

# RYE PLANNING BOARD

*10 Central Road Rye, NH 03870 (603) 964-9800*

## Notice of Decision

**Applicant:** Tuck Realty Corporation

**Owner:** Joseph Goss

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

**Case:** Case #11-2018

**Application:** **Major Subdivision** by Tuck Realty Corporation for property owned by Robert Goss and located at 0 Ocean Blvd, Tax Map 8 Lots 58 & 59 for a 5-lot subdivision. **Property is in the Single Residence District. Case #11-2018**

**Date of Decision:** Tuesday January 8, 2019

**Decision:**

<input type="checkbox"/>	Approved
<input checked="" type="checkbox"/>	Denied
<input type="checkbox"/>	Conditionally Approved
<input type="checkbox"/>	Continued

*The Board voted to deny the Waivers and Subdivision, see attached explanation of Notice of Decision.*

1/8/19  
Date

  
\_\_\_\_\_  
William Epperson, Chairman  
Planning Board

STATE OF NEW HAMPSHIRE  
TOWN OF RYE PLANNING BOARD

GOSS' GRANT SUBDIVISION APPLICATION  
Application No. 11-2018

NOTICE OF DECISION

I. Summary of Application Process.

The Goss's Grant Subdivision application was filed on March 23, 2018.<sup>1</sup> On April 10, 2018 the planning board determined that the application was incomplete for several reasons.

The planning board conducted a site walk on April 23, 2018. Board members, the applicants "team", the property owner, board consultants, members of the Rye Conservation Commission, several abutters and other interested Rye residents attended the site walk.

The applicant revised the plans to address the incomplete items. The board determined that the application was complete on May 8, 2018 and formally accepted jurisdiction over the application. On May 8 the board also determined that proposed Lot 58 did not comply with Rye Zoning Ordinance § 202.14 which states:

RZO § 202.14 Access to Lots: 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 applicant appealed the planning board's decision interpreting and applying RZO § 202.14 to the Rye Zoning Board of Adjustment (ZBA). Pursuant to RSA 676:6, the appeal to the ZBA stayed the planning board proceedings on the application.

On June 7, 2018 the ZBA reversed the planning board's decision interpreting and applying § 202.14 to proposed Lot 58. The planning board did not apply for a rehearing, and the RSA 676:6 stay ended on July 6, 2018. The applicant submitted a revised set of plans on July 27, 2018. The revised plans eliminated a retaining wall, guard rails and super-elevated pavement originally proposed and reduced the depth of fill required for street construction. The applicant submitted several LDR waiver requests with the July 27 package, including waivers from:

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<sup>1</sup> The applicant had a non-binding preliminary consultation with the planning board on January 9, 2018.



- LDR § 602.2, A.7-b to allow the inside of the street loop to be 36 ft. in diameter where 40 ft. is required.
- LDR § 602.2, A.7-b to allow the pavement width of the loop to be 20 ft. where 24 ft. is required.
- LDR § 602.2, B.1-b to allow 3:1 side slopes where 4:1 is required.

The board heard the revised plan on August 14, 2018. The revised plans did not have designated leachfield areas (DLA's) which complied with LDR § 603.3 on 4 of the 5 proposed lots. In addition to requiring DLA compliance, the board requested that several items of additional information be provided. Revised plans showing different DLA's were submitted on August 29, 2018, but not all the requested information was provided. Hence the board did not hear the application at its September 11, 2018 meeting.

The board next heard the application on October 9, 2018. The DLA on proposed Lot 59-3 still did not comply with LDR § 603.3. Revised plans which finally showed compliant DLA's on all lots were submitted on November 1, 2018.

The board heard the application again on November 13, 2018. After hearing presentations from the applicant's representatives and public testimony, the board closed the public hearing and record. The board began discussing the waiver requests to LDR § 602.2, A.7-b. A motion to deny the waivers passed. The applicant and his legal counsel then interrupted deliberations by demanding explanations and objecting to the board's procedures, which include requesting counsel to draft notices of decisions for subsequent review and approval. Since it appeared the meeting was getting out of hand, town counsel recommended continuing the deliberations to the next meeting.

On November 30, 2018 the applicant submitted a new plan which it represented did not require and waivers.<sup>2</sup> The applicant requested that the hearing and record be reopened for consideration of the new plan. On December 18, 2018 the board heard a brief presentation by the applicant of the new plan and voted not to reopen the hearing and record to consider it. After deliberating, the board voted: (1) to deny the requested waivers; and (2) to deny the subdivision application.

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<sup>2</sup> Since the board and its consultants did not review the new plan against the LDR's, the board does not know whether waivers would be required for the new plan.



## II. Denial of Request to Reopen.

The planning board denied the request to reopen because:

1. The new plan is significantly different than the plan which had been before the board since March 23, 2018.
2. The board had closed the public hearing and record on November 13, 2018. Abutters and the public had no notice of the new plan. If the board reopened the hearing, legal notice of a hearing on the new plan would be required.
3. In addition to proposed Lot No. 58, two additional lots on the new plan have driveway access from frontage which does not meet the minimum frontage requirement of the *Rye Zoning Ordinance*. This conflicts with proposed Zoning Amendment No. 2019-03 which was posted on November 23, 2018. RSA 676:12 precludes the board from accepting and hearing a new plan which conflicts with the proposed zoning amendment.
4. The plan could have been presented much earlier in the process. It was only after board deliberations on November 13, 2018 indicated likely disapproval of waivers that the new plan was presented.
5. When the board closed the hearing and record on November 13, it was ready to deliberate and make a decision. Had a decision been made on November 13, there would be no new plan.

## III. Denial of Waivers.

Contrary to the statements of the applicant, the original plan submitted on March 23, 2018 would also have required waivers for the retaining wall, guard rail, and super-elevated pavement cross-section and also for the non-compliant DLA's on that plan. The planning board engineer and the public works director each expressed concerns about the retaining wall, and the public works director also questioned the super-elevation. Had the applicant pursued that design, the waivers for the wall, guard rail and super-elevation probably would not have been granted.

After the ±8 week stay imposed by RSA 676:6 expired, the applicant revised the plans to eliminate the retaining wall, guard rail and super-elevated pavement. These changes reduced the

drainage flowing into the rain garden in the center of the loop thereby allowing less fill for the loop while still meeting DES requirements for separation to seasonal high water table (SHWT).

To do this required new waivers to:

- LDR § 602.2, A.7-b to allow an inside loop radius of 36 ft. where 40 ft. is required.
- LDR § 602.2, A.7-b to allow a pavement width of 20 ft. around the loop where 24 ft. is required.
- LDR § 602.2, B.1-b to allow 3:1 side slopes where 4:1 is required.

The waivers to the above three LDR requirements and the waiver to LDR § 602.2, B.2 (Grades) are denied because the applicant did not demonstrate the unnecessary hardship required by LDR § 900.

1. The hardship does not arise from special conditions of the property. It arises from the Seasonal High Water Table (SHWT) and the need to comply with DES requirements for separation of the bottom of the rain garden from SHWT. A high seasonal water table is not a special condition of land which is unique to this property. Most of Rye's so called "good land" for development was developed years ago. Developers are not turning to more challenging tracts, most of which have high water tables. *E.g* (most recently) the Stoneleigh Preserve Subdivision and the Roper Subdivision.
2. The hardship, if any, arises from the applicant's and the property owner's desire to carve five (5) building lots out of the non-wetlands portion of this difficult site. Economic gain does not constitute unnecessary hardship.
3. Although applicant's counsel disagreed with town counsel's advice on the standards for unnecessary hardship, he did not offer a different standard. On November 13, 2018 applicant's counsel stated: "The expense alone is a hardship to the applicant. It is less of a hardship if less money is spent." Again, economic gain is not unnecessary hardship.
4. Under the ZBA's interpretation of RZO § 202.14, the property could have been subdivided into three lots without requiring any street construction.

IV. Denial of Major Subdivision Application.

The first reason for denying the subdivision application is that it depends on four (4) waivers which were not granted. The board may not approve an application which does not comply with LDR requirements if waivers to those requirements have not been granted.

Additional reasons for denying the subdivision application are:

1. The applicant did not establish that the application complied with the LDR § 606. 1.

*SECTION 606 STANDARDS FOR THE PRESERVATION OF NATURAL FEATURES AND THE ENVIRONMENT*

*§ 606.1 General.*

*The land developer shall identify and take suitable steps as required by the Planning Board to preserve and protect significant existing features such as trees, scenic points, brooks, streams, rock outcroppings, water bodies, wetlands, other natural features and historic landmarks.*

- a. The applicant has not taken suitable steps to preserve the portion of the meadow beyond what is required to be preserved by wetlands buffers.

Reference 11/1/18 Plan Set Sht. C4.

Lot 59 DLA runs right up to wetlands buffer boundary.  
Lot 59 house ± 35 ft. from wetlands buffer boundary.

Lot 59-1 DLA runs right up to wetlands buffer boundary.  
Lot 59-1 house ± 40 ft. from wetlands buffer boundary.

Reference 11/1/18 Plan Set Sht. C5.

Lot 59-2 DLA runs right up to wetlands buffer boundary.  
Lot 59-2 house ± 40 ft. from wetlands buffer boundary.

Road slope at Stations 5 to 5+50 is ± 40 ft. from wetlands buffer boundary.

- b. The applicant has not demonstrated that suitable steps have been taken to reduce the stress to the tidal wetlands system.

- c. A suitable step to address these concerns and comply with § 606.1 would be to reduce the subdivision by one lot and terminate the street in the vicinity of proposed Lot 59-3 (the lot to



be eliminated). This would: (1) allow houses and leachfields to be located further west thereby preserving more of the meadow from development; and (2) reduce the stress on the tidal wetlands by reducing storm runoff.

2. The applicant did not establish that the application complied with the LDR § 606. 2.

*§ 606.2 Character of Land for Development.*

*Land judged by the Planning Board to be unsafe for building development because of exceptional danger to health or peril from fire, flood, tidal water, poor drainage, impermeable soil, excessive slope or other hazardous conditions shall not be approved for development until appropriate measures have been taken to eliminate the hazards.*

a. The threat from sea level rise and storm surge is an exceptional danger due to the proximity of these two tracts to tidal waters. Four scenarios for sea level rise and storm surge for the year 2100 were analyzed by the applicant's consultant. Under these scenarios the percentage of the development impacted by flood waters ranges from 63% to 89%.

- Although septic system bottoms (bottoms of leach pipe bed) are above the combined water surface for three lots for Scenario # 3, the side slopes of the raised leachfields are partially inundated and thereby susceptible to being undermined and washed away by flood waters.
- The assumption that septic systems designed only to meet Scenario # 2 is acceptable is not consistent with the past. Rye has numerous septic systems greater than 30 years old, and expansion of the town sewer system built circa 1990 or a construction of a regional system do not seem likely in the foreseeable future.
- Under Scenario #4, egress from the new street is blocked by flooding.

b. An appropriate measure which would reduce the hazards to septic systems from flooding in these scenarios would be to reduce the subdivision by one lot and terminate the street in the vicinity of proposed Lot 59-3 (the lot to be eliminated). This would allow the homes and the leachfields on Lots 59-1 and 59-2 to be located further west at higher elevations.

3. The application does not comply with LDR §'s 602.1, A.2. & A.3.

*§ 602.1 Lots.*

*Lot configurations, the layout of lot lines and the arrangement of lots in a subdivision shall be orderly and harmonious and shall not be contrary to established principles of subdivision design.*

*A. Lot Configuration: Except on cul-de-sacs, rectangularly shaped lots having side lot lines perpendicular to straight streets or radial to curved streets are preferred for buildable lots less than three (3) acres in size.*

*1. Lot lines intersecting the street shall not vary more than 30 degrees from the perpendicular or radial. Intersecting property lines at street intersections shall be joined by a curve of at least twenty (20) foot radius.*

*2. Lot shapes shall not be grossly irregular.*

*3. Lot lines shall not be gerrymandered to obtain required frontage, yard space or lot area.*

*4. All front setback measurements shall begin at the right-of-way line of the street.*

a. Lots 59-3 and 58 have been gerrymandered to obtain required frontage. They are also grossly irregularly shaped.

b. The requirements of A.2 and A.3 are not limited to lots less than three acres in size. The limitation applies only to the requirement for rectangularly shaped lots. The board's administrative practice has been to require lots of any size to meet the requirements of A.1 to A.4.

For all of these reasons the request to reopen; the waivers and the subdivision application were denied.

Notice of Decision Approved: January 8, 2018

  
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William Epperson, Chairman  
Rye Planning Board

  
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PB Chair Initials