



# Town of Merrimack, New Hampshire

Community Development Department

603 424-3531

6 Baboosic Lake Road

Fax 603 424-1408

Town Hall - Lower level - East Wing

[www.merrimacknh.gov](http://www.merrimacknh.gov)

Planning - Zoning - Economic Development - Conservation

## MERRIMACK ZONING BOARD OF ADJUSTMENT

### APPROVED MINUTES

**WEDNESDAY, DECEMBER 19, 2018**

Members present: Patrick Dwyer, Lynn Christensen, Kathleen Stroud, and Alternates Leonard Worster, Rod Buckley and Drew Duffy

Members absent: Fran L'Heureux and Richard Conescu

Staff present: Assistant Planner Kellie Shamel and Recording Secretary Zina Jordan

#### 1. Call to Order

Patrick Dwyer called the meeting to order at 7:00 p.m. and designated Rod Buckley and Drew Duffy to sit for Fran L'Heureux and Rich Conescu, respectively.

#### 2. Roll Call

Patrick Dwyer led the pledge of allegiance and swore in members of the public who would be testifying. Rod Buckley read the preamble.

- 8. Craig Lapiana (petitioner/owner)** – Variance under Section 3.05 of the Zoning Ordinance to permit an existing manufactured home to remain 31 feet from the rear property line whereas 40 feet is required and the construction of an addition to an existing detached garage 17 feet from the rear property line whereas 40 feet is required. The parcel is located at 58 Baboosic Lake Road in the R-4 (Residential) and Aquifer Conservation Districts. Tax Map 5C, Lot 484. Case # 2018-44.

This agenda item was considered before agenda item #3.

**At the petitioner's request, the Board voted 5-0-0 to continue this item to January 30, 2019, at 7:00p.m., in the Matthew Thornton Meeting Room, on a motion made by Lynn Christensen and seconded by Kathleen Stroud.**

- 9. Sign Design, Inc. (petitioner) and 57-59 Daniel Webster Highway, LLC. (easement owner)** – Variance under Section 17.10.3 of the Zoning Ordinance to allow the installation of a 63 square foot off-premise (within an existing easement for the benefit of 59 Daniel Webster Highway, replacing an existing ground sign on the property) ground sign whereas a maximum of 48 square feet is permitted. The parcel is located at 55 Daniel Webster Highway in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 2E, Lot, 006- 02. Case # 2018-45.

This agenda item was considered before agenda item #3.

55 D.W. Highway has a sign easement that benefits 59 D.W. Highway. The existing Nashua Corp. sign was constructed at 55 D.W. Highway in 1987. A variance was granted in 2012 that was conditioned upon the removal of that sign, but removal was never completed. The petitioner seeks a variance to replace that sign in the same location, but at a larger square footage than would be allowed. A maximum of 48 s.f. is permitted, but the proposed sign would be 63 s.f. (10' x 6').

Scott Clement, Sign Design, Inc., read the variance criteria into the record. He does not know who owns 57-59 D.W. Highway, only Clary Properties, the tenant who ordered the sign. Chairman Dwyer and Vice Chair Christensen stated their opinion that the property owner should have appeared at the meeting.

There was no public comment.

**The Board voted 5-0-0 to grant the variance on a motion made by Kathleen Stroud and seconded by Rod Buckley.**

### **Findings of Fact**

1. Granting the variance would not be contrary to the public interest because there is an existing easement to allow a sign at that location. The larger sign would provide better visibility than the existing sign and increase public safety, since multiple tenants and trucks will know where to turn whereas there is currently no address on the sign;
2. The spirit of the Ordinance is observed because an existing sign that currently has an easement would be removed and replaced with a sign that is 15' larger;
3. Granting this variance would do substantial justice because the larger sign would help those making deliveries to the location they need to go, thus alleviating the need for vehicles to brake hard and perform "U" turns to gain entry to a property that does not have frontage;
4. The values of the surrounding properties would not be diminished because the new sign would be an upgrade from the existing dilapidated one. The 63' sign is comparable to the neighboring signs at K&M Tires (80 s.f.) and "Interstate" (60 sf.);
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - 1) No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property because 59 D.W. Highway does not have frontage due to the topography. 57 DW. Highway is in front of 59 D.W. Highway. The owners have addressed this by obtaining an easement for their location. There would be no significant change. The hardship is visibility.

- 2) The proposed use is a reasonable one because deliveries to this address are a safety issue, since the existing sign is out of date. The new sign would have tenants' names and addresses.

**3. Cellco Partnership d/b/a Verizon Wireless (applicant) and Brett W. Vaughn Revocable Trust (owner) – Special Exception under Section 2.02.1 (B) (2) of the Zoning Ordinance to allow the installation of a telecommunications tower within the Residential District. The parcel is located at 123 Wilson Hill Road in the R-1 (Residential) District (by the Zoning Map). Tax Map 4A, Lot 023. Case # 2018-41. This item is continued from the November 28, 2018 meeting.**

This item was considered after agenda item #9.

Chairman Dwyer explained that federal law precludes the Board from considering emissions and health impacts.

Attorney Victor Manougian, McLane Middleton, who appeared on behalf of owner Brett Vaughn, showed the access and layout. There would be a gravel access driveway into the 50' x 50' compound. All setback requirements would be met. The monopole can hold three additional carriers and their equipment. There would be a small change from what was shown on the plan submitted to the ZBA: the compound would be shifted 8' north in order to avoid cutting so many trees, which provide natural screening. The tower would be 125' high with six panel antennae, nine remote radio heads and a junction box. The rest of the equipment would be kept in the fenced-in compound. A balloon test performed on October 29, 2018, demonstrated that the tower would not be visible from nine out of twelve sites, obscured at two and visible only from one, which is far from the golf course. Attorney Manougian submitted photos of the test. A propane-powered backup generator would run once a week in the early afternoon for testing purposes only. It would produce 45 decibels of sound at the north and 38 in the recently-approved subdivision and would run only in case of a power outage. The word "diesel" on the submitted plan is an error.

Attorney Manougian read the Special Exception criteria into the record.

**Public comment**

Chairman Dwyer read into the record a letter in opposition from Dan Ricker, 12 Merrill Road.

Sean Lynch, 120 Wilson Hill Road, has no problem with wireless service and asked about the tower's effect on home values. He stated he chose the land for his home because there were no cell towers in the area. He predicted that health would become more important to the public over time and that they would not purchase homes near cell towers. That is a financial impact. Sean Lynch asked how long the lease would last. He is concerned about the possibility of the tower falling. He would have to move because he does not want to raise a family near a tower.

Michael Martin, 144 Wilson Hill Road, asked if there would be an aircraft warning light at the top of the tower. Chairman Dwyer said there would be if required. Michael Martin called a light a nuisance and was concerned about sight lines. A lot of foliage was cut

since the report was submitted. He asked whether setbacks are correct in relation to the new subdivision. Michael Martin has Verizon wireless coverage and asked where there is a coverage gap, which he wanted confirmed by an independent source.

Fred Grimes, 117 Wilson Hill Road, spoke in opposition. This is a residential area and not a commercial area. Brett Vaughn was permitted two businesses on his property and now wants a cell tower. An on-line study states that cell towers would have a negative effect on property values. Verizon can add 20' more to a height of 145' without permission.

Attorney Manougian said there is a 25-year lease and there would be no light. Although Verizon has the right to make the tower higher with only a building permit, there is no need to do so, since there are no other carriers. Verizon would not spend \$200,000 on the tower if there were no need. There is a coverage gap.

Keith Vellante, C Square Systems, showed topographical maps, existing facilities/coverage for each area, gaps (especially in west Merrimack), and proposed coverage. Verizon wants a reliable and continuous network for 4G LTE data service to keep up with customer demand. The proposed tower would cover another 2,500 customers. No other towers would be eliminated. The new coverage area would diminish the burden on some other areas/towers. A tower on the hill would allow coverage of a large area that includes under-served areas. This is a unique site. Keith Vellante explained why no other site could be used. The photo test showed that the tower would not be visible from the homes on Wilson Hill Road. Attorney Manougian produced photos taken today. There are no leaves on the trees and the balloon still cannot be seen. He also showed an overlay of the tower coverage over the recently-approved subdivision.

Brian Ross, Structure Consulting Group, showed photos of where the access road would veer from the existing driveway, where the balloon is obscured, and from Wilson Hill Road, where it is not visible.

Mark Correnti, Certified Residential Appraiser, Fairmarket Advisors, cited home sales in Merrimack neighborhoods with cell towers. He stated there was no impact on the selling price (they sold for more than the asking price) or time on market (they sold in one day to one week). There was no difference in price/value for homes near a tower from comparable homes not near a tower. Mark Correnti stated that proximity to the proposed tower would not affect home values.

Brian Ross said that Verizon has been looking at this site since 2014, when it was put on hold. It is now a high priority because Verizon wants to off-load excess usage from the recently constructed Turkey Hill Road tower. Power/usage cannot be increased on existing towers.

Michael Martin, 144 Wilson Hill Road said the over-riding issues are safety, convenience and public welfare. He claimed there is no coverage gap. Much of the area is conservation land where there are no buildings and no customers. There is no foliage six months of the year. Xfinity put WiFi on the entire road. Most of the new

tower's coverage would be in Amherst. Why not increase the coverage of the Amherst towers?

Chairman Dwyer explained that the applicant would have to appear before the Planning Board if the Zoning Board of Adjustment (ZBA) grants the Special Exception.

Attorney Manougian met with Brett Vaughn, who contrary to hearsay, supports the tower. The Federal Telecommunications Act says a carrier must be allowed to cover a gap.

Attorney Manougian offered to continue the hearing and to pay for the ZBA to hire a consultant to review information submitted about the gap and need for coverage. It was the ZBA's consensus that this is not necessary.

Chairman Dwyer opined that a tower could affect real estate values for both current and proposed homes. Verizon customers say they have no coverage problems. This may not be the best site for a tower. Lynn Christensen said this is a great site, but, as a long-time Verizon customer, she does not see a need. Kathleen Stroud noted that experts say there is a need and she would tend to agree with them due to the fact that is their area of expertise, although she has no coverage problem.

**A motion to grant the Special Exception, with conditions, failed, 2-3-0, on a motion made by Lynn Christensen and seconded by Kathleen Stroud. Lynn Christensen, Patrick Dwyer and Drew Duffy voted in opposition.**

Lynn Christensen stated that the applicant did not meet the criterion that the specific site is an appropriate location for such a use or uses in terms of overall community development.

**The Board voted 3-2-0 to deny the Special Exception, on a motion made by Lynn Christensen and seconded by Drew Duffy. Rod Buckley and Kathleen Stroud voted in opposition.**

**4. Cellco Partnership d/b/a Verizon Wireless (applicant) and Brett W. Vaughn Revocable Trust (owner)** – Variance under Section 2.02.1 (B) (2):C of the Zoning Ordinance to allow a proposed telecommunications tower in the Residential District to not be camouflaged. The parcel is located at 123 Wilson Hill Road in the R-1 (Residential) District (by the Zoning Map). Tax Map 4A, Lot 023. Case # 2018-43.

**Deemed moot upon denial of Special Exception under Case #2018-41.**

**6. Lorraine A. LoRusso (applicant/owner)** – Variance under Section 2.02.7.6 of the Zoning Ordinance to permit the construction of a single-family dwelling 23 feet from a wetland whereas 40 feet is required. The parcel is located at 12 Carrie Drive in the R-1 (Residential) and Aquifer Conservation Districts. Tax Map 5B, Lot 176. Case # 2018-30.

On September 26, 2018, the ZBA denied this petition; on November 28, 2018, the ZBA granted a re-hearing. The petitioner has provided new and updated information, part of which includes a revised plot plan showing proposed storm water management controls that was not available at the time of the original hearing.

Attorney Laura Dodge, McLane Middleton, said the storm water management plan would address the greatest concerns in this wet area. The house and septic system would be located where indicated on the revised plan.

Tom Carr, Certified Wetland Scientist, Meridian Land Services, said that, since the 1,260 s.f. house and driveway would comprise only 6% impervious area on the 20,908 s.f. lot, the State does not require a storm water plan. Tom Carr submitted his report showing that all storm water would infiltrate into the lot. The driveway would be surfaced to infiltrate rather than shed water. It would be built of porous blocks over crushed stone with a wedge system of gaps between blocks where water would go into the ground. There are moderately well-drained sands that provide rapid infiltration and permeability where the house would be located. There would be no change in runoff problems in the area. The house would be on a concrete slab-on-granite foundation, so that, unlike other homes in the area, a sump pump would not be necessary. Tom Carr said this is a model scenario for a drainage system incorporated into construction that should be used more often.

Attorney Dodge said that the owner would use different landscape techniques to absorb water. Mitigating water issues would benefit the neighbors. This is a unique lot with special conditions that create a hardship. Vandalism on the vacant lot does not benefit abutters.

### **Public Comment**

Keith Driscoll, 15 Maidstone Drive, is concerned about locating the septic system on top of his. Chairman Dwyer explained that is illegal and cannot be done.

Edward Shidlovsky, 11 Maidstone Drive, has 6"-deep puddles on his property. He is concerned that 1,000-2,000 gallons of additional water would be pumped to the wetland and affect the area. He had to move his leach field because his backyard floods every year. Water levels are rising. Even with an infiltration system, some water would go onto his property.

Aidan Seltsam, 8 & 10 Carrie Drive, wanted assurance that the proposed systems would be effective. Chairman Dwyer explained that none can be given. Homeowners can do what they want on their property. The applicant took extra steps to get ideas so the home would not be a detriment to the neighborhood. Aidan Seltsam agreed she made a good faith effort to design a solution, but she could clear cut and sell the property immediately. Aidan Seltsam has photos of his and the applicant's properties half covered in 3"-4" of water now. He opposed authorizing the project when there is substantial risk to abutting properties without mitigation guarantees. Chairman Dwyer said the applicant made a conscious effort to improve the "mess". By the same token, Aidan Seltsam could do something to his property that is detrimental to neighbors.

Julie Seltsam, 8 & 10 Carrie Drive, suggested an impartial expert to assess the wetland and proposed mitigation. She is concerned that she would have no recourse. Chairman Dwyer said a home rather than a vacant lot would increase property values. Julie Seltsam was concerned that water issues would mean her home would have no resale value and could potentially damage neighbors' properties.

Lynn Christensen explained that the function of a ZBA is to grant a variance or special exception for a site that does not meet the criteria because of sufficient hardship. It must meet five particular criteria in order to qualify. This is a lot of record that is buildable if the criteria are met or a variance is granted. The abutters have to prove that there would be damage. New information was submitted to the ZBA since the denial. The ZBA can make a judgment based only on testimony presented to it.

Aidan Seltsam gets 2-3 flood events annually. There have been two floods so far this year when the pumps could not keep up. The water is still there.

Edward Shidlovsky said water levels have risen since clear cutting years ago.

Christina Coviello, 145 Baboosic Lake Road, is the backyard abutter. Water in her yard goes over her son's boots. She agreed with the Seltsams. She is concerned about where water would go and a septic system closer to the wetland than is normally allowed.

Attorney Dodge stressed that property law gives the owner the right to develop the property but not to be a nuisance to neighbors. The applicant would build according to the plan that was submitted. The neighbors have recourse. Meridian Land Services' septic plan was for the prior applicant. This septic system would not be on top of the Driscoll septic system. Tom Carr showed the vent for the Driscoll leach field on the plan. The proposed septic system is based on the best fit with the boundary survey that the applicant had done. The LoRusso and Driscoll leach fields would be 20' apart.

Tom Carr stated that all professionals are impartial and meet State standards. This is an approved method that would infiltrate 100% of the rainwater from the roof and driveway. Tom Carr repeated that water would not run onto abutters' lots and there would be no pumps. Recharged water would not run off. There would be a pre-treatment system that would put clean water into the leach field. This is the smallest possible system; it is designed for a two-bedroom home. The other homes in the neighborhood have 3-4 bedrooms.

Lorraine LoRusso noted that the abutters who testified are not against the home. Her concern is that the abutters might flood her own property. She is confident that her water would stay on her property and not affect the neighbors. She will follow Tom Carr's plan. She will not clear cut; rather she will keep everything as natural as possible.

**The Board voted to 5-0-0 to grant the Variance, with the condition that the Board grant the petitions in Case #2018-31 and #2018-32, on a motion made by Lynn Christensen and seconded by Rod Buckley.**

### **Findings of Fact**

1. Granting the variance would not be contrary to the public interest because the proposed location of the home and septic is not harmful to the public health, safety or welfare. The home is appropriately and safely located as far away from the wetlands as possible. The home would not be in the wetland; it would be constructed on the dry upland portion of the lot on a concrete slab-on-grade

foundation with proper grading and no perimeter drains. The location of the home and septic would not alter the essential character of the neighborhood. The proposed home is modestly designed, environmentally conscious and would be consistent with the character of the neighborhood. The proposed location of the septic is necessitated by the size of the lot, taking into consideration the wetland areas and appropriate proximity to the lot lines. The State has already approved placing the septic in the proposed location. Ms. LoRusso intends to utilize ecological landscaping techniques for minimizing any potential impact on wetlands and mitigating any potential water management concerns. The proposal is consistent with the 1967 subdivision plan, namely a single-family residential dwelling. It is designated as a buildable lot that qualifies for reduced setbacks due to its legal non-conforming status. It promotes public interest by providing housing in a market with limited properties available for sale without the need for more infrastructure or land development. It proposes no nuisance and is not bothersome to the surrounding neighborhood or community. It would not displace more water, create drainage issues or adversely impact abutting lots. Ms. LoRusso is considering a driveway made of permeable pavement and intends to utilize creative landscaping techniques to help absorb any potential water. There would be no undue impact on Merrimack's municipal resources.

2. The spirit of the Ordinance is observed because the proposed location of the home and septic is not harmful to the public health, safety or welfare. The home is appropriately and safely located as far away from the wetlands as possible. The home would not be in the wetland; it would be constructed on the dry upland portion of the lot on a concrete slab-on-grade foundation with proper grading and no perimeter drains. The location of the home and septic would not alter the essential character of the neighborhood. The proposed home is modestly designed, environmentally conscious and would be consistent with the character of the neighborhood. The proposed location of the septic is necessitated by the size of the lot, taking into consideration the wetland areas and appropriate proximity to the lot lines. The State has already approved placing the septic in the proposed location. Ms. LoRusso intends to utilize ecological landscaping techniques for minimizing any potential impact on wetlands and mitigating any potential water management concerns. The proposal is consistent with the 1967 subdivision plan, namely a single-family residential dwelling. It is designated as a buildable lot that qualifies for reduced setbacks due to its legal non-conforming status. It promotes public interest by providing housing in a market with limited properties available for sale without the need for more infrastructure or land development. It proposes no nuisance and is not bothersome to the surrounding neighborhood or community. It would not displace more water, create drainage issues or adversely impact abutting lots. Ms. LoRusso is considering a driveway made of permeable pavement and intends to utilize creative landscaping techniques to help absorb any potential water. There would be no undue impact on Merrimack's municipal resources.



3. Granting this variance would do substantial justice because the proposed use of the property is consistent with other lots in the subdivision. Most of the homes in the 85-lot subdivision were built before the wetlands ordinance and 40' setback requirement went into effect. Had this property been developed prior to the amendments, this home/septic could have been built without the need for a variance. It is just and reasonable to afford Ms. LoRusso the same rights she would have had pre-1990/2000 and granting her the right to build on her lot as others have similarly done. To deny her request for a variance would be a substantial injustice with no real gain to the public. Ms. LoRusso purchased the property relying on the fact that its use for residential purposes was legally permissible. The proposed use can appropriately and safely be located on the upland area a reasonable distance from the wetlands. Ms. LoRusso's loss vs. the general public's gain is far outweighed because a denial of her application would unreasonably deny her right to use her entire property and mount to a "taking" under the State Constitution. The proposed house and septic location would not contribute to pollution of surface or ground water nor create a negative impact on the wetlands. There would be no dredging, filling, drainage or alteration of the surface configuration of the land or wetlands. The plan has been carefully considered with the unique circumstances of the lot in mind. The use is in harmony with the wetlands, adjacent lots and the entire subdivision. Owners of similar lots in the neighborhood have obtained variances for similar relief. The proposed use is consistent with the area's present use. Seven lots are smaller than Ms. LoRusso's lot and presumably have structures built near the wetlands area. The surrounding properties are all residential and some have undergone rebuilding, renovations or additions. There is no greater impact on the wetlands by this proposed use.
4. The values of the surrounding properties would not be diminished because the property is in a residential area. Construction of the home will have no negative impact on surrounding properties. The plan is consistent with the existing character of the neighborhood and will increase property values. Broker Jackie Dufresne's opinion is that the proposed plan would "add value to the neighborhood". The design, location and construction consider the unique characteristics of the property while being cognizant and sensitive to abutting properties. Any potential water concerns are negated by the fact that the home would be built on the upland an appropriate distance from the wetlands and that landscaping techniques would be utilized to mitigate potential drainage issues.
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - 1) No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property because the property has special conditions that distinguish it from other properties in the area. A unique feature is that the configuration of the wetlands area renders a disproportionately small building envelope. Given

- the special conditions, the home and septic location are in the safest and most appropriate area on the lot. There is no other reasonable location to place the home and septic;
- 2) The proposed use is a reasonable one because it is permitted under the Town's Ordinance. The Town recognizes it as a buildable lot. The 1967 subdivision plan predates the 2000 wetlands ordinance. The proposed plan is reasonable because it takes into consideration the property's unique features and includes safeguards to protect the wetlands and abutting lots. The proposed home and septic would be constructed on dry land above the wetlands with no direct impact on them or any abutting property. The plan would develop the lot in an environmentally friendly way by implementing building and landscaping techniques that would not negatively impact the wetlands or surrounding properties.
- B. If the criteria in paragraph (A) are not established, explain how an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot reasonably be used in strict conformance with the Ordinance and a variance is therefore necessary to enable a reasonable use of the property. Given the unique and special circumstances of this property as distinguished from the other larger parcels around it, a home and septic cannot be constructed in strict conformance with the Ordinance. A variance is necessary to allow the proposed reasonable use; otherwise Ms. LoRusso would not be able to construct her home.

**6. Lorraine A. LoRusso (applicant/owner)** – Special Exception under Section 2.02.7.A.4 of the Zoning Ordinance to permit the construction of a single-family dwelling within the 25' wetland buffer. The parcel is located at 12 Carrie Drive in the R-1 (Residential) and Aquifer Conservation Districts. Tax Map 5B, Lot 176. Case # 2018-31.

Attorney Laura Dodge, McLane Middleton, read the Special Exception criteria into the record.

There was no public comment.

**The Board voted to 5-0-0 to grant the Special Exception, with the condition that the Board grant the petition in Case # #2018-32, on a motion made by Lynn Christensen and seconded by Rod Buckley.**

### **Findings of Fact**

- a) To prevent the development of structures and other land uses on or adjacent to wetlands that would contribute to pollution of surface and ground water. The proposed use will not conflict with this purpose because Ms. LoRusso proposes to build a 24' x 25' home on the dry upland area of the lot as far away from the wetlands and buffer area as possible. The house will be built on a concrete slab-

on-granite foundation with no perimeter drains. There will be no dredging, filling, draining or altering of the wetlands. The plan has been carefully considered with the unique circumstances of the lot in mind. A storm water management plan and specific infiltration methods address potential drainage concerns. The proposal will not impact existing conditions on abutting lots. In fact, it could alleviate some existing conditions experienced on neighboring lots;

- b) To prevent the destruction and degradation of natural wetlands that provide flood protection. The proposed use will not conflict with this purpose because the plan has been carefully considered and designed to preserve the natural wetlands and minimize any potential impact on the wetland areas. The proposed home is modestly designed, environmentally conscious and will occupy a modest footprint on the lot. Ms. LoRusso intends to utilize ecological building, landscaping and storm water management techniques for minimizing any potential impact on wetlands and drainage concerns;
- c) To prevent unnecessary or excessive expenses to the Town to provide and maintain essential service and utilities that arise because of inharmonious use of wetlands and adjacent upland areas. The proposed use will not conflict with this purpose because the plan is in harmony with the wetlands, adjacent upland areas, adjacent lots, and the entire subdivision. The uses poses no nuisance and is not bothersome to the surrounding neighborhood or community. The proposed plan will not displace more water, create drainage issues or adversely impact abutting lots. Landscaping and storm water management techniques will be utilized to mitigate these potential issues. Mr. Carr opines that “this should serve as a model home to the area and town of Merrimack where storm water management is a concern or potential concern”.
- d) To encourage those uses that can be appropriately and safely located in and around wetland areas. The proposed use will not conflict with this purpose because the plan creatively designs and positions the home on the lot in the best possible location. The size of the lot is unique in that it is smaller than other lots in the area and the configuration of wetland areas renders a disproportionately small building envelope. The plan was designed with these characteristics in mind. Like other similar lots in the immediate neighborhood and in other areas of the Town, use of land to build a residential single-family dwelling is an appropriate and reasonable use that can be safely located in and around wetland areas.

**7. Lorraine A. LoRusso (applicant/owner)** – Variance under Section 3.02.4 of the Zoning Ordinance to permit the installation of a septic system 10 feet from the side property line whereas 20 feet is required. The parcel is located at 12 Carrie Drive in the R-1 (Residential) and Aquifer Conservation Districts. Tax Map 5B, Lot 176. Case # 2018-32.

Attorney Laura Dodge, McLane Middleton, noted that the criteria for both variances had been read into the record at a previous meeting.

There was no public comment.

**The Board voted to 5-0-0 to grant the Variance, on a motion made by Kathleen Stroud and seconded by Drew Duffy.**

### **Findings of Fact**

1. Granting the variance would not be contrary to the public interest because the proposed location of the home and septic is not harmful to the public health, safety or welfare. The home is appropriately and safely located as far away from the wetlands as possible. The home would not be in the wetland; it would be constructed on the dry upland portion of the lot on a concrete slab-on-grade foundation with proper grading and no perimeter drains. The location of the home and septic would not alter the essential character of the neighborhood. The proposed home is modestly designed, environmentally conscious and would be consistent with the character of the neighborhood. The proposed location of the septic is necessitated by the size of the lot, taking into consideration the wetland areas and appropriate proximity to the lot lines. The State has already approved placing the septic in the proposed location. Ms. LoRusso intends to utilize ecological landscaping techniques for minimizing any potential impact on wetlands and mitigating any potential water management concerns. The proposal is consistent with the 1967 subdivision plan, namely a single-family residential dwelling. It is designated as a buildable lot that qualifies for reduced setbacks due to its legal non-conforming status. It promotes public interest by providing housing in a market with limited properties available for sale without the need for more infrastructure or land development. It proposes no nuisance and is not bothersome to the surrounding neighborhood or community. It would not displace more water, create drainage issues or adversely impact abutting lots. Ms. LoRusso is considering a driveway made of permeable pavement and intends to utilize creative landscaping techniques to help absorb any potential water. There would be no undue impact on Merrimack's municipal resources.
2. The spirit of the Ordinance is observed because the proposed location of the home and septic is not harmful to the public health, safety or welfare. The home is appropriately and safely located as far away from the wetlands as possible. The home would not be in the wetland; it would be constructed on the dry upland portion of the lot on a concrete slab-on-grade foundation with proper grading and no perimeter drains. The location of the home and septic would not alter the essential character of the neighborhood. The proposed home is modestly designed, environmentally conscious and would be consistent with the character of the neighborhood. The proposed location of the septic is necessitated by the size of the lot, taking into consideration the wetland areas and appropriate proximity to the lot lines. The State has already approved placing the septic in the proposed location. Ms. LoRusso intends to utilize ecological landscaping techniques for minimizing any potential impact on wetlands and mitigating any potential water management

concerns. The proposal is consistent with the 1967 subdivision plan, namely a single-family residential dwelling. It is designated as a buildable lot that qualifies for reduced setbacks due to its legal non-conforming status. It promotes public interest by providing housing in a market with limited properties available for sale without the need for more infrastructure or land development. It proposes no nuisance and is not bothersome to the surrounding neighborhood or community. It would not displace more water, create drainage issues or adversely impact abutting lots. Ms. LoRusso is considering a driveway made of permeable pavement and intends to utilize creative landscaping techniques to help absorb any potential water. There would be no undue impact on Merrimack's municipal resources.

3. Granting this variance would do substantial justice because the proposed use of the property is consistent with other lots in the subdivision. Most of the homes in the 85-lot subdivision were built before the wetlands ordinance and 40' setback requirement went into effect. Had this property been developed prior to the amendments, this home/septic could have been built without the need for a variance. It is just and reasonable to afford Ms. LoRusso the same rights she would have had pre-1990/2000 and granting her the right to build on her lot as others have similarly done. To deny her request for a variance would be a substantial injustice with no real gain to the public. Ms. LoRusso purchased the property relying on the fact that its use for residential purposes was legally permissible. The proposed use can appropriately and safely be located on the upland area a reasonable distance from the wetlands. Ms. LoRusso's loss vs. the general public's gain is far outweighed because a denial of her application would unreasonably deny her right to use her entire property and mount to a "taking" under the State Constitution. The proposed house and septic location would not contribute to pollution of surface or ground water nor create a negative impact on the wetlands. There would be no dredging, filling, drainage or alteration of the surface configuration of the land or wetlands. The plan has been carefully considered with the unique circumstances of the lot in mind. The use is in harmony with the wetlands, adjacent lots and the entire subdivision. Owners of similar lots in the neighborhood have obtained variances for similar relief. The proposed use is consistent with the area's present use. Seven lots are smaller than Ms. LoRusso's lot and presumably have structures built near the wetlands area. The surrounding properties are all residential and some have undergone rebuilding, renovations or additions. There is no greater impact on the wetlands by this proposed use.
4. The values of the surrounding properties would not be diminished because the property is in a residential area. Construction of the home will have no negative impact on surrounding properties. The plan is consistent with the existing character of the neighborhood and will increase property values. Broker Jackie Dufresne's opinion is that the proposed plan would "add value to the neighborhood". The design, location and construction consider the

unique characteristics of the property while being cognizant and sensitive to abutting properties. Any potential water concerns are negated by the fact that the home would be built on the upland an appropriate distance from the wetlands and that landscaping techniques would be utilized to mitigate potential drainage issues.

5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  1. No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property because the property has special conditions that distinguish it from other properties in the area. A unique feature is that the configuration of the wetlands area renders a disproportionately small building envelope. Given the special conditions, the home and septic location are in the safest and most appropriate area on the lot. There is no other reasonable location to place the home and septic;
  2. The proposed use is a reasonable one because it is permitted under the Town's Ordinance. The Town recognizes it as a buildable lot. The 1967 subdivision plan predates the 2000 wetlands ordinance. The proposed plan is reasonable because it takes into consideration the property's unique features and includes safeguards to protect the wetlands and abutting lots. The proposed home and septic would be constructed on dry land above the wetlands with no direct impact on them or any abutting property. The plan would develop the lot in an environmentally friendly way by implementing building and landscaping techniques that would not negatively impact the wetlands or surrounding properties.
- B. If the criteria in paragraph (A) are not established, explain how an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot reasonably be used in strict conformance with the Ordinance and a variance is therefore necessary to enable a reasonable use of the property. Given the unique and special circumstances of this property as distinguished from the other larger parcels around it, a home and septic cannot be constructed in strict conformance with the Ordinance. A variance is necessary to allow the proposed reasonable use; otherwise Ms. LoRusso would not be able to construct her home.

#### **10. Discussion/possible action regarding other items of concern**

None.

#### **11. Approval of Minutes — November 28, 2018**

**The minutes of November 28, 2018, were approved as submitted, by a vote of 5-0-0, on a motion made by Lynn Christensen and seconded by Drew Duffy.**

**12. Adjourn**

**The meeting was adjourned at 10:33 p.m., by a vote of 5-0-0, on a motion made by Lynn Christensen and seconded by Kathleen Stroud.**