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November 15, 2023

**BY ELECTRONIC MAIL ONLY: TGuarino@townofbourne.com**

Town of Bourne Board of Health  
Terri Guarino, RS, CHO  
Bourne Town Hall  
24 Perry Avenue  
Bourne, MA 02532

Re: Variance Requests, 176 Scraggy Neck Road, Bourne (Map 51.0, Parcel 1)

Dear Members of the Board:

On behalf of neighbors and abutters<sup>1</sup> to the proposed residential construction project (the “Project”) at 176 Scraggy Neck Road (the “Site”), I am writing to provide information to the Board on the above-referenced variance requests filed on behalf of The Long Point Trust, c/o Stephen and Marybeth Bisson (the “Applicants”) by Bracken Engineering, Inc. (“BEI”). The Applicants’ November 8, 2023 submissions request eight (8) variances from the Bourne Board of Health Regulations (the “Regulations”) requiring 150-foot setbacks for septic leaching facilities. Four of the requested variances would be to locate the leaching facilities less than 75 feet from Coastal Bank Wetland Resource Areas. **However, the Applicants’ requests do not accurately describe the variances needed, because the requests fail to calculate all distances to Coastal Bank #3.** The Board should reject the variances for this reason, and also because the Project fails to comply with other mandatory requirements in the Board’s Regulations and in Title 5, as explained below.

**1. The variance application does not accurately describe Project’s impacts, because it fails to list any setback distances to Coastal Bank #3.**

BEI’s variance application is inaccurate and fails to account for all Project impacts, because it does not include *any* setback distances to Coastal Bank #3, which is the closest Coastal Bank to the proposed septic system. To illustrate this deficiency, I have attached a map (Exhibit A) prepared by our expert hydrologist, Scott Horsley, which shows the setbacks from the top of Coastal Bank #3 to the proposed septic system. As shown on Exhibit A, the leaching field is only 8 feet from the bottom and 22 feet from the top of Coastal Bank #3, and the reserve area is even closer. Accordingly, the variances needed and the setback distances listed by BEI in the application are incomplete.

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<sup>1</sup> This firm represents: Maryfrances Galligan, 170 Scraggy Neck Road; Kevin and Kate McCarey, 168 Scraggy Neck Road; and Susan Malcom, 10 Winsor Road, all in Bourne, Mass.

The Bourne Conservation Commission’s November 23, 2022 Order of Conditions confirmed that the area labeled on BEI’s Existing Conditions Plan (last revised on September 26, 2022) as Coastal Bank #3 is a Coastal Bank Wetland Resource Area. As such, Coastal Bank #3 requires the same setbacks as the other Resource Areas on the Site, and there is no distinction under any wetlands or Board of Health regulation that permits Coastal Bank #3 to be treated differently or omitted here. *We respectfully request that the Board require the Applicant to update its plans to accurately list all variances needed for Coastal Bank #3, before any action is taken on the variance requests.*

**2. There are discrepancies between the plans approved by the Conservation Commission, and the latest architectural drawings for the Project.**

The plans approved by the Conservation Commission dated September 26, 2022 permit a 2,735 sq. ft. house, a 576 sq. ft. garage, and 1,006 sq. ft. of decks, for a total Project footprint of **4,317 sq. ft.** See Proposed Site Plan, prepared by BEI, last revised 9/26/22 and 9/20/23, attached to BEI’s letter dated 11/08/23 as pdf. page 34. However, the architectural plans submitted to the Board call for a *larger* Project consisting of a 2,930 sq. ft. house, a 615 sq. ft. garage, and 1,335 square feet of decks for a total Project footprint of **4,880 sq. ft.** See plans entitled “Proposed New House for Bisson Residence” by William F. Lee Architect & Associates, LLC, dated 9/12/23 and attached to BEI’s letter dated 11/08/23 as pdf. page 6. This means that the proposed Project footprint submitted to the Board of Health is 563 sq. ft. larger than what was approved by the Conservation Commission. If larger structures are being proposed here, then the setback distances to wetland resource areas as shown on the BEI plans are inaccurate, and the listed distances in the 8 variance requests before the Board of Health are also inaccurate. *Therefore, the Applicant’s architectural plans should be revised to conform to the plans approved by the Conservation Commission before any action is taken on this Project.*

**3. The Applicant’s variance requests do not comply with the mandatory requirements in the Board’s 150-foot Setback Regulation.**

The Board should deny the variances, because they do not comply with the requirements in the Board’s “150 Ft. Setback Regulation,” which provides that:

**a 150 foot setback will be required for all leaching facilities from the edge of a wetland resource or watercourse, as defined in 310 CMR 15.01 Title V.** Setback distance shall be measured during periods of highest ground or surface water conditions. The Board of Health may grant a variance from the 150 foot setback requirement, based upon satisfactory documentation prepared by a hydro geologist or professional sanitary engineer. In addition, **a hydro geologic study, prepared by a hydro geologist or professional sanitary engineer, will be required by the Board of Health for all leaching facilities within 100 feet of a wetland or watercourse, as defined by 310 CMR 15.01, Title V. In no case shall a septic system leaching facility be placed within 75 feet of a wetland or watercourse, except in cases of repair or extreme hardship.**

150 Ft. Setback Regulation, Section 1. (Emphasis added). Section 2 further provides that: “Extreme hardship shall be defined as loss or damage to structure or septic system due to fire, flood, acts of nature, or land taking (by eminent domain).” The Applicants’ variance requests do not comply with the Regulation’s mandatory requirements, as follows:

- As stated above, BEI’s application does not include *any* variance requests for setback distances to Coastal Bank #3, which is the closest Coastal Bank to the proposed septic system. As shown on Exhibit A, the proposed leaching field is only 8 feet from the bottom and 22 feet from the top of Coastal Bank #3. Coastal Bank #3 was confirmed by the Conservation Commission to be a Coastal Bank Wetland Resource Area, and it requires the same setbacks and consideration as the other Resource Areas on the Site.
- The Regulation does not allow a septic system leaching facility to be within 75 feet of a wetland, except in cases of repair or extreme hardship, both of which are inapplicable here, where the Site could accommodate a smaller house and septic system located farther away from the Coastal Bank Resource Areas.
- The hydro geologic study, prepared by a hydro geologist or professional sanitary engineer, that “will be required by the Board of Health for all leaching facilities within 100 feet of a wetland” has not been provided. (Emphasis added).

The Applicants are attempting to circumvent the Board’s variance requirements by claiming – without any legal authority – that the Board’s “150 Ft. Setback Regulation” does not apply to Coastal Banks because it references to an “old” version of Title V that did not define “wetland resource,” but did define “watercourse,” and/or by alleging that a Coastal Bank is not a wetland. These positions are attempts to evade the long-accepted protection of Coastal Banks as Wetland Resource Areas, and should be squarely rejected by the Board.

First, under the principles of statutory interpretation, when a local regulation like the Board’s “150 Ft. Setback Regulation” refers to a state law or regulation, it is assumed that the state regulation will be updated over time to conform to evolving standards. There is no basis to revert back to an earlier version of Title 5 to interpret the local regulation. If in 1988 the Bourne Board of Health intended to enshrine the then-current Title 5 requirements in its local regulation, it could have easily copied those requirements directly into the local code. However, it chose not to do this, but instead referenced Title 5 knowing that it would change and update over time. Therefore, it is the current version of Title 5 that applies when interpreting the local 150 Ft. Setback Regulation.

In the current version of Title 5, a Coastal Bank is clearly protected as a “Wetland”:

- Under 310 CMR 15.002 (definitions), a “**Wetland**” is defined as: “Any land area or surface area so defined by the Massachusetts Wetlands Protection Act, M.G.L. c. 131, §

40 and regulations promulgated pursuant thereto at 310 CMR 10.00: *Wetlands Protection...*”

- Under Title 5, 310 CMR 15.002 (definitions), “Bank (Coastal)” is also defined as: “Any land or surface area so defined by the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40 and 310 CMR 10.30(2).”
- Under the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40, “The term “coastal wetlands’... shall mean any bank....”
- The Massachusetts Wetlands Protection Regulations at 310 CMR 10.02 includes jurisdiction over “coastal wetlands,” and section 310 CMR 10.21 containing “Additional Regulations for Coastal Wetlands” applies to any “coastal bank.”
- Section 310 CMR 10.30 of the Massachusetts Wetlands Protection Regulations establishes Wetland Resource Area performance standards for Coastal Banks.

Accordingly, there is no question that a Coastal Bank is a “wetland” under Title 5, the Massachusetts Wetlands Protection Act, and the Wetlands Regulations at 310 CMR 10.00 *et seq.*, such that the Applicant must comply with all applicable setbacks to the Coastal Bank Wetland Resource Areas. Although the Applicant appears to be arguing that the Board’s Regulations do not apply to a Coastal Bank because it is not “wet” like a pond or the ocean, this misinterprets all the applicable and longstanding regulations protecting Coastal Banks as Wetland Resource Areas, as explained above.

Second, the Applicant’s interpretation of the Board’s “150 Ft. Setback Regulation” makes no sense, because it ignores the important use of the word “or” in the regulation. The Bourne Regulation requires a 150 foot setback “from the edge of a **wetland resource or** watercourse” (emphasis added). The use of the word “or” means that the setback must be from either a wetland resource or a watercourse, meaning that setbacks to either one must be considered. Where a Coastal Bank is clearly a Wetland Resource under all applicable regulations, it does not matter if it is not also a “watercourse.” The 150-foot setback to the Coastal Bank *Wetland Resource* still applies.

Third, the Applicant’s argument fails because even under the “old” Title 5 regulation – which we do not believe is relevant here – the definition of “Watercourse” cited by the Applicant includes any “coastal wetland.” Since a “coastal wetland” includes a “coastal bank” under all regulatory definitions, the local 150 Ft. Setback Regulation would apply even under the Applicant’s interpretation. Coastal Banks have been protected as wetland resources since 1978, when the coastal wetlands regulations – 310 CMR 10.21 to 10.37, including Coastal Banks at 310 CMR 10.30 – went into effect under the state Wetlands Protection Regulations. See 310 CMR 10.10(2) (“The effective date of 310 CMR 10.21 through 10.37 is August 10, 1978”). Therefore, Coastal Banks were protected as “wetland resources” and coastal wetlands under the state wetland regulations in 1988, when Bourne passed its 150 Ft. Setback Regulation.

Finally, the Applicant's variance requests fail to meet the section of the 150-Ft. Setback Regulations requiring that: "In no case shall a septic system leaching facility be placed within 75 feet of a wetland or watercourse, except in cases of repair or extreme hardship." Section 2 of the Board's Regulation further provides that: "Extreme hardship shall be defined as loss or damage to structure or septic system due to fire, flood, acts of nature, or land taking (by eminent domain)." The current proposal is not a "repair" of an existing system, and it does not meet the definition of "extreme hardship" under Section 2 of the Regulation. Furthermore, the Applicant cannot claim any general kind of "hardship" justifying variances within 75 feet of the wetland resource areas, because any supposed need to build a new house and septic system on the Site was caused by the Applicants' own conduct, such that it is a "self-created hardship" that disqualifies the Applicants from relief. In 2020, the Applicants (Stephen and Marybeth Bisson, Trustees of The Long Point Trust) separated 176 Scraggy Neck Road from adjoining property they also own at 178 & 180 Scraggy Neck Road through the Approval Not Required ("ANR") process. Here, the limited area on the Site for placement of a new house and septic system is the result of the actions of the property owners in separating 176 Scraggy Neck Road from adjoining land in common ownership. This means that any "hardship" caused by a reduced building envelope is entirely the result of the Applicants' own conduct, which disqualifies them from relief. See Campbell v. Rockport Zoning Bd. of Appeals, No. 12 MISC 472468 AHS, 2013 WL 6560886, at \*6 (Mass. Land Ct. Dec. 11, 2013) (upholding denial of a variance, where developer's predecessor in title caused a self-imposed hardship by subdividing land such that relief was needed from local water supply protection bylaw). Accordingly, the Board must deny the variances for the Project.

**4. The Applicant has failed to apply for required variances from Title 5.**

The Project also requires variances from the state Title 5 regulations, because the proposed septic system is only 22 feet away from the top of Coastal Bank #3. Pursuant to the provisions of Title 5, 310 CMR 15.211(3) for "Minimum Setback Distances": "All setback distances from wetlands shall be measured in accordance with the criteria of the Wetlands Protection Act and 310 CMR 10.00: Wetlands Protection, from the most landward edge of the following features: ... **top of coastal bank as defined in 310 CMR 10.30(2)**" (emphasis added). This means that under Title 5, a septic system must be located 50 feet from all Coastal Banks, measured from the top of the Coastal Bank. See 310 CMR 15.211(3). Where the Applicant has failed at this point to even acknowledge that Title 5 applies here, and has not applied for any Title 5 variances, we request that the Board reject the current application.

**5. The Applicants' nitrogen loading calculations need further review, and the required hydro geologic study has not occurred.**

The purpose of the nitrogen loading analysis is to determine the load and concentrations of nitrogen that flow to a coastal embayment. This Site is located on a peninsula, and it is surrounded by Salt Marsh, Coastal Banks, and Lands Subject to Coastal Storm Flowage. Additionally, four salt ponds surround the Site and are hydrologically connected it, as illustrated on the graphic prepared by Mr. Horsley, attached as Exhibit B. As shown on Exhibit B, groundwater flows to four separate coastal embayments that surround the Site. Each embayment

has a groundwater recharge area. The hydrogeologic study that is required by the Board's 150 Ft. Setback Regulation should identify groundwater flow directions and groundwater drainage areas to the surrounding salt ponds, to fully evaluate Project impacts. The hydrogeologic study should also include revised nitrogen loading calculations based upon the Site hydrology, and should only include recharge as dilution within the delineated groundwater drainage area where the septic system is proposed. Given the sensitivity of this particular Site, we request that the Board fully enforce the 150-Ft. Setback Regulation's requirement for a "hydro geologic study, prepared by a hydro geologist or professional sanitary engineer, [which] will be required by the Board of Health for all leaching facilities within 100 feet of a wetland."

Thank you in advance for your consideration of these comments.

Very truly yours,

*/s/ Elizabeth M. Pyle*

Elizabeth M. Pyle

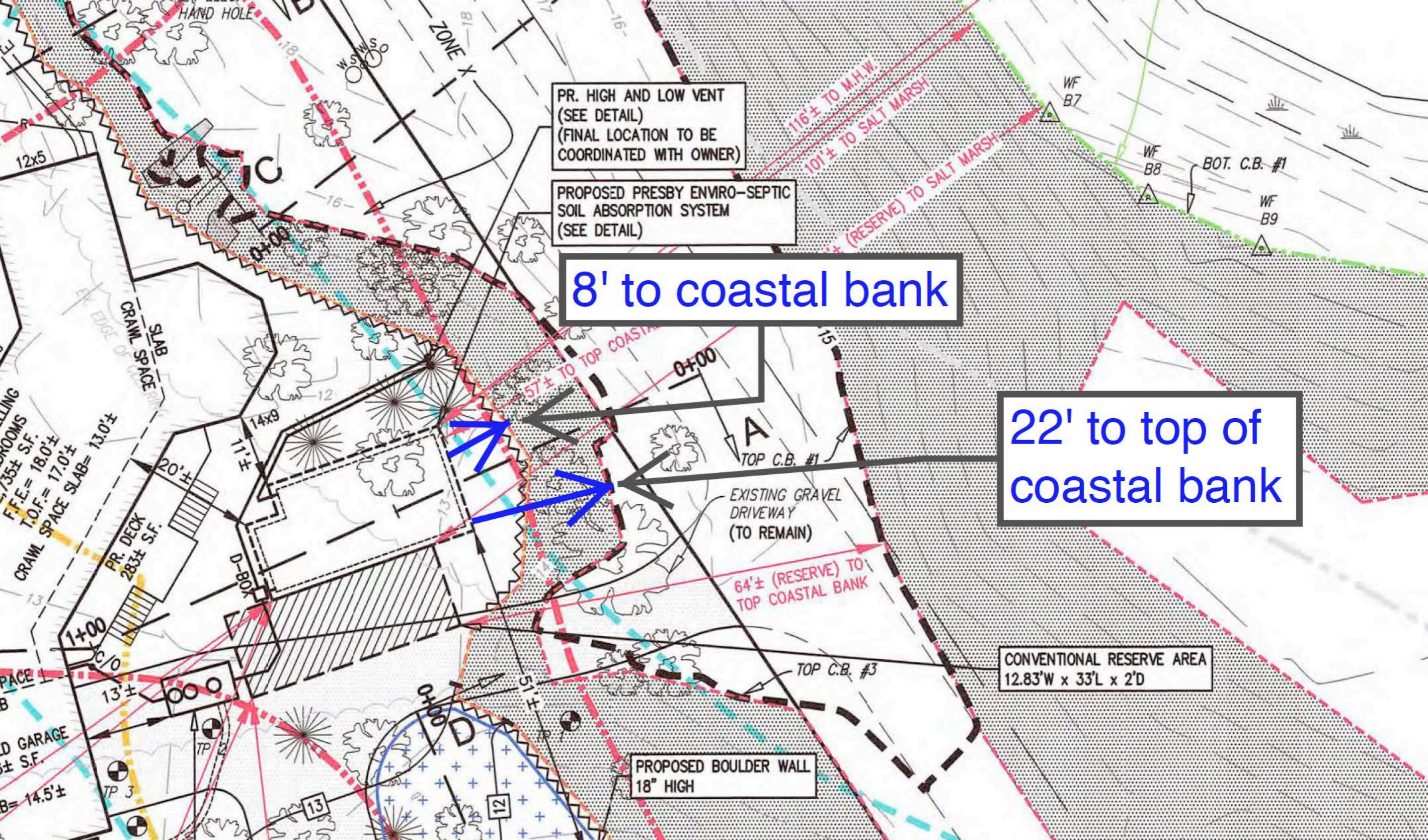
# Exhibit A

PR. HIGH AND LOW VENT  
(SEE DETAIL)  
(FINAL LOCATION TO BE  
COORDINATED WITH OWNER)

PROPOSED PRESBY ENVIRO-SEPTIC  
SOIL ABSORPTION SYSTEM  
(SEE DETAIL)

8' to coastal bank

22' to top of  
coastal bank





# Exhibit B

