

APPROVED MINUTES
Town of Auburn
Zoning Board of Adjustment
March 27, 2018

Present: Mark Wright, Chairman, Mike DiPietro, Peggy Neveu and Kevin Stuart, Members; Stephen Carroll, Alternate Member of the Board. Minutes recorded by Denise Royce.

Also, Present: Carrie Rouleau-Cote, Building Inspector and Jeffrey Porter and Richard Burnham, Conservation Commission.

Absent: Robert Beaurivage, Alternate Member.

Mr. Wright called the meeting to order at 7:04 p.m. and introduced the Board members and pointed out that they were short a member and therefore elevated Mr. Carroll to a full voting member for tonight's meeting.

At this time, Mr. Wright explained the procedure for tonight's hearing to everyone present and then added that the matter before the Board tonight was an Appeal of an Administrative Decision and that if they needed they would go for the Variance and if they decided on the Appeal that there would be no need for the Variance request. With that said, Mr. Wright asked Ms. Royce to read the case into the minutes.

Case #18-03
Kristin & Mark Travassos, Trustees
405 Wilsons Crossing Road – Tax Map 2, Lot 4
Zoned Rural

Applicant is requesting an Appeal of Administrative Decision – Interpretation by Auburn Code Enforcement Officer of Article 5.05 Permitted Uses (6) and whether alteration of site is inherent in permitted activities. A Variance from Article 5.08 relief from 125-foot setback from Level One wetland, to utilize 50-feet into the 125-foot designated wetland buffer for production of agricultural crops in a Rural zone. (Article 2, Section 2.02(68) and Article 5, Section 5.04(1)(a) cited by applicant's application)

Attorney Lefevre presented on behalf of the applicant and began with the Appeal of Administrative Decision. Attorney Lefevre stated that he did have a few questions for the Code Enforcement Officer and noted that she was seated right behind him. Attorney Lefevre asked the Board if they all had a copy of the application and the plan. The Board members all had a copy to review but their copies were not in color. Attorney Lefevre began by talking about the plan and the 11.63-acre parcel and the location of the house and that there were no issues with the house with regard to setbacks. Attorney Lefevre pointed out the green area which was the delineated wetlands and that what Mr. and Mrs. Travassos were looking for was regarding behind the house that they are looking to utilize

50-feet into the 125-foot wetland buffer as well as the area to the rear of the property. Attorney Lefevre indicated that they are looking to utilize this space for gardening to produce their own food. Attorney Lefevre went through the ordinance with regard to the WWPA which in this case is a 125-foot wetland buffer. They are not looking to utilize the wetland area but are only looking to encroach 50-feet into the wetland buffer for agricultural purposes. Attorney Lefevre pointed out that the first issue that they have is, they believe that the use is permitted under the Town of Auburn's Zoning Ordinance. Attorney Lefevre explained that, he had met with his client and reviewed the Zoning Ordinance for the Town of Auburn and did not believe they needed a Variance as he believed that the use was permitted. Attorney Lefevre began by talking about page 10 of the Zoning Ordinance and #68 of the definition of *Permitted Use* – *a permitted use is the use of a lot and/or structures that are specifically allowed by this Ordinance without a special exception or variance*. Mr. DiPietro commented that they were not talking about a use but that they are talking about a setback. Attorney Lefevre stated that the use they were talking about was gardening and agricultural type uses which was accessory to the dwelling. Attorney Lefevre stated that the use was permitted within the WWPA within the Town of Auburn's Zoning Ordinance.

Attorney Lefevre moved on to the first question he had for the Code Enforcement Officer which was on page 39, Section 4.05 (2) under the rural district, permitted uses and pointed out the permitted uses within the rural district and asked if they were permitted without a variance. Mrs. Rouleau-Cote stated yes. Attorney Lefevre went on to ask if it was true only for existing uses or is it also for new uses. Mrs. Rouleau-Cote commented that, that was a loaded question because it is a permitted use, however, they would still need to meet other zoning requirements. Attorney Lefevre again asked the question noted above and asked the Code Enforcement Officer to answer. Attorney Bennett explained to Attorney Lefevre that he wasn't in court. Mr. Wright explained that the Board was here tonight and wanted to get answers efficiently and address this to the extent they can and asked town counsel to comment. Attorney Bennett stated that a permitted use is a permitted use and was not sure where Attorney Lefevre was going with this. Mr. Wright commented that, their view as a Board is that, if it says permitted it applies to uses that could be grandfathered dependent on if they are then they are then you don't need anything and certainly if they came before them and said that, you want to do this in this zone and it's permitted, right out of the gate they would say, that unless there was something else they would say that it appears that they don't need a variance or special exception. Attorney Lefevre gave an example of a church and if it someone wanted to put a church on a piece of land that it was a permitted use. Mr. Wright explained to Attorney Lefevre that, where Mrs. Rouleau-Cote might be going with this and where he himself would be going with that is, there might be other provisions of our regulations in this town. For example, if there was going to be parking that they might say, you have to have a site plan review and you have to go to the Planning Board. So, there are other things even if it's permitted that would need to be satisfied and that is obviously a case by case and use by use basis. Mr. Wright agreed that a permitted use applies to something that exists today and something that the applicant comes for but did not believe that it was the end of the analysis. Attorney Lefevre agreed but wanted to elaborate a bit and stated that, a use that is permitted is one thing if there are setback requirements,

dimensional requirements, height restrictions or site plan requirements that those are all other things but a permitted use means that you can do it without a variance. Mr. Wright added that it was subject to whatever conditions the Zoning Board wants to affix to it which is in their ordinance. Attorney Lefevre commented that, if he doesn't need a variance then he doesn't need to be before the Zoning Board of which is where this Appeal of an Administrative Decision is going. Attorney Lefevre explained that, part of the reason he is here tonight was that he was creating a record and he wanted to make sure that he understands the Code Enforcement Officials position which is that, permitted uses are allowed without a variance and asked if that was correct. Mrs. Rouleau-Cote answered that the use is permitted without a variance.

Attorney Lefevre moved on to page 40 of the Zoning Ordinance which lists the permitted uses in the R1 district and the R2 district and asked the Code Enforcement Officer if those uses were permitted without a variance. Mrs. Rouleau-Cote answered that permitted uses are permitted without a variance.

Attorney Lefevre turned to page 42 of the Zoning Ordinance which lists the permitted uses in the C1 and C2 district which is Section 4.07 (2) and Section 4.07 (4) and asked if those uses were permitted without a variance. Mrs. Rouleau-Cote answered that permitted uses are permitted without a variance.

Attorney Lefevre went on to Section 5.05 – Permitted Uses, page 54 which is under the WWPA ordinance and asked the Code Enforcement Officer that under Section 5.05 and went through each of the permitted uses as follows:

- Wildlife habitat – does it require a variance to have wildlife habitat. Mrs. Rouleau-Cote answered yes, you would be able to maintain your property as a wildlife habitat as long as you followed other provisions within the watershed protection ordinance. Mrs. Rouleau-Cote pointed out that there were other provisions within the watershed protection ordinance that would prohibit certain activities without a variance. Attorney Lefevre stated his question is, would he need a variance to utilize his property as a wildlife habitat development and management. Mrs. Rouleau-Cote said, again, she would have to know what your wildlife habitat development and management plan was and if it included removal of trees or building a sanctuary for wildlife habitat then that might not be a permitted use because it would require the alteration of the property. Attorney Lefevre asked, where he would find the criteria in the ordinance that would tell him when he would need a variance for wildlife habitat development and management and when he did not need a variance. Mrs. Rouleau-Cote commented that, you haven't told her enough of what you want to do with that wildlife habitat development and management plan.
- Conservation areas and nature trails – Attorney Lefevre understood that this does point out some Planning Board review here and asked if he would need a variance to utilize his property as a conservation area. Mrs. Rouleau-Cote again commented that, this would be under Planning Board review and that the Planning Board would determine if it was some kind of activity that would require a variance

then you would be instructed to seek a variance. Attorney Lefevre further commented that if he was just using it as a conservation area within Section 5.05 (2) would he need a variance. Mrs. Rouleau-Cote stated that if the Planning Board and the Conservation Commission approves the plan.

- Recreation activity such as cross-country skiing, ice skating, and hiking would he need a variance. Mrs. Rouleau-Cote stated that, those types of activities using do not require alteration of the property so she would probably say no.
- Education activity would he need a variance. Mrs. Rouleau-Cote again commented that, as long as it did not require constructing a building or alteration of the terrain.
- Hunting and fishing, would he need a variance. Mrs. Rouleau-Cote stated that those activities typically do not require a variance.
- Removal of hazardous trees would he need a variance. Mrs. Rouleau-Cote commented that, as long as you just remove the trees and do not remove the stumps.
- Removal of invasive vegetation, would he need a variance. Mrs. Rouleau-Cote said no, as long as you follow Best Management Practices.
- Accessory Structures – if he complies with this section would he need a variance. Mrs. Rouleau-Cote stated that, as long as you don't clear, excavate, fill or grade for the installation of the accessory structure you would not need a variance.
- WWPA mitigation, would he need a variance for those activities. Mrs. Rouleau-Cote commented that, it would depend on the level of wetland and that we have had this occur during the subdivision process.

Attorney Lefevre stated that, from what he understands from the Code Enforcement Officer is that these permitted uses are permitted sometimes and sometimes they are not. Attorney Lefevre asked where in the ordinance does it say when he needs a variance and when he does not need a variance. Mrs. Rouleau-Cote stated that, if the activity that they would be doing needs or requires an alteration or disturbance of the wetland buffer or part of either a wetland mitigation or Planning Board review or Conservation review then those items would need to be sought by a variance because you would be encroaching into the wetland buffer and modifying the wetland buffer. Attorney Lefevre again asked where in the ordinance he could find that information. Mrs. Rouleau-Cote pointed Attorney Lefevre to the beginning of Article 5 which states the purpose of the Wetlands and Watershed Protection Regulations which states "It is intended that these water resource areas remain undisturbed to the extent practical." Mrs. Rouleau-Cote went on to say that, basically most of those items under Section 5.05 do not require any alteration of the wetland buffer in order for them to be achieved. Mrs. Rouleau-Cote explained that, we do not know what the extent of what the buffer is because the buffer might be a wide-open field that happens to have a wetland buffer in it so the disturbance would be very minimal. In other instances, it may be heavily wooded and it could be in an area with a higher functioning value and it may have endangered species in which case it would be more in tact and the activities that you would be doing may have more disturbance. Attorney Lefevre pointed out that, in Mrs. Rouleau-Cote's determination her two (2) issues were cutting trees and stumps. Mrs. Rouleau-Cote indicated that, she has yet to see a plan of what they intend to do to the extent of cultivating the property so she has no idea if they would be filling or grading

but knows there would be tree cutting and stumping and knows there may be changes in the drainage but she hasn't seen a plan at this time. Attorney Lefevre asked Mrs. Rouleau-Cote if she was adding to her decision at this time. Mrs. Rouleau-Cote said no. Attorney Lefevre indicated that the two (2) issues were cutting trees and pulling stumps which are the reasons why she believed that a variance was needed and asked Mrs. Rouleau-Cote if she was seeking to supplement that with some other endangered species. Mrs. Rouleau-Cote believed there was evidence of that and that she had evidence from when the subdivision occurred back in 2002.

Attorney Lefevre moved on to Section 5.05 (6) which was the one they were talking about and (9) which talks about permitted uses for accessory structures which specifically states "that do not require clearing, excavation, filling or grading for the installation or placement of the accessory structures" which language is not included in #6 because #6 says "production, cultivation, growing, and harvesting of any fruit, vegetable conducted in accordance with Best Management Wetlands Practices." Attorney Lefevre indicated that you cannot engage in the production, cultivation, growing and harvesting of agricultural crops without doing those things or tilling the soil and without removing obstructions like rocks and vegetation. Attorney Lefevre further added that, the notion that this use is permitted without a variance sometimes, which is what everyone has heard by the Code Enforcement Officer but other times it's not if there are certain things need to happen such as filling, clearing, grading is not supported by your ordinance.

Mr. Stuart asked how they would be accessing the second building envelope located to the rear of the property. Attorney Lefevre said that there is a road that was no longer a Class VI road but was not known as a Class A Trail which they could utilize that for access to their property. Attorney Lefevre explained that abutters had rights to utilize the Class A trail. The Board members and Attorney Lefevre reviewed the Class A trail and the location of the building envelope to the rear of the property.

Mrs. Rouleau-Cote went on to discuss the permitted uses in Section 5.05 the comment about the production, cultivating and growing of the crops and the Accessory Structures and calling out the clearing, excavation, filling and grading and believes that the production, cultivating, growing and harvesting can occur within the wetland buffer if there doesn't have to be something done to prep the property in order to prepare it for the agricultural use and thinks that is what the issue is here. Mrs. Rouleau-Cote indicated that this property is not in the condition to do those activities so there needs to be a significant alteration in order to do those activities. Just like Timber Harvesting/Forestry and Brush Clearing still needs to have some kind of Minor Conditional Use Permit in order to be able to do those types of activities within the wetland buffer. If this was a different situation where the property was suitable for the production, cultivating and growing of the crops as it sat then she believed that could be a permitted use with a reduction of the buffer but the fact that they have alter the site and do so much site prep in order to get to that point is where they go back to the other portions of the ordinance that say this is a disturbance of the wetland buffer. Mrs. Rouleau-Cote went on to read the section of the ordinance that says "Except to the extent necessary to prevent imminent personal injury or property damage, no cutting or removal of living trees or shrubs shall be permitted in

the WWPA without obtaining, and in this case of Timber Harvesting/Forestry and Brush Clearing, a minor conditional use permit. Mr. Stuart asked where that was written in the ordinance. Mrs. Rouleau-Cote indicated that it was further in the ordinance under Section 5.10. Mrs. Rouleau-Cote believed that, in this case, the spirit and intent of the Permitted Uses under Section 5.05 is that there would not be any significant change to the wetland buffer in order for these items to occur and the fact that this whole site is wooded and hasn't been farmed in many, many decades and that there would have to be so much work done in order for them to do this agricultural activity is where the issue lies. Attorney Lefevre commented that this proves his point, which is, the ordinance does not say agricultural uses are permitted so long as the property is suitable for that use or so long as the property is already being used for that use. Attorney Lefevre talked a little bit about the property and that he did visit the property and that the property was probably pasture about 50 years ago.

Attorney Lefevre again stated that the ordinance does not state that they have to get a variance if all of the following and what he has heard from the Code Enforcement Officer is that, that was the intent and spirit of the ordinance and he does not see that. Attorney Lefevre stated that there were the permitted uses and that there was another section that talks about when a variance is required in the buffer which says, "Except for uses permitted under the Minor Conditional Use Permit process which is Section 5.10. When you look under Section 5.10 it talks about Brush Clearing, Timber Harvesting and Forestry and so the notion that those types of activities are permitted by Conditional Use Permit seems to fly in the face of the requirement that somehow his client needs a variance to do something similar when it is accessory to a lawfully permitted use.

Attorney Lefevre directed the Board's attention to RSA 672:2 which is the chapter that talks about the purpose and quoted the language "Agricultural activities are beneficial and a worthwhile feature of the New Hampshire landscape and shall not be unreasonably limited by a municipal Planning and Zoning powers or by the unreasonable interpretation of such power." RSA 672:1(III)(b) Attorney Lefevre went on to direct the Board to RSA 672:1(III)(d) which talks about exactly what an "unreasonable interpretation" is and it says "includes the failure of local land use authorities to recognize that agriculture...are traditional, fundamental and accessory uses of land throughout New Hampshire. Attorney Lefevre also pointed out the definition for Agricultural Use is under RSA 221:34-a. The last RSA Attorney Lefevre wanted to mention is RSA 674:32-c (I) talks about "the tilling of oil and the growing and harvesting of crops and horticultural commodities, a primary or accessory use, shall not be prohibited in any district." Attorney Lefevre talked about going in only 50-feet and they still were going to protect the buffer of 75-feet which makes a lot of sense because we're not talking about a structure or building with impervious surface that would create all kinds of problems with runoff because we're talking about gardening and there would be no impact to the wetlands.

In conclusion, Attorney Lefevre stated that the Administrative Decision that says they need a variance is an unreasonable interpretation that is not supported by the Town of Auburn's Zoning Ordinance and is directly contrary to the ordinance and is directly

contrary to the State Law. Attorney Lefevre asked the Board if they wanted to deliberate or if they wanted him to go right into the variance request.

Mr. Wright believed he would entertain any questions or comments from interested parties or Board members to give them an opportunity to ask questions. Then he would entertain Attorney Lefevre to go into the variance request and then they could take both issues into deliberation.

Attorney Bennett commented that it was fair to look at this and, first of all, Auburn does not prohibit agriculture in its districts, it permits it and the applicant is permitted to agriculture on their property but the question is when it goes into the buffer. Attorney Bennett stated that, while agriculture may be a very important aspect of life in New Hampshire, so is the preservation of the wetlands and watershed and that's why the Town of Auburn has this in your ordinance which is to protect that. Attorney Bennett pointed out that the activities that are permitted within the wetland buffer are things that are not intrusive such as passive recreation, trails and education which are all non-intrusive. Attorney Bennett commented about the orchard and gardening provision that you will see that you are allowed consistent with Best Management Wetlands Practices what you will find is what you call wet meadow and not forested uplands. Again, that is land that exists in a state where it can be cultivated without timbering, forestry, stumping or grading the land. Attorney Bennett also pointed out that, because there is a lack of plans, the Board does not know exactly the extent of what the applicant has planned. Attorney Bennett stated that, although agriculture is permitted it's not permitted if you have to go and transform the land. Attorney Bennett pointed everyone to Section 5.10 (4)(a) it states that, in order to remove brush or to remove timber that you have to get a Minor Conditional Use Permit and then the forestry and timbering has to be done with Best Management Practices. Attorney Bennett indicated that there were two (2) uses which allow the removal of vegetation which included trees that pose a danger or threat to property or persons and you can remove invasive species.

Attorney Bennett stated that you have to look at the whole project which was clear cutting, stumping and removal of all the rocks which are not permitted within the WWPA without a variance. Mr. DiPietro asked if it was a variance or Minor Conditional Use Permit. Attorney Bennett said that you can get a Minor Conditional Use Permit to cut the trees but it does not include stumping or grading. Attorney Bennett suggested to the Board that, even with the Minor Conditional Use Permit that they could still go do what they want to do without a variance because stumping is not a forestry practice.

Mr. Wright asked if anyone else had any comments. Attorney Lefevre commented that, he is fascinated by the dialogue that they are having because he is being told that what his client wants to do is not allowed without a variance but when he reads the ordinance it says it's permitted. Attorney Lefevre commented on what Attorney Bennett eluded earlier about Best Management Practices because he printed out a copy online which talks about Best Management Practices for managing your agricultural uses within the wetlands and that they are not filling in the wetlands and they would be leaving a 75-foot buffer. Attorney Lefevre indicated that he had spoken with someone at DES and he asked

if there was something in there that says he cannot remove stumps 100 feet away from the wetland and was told no. Attorney Lefevre talked about the filter strip and that he was proposing a 75-foot filter strip.

Mr. Stuart asked if the house has been built. Attorney Lefevre stated that nothing has been done yet. Mr. Stuart asked why they were before the Board if nothing has been done yet. Attorney Lefevre indicated that they received a Zoning Determination that stated that they needed a variance in order to receive a reduction in the wetland buffer. Attorney Lefevre explained that they would be clearing some trees for the house lot and would like to have everything done at once. Mr. Stuart asked what the number of trees they were planning to clear. Attorney Lefevre talked about needing a half an acre per person so with a family of four (4) they would need two (2) acres total. Mrs. Rouleau-Cote commented that, a building permit has been issued with the restriction that the wetland buffer is to remain in-tact. Mr. Stuart asked what the plan was and if it was to plant grass. Attorney Lefevre said absolutely not and they have been asked if they have a garden plan and the answer is no but the vision would be to incorporate into the landscape the fruit trees and the nut trees and the concept is to clear it and to create the entire area into agricultural land. Discussion ensued with regard to location which would not include turf grasses but basically agricultural land. Mr. Stuart asked Attorney Lefevre if they believed they needed a Minor Conditional Use Permit. Attorney Lefevre commented that, that was his take on it and did not believe they needed a variance but needed a Minor Conditional Use Permit to cut down the trees. Mrs. Travassos added that, the Minor Conditional Use Permit did not include stumping and that she could not build a house without stumping and explained that the building envelope included about a quarter of an acre and there was no problem with clearing that area for the house but the issue was the 50-feet in.

A brief discussion ensued with regard to the building envelope for the house. Mr. Carroll asked what the number of trees they were looking at removing. Mrs. Travassos did not know and Attorney Lefevre also stated that they did not have a tree count. Mr. Carroll asked how they would be getting to the building envelope in the back of the property if they could not use the Class A Trail. No answer was given.

Mr. Sullivan asked how much they were planning on clearing. Mrs. Travassos answered by saying about a quarter of an acre in the front and about a third of an acre in the back and that the 50-foot strip is about a half of an acre. Mrs. Travassos reiterated about two (2) acres total. Mrs. Travassos also stated that there would be no fertilizers used. Discussion ensued with regard to compost. Attorney Lefevre stated that they did not have a square footage calculation. Attorney Bennett indicated that the ordinance limits the use of ash and lime only.

Mrs. Rouleau-Cote asked if they were still on the Administrative because the discussion regarding plans and such would be brought up with the variance request because if she is overruled that this is a permitted activity then there is no issue with regard to the agricultural use within this buffer other than the lime and ash. There is no plan, there is no mitigation, there is no provisions for assuring minimum impact of the wetland buffer.

Mr. Wright asked Attorney Lefevre to go through the Variance application.

Attorney Lefevre began the Variance application and stated that they have utilize their property in a manner that is permitted by the Zoning Ordinance and they have to follow Best Management Practices and they can't use commercial chemical fertilizers. Attorney Lefevre talked about the spirit and intent of the ordinance and indicated that there was no threat to public health safety and welfare. Attorney Lefevre went on to talk about contrary to the zoning scheme or alter the essential character of the neighborhood. Attorney Lefevre talked about state intent and that the Zoning Ordinance permits agriculture. Attorney Lefevre talked about the intention of the WWPA and that one of the intentions is to encourage land uses that are appropriate for the WWPA. According to the ordinance, one of the uses is agricultural use. Under diminution of property values standard and this is a single-family residence which would not have a negative impact and putting in a garden would not have a negative impact to surrounding property values. Substantial justice part of the test seems to be a balancing test which is what is the benefit to the public. Public interest in protecting the wetlands and they would have a 75-foot buffer protecting the wetlands. If they can't put in a garden then it would be a detriment to them because they have almost 12 acres. Attorney Lefevre pointed out the uniqueness of the property being the wetlands. The use that they are proposing is reasonable. The last part of the hardship is there a fair and substantial relationship an there is simply no reason why they can't put in a garden.

In conclusion, Attorney Lefevre believed they meet all five (5) criteria for a Variance. Attorney Lefevre further stated that, if the Board decided to side with the Code Enforcement Officer then the Variance would be the way to go. If they decide against the Appeal then the Variance is not necessary but hopefully the Board would agree with them and give them their relief.

Mr. Wright wanted to clarify Attorney Lefevre's last comment and stated that, they are an independent body and they serve two (2) different functions and that they have in the past disagreed with their Code Enforcement Officer so this is an objective and impartial Board that operates independent of the Code Enforcement Officer seeking her input to help them understand her thought process and interpretation of the ordinance but their decisions are independent of her, the Conservation Commission, the Planning Board and the Selectmen and that's how this governing body was set up to function. Mr. Wright indicated that he is not uncomfortable taking the position that is adverse to the Code Enforcement Officer or any other Board in this town and their job is to interpret the ordinance and do it fairly based on the specific case that is presented to them.

Mr. Wright continued by saying that, the Variance request is to have a garden up to 75-feet of the wetland and wanted to be clear of the scope they are asking for. Attorney Lefevre said yes and that they would be no closer than 75-feet. Mr. Wright believed there would be trees that would need to be removed to prep the property for planting and what not and there would be organic fertilizers. Mrs. Travassos wanted to clarify that organic can also contain pesticides and that she does not want pesticides and want a no spray farm.

Mrs. Rouleau-Cote wanted to point out that the wetlands on this property are Level One wetlands and a Tier 2 on our wetlands inventory map as well as another contiguous wetland that is over 5,000 square feet. These are wetlands that are of significant importance to the Town of Auburn and there has been scientific documentation relative to the Cohas Brook watershed which is part of this wetland. Mrs. Rouleau-Cote pointed out to the Board that, this Board has heard several cases over the years of properties relative to the Cohas Brook and there is a documented area of endangered species habitat such as the Blanding Turtles. There's the importance of maintaining the undisturbed uplands buffer for that habitat and this wetland is identified on the Town of Auburn's wetland inventory map that was prepared by West Environmental as part of the Planning Board's consideration prime wetlands mapping. The Town of Auburn has had a wetland ordinance in place since the mid 1980's.

Mrs. Rouleau-Cote went on to say that, historically the Zoning Board relief includes some kind of plan of the proposed activities, the limits of the encroachment area for minimal impact. Basically, wanting to know the extent of the activity and the implementation of Best Management Practices and at this time, we have not seen a plan and have no idea of what extent of the impact would be. Mrs. Rouleau-Cote believed that, somewhere along the line there should be a plan showing the type of activities and the type of farming and maybe pointing out row crops and where orchards and vineyards and if there would be any animals or livestock. Also, would there be any buildings for the agriculture such as storage, barn or greenhouses because historically these are not permitted within the 125-foot wetland buffer so the building envelope is very minimal and that the house is basically encompassing the entire building envelope so you would want to know what the farming activities would be. Especially the buildings proposed if any as they are not permitted within the wetland buffer.

Mrs. Rouleau-Cote pointed out that there were extensive documentation when the lot was created in 2002 which had some specific recommendations for minimizing the impacts on the wetlands which included the 125-foot setback to the wetlands to cutting the canopy to a minimum and other provisions which were part of the subdivision approval back in 2002. At the time there was a lot of discussion about protecting the wetland.

Mr. Porter commented that, one of the things that they talked about at the Conservation Commission when they first came before the Board was that, their intent was to work with the owner to figure out the best practices but without a plan the Board could not grant an open relief. Mr. Porter indicated that they were waiting for a plan and they were told they would not have a plan. Mr. Porter went on to say that, if they clear a portion of that buffer that there would still be more cutting which is a concern. Mr. Porter stated that they can cut the trees but they cannot stump it and the further out you get in the further you destroy the canopy and further impact there is to the wetlands. Mr. Porter added that they would prefer to see a plan and work with the owner to minimize the impact to the wetlands.

Mr. Wright asked the applicant and Attorney Lefevre if it would be possible to come up with a plan on how the area would be utilized and explained what has been said with

regard to the request for a plan. Attorney Lefevre said yes and that his understanding was that the Conservation Commission reviews the plan and then prepares a comment to the ZBA. Attorney Lefevre could not understand what type of oversight does the town have over his clients' garden. Attorney Lefevre commented that he did not know what the town wanted and that they would not encroach beyond the 75-feet and they are not asking for that. Attorney Lefevre also stated that they would not be putting any structures out there but actually under the town's ordinance he could put a shed out there so he doesn't have to put together a plan to show where his shed is going to be because he was allowed to do it but they wouldn't be doing that. Attorney Lefevre stated that the Board was putting the applicant in a very difficult position for proposing a plan to show what because they are putting in a garden. Mr. Carroll asked what the number of trees they were proposing to remove. Mr. Wright indicated that they are granting minimum relief so the Board is looking to say what is in our ordinance and if it's not permitted were looking for what is fair.

Attorney Lefevre pointed out that, under the variance application that there were two (2) different test that talks about the Simplex test but there was another test. Attorney Lefevre believed that what his client was proposing to do was so reasonable and to have a representative of the town come and speak in opposition to the variance is very very unusual. People who usually come and speak against the variance are usually neighbors or abutters who are people who have a personal stake in the matter but to have a representative of the town come and advocate against the Board granting the variance is very very unusual. Attorney Lefevre stated that he now understands why the Administrative Decision was written the way it was. Mrs. Rouleau-Cote wanted to know if she was the public official that was against the variance. Attorney Lefevre said yes. Mrs. Rouleau-Cote stated that, she did not believe she made any statement against the variance but what she did say was that a typical procedure is for issuance historically that a Zoning Board has done for issuing a variance. Mr. Carroll also commented that he was not talking about the garden but was interested in them going into the buffer and cutting down trees were not telling you where to plant your trees but we just want a plan and a visual of how much destruction is going to happen in 50-feet of a wetland buffer. All the Board wants is a clear understanding of what you are proposing to do within the 50-foot wetland buffer and clarity is power and there is not plan on the table. The Conservation Commission asked to see a plan and this Board is asking to see a plan. Attorney Lefevre believed there was a disconnect and it seems to be a little self-evident because he knows what it is to plant a garden and plant trees. Attorney Lefevre added that it would include cutting down the trees and it would include removing the stumps and turning over the soil and making it useable land for gardening it's too the extent that is obvious to him and it may not be obvious to others.

Mr. Wright commented that they would decide as a Board and did not disagree with the way Mr. Carroll was thinking of understanding fully what would be impacted and how. Mr. Lefevre believed they were done with their presentation. Mr. Porter mentioned that one of the things they asked for was a site walk and that they have not seen any of that as well which was part of the original discussion.

Mr. Stuart asked about the Minor Conditional Use Permit. Attorney Bennett commented that there was no permitted cutting of brush and trees without a Conditional Use Permit but that was not what they are looking to do as I believe they're looking at clear cutting. Mr. Stuart could not understand why this was not a noticed issue and regardless of how they vote on this is a Minor Conditional Use Permit required. Mrs. Rouleau-Cote commented that, if the Variance is granted then it would trump the need for a Conditional Use Permit. Attorney Bennett commented that, they are not asking to timber a forest they are clear cutting and not timber cutting. No cutting is allowed without a permit. Mr. Wright continued by saying that they want it very clear with what they are asking this Board to grant to deviate from what is permitted and is it to plant a garden up to 75-feet from a Level One wetland. Attorney Lefevre said yes and it would entail removing the trees and removing the stumps and cultivating the land and tilling the soil and doing everything necessary to productive agricultural use of land. Attorney Lefevre talked about Best Management Practices. Mr. Burnham commented that his interpretation of this issue is that we would not be here if this was an 11-acre parcel of land that wasn't consumed by wetlands so the issue is the wetlands, the issue is the gardening and where they would be doing the gardening. Mr. Burnham went on to say that the intent is to cut the trees and then the intent is to leave them alone after you cut the trees and let nature take its course to rejuvenate.

Mr. Wright had one more question before going into deliberation and that Attorney Lefevre talked about Best Management Practices and believed a comment was made that his client would follow those Best Management Practices for agriculture and asked if his client would be willing to follow Best Management Practices for Erosion Control if they were to remove anything in that buffer. Attorney Lefevre said yes but was unsure what Mr. Wright was talking about. Mr. Wright read a section in the Zoning Ordinance that talks about Best Management Practices for Erosion Control. A brief discussion ensued with regard to Erosion Control. Mr. Wright also commented that the Board has read the Conservation Commissions Meeting Minutes. Attorney Lefevre again commented that the way the ordinance is written is that the use is a permitted use. Mr. Wright commented that, that was one interpretation and the question is what's permitted within that use. Is taking trees down covered or is it not covered.

At this time, Mr. Wright turned to the Board and stated that, he would entertain a motion to enter into deliberation.

Mr. Stuart made a motion to enter into deliberations at 8:59 p.m., seconded by Mr. Carroll.

Mr. Wright talked about the first thing was the Appeal of an Administrative Decision of the Code Enforcement Officer and wanted to hear what the Board was thinking. Mr. Wright believed it was a question of interpretation and that his view is that it is not unreasonable for the Code Enforcement Officer to look at this and said, looking at it strictly as production, cultivation and harvesting and that there is nothing that says you can take the trees down and take the stumps out. There are other places and the applicant pointed out that maybe it would have been in there if that was what you intended and the only

section in here that talks about grading, excavation is when they are thinking of pouring a foundation so you would see it for the removal of trees. Mr. Wright believes you can argue both ways and believes that it could go beyond that. Mr. Wright moved on to the Variance request and did not believe it was unreasonable to have taken the position that the Code Enforcement Officer took. Mr. Wright did not believe it was clearly erroneous and believed there were places where you could make an argument. Given that it has places that it talks about taking trees down and what we are really talking about is growing crops, it seemed to him that, taking those trees down within the 50-feet isn't just something that can be done. Mr. Wright believed that if there were no trees there and they just wanted to plant that they would not even be before the Board tonight but it's because of what is permitted under that six (6) because is cutting trees down and taking those stumps out permitted. Mr. Wright believed it was reasonable to say that it's not but understands that you could argue it the other way too.

Mr. Wright explained to the Board that, after everyone shares their views then they could go over the variance before they decide whether or not to approve it. Mr. Carroll commented that, he believes that Mrs. Rouleau-Cote's decision was correct and the whole process should have been followed and believed when they went to the Conservation Commission that they were asking for the same information. Mr. Carroll thought that there could be conditions imposed and believed that the Conservation Commission wanted to do a site walk with the applicant to get a view of what they are proposing to do. Mr. Carroll agreed with everything Mr. Wright talked about above.

Mr. Wright asked Mr. Stuart what his thoughts were. Mr. Stuart began by saying that he was puzzled by the whole process and his concern is with as far as the applicant's testimony that it completely follows the ordinance and the only evidence they have and the testimony they have is that they want to follow the ordinance with regard the production, cultivation and harvesting of crops and following Best Management Practices within 75-feet and they paid a wetland scientist. Mr. Stuart went on to say that the rub here was all about forestry and that was why he asked both parties and did not believe either party gave a full straight on answer on whether a Minor Conditional Use Permit is required because in his mind he believed they were before the wrong Board and believed they should be going before the Planning Board because what they want to do is cut down trees. Mr. Stuart believed that it was a permitted use and they didn't need to be before the ZBA Board. Mr. Stuart reiterated that he believed they should not be before the ZBA but that they should be before the Planning Board because what they want to do is cut down trees which is permitted and requires a Minor Conditional Use Permit. Mr. Stuart did have a problem with them clear cutting and that they obviously need a permit for that because you just can't just do it. Mr. Stuart was a little perplexed and stated that he would be inclined to grant the relief and that's how he sees this case. Discussion ensued between Mr. Stuart and Mr. Wright and Mr. Stuart would like to see both sides come together and say that it should be a Minor Conditional Use Permit. Mr. Wright asked Mr. Stuart if believed that Mrs. Rouleau-Cote's decision was not enforceable. Mr. Stuart said correct.

Mr. Wright asked Mr. DiPietro for his thoughts. Mr. DiPietro stated that he agreed with Mr. Stuart except that digging out the stumps within the wetland buffer goes beyond forestry and agrees that the applicant has a right to go to the 75-foot wetland buffer but he would lean towards a variance to do that. Mr. Wright asked Mr. DiPietro regarding Mrs. Rouleau-Cote's decision first. Mr. DiPietro stated that Mrs. Rouleau-Cote's decision was based on going beyond forestry by digging out the stumps and making disturbances that are not included in forestry and that her decision was valid.

Mr. Wright asked Mrs. Neveu what her thoughts were. Mrs. Neveu believed that Mrs. Rouleau-Cote's decision was valid and on the variance request, the ZBA relies on the Conservation Commissions decision and they voted not to allow the reduction and have not done a site walk and there was discussion about plans. Mrs. Neveu did not believe it met the spirit of the ordinance with the protection of the wetlands.

Mr. Wright reiterated what had been said earlier and mentioned that Mr. Stuart's position was that Mrs. Rouleau-Cote's decision was wrong. Mr. Carroll wanted to clarify that, he believes Mrs. Rouleau-Cote's decision was correct. Mr. Carroll did not believe they were talking about forestry but believed they were talking about clear cutting the land to start a garden which is a whole different situation than going in and clearing trees and leaving the stumps and understood that you could not start a garden with stumps around. Mr. Carroll talked about the Conservation Commission and if they worked with the Conservation Commission in the spirit of the Conservation Commission and recommended and then come before the ZBA to see if the Board would grant a variance because we also have a spirit here too on our Board and that's why it's taking 2½ hours because this is a pretty big deal and who knows where they'll be in 10 years and it's important to him as well as this Board. Mr. Carroll noted that whether or not a Conditional Use Permit is granted for forestry which is timber harvesting which is not clear cutting the land which is two different things and without a plan they have nothing to go off of.

Mr. Wright believed that the consensus with regard to Mrs. Rouleau-Cote's decision is that the majority of the Board to find the applicant's plans of the property for the removal of trees up to 75-foot that included the removal of trees was not permitted under our ordinance. Mr. Wright went on to say that, if Mrs. Rouleau-Cote's decision is correct the only way the applicant could proceed was with a variance which is the second piece of tonight's presentation. Mr. Wright went on to say that, the applicant has gone through the factors but that he was inclined to table this case until next month and have the Conservation Commission perform a site walk with the applicant and have the applicant describe what they are thinking and get a sense where things will begin and end. At least have some information from the Conservation Commission after being there and then come back before this Board with the number of trees they want to remove including the stumps that would be coming out. Mr. Wright indicated that he would like to see some photographs showing a stake in the ground showing where the area would be cleared up to visually and a list of things like there's not going to be any structures and there's not going to be any animals so they can feel comfortable basing their decision on. Mr. Wright did not believe it was unreasonable for what the applicant was asking but believed they needed a little bit more information to bridge the gap of not seeing it and not having the

Conservation Commission walking the site and not knowing the number of trees especially when it's a Level One wetland and they're encroaching on that. Basically, the Board is looking for more input and for the chance of having the Conservation Commission perform a site walk of the property. The Board members all agreed with what Mr. Wright was asking for.

Attorney Bennett wanted to make a comment. Mr. Wright explained that they were in deliberations. Attorney Bennett stated that he understood but it was a point of law. Mr. Wright understood and allowed Attorney Bennett to comment. Attorney Bennett began by saying that there were two (2) things before the Appeal and the Variance. First, if the Board acts on the appeal tonight and say if the Board denies it, it would kick in the 30-day appeal period while the Variance is still going on and perhaps the way to do it and that counsel has suggested to him as well and that he is suggesting the same to the Board is that if they decide to postpone it that they continue both matters so they don't have an Appeal going and then if the Variance is granted. Mr. Wright thanked Attorney Bennett and Attorney Lefevre the Board members agreed.

In conclusion, Mrs. Neveu and Mr. DiPietro were comfortable with making a decision on the Appeal. Mr. Wright believed they should Table both matters and Mr. Stuart also agreed.

Mr. Wright asked the Board to come out of deliberation.

Mr. DiPietro made a motion to exit out of deliberations at 9:19 p.m., seconded by Mrs. Neveu.

Mr. Wright asked if there any further questions or comments for the applicant. None were noted. Mr. Wright pointed out that they have two (2) request which was an Appeal of an Administrative Decision and a Variance and that they talked during deliberation about tabling this to give the Conservation Commission an opportunity for a site walk and to provide some input to the Board and for the applicant to come up with some fundamental general description of what will occur and some photographs and the area delineated in terms of where things will begin and where they'll stop, the number of trees that will be cut.

Mr. DiPietro made a motion to TABLE the Appeal of Administrative Decision and the Variance application until April 24, 2018, to allow the applicant to bring back what the Zoning Board of Adjustment has requested above including the Conservation Commission conducting a site walk of the property for Case #18-03, 405 Wilsons Crossing Road, Tax Map 2, Lot 4. Seconded by Mr. Stuart.

Mrs. Travassos indicated that the house was being delivered in 6 weeks and that 2 weeks is not enough time to cut the trees and pour the foundation. Mrs. Travassos further added that, they have already met with the Conservation Commission twice and they did not want to walk the land with the snow. Mr. Burnham asked when the next ZBA meeting would be held. Mr. Wright stated that it would be the fourth Tuesday of the month. Ms.

Royce indicated that the next meeting is scheduled for Tuesday, April 24th. Attorney Lefevre stated that the Conservation Commission would have to convene a meeting for purpose of scheduling a site walk and that the site walk itself is a public meeting that has to be noticed and everything else. Mr. Porter stated that the Conservation Commission meets the first week in April and that they could do the site walk the weekend after that. Discussion ensued with regard to the site walk. Mr. Wright explained the 30-day appeal period and did not know what to tell Attorney Lefevre and the applicant and pointed out that they would not be making their decision based solely on the aggressive schedule that they just described.

Attorney Lefevre asked Mrs. Travassos if she would give the Conservation Commission permission to go onto the property to conduct their site walk. Mrs. Travassos said yes. Attorney Lefevre went on to say that, if the Board is going to issue a decision that it could say, Conservation Commission we would ask you to go out there and take a look at it individually or as a group and get back to us. They were fine with that. Mr. Wright wanted the Conservation Commission and the applicant to figure it out and not this Board. Discussion ensued with regard to a site walk. Mr. Wright asked Mr. Porter if he could have a commitment that the site walk would occur prior to the next meeting. Mr. Porter said yes but that they would need to see some maps to look at and the delineation of the wetlands and walk the property with the property owners. A brief discussion ensued with regard to the site walk on Saturday, April 7th and everyone would meet and decide a date and time which may also occur on Sunday, April 8th. Mr. Wright asked Attorney Lefevre if they understood what the Board was looking for and Attorney Lefevre said yes, photographs, number of trees to be taken down and some form of a plan that's not a plan.

Mr. Stuart asked Mr. Wright for clarification so that he can understand was that they were talking about doing a Variance that would supersede doing a Conditional Use Permit. Mr. Wright said yes.

Mrs. Neveu voted to Table, Mr. DiPietro voted to Table, Mr. Carroll voted to Table, Mr. Stuart voted to Table and Mr. Wright also voted to Table. This case has been TABLED until Tuesday, April 24, 2018.

Mr. Wright explained that he believed it was very clear on what the Board was looking for and reiterated that, the Public Hearing has been Tabled until the next meeting

Other Business

Mr. Wright wanted to speak to the Board members regarding Mr. Lagana's resignation from the Board. Mr. Wright informed the Board members that, he has spoken with Mr. Carroll and that Mr. Carroll has agreed to an elevated position to a full Board member. Mr. Wright asked Ms. Royce to make a note to the Board of Selectmen of his recommendation to elevate Mr. Carroll to a full voting member of the ZBA. Ms. Royce noted the request. Also, Mr. Wright wanted to inform the BOS to seek more alternates for the ZBA as they are short a few alternates at this time. Ms. Royce understood what

Mr. Wright was asking and informed Mr. Wright that she believed that Mrs. Phillips wanted to become an alternate on the Board.

Mr. Wright wanted in on the next agenda to vote on a Chairman and Vice-Chairman of the Zoning Board of Adjustment. Ms. Royce noted to add the election of officers on the agenda for April.

Minutes

Mr. Carroll made a motion to accept the minutes of January 23, 2018 as written, seconded by Mr. DiPietro. All were in favor, and the motion passed.

Adjourn

Mr. Carroll made a motion to adjourn, seconded by Mr. DiPietro. All were in favor, the motion passed unanimously, and the meeting stood adjourned at 9:40 p.m.

The next ZBA Hearing is scheduled for April 24, 2018 at 7:00 pm and will be held at the Town Hall, 47 Chester Road.