

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

**Wednesday, August 9, 2017**

**5:00 p.m. – Rye Town Hall**

***Members Present: Chair Patricia Weathersby, Shawn Crapo, Burt Dibble, Patrick Driscoll, Gregg Mikolaities and Charles Hoyt.***

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

Chair Weathersby called the meeting to order at 5:00 p.m. and led the Pledge of Allegiance.

### **II. Applications:**

**Note:** *Shawn Crapo recused himself for the following case.*

**Seated for the following rehearing request: Patricia Weathersby, Burt Dibble, Patrick Driscoll, Gregg Mikolaities and Charles Hoyt.**

- Petition by Hoeffle, Phoenix, Gormley & Roberts, PA on behalf of Stephen C. Brown, Trustee, SKRJ Realty Trust for property owned and located at 0 Big Rock Road, Tax Map 8.1, Lots 79 & 80, requests for a rehearing on the ZBA June 7, 2017 denial of applicant's variance request. Case #02-2017.

**Public hearing closed during Board discussion on the request.**

Chair Weathersby noted that everyone should have a copy of the rehearing request and submittals from Ferrin, Crapo and Consentino. She continued that Attorney Phoenix states that he is not even sure that he needs to have this Motion for Rehearing. She pointed out that a rehearing request was filed after the original decision. The Board went through that and found that there were grounds for a rehearing based on the wording of the motion to state the reasons for denial. The case was opened up for a rehearing to flesh out those terms of denial and issue a Notice of Decision. She continued that she thinks all the reasons for the request for rehearing were dealt with at the original one, except for the one the Board took up. She is not going to make a legal conclusion on whether a Motion for Rehearing needed to be filed or not; however, it is her understanding that all the original grounds have been dealt with when the Board first took up the rehearing request. Personally, she does not see anything else in the rehearing request that either has not already been dealt with or gives the Board "is it unlawful or unreasonable" grounds to have another rehearing.

Member Hoyt agreed.

Member Dibble stated that they went over it pretty thoroughly.

No further comments were heard from the Board.

**Motion by Burt Dibble to deny the rehearing request. Seconded by Patrick Driscoll. All in favor.**

**Shawn Crapo, Central Road**, as a member of the public, called for a point of order. He stated that the reasons for denial of the rehearing should be stated.

Chair Weathersby stated that it has been dealt with.

Member Dibble stated that no new information has been presented and everybody feels that it has been considered thoroughly.

Member Mikolaities agreed.

**Note: Burt Dibble was excused from the meeting at 5:10 p.m. Shawn Crapo was reseated.**

**Seated for the following rehearing request: Patricia Weathersby, Shawn Crapo, Patrick Driscoll, Gregg Mikolaities and Charles Hoyt.**

- Petition by John Kuzinevich, Attorney at Law, on behalf of Harbor Street Limited Partnership for property located at 421 South Road, Tax Map 4, Lot 31, requests a rehearing on the ZBA July 5, 2017 denial of the applicant's Special Exception from Section 301.7 (B). Case #13-2017.

**Public hearing closed during Board discussion on the request.**

Chair Weathersby noted that the Board should have copies of letters received from abutters dated August 3<sup>rd</sup> and August 9<sup>th</sup>.

The Board reviewed the letters.

Speaking to Planning Administrator Reed, Chair Weathersby asked for clarification on whether the property is in the Aquifer Protection Area.

Planning Administrator Reed explained that it is in the Aquifer Ordinance but it is 100 percent in the Wellhead Protection District. It is not in the recharge area for the aquifer, it is not in the transmissivity section of the aquifer but it is 100 percent in the Wellhead Protection District. Chair Weathersby stated that it was advertised as being in the Aquifer. She commented that she is getting to the merits of the submittal. One of the matters was that it was advertised as being in the Aquifer Protection District.

Planning Administrator Reed stated that Section 306 of the Rye Zoning Ordinance, page 32, states "Aquifer and Wellhead Protection District", adopted 2008, revised 2014 and again in 2015. "The Aquifer and Wellhead Protection District is innovative land use control adopted". She noted that it is in that district. The applicant knew that. In the beginning the Planning Board was "splitting hairs" over Aquifer versus Wellhead and Town Attorney Michael Donovan said it is all one district.

Regarding the Special Exception request for rehearing, Chair Weathersby stated that was their (applicant's) first point that the property was not in the Aquifer Protection District and that may have improperly influenced the Board. She is not sure this point is valid.

Member Crapo stated this did not influence his vote one way or the other; whether it was in the Aquifer or Wellhead Protection District.

Regarding Lot 2, which is a portion of the parcel, Chair Weathersby read from the rehearing request; ***"Proposed Lot 2 cannot be used productively without the Special Exception. It is a large section of upland. It is a portion of the entire development. There was no basis for the Board's statement that the remaining property can develop into 16 lots."***

Member Crapo stated they are insinuating the only productive use of land would be to have a separate house on this lot. He thinks it could be considered productively the terra firma from this lot could be added to another lot, or reshaped with other lots, and that would still be productive. It would just be in a different manner. He continued that throughout the document there are insinuations and some hardline "splitting hairs" that he really disagrees with and are disingenuous in an attempt to sway a future court. He reiterated that they are trying to rule that the only productive land would be to put a house here with a Special Exception.

Member Hoyt stated it is one lot. The road and the uplands is considered one lot. He does not view that as just a road in its own self and then there is an upland. It's one property. That road belongs to that uplands. It is not detached from the wetlands or the uplands.

Member Crapo stated that he had said there could be 16 other lots. He meant it in the interpretation of carving up the one master lot. The entire parcel that went before the Planning Board, and the ZBA was looking at one portion of it, none of those lines were hard and fast and had been decided. To say there has to be this bridge to use this one proposed lot and without that is unproductive use of the land, is twisting it way too far.

Chair Weathersby agreed. She stated the land can be used productively without the Special Exception.

Member Driscoll stated he agrees with that verbatim.

Chair Weathersby pointed out that it is stated in the Board's rationale that the lot is 3.86 acres. They had planned to combine it with other parcels. Lot 2 does not yet exist but is part of the

subdivision. It is not essential to the productive use of the land as the development parcel may continue to be developed into at least 16 lots. She thinks that is perfectly reasonable and lawful.

Chairman Weathersby pointed out the applicant is going through the Board's reasons for denial point by point. She continued that reason 2 on the (ZBA) Notice of Decision was that ***economic advantage was the sole reason for the requested Special Exception.*** The applicant's attorney is refuting that saying although use of the property has some economic advantage, there was sufficient testimony that the Special Exception was sought not to minimize construction costs and obtain economic advantage. She stated the Board had a fair amount of discussion about this that it was basically to try and get another lot in there so they could sell another house lot.

Member Crapo pointed out they were not talking about minimizing construction costs. It was more with the Special Exception there was access to that 2 acres and "jam" another house in there to try and maximize profits.

Member Hoyt stated the economic benefit to the client did not come into play in his decision. The most important factor of his decision was crossing that wetlands and being so close to the vernal pool. The town has rules and guidelines to follow. Let's say a car slips into the wetlands because it slides off the road. There is oil and gas going into the system. It is just too close and it bothered him.

Regarding the applicant's point 2, which referred to economic advantage (as stated in the Board's Notice of Decision), Chair Weathersby stated there was sufficient testimony that some of the board members found that economic advantage was the sole reason for the Special Exception request to cross the wetland. It was not everybody's but some of the members found that. She does not find that to be unreasonable or unlawful.

Member Driscoll agreed. He stated he did not find it was the sole reason for the request for a Special Exception but he did find it as a weighing reason.

Chair Weathersby asked if the members felt like the rehearing request should be granted based on (applicant's) reasons 1 or 2.

The Board did not.

Chair Weathersby stated that (applicant's) reason 3 goes to the Board's point that ***the proposed driveway which crosses the wetlands and disturbs both vernal pool and wetlands buffers is reasonably likely to be detrimental to the environment and/or public water resources.*** She noted that the applicant says there is no sign or evidence that construction of a driveway would be detrimental.

Member Driscoll stated that he disagrees with their (applicant's) point in number 3 about unrefuted testimony. This is one of those areas where he thought they went well off track. They didn't keep it directly towards the crossing of the wetland and the impact of that road on the

wetland. They went off on a bunch of other tangents in that area. He is completely in agreement with the way it is stated in the Notice of Decision.

Member Crapo agreed.

Member Hoyt stated he agrees with Member Driscoll.

Chair Weathersby stated it does not necessarily have to be scientific evidence. The Board heard testimony from abutters and the town's consultants. It is also common sense.

Member Crapo stated that they heard from a qualified abutter who did refute some of Mr. Gove's testimony, Dr. Barrett. Mr. Gove then showed up to refute and counteract. It did not match up verbatim how the vernal pools may or may not have been tested. To say there was no scientific evidence and to later on the paragraph talk about because the Planning Board obtained a wetland scientist that the Board of Adjustment was trying to do the Planning Board's job. The Board focused on doing its job, which was to evaluate the variance request in terms of their proposal. He does not see that the ZBA "stepped on and did the Planning Board's job" and micromanaged. He disagrees with their (applicant's) point 3. He thinks the Board's reason can be upheld.

Chair Weathersby asked the Board if anyone felt that (applicant's) point 3 was a reason for a rehearing.

The Board did not.

Chair Weathersby stated that (applicant's) number 4 goes to the Board's point, ***construction of the driveway and wetlands crossing involves tree and vegetation cutting, the addition of fill, grading, installation of bridge footings, erection of bridge and paving, all within the wetlands buffer and vernal pool buffer, the effects of which may be detrimental to the environment and/or public water resources.*** Their response was there was extensive testimony as to the care of construction and that it will not take place in the wetlands. They said the amount of buffer impact is minimal and will not have a detrimental effect.

Member Driscoll stated that he disagrees that there was extensive testimony as to the care of construction that was planned for that area. Back to common sense, just because someone has a great plan in place doesn't mean that it's reasonable to consider that it is going to be executed that way.

Chair Weathersby stated that one of the frustrations at the end was that the Board didn't have a lot of information as to exactly what was going on. The amount of fill or extent of fill.

Member Hoyt commented there was no cross section through the road to determine which way the water was flowing.

Chair Weathersby stated they didn't have a lot of testimony on the care of construction.

Member Crapo stated that having construction next to something just because the shovel is not put in one piece of dirt does not mean that the vibrations and the sound and wind blowing does not affect that. Their trying to say, in isolation literally, they are going to be able to do this like a clean room procedure. That's not how it works.

Member Hoyt stated the word wetlands in there is like an oxymoron. Construction of a road to an upland lot should not take place.

Chair Weathersby stated the fact is it is not taking place in the wetlands. It is spanning the wetlands. It is taking place in the wetlands buffer, right on the edge of the wetlands.

Member Crapo stated that part of the buffer is to protect wildlife, as well as the physical dirt and water. If a car is put in the woods, now the woods has been disturbed. The presence of all of that stuff disturbs it, whether it physically touches it or not.

Chair Weathersby asked the Board if there is anything else on (applicant's) number 4.

Member Mikolaities stated he is keeping quiet because the Board is still talking about the Special Exception. He commented they are going through all the reasons for the Special Exception. He asked if they were going to do it again for the variance.

Chair Weathersby replied yes. She continued that he should chime in if he has something to add on Special Exception.

Member Mikolaities stated on the Special Exception he voted "yes" because he felt it was a less bar. On the variance, he thought he expressed himself at the meeting.

Chair Weathersby noted that if he feels they (applicant) are correct....

Member Mikolaities stated he didn't know if the Board was going to go through number 4 again. Number 4 on the variance, he felt there was a higher bar.

Speaking to Member Mikolaities, Member Crapo stated that procedurally if there is something on the list that he feels that there is a compelling argument to sway the Board into a three to two vote for a rehearing, he should be speaking up.

Member Mikolaities replied that he gets it but he just didn't know if they were doing two at once.

Chair Weathersby clarified that they are just doing the Special Exception right now.

Chair Weathersby asked the Board if anyone feels as though (applicant's) reason 4 is a reason for a rehearing.

The Board did not.

Speaking to Member Mikolaities Planning Administrator Reed stated that his comment was that he is going to be remaining quiet. She asked if she should take that as abstaining or unanimous.

Member Mikolaities stated he voted "yes" so nothing is swaying him from voting "no".

Member Crapo stated that right now they are deciding whether or not this document merits a rehearing. Just because someone votes in favor of the Special Exception does not mean they have to vote in favor of the rehearing request.

Speaking to Member Mikolaities, Chair Weathersby clarified that if he feels the Board made an error or feels that the decision was unreasonable or unlawful he should state that. She asked if he feels (applicant's) 1, 2, 3 or 4 presented an argument that there should be a rehearing.

Member Mikolaities stated that he read the rehearing request and highlighted it. He felt there was no new testimony. There was nothing in the request that would change him either way; yes or no. It doesn't further reinforce his "yes" and it does not give him pause to say "no". He would agree with everything that has been said so far. He agrees with what Member Crapo has said and some of the adjectives and language.

Chair Weathersby read number 5 from the (ZBA) Notice of Decision; ***The proposed driveway crossing the wetlands will be utilized by construction vehicles, cars, delivery trucks, septic trucks and other maintenance vehicles which carry risks of contaminating the wetlands by leakage or spillage.*** She noted that the applicant's response is listed for the Board to read.

Member Crapo stated he takes exception to "unrefuted". The public or abutters on any given application shouldn't have to show up with paid scientific people. To take that to a literal degree would mean an application comes in, they hire experts and present something. The Board is then to take that all at face value and not bring life experiences and common sense into play. So, then the Board must vote in their favor? The Board can't weigh, take it into context and say no?

Chair Weathersby commented they certainly can take into account their life experiences and common sense.

Member Crapo stated to take that to a degree and say "unrefuted", it looks great for a judge down the road to say "well no one was there against it". The Board does not have to "cave" when there is only one side of scientific evidence presented.

Referring to (applicant's) reason 6, Chair Weathersby stated this is the enabling argument that if a Special Exception was given it would enable Lot 2 to have a single family home. The Board's NOD states that ***Lot 2 consists primarily of wetlands, vernal pool and associated buffers, which would likely be utilized by the homeowner during normal use. Such use and development***

***have the potential to detrimentally affect the quality of the wetlands, vernal pool and aquifer due to potential inadequate maintenance.***

Member Driscoll stated that during their presentation this was an area that rubbed him the wrong way. They are saying the Board went off track after the applicant and his experts went all over the place in what they were presenting. The Board's job is to hear the presentation and discuss it, especially during closed testimony, amongst the Board, as to what is applicable and what isn't. This point had no weighing in his final decision. He does not like that they can talk about whatever they want in their presentation and if the Board addresses it then all of a sudden it is a sticking point.

Chair Weathersby read from (Board's NOD) reason 7; ***Construction and maintenance of the proposed driveway may negatively affect the wetland and/or public resources.*** They (applicant) explain the Planning Board's role. They (PB) signed off. She thinks this is another way to say what the Board has already said. She does not feel there is anything there that gives a reason to rehear.

Member Crapo stated the Planning Board process sent the applicant to the ZBA for a variance. The Planning Board can't grant the variance. To say they signed off at that point would be a misnomer because the Planning Board required the variance. They (PB) may have signed off on the plans if they (applicant) got the variance but it's not inherent.

Speaking to Planning Administrator Reed, Chair Weathersby asked if peer review signed off on the plans.

Planning Administrator Reed stated that technically they did not sign off. There was a lot of back and forth with the peer consultants. There was still a lot of questions and lots of conditions. There was not a blank sign off. Sebago Technics said, "If you apply these conditions we'll agree to it". Mark West said, "I think they have covered everything but...". Danna Truslow said, "I have some concerns. It could be approved with certain conditions". She reiterated there wasn't a blank slate sign off. There were lots of "do this and do that and we will agree" for all of the consultants.

The Board had no further comments on 7.

Chair Weathersby stated their (applicant's) point 8 goes to the Board's point 8, which states, ***the proposed wetlands crossing and buffer disturbance are injurious and detrimental to the neighborhood.*** She pointed out the Board can read the applicant's argument.

Member Crapo stated they are trying to say there was no showing that the driveway and its construction was detrimental. After hearing all the evidence, he still felt it was detrimental. He commented that it can't be expected that real life will follow every variable that is on an engineering plan. He did not feel it was compelling enough that it would not harm. When all the

questions were answered, he voted it was going to be harmful. The Board is allowed to draw their conclusions based on the evidence.

Chair Weathersby commented the Board's statement is a conclusion. Just the fact that it was believed there was potential environmental damage is sufficient alone to find that it could be injurious or detrimental to the neighborhood.

The Board had no further comments on 8.

Chair Weathersby stated (applicant's) reason 9 goes to the Board's point 9, ***the proposed driveway and related wetlands crossing and buffer disturbance are not in harmony with the general purpose and intent of the zoning ordinance nor in accordance with the general or specific rules contained therein.*** She noted this is going back to the Special Exception requirements; (ZBA's NOD) reasons 8, 9, 10 and 11.

Member Crapo stated that for all the reasons listed, the Board felt the proposal was not in harmony so it makes the whole proposal not in harmony. To say "but for this the lot complies", well because of this the proposed lot does not comply. The Board decided it was not a fit. There could be a house that fits all the setbacks but if there was one thing they need a variance for and the Board decides it does not meet hardship, or something like that, that's the way it sits.

Chair Weathersby stated it is up to the Board to conclude whether the proposal is in harmony with the purpose and intent of the zoning ordinance or the rules. The Board concluded it didn't based on everything here. She does not find it to be unlawful or unreasonable. She continued that (applicant's) reason 10 goes to the Board's point 10 (NOD), ***protection of the wetlands, vernal pool and aquifer would have been dependent in a large part on proposed use restrictions and covenants in the property deed and/or homeowner's association regulations; the compliance therewith cannot be guaranteed, particularly long term.*** She continued that (applicant's) number 11 goes to the Board's point 11 (NOD), ***the Special Exception is not essential to the productive use of the land.***

Member Crapo stated they have done the "gun to the head" argument by saying that someone could clear cut the property. He continued that someone is not going to clear cut it to put a house and driveway there. They may clear cut it to just open up nature. These are two separate processes in his mind with what is done with nature versus putting a driveway through to put a house there.

Chair Weathersby stated the Board did not hear a lot of evidence based on what can happen if Lot 2 gets divided up. The Board did not discuss where it would go or where the dividing line would be. The Board did not explore that. She does not find this a reason to grant a rehearing. Member Hoyt stated this crossing of wetlands has a ripple effect, a negative effect, on all the requests that their asking for. This is what determined it for him. The requests 1 through 11 all boils down to crossing a wetland. It has a detrimental effect on all the issues they are requesting that didn't have a detrimental effect.

Member Crapo stated they tried to describe it as this surgical strike that they could magically place the bridge there with minimal intrusion. However, it is going to have intrusion for the rest of its life by people driving across it. The overall tone of this argument is that the Board cannot find this harmful because they described it as not being harmful.

Member Hoyt commented that they were saying that they were not touching the wetlands. He noted that the footings are touching the wetlands. Someone going across it could throw a can out the window and touch it. This does not make sense to him that they are “not touching the wetlands”. He did not buy that.

**Motion by Shawn Crapo to deny the request from the applicant for the rehearing in regards to the Special Exception, 301.7 B, Case number 13-2017; as it was found that the reasons stated in the applicant’s request did not merit a rehearing. Seconded by Charles Hoyt. All in favor.**

- Petition by John Kuzinevich, Attorney at Law, on behalf of Harbor Street Limited Partnership for property located at 421 South Road, Tax Map 4, Lot 31, requests a rehearing on the ZBA July 5, 2017 denial of the applicant’s Variances from Section 301.7 (B)(1)(5) & (7). Case #14-2017.

**Public hearing closed during Board discussion on the request.**

Chair Weathersby noted this is a request for a rehearing on the Board’s July 5<sup>th</sup> decision on variances from 301.7 (B) (1), (5) and (7). There are materials from the applicant, a July 20 letter and submittals from the abutters. She continued there were 12 reasons listed in the July 5<sup>th</sup> Notice of Decision. The (applicant’s) first point about the Aquifer Protection District was dealt with, referring back to the prior petition request. Number 2 (applicant’s), was also dealt with for the Special Exception rehearing request. Referring to their number 1, she stated she thinks it is the same request as their prior.

Member Crapo commented it isn’t. It more mirrors their (applicant’s) number 3. Referring to the applicant’s arguments, Member Crapo stated that the Board’s job was not to educate themselves on the entire Planning Board minutes to see who signed off on what. It was to evaluate the evidence they presented before the Board to get the variance. He continued that abutters did speak. Abutters had scientific credentials.

Chair Weathersby stated the Board had a discussion on the Planning Board process and whether the Board can draw on their own knowledge and common sense to make conclusions on what had been heard. The Board concluded there was potential, not certainty, that the environment could be damaged. She does not think that was an unreasonable conclusion based on the testimony that was heard.

Member Crapo stated that the benefit to the public, in protecting that, outweighs the benefit of the applicant putting in an additional house in their project. If it goes bad the environment is ruined for all the general public and can have a domino effect. Putting one house in there, is a benefit to this applicant and once it is sold it's gone. It could have a long term domino effect.

Referring to (applicant's) point 1, Chair Weathersby stated she would refer back to the discussion the Board had on the Special Exception. She continued that (applicant's) point 2 is similar to what the Board discussed in (applicant's) point 5 of the Special Exception rehearing request. ***The driveway through the wetland buffer was found to have the potential to affect the environment.*** She does not think this is an unreasonable conclusion.

Chair Weathersby noted that (applicant's) point 3 was considered before. The Board considered the effect of the house, which is the reason for the driveway going through the buffer. It is very similar, if not identical, to (applicant's) point 6 in the Special Exception petition.

Member Crapo stated that the Board is not only supposed to consider the driveway when it is basically to put a house there. What is requested has a package effect.

Chair Weathersby stated the Board has had this discussion with other applications. The reason for a subdivision being done is to have two lots. The reason for a driveway to go in is to access a house lot. In her mind, they cannot look at it in total isolation if it enables something that is injurious or detrimental to the neighborhood or contrary to public interest. She continued that (applicant's) point 4 goes back to the trees.

Member Crapo state the buffer protections would exist regardless. It becomes a policing issue for the town. It's the buffer. There are restrictions in there and they would have to legally follow them or get a cease and desist. There are protections in place.

Chair Weathersby noted this is their (applicant's) argument 10 from the Special Exception that has been dealt with. There are still protections that protect cutting of vegetation in the wetlands. They alleged they were going above and beyond those protections, which may be true. However, she does not think their allegation that if Lot 2 was split and combined with Lots 1 and 3 they could effectively clear and destroy the function and value of buffers. She thinks that is an incorrect statement.

Member Crapo stated he does not think this caused the Board to draw an improper conclusion as far as the protection of the wetlands.

Chair Weathersby stated that (applicant's) point 5 states, ***there is no showing that the subdivision plan can be reconfigured at this late date in a safe and practical manner. The uplands are like an island surrounded by wetlands and vernal pools. This proposal was selected for the least impact.***

Member Crapo stated there is no merit in this argument. It is not the Board's job to set their development deadline.

Chair Weathersby stated it is not the Board's job to say "reconfigure the subdivision". The Board dealt with the variance request to put the driveway and the bridge through the wetland buffer.

Member Crapo pointed out that they are trying to address the fact that the Board said there may be alternatives for better use of the land. He does not think it is improper of the Board to view it in light of that. If the Board was to draw a conclusion that they have a vested right to develop it, this was the only way to develop it, and it was safe, then the Board would have granted the variance. However, the Board does not have to be on the applicant's deadline.

Chair Weathersby stated she does not think there was a showing that the subdivision plan could not be reconfigured at this late date or any date. That was not the Board's criteria that they were faced with or charged to consider. She continued that (applicant's) point 6 goes to unnecessary hardship and denial of reasonable use of the property. They said ***a variance is needed to make reasonable use of the property. The applicant stated the use is reasonable and there is no environmental impact. They said there was no basis for the Board's statement that it could be developed into 16 lots.***

Member Crapo commented that someone could productively use this as one lot. It gets into the definition of productive use and how strict or not the court is going to get with that. It is in the eye of the beholder. One person could think it is productive to have cabins on this lot and one person could think it is productive to have nature with nothing developed.

Chair Weathersby stated she does not think a variance is needed to make reasonable use of the property. The property being considered is almost 4 acres. It is part of, what they are hoping, a combined 59 acre subdivision. Reasonable use of the 3.86 acre property can be made without granting these variances. Chair Weathersby stated that the applicant's point 7 states there is no basis to conclude that values (property) will go down. She thinks the applicant is referring to property values. It goes on about the neighborhood.

Member Crapo stated that the denial letter says the values of surrounding properties will be diminished if the variances are granted. The Board did not say whether from the whole subdivision would affect the values. The variance enables at least one proposed lot in an area that might affect wetlands and that can affect the values.

Chair Weathersby stated the Board's conclusion that values of surrounding properties will be diminished if the variances were granted was not unreasonable, given what was considered to be the environmental impact as well as the development. She continued with (applicant's) point 8

Member Hoyt noted there were over 700 public petitioners who were against this.

Member Crapo stated the public interest is the wetlands and protections. The public has voted in these buffers and restrictions. That is the public's voted interest. The Board was being asked to vary that. He does not think they met the threshold of the benefit of this to them outweighing the benefit of the protections the public gets for voting what they voted in. That is how he rationalized it.

Member Hoyt commented this is how he viewed it also.

Chair Weathersby stated their last point was that *the lot is not similar to others in the neighborhood. It is upland isolated by buffers and wetlands. None of the subdivision plans showed a similar situation. They stated the situation is unique. They stated the Board did not have the surveys, test pit information and lot design and had no basis to reach its conclusion.* She noted that the conclusion (Board's) they are referring to was that there are no special conditions of the property that distinguish it from other properties in the area. It is a single residential lot currently and is similar to other lots in the neighborhood.

Member Crapo commented it is one large lot. In some cases, they want to look at Lot 2 and in some they want to look at the parcel as a whole. A crossing on proposed Lot 2 is what the Board was looking at for the variance.

Chair Weathersby stated there was testimony that right now it is single family. It has some wetlands and some uplands. It is very similar to other properties in the area. The Board heard from the Menards next door about how their lot is a mixture of things. In looking at the neighborhood, it is all single family residence and is a mixture of wet areas and upland areas. She thinks the Board's conclusion that the property had no special conditions that distinguish it from other properties in the area was not unlawful or unreasonable.

The Board had no further comments.

**Motion by Shawn Crapo to deny the applicant's request for rehearing for the July 5, 2017 denial of variances from Section 301.7 B (1) (5) and (7); as it was found that the reasons stated in the petition did not merit a rehearing. Seconded by Charles Hoyt. All in favor.**

### **Adjournment**

**Motion by Shawn Crapo to adjourn at 6:10 p.m. Seconded by Gregg Mikolaities. All in favor.**

Respectfully Submitted,  
Dyana F. Ledger

# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

**Applicant:** Hoefle, Phoenix, Gormley & Roberts, PA

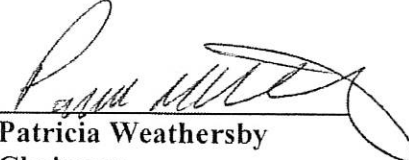
**Owner:** Stephen C. Brown, Trustee, SKRJ Realty Trust of  
21 South Main Street, Rochester, NH

**Property:** 0 Big Rock Road, Tax Map 8.1, Lot 45 and Tax Map 5.2, Lots 70 & 80  
Property is in the General Residence & Coastal Overlay Districts

**Application case:** Case # 02-2017

**Date of decision:** August 9, 2017

**Decision:** The Board voted 5-0 to deny the Applicant's request for a Rehearing and Reconsideration of the Board's June 7, 2017 denial of the applicant's variance request as no new evidence was presented and the applicant's arguments had previously been thoroughly reviewed and rejected by the Board.



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

**Applicants:**

John Kuzinevich, Attorney at Law  
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 and Aquifer and Wellhead  
Protection District

**Application case:**

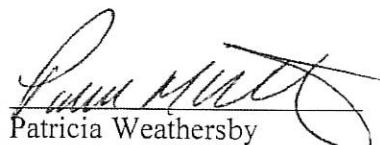
Case # 13-2017

**Date of Decision:**

August 9, 2017

**Decision:**

The Board voted 5-0 to deny the Applicant's request for a rehearing and reconsideration of the Board's July 5, 2017 denial of the applicant's request for a special exception from Section 301.7(B), finding the applicant's arguments insufficient to require rehearing.

  
Patricia Weathersby  
Chairman

# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

**Applicants:**

John Kuzinevich, Attorney at Law  
Harbor Street Limited Partnership of  
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**Property:**

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Property is in the Single Residence District and Aquifer and Wellhead Protection District

**Application case:**

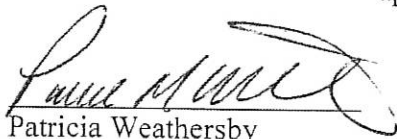
Case # 14-2017

**Date of Decision:**

August 9, 2017

**Decision:**

The Board voted 5-0 to deny the Applicant's request for a rehearing and reconsideration of the Board's July 5, 2017 denial of the applicant's request for variances from Sections 301.7(B)(1)(5) & (7), finding the applicant's arguments insufficient to require rehearing.



Patricia Weathersby  
Chairman

To: The Rye Zoning Board of Adjustment

Subject: Objection to development of 0 Big Rock Road, Rye, NH

I am writing this letter to voice my objection once again to the development proposal submitted by Hoefle, Phoenix, Gormley & Roberts, PA on behalf of Stephen C. Brown, Trustee, SKRJ Realty Trust for property owned and located at 0 Big Rock Road, Tax Map 8.1, Lot 45 and Tax Map 5.2, Lots 79, 80 requests for a rehearing on the ZBA June 7, 2017 denial of applicant's variance request, Case #02-2017.

Why are we spending additional tax payer money in the form of time commitments for this board to deliberate on an issue that has already been defeated multiple times in the past few years? The parcel in question was never deemed a "buildable" lot, and yet this request still comes up for reconsideration. I have to ask the question: When does "no" mean "no" in the Town of Rye?

This request is an obvious push from a developer who appears to have no intention of living in this community. His only pursuit is to obtain the necessary permits and flip the property for a profit, leaving the abutting homeowners to deal with any problems and complications which arise from developing the parcel.

The issues remain clear:

- Requests for development of this lot by multiple owners have been repeatedly turned down by this board; what has changed now to allow yet another consideration of this case? What has changed since the last denial that make circumstances any different?
- The property has always been classified as "unbuildable"
- The surrounding areas of Powers Ave. and Grey Court have documented water retention and drainage issues; development of "0" Big Rock will only exasperate these issues
- Abutters have not been included in any planning efforts by the proposed developers' engineering company to insure drainage concerns would be mitigated; the only thing we have seen are "proposed rain gardens which would require maintenance by the property owner" to hopefully control runoff into abutting properties
- Development of this parcel does not serve in the best interest of abutting taxpayers
- Development of this parcel is not in keeping with the surrounding neighborhood

As an abutting taxpayer and homeowner here in Rye, I am continually frustrated by the amount of time and effort we as a Town are spending on this request, let alone the personal time commitment to continually attend these meetings to speak on our own behalf.

The Town of Rye has a commitment to its tax-paying residents to insure that we are not taken advantage of by ruthless developers and their endless streams of money and lawyers in an effort to simply make a profit. Do what is best for this Town, for its taxpayers, and for the abutters of 0 Big Rock Road: Deny this request.

Sincerely,



Robert P. Consentino

Sharon A. Consentino

32 Powers Ave

Rye, NH 03871



**Kim Reed**

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**From:** Kerin Ferrin <ktcp.ferrin@gmail.com>  
**Sent:** Wednesday, August 9, 2017 9:03 AM  
**To:** Kim Reed  
**Subject:** 0 Big Rock Road

To: The Rye Zoning Board of Adjustment  
From: Kerin and Tom Ferrin, 37 Gray Court, Rye, NH  
Subject: Objection to development of 0 Big Rock Road, Rye, NH  
August 8, 2017

We are writing this letter to voice our objection once again to the development proposal submitted by Hoefle, Phoenix, Gormley & Roberts, PA on behalf of Stephen C Brown, Trustee SKRJ Realty Trust for property owned and located at 0 Big Rock Road, Tax Map 8.1, Lot 45 and Tax Map 5.2, Lots 79,80 requests for a rehearing on the ZBA June 7, 2017 denial of applicant variance request, Case #02-2017.

A huge contingent of neighbors sat through a *five hour* meeting to listen to this issue be argued by both sides. We were able to voice our legitimate concerns, and we heard the applicant's request be DENIED.

Why are we still talking about an issue that has been denied multiple times in the last several years?  
Why are they allowed to be heard on this issue once again?  
It has been made abundantly clear that this land is unbuildable.

Why do we, do you, continue to spend time on this case?  
This developer wants to build on this land and flip it, never to be impacted by the effects on both the land nor the current abutters.

No means No. This issue should be over and done with.

Sincerely  
Kerin Ferrin  
Thomas Ferrin  
37 Gray Court  
Rye, NH 03870

Debra and Randy Crapo

August 9, 2017

8 Big Rock Road

Rye, NH 03870

603-964-5609

To the Rye ZBA;

RE: Case #02-2017 Request for Rehearing for 0 Big Rock Rd. from SKRJ Realty Trust

Re: Ongoing requests for the people of Jenness Beach, Big Rock Road, Gray Court, Cable Road, Powers Ave., and Ocean Blvd to be protected from devaluation and flooding from a Non-Buildable Lot gaining any right to build on 0 Big Rock Road.

This current ZBA and those in the past have properly turned down attempts to develop this wet, saturated, non-buildable, yet new people make repeated attempts to take another bite at the apple. This board made their decision and the applicant should have to abide by it. Instead they are appealing. Here are some of the reasons we feel that you should, yet again, deny the request for rehearing.

Respected Builders in the town of Rye have looked over the land in the past, reviewed the massive amount of paperwork on this land and realized it is non-buildable and walked away from it.

The Conservation Committee reviewed this land for possible purchase by the Town and determined it was exactly as listed on the assessment cards – non-buildable, therefore protected for lifetime conservation.

Randy and I looked into purchasing the land in the early 80's. The bank told us they could not add non-buildable property to our mortgage at any price.

These and many other people would be in a position to question how this changed for the present owner and he bought it quickly after his friend, the Assessor of Rye who was fired for his actions on this non-buildable lot.

Reasons we are writing this letter:

1. We have lived next to this land for over 40 years and it is a wet, unbuildable piece of land that is a low point which provides drainage from streams headed to the ocean and adds to the tranquility of the neighborhood. Development of it will cause water and drainage issues to surrounding properties.
2. The town has turned down multiple requests over the years to build on this property and taxed it as non-buildable. That changed when this buyer took over and the change was

made through underhanded efforts of a Town of Rye employee to assist the applicant, who he stated to Rye Selectmen, in a meeting, was a friend of his.

3. This applicant has attempted several different methods of gaining approval. Going forward, the record before the court needs to include the entire record. We feel that the applicant has gerrymandered the process to attempt to present his case before a judge in a light that seems to minimize the impact of the request. This seemingly deceitful tactic should not be allowed, and the entire record of this property, including the multiple bankers boxes of records should be considered the "record" not just the minutes of the most recent attempts.

4. The Town of Rye has failed to follow up properly on the wetlands violations of the previous owner, which the current applicant is trying to leverage and claim that 10,000 sq. ft. of wetlands (out of the approximately 13,000 there in previous applications before this board) has "disappeared" to his benefit.

5. The applicant is an attorney whose firm deals with real estate construction. The applicant claims to have not known of many of the features and history of the property, when there are multiple boxes full of information on file at the Rye Town Hall on this property. Due diligence prior to the purchase could have revealed the many issues with this property. The fact that the current owner appears to have paid an inflated price for this property should not have bearing on any hardship consideration.

Reasons that this request should be denied:

1. This rehearing request references an older rehearing request, but fails to include copies of that in this document.

2. The board did not err in considering the "project" when reviewing these variances. These variances are not required to simply own the land. They would be required to sell the land as two separate lots. The only purpose in subdividing these lots is obviously to attempt to allow someone to build on them. To merely "own" these lots, the variances are not needed. Rather, to "develop" these lots with a "project" the variances are needed. Why then, should the applicant not expect the board to view the development proposed in the application as the reason for the variances. The application included a drainage study and the applicant presented that they were proposing two homes, roughly 3000 sq. ft. footprints, two stories, with three car garages. That would be approximately 6000 sq. ft. homes in an area with much smaller homes.

3. Page two of this rehearing request references frontage area that was not previously discussed and is attempting to add to the record and argue facts that were not presented regarding frontage comparisons to neighboring properties. The subject neighboring

property is uniquely shaped and situated at the end of an actual road, therefore not similar for frontage comparisons, even if the argument is allowed to be brought up at this point.

4. The overcrowding issue references Brown's right to develop the lots. These were always non-buildable lots. Through apparent, and obvious to us, collusion with the previous Town of Rye tax assessor (openly admitted to by the prior assessor, in a meeting with the selectmen) to reclassify the lots in favor of the applicant just after the purchase was finalized. These lots were always non-buildable, priced accordingly, and should remain as such. The fact that the current owner paid more than he likely should have should have no bearing or cause any rights to "vest".

5. The applicant continues to claim improper numbers on wetlands that can only be arrived at by capitalizing on the previous owners destruction of the wetland. The engineer for the previous owner and this owner are the same company and person, yet now the wetlands have supposedly shrunk by 10,000 sq. ft. which happens to be just about enough to cause this proposal to not need buffer relief. Yet, the land is still wet and trees routinely uproot and fall over which didn't happen before the wetlands were disturbed. Reports to DES that the reparation plan was followed are flawed and the owner has taken advantage of the lack of enforcement staff and budget of those agencies.

6. Another reference that the closest neighbor only has 20ft frontage is again taken out of context and is not a comparison that should be allowed to argue for frontage. The applicant is asking for less frontage on a well travelled street which does not safely add any more cuts for driveways, the 20ft frontage is a uniquely shaped lot at the end of a barely travelled dead end street, no comparison.

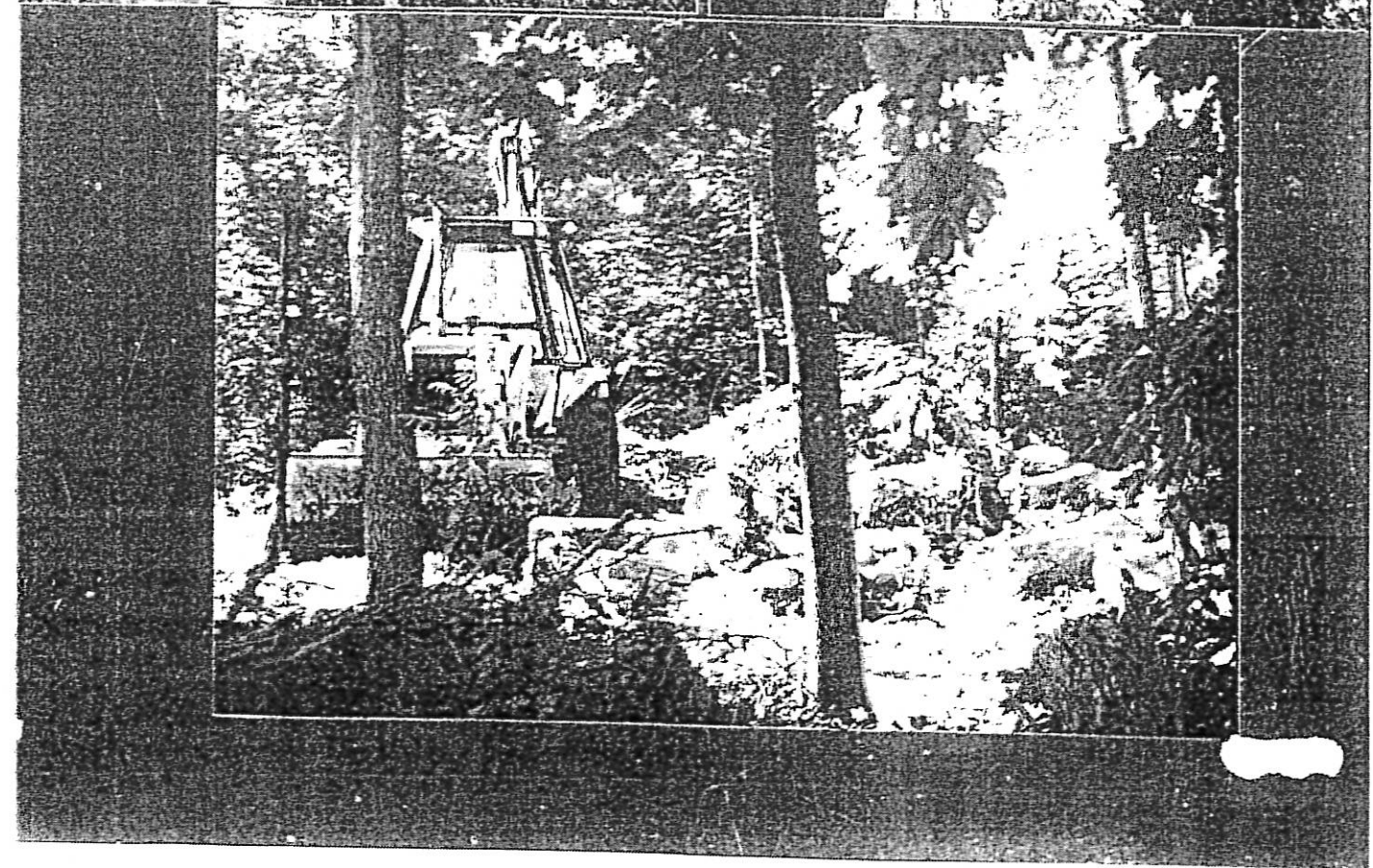
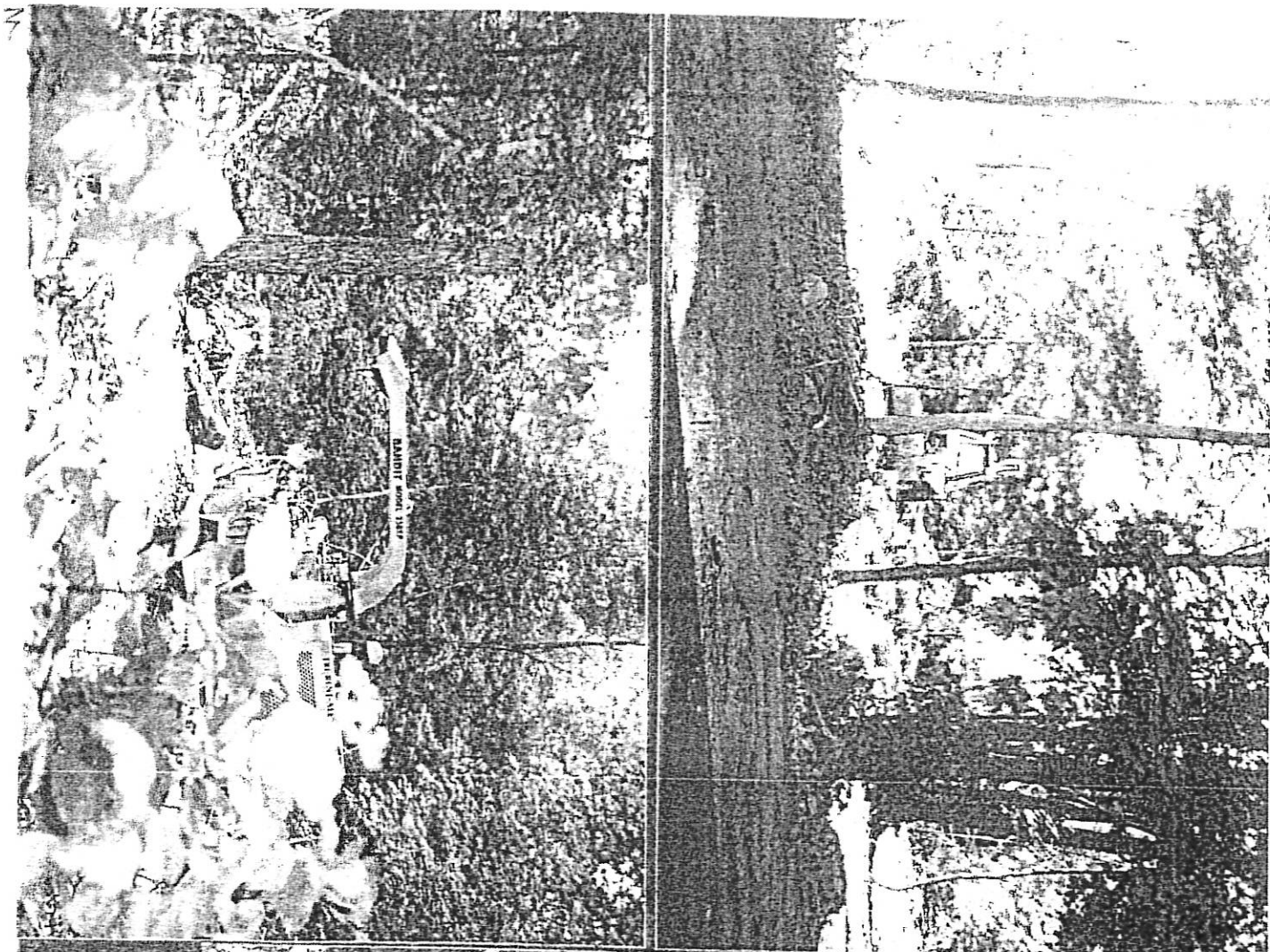
7. The other abutter to the old paper street of Thompson court has already been given the rights and the land is considered added to his property. To argue that the applicant has the right to still use that paper street, even after long abandoned, is improper. He can't argue that the town let it expire and the land is his, and in the same argument claim a right to use it. It either exists, or is extinguished, it can't be both.

Therefore, we respectfully request that the board deny the request for rehearing on this matter.

Respectfully,

  
Debra and Randy Crapo





John Kuzinevich

Attorney at Law

71 Gurnet Road  
Duxbury, Massachusetts 02332

Telephone: 781 536-8835  
Mobile: 508 245-2105

Email: [JKUZ@comcast.net](mailto:JKUZ@comcast.net)

July 20, 2017

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

Re: Stoneleigh Subdivision

Dear Members of the Board of Adjustment:

Pursuant to Section 703 of the Rye Zoning Ordinance, the Applicant/Owner, Harbor Street Limited Partnership hereby moves for reconsideration of the Decision dated July 5, 2017 in case number 13-2017 in which the Board denied a special exception from Sections 301.7(B) concerning construction of a driveway involving a wetlands crossing within the setback from a vernal pool and certain disturbances to buffers.

The Board misperceived key evidence and exhibited a bias to prevent lawful development of a house lot in the interest of nominally preserving Rye's water supply. Thus, the Board was concerned with the Aquifer Protection District as noted in the property description. The property is not in the Aquifer protection district and this error may have improperly influenced the Board. The remaining areas of concern will be addressed in the same order as contained in the decision.

1. The land constituting Lot 2 cannot be used productively without the special exception. There is a large section of upland which otherwise can be configured a legal lot but for the driveway. Although it is only a portion of the entire development, the applicant is entitled to make productive use of all of the property. Moreover there was no basis for the Board's statement that the remaining property can be developed into 16 lots, as if that justifies denial. The Planning Board refused to give needed waivers on another lot so this Board's denial of even a single lot cannot be viewed in isolation.

2. The reason for the special exception was to allow productive use of the property. Although any use of property has some economic advantage, there was significant testimony that the special exception sought was not to minimize construction cost or to obtain an economic advantage equal to being allowed to use the land.

3. There was no scientific evidence that construction of a driveway would be detrimental to the environment and/or public water resources. There was unrefuted testimony that there would be no harm in these areas by a wetlands scientist, Mr. Gove and an environmental scientist, Mr. Stone. In addition, the Planning Board in the process of subdivision approval has gone to extensive lengths to address environmental issues and water quality for all 17 lots of the subdivision. The Planning Board has retained, at the developer's expense, a wetlands scientist, a soils scientist, an engineering firm, a planning consultant, and a hydrologist to review all plans to provide adequate protection for the Town. Indeed, the Board of Adjustment was trying to do the Planning Board's job on a microcosmic scale when it assumed the worst case scenarios of a single driveway which is a small part of the subdivision. It lacked the evidence to make this determination absent a complete review of all the work of the Planning Board and its consultants, and exceeded a reasonable scope of review.

4. In addition to the response to 3, there was extensive testimony as to the care of construction and that it will not take place in wetlands. The amount of buffer impacted is minimal and there was no showing of detrimental effect.

5. There was unrefuted testimony that hydrocarbon spills naturally degrade. Thus the use of a normal driveway for a single family home, poses no risk to the environment. Further denial of the variance does not reduce other infrastructure in the subdivision. As will be discussed below, there is no environmental degradation.

6. The Board improperly considered the effect of a house which is outside the areas where the variances were requested. But for the variance, this is a building lot that meets all of the land development and zoning laws of the Town. The Boards then speculates that a normal homeowner would damage the environment. This is an improper standard as it could be applied to any potential new home in Rye. This is best illustrated by the Board complaining the homeowners may have pets somehow degrading the environment, all due to the construction of a driveway that has nothing to do with pets. Presumably, other homes in the neighborhood have pets which could freely roam and may come onto lot 2. This extreme shows that the goal was to improperly prevent building rather than examine whether construction of a driveway in some buffers was significant. There is no work being done in wetlands.

7. In addition to the answer to 3, the Planning Board must make sure there is no detrimental impact by the subdivision. It peer review consultants have signed off on the plans. The driveway of one house would have a negligible impact if any.

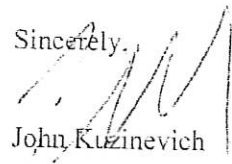
8. There is no basis to conclude values will go down or that the driveway is otherwise injurious to the neighborhood. The areas is zoned residential. This proposed 3.77 acre lot is well set back from any roadway and is several hundred feet from any existing property and will likely not be seen from existing properties. However, again, in this instance the Board appears to be considering the entire subdivision. The driveway, which is far from neighborhood properties has no impact on values. Further even if the Board were correct in its attempt to deny a lot, there is no showing that one house out of a 16 or 17 lot subdivision has any impact on surrounding properties. There was no showing that the driveway or its construction was detrimental in any way. In reaching this and other findings, the Board ignored the standards in Sections 701.3 and 301.7 F of the Zoning Ordinance.

9. This is a minimal disturbance in the buffer and steps have been taken to protect the environment and neighborhood. Thus, the special exception is in harmony with the Ordinance as it allows the orderly development of a lot that otherwise fully complies with all of Rye's land use regulations. The Board's decision is devoid of any reasoning why the waiver is not in harmony with the zoning ordinance.

10. The principal protection for the buffers is a broad no cut or alteration area to prevent cutting any trees and brush in the wetlands areas. While it is done through restrictions and covenants, there is no basis to assume that they will not be followed at least substantially. These restrictions provide more effective protection to the buffers as the Rye Zoning Ordinance seeks to protect some trees over 4-1/2", while allowing cutting of smaller trees and brush in the buffers. If Lot 2 were split and combined with lots one and three, the homeowners could effectively clear and destroy the function value of the buffers without any legal deterrent or the imperative of complying with property restrictions. As Mr. Gove testified it is the brush that is most important for protecting the vernal pool and its wildlife. Thus, the Board got it backwards and increased rather than minimized environmental risk by denying the variances. Indeed, all of the work done by the applicant and his consultants was to provide a net environmental gain to the property.

For all of the above reasons, the applicant requests reconsideration.

Sincerely,



John Kuzinevich

# 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 and Aquifer and Wellhead Protection District

Application case: Case # 13-2017

Date of Meeting: June 7, 2017

Date of Decision: July 5, 2017

Decision: The Board voted 4 to 1 to deny the Applicant's request for a Special Exception from Section 301.7(B) to construct a driveway and associated bridge with the following:


- (1) a 17' x 16' wetlands crossing 51 ft from a vernal pool where a 100 ft setback is required;
- (2) 2,900 s.f. of disturbance within the 100' vernal pool buffer; and
- (3) 3,510 s.f. of disturbance within the 75' wetlands buffer (some overlap of buffers).

The Board found that such request failed to satisfy the criteria for granting a special exception based upon the following reasons, any one of which members relied upon for denying the special exception:

1. The lot consists of 3.86 acres which the applicant plans to combine with other parcels for a total development parcel of approximately 59 acres. Proposed Lot 2 does not yet exist but is part of the proposed subdivision containing a total of 17 building lots. The relief requested is not essential to the productive use of the land as the development parcel may continue to be developed into at least 16 lots.
2. Economic advantage is the sole reason for the requested special exception;
3. The proposed driveway which crosses wetlands and disturbs both vernal pool and wetlands buffers is reasonably likely to be detrimental to the environment and/or public water resources;
4. Construction of the driveway and wetlands crossing involves tree and vegetation cutting, the addition of fill, grading, installation of bridge footings, erection of bridge and paving, all within

the in the wetland buffer and vernal pool buffer, the effects of which may be detrimental to the environment and/or public water resources;

5. The proposed driveway crossing the wetlands will be utilized by construction vehicles, cars, delivery trucks, septic trucks and other maintenance vehicles which carry risks of contaminating the wetlands by leakage or spillage;
6. The requested driveway enables the development of Lot 2 for a single-family home with associated septic system. While such uses are physically located outside the environmental buffers, proposed lot 2 consists primarily of wetlands, a vernal pool and associated buffers and at least the buffers will be likely utilized by the proposed homeowner during normal use. In addition, construction of the home and septic system will involve the addition of fill, grading and other construction activities. Such use and development have the potential to detrimentally affect the quality of the wetlands, vernal pool and aquifer due to potential inadequate maintenance, runoff, pets and nonadherence to subdivision conditions designed to protect the wetlands and vernal pool;
7. Construction and maintenance of the proposed driveway may negatively affect the wetland and/or public water resources;
8. The proposed wetlands crossing and buffer disturbance are injurious and detrimental to the neighborhood;
9. The proposed driveway and related wetlands crossing and buffer disturbance are not in harmony with the general purpose and intent of the zoning ordinance nor in accordance with the general or specific rules contained therein.
10. Protection of the wetlands, vernal pool and aquifer would have been dependent in a large part on proposed use restrictions and covenants in the property deed and/or homeowners association regulations; the compliance therewith cannot be guaranteed, particularly long term.
11. The special exception is not essential for the productive use of the land.

  
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.

John Kuzinevich

Attorney at Law

71 Gurnet Road  
Duxbury, Massachusetts 02332

Telephone: 781 536-8835  
Mobile: 508 245-2105

Email: [JKUZ77@comcast.net](mailto:JKUZ77@comcast.net)

July 20, 2017

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

Re: Stoneleigh Subdivision

Dear Members of the Board of Adjustment:

Pursuant to Section 703 of the Rye Zoning Ordinance, the Applicant/Owner, Harbor Street Limited Partnership hereby moves for reconsideration of the Decision dated July 5, 2017 in case number 14-2017 in which the Board denied variances from Sections 301.7(B)(1), (5) and (7) concerning construction of a driveway involving a wetlands crossing within the setback from a vernal pool and certain disturbances to buffers.

The Board misperceived key evidence and exhibited a bias to prevent lawful development of a house lot in the interest of nominally preserving Rye's water supply. Thus, the Board was concerned with the Aquifer Protection District as noted in the property description. The property is not in the Aquifer protection district and this error may have improperly influenced the Board. The remaining areas of concern will be addressed in the same order as contained in the decision.

1. There was no scientific evidence that construction of a driveway would be detrimental to the environmental and/or public water resources. There was unrefuted testimony that there would be no harm in these areas by a wetlands scientist, Mr. Gove and an environmental scientist, Mr. Stone. In addition, the Planning Board in the process of subdivision approval has gone to extensive lengths to address environmental issues and water quality for all 17 lots of the subdivision. All of the Planning Boards consultant have signed off on the subdivision as providing adequate protection. Indeed, the Board of Adjustment was trying to do the Planning Board's job on a microcosmic scale when it assumed the worst case scenarios of a single driveway which is a small part of the subdivision. It lacked the evidence to make this determination absent a complete review of all the work of the Planning Board and exceeded a reasonable scope of review. There

is no showing that a single driveway and house lot will have any measureable effect on Rye's water or the environment.

2. There was unrefuted testimony that hydrocarbon spills naturally degrade. Thus the use of a normal driveway for a single family home, poses no risk to the environment. Further denial of the variance does not reduce other infrastructure in the subdivision.

3. The Board improperly considered the effect of a house which is outside the areas where the variances were requested. But for the variance, this is a building lot that meets all of the land development and zoning laws of the Town. The Board then speculates that a normal homeowner would damage the environment. This is an improper standard as it could be applied to any potential new home in Rye. This is best illustrated by the Board complaining the homeowners may have pets somehow degrading the environment, all due to the construction of a driveway that has nothing to do with pets. Presumably all 16 other lots could have pets which freely roam and may come onto lot 2. This extreme shows that the goal was to improperly prevent building rather than examine whether construction of a driveway in some buffers was significant. There is no work being done in wetlands.

4. The principal protection for the buffers is a broad no cut or alteration area to prevent cutting any trees and brush in the wetlands areas. While it is done through restrictions and covenants, there is no basis to assume that they will not be followed at least substantially. These restrictions provide more effective protection to the buffers as the Rye Zoning Ordinance only preserves some trees over 4" while allowing cutting of smaller trees and brush in the buffers. If Lot 2 were split and combined with lots one and three, the homeowners could effectively clear and destroy the functional value of the buffers without any legal deterrent or the imperative of complying with property restrictions. As Mr. Gove testified it is the brush that is most important for protecting the vernal pool and its wildlife. Thus, the Board got it backwards and increased rather than minimized environmental risk by denying the variances.

5. There was no showing that the subdivision plan could be reconfigured at this late date in a safe or practical manner. Indeed, the upland area of the lot is like a island surrounded by wetlands or vernal pool or wetlands buffers. Thus, any access requires crossings similar to the proposal, however the proposal was selected for the least impact.

6. Unnecessary hardship is a denial of reasonable use of the property. Here the buildable area of the lot is surrounded by buffers or wetlands and vernal pools. This constitutes a special condition which is unique within the proposed subdivision. Thus, there is a large section of upland which otherwise can be configured a legal lot but for the driveway. Although it is only a portion of the entire development, the applicant is entitled to make reasonable use of all of the property. Therefore a variance is needed to make reasonable use of the property. In addition, the use is reasonable and given the lack of environmental impact, there is no substantial relationship between the ordinance and its specific application to the property. Moreover there was no basis for the Board's statement that the remaining property can be developed into 16 lots, as if that justifies denial. The Planning Board refused to give needed waivers on another lot so this Board's denial of even a single lot cannot be viewed in isolation.

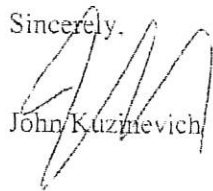
7. There is no basis to conclude values will go down. The area is zoned residential. The entire subdivision is set back and existing properties may not even see the houses. However, again, in this instance the Board appears to be considering the entire subdivision. The driveway, which is far from neighborhood properties has no impact on values. Further even if the Board were correct in its attempt to deny a lot, there is no showing that one house out of a 16 or 17 lot subdivision has any impact on surrounding properties.

8. As can be seen from above, there was extensive concern for the environment. This driveway does not offend the public interest.

9. The lot is not similar to others in the neighborhood as its upland is isolated by buffers and wetlands. None of the subdivision plans showed a similar situation and the considerations are unique. The Board did not have the survey's, test pit information and lot design so it had no basis to reach its conclusion.

For all of the above reasons, the applicant requests reconsideration.

Sincerely,

  
John Kuznetsov

# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

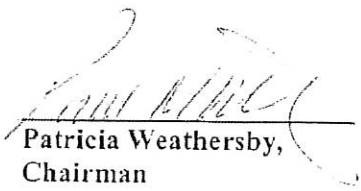
- Applicant/Owner:** Harbor Street Limited Partnership of  
7B Emery Lane, Stratham, NH
- Property:** 421 South Road, Tax Map 4, Lot 31  
Property is in the Single Residence District and Aquifer and Wellhead  
Protection District
- Application case:** Case # 14-2017
- Date of meeting:** June 21, 2017
- Date of Decision:** July 5, 2017
- Decision:** The Board voted unanimously to deny the Applicant's request for  
Variances from Sections 301.7(B)(1)(5) and (7) to construct a driveway  
and associated bridge with the following:
- (1) a 17' x 16' wetlands crossing 51 ft from a vernal pool where a 100 ft  
setback is required;
  - (2) 2,900 s.f. of disturbance within the 100' vernal pool buffer; and
  - (3) 3,510 s.f. of disturbance within the 75' wetlands buffer (some overlap  
of buffers).

The Board found that such request failed to satisfy the criteria for granting variances – the specific reasons include:

1. Construction of the driveway and wetlands crossing involves tree and vegetation cutting, the addition of fill, grading, installation of bridge footings, erection of bridge and paving, all within the in the wetland buffer and vernal pool buffer, the effects of which may be detrimental to the environment and/or public water resources;
2. The proposed driveway crossing the wetlands will be utilized by construction vehicles, cars, delivery trucks, septic trucks and other maintenance vehicles which carry risks of contaminating the wetlands by leakage or spillage;
3. The requested driveway enables the development of Lot 2 for a single-family home with associated septic system. While such uses are physically located outside the environmental buffers, proposed lot 2 consists primarily of wetlands, a vernal pool and associated buffers and at least the buffers will be likely utilized by the proposed homeowner during normal use. In addition, construction of the home and septic system will involve the addition of fill, grading and

other construction activities. Such use and development have the potential to detrimentally affect the quality of the wetlands, vernal pool and aquifer due to potentially inadequate maintenance, runoff, pests and nonadherence to subdivision conditions designed to protect the wetlands and vernal pool;

4. Protection of the wetlands, vernal pool and aquifer would have been dependent in a large part on proposed use restrictions and covenants in the property deed and/or homeowners association regulations; the compliance therewith cannot be guaranteed, particularly long term.
5. Alternate routes to the upland on proposed lot 2 that do not involve crossing a wetland, do not disturb a vernal pool buffer and are less impactful to wetland buffers are possible (although may involve reconfiguration of subdivision plan);
6. Denying the variances does not create an unnecessary hardship to the applicant. The lot consists of 3.86 acres which the applicant plans to combine with other parcels for a total development parcel of approximately 59 acres. Proposed Lot 2 does not yet exist but is part of the proposed subdivision containing a total of 17 building lots. The development parcel may continue to be developed into at least 16 lots. Any hardship is primarily economic.
7. The values of surrounding properties will be diminished if the variances are granted.
8. The proposed wetlands crossing and buffer disturbances are contrary to the public interest.
9. There are no special conditions of the property that distinguish it from other properties in that area. It is a single residential lot currently and is similar to the other lots in the neighborhood.
10. Granting the variances would allow for further development of the land (proposed lot 2) which will alter the essential character of the locality.
11. The loss to the applicant by denying the variances (possible loss of one potential building lot) is not outweighed by the gain to the general public of protecting its wetlands, aquifer and neighborhood.
12. Granting the variances would threaten public health, safety and welfare.

  
**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.

August 3, 2017

Ms. Kimberly Reed, Planning and Zoning Administrator DELIVERED BY HAND AND EMAIL  
Attn: Ms. Patti Weathersby, Chair, Rye Zoning Board of Adjustment  
Town of Rye, New Hampshire  
10 Central Road  
Rye, NH 03870

Re: Cases #13&14-2017, Applicant's request for Rehearing of ZBA denial on July 5, 2017

Dear Members:

On behalf of the abutters to 421 South Road, Rye, New Hampshire, this letter provides objections to the requests for Rehearing. We believe the Board of Adjustment decision to deny special exception and variance for a driveway crossing was fair and required under Section 306: Aquifer and Wellhead Protection District (2008). We believe the Board understands the integral function of both bedrock and stratified-drift aquifers to provide Rye's drinking water and the need for the same high standard to protect each. The board's decision to protect the integrity of the vernal pool buffer and wetland buffer at the location of crossing on proposed Lot 2 and wetlands and wetlands buffers downstream of the driveway crossing was correct and the requested hearings should be denied.

The expert evidence below regarding the characteristics of the bedrock aquifer protected under the S 306: Wellhead Protection District was presented to the PB by Danna Truslow as peer review for the town and provided later to the ZBA by abutters during appeal.

The other uncertainty is the path of septic system influenced groundwater in areas of shallow bedrock. The NE development area is underlain by shallow bedrock and overburden is saturated only part of the year based on the water level data gathered during the fall and early winter of 2016. Bedrock groundwater flow is less predictable and flows preferentially with fracture zones. We don't have information on site-specific preferential fracture zones but there are fracture orientations on the outcropping rocks and the lineaments/fracture traces developed by the USGS/DES. Nearby homeowner well yields (NHDES one stop) suggest highly fractured bedrock very nearby including the Menard well to the west.

Flow in the vertical direction into bedrock from southern areas of the site may enter a deeper flow system and return to the shallow flow system at a greater distance than if the groundwater remained in the shallow overburden flow regime....potentially impacting groundwater at a greater distance from the development. (Truslow, February 2017)

Figure 1- Site Locations with Fracture Lineaments and Well Locations (Truslow, February 2017, Exhibit 2A) attached to this letter indicates several fractured bedrock lineaments of NW – SE orientation passing directly through the proposed site and continuing to close proximity of the Rye town wells. One southern lineament passes through the wetlands and vernal pool on Lot 2 and intersects other lineaments that directly align toward the town wells.

The environmental expert Mr. Stone instructed the Board that all new water, including septic effluent plumes, surface and storm water runoff from houses and driveways and irrigation and

1. The abutters respectfully submit that the Board decision to deny the special exception and variance on Lot 2 is unrelated to waivers considered by the PB on a different lot for DLA insufficiency.
2. With all due respect, to the abutters, the special exception and variance for a driveway crossing through the vernal pool and wetland buffers on Lot 2 is entirely sought to obtain the far greater economic advantage brought by the project in its entirety, including construction of 2 proposed public roads to access Lot 2 and 16 additional lots. The complaint expressed by Att. Kuzinevich in point #1 of the request: "...this Board's denial of even a single lot cannot be viewed in isolation" supports our conclusion. If a denial cannot be viewed in isolation, can an approval of one driveway crossing with no road access be viewed in isolation? Several stretches in both directions along Stoneleigh Way, the proposed access road to Lot 2, have impacts to wetland buffers.
3. Expert evidence by Dr. Bud Barrett (former Impact Specialist, Dickie-Lincoln Hydroelectric Project) indicated that best practice assessment of flora and fauna in vernal pool and wetland habitats includes multiple surveys over time. This was not completed by the wetland scientist. Impacts to groundwater from proximate human habitation often include micro pollutants to ground water, such as estradiol and other pharmaceutical contaminants transported in groundwater from septic systems. Ms. Truslow (2017) wrote regarding Lot 2:

Also the plume as drawn is at a concentration of 10mg/L at the center of this shallow wetland feature, which can change water chemistry in the pond, especially with introduction of phosphorus to the groundwater as well, a common septic system discharge constituent.

Any runoff and leaching of medical waste, fertilizers, pesticides and herbicides into groundwater is unacceptable and costly to remediate. Prevention is far safer and economically beneficial to taxpayers of Rye, and we believe the board's denial was in the public interest.

4. The abutters have been frustrated and confused by the following actions by the development team.
  - a) The first application for 421 South Road to the Technical Review Committee (TRC) contained information from several different subdivisions and different locations than South Rd and Rye NH
  - b) Extensive bedrock was referenced by "rubble" or "rubble land"
  - c) The HIS soil legend was displayed on the plans without correlating HIS soils data
  - d) The transfer of an onerous number of restrictions to the deeds of individual homeowners, the Homeowner Association (HOA) and covenants (such as no garbage disposals to prevent leaching of phosphorous from food waste into groundwater) that appears to be necessary for the present size and scope
  - e) The developer publically accused the abutters of vandalism of test pit flags, survey hubs and roadway stations in the field and then secured letters from the owners (next door neighbors to the abutters) remonstrating us and restricting our access on the site walks. The abutters deny any vandalism and the accusation remains unsubstantiated.
5. After multiple requests in abutters' letters and over 10 months of deliberation, why was no accurate staking and marking on the ground of road centerlines and grades, lot corners and boundaries of all wetland buffers pertinent to the road design completed before either site

James C. Hodsdon  
427 South Road 3/1/2017

Anne C. Hodsdon

Beverly Randing Levesque  
381 South Rd 8/2/11

BEVERLY RANDING  
LEVESQUE

AB DL  
391 South Rd 8/1/11

Robert S. Goss

Shelly L. Patrick  
355410 South Rd 3/1/17

SHAW L. PATRICK

Stephanie L. Patrick (Clarke)  
338 South Rd BE OH  
3/11/2017

Stephanie L. Patrick Clarke

Christine E. Jones 3/1/18  
414 South Rd 3/1/18

Christine E. Jones

# EXHIBIT 2A

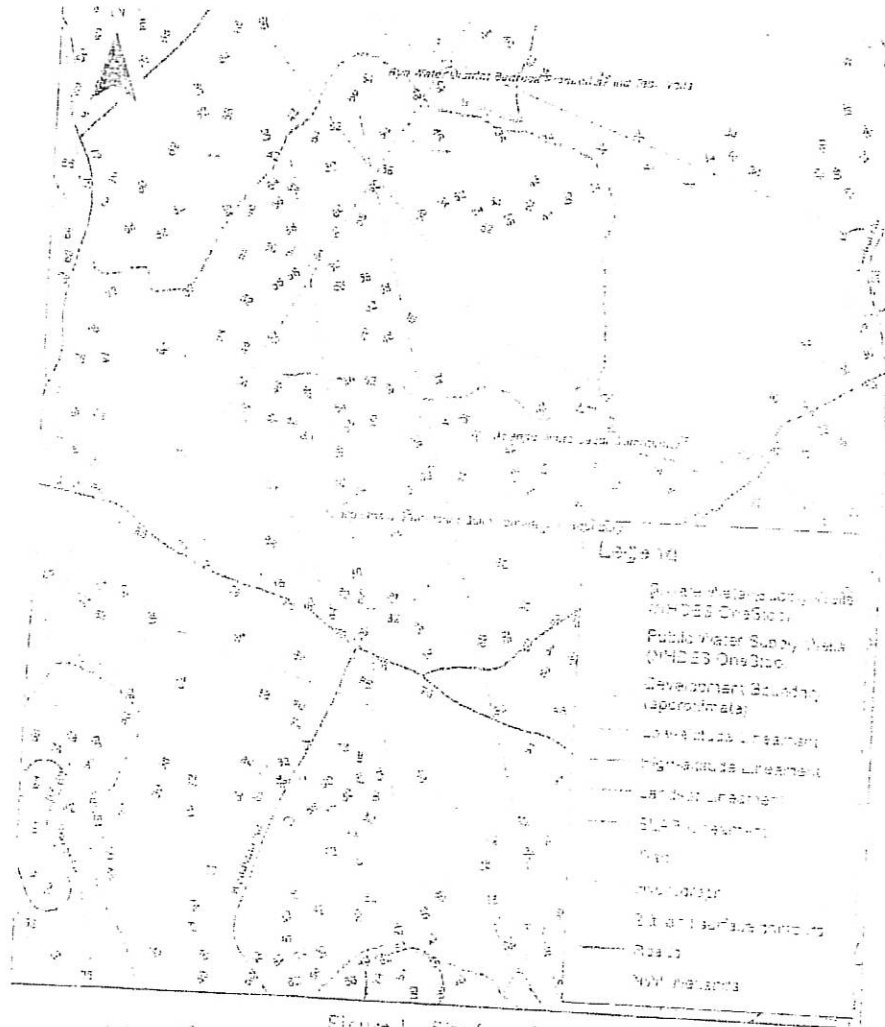


Figure 1 - Site Locations with Fracture Linearments and Well Locations

August 9, 2017

Ms. Kimberly Reed, Planning and Zoning Administrator DELIVERED BY HAND AND EMAIL  
Attn: Ms. Patti Weathersby, Chair, Rye Zoning Board of Adjustment  
Town of Rye, New Hampshire  
10 Central Road  
Rye, NH 03870

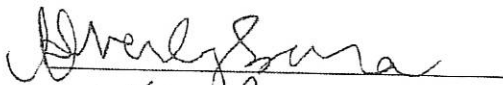
Re; Cases #13&14-2017, Applicant's request for Rehearing of ZBA denial on July 5, 2017

Dear Members:

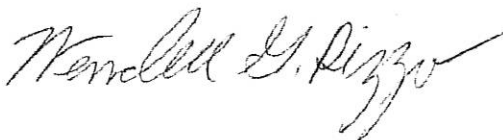
The following graphics help the abutters and residents of Rye understand the relative locations of till and formations of bedrock and sand & gravel aquifers underground. The colored map allows us to visualize the locations of protected overlay districts for bedrock and stratified drift aquifers and source water hazardous inventory sites relative to Rye town wells. A survey by petition utilizing this information was conducted. 775 + Rye residents and abutters support the protection of Rye drinking water and the preservation of Rye Aquifers and wells. We support the boards' vote to uphold the ordinances in place in perpetuity and to maintain the integrity of all wetlands in the Aquifer and Wellhead Protection District.

Respectfully submitted – Abutters on behalf of 775+ residents of Rye, New Hampshire

Signature Page 421 South Road Proposed Development

  
Kim Bosma

416 South Rd.



Wendell G. Rizzo  
433 South Road  
Rye, N.H. 03870

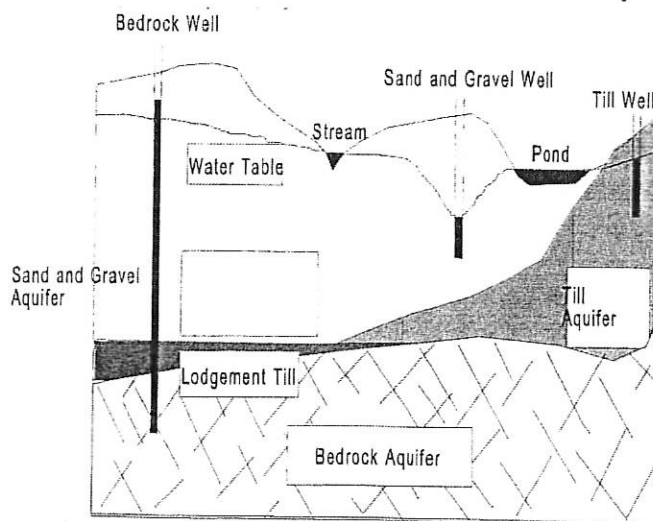
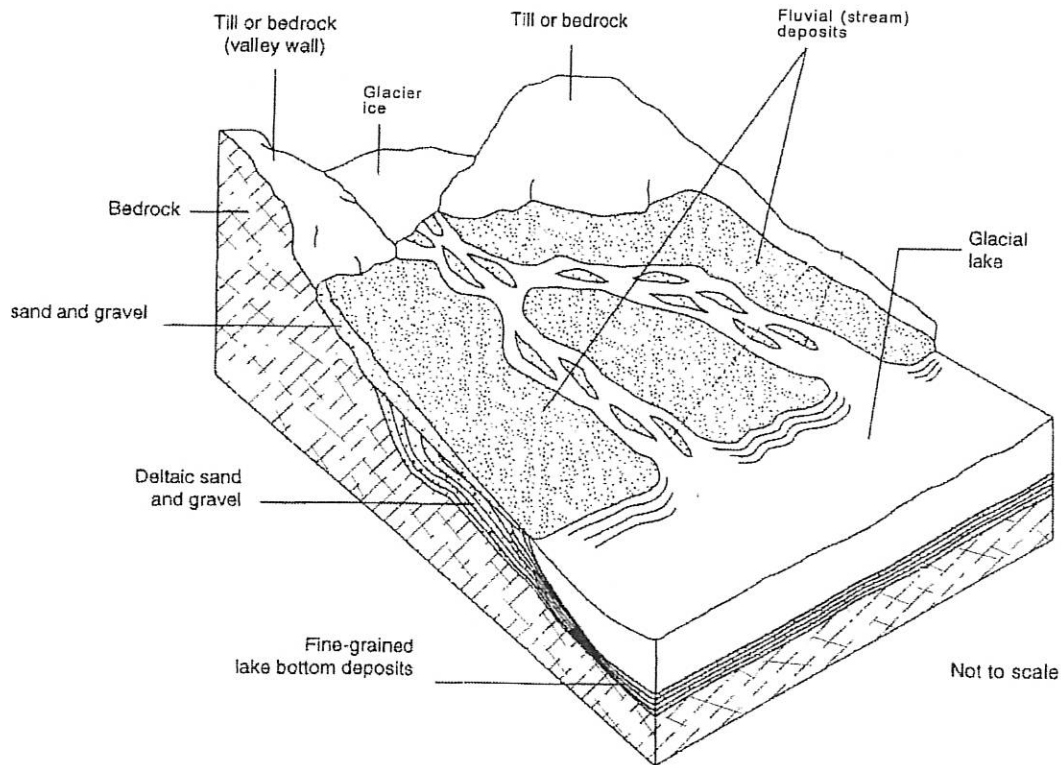


Figure 3: Water table

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*Favorable Gravel Well Analysis/FGWA*

