations that could go against the health of the people who could occupy the structure; however, that could be cleared up by granting variances. He thinks that the Building Inspector did the right thing. He would not be inclined to go against what the Town's Building Inspector has proposed; however, he would be up to looking at the application and granting variances. The structure was put in when there were no laws so the Town has to live with it. He thinks they can work around these issues. He likes the septic design. It will make the situation a lot better than what it is now. The system needs to be put in as soon as possible. The pollution of the water in that area causes a health hazard to the surrounding community.

Mr. Rowell reiterated that he did not find any evidence of building permits for any changes to the building. He thinks there is a big doubt as to whether this building or the shed in the back was being occupied in the 1960's. He does not think it is a grandfathered dwelling. A big reason is because the Planning Board, during the Hunter's Run Subdivision, did not address it. If it was a dwelling unit, they would have addressed it at that time and put it on a lot by itself.

Chair Weathersby explained that procedurally they are going to let Attorney Phoenix wrap up. The Board will deliberate and consider the Notice of Violation first. The Board will decide if the administrative appeal should be granted or not. If not, the Board will address the variances.

Attorney Phoenix stated that the Board should not only consider the grandfathering but also the actions, or non-actions, of the Town. It was at least three times in a row where no action was taken. It was then said by the owner's lawyer this is okay. He believes that when Susan Zarlengo (Labrie) said this is okay, that is it. The Town cannot then say, one or two owners later, that Susan was wrong and it has to be changed. The Town is bound by that. As far as the procedural aspects, it appears a variance is needed for the septic system, which is not before the Board. One option would be to continue the variance application to allow this to be added so it can all be considered at once, at which time some of the Conservation Commission's concerns can be addressed. It may also be considered that the administrative appeal decision be continued so there is not an appeal situation being created.

Chair Weathersby stated the trouble with what is being proposed is it was known that the property needed a septic system. This could have been dealt with a long time ago and all been presented at the same time.

Attorney Phoenix stated there are other considerations other than the presentation before the Board. There is the practical consideration of the owner's ability to do something. At the time this was started he did not have Mr. Barba's authority to present the septic system. His legal analysis is the applicant does not have to, as long as this one is working. Over time, Mr. Barba became convinced it was the right thing to do.
Chair Weathersby stated that she is inclined to vote on the administrative appeal at this meeting.

There was discussion on voting on the administrative appeal and delaying the start of the appeal time until the actual Notice of Decision is drafted and approved by the Board at the next meeting.

Member Durkin proposed a continuance until the Board receives additional input from Attorney Donovan. To vote on the administrative appeal at the next meeting should not take a long time. It is important to do it all in one package and have the full set of variances.

Attorney Phoenix pointed out the septic does not work unless it goes back on town water.

Member Dibble pointed out that it seems silly to put $15,000 into a new septic system if the owner cannot get an occupancy permit. It would seem that an inspection of the building would be appropriate.

Mr. Barba noted that he had a home inspection conducted when he purchased the property in 2006.

Member Crapo commented that a home inspection for real estate does not get into building codes.

Chair Weathersby stated all these issues go to the variances and whether or not they should be granted. The decision now is whether the Board votes on the administrative appeal.

There was discussion on whether to continue the decision on the administrative appeal to the next meeting.

It was determined that the Board would address the variances at the next meeting and vote on the Notice of Violation at this meeting. The Notice of Decision will become effective after the Board reviews the draft Notice of Decision at next month's meeting.

At 10:47 p.m., Chair Weathersby closed the public hearing.

Chair Weathersby noted the Mr. Rowell's letter states that the ordinance only allows for one dwelling on the lot.

Member Crapo stated that structure-wise there is evidence before the Board, (before and after photos), that the rooflines do not line up. If it was the same structure it would have been grandfathered. At some point, the building has been expanded. In his mind, this trumps the grandfathering because it has been expanded. Therefore, it needs to comply with zoning. He would support Mr. Rowell's letter that it is illegal. No one can present any evidence to when these illegal building modifications were made. It could have been done after Ms. Zarlengo's letter. He does not think this is a grandfathered structure that predates zoning.

Member Durkin stated that he agrees with Member Crapo. At the same time, the concern he has is the fact that the Barbas relied on information that was provided by the Town with respect to the dwelling. The concern he has is that the Town did not follow through with enforcing whatever violations those may have been.

Chair Weathersby stated that she does not think the burden of showing the grandfathered use, or the majority of the structure is grandfathered, has been met. She thinks there are gaps in the

periods of time that people lived there. It is her opinion that some of the gaps are three years or longer. Certainly, the structure has expanded since 1953. There is also conflicting evidence on whether this is the same house that Mr. Green lived in. She does not think it has been proven there were not three year gaps in occupancy or that the house is substantially in its same configuration as it was in 1953. She is more troubled with Susan Zarlengo-Labrie's decision in 2003, where she made the declaration to the owner that it was a legal dwelling unit and a year or two later made a different determination.

Member Hoyt stated that he thinks Peter Rowell did the right thing. He thinks there is a definite hardship to a building that has been there. He thinks it was built as a dwelling and certain things need to be addressed. One of them is the septic system and other issues that relate to the dwelling itself.

Member Dibble stated that Mr. Rowell has done a good job lining out the problems. He also thinks there is enough of a civic estoppel argument that the Town bears some responsibility for what has happened. The burden of proof is not entirely on the applicant. He thinks the applicant behaved in good faith. The applicant is being placed in a very difficult situation. He noted that he would be delighted to see a septic system put in. He would be delighted to see the owner of the property have a successful time here. How to structure such an agreement is a little unclear to him at the moment.

Referring to submitted letters, Chair Weathersby stated that in 2003 Susan Zarlengo-Labrie stated that the second dwelling was established prior to zoning. Therefore, the dwelling was a legal use and may continue indefinitely. In 2008, it came to Ms. Zarlengo-Labrie's attention that it is being rented. The 2008 letter states that the accepted use is occasionally for family members. Rent cannot be collected and it can only be used as a guest house. Ms. Zarlengo ordered the place to be vacated and stated the dwelling was not legal. The septic system could not be used for a dwelling. She continued that the letters conflict in part with her 2003 decision. It is troublesome that this conflict exists. She is inclined to think that the part of Mr. Rowell's letter that addresses the single dwelling did not err.

Chair Weathersby called for a poll vote of the Board in regards to the three components of the Building Inspector's Notice of Violation. Has there been any error in any order, requirement, decision or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16?

1. Effluent disposal system:

   Shawn Crapo – No
   Tim Durkin – No
   Burt Dibble – No
   Charles Hoyt – No
   Patricia Weathersby – No

2. Second dwelling on the lot:

Shawn Crapo – No
Tim Durkin – Yes
Burt Dibble – Yes
Charles Hoyt – No
Patricia Weathersby – No

3. Wetlands Buffer:

Shawn Crapo – No
Tim Durkin – No
Burt Dibble – No
Charles Hoyt – No
Patricia Weathersby - No

Motion by Shawn Crapo to deny the Administrative Appeal with the decision not being final until the Notice of Decision is prepared, reviewed by the Board and accepted. Seconded by Charles Hoyt. Vote: 4-1 Opposed: Tim Durkin

Motion by Shawn Crapo to continue the variance request until the May meeting. Seconded by Tim Durkin. All in favor.

4. **Brent Morin for property owned and located at 93 Clark Rd., Tax Map 19, Lot 84** requests Variances from Section 203.3B for a shed in the side setback where 3' is proposed and 20' is required and for an existing garage where a side setback of 6.8' exists and 20' is required. **Property is in the Single Residence District. Case #11-2017.**

Brent Morin, applicant, spoke to the Board. He explained that he owns a house at 93 Clark Road with a small one bay garage. He is requesting to add a shed to his property for additional storage space. His lot is narrow with 100ft of frontage. The existing garage is non-conforming and is about 6 to 8ft off the property line. He is proposing to locate the shed in the backyard, which will provide a little bit of a barrier between his property and the neighbor's. The shed would be placed in back of the garage for easy access to storage. He is asking for 3ft off the property line to provide maximize backyard space.

Chair Weathersby noted that the neighbor to the west is the one that the shed would be closest to. She asked if he has spoken to that neighbor.

Mr. Morin replied that he has spoken to the neighbor. He has a letter with signatures of all abutters that reside on Clark Road in the packets.
Letter signed by:

- Jeff Abood, 95 Clark Rd
- John Smyrnos, 92 Clark Rd
- Kyle Morin, 127 Clark Rd
- Roy Berger, 89 Clark Rd

- Gary Chapman, 106 Clark Rd

Mr. Morin noted that Mr. Abood is the one that is most affected by the shed and he is in favor.

Chair Weathersby opened to the public for comments.

Roy Berger, 89 Clark Road, stated that he is in full support of the proposal.

Chair Weathersby closed the public hearing at 11:17 p.m.

Member Durkin stated it is a reasonable well prepared proposal. He supports the applicant.

Member Crapo noted it is 3ft off so it can be accessed. That area is pretty tight.

Member Hoyt commented that it is a nice presentation.

Chair Weathersby called for a vote on variances to Section 203.3B:

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

   Shawn Crapo – Yes
   Tim Durkin - Yes
   Burt Dibble – Yes
   Charles Hoyt – Yes
   Patricia Weathersby - Yes

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

   Shawn Crapo – Yes
   Tim Durkin - Yes
   Burt Dibble – Yes
   Charles Hoyt – Yes
   Patricia Weathersby - Yes

3. **Substantial justice is done?**

   Shawn Crapo – Yes
   Tim Durkin - Yes
   Burt Dibble – Yes
   Charles Hoyt – Yes
   Patricia Weathersby - Yes

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

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

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

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – 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 that provision to the property?**

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

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

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

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

Shawn Crapo – Yes
Tim Durkin - Yes
Burt Dibble – Yes
Charles Hoyt – Yes
Patricia Weathersby - Yes

Motion by Charles Hoyt to grant the applicant Brent Morin, for property located at 93 Clark Road, a variance to Section 203.3B for a shed in the side setback where 3ft is proposed and 20ft is required. Seconded by Burt Dibble. All in favor.

9. ~~**Charles & Lindsay Beynon of 362 Main Street, Unit 2, Charleston MA for property owned and located at 30 LaMer Drive, Tax Map 13, Lot 44** request Variances from Section 603.2 to tear-down existing building and replace with new; and from Section 301.B (1), 301.8B (2) and 301.8B (7) for a driveway 47.9' from tidal marsh, an impervious walkway 52.4' from tidal marsh and for a building 55.6' from the tidal marsh where 100' is required. **Property is in the single Residence District. Case #12-2017.**~~ **WITHDRAWN.**

10. **Harbor Street Limited Partnership of 7B Emery Lane, Stratham, NH for property owned at 421 South Road, Tax Map 4, Lot 31** requests a Special Exception for property located at Tax Map 4, Lot 25 form Section 301.7(B) to construct a driveway with the following: (1) a 17' x 16' wetlands crossing 51ft from a vernal pool where a 100 ft setback is required. (2) 2,900 s.f. within the vernal pool buffer where a 100 ft buffer is required; (3) 3,510 s.f. within the wetlands buffer where a 75ft buffer is required. **Property is in the Single Residence District. Case #13-2017.**

- **Continued to the May meeting.**

11. **Harbor Street Limited Partnership of 7B Emery Lane, Stratham, NH for property owned at 421 South Road, Tax Map 4, Lot 31** requests a Variance from Section 301 for property located at Tax Map 4, Lot 25 to permit a driveway within the following: 1) a 17' x 16' wetlands crossing 51ft from a vernal pool where a 100 ft setback is required. (2) 2,900 s.f. within the vernal pool buffer where a 100 ft buffer is required; (3) 3,510 s.f. within the wetlands buffer where a 75ft buffer is required. **Property is in the Single Residence District. Case #14-2017.**

- **Continued to the May meeting.**

ADJOURNMENT

Motion by Burt Dibble to adjourn at 11:25 p.m. Seconded by Shawn Crapo. All in favor.

All corresponding paperwork and documents may be viewed at the Rye Town Hall, Building Department.

Respectfully Submitted,
Dyana F. Ledger

MICHAEL L. DONOVAN
Attorney and Counselor at Law
52 Church Street
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Tel. (603) 731-6148
Fax: send a pdf
mdonovanlaw62@gmail.com

MEMORANDUM

TO: Patricia Weathersby, Chair
Rye Zoning Board of Adjustment

RE: Variance Application of Stephen C. Brown, Trustee
0 Big Rock Road

DATE: March 31, 2017

Dear Patricia:

I have reviewed the draft minutes of the March 1, 2017 ZBA meeting and Mr. Brown's Request for Rehearing. There are two things which need to be corrected and/or clarified for the public record. Each involves a statement made by Attorney Phoenix as set forth in the second full paragraph of Page 6 of the draft minutes.

First, the minutes indicate that Attorney Phoenix stated "... that according to the Town's Attorney, and the law that he has cited, Mr. Brown has the right to develop the 2 lots, subject to other necessary approvals." What I told Attorney Phoenix several times is that 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. I have never stated to Attorney Phoenix that Mr. Brown has a right, per se, to develop any lots.

Second, and more importantly, Attorney Phoenix incorrectly states that the *Morgenstern* case involved lots of the old Myrica by the Sea Subdivision. That is not correct. *Morgenstern* involved a lot which was platted on a Subdivision Plan approved by the planning board on December 18, 1967. At the time the subdivision plan was approved the lot conformed to the zoning ordinance. Later increases in minimum lot size requirements made the lot nonconforming at the time Mr. Morgenstern applied for a Section 601 variance.

The 1967 plan (which is attached) is titled: "Plan of Lots A Revised Section Of Myrica-By-The-Sea Rye Beach, New Hampshire." Attorney Phoenix may have read a reference to the "Myrica-By-The-Sea Plan" in a court opinion and incorrectly assumed it was the circa-1920 Myrica Plan.

That being said, I exchanged emails with Attorney Phoenix concerning the applicability of the *Morgenstern* case in which I told him that it involved a subdivision plan approved by the

planning board in the 1960's and not the old Myrica Plan. That was more than a week before he submitted the Rehearing Request. Nevertheless, the Request for Rehearing continues to misrepresent the *Morgenstern* case as involving a lot on the old Myrica Plan.

> ...See also Morganstern [sic] v. Town of Rye, 147 N.H. 558 (2002) in which the property owner, coincidentally, purchased land in the Myrica by the Sea Subdivision in 1992 ....."

Rehearing Request, Page 6.

Very truly yours,

MLD

Michael L. Donovan

Attachment

cc: Timothy Phoenix, Esq.

Plaintiff's Exhibit 27

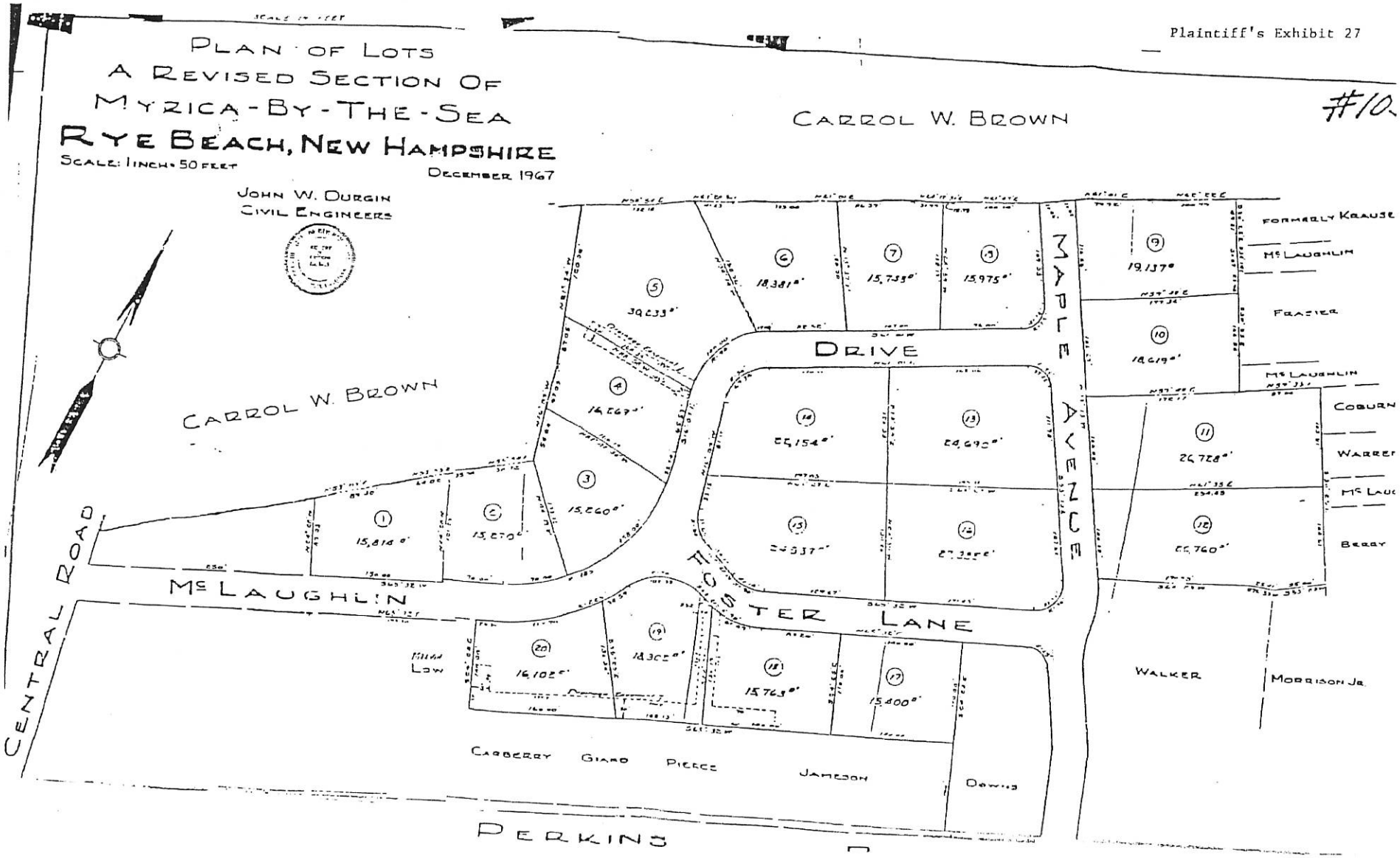
#10

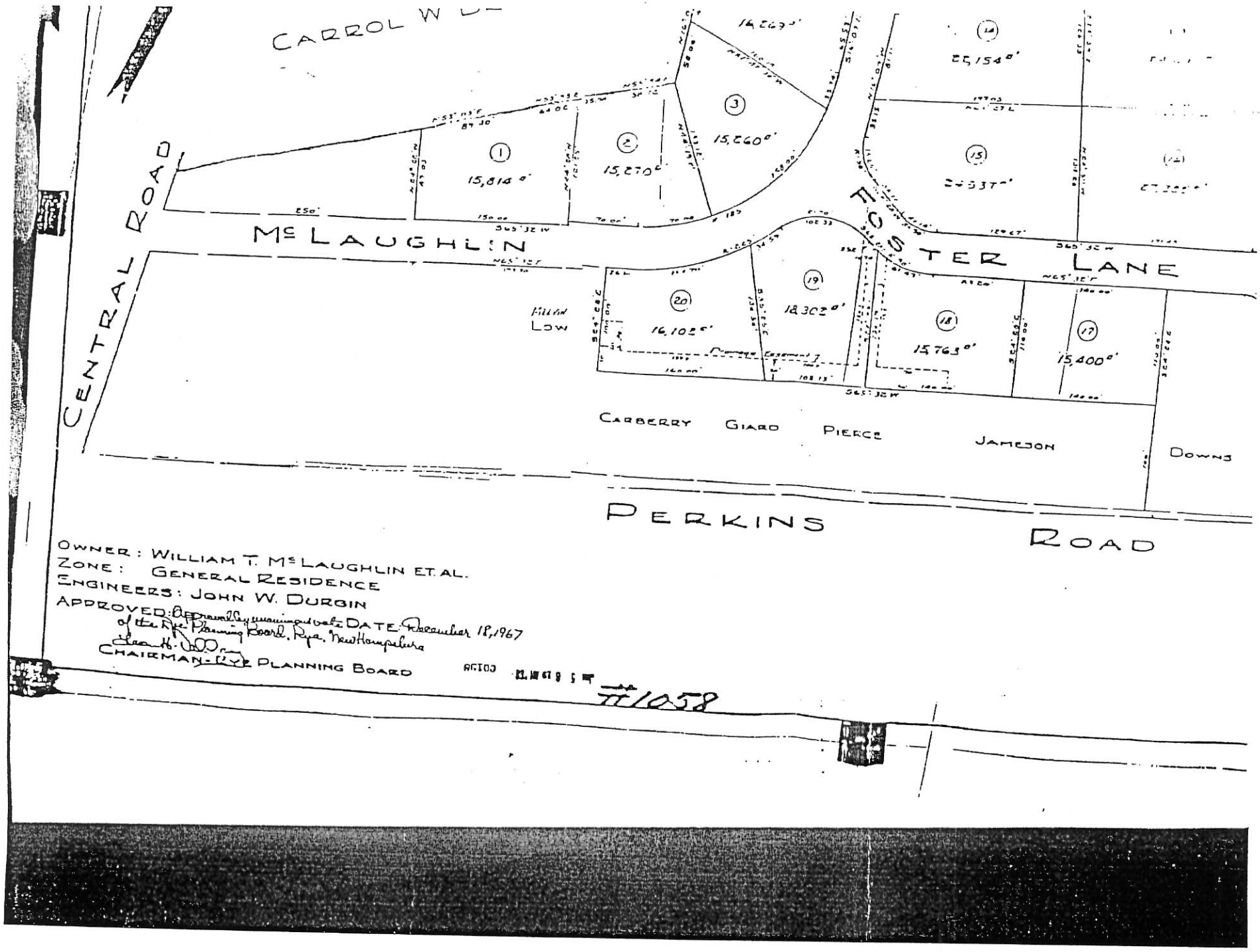
PLAN OF LOTS
A REVISED SECTION OF
MYRICA-BY-THE-SEA
RYE BEACH, NEW HAMPSHIRE

SCALE: 1 INCH = 50 FEET

DECEMBER 1967

JOHN W. DURGIN
CIVIL ENGINEERS




CARROL W D—
CENTRAL ROAD
Mc LAUGHLIN
TOSTER LANE
PERKINS ROAD
1
15,814 ±
2
15,270 ±
3
15,260 ±
14,269 ±
14
25,154 ±
15
24,537 ±
19
18,302 ±
20
16,102 ±
18
15,763 ±
17
15,400 ±
Killam
Low
Drainage Easement
CARBERRY
GIARD
PIERCE
JAMESON
DOWNS
OWNER: WILLIAM T. Mc LAUGHLIN ET AL.
ZONE: GENERAL RESIDENCE
ENGINEERS: JOHN W. DURGIN
APPROVED: Approved by unanimous vote DATE December 18, 1967
of the Rye Planning Board, Rye, New Hampshire
Leon H. Todd
CHAIRMAN - Rye PLANNING BOARD
#1058

HOEFLE
PHOENIX
GORMLEY &
ROBERTS, P.A.

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Of Counsel:
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MEMORANDUM

TO: Patricia Weathersby, Chair
Rye Zoning Board of Adjustment

RE: Variance Application of Stephen C. Brown, Trustee
0 Big Rock Road

DATE: April 4, 2017

Dear Ms. Weathersby:

This will respond to Attorney Michael L. Donovan's March 31, 2017 Memo to you and clarify statements attributed to me in the draft minutes of the March 1, 2017 ZBA meeting, and in my subsequent Motion for Rehearing.

Attorney Donovan correctly states comments attributed to me in the minutes (on page 3, not page 6). The way the minutes are worded, I understand his concern and comments. The minutes can be read as though I said that Attorney Donovan actually told me that Mr. Brown has the right to develop at least two lots in their present configuration. Unfortunately, the minutes do not reflect my statements, or least my intended statements. In order to clarify, at no time did Attorney Donovan state that Mr. Brown has a right, *per se*, to develop any lots. Rather, I said, or at least intended to say, and it is my argument to the ZBA that Mr. Brown has vested rights to build upon the lots as set forth in the 1920s Myrica Subdivision based upon a reading of RSA 674:39II, the Morgenstern and other cases, and the following quote from Attorney Donovan taken from the minutes of Mr. Brown's lot unmerger request:

> Attorney Donovan stated the Town's rights to the Paper Street expired 20 years after the Myrica by the Sea plan recorded. When 20 years past, by law the owners of the abutting lots owned up to the central line of the Paper Streets, however, the owners of those lots retain a right-of-way to access their land. The owner could then go in and build a private street if it

> were needed to access some of those small 11 lots. They had the right to use that access. That right would include improving Thompson Court to access the lots.

My position on the foregoing remain; however, to the extent that the draft minutes attribute any comments from Attorney Donovan as to vested rights, the minutes should be amended, perhaps to something along the following:

> "he stated that considering the quote of the Town's attorney, and the statutory and case law that he has cited, he believes that Mr. Brown has the right to develop the two lots, subject to the necessary approvals."

With respect to the second issue, Attorney Donovan's memo states that "Attorney Phoenix incorrectly states that the Morgenstern case involved lots of the old Myrica by the Sea Subdivision". This will confirm that in my original submission and at the March 1, 2017 ZBA hearing, I was of the belief and misunderstanding that Morgenstern applied to the original 1920s Myrica Subdivision. While I have no recollection of discussing with Attorney Donovan the 1967 Myrica re-subdivision or its application, I do confirm that Attorney Donovan and I discussed the Morgenstern case after March 1st and he advised that it involved a subdivision plan approved by the Planning Board. The Brown lots were not Planning Board approved. In my rehearing request, I attempted to address the distinction between the statutory provisions and Morgenstern case addressing Planning Board approved subdivisions, and the instant case where there was no such approval, in footnote 7 which provided:

> Statutory and case law refer to rights after an approved plan by the Planning Board. Here, the developer's rights occurred before there were Planning Boards and before Zoning Ordinances and the statutory scheme were enacted. Notwithstanding, as prior nonconforming conditions, the original Myrica developer's rights vest in Brown.

My rehearing submission, page 6 was lifted directly from my original submission, during the time I incorrectly believed that the Morgenstern case related to the 1920s Myrica subdivision. A mistake /misstatement rather than misrepresentation, the language on page 6 does in fact incorrectly attribute the Morgenstern case to 1920s Myrica subdivision (before zoning and planning boards existed) rather than the 1967 subdivision approved by the Planning Board.

To clarify, it is my belief that the Morgenstern case and RSA 674:39II support Brown's position of vested rights despite there being no Planning Board approval for the original subdivision; however, the lots at issue in Morgenstern did relate to the post zoning ordinance and

planning board enactments and subsequent 1967 Planning Board approved subdivision, not the pre-zoning, pre-planning board 1920s Myrica plan.

I have discussed these issues with Attorney Donovan today and he has advised that I may advise you that he accepts my intent and explanation. To the extent that any confusion has been caused, please accept my apology, and I trust that this memo clarifies the issues.

Very truly yours,

R. Timothy Phoenix

RTP/msw

cc: Stephen C. Brown, Trustee
Michael L. Donovan, Esq.

Debra Crapo
8 Big Rock Rd,
Rye NH 03870
debcrapo@aol.com
603-964-5609

April 5, 2017

To Chairperson Weathersby and the Rye ZBA,

I am writing to you in regards to the pending request for rehearing that you will be deliberating on Wednesday, April 5, 2017 for the 0 Big Rock Rd. property of SKRJ Realty Trust (Stephen C Brown, Trustee).

First, I want to thank the board for their effort in hearing this matter last month, and the hours it took to absorb the information and make your decision. I feel the final decision was proper and based on the zoning laws of the state and town, without need to be re-heard.

The applicant's attorney has filed his request within the 30 day window, but without a lot of time for the neighbors to research the specifics of his allegations, rather just respond in time to have you read this. I understand that there will be no public testimony allowed on the re-hearing matter.

To be brief, I will try to discuss the main points where I have issue with this process and the applicant's submission.

1. MINUTES of the meeting. The current draft minutes are extremely paraphrased and leave out volumes of necessary detail. I understand that the ZBA is the only body that can address adding more content through a request to the transcriptionist.
    a. I request that more detail be added to the typed minutes before ANY final approval of them.
    b. I understand that economics come into play with minutes and that a four to five hour meeting cannot be typed verbatim. I have researched this with a professional transcriptionist and she estimated that it would be between 2-300 pages of double spaced minutes if verbatim.
    c. Short of verbatim minutes and to preserve the integrity of the information that is considered part of the file, as I assume this case may end up before a judge, I request that my attached thumb drive be added as an exhibit, not a replacement for the minutes, but a required exhibit that becomes part of this official record. On the thumb drive is a copy of the streaming recording from the March 1, 2017 zoning meeting on this matter. I would like to insist that it is the only complete, fair and accurate version of what transpired.
    d. Attorney Phoenix has used the missing information from the draft minutes to bolster his argument and even stated in places that "Absolutely no contrary evidence was offered". This is absolutely not true; however, the shortened version of the minutes could erroneously lead a judge to believe that his version is true.

2. The applicant is using mis-direction to hide the fact that they want to build houses on this land and trying to get the board to micro-focus in the wrong area.
    a. The listed variances are required before the applicant can move forward with the buildings being proposed to the planning board. The documents are on file in the Town Hall and are part of the packages and show two proposed approximately 6000 square foot homes with three car garages. One of the lots is definitely lacking in uplands and is requiring a variance. The combined lots, conveniently, had roughly 10,000 square feet of wetlands 'disappear', allowing them to attempt to subvert the wetlands regulations on this lot and any related buffers. The record, by the supposed engineer, is faulty and manufactured.
    b. Additionally, the applicant is attempting to insert new information into the record by inclusion of the maps that were not presented during the prior hearings, but are attached to the appeal letter.
    c. The applicant wants this board to completely ignore that the requested variances would, if granted, vest with the land and be the basis for someone building on them. THAT IS THE PROJECT at hand and is what should be considered for the variances. The simple variances cannot be considered in a vacuum, as they are part of a larger project. That larger project will have runoff issues. To say that it is improper to look at the runoff is faulty.
    d. The APPLICANT PRESENTED FIRST. It was the applicant and their team who lead most of the discussion and centered on the wetlands. To then try to say that the board may have erred by giving any weight to that is preposterous.
    e. The applicant wants the board to just take their presentation at face value, and bear no weight to the known history of the abutters.
    f. The applicant is attempting to benefit from the fraudulent actions of the prior town assessor, who admitted to committing acts to specifically benefit this applicant, who is an officer of the court and should not be involved in underhanded dealings.
    g. The applicant is arguing that he has vested rights in this property to build. This property was listed as NON BUILDABLE for many years due to the fact that it is so wet that it cannot perk for a septic, and possibly a foundation.
    h. This property has been taxed low for years, and prior attempts by the abutters to have the conservation commission investigate purchasing it were frustrated by the fact that it was non-buildable. Now, that is being used against the abutters and could result in the diminution of the property values of the abutters. Having large homes in behind another home is not going to add value; rather it will destroy the tranquility and character of the neighborhood.
3. It is proper to consider the project, not just the variances.
    a. If not for the Project, why would these variances be needed? This is not just an attempt by an owner of non buildable land to redraw the lot lines. This is an attempt by an owner to take land that was non buildable, and reconfigure it, via variances, to maximize the benefit and get the most money out of reselling the lots, and or homes. To do that they need the variances. They do not need the variances to just own the land, walk it, camp on it, park on it and visit the beach, etc. The variances are needed to develop it.
4. To argue the ZBA didn't provide enough reasons for the denial is just grasping at straws. The meeting was many hours long. Many of the board members voiced their concerns and issues and asked

questions. To try to convince a judge, if this case heads that direction, that the board members should then have taken more time and RE voiced their opinions is a real stretch of the spirit of a volunteer board.

5. The ZBA did not err by failing to consider variances to surrounding lots. The lots referenced were all buildable lots when they were developed. They are not similar to this lot.
6. This owner knew of the likelihood that this lot could never be built on. To argue that he has vested rights is preposterous. The listing for the property specifically said that any potential buyer must do their own due diligence. The buyer is an attorney. He knows what an informed decision is. He knows what due diligence is. His firm represents clients in real estate construction; therefore, he knows how to research a property. He knew he was buying this land that had repeatedly been non-buildable by tax card, by prior attempts at variances, and through prior attempts to perk test. ALL of that information is available in the files on this property at Rye Town Hall
7. On all aspects and criteria, the lots fail to meet the requirements needed to receive the requested variance relief. Without belaboring this letter with the exact details, I feel that the board voted properly and took the proper procedures in evaluating the matter before them and arriving at the conclusion that the variances were not appropriate for this property or project.

Respectfully, I request that the board vote on Wednesday, April 5, 2017 to DENY the request by the applicant for a rehearing.

Additionally, regardless of the result of the vote on rehearing, I request the following actions by the ZBA, Town Administrator, Town Attorney, Selectmen, and any other necessary parties in this case:

1. Create more complete minutes for the March 1, 2016 ZBA meeting.
2. Require that the video (copy presented with this letter) become an exhibit to the official record for the rehearing request, and part of the record of the hearing night.
3. Require that any further hearings on this property and current litigation include the Full Record, to include ALL of the documents for this property, not just the most recent, or the application specific documents.

Respectfully Submitted,

Debra E. Crapo

Debra Crapo

8 Big Rock Rd,

Rye NH 03870

To: The Zoning Board of Adjustment, Town of Rye

From: Kay T. Ruma, Trustee KTR 1992 Trust
6 Big Rock Road, Rye, NH 03870

Re: Zero Big Rock Road

Date: April 5, 2017

I understand that Stephen C. Brown, Trustee, SKRJ Realty Trust, will petition tonight for a Rehearing and Reconsideration of the Rye Board of Adjustment's March 1, 2017 denial of Mr. Brown's variance request for the property located at Zero Big Rock Road. Tax Map 8.1, Lot 45 and Tax Map 5.2, Lots 79 and 80.

Mr. Brown cites in his petition for rehearing that there are other properties in the Myrica Tract with dimensions smaller than what he is requesting. The ZBOA should understand that all of the other developed properties in Myrica have paid substantial property taxes over decades before and after development because they were build-able lots, while Zero Big Rock Road has never been taxed as such until the current owner recently decided to build.
By agreeing to hear this petition I hope that the ZBOA does not imply that they plan to reverse their

prior position after every abutter has clearly stated their compelling objections to this project. If these requested variances (a foot here and there) are granted it will signal the Rye Planning Board that the abutters approve this project and have given it their blessing. Let me be clear—I do not approve granting these variances and the other abutters have stated the same. Not one person spoke in favor of this project at the March 1, 2017 meeting.

Sincerely,

Kay T. Ruma
6 Big Rock Road
Rye, NH 03870

TO: The Rye Zoning Board of Adjustment

FR: Robert Consentino, 32 Powers Ave – Lot #77

SUBJ: 0 Big Rock Road Zoning Board of Adjustment rehearing; 5 APR 2017

To the Board:

I am submitting this letter as a supplement to a letter submitted by my wife, Sharon Consentino, as I was on a business trip when informed that this meeting was to take place. Let the record show that I wish to refute statements made by Attorney Phoenix in his request for rehearing, dated March 24th, 2017.

Before I get to the alternative facts stated by Attorney Phoenix in his request, I want to address three issues that continue to trouble me; the first relates to town process, and the other two relate to this specific case:

1. I wish to inquire why there is no requirement by The Town to contact a direct land abutter in the case of a rehearing request. As abutters, we are directly impacted by any and all proposed development of abutting land, and as a result, The Town has a responsibility to insure that we are informed of any and all plans that could potentially impact our property.
2. I wish to inquire why this case is even being heard. This parcel of land has a long history of repeated attempts to develop, sub-divide, merge, and un-bundle – all which have met with denials from The Town. The record also shows that this land was classified as "unbuildable" for many years, until a previous Town official changed that classification before subsequently being removed from their position. For these reasons, I have to ask what the legality of that change in classification was, and why The Town did not reverse that decision, and restore this land to an "unbuildable" classification. It was made very clear in the solicitation to sell 0 Big Rock Road that the purchaser would have to perform the "due diligence" to obtain the necessary permits. As the old saying states: Buyer beware.
3. As evidenced from subsequent hearings, it is clear that Attorney Phoenix's client has no intention of building a home and living on this parcel of land; it is obvious his intention is to obtain the necessary permits to develop the property, and then flip the parcel for profit. As an abutter, this troubles me greatly as we will be left to deal with any of the problems that may arise as a result of oversight in the proposed development plan.

Now, I wish to refute some of the statements made by Attorney Phoenix in his Request for Rehearing, dated March 24th, 2017:

Pursuant to point #2, page 2 of the document, Brown's expert states that "drainage/storm water runoff would be improved post-construction compared to existing conditions". No conclusive evidence for this statement was presented by his expert, MSC, a division of TF Moran. In fact, there is no record of any impact assessment at all as it relates to the abutting property at 32 Powers Ave (lot #77, directly downstream of lot #79 – lot #77 is part of the parcel of land where the proposed structure would be built), nor is there any evidence of any related impact assessment to adjacent properties on Gray Court, who are also considered "downstream" of this parcel.

Pursuant to point #4, page 2 of the document, related to the care and maintenance of proposed "rain gardens" to manage water runoff from the property, and the Zoning Board of Adjustments ("ZBAs) assessment that property owners would not "reasonably care for the rain gardens": Attorney Phoenix goes on to call this assessment "irrelevant". I want to assure Attorney Phoenix that this point is in fact very relevant to a land abutter who is directly downstream of this property (me), and two of its aforementioned "rain gardens". I would pose this question to Attorney Phoenix and his client Mr. Brown: Will they assume the liability for any and all storm-water runoff related damage to my property as an abutter in the event that these proposed "rain gardens" do not function as they state in their studies? I assume I will be waiting long and hard for an affirmative answer to that question.

Also pursuant to the same point (#4): At the previous ZBA meeting, when examining the proposed rain garden locations on lot #79 which abut my property (lot #77), one of the board members directly questioned Mr. Brown's expert from MSC about what would happen in the event that one of these rain gardens was overwhelmed with water. In his plan, the expert pointed out that some of the proposed rain gardens would have an "overflow drain-off path" to alleviate a flooding condition. Let the record show that there was no deeper explanation of where this excess water would flow, nor was not clear to me where this drain off path would be located for one rain garden in particular – a rain garden located in the south-east corner of lot #79 – which directly abuts, is upstream of my lot (#77), and is located in a valley at the junction of 3 lots (#'s 79, 82, and 83). Subsequently, runoff from all 3 lots effects my property today (as demonstrated by a photograph I submitted for the record which showed flooding in my back yard after a heavy rain event). When I asked Mr. Brown's expert from MSC about the proposed overflow path for this rain garden, he explained that there was none for this particular location. That is due to the topography of the surrounding properties – this is a "land-locked" location, and the only place for that water to flow is into my property, which is downstream of a convergence of all 3 properties.

For the sake of time, and in respect of other townspeople who have agenda items scheduled for tonight's ZBA meeting, I will limit my rebuttal to what I consider the most glaring oversights in Attorney Phoenix's assessment of the preceding ZBA meeting.

Sincerely,

Robert P. Consentino

To: Zoning Board of Adjustment

From: Robert & Sharon Consentino, 32 Powers Ave, Rye, NH

Subject: 0 Big Rock Rd

Date: ZBA Meeting 4/5/17

To the Board,

As one of the largest land abutters (lot 77) to 0 Big Rock Road, we are vehemently opposed to the development of the land.

Rye town hall has records that this land was "unbuildable". This was due to many key issues, two of which would be wetlands that cover a good portion of the land and the necessary land mass for septic or connection to sewer. The "unbuildable" status was noted for decades until a town employee changed the status under questionable methods and was subsequently fired.

The Conservation Committee had considered buying this parcel, but due to the "unbuildable" status, they decided to put the funds and effort to preserving other land that was at risk of development.

There is most definitely an onsite drainage and storm water issue. We have a direct view to this parcel from 14 windows & doors, and therefore witness this property daily. When the perk test/pit digging was done in December, the US Drought Monitor (http://droughtmonitor.unl.edu/)reported the Seacoast area in a severe drought status. With any precipitation, this parcel reveals the wetlands and pictures have proven this true for decades. We have had our back yard flooded with rain water from 0 Big Rock on many occasions. The volume of water impacts our usage of our land, and disturbs the professional landscaping.

In addition, the legal representation for 0 Big Rock proposed rain gardens to take care of the rain runoff that would come into our property and others downstream due to the land elevation. There was no answer as to who would maintain these gardens if the owners would not do the task. We asked for the plan when the rain gardens overflow. There was no answer. There has not been an impact study on this issue and no answers to our concerns. The wetlands are not receding and are not disappearing.

We urge you to deny the request for the rehearing since the facts have not changed, and neither has the land. We believe that building at 0 Big Rock will result in many issues that will negatively impact our land value and our neighbors.

Thank you.

Robert and Sharon Consentino

RYE CONSERVATION COMMISSION
10 CENTRAL ROAD
RYE, NH 03870

March 30, 2017

RE: 740 Washington Road, Map 11, Lot 103

On March 24, 2017, the Rye Conservation Commission (RCC) conducted a site walk at 740 Washington Road. Prior to the site walk, representatives of owners Carol Barba and Manuel Barba, Jr. presented the project to the RCC at the Rye Town Hall. Attorney Monica Keiser explained the history of the property which has a second dwelling on a single lot in apparent violation of the Rye Zoning Ordinance. This dwelling is entirely within the 75 foot wetland buffer which violates Sections 301.8B(1), 301.8B(2) & 301.8B(7) of the Rye Zoning Ordinance. The dwelling does not have a septic system and is using a cesspool of indeterminate age and origin. This is in violation of Rye Building Code Section 7.9. The RCC does not have oversight on the issue of a second dwelling on a single lot but is concerned only with the violations that impact the wetland resource and the environment.

Mr. Christopher Gagnon of MSC Engineering explained the proposal to install an enviroseptic septic system on the property. This system would consist of a tank and pump chamber to be installed 10 feet from the dwelling and entirely in the 75 foot wetland buffer. The tank would be gravity fed from the house into the chamber and then pumped via a 150 foot long forcemain pipe to the leach field. The leach field would be sited just outside the wetland buffer. The system would be designed for a 2 bedroom dwelling. Mr. Gagnon said that the tank was located where it was because of the grade on the site and that it needed to be there to allow the gravity feed from the house to the tank. Virtually all of the 150 foot long forcemain pipe would be in the wetland buffer.

On site, Mr. Gagnon reviewed the location and functioning of the proposed septic system and the RCC walked the property in the vicinity of the system as well as the wetlands on that portion of the lot. There is a flowing stream within a few feet of the delineated wetland boundary. Upon further inspection, the RCC discovered that the stream flows within 20 feet or so of the northwest corner of the existing dwelling. The northwest corner of the building is 12 feet from the wetland boundary. The commission also discovered a pipe originating in the dwelling that ran into the wetlands and which terminates and discharges within a few feet of the stream. This may be attached to a sump pump. There is a large impervious paved driveway from Hunter's Run to the dwelling. Almost all of this driveway is within the 75 foot wetlands buffer. The construction of the proposed septic system would necessitate the cutting of several

large white pine trees, all greater than 4" diameter at 4 feet height. The great majority of these trees are in the wetland buffer.

The RCC has concerns that the proposed septic will require careful maintenance. It was suggested that the system should be on a required pumping and maintenance schedule like the septic systems in the Parsons Creek watershed.

In summary, the RCC believes that the existing dwelling and driveway are poorly sited and pose significant negative environmental impacts due to the proximity to the stream and because it is entirely in the wetland buffer in violation of Sections 301.8B(1), 301.8B(2) & 301.8B(7) of the Rye Zoning Ordinance. As previously stated, the RCC's authority does not extend to the consideration of a second dwelling on a single lot.

Recommendations:

1) The proposals on the April 5, 2017 ZBA agenda ask for Administrative relief from the Building Inspector's Notice of Violation of Rye Building Code Section 7.9 for not having a pressurized water system connected to an individual sewerage disposal system as well as Building Code relief from Section 7.9 for effluent of second unit not be connected to an individual sewerage disposal system. The RCC recommends that the ZBA deny both of these requests. The existing cesspool poses a danger to water quality and sanitation and is completely contrary to the building code.
2) The Rye Conservation Commission's preference is that no further use be allowed. As noted above, the existing situation is an environmental hazard. Even with a new septic, the dwelling and tank/pumping chamber will be 100% in the 75 foot wetland buffer. The dwelling is within 20 feet of an active stream and within 12 feet of the wetland boundary. Additionally, there is a pipe apparently discharging effluent of some type directly into the wetland.
3) If further occupation and habitation is allowed, the RCC would like to see the dwelling and proposed septic moved out of the wetland buffer and onto the upland portion of the lot. The lot is large and the dwelling could be moved to a place that would accommodate the septic and be outside the wetland buffer.
4) If the dwelling is allowed as currently sited, the driveway should be made smaller, relocated and constructed with pervious pavers to minimize the impact to the wetland. The old driveway should be removed and replanted to native vegetation.
5) The RCC recommends a required pumping and maintenance schedule for the proposed system, if approved.
6) The RCC recommends any approved construction should minimize the cutting of the large trees in the wetland buffer. A plan for revegetating the cut areas should be created and implemented. Additional native plantings along the wetland boundary should be required to facilitate the interception and filtration of possible contaniments.

Sincerely,

Francis P. (Mike) Garvan II, Clerk

1/23/2017

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

To whom it may concern,

Case # 04-2017

We agree completely with the Zoning Board on their proper decision that a second dwelling is not allowed a on the property in question due to several code violations.

Case #06-2017

We would like to express our opinions to deny any variance for this property to have a second dwelling. The property in question is not only an eyesore but has decreased the value of properties on Hunters Run and the surrounding abutters. We are also worried about further contamination of the existing water lands and stream that runs adjacent to our property.

Sincerely yours,

Tony Manfredi

Sally Manfredi

Both residents of;

22 Hunters Run
Rye, NH 03870

Town of Rye
BUILDING DEPARTMENT

Susan Labrie
Building Inspector
slabrie@town.rye.nh.us

Kimberly Reed
Planning Administrator
kreed@town.rye.nh.us

ENFORCEMENT ORDER

October 14, 2008

Mr. and Mrs Manuel Barba, Jr.
740 Washington Road
Rye, NH 03870

RE: renting of illegal shed/dwelling on property

Dear M/M Barba:

It has come to my attention that the shed/dwelling located in the rear of your property is being rented.

It is an illegal structure that has a history of enforcement. The accepted use is occasional use for family members; money can not be collected and it can not be used as a dwelling, only guest house.

At this time, I order the place to be vacated within two months.

This structure is not legal, does not have a legal septic system, and can not be used as a dwelling. You must cease all operations with this dwelling.

I appreciate your cooperation.

Sincerely,

Susan Labrie
Building Inspector

CC: Assessing
Police Chief Walsh
Interim Town Administrator

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner: Emil R. & Debra A. Uliano

Property: 394 Wallis Road, Tax Map 18, Lot 86
Property is in the Single Residence District

Application case: Cases # 10-2017

Date of decision: April 5, 2017

Decision: The Board voted unanimously to grant the applicant Variances from Zoning Ordinance Section 603.1 for demolition of an existing shed and replacing it with a non-conforming garage and from Section 203.3B for the garage to be 10' from the side boundary line.

Patricia Weathersby,
Chairman

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

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner: Manuel & Carol Barba

Property: 740 Washington Road, Tax Map 11, lot 103
Property is in the Single Residence District

Application case: Cases # 04-2017 and # 06-2017

Date of decision: April 5, 2017

Decision: The Board voted 4 to 1 to deny the applicant's request for an Administrative Appeal from the Building Inspector's 11-1-2016 Notice of Violation and that such denial shall not be final until such time as a written Notice of Decision is approved by the board (anticipated to be finalized at the May 3, 2017 meeting.)

The Applicant's request for variances from Section 203.1A for a second detached dwelling on the property and from Section 301.8B (1) (2) & (7) for second dwelling within the 75' of the wetlands buffer; and Building Code Relief from Section 7.9 for effluent of second unit not be connected to an individual sewerage disposal system were continued to the May 3, 2017 meeting.

Patricia Weathersby,
Chairman

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

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner: Brent Morin

Property: 93 Clark Road, Tax Map 19, Lot 84
Property is in the Single Residence District

Application case: Cases # 11-2017

Date of decision: April 5, 2017

Decision: The Board voted unanimously to grant the applicant a Variance from Section 203.3B for a shed 3' from the side boundary line.

Patricia Weathersby,
Chairman

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

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner: Harbor Street Limited Partnership of 7B Emery Lane, Stratham, NH

Property: 421 South Road, Tax Map 4, Lot 31
Property is in the Single Residence District

Application case: Cases # 13-2017 and # 14-2017

Date of decision: April 5, 2017

Decision: The Applicant's request for a Special Exception for property located at Tax Map 4, Lot 25 form Section 301.7(B) to construct a driveway with the following: (1) a 17' x 16' wetlands crossing 51ft from a vernal pool where a 100 ft setback is required. (2) 2,900 s.f. within the vernal pool buffer where a 100 ft buffer is required; (3) 3,510 s.f. within the wetlands buffer where a 75ft buffer is required was continued to the May meeting.

The Applicant's requests for a Variance from Section 301 for property located at Tax Map 4, Lot 25 to permit a driveway within the following: 1) a 17' x 16' wetlands crossing 51ft from a vernal pool where a 100 ft setback is required. (2) 2,900 s.f. within the vernal pool buffer where a 100 ft buffer is required; (3) 3,510 s.f. within the wetlands buffer where a 75ft buffer is required was continued to the May meeting.

Patricia Weathersby,
Chairman

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