

## **RYE ZONING BOARD OF ADJUSTMENT**

**Wednesday, July 11, 2018  
7:00 p.m. – Rye Town Hall**

***Present: Chair Patricia Weathersby, Vice-Chair Shawn Crapo, Burt Dibble, Patrick Driscoll, Tim Durkin, Alternates Rob Patten and Charles Hoyt.***

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

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

### **II. Approval of Minutes:**

- **June 6, 2018**

**Motion by Shawn Crapo to approve the minutes of June 6, 2018 as amended. Seconded by Tim Durkin. All in favor.**

### **III. Applications:**

- 1. Michael J. Simchik for property owned and located at 260 Pioneer Road, Tax Map 24, Lot 110, requests a variance from Section 301.8B (1) & (7) for a generator (after-the-fact) installed 15' +/- within the 100' tidal wetlands buffer. Property is in the Single Residence District. Case #19-2018.**

**Note: Patricia Weathersby recused herself from the application. Shawn Crapo stepped in as acting chair and Alternate Charles Hoyt was seated.**

**Corey Colwell, MSC – TF Moran Engineering, representing the applicant,** presented the application. The proposal is to obtain a variance from 301.8B (1) and (7), of the Rye Zoning Ordinance, to permit an after-the-fact installation of a generator, which sets on a concrete pad. Also in the buffer is an underground line from the generator to the house and a propane tank next to the generator. In October of 2017, the building inspector issued a notice of violation on this property for two violations. The nature of the violations were for cutting of trees in the buffer zone, as well as the installation of a generator in the buffer. The building inspector requested that the owner file for an after-the-fact variance for the tree cutting and the generator installation. A response to the building inspector was sent in February of 2018. The letter stated that the owner disagreed with tree cutting but agreed that a variance was necessary for the installation of the generator. There was disagreement that the trees required a variance because the landscaper maintains that they conducted a thinning operation in accordance with best management practices. He noted that they followed the action required by the building inspector by delineating the wetlands and locating all trees over 4.5 inches in diameter, at breast height, that were cut. Those trees were inventoried on the plan and sent to the building inspector. The

applicant then filed for an after-the-fact variance for the generator. In the building inspector's letter of March 22, 2018, he stated that he was dropping the issue of tree cutting and only the variance for the generator was needed. Mr. Colwell noted that the request for variance includes the generator, the line to the building and the underground propane tank. He continued that the property is 8 acres and is located on the north side of Pioneer Road. The dwelling is in the middle of the lot and there is a long gravel driveway from Pioneer Road to the building. The entire property is wooded, except for the dwelling, driveway and an adjacent pond to the southwest of the building. The dwelling was built in 1989 and renovations were completed about a year ago. It was this time last year that the contractor installed the generator. Neither the contractor nor the owner were aware that the generator was in the buffer and required a variance. The unique feature about this property is that all 8 acres, with the exception of a small portion of land in the middle, is not buildable because of the nature of the wetlands on the lot. The small portion of land that is buildable is occupied by the dwelling and front steps. He noted that the generator was installed about 50' from the dwelling, which is 15' from the wetlands. It was placed in this location because it is the area on the lot that is least susceptible to flooding.

He reviewed the criteria for granting the variance:

- The variance is not contrary to the public interest because the generator and underground propane tank are approximately 180' from the closest property line. It does not impact abutting properties or the public. The purpose of the wetland buffer, according to the ordinance, is to maintain natural vegetation and cover to a waterway. The 30sf occupied by the generator and propane tank have very little effect on the wetlands buffer.
- The spirit of the ordinance is observed because granting the variance would not conflict with the ordinance such that it violates the ordinance's basic objective. The objective of the ordinance is to promote the health, safety and welfare of the community. Further, it is to lessen congestion in the streets, secure safety from fire, panic and other dangers, promote adequate light and air, prevent overcrowding, avoid undue concentration of population, facilitate adequate provisions for transportation, solid waste, utilities, schools and recreation, and ensure proper uses of natural resources. A generator and a propane tank on a private property, 180' from the closest property line, do not conflict with these provisions.
- Substantial justice will be done because if there is no benefit to the public that would outweigh the hardship to the applicant, this factor is satisfied. Denying the variance would create a hardship to the applicant that would outweigh any gain to the public.
- The values of surrounding properties are not diminished because the generator and the tank are 180' to the closest property line. Between the generator and the closest abutter is a forested wetland. There is at least 180' from the generator to the property line and additional feet to the closest abutting home. This separation does not diminish surrounding property values.
- Special conditions exist that distinguish this property from others in the area because there is no area on this property where the generator could go, except for a small piece of land. That piece is already occupied by a dwelling and steps. There is no available space on this lot to put a generator. That is a special condition of the property that distinguishes it from others in the area.
- There is no fair and substantial relationship between the general purposes of the ordinance provisions and the specific application of that provision to this property. The

purpose of this provision is 301.8B, the wetlands buffer provision. This is to protect the adjacent wetland by maintaining a 100' vegetative buffer. The specific application of this provision would not allow any construction activity on this lot because the entire lot is within the wetland buffer, except for a small piece. Since the home exists, they should be allowed a generator and propane tank to provide the necessary backup power and continue to supply propane for the everyday needs of the home. The use is reasonable because the propane tank is necessary to supply the home with cooking and heat. A generator is necessary to provide backup power.

- Literal enforcement of this ordinance would result in unnecessary hardship because special conditions exist that separate this property from the others in the area. The property virtually has no buildable area on this lot. The generator would require a variance in any location on this lot.

Mr. Colwell stated that they met with the Conservation Commission and a site walk was held. The commission summarized their findings in a memo dated June 19<sup>th</sup>. The memo stated that although the commission believes that the building inspector should not have overturned the notice of violation for the tree cutting, they were in favor of allowing the after-the-fact generator because it was in the best place possible given the lot configuration. He commented that the applicant feels the request is fair and reasonable.

Member Durkin asked if there was a propane tank there previously. It was mentioned that this was not only for a generator but for certain house utilities.

Mr. Colwell replied that he believes the propane tank was there prior to last year. The generator and the underground line were just installed last year.

Member Driscoll clarified that there was no permit for the generator installation.

Mr. Colwell confirmed. He explained that permits were pulled for the renovation of the building; however, they were unaware that a permit or any relief was required for the generator.

Member Driscoll stated that he did not see anything in the packet of how it was installed. It looks like it is built up on the pad just off the retaining wall. He did not see anything in the application in regards to what that was built up with. Is that going to have any harm into the wetlands because it is on the other side of the retaining wall?

Mr. Colwell explained that it is built on a concrete pad that is elevated with gravel. Because it is so small, it is not really going to have any flooding affect or dissipate any water onto abutting properties. He reiterated that the closest property line is 180' away. It is such a small impervious area that it will have virtually no effect on runoff or any increase in runoff.

Vice-Chair Crapo opened to the public for comments or questions. Hearing none, he closed the public hearing at 7:39 p.m.

Speaking to Member Driscoll, Member Durkin asked if he did a site walk. He asked if the location is consistent with what Mr. Colwell is saying.

Member Driscoll stated that from what he saw at the site, he thought the Conservation Commission would have more of a problem with it. There is a retaining wall built up to keep all the loam in the property. On the other side of the retaining wall is an outcropping of the base that has the generator on it. He reiterated that he thought the Conservation Commission would have more of an issue with its location and what it would do to the surrounding wetlands. There was no issue with the abutters. He continued that it seems like a decent lot between the generator and the house. He does not see why it couldn't be put on this side of the retaining wall but it shouldn't be done now. The Conservation Commission letter states that they are okay with it. If they are okay with it, he doesn't see much of an issue.

Member Durkin commented it seems reasonable.

Member Hoyt asked if the generator was missed when they did the application for the renovations.

Vice-Chair Crapo reopened the public hearing.

Mr. Colwell explained they were not aware the generator required an application. He does not think the generator was discussed. The topic of conversation was mainly the interior renovations.

Vice-Chair Crapo asked if the renovations were under a building permit.

Mr. Colwell explained there was a lot of work done inside. He was told by the property owner that a permit was pulled because they were major renovations.

Member Driscoll asked if the building inspector saw the generator during his final inspection.

Mr. Colwell explained that there was a complaint filed by an abutting landowner about tree cutting activity. When the building inspector went out, he saw the generator located in the wetland buffer that did not have a permit. The notice of violation was issued based on the complaint about the tree cutting.

Vice-Chair Crapo re-closed the public hearing at 7:43 p.m.

Vice-Chair Crapo called for a vote on relief for *Section 301.8B (1) & (7)*:

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



Patrick Driscoll – Yes  
Tim Durkin – Yes  
Charles Hoyt - Yes  
Burt Dibble – Yes  
Shawn Crapo – Yes

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

Patrick Driscoll – Yes  
Tim Durkin – Yes  
Charles Hoyt - Yes  
Burt Dibble – Yes  
Shawn Crapo – Yes

**3. Substantial justice is done?**

Patrick Driscoll – Yes  
Tim Durkin – Yes  
Charles Hoyt - Yes  
Burt Dibble – Yes  
Shawn Crapo – Yes

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

Patrick Driscoll – Yes  
Tim Durkin – Yes  
Charles Hoyt - Yes  
Burt Dibble – Yes  
Shawn Crapo – Yes

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

Patrick Driscoll – Yes  
Tim Durkin – Yes  
Charles Hoyt - Yes  
Burt Dibble – Yes  
Shawn Crapo – Yes

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

Patrick Driscoll – Yes  
Tim Durkin – Yes  
Charles Hoyt - Yes  
Burt Dibble – Yes  
Shawn Crapo – Yes

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

Patrick Driscoll – Yes  
Tim Durkin – Yes  
Charles Hoyt - Yes  
Burt Dibble – Yes  
Shawn Crapo – Yes

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

Patrick Driscoll – Yes  
Tim Durkin – Yes  
Charles Hoyt - Yes  
Burt Dibble – Yes  
Shawn Crapo – Yes

**Motion by Burt Dibble to approve the application of Michael J. Simchik for property owned and located at 260 Pioneer Road for a variance from Section 301.8B (1) & (7) for a generator installed (after-the-fact) 15' +/- within the 100' tidal wetlands buffer. Seconded by Patrick Driscoll. All in favor.**

**Note: Patricia Weathersby was reseated as chair. Charles Hoyt was unseated.**

- 2. Edward N. Herbert Assoc. Inc, for property owned by Cara C. Zohdi 1998 Trust of 1 Frost Rd, Windham NH and located at 4 Winslow Way, Tax Map 17, Lot 75-1, requests a variance from Section 304.4 for a house height to be 35' +/- where 28' is allowed. Property is in the Single Residence and Coastal Overlay Districts. Case #20-2018.**

**Peter Zohdi, from Herbert Assoc.,** presented to the Board. He explained that the application is for a variance for the height of the building. In this zone, the house cannot be more than 28' and they are requesting a variance for 35'. He noted that behind the lot is all wetland and marsh land. If the house was to go to 35', it would not take the view from any abutter. There is nothing within 800' behind the house. He continued there was an existing house on the property, which was taken down in December to build a newer house. The new house will be in approximately the same location as the old house. He met with the Conservation Commission and they wanted the leachfield moved slightly away from the buffer zone. The town was presented with the erosion control plan. The home that is being built is a four bedroom home

with three car garage. The house will be 35' if a variance is obtained. *(He presented the home plans with elevation drawings to the Board.)*

Chair Weathersby asked the heights of the other homes on Winslow Way.

Mr. Zohdi replied that they are all higher than 28'. The previous home got a variance at one time for a widow's walk.

Chair Weathersby asked if he had the heights of the other homes on Winslow Way.

Mr. Zohdi replied no.

Member Driscoll stated that he has driven on that road several times. It is hard to determine if any of the homes are above 28'.

Speaking to Zoning Administrator Reed, Chair Weathersby asked if any of the other homes in that subdivision received height variances.

Zoning Administrator Reed replied not that she is aware of. She was working for the town during the second subdivision but she does not really know if anything was approved for a variance.

Member Driscoll asked what the benefit is in going to 35'.

Mr. Zohdi explained it is to accommodate the roofline for this design. He tried to bring the roofline down but he would like to try for a variance.

Chair Weathersby asked for clarification on the plans of where the house is over 28'. It looks like the garage is not over 28'.

Mr. Zohdi replied the garage is not. *(He pointed out the area on the plan where it is 35'.)*

There was discussion on the drawings.

Mr. Zohdi noted that what he is presenting on the easel before the Board is the final version of the plan.

Chair Weathersby commented that the height is over 28'; however, it is not clear as to how much. The application can either be continued or the Board can keep going with the presentation.

Member Durkin stated that he feels they should continue the application because he would like to know the heights of the other homes. He would also like to know which rendering is correct.

Member Driscoll commented that he does not have enough information to vote in favor of a variance.

Speaking to the applicant, Chair Weathersby noted that the Board would like to see a set of the final plans and clarification on how much relief is being requested.

Vice-Chair Crapo asked for a benchmark for where the building inspector was measuring the grade from.

**Motion by Burt Dibble to continue the application until the August meeting. Seconded by Tim Durkin. All in favor.**

3. **Thomas & Laurie Glasrud of 35U Columbia Street, Portsmouth for property owned and located at 5 Wentworth Rd, Tax map 26, Lot 15,** request variances from Section 603.2 to tear down an existing house and replace with new; from Section 203.3E for dwelling coverage of 16.4% where 15% is allowed; from Section 301.8B (1) (2) (5) & (7) for a septic system 55.4' within the 100' wetland buffer, for a house 76.1' within the 100' wetland buffer and for the removal of 6 trees within the 100' wetland buffer and Building Code relief from Section 7.9.2.5 for a septic system 55.4' within the 75' wetlands buffer; from Section 7.9.4.1 for septic system 55.4' within the 100' tidal marsh setback; from Section 7.9.4.3 from septic system less than 36" from bedrock; from Section 7.9.4.4 for septic system slope greater than 15.1% and from Section 7.9.6 for new construction standards. **Property is in the Single Residence District. Case #21-2018.**

**Attorney Tim Phoenix, representing the applicant,** stated that the lot is 16,975sf with an existing older home that is functionally obsolete. The home is in the front and side setbacks with a very steep driveway. The existing home covers 4.8% of the lot with an overall impervious of 23.1%. The Glasruds intend to take down the house in its entirety and build a new home. In front of the lot is ledge, so it dictates the location for the new home. The home will be centered on the lot so front and side setback relief will not be needed. Since virtually the whole lot is within the wetland buffer, everything that is done on the lot requires relief. The house is a little larger with coverage of 16.4%. Overall, the impervious surface is going to be reduced from 23.1% to 17.5% by using a pervious driveway. He turned the presentation over to Corey Colwell.

**Corey Colwell, MSC – TF Moran Engineering,** stated that there are seven hurdles that they tried to overcome in placing the new home on the lot. The existing home is very close to the road and well within the front yard setback. That means the driveway is short from Wentworth Road to the garage and the grade in a few spots is about 20%, which is much too steep. With the location of the house, the runoff from the roofline is coming down the driveway into a catch basin on Wentworth Road and is being discharged directly into Sagamore Creek untreated. The rest of the runoff is flowing back across the lawn directly into Sagamore Creek. Lastly, the septic system is outdated and is probably not providing adequate treatment of effluent. The

challenge was to site a home and septic system that brought those constraints into closer conformity. He continued the proposed home is two stories and has about 2960sf of living space. There will be a raised deck in the back with steps. There will be a covered porch and balcony in the front. The new home will be located further back from Wentworth Road than the existing home. It will be out of the front yard setback. It gives a much longer length to the driveway. A longer length means much shallower grade. The existing grade is about 20% and moving it back brings the driveway down to about 12%. The location of the new home also allows for a significant reduction in the amount of stormwater runoff that is flowing to Wentworth Road and into the catch basin. The roof runoff in the front will go into a permeable driveway. The rest of the roof runoff on the side will go into a raingarden. *(He pointed this out on the plan for the Board.)* Because the driveway is pervious, it allows for a reduction in site impervious coverage from 23.1% to 17.5%, which is a 5.6% reduction in impervious coverage. The location of the home allows for an enviro-septic system to be installed about 55' from the adjacent creek. This is almost the same location where the septic system is today. He noted that the septic design plan has not been submitted to the town or state. The plan was done to demonstrate that a septic system would fit on this lot. The system is designed to mitigate effects on the adjacent tidal creek. The key component of the enviro-septic system reduces biochemical oxygen demand and reduces nitrogen into the creek. This will be much cleaner effluent than what is currently flowing downslope towards that creek. The system is designed to handle three bedrooms. It has a 1250 gallon tank. There is 180 linear feet of enviro-septic pipe. It is a slightly oversized system to handle the proposed home.

Mr. Colwell noted that the plans have gone to the Conservation Commission with a site walk being held. The commission expressed some concerns. They were concerned about the home being placed closer to the creek than the existing home. At the site walk, it was demonstrated how the stormwater is much cleaner from the proposed home than the existing home with the raingarden and pervious driveway, such that very little runoff would get into the catch basin and then into the creek. He continued that under the deck and steps in the back, they are proposing an infiltration basin. All the roof runoff will either be captured by the pervious driveway, the raingarden or the infiltration trench below the deck in the back. Currently, all roof runoff is going into the catch basin then the creek or its running across the lawn directly into the creek. All that runoff has virtually been eliminated with the new design.

Member Durkin asked if the new structure will have a foundation.

Mr. Colwell confirmed.

Member Durkin asked if drilling will be necessary for ledge.

Mr. Cowell replied yes. He continued that they do not know how much drilling will be needed but some will be required.

Chair Weathersby noted that the plan says "concrete slab on grade".



**Shawn, Revision Construction**, explained that the front section of the house will be slab on grade. The rear portion will be a full basement. It will be a combination of a full basement with some slab on grade.

Member Durkin commented that the plan says slab on grade all the way through.

Speaking to the representative from Revision Construction, Chair Weathersby asked if he has a plan to show what is being proposed.

Shawn, Revision Construction, replied no. The change was made once they realized how the slope on the lot would affect these plans.

Mr. Colwell explained that a lot of what is on site dictates what can be done with the basement. As he understands it, the plan is to put this on a full basement. The plan has gone through several renditions but it is not going to affect coverage, runoff or any of the above ground features.

There was review and discussion about the plans.

Vice-Chair Crapo asked if the intent is to have a walkout basement, if excavation goes perfectly.

**Thomas Glasrud, applicant**, replied that it will not be a walkout.

Member Driscoll stated that what has been given to the Board says that the house is going to be built on a slab. If it has a full basement will the house look the same?

Mr. Colwell replied that the back would look different if there was a full basement. The architectural drawings are designed to show what the house will look like. The drawings do say "slab on grade". The only thing that would change is the rear elevation from the architectural drawings. He pointed out that the building height would not change. The building would just have more reveal in the back.

Chair Weathersby asked if fill is being brought in.

Mr. Colwell replied no.

Mr. Glasrud explained that anything in the back is going to be covered by the deck and will not be seen.

Mr. Colwell pointed out that the foundation wall will be seen below the deck. He continued this is out of the flood zone so they have some "play" with what is done with the foundation. The house does not have to be on piers or stilts. The idea was to get in there and do some digging to see if it is reasonable to put the full foundation in.

Chair Weathersby noted it is out of the flood zone but is in the tidal buffer. She asked if there is a freshwater wetland.

Mr. Colwell replied just a tidal. He continued that a 30ft wide vegetative buffer is being proposed adjacent to the creek in the back. This was recommended by the Conservation Commission.

Member Driscoll asked how affective the permeable paver driveway is at reducing runoff if it is sitting on top of ledge.

Mr. Colwell explained the ledge has to be excavated. If that is not done, it will not be permeable. What makes it permeable are layers of stone.

Member Driscoll asked the thickness of the soil subgrade layer.

Mr. Colwell stated that ledge would have to be removed to the bottom of that soil subgrade. There would be 6" of gravel, 6-8" of larger stone, 6-8" of small stone, 2" of smaller stone and the permeable pavers.

Vice-Chair Crapo commented this is approximately a depth of 22-24" from top of paver to the base.

Referring to the driveway, Chair Weathersby asked if they are excavating to reduce the slope.

Mr. Colwell explained that by moving the run back, they are starting at 2' lower than the existing garage. Some of the steepness can be taken out with excavation. He further explained that 12% is about as steep as they would go.

Chair Weathersby asked how much of the hill will need to be excavated.

Mr. Colwell replied that it is probably a couple of feet. It can be pulled back off the sides so retaining walls are not needed. He continued that the Conservation Commission reviewed the plans. Their summary is that the approved septic system and better stormwater management design mitigates some of the negative encroachment into the tidal buffer zone. In order to mitigate the extensive disturbance in the 100' tidal buffer zone, the Conservation Commission recommended a 30' vegetative buffer, no lawn or mowing in the buffer, and a buffer of native plants along the creek edge. With these conditions met, the Rye Conservation Commission does not have any objections to the project.

In regards to the septic, Chair Weathersby asked the depth to bedrock.

Mr. Colwell replied 32".

Member Driscoll stated that it seems a decent portion of the drainage is going to come down on the sides of the house, whereas the mitigation systems seem to be on the front and back.

Mr. Colwell explained the stormwater management plan shows how the roof is sloped in each location. *(He submitted copies of the stormwater management plan to the Board and reviewed for the Board.)*

There was review and discussion on the stormwater management plan.

Referring to the septic, Chair Weathersby stated that she is a bit concerned about the slope of the septic. She asked if they looked at putting the septic towards the front. She asked why they feel the proposed location for the septic is the best location.

Mr. Colwell explained that they did a lot of test pits. The deepest soil to water table is the location that is being proposed. That is also near the location of the existing system. *(He concluded his presentation.)*

Referring to the Conservation Commission letter dated June 5<sup>th</sup>, Attorney Phoenix noted that the Glasruds agreed to the conditions set forth. In regards to the requested building code relief for the septic system, the existing system is about 60' from the resource and the proposed is about 55.4'. There is a question as to whether this is needed because 301.8B (2) was amended in 2018, which provides for replacement of system in the same location as the system it is replacing. He pointed out this is essentially what is being done. He continued that under 603.2, if a house is taken down it has to be made more conforming, which cannot be done on this lot because the location of the wetland and the setback line. In some respects, it is being made more conforming because the existing house violates the front and side setbacks and the proposed home complies. Referring to 7.9.4.4, he noted that the slope is less than 15% and the notice says greater than 15%. He is not sure where this came from but he does not think it is 15% or more. He asked the Board if they are comfortable with the foundation.

Speaking to Mr. Colwell, Vice-Chair Crapo asked if there will be any changes to the numbers for runoff, drainage or fill if the basement is excavated to a full basement.

Mr. Colwell replied that it won't affect the numbers because it will not change the footprint or impervious area.

Chair Weathersby asked if the infiltration area abutting the foundation wall would be a concern.

Mr. Colwell replied no. The bottom of the infiltration area slopes down towards the creek. The biggest advantage is that the runoff right now is untreated and with the infiltration area it will be treated. It will go through the sand and follow the contours to the creek. The water will not get into the house. The natural flow of water is still down towards the creek.

Chair Weathersby asked if the stormwater management plan was done based on slab on grade.

Mr. Colwell reiterated that it wouldn't change because only the roof-cut is taken into consideration for the stormwater management plan.

Referring to the abutter (Blunt Island Trust) on the other side of the creek, Member Durkin asked if they have been shown these drawings.

Member Dibble commented they are on the abutter's list.

Mr. Colwell stated that Blunt Island Trust is a client of his. He was shown the plans a few weeks ago and he did not have any concerns.

Attorney Phoenix reviewed the criteria for granting the variances.

- The variances are not contrary to the public interest and the spirit of the ordinance is observed. Under the Malachy Glen Case, and subsequent other cases, is whether granting the variance would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objective. Does it alter the essential character of the locality or threaten the public health, safety or welfare? The public health, safety and welfare is vastly improved by this project. As far as the central character of the locality, an old obsolete home is removed in favor of a new and tastefully designed home. There are very large and new homes up and down Wentworth Road. The existing home is different in terms of the locality. The proposed home will meet and fit in with the character of the locality. The health, safety and welfare is improved.
- Granting the variances will not diminish surrounding property values. The existing home probably diminishes property values because of its age, condition and lack of stormwater treatment. Granting the variances will not diminish surrounding property values but will probable enhance them.
- Special conditions exist that distinguish the property from properties in the area. Because of the location of the creek and the existence of ledge in the front, there is nowhere else to put a house. The house has been sited optimally to allow the septic to go in the best soils location, to allow the slope of the driveway to be reduced and there is ledge in the front. These factors combined are the driving factors creating special conditions that require this relief. Even the existing home today, would essentially require the same kind of relief.
- No fair and substantial relationship exists between the public purposes of the ordinance and its application in this instance. The building coverage is designed to provide adequate air, light, space, and stormwater treatment. Given the size and placement of the home on the lot, that intent is met, particularly since the more important coverage issue is the overall impervious coverage. There is no reason to apply the coverage limitation requirements in this case. As far as the wetland setback, this is much better than what is there today.
- The proposed use is reasonable. It is a better single-family home, which is reasonable.

- Substantial justice will be done by granting the variances. The test is if there is no benefit to the public that would outweigh the hardship to the applicant, this factor is satisfied. Any loss to the applicant not outweighed by gain to the public is an injustice. The Sagamore Creek resource is better protected by the new septic system and the stormwater treatment. There is no benefit to the public by denying of the variances. In fact, the public is worse off if things stay the way they are. There will be a great injustice to the Glasruds because they will not be able to build a new home with new septic and driveway.

Member Driscoll asked for the details of the fence that is going around the whole property.

Mr. Colwell replied that the purpose of the fence is to contain the Glasruds' dogs on the property.

Mr. Glasrud explained that they are envisioning a fence that can be seen through along the water line in the back. Along the sides, the fence will be a 4' solid so the dogs will not get through.

Chair Weathersby opened to the public.

**Bob Devore, 11 Wentworth Road**, stated the he and his wife are in support of the application with some caveats. It is a very small lot that is very intensively developed. He compliments the architects for the quality of the design. It is very well done and fits very well within the neighborhood. His concern is with the absence of the detail of the site. There is a lot of detail on the architectural drawings but there is not a lot of detail on the site plans. The runoff issues on this site are critical. There is an abundance of ledge. He continued that the proposed fence around the property very much affects his view into the harbor. He noted that he also has a dog, and in order to not restrict the views, he put an invisible fence around his property. He would like to see a good project next to him.

Member Durkin asked what the caveats are that he is asking for.

Mr. Devore replied that he would like to see more details on the site plan, such as the landscaping and the elevations in the back. Also, the driveway issue is critical.

Speaking to Mr. Colwell, Member Durkin asked if additional details are possible, given Mr. Devore's comments.

Mr. Colwell stated that the Conservation Commission expressed the desire to see a landscape plan for the 30' vegetative buffer. They made that a recommendation for any type of approval. The applicant intends to do this and features of the stormwater management plan could be shown also. The grades could also be shown on the plan.

Speaking to Mr. Glasrud, Member Durkin asked if the fence is something he would reconsider.



Mr. Glasrud explained that an invisible fence does not keep dogs on the outside from coming in. From a liability perspective, he had concerns about that.

Attorney Phoenix stated that he appreciates the spirit of the comments; however, legally he wants to be careful of who approves what. Landowners have rights and the applicant is before the Board for certain variances. He does not think there is an issue with sharing information on what is being done; however, he wants to be careful of who has veto power and who has approval power over landscaping and fences.

In regards to the fence, Vice-Chair Crapo stated that as long as it is not too tall a fence or encroaching on the line, it is not before the Board. Unless the abutter has an easement in his deed that says he has a view easement to the water (right at the foot of the property), the applicant can have a fence.

Chair Weathersby stated that she disagrees. She has a concern about the fence because it involves fence posts that are going to be put into the buffer every six feet. This is further disturbance to the buffer that may be unnecessary.

Attorney Phoenix stated that he believes that fences are exempt from any dimensional setback requirements under the ordinance. He would argue that this would include wetland buffers. He pointed out that invisible fences require excavation as well.

Mr. Colwell noted that the project requires three more permits; a septic approval, wetlands and shoreland permit. The NH DES Wetlands Permit covers anything within 100' of the tidal wetland. That would have to go back before the Conservation Commission and the impact would go on that plan. If there is a fence, the posts and the impact would be quantified and put on the wetlands permit plan. He does not think the fence requires relief from the BOA, as long as it meets the height and is one foot off the property line.

Chair Weathersby commented it is the disturbance of the buffer under 301.8B.

Hearing no further comments, Chair Weathersby closed the public hearing at 9:18 p.m.

Referring to the landscape and grading plan, Chair Weathersby stated that it would be nice to have; however, she does not think they need it to decide on the application. She commented that it sounds like the applicant is willing to put it together for information purposes.

Vice-Chair Crapo stated that it is being represented that they will observe the 30' strip for the plantings the Conservation Commission has recommended. This does not have anything to do with the BOA but it does for the Conservation Commission.

Chair Weathersby stated that we could have them produce a landscaping plan that is acceptable to the Rye Conservation Commission as part of the conditions.

Member Driscoll asked what the enforcement is in regards to the native plantings.

Member Durkin commented there is no enforcement.

Chair Weathersby noted that the condition would be that they are planted and maintained. If it comes to someone's attention that the plantings are not there or have died, then they are not there and it is a violation.

Member Dibble stated that there was discussion on plantings inside the fence. In looking at the slope of the grade, it goes from 14' to 0' at a very narrow range. It is almost impossible to walk on it. It doesn't look like a condition of plantings in that range would represent any hardship, in terms of loss of the yard.

Chair Weathersby commented that it sounds like the Board may want a landscape plan produced and brought before the Rye Conservation Commission to make sure it meets the conditions set forth in their letter.

Member Durkin replied yes.

Member Driscoll commented that the raingarden is not in the Rye Conservation Commission's letter. He asked if this should be added.

Chair Weathersby asked if the Board would like a plan showing all features of the stormwater management plan and the recommendations of the Rye Conservation Commission.

The Board agreed.

Referring to the Conservation Commission's letter, Member Dibble stated that it talks about "no lawn mowing" but it does not particularly say in the "tidal buffer". He noted that the tidal buffer runs through the house, which would preclude any lawn mowing in the backyard. This would represent a hardship in his mind. If they are saying there needs to be compliance with the Conservation Commission's opinion, they might want to consider that a hardship.

Speaking to Sally King, Conservation Commission Chair, who was present at meeting, Chair Weathersby stated that one of the RCC's recommendations is that there will be no lawn mowing in the buffer. She asked if they mean the tidal buffer.

Mrs. King confirmed. They were asking for more than what is traditionally asked for because it slopes down pretty dramatically. She continued that the Commission is trying to discourage nitrogen use of any kind in the buffer zone.

Member Dibble clarified that the tidal buffer runs through the house. This would preclude any type of mowing in the backyard.

Mrs. King confirmed. The Commission is trying to discourage lawn.

Vice-Chair Crapo asked if the leachfield would be left natural.

Mrs. King stated that she does not want to speak out of turn and she has not looked at the letter in a couple of days.

Vice-Chair Crapo commented that if they are saying not in the tidal buffer that would leave the front yard only.

Mrs. King stated that there is no front yard right now. It is all ledge.

Speaking to Mr. Colwell, Vice-Chair Crapo asked what is acceptable in the area of the leachfield. If there is no mowing, and it goes to field grasses, that could end up as small brush which becomes big brush, and will result in a dead leachfield.

Mr. Colwell stated that there has to be a lawn over the leachfield. He continued that at the site walk with the Conservation Commission it was discussed that the whole thing would be lawn between the house and the creek. The commission said that they did not want that much lawn and recommended that it be planted with at least a 30' vegetative buffer. It was very clear to him that the lawn mowing was only restricted in the vegetative buffer. He reiterated that they were very clear to the commission that there would be lawn in the backyard. If there is no lawn over the leachfield, it will fail. The roots will grow into the pipes and the system will fail. The state and all designers recommend putting nothing but grass over the leachfield. He noted that they would not have a problem with using organic fertilizers only in the 100' buffer. There are organic fertilizers with very low or no nitrogen that can be used on lawns.

Speaking to Vice-Chair Crapo, Member Durkin asked his thoughts on the slab versus foundation and its impacts. It is very likely that ledge will need to be pulled out. That must have some impact.

Vice-Chair Crapo stated that his concern in the past on different applications has been when the water is going towards the house and being on a slab it would percolate under versus having a 10' barrier.

Member Durkin asked Member Driscoll his thoughts.

Member Driscoll stated that the elevation is high enough that the basement does not concern him that much. He does not see it affecting any of the abutters.

There was discussion on possible conditions.

Chair Weathersby stated that she is okay with the project, except for the fence.

Member Durkin commented that it is more invasive to the buffer. He does not feel it is necessary. He would support the proposal without the fence.

Vice-Chair Crapo stated that nothing before the Board is granting permission or a variance for the fence.

Chair Weathersby stated that they are giving relief to alter the surface of the buffer, 301.8B (1) & (7), is for all surface alteration so that includes the fence. She reviewed the conditions the Board agreed to:

- Comply with the recommendations of the Rye Conservation Commission's letter dated June 5<sup>th</sup>. (With the interpretation that there will be no lawn mowing in the vegetative buffer.)
- Install and maintain the raingarden, pervious pavers, storm infiltration areas and all other features of the stormwater management plan.
- Organic fertilizer only.
- Approval of NH DES Permits; shoreland permit, wetlands permit and septic.

Chair Weathersby called for a vote to Section 603.2, tear down and rebuild, 203.3E and 304.5 *for dwelling coverage of 16.4% (It was later determined that this variance was not needed.)*

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

**3. Substantial justice is done?**

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby – Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby – Yes



Chair Weathersby called for a vote on 301.8B (1) for surface alteration for everything but the fence:

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

**3. Substantial justice is done?**

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby – Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby – Yes

Vice-Chair Crapo asked why they would be voting on surface alteration for the fence if it is allowed.

After review of the ordinance, Chair Weathersby agreed that fences were allowed and that variance was not needed.

Chair Weathersby called for a vote on 301.8B (2) (5) and (7) septic and house in the 100' buffer, tree removal and all other uses:

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

**3. Substantial justice is done?**

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby – Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby - Yes

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

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby – Yes

Chair Weathersby called for a vote on building code waivers for 7.9.2.5, septic within the 75' wetland buffer, 7.9.4.1, septic within 100' tidal marsh setback, 7.9.4.3, septic less than 36" from bedrock and 7.9.4.6, septic slope greater than 15.1% and 7.9.6, new construction methods:

- **Would enforcement of those five sections of the building code do manifest injustice and would be contrary to the spirit and intent of the building code and public interest?**

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – Yes  
Burt Dibble – Yes  
Patricia Weathersby – Yes

Vice-Chair Crapo noted that 304.5 does not to this property because it is not in the Coastal Overlay District.

Chair Weathersby agreed that a variance to 304.5 is not needed and should be removed from the first vote.

**Motion by Burt Dibble to approve the application of Thomas and Laurie Glasrud for property owned and located at 5 Wentworth Road for variances and building code relief as advertised, with conditions that the landscaping be in accordance with the June 5, 2018 Conservation Commission letter, including no mowing in the vegetative buffer setback and the use of organic fertilizers only; it be constructed in accordance with the stormwater management plan and all NH DES Wetland, Shoreland and septic permits are obtained. Seconded by Shawn Crapo. All in favor.**

Chair Weathersby suggested that they hear the administrative appeal for Tuck Realty and if necessary hear the second part in August.

**Motion by Shawn Crapo to continue the applications of Stevan Huff, Ken Dionne, Richard Beauchesne & Patricia Healy, and Ocean View Trust. Seconded by Burt Dibble. All in favor.**

**Note: Burt Dibble recused himself for the Tuck Realty application and Charles Hoyt was seated.**

- 4. Tuck Realty Corp for Joseph W. Goss for property owned and located at 0 Ocean Blvd, Tax Map 8, Lots 58 & 59, requests an administrative appeal pursuant to Section 701.1, of the decision of the Rye Planning Board dated May 8, 2018 – that proposed Lot 5 on the Goss Grant Subdivision Plan does not meet the frontage “access” requirements of the RZO Sections 202.14, Section 203.3F and Appendix A. Property is located in the Single Residence District and Coastal Overlay District. Case #23-2018.**

**Attorney Phoenix, representing the applicant,** presented to the Board. He explained the proposal is for four lots to be accessed off the new cul-de-sac that will be built. The lots will have frontage on the cul-de-sac. The fifth lot has about 400’ of frontage on Ocean Boulevard and about 60’ of frontage on Locke Road. The proposal is for four lots with access off the cul-de-sac and one lot with access off Locke Road. This was presented preliminarily to the Planning Board a few months ago and they raised a concern about them taking a position on whether or not the 60’ could be considered as accessible frontage, or whether the access has to be over the 400’ of frontage because the ordinance requires 200’ of frontage. There is well over 200’ of frontage off Ocean Boulevard they do not want to use because of the marsh. Instead, they would like to bring the access across the 60’ of frontage. He continued that after the Board raised that issue, he submitted a letter to them with supporting facts, as to why relief is not needed from the BOA to access the lot off the 60’ frontage. The Planning Board disagreed and this administrative appeal was submitted. He noted that he was before the BOA six years ago with a very similar situation with the Hoefle Subdivision, where the Planning Board took the same position. In that case, there was over 200’ on Garland Road and 40’ of frontage on the new cul-de-sac. The applicant wanted access off the cul-de-sac. The Planning Board said “no”. It was appealed to the BOA who very quickly and unanimously found that a variance was not needed and the lot could be accessed. He noted that it was argued that the 200’ on Garland Road could be used to meet the linear requirement but access could be off the cul-de-sac. The Planning Board interpreted the intent of the ordinance was to have access to the lot over the frontage that meets the 200’ requirement. This Board said it was not true then and he says it is not true now.

Vice-Chair Crapo stated that the difference was that it was said that the “teardrop” could be made bigger to have frontage on that side but there is Garland Road frontage. The application that is before the Board tonight would need a boat. The viable frontage on Garland Road does not directly compare. In his mind, it is not “apples to apples”.



Attorney Phoenix stated the he respectfully disagrees. He continued that the Planning Administrator wrote a memo that outlined the history of this and the history of the ordinance. One of the points she made is the Planning Board feels there is a difference because on this proposal there is a marsh that would be very difficult to cross. In the Hoefle Subdivision, it was argued that it could be driven over; however, it can't. He noted that Exhibit E is the administrative rules with respect to well radii and the sanitary protective area. The sanitary protective area is a circle centered on the well having a radius based upon the permitted production volume of the well. In this case, it was 400'. The sanitary protective area shall be maintained in a natural state at all times, except as necessary for limited land clearing and terrain alteration required for well access and construction of a pump house or structures related to the well or water systems. No persons shall discharge into the sanitary protective area any drainage from any roadway, parking lot or other area on which vehicles of any type travel or are parked. He stated that the fact is it is physically difficult to get to the lot over the marsh from the frontage on Route 1A, where there it was legally impermissible to cross because it was going through the well radius.

Chair Weathersby stated that the way she remembers this is the lot could've been accessed off Garland but it would've impacted the well radius, or Marjorie Way could be reconfigured such that frontage could be acquired for that lot but that would bring the houses closer to the well radius as well. Everyone agreed that environmentally, the access off Marjorie Way was the best way to go.

Attorney Phoenix explained that this was the discussion at the Planning Board. The Zoning Board was based upon the ordinance. This is what was approved, without a variance, because of the decision of the ZBA supporting what is being argued now. The ordinance says there has to be 200' of frontage and access has to be over its own lot. He noted that Shawn Crapo voted to approve it in the case of the Hoefle Subdivision. The facts of access over less than 200' frontage and the 200' frontage somewhere else are identical.

Referring to the Tuck Realty proposal, Member Durkin asked what the basis was for determining the lot. He asked how the lot was created.

Attorney Phoenix explained there are two overall lots that are being proposed to be combined and re-subdivided into this lot and four other lots.

Member Durkin clarified that this is a proposed lot.

Attorney Phoenix confirmed.

Vice-Chair Crapo pointed out the 60' is on Locke Road, not the proposed cul-de-sac.

Attorney Phoenix confirmed.

Vice-Chair Crapo noted that this is not “apples to apples”. This is accessing the lot off Locke Road, not the cul-de-sac. The comparison was to make the cul-de-sac larger to accommodate the frontage.

Attorney Phoenix stated that they cannot look at what could have been done. They have to look at what was done. The Planning Board said that the Hoefle lot was not permissible that way and the BOA said “yes, it was”. In the Hoefle Case, Attorney Michael Donovan gave the following opinion; “The ordinance says that a lot has to have access over its own frontage; however, it does not say it has to be over the minimum frontage. In terms of the zoning requirement, as long as the lot has a driveway coming through its frontage, it does not say it has to come from the 200’ of frontage. The lot itself is legal in that it has the 200’ of frontage, more than that, and only 40’ on the cul-de-sac. As long as it has access coming from or the other of these places it meets zoning”. He pointed out that this is what the BOA found. He continued that the reason that frontage is needed is to access the lot. There are many other reasons as to why it is 200’, such as having separation from neighbors, prevent overcrowding, to provide site lines, air, light, space and stormwater treatment. All of those reasons are met. The only thing that is not met is accessing the buildable portion of the lot over the place where there is 200 linear feet of frontage. He continued that the ordinance says in this district “the frontage of any lot shall be at least 200 feet”. This is RZO Section 203.3F. In 203.14, it goes on to say “access to a lot shall be over its own frontage. While a lot may be reached via a shared driveway by permission of the Planning Board for safety reasons, a lot shall not be considered suitable for development, unless it is accessible over its own frontage”. The definition of frontage in the appendix of the zoning ordinance says “a frontage is all that continuous side of a lot or tract of land abutting on one side of the street or proposed street measured along the street line”. He would argue that there is 200’ of frontage and there is access over the lot’s own frontage.

Attorney Phoenix stated that “access” is defined in the dictionary as “the means or opportunity to approach or enter a place”. The Rye Driveway Regulations define it as “a way to or means of approach to provide physical entrance to a property”. Nowhere does the ordinance say, or imply, that the access to a lot has to be over the 200’ of frontage that provides the linear length. That is what Attorney Donovan opined back in 2012. He may have opined it again in 2018 because the Notice of Decision issued by the Planning Board said “sometimes Attorney Donovan is wrong”. He takes it that Attorney Donovan has the same position now. He continued that the Planning Board has injected its interpretation of the spirit and intent of the ordinance when they are not permitted to do so. “Any alleged implied meaning or intent is not relevant. N.H. construes the language of the ordinance according to its common and approved language using the intent of the drafters from the words of the ordinance considered as a whole. When the language of an ordinance is plain and unambiguous, you need not look beyond the ordinance itself for further indications of legislative intent and we will not guess at the drafters of the ordinance might have intended or add words that they did not seek to include”. He noted that the town has a very clear ordinance that says what is frontage. It says that there has to be access and they have access. Nowhere does it say the access has to be over the linear feet. Since it does not say that, neither the Planning Board, nor the BOA, can interpret it in a way other than the way the words read. In fact, from 2000 to recently, this issue has come up from time to time. The Planning

Administrator did a great job in looking at discussions from committees looking at various ordinance changes. There were several times the frontage issue was discussed; however, they never changed it. It still reads the same way it has all along, just like it did in Hoefle. He noted that he does not think the Hoefle comparison is really even necessary because standing alone, all of the requirements are met under the ordinance for access to the lot. He has found nothing that would be a legitimate dispute.

He stated that the Planning Board's Notice of Decision said the Hoefle appeal may have been different had the Planning Board or others opposed it before the ZBA. That is totally unreasonable and unfair. The decision was the decision. They also mentioned that the legislative history was not part of the Hoefle decision and that is not accurate. He searched the legislative history back and found that there was some talk about it but there was no discussion on why the words were the way they were and what was meant by them. There was no intent found. Finally, he thinks it was unreasonable for the Planning Board to have ignored the advice of its counsel and the decision the Zoning Board made six years ago. He feels very strongly that the Planning Board got this wrong. The ordinance is the same. The situation is the same. The ordinance says that if there is access on one frontage and enough linear frontage somewhere else, it meets the requirements. He is asking the Board to overturn the decision of the Planning Board, just like it did six years ago.

Chair Weathersby opened to the public in favor of the appeal. Hearing no comments, she opened to the public in opposition in regards to the frontage only.

**Anne Decker, Harbor Road**, stated that there are five lots proposed. This is a proposed lot. It is not an existing lot. Because this is on marsh land, and because of the vulnerability of the flood zones, this is an important reason to change the lot size to have four lots rather than five lots. There are many residents who have written about their concerns regarding the boundaries and letting the frontage be 200'.

**Sally King, Wallis Road, Conservation Commission Chair**, stated that she has a concern that frontage over a wetland is being counted, when there is probably a better appreciation than there was six years ago, of the fragility of that land. Attorney Phoenix was saying that they do not want to go over the wetland side. She noted that it is not a given that they can go over the wetlands side. It is precedent setting. If they start to say that frontage on wetlands is frontage, it would be very dangerous for the environment in the seacoast and Rye in particular.

Chair Weathersby stated that she does not think they are saying frontage on wetlands. She thinks they are saying frontage on Ocean Boulevard.

Mrs. King noted that access over that would be going over wetlands, which they assume is a possibility. She assumes it is not.

Ms. Decker commented that she sent pictures showing the flood in March and the frontage on Ocean Boulevard. It was flooded in this location.

Chair Weathersby noted that letters were received from:

- Anne Decker
- The Winslows
- Rye Conservation Commission
- The Fennesseys
- The Tooheys
- Ann Malpasse

She noted that most of the letters address the wetlands, flooding, stormwater and the marsh. The letters do not deal with the definition of frontage.

Member Hoyt stated that he thinks Attorney Phoenix has proven his case. There are all these objections and he understands that. It is a sensitive area and there are wetlands to address. In looking at the application and what is being asked for, in his opinion, Attorney Phoenix has made his case. He pointed out that the applicant is going to come back for other issues down the road.

Attorney Phoenix stated that the points of Mrs. King and the neighbors are well taken. He understands there are legitimate concerns. The applicant is in the process of dealing with those issues. All the voices will be heard. Some of the letters have also been submitted to the Planning Board which is the proper forum for those. This Board deals with very technical issues. What does the ordinance say with respect to frontage and access? There is support in the ordinance in other sections for not having to go over the frontage that meets the 200' frontage requirement. A shared driveway is an example. A corner lot is another example, which requires 200' of frontage and the driveway to be on the lessor travelled street. Even though this is not a corner lot, the exit is to the lessor travelled street and it is not crossing a wetland. He noted that they really do not have to get into any of those things because the words of the ordinance is so clear. There has to be frontage and there has to be access over its own frontage. Nowhere does it say that the access has to be over the 200' of frontage.

Vice-Chair Crapo stated that he assumes the access has to be legitimate access. He asked if the Public Works Director has reviewed this. He asked if the proposed stretch would support a proper driveway permit.

Attorney Phoenix stated that he does not know the answer to that yet but that is not before the Board. The ordinance says there has to be access over its own frontage. The Planning Board will determine if the requirements are met. The BOA does not determine whether the applicant ends up getting the access. The Board determines whether they meet the definition of access. The definition of access from the driveway regulations states "access is a way or means of approach to provide physical entrance to a property". He pointed out that access is there. Whether it is subsequently approved by the Planning Board or not, it is still access under the town's definitions.

Chair Weathersby explained that the Board is not passing the satisfaction of the access. They are asking if the Planning Board misinterpreted the zoning ordinance when they determined that the larger frontage could not be used to meet the frontage requirement.

Vice-Chair Crapo stated that if a driveway cannot be approved over what they are saying is the frontage, in his mind it cannot be considered frontage.

**Mike Garrepy, applicant**, stated that this is a good question but it might not be applicable to this application. He continued that they are more than willing to go to the Planning Board to take the next step. He is working with the road agent on all the road design issues.

Attorney Phoenix commented that they cannot go back to the Planning Board until this issue is resolved. Final use of the property, building a house and a driveway, is yet to be determined. Right now, the question is, does this meet the definition of frontage? Yes, in two places. Does this meet the definition of access to the lot over its own frontage? The answer is definitely yes.

Hearing no further comments, Chair Weathersby closed the public hearing at 10:45 p.m.

Member Durkin stated that from a practical standpoint it makes absolutely no sense. The 400' of frontage is under water. He supports the Planning Board's decision.

Member Driscoll stated that Attorney Phoenix is saying that it is very clear what the zoning says. However, the frontage is where someone would access their home, in most cases, and that's what common sense tells him. He does not think they need to make the zoning ordinance 3,000 pages to make sure all these things are clarified. In looking at what they use to vote on variances, he would look at the spirit of the ordinance; however, they are not talking about spirit of the ordinance right now. He feels like he is being lawyered. It is leaned this way because some inconsistencies or verbiage is left out of the ordinance. Unfortunately, he cannot find any way to bring himself to vote against the request.

Member Hoyt agreed. It would seem logical to have the access on the frontage that meets the requirement of 200'; however, that is not how the ordinance is written. He is "checkmated" into saying that he agrees with the proposal. He commented that the applicant has a long road in front of them. There are all kinds of issues to overcome. However, he is convinced the Attorney Phoenix has presented a good case on the issue in front of him.

Vice-Chair Crapo stated that from a technical standpoint, he thinks they can use the frontage. He asked if they need to review the denial letter. The Planning Board's reasons for denial are very thin.

Chair Weathersby explained that the Board has to determine whether there was an error in the determination of the Planning Board. The reasons don't have to all be gone through. It is pretty clear that they denied it because they felt it didn't comply with the frontage and access requirements of the Rye Zoning Ordinance. In regards to the application, she continued that she



does not like it either. The definition of frontage has been an issue for years. She is frustrated that it is still an issue and things like this are able to be brought in. She is not opposed to a smaller frontage being used when there is a larger one; however, she thinks there should be access over both of them to allow that to happen. She noted that this is not how the ordinance reads right now. She personally thinks that they meet the 200'. They meet the requirement that the access has to be over its own frontage. They meet the definition of frontage. Being a lawyer, she follows that path to determine whether their decision was correct or incorrect. She would reluctantly have to agree that their decision was an error.

Vice-Chair Crapo stated that he does not like it for the Town of Rye but he agrees from the legality standpoint.

Referring to the Planning Board's decision of May 8, 2018, where it found that newly configured lot 5 does not comply with the access requirements of the zoning ordinance, Chair Weathersby asked if there has been an error

- **In enforcement of the zoning ordinance that was adopted in accordance with RSA 674:16?**

Shawn Crapo – Yes  
Patrick Driscoll – Yes  
Tim Durkin – No  
Charles Hoyt - Yes  
Patricia Weathersby – Yes

**Motion by Shawn Crapo to grant the administrative appeal of the applicant. Seconded by Charles Hoyt. Vote: 4-1 Opposed: Tim Durkin**

5. **Tuck Realty Corp for Joseph W. Goss for property owned and located at 0 Ocean Blvd, Tax Map 8, Lots 58 & 59, requests variances from Section 202.14, 203.3F and Appendix A "frontage definition" to access for a proposed lot 5 of the subdivision over 59' of frontage along Locke Road in lieu of the frontage on Ocean Blvd. Property is in the Single Residence District and Coastal Overlay District. Case #23-2018.**
- **Attorney Phoenix withdrew the application without prejudice.**
6. **Stevan E. Huff for property and located at 1611 Ocean Blvd, requests variances from Section 603.1 for expansion of a non-conforming structure, from Section 204.3B for a deck and spiral stairway 9.8' from the south side boundary and 6.3' on the north side boundary where 20' is required; and from Sections 301.8B (1) (2) & (7) for construction 50 +/- within 100' tidal wetlands buffer. Property is in the General Residence and Coastal Overlay Districts. Case #25-2018.**
- **Continued to the August meeting.**

7. **KRD Builders, Inc. – c/l Ken Dionne of 106 Chestnut Hill Rd, Amherst for property owned by Bradford S. Sterl of 3 Hollow Rd, Bow, NH and located at 8 Old Ferry Landing Rd, Tax Map 24, Lot 97, requests an equitable waiver per Section 701.4 of the RZO for a house height that exceeds maximum height of Section 203.3G by .67 ft. where 35' is required. Property is in the Single Residence District. Case #26-2018.**
  - Continued to the August meeting.
8. **Richard Beauchesne & Patricia Ann Healy of 46 Mountain Rd, Camden, ME for property owned and located at 0 Cable Rd, Tax Map 8.4, Lots 76-1 and 76-2, request variances from Section 304.4 for building height of 30' where 28' is required; from Section 601 to build a house on two non-conforming lots, which, when merged will remain non-conforming; and from Section 304.5 for dwelling coverage of 16.3% where 15% is required. Property is in the General Residence, Coastal Overlay District. Case #27-2018.**
  - Continued to the August meeting.
9. **Ocean View Trust, Timothy E. Sandborn, Trustee for property owned and located at 753 Ocean Blvd, Tax Map 23.1, Lot 16, requests variances from Section 603.1 for expansion on a non-conforming structure; from Section 204.3B for addition 11.5' from the south side setback where 20' is required; and from 204.3C for an addition 16.2' from the front setback where 30' is required and building code relief from Section 7.9.7 and 7.9.6 for an ISDS Plan that shows a separation of 24" from seasonal highwater table where 48" is required. Property is in the General Residence, Coastal Overlay Districts. Case #28-2018.**
  - Continued to the August meeting.

#### **IV. Other Business**

Vice-Chair Crapo asked if there was a process that could be put in place to assure the applicants go before the Board with everything that is needed for the application. There have been several applications over the past few months that are not complete and have to be sent away.

Zoning Administrator Reed stated that she has been told that she cannot deny an application from being heard by the Board. It has to be sent to the Board and that is their decision.

Chair Weathersby stated that it would be helpful if the applications that are deficient be flagged to give notice to the Board. The Board can then see right away what is missing and can decide if they want to continue to hear the application.



Vice-Chair Crapo noted that it is unfair that applicants are being continued to the next month with their projects being delayed for thirty days because the Board spends forty-five minutes on an application that was not complete. He continued that they have developed a procedure and checklist for the process. If the application does not meet that checklist, Mrs. Reed should be able to turn it away. There needs to be some bar as to the minimum that can be submitted.

Member Hoyt commented that if the application does not meet those points it can be turned down. Those points are available to everyone and are in written format.

Mrs. Reed explained that when the applications used to be turned in to her, she would go through the checklist with the applicant and go through the submittals. She has now been eliminated from that process and the applications are turned in directly to the building department.

Vice-Chair Crapo stated that he would like to request that Attorney Donovan look into that procedure. He thinks it is a flawed procedure to have the person whose denial letter is being appealed, accepting and reviewing the appeal application and running the process. To him, that seems like a conflict of interest.

The Board agreed that the applications should be submitted to the Zoning Administrator.

Chair Weathersby agreed to follow up on this issue.

### **Adjournment**

**Motion by Shawn Crapo to adjourn at 11:00 p.m. Seconded by Patrick Driscoll. All in favor.**

***\*All corresponding paperwork, documents and files may be viewed in the building department at the Rye Town Hall.***

Respectfully Submitted,  
Dyana F. Ledger

# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

**Applicant/Owner:** Micahel J. Simchik


**Property:** 260 Pioneer Road, Tax Map 24, Lot 110

**Application case:** Case # 19-2018

**Date of decision:** July 11, 2018

**Decision:** The Board voted 5-0 to grant variances from the following section of the Zoning Ordinance:

- Section 301.8 B (1) & (7) for a generator 15' +/- within the 100' tidal wetlands buffer.



Shawn Crapo,  
Vice-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:** Edward N. Herbert Assoc. Inc., for property owned by  
Cara C. Zohdi 1998 Trust of 1 Frost Road, Windham, NH

**Property:** 4 Winslow Way, Tax Map 17, Lot 75-1

**Application case:** Case # 20-2018

**Date of decision:** July 11, 2018

**Decision:** The Board voted 5-0 to continue the application to the August 1, 2018  
meeting so that the applicant could provide additional information. .



Patricia Weathersby  
Chairman

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# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

**Applicant/Owner:** Thomas & Laurie Glasrud of 35 U Columbia Street, Portsmouth

**Property:** 5 Wentworth Road, Tax Map 26, Lot 15

**Application case:** Case # 21-2018

**Date of decision:** July 11, 2018

**Decision:** The Board voted 5-0 to grant variances from the following sections of the Zoning Ordinance:

- Section 603.2 to tear down an existing house and replace with new;
- Section 203.3E for dwelling coverage of 16.4%;
- Section 301.8B (1) for surface alteration within the tidal wetlands buffer
- 301.8B (2) for septic system 55.4' within the tidal wetlands buffer;
- 301.8B (5) for the removal of 6 trees within the 100' tidal wetland buffer; and
- 301.8B (7) for a septic system and dwelling 55.4' and 76.1' within the 100' tidal wetland buffer.

The Board voted 5-0 to grant Building Code Relief from the following sections of the Building Code:

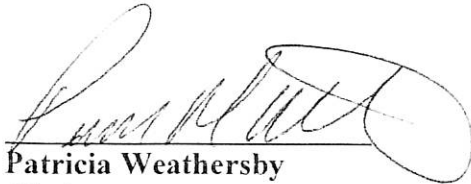
- Section 7.9.2.5 for a septic system 55.4' within the 100' tidal wetland buffer
- Section 7.9.4.1 for septic system 55.4' within the 100' tidal wetland buffer;
- section 7.9.4.3 for septic system 32" from bedrock;
- Section 7.9.4.4 for septic system with a slope of 15.1% +/-; and
- Section 7.9.6 for the septic system not meeting new construction standards.

**Each variance and building code relief was granted upon continued compliance with the following conditions:**

1. The applicant adheres to the recommendations of Rye Conservation Commission as set forth in its June 5, 2018 letter with the clarification that there is to be no lawn in the vegetated buffer (rather than entire tidal wetlands buffer);

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2. The applicant installs and maintains rain garden, pervious pavers, stone infiltration area and other stormwater features as shown on the applicants stormwater management plan dated May 23, 2018;
3. The applicant only uses organic fertilizers; and
4. The applicant obtains approved wetlands, shoreland and septic system permits from NH DES based on the plans presented.



Patricia Weathersby  
Chairman

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# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

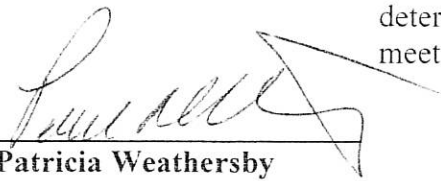
**Applicant/Owner:** Tuck Realty Corp for Joseph W. Goss

**Property:** 0 Ocean Blvd, Tax Map 8, Lots 58 & 59

**Application case:** Cases # 23-2018 and 24-2018

**Date of decision:** July 11, 2018

**Decision:** The Board voted 4-1 to grant the applicant's administrative appeal, finding the Planning Board erred in its decision of May 8, 2018 when it determined that proposed lot 5 of the Goss Grant Subdivision did not meet the frontage requirements of the zoning ordinance.



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

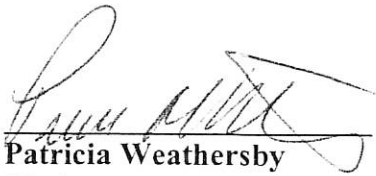
**Applicant/Owner:** Stevan E. Huff

**Property:** 1611 Ocean Blvd, Tax Map 13, Lot 27

**Application case:** Case # 25-2018

**Date of decision:** July 11, 2018

**Decision:** The Board voted 5-0 to continue the application to the August 1, 2018 meeting.



Patricia Weathersby  
Chairman

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# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

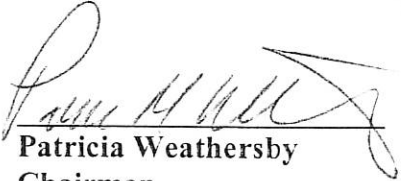
**Applicant/Owner:** Richard Beauchesne & Patricia Ann Healy  
of 46 Mountain Rd, Camden, ME

**Property:** 0 Cable Road, Tax Map 8.4, Lots 76-1 and 76-2

**Application case:** Case # 27-2018

**Date of decision:** July 11, 2018

**Decision:** The Board voted 5-0 to continue the application to the August 1, 2018 meeting.



Patricia Weathersby  
Chairman

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# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

**Applicant/Owner:**

Ocean View Trust, Timothy E. Sanborn, Trustee

**Property:**

753 Ocean Blvd, Tax Map 23.1, Lot 16

**Application case:**

Case # 28-2018

**Date of decision:**

July 11, 2018

**Decision:**

The Board voted 5-0 to continue the application to the August 1, 2018 meeting.



**Patricia Weathersby  
Chairman**

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# BOARD OF ADJUSTMENT

-Rye, New Hampshire-

## NOTICE OF DECISION

**Applicant:** KRD Builders, Inc.-c/I Ken Dionne of 106 Chestnut Hill Rd, Amherst

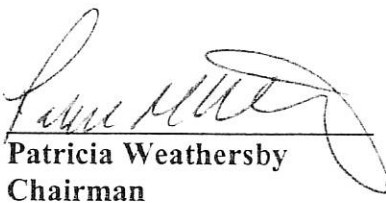
**Owner:** Bradford S. Sterl of 3 Hollow Rd, Bow, NH

**Property:** 8 Old Ferry Landing Road, Tax Map 24, lot 97

**Application case:** Case # 26-2018

**Date of decision:** July 11, 2018

**Decision:** The Board voted 5-0 to continue the application to the August 1, 2018 meeting.

  
**Patricia Weathersby**  
**Chairman**

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