



# Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

## **MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, SEPTEMBER 26, 2018**

Members present: Patrick Dwyer, Richard Conescu, Lynn Christensen, Kathleen Stroud, and Alternates Leonard Worster and Rod Buckley.

Members absent: Fran L'Heureux and Alternate Drew Duffy.

Staff present: Planning and Zoning Administrator Robert Price 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 to sit for Fran L'Heureux.

### **2. Roll Call**

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

### **3. CrossAmerica Partners LP (applicant) and Leemilt's Petroleum, Inc. (owner)**

Variance under Section 2.02.2.B of the Zoning Ordinance to permit the re-use of an existing gasoline service station that has been closed for more than one year, causing its legal non-conforming status to lapse. The parcel is located at 605 Daniel Webster Highway in the C- 1 (Limited Commercial) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 6E- 1, Lot 055. Case #2018-26.

Attorney Brett Allard, Bernstein Shur, Sawyer & Nelson, said the site of the former BP gas station was permitted this use by right in the 1970s. In the 1990s a variance was granted to allow the existing canopy to encroach 1½' into the front setback. Attorney Allard stated it is possible that a variance might not be needed because the non-conforming status may not be lost. He cited the Pike Industries, Inc. v. Brian Woodward court case. In that case, Pike Industries operated an asphalt plant as a non-conforming use. They stopped producing asphalt for over one year, but the Court ruled that since Pike maintained use of the site and that the site was kept in a state of readiness to produce asphalt, its non-conforming use status was not lost. A variance in this case might not be necessary and the non-conforming status may not be lost because Leemilt's Petroleum maintained the site in a state of readiness. He stressed that the petitioner still intended to seek the variance, but asked the Board to bear this in mind while deliberating the facts. CrossAmerica would be the tenant. Attorney Allard read the statutory criteria into the record.

### **Public comment**

Kinsley Osgood-Barnard, 9 Harris Avenue, said the gas station would be an asset, a convenience and an improvement to the neighborhood. The site should not remain vacant.

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

### **Findings of Fact**

1. Granting the variance would not be contrary to the public interest because it would not negatively alter the essential character of the neighborhood. The property is already improved with the existing gas station. The applicant seeks only to reopen the business. The character of the neighborhood would be improved because the applicant would revitalize the existing gas station from vacant to operational. Granting the variance would not threaten public health, safety or welfare. Because the property is already improved as a gas station, there are two existing curb cuts for access onto Daniel Webster Highway and an existing curb cut for access onto Depot Street. Thus there would be no adverse effect to safety or traffic flow. The public interest would be served by decreasing the chances of crime, vandalism, etc.;
2. The spirit of the Ordinance is observed because granting the variance would not threaten public health, safety or welfare. The property otherwise complies with all dimensional and area requirements of the zoning ordinance or has received approvals for same. Granting the variance would allow the applicant to improve the property back to its highest and best use as an operational gas station;
3. Granting this variance would do substantial justice because there would be a loss to the detriment of the applicant if the variance were denied. The applicant would be required to tear down the existing gas station and remove the existing underground fuel storage tanks. The applicant's loss is not outweighed by any gain to the general public. The public would gain from granting the variance because the applicant would improve the property from a vacant condition to an operational one. There would be a loss both to the general public and the applicant if the variance were denied. Requiring the applicant or any future property owner to tear down the existing buildings and improvements that are otherwise perfectly suitable to facilitate the highest and best use of the property would not do substantial justice;
4. The values of the surrounding properties would not be diminished because, in general, vacant gas stations diminish surrounding property values. They fall into disrepair, are unsightly, and attract crime, vandalism and loitering. Operational gas stations can be maintained in an attractive manner and are often improved with security systems to deter criminal activity and increase surrounding property values;
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 is distinguishable from other properties in the area. It is the only gas station in the area and the only property improved as a gas station facility that, due to zoning changes, requires a variance to reopen. In its current condition, the only feasible use of the property is as a gas station. While a gas station is not permitted on the property under current zoning regulations, the property is zoned C-1 and the proposed use is commercial. While it might make sense to deny a variance for the proposed construction of a new gas station in this area, the applicant faces a particular hardship because the property is already improved with an existing gas station facility that was permitted by right under prior zoning regulations in effect at the time of the original development but is prohibited from operating same under current zoning;

- 2) The proposed use is a reasonable one because the property is zoned C-1 and the applicant proposes a commercial use. The property is already improved with an existing gas station facility and the applicant merely requests to reopen same and improve an unsightly vacant facility into an attractive operational facility.

4. **Rachel Schelhorn (applicant/owner)** – Variance under Section 3.05 of the Zoning Ordinance to permit an attached 20'x 24' garage addition 8 feet from the front property line whereas 30 feet is required. The parcel is located at 23 Ingham Road in the R-4 (Residential) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 3C, Lot 026. Case #2018-27.

Kathleen Stroud recused herself from discussing and voting on this item. Patrick Dwyer designated Leonard Worster to sit for Kathleen Stroud.

Rachel Schelhorn, 23 Ingham Road, said her current garage is non-conforming. It is in front of the property line, not functional, not attached to her home, and is an eyesore. A new two-car garage would be safer and increase her property value.

There was no public comment.

Patrick Dwyer said the proposed garage would look much better and Lynn Christensen said that it would be less non-conforming than what currently exists.

**The Board voted 5-0-0 to grant the Variance, on a motion made by Rod Buckley and seconded by Richard Conescu.**

#### **Findings of Fact**

- 1 Granting the variance would not be contrary to the public interest because the proposed garage would be safe for parking cars. Due to proximity to the road, the existing garage is unsafe, making it impossible to house cars. The proposed garage would enhance the neighborhood, increase property values and impose no burden on abutters;
2. The spirit of the Ordinance is observed because the current out-of-date, non-conforming, unsafe garage would be removed and replaced. The new structure

would comply with the front setback from Cambridge Street and would be moved another 8' back from Ingham Road. It would not only be more aesthetically pleasing, but the property would feel more private and residential;

3. Granting this variance would do substantial justice because the proposed garage would be much more functional. Not only would the attached garage allow parking cars inside, there would be enough room to park cars off the road in front of it. It would enhance the desired residential feel and more closely resemble the other houses in the neighborhood;
4. The values of the surrounding properties would not be diminished because removing the existing unsuitable, unsafe eyesore of a garage and adding a brand new attached two-car garage would not only add value to this property but also to the surrounding properties and neighborhood as well;
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 this property is currently a legal non-conforming lot, which makes it impossible to add a new garage without infringing on the required setbacks. The property sits on only a .23-acre lot, adding to the unnecessary hardship of building the garage within the current legal setbacks;
  - 2) The proposed use is a reasonable one because approval of the variance would grant the ability to replace an existing non-conforming structure that is unusable and unsafe. The addition would increase safety, property value, neighborhood aesthetics, and make the property more functional.

**5. Kinsley Osgood-Barnard (applicant/owner)** – Special Exception under Section 2.02.2.C of the Zoning Ordinance to permit the use of an existing single-family dwelling to continue on a commercially-zoned parcel that is also being proposed for a commercial use. The parcel is located at 9 Harris Avenue in the C-1 (Limited Commercial) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 6D-1, Lot 038. Case # 2018-28.

Kathleen Stroud returned to the Board. Leonard Worster returned to Alternate status.

Kinsley Osgood-Barnard, 9 Harris Avenue, wants to live and work on the property. Her business is dog boarding and grooming. Her neighbor approves. There would be 10 kennels inside and a 30'-wide fenced-in outdoor run. Kinsley Osgood-Barnard read the Special Exception criteria into the record.

Robert Price said the residence has existed for many years. The applicant wants to maintain the house as well as establish the business. Despite the existence of the home, since the property is being proposed as a mixed use, a Special Exception is needed to allow the home to continue serving as a residential use on the property alongside the proposed commercial use.

### **Public comment**

Andrew Moore, 11 Harris Avenue, said his brother owned the petitioner's house years ago and is thrilled it would be improved. He has no objection, but he is concerned about noise, appearance, property values and aesthetics. He would like to see a plan. It was explained that these are Planning Board issues, and that a plan would be required to seek approval from the Planning Board.

Richard Conescu said the proposal makes a lot of sense from a zoning perspective. Patrick Dwyer liked the mixed use element to the proposal.

**The Board voted 5-0-0 to grant the Special Exception, with the condition that the applicant shall obtain site plan approval from the Planning Board for the proposed use on the site, on a motion made by Richard Conescu and seconded by Lynn Christensen.**

### **Findings of Fact**

1. The specific site is an appropriate location for the proposed use in terms of overall community development because C-1 zoning permits grooming and boarding;
  2. The proposed use, as developed, will not adversely affect the neighborhood because there are already businesses very close to this neighborhood as well as highway noise on both ends of the street. The kennel would be small, no more than 10 dogs at a time for boarding and two dogs a day for grooming;
  3. There will be no nuisance or serious hazard to vehicles or pedestrians because the barn would be attached to the house 100' from the dead-end street. Customers drop off their dogs and leave. They do not all come at once. There is enough room for several cars;
  4. Adequate and appropriate facilities would be provided for the proper operation of the proposed uses because a custom building would be erected to house the dogs appropriately.
- 6. Kinsley Osgood-Barnard (applicant/owner)** – Special Exception under Section 3.09 of the Zoning Ordinance to permit a 20'x30' barn and 4 season porch addition to a single-family dwelling constructed before June 29, 1953. The parcel is located at 9 Harris Avenue in the C-1 (Limited Commercial) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 6D-1, Lot 038. Case #2018- 29.

Chairman Dwyer expressed a desire for the petitioner to have submitted a plan for the Zoning Board of Adjustment (ZBA) to review. Robert Price explained that, since the existing home was constructed in 1895, the proposed barn is permitted by Special Exception. The Ordinance allows the ZBA to grant a Special Exception for additions, alterations or improvements to buildings or structures built before June 29, 1953, that do not conform to minimum setback regulations. Since dimensions are not at issue, a plan

is not necessarily required but the Board has the right to ask the petitioner to provide one before making a decision.

Ellen Osgood, 3 Montclair Avenue, Nashua, who is the applicant's mother, stated that the petitioner's contractor would not draw plans until receiving 1/3 of their fee and the petitioner does not want to make that level of investment without knowing beforehand if she will be allowed to do what she proposes.

Kinsley Osgood-Barnard, 9 Harris Avenue, described the four-season porch that would be connected to the barn and house in the back 40' from the wetland. There are wetlands on only one side and only one neighbor. The petitioner wants to build and paint it to look exactly like the existing 1895 house. The house will act as a buffer from the dogs' noise. Kinsley Osgood-Barnard would try to keep them from barking and keep them inside at night. She read the Special Exception criteria into the record.

There was no public comment.

Richard Conescu explained that, since the applicant must produce plans for the Planning Board, she would have to pay someone to prepare them.

**The Board voted 5-0-0 to grant the Special Exception, with the condition that the applicant shall obtain site plan approval from the Planning Board for the proposed barn addition, on a motion made by Lynn Christensen and seconded by Kathleen Stroud.**

### **Findings of Fact**

1. The additions, alterations or improvements are for a use currently permitted within the Zoning district because it is a property in the C-1 zoning district;
2. The additions, alterations or improvements are ordinarily and customarily associated with the existing building and/or use because the garage would be attached to and look like the home;
3. The additions, alterations or improvements would serve to promote the reuse, restoration, rehabilitation or otherwise enhance an existing building or structure, especially an historic or potentially historic building or structure because the garage would look like the house and with the character of its time;
4. The additions, alterations or improvements would not result in increased hazards to vehicles or pedestrians; impair or impede emergency vehicle access or the provision of emergency services, or encroach on planned right-of-way corridors because the building would be 40' or more from the street and there is ample parking;
5. The additions, alterations or improvements would not result in unreasonable impacts to abutting properties by way of increased noise, visual blight, odor or other nuisance because no one is next to or behind the barn's location. It would be placed as far from the neighbor as possible. There would be a maximum of 10 dogs boarding;

6. Adequate parking and other necessary support facilities would be provided for the existing building or structure as well as for the proposed addition, alteration or improvement. There are five spaces there already;
7. The proposed improvement would have been allowed by right prior to adoption of the Zoning Ordinance provision at issue because the house was built before 1953;
8. The proposed improvements cannot reasonably be constructed in a differing way or in a differing portion of the property so as to comply with existing setback requirements because the house is not within setbacks.

**7. 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 May 31, 2017, the ZBA denied a variance to construct a new single-family dwelling with a wetland setback of 20' whereas 40' are required. Lorraine Russo is the new owner with a new proposal. NH law does not allow a property to request the same relief after it has been previously denied by a zoning board. In order for the ZBA to hear this petition legally, the petitioner must demonstrate either that a material change of circumstances affecting the merits of the application has occurred or that the current petition is for a use that materially differs in nature and degree from the use previously denied.

Attorney Laura Dodge, McLane Middleton, presented a chart showing the changes in the current petition from the previous 2017 petition:

- Applicant: Lorraine LoRusso would own and live in the home as her primary residence;
- Degree of diligence: The applicant obtained independent expert analysis from a certified licensed land surveyor, certified wetland scientist, and real estate professional. The application provides additional evidence and analysis and a complete legal analysis of the variance criteria and establishes how each is met;
- Proposed use: The house would be smaller, a 30% reduction of the home footprint;
- Plot plan: Certified by a certified wetland scientist and licensed land surveyor and delineation of wetlands;
- Water management/mitigation plan: Landscaping design (rain garden, natural drains and water absorbing plants);
- Supplemental information: photos, property valuation evidence, house plans, landscaping plans to support variance criteria.

Attorney Dodge stated that the septic system and house would be located in the safest and most appropriate location on the lot. The water management/mitigation plan would minimize impact to the wetlands and to the abutters.

Chairman Dwyer reminded the applicant that the abutters had been concerned about rainwater, the culvert, runoff, flooding, and lack of proper documentation about runoff.

Jon Lefebvre, Land Surveyor, Meridian Land Services, Inc., said Meridian delineated the wetland. The proposed location of the house and septic system would have the least impact and meet State standards. It would not create a large change in impervious surface. If the road had been built to today's standards, water would not be a problem. The culvert that was the subject of much discussion with the 2017 petition is not located on this property.

Attorney Dodge said that the 24'x25' footprint would be on a concrete-on-slab foundation. There would be no dredging, filling or wetland disturbance. The home would be built on the dry portion of the lot.

Jon Lefebvre said the proposed septic system would be smaller than the one that was originally approved by the State. Effluent would be treated before going to a leach field.

Lynn Christensen said that she heard some compelling arguments to allow discussion of a variance. Chairman Dwyer agreed that more due diligence was done about the wetland and septic system.

**The Board voted 5-0-0 to determine that the current petition is materially different in nature and degree from the petition denied on May 31, 2017, on a motion made by Lynn Christensen and seconded by Richard Conescu.**

Attorney Dodge said this is a small lot in a residential subdivision. The house would be consistent with other houses in the area. Because of the wetland's location, there are limits on where the house can be placed. It would have a small footprint and be placed on the upland portion of the lot with no encroachment into the wetland itself.

Attorney Dodge read the statutory criteria into the record:

1. Granting the variance would not be contrary to the public interest because and 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.

Discussion ensued about vandalism on the property.

When Lynn Christensen said there is no guarantee that the applicant must do what she intends, Attorney Dodge said the ZBA could impose conditions on its approval. Robert Price did not know whether a building permit could be contingent on meeting conditions. Chairman Dwyer suggested consulting Legal Counsel.

As to Conditions #5, hardship, Lynn Christensen noted that the applicant bought the lot even though she knew the previous variance request had been denied. Lorraine LoRusso countered that the previous applicant had not done due diligence to see if this

were a buildable lot. She thought she could meet the standard and did very careful planning not to disturb the wetland. The lot would remain as much in its natural state as possible.

Lynn Christensen noted that the applicant also seeks a Special Exception for encroachment into the wetland buffer as well as a variance to permit an encroachment into the Town-required septic setback. Lorraine LoRusso stated she does not need a drilled well and has Town water. She would install a small eco-friendly septic system. She has done research and talked to people since February 2018, which Habitat for Humanity (the previous petitioner) did not do. She holds an undergraduate degree in biology.

Patrick Dwyer said the plan must be on a buildable lot and have the least impact. Attorney Dodge said the applicant identified and delineated the wetland and did an analysis of whether she could build on the lot.

### **Public comment**

Aidan Seltson-Wilps, 8 Carrie Drive, who also owns 10 Carrie Drive, is “adamantly” opposed. There is significant standing water on his property. He questioned how to enforce conditions and what the performance metrics would be. Lot 10 is unbuildable because of the wetland. Geography and reality of the lot changed significantly since approval of this as a buildable lot in the 1960s. How high is the elevation? Where would the house be built? His sump pumps barely keep up. What assurance is there about mitigation techniques or catastrophic damage to neighboring homes? Aidan Seltson-Wilps said it is not realistic to build a home without there being a negative impact on the entire development, which he termed a “bog”. No one has ever built on the property. The price dropped drastically. There was no interaction with neighbors. This will never work. The house would be 200’ from Aidan Seltson-Wilps’s property. Where would the water go? There are sinkholes in the area and road needs to be repaved. Aidan Seltson-Wilps is not aware of vandalism. He claimed that the lot should not exist and wanted assurance that there would be no damage to neighbors’ properties.

Jeff Ditman, 7 Carrie Drive, who is “strongly” opposed, refuted some of Attorney Dodge’s claims. The proposal would affect his property. Vandalism is a non-issue. His French drain and sump pump work, but the pump runs often. He disagrees about conforming to the character of the neighborhood. A two-bedroom home would be smaller and have less value than the other homes and would affect their property values. Patrick Dwyer disagreed; values are based on the size of comparable homes. Jeff Ditman said the buyer should have been aware that the prior application was denied and that this one might also be denied. 9 Carrie Drive is a small lot whose garage permit was denied because of the wetland. A hollow tree stump filled up with rain. There are only seven homes on the street. This lot is very wet and would be wetter if trees were removed and water displaced. Jeff Ditman asked how to prevent removing more trees in the future to make more livable space. Patrick Dwyer stated that trees cannot be cut in a wetland.

Eric Gaska, 19 Maidstone Drive, lives across the street. The culvert is in his back yard. He informed Lorraine LoRusso about the situation. The issue is where water has to go. Water took over Eric Gaska's grass and back yard, and turned it into a "swamp". He, too, dismissed vandalism. Eric Gaska is a contractor. He said the property had been surveyed five times and was not considered a buildable lot. There is a pond in the applicant's back yard where the house would be. It is a "swamp". Eric Gaska worried about the effect on his property.

Christine Coviello, 145 Baboosic Lake Road, agreed that the buyer should have known about the property's history. Today's light rain flooded her yard, was up to her son's boots and ducks swam in it. She, too, asked where the water would go. She wanted a guarantee that there would be no more water on her property. This is not a buildable lot.

Attorney Dodge noted that the applicant has a right to develop her property, which is buildable according to the Town, but she must consider abutters' issues. "Reasonable use" means she cannot cause a nuisance or harm to abutters. Water is currently a problem. Removing dying trees that do not absorb water may help. The project would not negatively impact other properties. The wetland scientist said there would be no new impact on the wetland or the abutters. The abutters presented no evidence that there would be more water or issues on their properties. The culvert runs under this lot. The flow actually comes from the Coviello property to the LoRusso property. It is not known whether the proposal would exacerbate the water problem. Attorney Dodge repeated that there would be no clearing or dredging, that the house would be built on a slab and that there would be no negative impact on neighboring properties.

Patrick Dwyer agreed that the applicant has a right to develop her property, but he asked what would happen if she made the situation worse. Lorraine LoRusso said it might improve. No one knows. The engineering firm calculated rain runoff and said this is a doable project. There would be a permeable driveway with baskets to capture the rain. There is a plan. It would maintain the eco-system.

Robert Price said an appearance before the Merrimack Conservation Commission (MCC) is not necessary because this is a residential lot. He added that statements made by the petitioner during the hearing in regard to development techniques and measures could potentially bear some weight if there were a court case.

Lynn Christensen said that this is the best plan to build on this lot, but there is no control over what a future owner would do.

Attorney Dodge opined that perhaps additions to abutting properties caused the water issues. Wetlands change over time. This will remain a vacant lot if the ZBA does not approve the variance. This is the best proposal and this is a buildable lot.

Richard Conescu said there is no unnecessary hardship (Condition #5) if the buyer knew that the ZBA denied a variance last year and that conditions make it difficult to build. As to "unique special conditions", Attorney Dodge stated that this was advertised as a vacant lot. The applicant did due diligence after she bought the lot. Lynn Christensen said it may be a legally buildable lot, but she doubts it is actually buildable.

Conditions were different before the development was built. The developer installed a lot of impervious surface, which contributed to the problem. In her opinion, there is no place even for a small house.

Attorney Dodge said that eight variances were granted in the neighborhood in the 1970s. This lot is smaller than those lots. Meridian Land Services said there would be no nuisance or negative impact to abutters. Lynn Christensen countered that it would infringe on setback rules. She and Richard Conescu objected to lack of enforcement ability after construction. Robert Price explained that the Building Department would review the proposed footprint. A building permit requires meeting codes and regulations.

Richard Conescu reminded the Board that it must grant all three petitions or the proposal as a whole, fails.

**The Board voted 1-4-0 to grant the Variance, on a motion made by Richard Conescu and seconded by Lynn Christensen. Richard Conescu, Lynn Christensen, Kathleen Stroud and Rod Buckley voted in opposition.**

**The Board voted 4-1-0 to deny the Variance on the grounds that the petitioner did not meet the criterion of unnecessary hardship (Condition #5) because she knew about the previous variance denial said the petitioner did not meet the criterion of public interest (Condition #1) because of the potential effect of water/drainage issues on surrounding properties, on a motion made by Kathleen Stroud and seconded by Lynn Christensen. Patrick Dwyer voted in opposition.**

- 8. 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.

**Withdrawn**

- 9. 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.

**Withdrawn**

Chairman Dwyer called a five-minute recess at 9:23 p.m.

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

Robert Price informed the Board that ARNE, LLC decision that was appealed to Superior Court was remanded back to the ZBA because the Court found that the ZBA failed to adequately analyze whether denial of the petition would result in unnecessary hardship. The matter will be first on the October 31, 2018, agenda.

**11. Approval of Minutes – August 29, 2018**

**The Board voted 4-0-1 to approve the minutes of August, 29, 2018, as submitted, on a motion made by Lynn Christensen and seconded by Kathleen Stroud. Rod Buckley abstained.**

**12. Adjourn**

**The meeting was adjourned at 9:28 p.m., by a vote of 5-0-0, on a motion made by Kathleen Stroud and seconded by Rod Buckley.**