

**Town of Auburn
Zoning Board of Adjustment
May 26, 2015**

Present: Mark Wright, Chairman, Jim Lagana, Vice Chairman, Mike DiPietro, Jeffrey Benson, Members. Robert Beaurivage and Kevin Stuart, Alternate Members. Minutes recorded by Denise Royce.

Also Present: Carrie Rouleau-Cote, Building Inspector.

Absent: Elizabeth Robidoux, Member and Peggy Neveu, Alternate Member.

Mr. Wright called the meeting to order at 7:07 p.m. and informed everyone present that he would be shuffling cases a bit tonight to accommodate some Board members and an applicant. Mr. Wright introduced the Board members and explained the procedure for tonight's hearing.

Mr. Wright elevated Mr. Stuart to full voting status for the first case.

Request for Rehearing

Kevin & Tracey Dandrade

Variance Decision - Granted

Maverick Development, Tax Map 5, Lot 29 & 36

Pingree Hill Road & Haven Drive

Zoned Residential One

Mr. Wright asked if the Petitioner was present and asked Mr. Dandrade to begin and then informed everyone that he would give the applicant a chance for rebuttal before the Board decides.

At this time, Mr. Dandrade began by saying that the plan has changed since the ZBA rendered its decision and voted to condition it on that exact plan and that plan has changed since they've last met. Mr. Dandrade believed that the ZBA should have

considered 5.08 and 5.09 review criteria when looking at the variance request. Mr. Dandrade went on to say that not once did the Board go to this section reviewed the request in the underlying zoning. Mr. Dandrade talked about minimizing wetland disturbance fell short within the plan that was presented to the Board. Mr. Dandrade also mentioned that a peer review has yet to be conducted to distinguish whether or not it's a Level One or Level Two and believed it was premature until that occurs for the Board to render a decision on the rehearing. Mr. Dandrade did not believe they have shown a hardship because they could very well move the detention basin up gradient into the next buildable lot to further minimize the amount of detention basin that they would need within the buffer. Mr. Dandrade talked about the connection to Cohas Road as opposed to having a through road which was still up in the air. Mr. Dandrade mentioned the decision that the Board members made with JMJ Properties, LLC where the Board denied the request for a variance and asked them to push it up gradient into the adjacent lot which is exactly what they want to do here. Mr. Dandrade believed that the Board was somewhat inconsistent with its decision making between the Maverick application and the JMJ Properties, LLC and would ask the Board as the plan comes back before them that they take those elements into consideration.

Mr. Wright asked if there was someone from Maverick Development that would like to comment or speak on this request. Mr. Mitchell pointed out that his office prepared the ZBA application and that Mr. Febonio was also present tonight. Mr. Mitchell began by saying that it was true that the plan has changed some and that the road will no longer go through the vernal pool as they are doing a lot line adjustment with the abutting lot owner to swap land which was not available at the time that they went to the Zoning Board. Mr. Mitchell went on to talk about the locations of the detention ponds which were approved and believed that the variances that were granted were proper. Mr. Mitchell talked about moving the road and that the only thing that would change is if the agreement between the two lot owners were to fall apart. The alternative that is shown is a positive alternative, if the pond could not be built in the exact location if they move the road then they would no longer need to have that particular variance on that pond and believes that it is fair that the Board not grant the appeal. Mr. Mitchell wanted to comment on Mr. Dandrade's statement that having it a through road to Pingree Hill was still up in the air but the fact is, is that the Planning Board has stated that the road will go through for safety reasons. Mr. Mitchell also pointed out that, twice the Planning Board has informed Mr. Dandrade that they would not authorize a review because they believe that what has been submitted is adequate but it continues to come up by Mr. Dandrade. With this in mind Mr. Mitchell believes that the application as submitted as approved by the Zoning Board was proper and correct and would ask that you allow the approval to stay.

Mr. Febonio wanted to remind the Board that they have made changes to the detention ponds since they first made the presentation on the detention ponds. They have met with Fish and Game and the only request they had was to remove the sumps out of the ponds so that wildlife would not get trapped in the sumps and once again they went back to the drawing board and removed one of the detention ponds and moved it to back lot to try to minimize the impact to the 125 foot wetland buffer. They have made some pretty major changes in doing this to try to minimize the impact. Mr. Febonio explained that the

discussion with regard to the vernal pool has been going on for over a year now and have asked for very little.

Mr. Wright asked the Board members if they had any questions and reminded the Board that they have received e-mails regarding attorney/client privilege. Mr. Wright asked the Board if they had any questions for the applicant or the petitioner. Mr. Stuart wanted to ask the applicant about the changes that occurred since the last meeting. Mr. Mitchell stated that they were changes going back all the way to the beginning. Mr. Mitchell stated that all the changes that Mr. Febonio was talking about was regarding changes prior to going before the Zoning Board and that the pond that is located in the back is exactly the same as when it was approved by the ZBA. Mr. Stuart thanked Mr. Mitchell for his response.

Mr. Wright asked if there were any further questions. None were noted. At this time, Mr. Wright stated that he would entertain a motion to grant or deny the request for rehearing.

Mr. DiPietro made a motion to vote to grant a rehearing as presented, seconded by Mr. Benson. Mr. DiPietro voted to deny, Mr. Benson voted to deny, Mr. Stuart voted to grant, Mr. Lagana voted to deny and Mr. Wright also voted to deny. The motion did not pass by a vote of 4 to deny and 1 to grant.

Case #15-09

David and Michelle Mudge

425 Manchester Road – Map 25, Lot 4

Zoned Residential Two

TABLED from April 28, 2015

Applicant is requesting an Appeal from an Administrative Decision that the Building Inspector made regarding repairing and sales of classic cars in a Residential Two zone. (Article 13, Section 13.11)

Mr. Mudge passed out a packet to all the Board members. Mr. Mudge began by saying that he has paperwork showing that he has had continuous use since 1998 and that “Dave’s Repair Shop” never lapsed. Mr. Wright asked Mr. Mudge about the activity that has been going on since 1998. Mr. Mudge said that he has gone to Concord and while he was in Concord they contacted Mrs. Rouleau-Cote for proof. Mr. Mudge said that the DMV did not take too kindly the response that they were accused of rubber stamping and giving him a license. Mr. Mudge informed the Board members that they gave him the documents and didn’t even charge him. Mr. Mudge also stated that he has receipts. Mr. Wright asked to see the documentation that Mr. Mudge had listed on the letter that was presented to the Board members. At this time, Mrs. Rouleau-Cote wanted to comment on what the conversation consisted of with the DMV. Mrs. Rouleau-Cote began by saying

that she explained to the woman in the personnel division what the process was at the town that Mr. Mudge was asked by the Zoning Board to provide documentation because when the form was filed back in 1998, it originally was checked off that it complied with multiple ordinances and requirements and that it may have been done in error by the previous Building Inspector. It was pointed out in talking with the woman on the phone that she noticed it was typed in that the question was would sales be allowed at this location if requested and she commented to her that she can see where the Building Inspector at the time wrote in "NO sales and signs may not exceed four (4) square feet in area". Mrs. Rouleau-Cote pointed out that her copy had additional text on it and the woman at DMV asked for a copy of hers and Mrs. Rouleau-Cote asked for a copy of what she had in her file. At this time, Mrs. Rouleau-Cote presented the Board with a copy of what DMV received as well as what is in our building file. At some point additional language was added to that which did not go to Concord. Mr. Mudge stated that he never saw that documentation. At this time, the Board members individually reviewed the documents Mr. Mudge presented to the Board. Mr. Wright asked Mr. Mudge if the Board could make copies of certain documents to have in our file. Mr. Mudge said yes. Mr. Mudge continued to review the receipts for classic cars with the Board. Mr. Stuart asked Mr. Mudge if the receipts were for classic cars and not for lawnmowers. Mr. Mudge stated yes and that he did not know how lawnmowers keep creeping into it.

Mr. Wright asked the Board members if they had a chance to review the letter presented to the Board from Manchester Water Works today and read the letter for the Board members and the audience. A copy of which is available in the file. In conclusion, the letter requested that the Board deny the request to allow automobile repair in that location. Mr. Mudge commented that Mr. Ethan Howard was aware of Dave's Repair Shop and again reiterated that he does not advertise but that he likes repairing classic cars. Mr. Mudge stated that he's not looking for a variance but just wants to keep doing what he's doing and nobody will know.

Mr. Wright thanked the applicant for undertaking the effort in obtaining more information. Mrs. Rouleau-Cote added that since last month's meeting that the applicant has placed the home on the market and would suggest that the Board stipulate it as a residential garage because it is being marketed as a commercial garage and hopefully the real estate agent discloses that it is a residential garage and not a commercial garage. Mr. Wright asked Mrs. Rouleau-Cote if she had anything to add. Mrs. Rouleau-Cote stated that unfortunately the two (2) gentlemen that Mr. Mudge worked with are both deceased and that she provided everything she had in her records.

Mr. Wright asked Mr. Mudge about the relief that he is asking for and the activity that he has advised that has continued to best describe it as repair and restoration of classic cars to the exclusion of everything else. Mr. Mudge said not to the exclusion but the majority and main part yes. Mr. Wright asked to put a percentage amount on the restoration of classic cars. Mr. Mudge said that during this time of the year it was mainly lawnmowers and then it goes back to classic car restoration and it was hard to put a percentage on that. Mr. Wright asked if Mr. Jore put anything in there for lawnmowers. Mr. Mudge said not but Mr. Jore knew he was going to do some lawnmowers.

Mr. Stuart asked Mr. Mudge if he had more receipts. Mr. Mudge said yes for batteries, tail lights and oxygen and car sales.

Mr. Mudge wanted to comment before the Board went into deliberations and commented that the garage by itself was considered a commercial garage and that was why it was listed that way and informed the Board that the property would be listed as residential. The reason they stated it was a commercial garage was because they wanted to be descriptive and that he would change it if the Board so chooses.

Mr. Lagana made a motion to enter into deliberations. Mr. DiPietro seconded the motion and the Board entered into deliberations at 7:56 p.m.

Mr. Lagana began by saying that the minutes will show that he was quite concerned during last month's case that there had been interrupted use of the garage had lapsed for more than a year and was leaning more towards denying the applicants request. The Board did ask for new and compelling evidence of which the Board has seen this evening including license renewals going back at least 6 years which is very important. Mr. Lagana believed if they did allow the use they would have to bring some type of rationale to it because the Board hears about classic cars and then we see evidence and receipts that it's not always classic cars its pickup trucks, friend's cars, lawn mowers and small engines. Mr. Lagana pointed out that as difficult as it may be to overturn the Code Enforcement Officer's decision it's choose your poison because as we saw in town counsels letter to the Board the applicant can come back before the ZBA and request a variance and should it be granted it would go with the land. At least now when Mr. Mudge stops the use also stops as well. Mr. Lagana pointed out that he believed that the original Building Inspector made a grievous error in granting this permission because it clearly is not appropriate in this zone.

Mr. Wright stated that Mrs. Rouleau-Cote's decision was a proper decision within our ordinance as she is applying our ordinance in a lawful manner and it is absolutely true that the proposed use or the continuous use of what has been going on there absent an estoppel or another theory would absolutely be the proper way to handle this case. Mr. Wright reiterated that Mrs. Rouleau-Cote was absolutely right and it is a judgment call on the Board's part to weigh the evidence and hearing the testimony on whether or not it has been continuous. Mr. Wright also talked about the paperwork that was presented by the applicant and was very pleased to see it as well. Mr. Wright went on to say that the burden has been met by the applicant based on what he has seen tonight and asked how the Board would grant an appeal in a way without expanding the scope. Mr. Lagana wanted it known that he agreed with everything that Mr. Wright has said as well as Mrs. Rouleau-Cote's decision. Mr. DiPietro also agreed with Mr. Wright and believed that the petitioner has proven that the business has been continuous.

Mr. Wright pointed out that Mr. Beaurivage has recused himself from this case as he has worked for Manchester Water Works. Mr. Wright moved on to ask Mr. Benson for his opinion. Mr. Benson also indicated that he was in full agreement with what Mr. Wright has said and especially with Mrs. Rouleau-Cote's work and with the fact that it's not a variance but that the Building Inspector many many years ago has put this before us. Mr. Benson also added that whatever is agreed to tonight that it can't be sold with the business and can't go with the house and ends with Mr. Mudge.

Mr. Stuart also agreed with everyone's comments and the original application was a recommendation of the Department of Motor Vehicles which was suggested that it was really a motor vehicle and not generalized all engine repair and continuous use and relief on. Mr. Wright added that the overwhelming evidence shown tonight with the classes and the certificates which were automobile focused and tied to his automobile status and would suggest that any relief be tied to the use as a licensed dealer. Mrs. Rouleau-Cote was right as it was not permitted in the zone and that the applicant has met his burden. Mr. Wright also thought that by tying it to being a licensed dealer and that the applicant has mentioned classics but it did not have to tie into that.

At this time, Mr. Wright asked the Board members if there were any further comments. None were noted.

Mr. DiPietro made a motion to come out of deliberations. Mr. Benson seconded the motion and the Board came out of deliberations at 8:08 p.m.

Mr. Wright asked if there were any abutters present. Ms. Provost, who owns property on Manchester Road and believed her question had been answered and she is fine with it only going with Mr. Mudge and no future owners and that she had no idea that a business was going on there but knew about the lawnmowers.

Mr. Laliberte of Appletree Road who has known Mr. Mudge for five (5) years was in support of Mr. Mudge continuing his business.

Mr. Wright asked the Board members what their pleasure would be and would entertain a motion. Mr. Benson wanted to know what the best way to set the conditions. Mrs. Rouleau-Cote commented that the Board may want to reference to Mr. Jore's comments with regard to vehicle sales on the property which is what was agreed to in 1998. Mr. Wright thought it would be a good point. Mr. Wright believed that having it tied to his dealer license would meet the Board's approval meaning that Mr. Mudge would have to maintain his dealer license and repair and restoration of automobiles.

Mr. Wright elevated Mr. Stuart to full voting status for this case.

Mr. Lagana made a motion to move the question contingent upon the following conditions; 1) that any repair activity is tied to Mr. Mudge being a licensed dealer

and should the dealer license lapse that no repair activity takes place; 2) As was originally agreed when relief was granted by the original Building Inspector that there should be no display sales on the property (paperwork sales only); 3) Repair activity shall be relegated to classic vehicles only; 4) No cars off the street, no pickup trucks off the street and classic cars only as the trade name implies and excludes lawnmowers, small engines, boats and snow mobiles; and, 5) that advertising immediately ceases as a commercial garage and that the property is not sold with the intention of being a commercial garage for Case #15-09, David and Michelle Mudge, 425 Manchester Road, Tax Map 25, Lot 4, seconded by Mr. Stuart.

Discussion ensued with regard to comments. Mr. Benson asked if the license could be sold. Or the business is sold. Mr. Lagana stated that if the business is sold then the new buyer would have to apply for a license. Mr. Stuart believed if the house was sold then this relief that is being granted becomes null and void because it does not go with the land. Mr. Wright agreed and said that if it was a Special Exception or a Variance then it would. Mr. Stuart reiterated that this would not transfer to the new owner.

Mr. Wright asked if there was any further discussion. None were noted. Mr. Wright explained that to grant his appeal then it is approved subject to Mr. Lagana's conditions and if they deny his appeal then it's denied.

Mr. DiPietro voted to grant, Mr. Benson voted to grant, Mr. Stuart voted to grant, Mr. Lagana voted to grant with the conditions above, and Mr. Wright also voted to grant with the conditions noted above and based on the fact that the applicant has met the burden despite the fact that Mrs. Rouleau-Cote was correct in her decision. The motion passed in the affirmative.

Mr. Mudge asked Mr. Wright if one of the conditions was that he could no longer do lawnmowers as it will really affect his neighbors. Mr. Mudge asked if he could get some sort of relief. Mr. Wright stated that it was part of their decision and that they based it off of Mr. Jore's decision back in 1998. Mr. Mudge asked if he could get any kind of relief in the future. Mr. Wright informed Mr. Mudge that he would have to apply for a variance. Mr. Wright also informed Mr. Mudge that everything would be noted in the minutes.

Case #15-13

Rocco and Suzanne Baglio

52 Wilsons Crossing Road, Tax Map 18, Lot 30

Zoned Residential One

Applicant is requesting a variance to allow construction of a residential garage within the 50 foot front setback and a variance to allow construction of a residential garage within 100 feet of a Level One wetland in a Residential One zone. (Article 4, Section 4.06(6) and Article 5, Section 5.08(1)(a))

Mrs. Baglio read her application into the minutes for the record for both variance requests. Mrs. Baglio stated that they were unable to place the garage in other areas due to the septic placement and the location of a vernal pool. Mr. Wright asked about the 87.9 feet as opposed to 100 feet. Mr. Wright asked the Conservation Commission for their input. Mr. Porter stated that there was a site walk conducted but that he did not attend and has not received the details of that site walk. Mr. Porter said that in the absence of any input from the Board members who attended the site walk that his only concern was that if the relief was granted for 87.9 feet that there be no further disturbance in that area because it's near a Level One vernal pool. Mr. Wright asked the applicant what the topography was like in the area. Mr. and Mrs. Baglio both answered that it was wooded.

Mr. DiPietro asked the applicant where they park their cars currently. Mrs. Baglio stated that they park in the paved driveway. Mr. Wright asked the applicant if they were seeking relief to be 87.9 feet from the wetlands.

Mr. Wright asked Mrs. Rouleau-Cote stated that she has been on the property and that the vernal pool may or may not have been created but that it was indicative of a vernal pool. Mr. Lagana pointed out that the plan states "assumed vernal pool". Mrs. Rouleau-Cote stated that unless you do a habitat study of counting egg mass and the like which is very costly. Mr. Stuart asked when the site walk was conducted. Mr. Porter stated May 12th. A brief discussion ensued with regard to the vernal pool.

Mr. Stuart asked why they could not move the garage. Mr. and Mrs. Baglio stated that it was because of the septic system. Mr. Beaurivage asked Mrs. Rouleau-Cote if she agreed with the 87.9 feet. Mrs. Rouleau-Cote said yes and that when she was out there with the surveyor she roughly paced off 100 feet and realistically the property to the right actually has activity closer to the vernal pool than the Baglio's would. Mrs. Rouleau-Cote also pointed out that the vernal pool is kind of on a vacant lot as they are occupying the lot to the left.

Mr. Wright elevated Mr. Beaurivage for this case. Mr. Wright asked if there were any abutters present. None were noted. Mr. Wright asked the applicants that the current plan is to have no further disturbance between the vernal pool and the garage. Mr. and Mrs. Baglio said no. Mr. Beaurivage asked if it was a two stall garage. Mr. Baglio said yes. Mr. Wright pointed out to the Board that there were two (2) variances, one for the front setback and one for the wetland setback. Mr. Wright asked the Board members if they had any further questions. None were noted. Mr. Wright believed we would take the variances one at a time.

Mr. Lagana made a motion that they vote on the variance to allow construction of a residential garage within the 50 foot front setback for 52 Wilsons Crossing Road, Tax Map 18, Lot 30, Case #15-13, seconded by Mr. Beaurivage. Mr. Beaurivage voted to grant, Mr. DiPietro voted to grant as he believes the 5 factors have been met, Mr. Lagana voted to grant as he believes the 5 factors have been met, Mr. Benson voted to grant as he also believes that the applicant has met the 5 factors, and Mr. Wright also voted to grant as he believed the applicant has met the criteria for a variance. The motion passed in the affirmative.

Mr. DiPietro made a motion that they vote on the variance to allow construction of a residential garage within a Level One wetland setback with the condition that the maximum distance of undisturbed property between the garage and the vernal pool is maintained based on this plan by the 20" black oak for 52 Wilsons Crossing Road, Tax Map 18, Lot 30, Case #15-13, seconded by Mr. Benson.

Discussion ensued with regard to Mr. DiPietro's motion. Mr. Wright called for a vote. Mr. Beaurivage wanted to make a friendly amendment to Mr. DiPietro's motion to tie it into the dimensions as shown on the plan. At this time, Mr. DiPietro amended his motion.

Mr. DiPietro amended his previous motion that they vote on the variance to allow construction of a residential garage within a Level One wetland setback to be 87.9 feet from a Level One vernal pool wetland as set forth on the plan presented tonight for 52 Wilsons Crossing Road, Tax Map 18, Lot 30, Case #15-13, seconded by Mr. Lagana. Mr. Beaurivage voted to grant, Mr. DiPietro voted to grant as he believes the 5 factors have been met, Mr. Benson voted to grant as he believes the 5 factors have been met, Mr. Lagana voted to grant as he also believes that the applicant has met the 5 factors, and Mr. Wright also voted to grant as he believed the applicant has met the 5 factors. The motion passed in the affirmative.

Mr. Wright informed the applicant that there was a 30 day appeal period and thanked the applicant.

At this time, Mr. Wright turned the meeting over to the Vice-Chairman, Jim Lagana. Mr. Lagana explained that he was taking over for Mr. Wright as he was conflicted out of the remaining cases.

Mr. Lagana elevated both Mr. Stuart and Mr. Beaurivage to full voting status for the remaining cases tonight.

Case #15-12

David Scarpetti

On Behalf of Shirley O. Stark, Trustee

93 Rockingham Road – Tax Map 30, Lot 5

Zoned Commercial Two

Applicant is requesting a variance to allow construction of two single family homes in a Commercial Two zone. (Article 4, Section 4.07(4))

Mr. Wichert presented on behalf of the owner and Mr. Scarpetti. Mr. Wichert explained the property location and what currently existed on the property now. Ms. Royce passed out copies of the proposed plan to the Board members to review. Mr. Wichert further explained that the house was very old and built and is located in the Commercial Two zone. Mr. Wichert pointed out that in the Town of Auburn's Zoning Ordinance that they are able to do multi-family by Special Exception but they are not allowed to do single family residences in the Commercial Two zone and that is why they are before the Board tonight for a variance. Mr. Wichert stated that there is not a big interest for multi-family and that the majority of the surrounding property is single family residences. If the Board would allow single family residences that they would then go before the Planning Board to subdivide the lot to create two single family residential lots and then move forward with the process by removing the existing structure. Mr. Wichert stated that there was 451 feet of frontage and that they would try to keep the structures closer to Rockingham Road due to the highway noise to the rear of the property. Mr. Wichert further stated that he believed the property was appropriate as residential and that Mr. Scarpetti has spoken to abutters who were in favor of residential as opposed to having a commercial use.

At this time, Mr. Wichert went through the variance criteria application for the record. After reading the application into the minutes, Mr. Wichert asked the Board members if they had any questions. Mr. Lagana pointed out to Mr. Wichert that the ZBA is here to provide minimal relief and agreed with Mr. Wichert that multi-family use is allowed by Special Exception and asked Mr. Wichert to explain further why he believes that single family is better suited for the area rather than multi-family use. Mr. Wichert stated that there were two (2) main reasons which was that the area was predominantly single family residences and that it fits the neighborhood better. Mr. Wichert believed if they went with the multi-family that dimensionally it fits better as single family residential. Mr. Stuart asked if the homes were going to be small. Mr. Scarpetti answered by saying that they would be colonials. Mr. Lagana asked if they have met with the Planning Board on this. Mr. Wichert said no.

Mr. Lagana asked if there were any abutters present. Mr. Carmody of 95 Rockingham Road stated that everything sounds great but that he would like to keep the buffer between the lots and how close would they be from his home. Mr. Lagana commented that they would still have to maintain 30 feet from the property line and that Mr. Carmody would have 30 feet from the property so there would be 60 feet between homes. Mr. Carmody asked about drainage because he had a drilled well that was not very deep and that the water runs off the property now. Mr. Lagana turned the question over to the Building Inspector. Mrs. Rouleau-Cote answered by saying that the septic design would have to go through the septic designer and the surveyor and if the abutter does have a dug well that typically the Town of Auburn's Zoning Ordinance requires them to maintain 125 feet from a dug well so there is protection there. With regards to drainage and lot

configuration would be handled at the subdivision level and not the ZBA. Mr. Carmody was concerned about water flow. Mrs. Rouleau-Cote pointed out that typically under single family lot development there is not a lot of environmental impact designing but there would be for commercial development. Mr. Lagana pointed out to Mr. Carmody that if action were to be taken this evening and that the applicant went before the Planning Board that he would also be notified of the hearing and could attend that hearing and voice his concerns at that time. Mr. Wichert explained that they would be complying with the Town Zoning Ordinance. Mr. Beaurivage asked if the existing structures would be demolished. Mr. Wichert said yes.

Mr. Lagana asked if there were any other interested parties that would like to speak tonight. Mr. Finch of 67 Rockingham Road stated that he supported the plan and preferred to see single family as opposed to multi-family. Mr. Benson asked if the Board could issue a variance on a non-existing lot or would they have to split the lot first. Mr. Lagana commented that it was a good question and that they would have to go before the Planning Board. Mr. Wichert answered by saying that if they went before Planning Board and subdivided the lot first and then came to ZBA and did not get the variance then they would be stuck with a subdivided lot. Mr. Lagana believed it was double jeopardy. Mr. DiPietro believed they could make it contingent. A brief discussion ensued with regard to procedure. Mr. Lagana also believed that the majority was single family residential and did not believe that they would see commercial in that area for some time.

Mr. Lagana asked the Board members if they had anything further to add. Mr. DiPietro believed that the applicant had met the 5 variance factors and agrees that single family is preferred based on the fact that there is single family in the neighborhood. Mr. Beaurivage also believed that the applicant has met the 5 variance factors and believed that single family was better suited for the area. Mr. Stuart also believed that they have met the 5 criteria and the fact that the neighborhood is predominantly single family homes is a big factor. Mr. Stuart also believed that the spirit of the ordinance is being met because of the neighborhood and what they have heard from abutters is that they are in favor of single family as opposed to multi-family. Mr. Benson also agreed with what has been said by the Board members.

Mr. DiPietro made a motion that they vote on the application as presented tonight to subdivide the lot to put 2 single family residential homes contingent upon approval from the Planning Board of the subdivision for 93 Rockingham Road, Tax Map 30, Lot 5, Case #15-12, seconded by Mr. Beaurivage. Mr. Beaurivage voted to grant, Mr. DiPietro voted to grant, Mr. Benson voted to grant as he believes the 5 factors have been met, Mr. Stuart voted to grant as the odd shape lot and testimony from the abutters and that the applicant has met the 5 factors, and Mr. Lagana also voted to grant as he believed the applicant has met the 5 factors. The motion passed in the affirmative.

Mr. Lagana informed the applicant that there was a 30 day appeal period and that substantial construction has to be completed within 2 years.

Request for Rehearing

Eric Mitchell

On Behalf of JMJ Properties, LLC

Lovers Lane, Tax Map 8, Lot 25

Variance Decision – Denied

Mr. Lagana asked Mr. Mitchell about the two cases before the Board tonight for a request for rehearing and the variance request. Mr. Lagana asked if it was his thought that if the request for rehearing was granted tonight that the Board would hear it tonight and if it was the same case. Mr. Mitchell stated that a lot of it had to do with timing and if the rehearing was granted tonight that they would not be heard for another month. Mr. Mitchell pointed out that they have done some new information which was not done at the first hearing that was denied. Mr. Mitchell went on to say that they did submit a new application that was submitted in a timely fashion for the same project but have new information. The purpose of having a new application before the Board was so that it could be heard tonight. Mr. Mitchell reiterated that if the Board were to act on the request for rehearing that the earliest the Board would hear it would be a month from now so they are here tonight to have the Board hear the request for a variance tonight. Mr. Mitchell stated that what they would ask the Board to do is to temporarily postpone acting on the request for rehearing and to hear the actual variance request that was properly noticed based on new information which was the wildlife corridor study. Mr. Mitchell informed the Board that Attorney Andrew Sullivan and Mr. Jean Gagnon were present tonight. Mr. Lagana asked Mr. Mitchell that should the variance be granted tonight if he would be withdrawing the request for rehearing. Mr. Mitchell said yes. Attorney Sullivan said that, if not then they could act on the request for rehearing. Mr. Benson asked if the plan that they were going to provide was different from the request for rehearing. Mr. Lagana believed that it sounded like it would be the same but will add the new information which would be the wildlife corridor study. Mr. Benson did not believe the Board could do that because it was the same thing. Mr. Lagana also agreed with Mr. Benson. Mr. Lagana explained that they have heard all of the evidence except for the information pertaining to the wildlife corridor so basically when you come back for a rehearing that you are introducing new information which may cause the Board to grant the rehearing. Attorney Sullivan added that if they address the new variance prior to then we may never get to the rehearing because it becomes moot. What the Board has before them is a complete package for a new variance with additional new material that was not available at the previous hearing which is the wildlife corridor study. Coincidentally that is also the additional material that was presented as a reason to grant a rehearing. The practical measure today or a month from now, before you will be the entire analysis complete with the wildlife corridor study so by addressing the new appeal tonight they would avoid another step. Mr. Lagana believed there would be an awful lot of redundancy. Attorney Sullivan said not necessarily. Mr. Stuart commented that his concern was that he was not sure that everyone would have been ready to deal with the variance tonight if people knew there was a motion for rehearing that there would be another month to get information together

with respect to Conservation Commission or anyone else as opposed to going straight for the variance. Mr. Stuart asked if the plan was the same plan that they already voted on or had the plan actually changed. Mr. Mitchell stated that the plan itself is the same but they have additional information relative to a wildlife corridor study as well as appraisal figures as far as if they had to eliminate a lot. Mr. Mitchell stated that they did have new information. Mr. Mitchell stated that they would be talking about the same things but that they had better information that was not available at the first hearing. They don't want to lose a month by waiting another month to do it and yes they would be talking about the same things then that they would be talking about tonight but they are trying to save a month. They are not trying to confuse the Board in any way but if this was heard at the last hearing that yes we will rehear it then they never would have filed a request for rehearing. Mr. Lagana asked Ms. Royce if tonight's variance request was properly noticed to abutters. Ms. Royce said yes. Mr. Lagana believed if the fees have been paid that the Board would need to move forward with the request. Mr. Stuart was concerned that they would be rehearing a request for variance that the Board already voted on and that they were submitting the same application all over again. Mr. Mitchell explained it as, if there application previously submitted was denied, which it was and if there was no appeal to rehear it and if they wanted to bring that same action before the Board for their review they would need to have new information because they could not come back before the Board to ask them to hear it again. The new information that they have is a wildlife corridor study that was not done before and appraisal information of what that potential lot may be worth and that new information is enough to allow the Board to rehear it.

Mrs. Rouleau-Cote commented that she wondered if his presentation for the request for variance will influence their decision on whether to rehear it or not if he goes through the entire case for a variance and you deny the variance are you now voting to rehear the first denial or the second denial. Mr. Lagana believed it would be a lot cleaner if maybe perhaps the request for rehearing is withdrawn and they hear the new case this evening with the evidence that Mr. Mitchell has brought to them about the wildlife corridor and if that is overturned then you would appeal that case. Attorney Sullivan said yes they'd be back next month to potentially decide whether or not the Board would rehear the case which would potentially push them back two months. Attorney Sullivan explained to the Board members that the new material would be before the Board in both applications so whether you hear it tonight or next month would not add or detract it would be up to the Board's discretion.

Mr. Porter commented that when he spoke with the engineers in town that because it was an appeal for a rehearing that they could not use the engineers to rebut any information that was coming it and as it is going to potentially being a rehearing that they will have that rebutting information. At this time, Mr. Porter requested that the Board continue this case until such time they can get both sides to comment as the wildlife corridor is only one part of it and that they would be happy to work with both parties and believes there is a lot of discussion with regard to the Level One wetlands in this area. Mr. Stuart asked Mr. Porter if he was expecting additional evidence. Mr. Porter said that since it is an appeal that Stantec will not work with the town with regard to hearing any information

towards an appeal basis as rehearing allows for the introduction of new evidence. A brief discussion ensued with regard to what information is allowed to be used during an appeal process.

Mr. Lagana stated that the Board tries to be accommodating as best we can and that will not change but thinks that where there is one case in process and one case being discussed and one case being challenged right now will confuse the Board, abutters and interested parties and believes that the Board should address the existing case, existing appeal before the Board hears another one. Mr. Lagana further stated that he also agrees with Mr. Porter of the Conservation Commission that the Board postpones hearing any new case until the Board decides the existing appeal that is pending before them. Mr. Lagana understood that time was money and they want to develop this land as quickly as possible but believes they would be just adding confusion. Mr. Mitchell wanted to add that the purpose of going to the Conservation Commission with the wildlife corridor study at the beginning of this month was to inform them that they have done something so they would not think that they were doing something that they did not know about. Mr. Mitchell also added that what he is hearing now is that they want to hire someone to conduct an independent peer review and did not know who would be paying for that. Mr. Mitchell stated that he understands that the Conservation Commission was not in favor of the variance as requested to allow the detention pond within the 125 foot wetland buffer and preferred it if they moved it further away. Mr. Mitchell did not believe that this has ever been done before and who would pay for it. Mr. Lagana asked that Mr. Mitchell make the appeal to the ZBA this evening and they will decide whether or not to rehear the case again or deny the rehearing. Then you would come back before the Board at that time and it would be subject to that same peer review as any other applicant. Mr. Lagana reiterated that what they would like to do is entertain the rehearing for the original case and vote whether to grant or deny that rehearing and if it is denied then as the Conservation Commission requested the Board will Table the new variance request until the next hearing. Attorney Sullivan asked what would happen if the rehearing was granted and there would be a new hearing would the Board entertain submission of new material from the Conservation Commission at that new hearing or would the Board make a decision on what is presented tonight. Mr. Lagana stated that if there is a new hearing that is granted then it is literally a new hearing and Mr. Mitchell would come back at that time and they would hear new evidence. Attorney Sullivan added that alternatively if they withdrew the rehearing request that the Board would hear the new variance request tonight as submitted without any input from the Conservation Commission. Mr. Lagana said yes they would and in fairness that the Conservation Commission may request that the Board table it until a peer review takes place. Attorney Sullivan asked Mr. Lagana if this was precedent for the Board to table it at the request of the Conservation Commission. Mr. Lagana stated that if they believe there is enough strength to that request then they would table the case.

Mr. Benson pointed out that they were here tonight because Mr. Mitchell requested a rehearing and if the Board denies the request after they hear the reasons as he understands it, another variance just can't be added and believes that the next step is court because they have already heard the variance and denied it and a request for

rehearing and the Board was to deny the rehearing and if they agree to rehear that the Board would have a meeting where both parties get to hear the new variance request but if it's denied did not believe there could be another variance request for the exact same thing. Mr. Lagana stated that Mr. Benson makes a very good point and pointed out that it is the applicants decision to pursue relief in court but if he comes forward with a brand new case and a brand new plan and new evidence it would have to be significantly different than the original then it would be a new variance request. Mr. Benson believed that nothing has changed in the plan and that the detention pond was still where the detention pond was in the original application and the only new material is the wildlife corridor study. Mr. Lagana believed they should open the case if they were going to be discussing portions of it and if the applicant approves they would then go forward with the rehearing and then hear some of this evidence. Mrs. Rouleau-Cote pointed out that it's not the rehearing that the Board is only going to decide whether or not the Board will rehear the case.

Mr. Mitchell wanted to clarify that they were certainly not trying to confuse the Board but even though the plan and location of the pond is the same as what was denied that new information relative to a corridor study and lot valuation is something that may change the Board's mind if it was something that was available at the time of the original hearing then they are allowed to resubmit a new application with the same plan but with new information. Mr. Lagana asked if that was the case then why wouldn't they withdraw the request for rehearing and come forward with a new variance request with the new information. Mr. Lagana explained what had occurred at the variance request that was denied that if Mr. Mitchell were to recall that 4 out of 5 of the Board members believed that it did not meet the hardship criteria and 3 out of 5 of the Board members believed that it failed multiple of the 5 factors and did not believe any of the members sited the wildlife corridor considerations and it was discussed by the Conservation Commission but was not mentioned by the Zoning Board members upon their decisions. Mr. Mitchell stated that the width of the corridor study and wildlife corridor was brought up on several occasions by the Conservation Commission and recalled when the first ZBA member voted to deny based on the recommendation of the Conservation Commission. Mr. Mitchell believed that the Conservation Commission's objection was that it was in the 125 foot wetland buffer and that it shouldn't be within the 125 foot wetland buffer. Other than a dimensional argument that there was nothing that the Conservation Commission other than saying that the wildlife corridor is important and that they it to be 200 feet which is why they went ahead and did the wildlife corridor study. A brief discussion ensued with regard to the new information. Mr. Porter added that while the wildlife corridor is a part of the setback for the 125 Level One wetlands that is not the mitigating factor of where the Conservation Commissions decision came from. This is an area that they value highly and we are trying to stay out of it but to bring in a wildlife corridor study muddies the water and allows them to add in valuation of the parcel and this is not what the Conservation Commission ruled on or voted on.

Mr. Lagana requested that the applicant move forward with the rehearing request and try to resolve the outstanding case before they move forward. Mr. Lagana allowed Mr. Mitchell to converse with Attorney Sullivan at this time. Attorney Sullivan asked the Board

if they decide to deny the rehearing what were the chances that the Board would hear the new variance tonight. Mr. Lagana stated that they would open the case since it was properly noticed and the fees have been paid and as they have heard the request from Conservation Commission that they would table the matter until such time as they are able to review the wildlife corridor and engage in a peer review. Attorney Sullivan noted that either way they would not be deciding on either one until next month anyways and suggested that they go for the rehearing.

Mr. Lagana noted that there were a few abutters that raised their hand but first they would like the applicant to speak and then members of the Board and then members of other Boards and then go to abutters and interested parties.

Request for Rehearing

Eric Mitchell

On Behalf of JMJ Properties, LLC

Lovers Lane, Tax Map 8, Lot 25

Variance Decision – Denied

Mr. Mitchell began by saying that they have prepared a wildlife corridor study as well as an appraised value of the lots. Mr. Mitchell believed that this was sufficient information for the ZBA to consider a rehearing.

Attorney Sullivan added that the reason also to grant a rehearing was a misapplication of the law and noted the various reasons and cited Chester Rod and Gun Club v Town of Chester and it talks about public interest and the spirit of the ordinance. It says that the requirement that a variance cannot be contrary to public interest is related to the requirement that it be consistent with the spirit of the ordinance meaning that they are tied together. Attorney Sullivan went on to explain that any decision that is made because it violates the 125 and this violates the 125 and that is why they are before the Board tonight. The Board is here to decide if it's within the 125 and all the other criteria are measured does it violates the basic objective and believes that the wildlife corridor will show that the basic objectives of 5.03(2) which outlines the watershed and wetland criteria are all met. Attorney Sullivan pointed out that the wildlife corridor will show with greater clarity that there is no distinction on these locations and if you apply that with the fact that the conflict of the ordinance itself it cannot be a reason to deny it if you have sufficient grounds to readdress the situation. Mr. Lagana thanked Attorney Sullivan and asked for Conservation Commission input.

Mr. Porter began by saying that the spirit of the ordinance is that the Conservation Commission supports the separation of the wetlands by Level One, Level Two and Level Three. They believed that their criteria has been met and are willing to work with the developer as best they can and support that the town engineer will either support or refute that information. Mr. Porter pointed out that the Town of Auburn is currently experiencing significant growth and a significant push into our buffer areas and this is what the Conservation Commission is trying to prevent and there are going to be challenges.

Mr. Lagana asked for abutter comments. Ms. Cleary commented that it was all about the almighty buck and not about the wildlife corridor. Mrs. Rouleau-Cote wanted to point out that this is testimony as to whether the Board should be having a rehearing and not a hearing and that is points that abutters could make if a rehearing is granted. Mr. Burnham was under the impression that this was an appeal and not a rehearing. Mr. Lagana stated that this is a request for rehearing and that the Board will decide tonight on whether or not they will rehear the case. Mr. Burnham talked about preserving the wetlands and believed that the Board should stick with the rules that are in place with the town.

Mr. Lagana asked if any members of the Board wanted to speak. Mr. Benson believed it was important and it was part of their request for rehearing. Mr. Benson also mentioned that if there were more lots that they would make more money and if they denied the variance that it may cost a lot and that's where the Town Ordinance comes in and really hasn't heard any additional new evidence. Mr. Lagana asked the Board if they would like to move on a vote to grant the request for rehearing or to deny the request for rehearing.

Mr. Stuart made a motion to grant the request for rehearing for Lovers Lane, Tax Map 8, Lot 25, Case #15-05, seconded by Mr. DiPietro. Mr. Benson did not believe the hardship has been proven and granting the variance would not be in the spirit and intent of the ordinance and be contrary to public interest and voted to deny, Mr. Stuart voted to grant and did not believe that Conservation Commission has had a chance to review the new evidence and it was something that he would like to see and do believe that the wildlife corridor was not the only factor and believes that they would have a chance to present more evidence, Mr. Beeaurivage also voted to deny as he did not believe they met 3 of the 5 criteria for a variance, Mr. DiPietro believed there was enough new information to grant a rehearing, and Mr. Lagana voted to deny the rehearing and agree with Mr. Benson that the wildlife corridor was only one of the criteria mentioned in the original case and believe that since the applicant has already filed another application that the Board would hear has made this rehearing request moot. The motion did not pass by a vote of 3 to deny and 2 to grant.

Mr. Lagana informed the applicant that the vote was 3 to 2 that the Board will not rehear that case. Attorney Sullivan pointed out that Mr. Benson and Mr. Beaurivage responded to a variance request and did not respond to the criteria of a rehearing request so he questioned the validity of the rationale because 2 out of the members voting did not respond to the motion. Mr. Lagana appreciated Attorney Sullivan's comment and stated that he tried to clarify the vote to grant or deny and believes it's a fair observation but also believes it was clarified for the record and asked Attorney Sullivan if he would like them to vote on it again. Attorney Sullivan stated that there was more food for him. Mr. Benson disagreed and that he started out by saying that he didn't think there was additional information shown. Mrs. Rouleau-Cote pointed out to Mr. Benson that he did use the

term variance. Mr. Lagana stated that it would please him that if they would revote on the request for rehearing and that he would entertain a motion and the response would be to simply grant or deny.

Mr. Beaurivage made a motion to revote on the request for rehearing for Lovers Lane, Tax Map 8, Lot 25, Case #15-05, seconded by Mr. Benson. Mr. Beaurivage voted to deny, Mr. DiPietro voted to grant, Mr. Benson voted to deny, Mr. Stuart voted to grant, and Mr. Lagana voted to deny. The motion did not pass by a vote of 3 to deny and 2 to grant.

Attorney Sullivan stated to Mr. Lagana that he would assume that the Board would now Table the new variance for next month. Mr. Lagana stated that he would open the case and would leave it to the Board members to decide.

Case #15-14

Eric Mitchell

On Behalf of JMJ Properties, LLC

Lovers Lane – Map 8, Lot 25

Zoned Residential Two

Applicant is requesting a variance to allow a stormwater detention pond within the 125 foot Level One wetland buffer in a Residential Two zone. (Article 5, Section 5.08(1)(a))

Mr. Mitchell began by saying that he was before the Board tonight on behalf of JMJ Properties, LLC and that Attorney Sullivan was also present tonight representing Mr. Gagnon. Mr. Mitchell pointed out to the Board that he would like to continue with the full presentation tonight but would not if it was something that the Board would want to continue until the next meeting. Mr. Mitchell believed that they had enough information to present to the Board tonight so that they would be able to make an informed decision but given the circumstances of what just happened that he would prefer not to but if the Board was inclined to Table this then it would be up to the Board. Mr. Lagana stated that in light of testimony that they heard tonight from the Conservation Commission and their desire to conduct a peer review of the wildlife corridor believed that it would be in the best interest to table it but would leave it up to the Board to decide. Mr. Lagana asked the Board members if they would like to speak to that action. Mr. Benson began by saying that he believed that the Board should table it for a couple of reasons and one being that they have an open request and would like to hear from town counsel on whether or not you can bring an exact same variance before the Board after it has been denied and act upon it and would like to get some clarification from town counsel. The other reason being that the other parties are not ready to rehear the case tonight and that the Board

would end up tabling it. Mr. Lagana asked Mr. Benson if he would be making a motion that they table the case.

Mr. Benson made a motion to TABLE Case #15-14 until the next ZBA Hearing scheduled for June 23, 2015, seconded by Mr. DiPietro. All were in favor, the motion passed unanimously and Case #15-14 has been TABLED until June 23rd.

Mr. Mitchell asked the Board if they would like the presentation materials that he had so that each of the members would have copies to review. Mr. Lagana said yes. At this time, Mr. Mitchell passed out copies of the materials to each of the Board members.

ZBA Rules of Procedures

At the beginning of the meeting Ms. Royce asked Mr. Wright if the Board would be voting on the ZBA Rules of Procedure tonight. Mr. Wright informed Ms. Royce that they would act on the ZBA Rules of Procedure at the next Public Hearing.

Election of Officers

Election of Officers would be conducted at the next Public Hearing.

Minutes

Mr. DiPietro made a motion to accept the minutes of April 28, 2015, seconded by Mr. Beaurivage. All were in favor, the motion passed in the affirmative.

Adjourn

Mr. Stuart made a motion to adjourn, seconded by Mr. Beaurivage. All were in favor, the motion passed unanimously and the meeting stood adjourned at 9:55 p.m.

The next ZBA Hearing is scheduled for June 23, 2015 at 7:00 pm and will be held at the Town Hall, 47 Chester Road.