

NOTICE OF DECISION AND FINDINGS OF FACT TOWN OF RYE PLANNING BOARD

APPLICANT: 665-667 Wallis Road, LLC

PROPERTY: 665-667 Wallis Road, Tax Map 11, Lot 78

ZONE: Commercial District, Single Family Residence District, Berry's Brook Watershed and Aquifer Protection Overlay Zones

CASE NO: #12-2023

DATE OF DECISION: October 17, 2023 and Amended November 21, 2023

The Rye Planning Board issues this Notice of Decision and Findings of Fact in accordance with RSA 676:3. In issuing this Notice of Decision and these Findings of Fact, the Planning Board incorporates such facts and evidence as are reflected in the submittals and meeting minutes associated with this matter that are supportive of the decisions and Findings of Fact contained herein.

WAIVERS

Motions made by J Lord, seconded by Rob Wright to grant the Applicant's requests to the following waivers of the Rye Development Regulations:

1. LDR §202-3.1.A(17) Soil types and mapping
2. LDR §202-3.3.B(5)(c) Soil types in accordance with SSSNNE
3. LDR 202-3.5.B(1) Final Stormwater Management Plan (including information required by LDR §202-3.3B(6), 6.9, and Article IX)
4. LDR §202-3.5.B(1)(c) Landscaping Plan (LDR §202-11.4)
5. LDR §202-3.5.B(1)(d) Plant Maintenance Plan (LDR §202-11.5A)
6. LDR §202-3.5.(1)(g) Lighting Plan (LDR Article X)
7. LDR §202-3.5.B(1)(j) Site Impact Analysis by an Environmental Engineer
8. LDR §202-6.7.C.1 Designated 4,000 s.f. Reserve Leach Field Area

The Board voted unanimously to grant the aforementioned waivers, the basis for waivers granted per Decision #32-#35, and that strict conformity would present an unnecessary hardship and granting a waiver under such circumstances is not contrary to the intent or spirit of the regulations.

FACTUAL FINDINGS

1. The Property is located at 665-667 Wallis Road (Tax Map 16, Lot 21) ("**the Property**").
2. The Property is owned by 665-667 Wallis Rd, LLC.
3. The Property is approximately 30,500 square feet (.7 acres) in size with 122.87' feet of frontage on Wallis Road.

4. The Property is located mostly in the Commercial Zone and partially in the Single Residence District and is also located in the Berry's Brook Watershed and Aquifer Protection Overlay Zones.
5. The Property is improved by a pre-existing, one-story duplex with a 2-car garage to the rear of the duplex.
6. The Property is accessed by Wallis Road by an existing asphalt driveway located to the south of the existing duplex, which proceeds in a northwesterly direction toward the existing 2-car garage and asphalt parking area.
7. The Property is presently serviced by a shared septic system that, in the aggregate, is comprised of 750-gallon tanks with a leach field that is located, in part, on the Property and, in part, on Tax Map 16, Lot 22.
8. The septic system is estimated to be constructed in 1965.
9. The existing impervious coverage is 19.5%.
10. On May 19, 2023, the Applicants submitted an Application for a Major Site Development Plan and Condominium Conversion for the Property, seeking to convert the existing duplex into a three-unit condominium development. As part of this Condominium Conversion, the Applicants propose to expand the existing residential structure by constructing a second story and stairwell addition.
11. The Applicants propose to mitigate stormwater impacts by and through, removing a portion of the asphalt driveway and installing pervious pavement (or, if necessary, pervious pavers), replacing the existing concrete walkway with pervious pavers, and having the captured runoff from those pavers be directed to a perforated underdrain that leads to a stone apron on the Property in the vicinity of a Town-owned catch basin on Wallis Road.
12. The Applicant submitted plan sets related to the Condominium Conversion prepared by Ross Engineering, LLC, which included: (1) an Existing Condition Plan (Sheet 1), (2) a Site Plan last revised August 8, 2023, (3) a Stormwater Management Plan (Sheet 3), (4) an Overlay Plan (Sheet 4), (5) A Detail sheet (Sheet 5), and (6) an Erosion Control Plan (Sheet 6). All plans contained in the Plan set reflect that the last revision was September 12, 2023.
13. The Applicants also submitted a Subsurface Disposal System Plan, dated August 8, 2023 and also prepared by Ross Engineering, LLC. The Subsurface Disposal System Plan proposes an Advanced Onsite Solutions septic system which is proposed to be located to the rear of the garage on the Property.
14. The Applicants seek waivers from the following provisions of the Land Development Regulations ("LDR"), as voted by the Board on October 17, 2023 (per 08/08/23 Memorandum by Attorneys Kieser and Phoenix, pp 5-7):
 - a. Soil types and mapping pursuant to LDR §202-3.1.A(17);
 - b. Soil types in accordance pursuant to LDR §202-3.3.B(5)(c);

- c. A Stormwater Management Plan pursuant to LDR § 202-3.5.B(1), § 202-3.3.B(6), §202-6.9, and Article IX of the LDRs;
- d. A Landscaping Plan pursuant to LDR §202-11.4;
- e. A Plant Maintenance Plan pursuant to LDR §202-11.5A;
- f. A Lighting Plan pursuant to LDR Article X;
- g. A Site Impact Analysis prepared by an Environmental Engineer pursuant to LDR § 202-3.5.B(1)(j); and
- h. A Reserve Leach Field Area pursuant to LDR §202-6.7.C.1.

15. On May 3, 2023, the Rye Zoning Board of Adjustment granted the Applicants a variance from:

- a. §190-2.11.C(2) to allow for expansion of a second floor 12.9' from the side boundary;
- b. §190-6.2.A for expansion of nonconforming residential units; and
- c. §190-6.3.A for expansion of a nonconforming structure to a two-story structure with 3 residential units.

16. The ZBA further granted a waiver from §35-14(C)(1) and §35-14.D.1(c) of the Rye Building Code to allow for the installation of a leachfield 2.5' from ledge.

17. The ZBA further issued a special exception pursuant to §190-6.4 and §190-7.1.A(3) and §190-5.3 to allow for expansion of an existing 2-unit dwelling into a 3-unit dwelling and conversion to a condominium form of ownership.

18. The ZBA's approval was subject to the following conditions of approval:

- 1. The Applicants shall observe the deeded septic agreement referred to in their application.
- 2. The Applicants shall keep clear site lines in the front yard setback 30' from the property line to keep fencing for landscaping 30 inches or lower to grade; and
- 3. Some type of notice(s) in the Declaration of Condominium documents that notifies buyer that they are in a commercial zone, subject to abutter's commercial use.

19. The Planning Board initially noticed a public hearing on this matter for July 18, 2023. That hearing was continued to August 15, 2023.

20. On August 15, 2023, the Board voted to accept the Application and open the public hearing.

21. Prior to the August 15, 2023 hearing, the Town received an analysis from Emily DiFranco of Comprehensive Environmental, Inc. dated July 19, 2023, opining that the Applicant's proposed septic system is "adequate for the proposed development" and that the "proposed aerobic treatment unit (ATU) planned for installation on this site is an improvement over conventional septic systems including the existing system on site." Ms. DiFranco recommended that "any replacement system or future installations at the site be an ATU system or other system that provides equal or better water quality treatment." Ms. DiFranco, however, expressed some concern as to the presence of shallow ledge in the

vicinity of the proposed leaching area. Ms. DiFranco also recommended that a reserve leach field of similar size be identified on the Plan Set and that owners be provided by a User's Manual associated with Operation and Maintenance for the advanced septic system. Further communication dated 8/10/23 by Emily DiFranco of Comprehensive Environmental, Inc., "It was recommended in the July 19, 2023 review that Ross Engineering ensure that any impermeable layer encountered during the installation be removed to meet the 30" requirement and stated intent. Based on the updated plan set (8/8/23), it appears Ross Engineering has added that note to the Septic Plan sheet." (and Site Plan). "As shown in the plan set (8/8/23), the additional leach field was added." "Based on conversations with other reviewers, it is noted that the underdrains in the permeable paver section have the potential to pick up untreated or partially treated effluent in the leach field. Though it is likely that the bacterial treatment in the leach field is sufficient, additional nutrient treatment may be needed. Removing the closest underdrain to the leach field and discharging the lower underdrain to a rain garden for further infiltration is recommended."

22. On August 10, 2023, the Town received a letter from Truslow Resource Consulting ("**TruslowRC**") related to groundwater recharge and water quality protections. TruslowRC's letter recommended that the underdrain be directed to a rain garden, instead of a stone apron to address the discharge from the underdrain and that the first row of underdrains closest to the septic system's leachfield be eliminated to less the likelihood of interception.
23. On August 11, 2023, the Town received a letter from Steve Harding of Sebago Technics ("**Sebago**"), providing comments on the stormwater and engineering aspects of the project. Sebago expressed support of the proposed Stormwater Management Plan provided by the Applicant and that the proposed "infiltration system will function as intended to reduce the estimated surface water flow from the site." Sebago further opined that the proposed plan would constitute an improvement on existing conditions and will lessen the area of impervious surface. Sebago concurred with CEI and TruslowRC's opinion to eliminate on underdrain closest to the leach field for the septic system to avoid interception and supported the outlet of the underdrain to a rain garden.
24. On August 18, 2023, the Board conducted a public hearing on the matter, at which time Applicants' counsel, Tim Phoenix, the Applicant's Engineer Alex Ross, Marc Jacobs, Wetland Scientist, and Gary Spaulding of Advanced Onsite Solutions provided information and responded to inquiries from the Board. The hearing was continued to September 19, 2023.
25. On September 11, 2023, Public Works Director Jason Rucker opined that the Applicant's proposed stone outlet for the underdrain to "store and address the stormwater potential runoff from the infiltration pipe will be a sufficient BMP for this application."
26. On September 13, 2023, Sebago and TruslowRC provided further communications.
27. TruslowRC opined that the septic system and pervious paver and drainage infrastructure have been modified to protect against excess nutrient loading that could impact groundwater quality and downgradient surface water quality. Truslow RC identified discrete recommended revisions to the plans.

28. Sebago stated that it continues to support the Stormwater Management Plan approach to infiltrate runoff generated from the site for the proposed project with the use of permeable pavement in a portion of the driveway and permeable pavers to connect the front of the building to Wallis Road. Sebago further stated that the use of a stone apron at the underdrain's outlet, in lieu of a rain garden, was "an acceptable approach to act as a treatment method prior to discharge to the Town's catch basin along Wallis Road." Sebago also confirmed the removal of the underdrain closest to the leach field. Sebago expressed some concern, however, with the Applicant's proposal to reserve the right to install pervious pavers, as opposed to porous pavement, should an "excessive amount of ledge" be encountered, and recommended clarification on that phrase. Sebago made further recommendations for the plans.
29. On October 17, 2023 Emily DiFranco of Comprehensive Environmental, Inc. reiterated guidance based on the ledge probe and test pit data and the stated intent, the bottom of the pipe is not the intended 30' above an impermeable layer in the area of LP F. It was noted in her letter that the EnviroSeptic Manual on page 5 recommends that a vertical separation distance to restrictive features (SHWT and impermeable layer) of 30 inches to bottom of pie is required for EnviroSeptic systems. "Ross Engineering also has added a note to ensure that any impermeable layer encountered during the installation be removed to meet the 30' requirement and stated intent. As long as they plan to do that during construction, it should be fine."
30. On October 17, 2023, the Board conducted a further public hearing on the matter, reviewing the Plan Set dated 9/12/23, the Subsurface Disposal System dated 10/13/23, and Sebago's email of 10/12/23. The draft conditions of approval were reviewed and agreed by the Applicant, waivers from 8/8/23 Memorandum by the Attorneys Kieser and Phoenix were discussed and approved by the Board and voted upon and the NOD and edited and approved.

Motion by Rob Wright to approve Factual Findings, seconded by J Lord, unanimously approved.

DECISION

31. After review of all submittals provided and statements made during the record, the Board grants the waivers sought by the Applicants because the planning board finds that either: (1) strict conformity would pose an unnecessary hardship to the Applicants and waiver would not be contrary to the spirit and intent of the regulations or (2) specific circumstances relative to the proposal indicate that the waiver will properly carry out the spirit and intent of the regulations.
32. The Board grants the Applicants request for a waiver from LDR §202-3.1.A(17) and LDR §202-3.3.B(5)(c) because the Applicants strict conformity is unnecessary where the Applicants have performed extensive ledge probes and three test pits were dug in various locations on the property and where the majority of the project pertains to already improved and disturbed areas. Therefore, the Board determines that the spirit and intent of the regulations have been satisfied with the information provided in the context of this Applicants' proposal.
33. The Board grants the Applicants' request for a waiver from LDR § 202-3.5.B(1), § 202-3.3.B(6), §202-6.9, and Article IX of the LDRs related to the submission of a Stormwater Management Plan because the Applicants' proposal seeks to convert the existing structure into a three unit condominium by adding

a second story and acting in the general developed footprint of the property and the Applicants have proposed improvements over existing conditions through the use of porous pavement and pervious pavers and through the use of an AOS septic system. Given the specific circumstances associated with the proposal, the spirit and intent of the regulations, which is to ensure capture and treatment of stormwater runoff, is satisfied. For the same reasons, the Board grants the Applicants waiver to LDR § 202-3.5.B(1)(j) related to a Site Impact Analysis prepared by an Environmental Engineer.

34. The Board grants the Applicants' request for a Landscaping Plan, Plant Maintenance Plan, and Lighting Plan pursuant to LDR §202-11.4, LDR §202-11.5A, and Lighting Plan pursuant to LDR Article X because the current proposal does not seek to alter the current residential use of the Property in a manner that would require significant buffering or screening and the Applicants do not propose any altered lighting on the Property.
35. The Board grants a waiver to LDR §202-6.7.C.1 requiring a 4,000 square foot reserve leach field area because the Applicants have identified a 275 square foot reserve leach field area and the Applicants are required, by and through the conditions set forth below, to ensure that the Property is served by an AOS septic system or a septic system that uses equal or greater treatment solutions.
36. The Board finds that, with the conditions of approval set forth below, the Applicants' proposal satisfies all other pertinent provisions of the LDRs.
37. The Applicants' proposal reflects that suitable steps will be taken to protect significant existing features on the Property.
38. The proposed subsurface treatment system is of a type and is to be put in a location sufficient to constitute an improvement over existing conditions and provides sufficient protection to groundwater and other environmental resources.
39. The Applicants' proposed stormwater management system, comprising of porous pavement, pervious pavement, and an underdrain that outlets to a stone apron near the Town's Stormwater System is appropriate. Given the presence of shallow ledge, the AOS system, and other features of the proposed stormwater management system, the Board finds that the use of a stone apron, instead of a rain garden is sufficient to adhere to the standards set forth in Article IX of the LDRs.
40. The Applicants' proposal to increase the residential use on the Property by one residential dwelling unit will not adversely impact the neighborhood, will not materially increase traffic generation, or will not otherwise alter the surrounding neighborhood.

Motion by J Lord to approve Decision, seconded by Rob Wright, unanimously approved.

CONDITIONS OF APPROVAL

1. Site Plan shall depict the entire lot and provide adequate space for the approval signature of the Planning Board, the date of approval and the Planning Board file number.
2. A 35' no-cut buffer in the wooded area abutting Tax Map 016, Lot 36 on Tehias Road will be depicted.
3. The Applicants' submittal titled, "Stormwater Management Operation and Maintenance" last revised September 12, 2023 ("**Stormwater Manual**") shall be revised to address comments 2-5 raised in the Truslow RC letter dated September 13, 2023.
4. The Applicants shall review and confirm that the various underdrain pipe outlet invert and stone outlet area elevations shown on the plan titled, "Stormwater Management" last revised on September 12, 2023 and prepared by Alex Ross ("**Stormwater Management Plan**") and in the Infiltration Trench Outline and Stone Outlet area details are consistent.
5. The Detail Sheet, identified as Drawing Number 5 of the Plans, and last revised September 12, 2023 ("**the Detail Sheet**") shall be revised to reflect that 3-inches of bedding stone shall be added under the 4-inch perforated underdrain in the Pervious Paver Detail.
6. Applicant shall follow all notes, requirements, recommendations, and suggestions set forth in the Plans.
7. The location, layout, construction, and design of all structures on the Property shall be in accordance with the document titled, "Site Plan" prepared by Ross Engineering, LLC, identified as Drawing No. 2 of the Plans, and last revised September 12, 2023 ("**the Site Plan**").
8. All porous pavement shall be installed in accordance with all installation recommendations and requirements identified in the Detail Sheet.
9. All pervious surfaces (i.e. porous pavement or pervious pavers —see Condition 11) and stormwater infrastructure shall be maintained in accordance with the maintenance specifications identified in the Stormwater Management Plan, the Detail Sheet, and the Stormwater Manual. All inspections and maintenance to the stormwater infrastructure shall be performed by qualified contractors. A note shall be added to the Stormwater Management Plan and Site Plan requiring the Applicants and/or Condominium Association to adhere to the Stormwater Manual. On or before April 15th of each year the Applicant and/or Condominium Association shall provide a Stormwater Inspection & Maintenance Log, in the form identified in the Stormwater Manual, to the Town of Rye Department of Public Works or within thirty days of a qualifying stormwater event identified in Condition 3 or the Stormwater Manual.
10. Any contractor performing winter maintenance and/or snow removal shall be informed of all maintenance specifications related to porous asphalt pavement systems. A note shall be added to sheet the Site Plan and Stormwater Management Plan reflecting this condition.

11. If the Applicant encounters ledge at a depth of 32 inches in a contiguous area of greater than or equal to 500 square feet such that the installation of porous pavement becomes impracticable, as determined by the Applicant's Engineer, the Applicant may install a pervious surface in lieu of the porous pavement. In such event, the Applicant shall provide the Town with an updated Site Plan and Stormwater Management Plan reflecting the location of such pervious surfaces and shall provide an updated Details Plan reflecting the installation and maintenance specifications. The Detail Sheet shall be amended to reflect this condition.
12. Applicant shall ensure that any impermeable layer that is encountered during the installation of the septic system shall be removed to a depth of at least 30" to meet all necessary installation requirements for any subsurface disposal system.
13. Any replacement systems or future installations of subsurface disposal systems on the Property will be an Aerobic Treatment Unit or other system that provides equal or better water quality treatment than what is proposed by the Applicants. A note shall be added to the Site Plan reflecting this condition.
14. Rock hammering or similar rock removal activities will be limited to the hours of 8 am - 4 pm, Monday – Friday.
15. No blasting shall be permitted on the Property.
16. Owners shall adhere to Appendix F of the Town of Rye's Land Development Regulations related to the use fertilizers on the Property.
17. If an irrigation system is installed on the property, Owners shall adhere to Appendix G of the Town of Rye's Land Development Regulations.
18. The Applicants, Condominium Association, and all unit owners shall adhere to all maintenance, inspection, and operation instructions associated with the subsurface disposal system. No garbage disposals or water treatment systems.
19. The Applicants and/or Condominium Association shall arrange for the subsurface disposal system on the Property to be inspected in accordance with manufacturer's recommendations, but no less frequently than once every three years from the date of installation. The Applicants and/or condominium association shall provide all such inspection and test results associated with the subsurface disposal system to the Town of Rye within thirty days of receipt of such inspection results.
20. A Condominium Association shall be created this development. Applicant shall submit a Condominium Declaration and Bylaws to the Planning Board. The Condominium Declaration and Bylaws shall be subject to the satisfactory review of town counsel, whose review shall be limited to ensuring that the Condominium Declaration and/or Bylaws contain the following provisions ensuring the following:
 - a. Covenants and obligations for maintaining all stormwater drainage improvements and interior access ways, including all porous pavement or pervious surfaces;

- b. Covenants and obligations for adhering to all recommendations, requirements, and notes in the Plans, all conditions of approval, and all conditions to be issued by any federal, state, or municipal agency;
 - c. The Condominium Association shall be responsible for the maintenance, repair, and/or replacement of subsurface disposal systems, porous pavement and/or pervious surfaces, underdrains, stone aprons and outlets, and other stormwater management infrastructure located on the Property and the submission of all inspection logs associated therewith;
 - d. The Condominium Association and its agents shall have access and authorization to enter onto any common area or limited common area for the purposes of inspecting and maintaining the subsurface disposal system, porous pavement and/or pervious surfaces, underdrains, stone aprons and outlets, and other stormwater management infrastructure located on the Property;
 - e. In the event that the Town has reasonable concerns regarding the maintenance and function of the subsurface disposal system, porous pavement and/or pervious surfaces, and/or stormwater infrastructure, the Town of Rye shall, after providing 72 hours' notice to the Condominium Association and all owners, have access and authorization to enter onto any common area or limited common area for the purposes of inspecting and maintaining the subsurface disposal system, porous pavement and/or pervious surfaces, underdrains, stone aprons and outlets, and other stormwater management infrastructure located on the Property;
 - f. The Condominium Association shall be responsible for complying with the Stormwater Management Plan, the Detail Sheet, and the plan titled "Erosion Control Plan" last revised September 12, 2023 and prepared by Ross Engineering, LLC;
 - g. The Condominium Association shall provide each unit owner and subsequent purchaser thereof with the applicable instruction manual for any subsurface disposal system;
 - h. Each new owner of any Unit shall be responsible for filing an acknowledgment that the new owner will comply with the requirements of the aforesaid covenants and restrictions.
21. Applicant shall supply an estimate of the costs for the installation, construction, inspection and disposition of all stormwater management infrastructure on the Property. Applicant shall further supply a performance bond or other acceptable form of surety in an amount sufficient to ensure the adequate construction and installation of the stormwater and drainage facilities. The form of such performance bond or other surety shall be subject to the review and approval of town counsel.
22. Applicant shall provide the Town with sufficient funds to be placed into escrow to pay final statements of the Town's engineer and town counsel.

23. Applicant shall sign an Escrow Agreement and post escrow for the Planning Board engineer's monitoring of site improvements. Said amount shall be determined by the Planning Board engineer.
24. Notes shall be added to the Site Plan reflecting conditions 7 through 18.
25. For the purposes of RSA 674:39, active and substantial development or building shall be the earlier of:
(a) construction of the foundation for the stairwell addition or (2) the excavation or disturbance of land for the driveway and septic.
26. As-built plans for all site improvements shall be submitted to the Building Department within 60 days of the completion of construction (3 sets).
27. Per LDR § 202-4.4, this conditional approval shall expire in 24 months if the Chair has not signed the plan as the result of the Applicant's failure to meet those conditions necessary to permit the chair to sign the plan.
28. The executed conditions of approval shall be appended to and recorded with the Condominium Declaration.
29. The Planning Board chair may sign the Plans when the foregoing conditions Nos. 1-5, 20, and 24 are met.
30. The Town may issue a building permit to proceed with the work authorized by this approval upon the satisfaction of Conditions 21 through 23.

Motion to approve by JM Lord the Conditions of Approval, seconded by Rob Wright, unanimously approved.

Motion by JM Lord to approve the Major Site Development Plan and Condominium Conversion by 665-667 Wallis Road, LLC for property located at 665-667 Wallis Road, Tax Map 16, Lot 21 for construction of a new driveway, new septic system and new second floor with stairway to be added to existing building to create a three-unit condominium. Property is in the Commercial District, Single Residence District, Aquifer & Wellhead Protection District and Berry's Brook Watershed. Seconded Rob Wright, unanimously approved.

Any party aggrieved by this decision has the right to seek judicial review of this decision by filing an appeal to the Rockingham County Superior Court within thirty (30) days of the date of the hearing at which the Board voted to take the action set forth herein, unless such decision related to the application, construction, or interpretation of the Rye Zoning Ordinance, in which case, an aggrieved party may appeal such decision to the Rye Zoning Board of Adjustment in accordance with RSA 676:5 and the Zoning Board of Adjustment Rules of Procedure.

Dated 11-28-2023

Signed: JM Lord

J.M. Lord, Acting-Chair