

DRAFT

**Town of New London
Zoning Board of Adjustments
September 28, 2009**

Present: Bill Green (Chairman), Courtland Cross, Douglas Lyon, Jeff Horton, W. Michael Todd

Also present: Peter Stanley

Chair Green called the meeting to order at 7:30pm and noted that the purpose of the hearing was to hear the request by Peter Blakeman, engineer representing Audrey Perry for a special exception, as explained below.

SPECIAL EXCEPTION

**Blakeman Engineering (c/o Audrey Perry and Richard Burgess)
Fairway Lane
New London, NH 03257**

Tax Map: 123 Lot: 016

PURPOSE OF REQUESTED WAIVER:

Special Exception as permitted by Article XIII, Section E.1 of the New London Zoning Ordinance in order to cross 2 wetlands with driveway and utilities to access the building site for a new single-family residence.

Chair Green noted that the hearing would be recorded. He asked Mr. Peter Blakeman to make his presentation and then he would take comments from the board and from the floor. He asked those who had comments or questions to identify themselves for the purpose of keeping a complete record of the hearing.

Mr. Blakeman said that his firm had been working on this project for quite some time for Mrs. Perry. He noted that Peter Shower, Wetland Scientist who delineated the wetland area, was there to answer any questions regarding the wetlands in the proposed area. Susan Hankenburk was also there to represent the Perry family.

Mr. Blakeman began by giving some history of the property in question. He said that in 1967 the one acre piece of land on Fairway Lane was created as part of the Country Club Estates. Mrs. Perry has owned the property since 1969 and has been paying their taxes on it since that time as a building lot. Mr. Blakeman noted that he was hired 4+ years ago to start work on the project for the Perry's. Originally, they wanted to design a septic system on the lot but it was adjacent to the wetlands, so there were some problems due to the required setbacks. The septic plan also needed some other waivers from the Town's regulations, as well as from the State in order to proceed. Mr. Blakeman did not feel that the State would approve the plan because it required waivers and was for a new construction. Because there were sewer lines nearby, they decided not to create a private sewer system. The Lake Sunapee Country Club agreed to let them tie into their sewer line that ran near to the property on Fairway Lane. Mr. Blakeman commented that Public Works Director, Richard Lee, had been approached about this plan. From there, they went to the State of New Hampshire to get appropriate permitting for the wetlands crossings. Mr. Blakeman shared that he has received the permit. He said that he came before the Zoning Board and the Conservation Commission in 2007 and 2008 and that at those times, they were not comfortable signing off on this minimum impact project. Instead of coming directly to the Town again, Mr. Blakeman submitted the application for a permit to the State of New Hampshire. The permit gives permission to cross the wetlands to install a driveway and to connect to the sewer line. He noted that the disturbed amount of land would total 1150 square feet. Mr. Blakeman noted that there would be culverts installed in the crossing and that they would be crossing at the narrowest section of the wetlands. He added that this plan had been reviewed by Peter Stanley, Zoning Board Administrator. Mr. Blakeman also noted that he has received the permit from the State, called a "permit by notification" which is not a physical permit that is mailed out. He explained that once the application is accepted and notification is complete, they are notified via the State's website. The applicants are instructed to sign the application and post it at the site. Mr. Blakeman indicated that he put a copy a screen capture of the application in the information packets that were handed out to the board members, to show that it was complete.

Mr. Blakeman went on to explain that wetlands bisect the property and that there was a portion of land along Fairway Lane that would not allow sufficient room to put a house on. He added that there was a second portion, between the wetland fingers, that is less than .2 of an acre and is about 50' wide. He said that he had submitted a wetlands application to build in that area a couple years ago and it was denied by the Conservation Commission because they would have to fill in around the house, which would be against regulations for proximity to a wetland. Mr. Blakeman said that it is a very narrow strip of land and that he believed the impact of building a house in that section would have been greater to the wetlands than to build in the rear of the property where there is about .4 of an acre. He noted that there were no further approvals needed to build in that area.

Mr. Blakeman proceeded to read through the "Special Exception Criteria XXI G.1-3 For Driveway Crossings of Wetlands (XIII.E.(1)), which has been attached to these minutes. He believed that the proposed driveway met each of the criteria listed in the document.

Mr. Blakeman said that they have received the wetlands approval for the crossings from the State, and were at the meeting to discuss the driveway crossings, themselves.

Mr. Cross asked if they had received approval from Public Works Department to tie in to the country club's sewer line. Mr. Blakeman said that he had not. He explained that it was more of a construction project similar to creating a trench. Mr. Todd asked if they would be looking at about 500' or so of trenching for this part of the project. Mr. Blakeman answered in the affirmative.

Mr. Cross asked if the proposed driveway conformed to other driveway requirements. Peter Stanley said that they were there to show that there were no other possible ways to access the land other than over the wetlands.

Chet Allison, an abutter of the Perry property, asked Mr. Blakeman if he believed there would be no impact to any of the neighbors resulting from putting in the proposed driveway. Mr. Blakeman said that he did not.

Mr. Ellison noted that he was a neighbor to the Perry property and that he had walked the land that very day. He showed the Zoning Board members where his house was situated on the map that Mr. Blakeman had furnished. His home was the one on the map with the swimming pool. He said that he would be most affected by this proposed driveway because its design swings around like a "T." This troubled Mr. Ellison because he believed that every time a car would go into the new driveway, his house would be illuminated. This fact, he believed, would impact his privacy. Mr. Todd noted that the area of which Mr. Ellison was speaking of was presently lawn and was mowed. There were no trees present. Mr. Ellison felt that this driveway would impact him greatly. Mr. Blakeman suggested that if it was an issue, he could plant shrubs to keep the light out. He also explained that there Mr. Ellison's lawn presently goes up and across the property line, as was the case with their swimming pool. He added that dog pens had also been put onto the Perry property in the past.

Mr. Blakeman went on to say that in the past with new subdivisions, the Planning Board has asked developers to leave a buffer on each side of the property line. He said that he didn't feel that it was right to ask this. Trees could be planted along the property line but he did not feel it was their responsibility to do so.

Cyann Rose Jensen, who owns half of the house that Mr. Ellison was talking about, wanted to clarify why there had been some confusion as to where the property line was. She said that where the lawn goes in, there are dog pens and a pool there. Up to this point, they had been using that little strip of land because Mrs. Perry pointed out the tree line and told Ms. Jensen that it was the property line. Ms. Jensen said that she believed that she had been previously cleared to use the property, believing that it was part of her own lot. She noted that at a point, the property turns into swamp. She noted that Mr. Ellison was right; it would impact their house in that it would collect every bit of light from cars driving into the driveway. She felt that there would be no privacy and it would be like living in a city. Chair Green asked how far from the property line their house was situated. Ms. Jensen said that it was about 20-24 feet. She also said that the area between her house and the property line is very wet and cannot be mowed until mid-summer. A small pond that is created from the water running down the land gathers already, and if they disrupt the wetland on the Perry land, the whole thing would be a terrible disaster to their well. Mr. Ellison said that he would like a guarantee that there would be no problem with excess water on their property, as he doesn't want to be flooded out. Mr. Blakeman said he understood that there would be a house built on the Perry land at some point, but that those discussions would be for the Board of Selectmen. He reminded them that this meeting was to talk about

the driveway and not the impending building. He noted, however, that they were certainly assuming that a house would be built there at some point.

Susan Hankenburk, attorney representing Mrs. Perry, handed out a prepared brief memorandum of the law to highlight the constitutional issues with regard to the fact that, as Mr. Blakeman pointed out, the subdivision was approved in 1967 and this particular person had owned the lot since 1969, they've been paying tax on it as a buildable lot of record, and their rights to be able to utilize the rights of the property is protected by statutes and case law in New Hampshire. Because it is a residential use and is in an area where residential uses are allowed, the fact that it is a pre-existing nonconforming lot of record renders it for legal purposes as a conforming lot. She said that for legal purposes this has to be treated as a conforming lot. Additionally, by having acquired the permit from the wetlands board for the crossing, the lot is entitled to a special exception from the board. They have to look at what the ordinance says are required for a special exception.

Mr. Todd asked Ms. Hankenburk if it was her idea to substitute her brief instead of having the Zoning Board discuss the facts and then deliberate. She said that she would not instruct the board on how to handle the case. She added that because the State had approved the crossings, it is clear that it is the least impact that could be accomplished in accessing the lot.

Chair Green asked Ms. Hankenburk to hit her points so the board could deliberate. She said that the primary issue was to give evidence that the building site could legally support access and utilities, which was what had been demonstrated by the wetlands board when they issued the permit. She was also aware that there could be some concern from abutters about runoff and the wetlands. She indicated that Mr. Blakeman had pointed out in his report that there was an existing ditch line in the foot path that that it had been there for some time. The ditch line was approved by the Planning Board in 1967. She felt that what was being proposed does not result in any measurable increase in flows during rain events. Ms. Hankenburk commented that it was not Mrs. Perry's responsibility to deal with the circumstances that have been created by the subdivisions in that area.

Ms. Jenson said that the runoff disturbance proves the opposite side. She asked what would happen to the pond in the woods near the building lot. The pond causes a lot of water to gather on the property and she wondered if the driveway they want would come into the eventual home site and impact the way the water flows. Chair Green asked if she was inquiring what the state looks at when reviewing applications for wetland approval. Ms. Jenson answered in the affirmative and said that if they looked at the site, they would have had to consider that water would not run up-hill.

Mr. Blakeman said the state looks at the crossing, itself, the driveway, and the fill associated with the driveway. They look to see that the impacts to the wetlands are minimized as much as possible. They balance the issue of crossing the wetlands with the minimum impact possible to be able to utilize the property.

Joan Ward, meeting attendee and abutter said that if they were going to build a driveway, they'll eventually build a house. She pointed out that they were not allowed to fill in the wetlands. This being the case, the house would sit perched on its knoll and it would be a strange set up. The conservation people said, at the last meeting they attended, that they were not allowed to legally fill this sort of property. Peter Stanley confirmed that filling of the wetlands was not allowed. Ms. Ward said that after this summer of rain and the number of mosquitoes, how could anyone sell a house to someone and tell them they can't touch the wetlands. She said that it didn't make sense and seemed to be morally wrong.

Chair Green noted that Ms. Ward's house was next door to the property in question. He explained that part of her own property was driveway and lawn and they haven't done anything with the wetlands near them. He asked her why it wouldn't be the same case for the Perry property. Ms. Ward said that it wouldn't be the same because they have more land surrounding their house so they were able to do more with it. She stressed that they leave the wetlands alone. Mr. Green said that the Perry property was limited, but usable land. Ms. Ward felt that developing the property would not be an asset to the land. She said that she could understand not wanting to pay tax on this land they've had for years and perhaps the Town could take it and continue pouring water into it as they have done for many years. She asked how that would be approached. Peter Stanley said that the Town does not purchase house lots but that the neighbors could get together and purchase it, and annex the lot by each taking up a small portion of the land. He said that this sort of thing has happened before and could work in this instance.

Allen Coop, meeting attendee and abutter, said that he knew the lot better than anyone else as he has lived across from it for 25 years. He admitted that he was not an expert, but that the lot is really wet, almost all the time. He said he visited the property that day and there was standing water on it. He explained that there was a lot of water that comes off the hill and Old Coach Road and Fairway Lane. He has witnessed the several attempts by the Town to try and keep it drained. He opined that the excess water in this part of town could only be solved only by illegal filling or diverting the water to the neighbors. He said that he realizes there was a problem with the subdivision but opined that two wrongs don't make a right. Mr. Coop stated that he had heard from many people that it was not a buildable lot.

Lisa Gooding, meeting attendee and abutter from the corner of Old Coach Road and Fairway Lane, believed that the water would go to all the neighbors' property. She opined that Ms. Ward's basement would be flooded. She explained that the Town uses the area for runoff and if it is disturbed, where would the water go? She noted that environments have changed since 1967 and that there are lots more environmental issues today. She understands why they wouldn't want to pay taxes on it, but hopes it can be worked out if it is not a buildable lot. She said that they are trying to develop a lot and a house under conditions that it make it appear to be a bog.

Mr. Blakeman said the drainage on Old Coach Lane would not be fixed by anything that happened on the Perry's lot. He explained that there were two culverts on the land that divert a lot of water during storms. He said that he was sure that these culverts have changed the hydrology, but the point was, he believed, that this driveway and a future house can be built and maintained without filling the wetlands. He commented that this sort of thing happens all over this area and that houses can be successfully built adjacent to wetlands. He added that fewer houses in this sort of situation are being built due to enforcement of wetland regulations becoming stricter. Mr. Blakeman didn't feel it was fair for the Town to say "You can't build there because we think you might fill the wetlands down the road." Mr. Todd asked why they can't address the issue of a house being built on the land before they address the driveway issue. Mr. Blakeman said that the house issue is for the Board of Selectmen to decide.

Ms. Jensen asked if the driveway goes in, how would they protect themselves from getting the runoff from the watershed, as her land is currently the catch basin. She said that this construction was going to impact them and she saw no way it wouldn't impact them. She wanted to know where the water would go. Chair Green asked if the Perry property was the lowest in elevation, to which Ms. Jensen answered that it was, in fact, her property that was the lowest. The Perry property was higher. She added that once changes are made on the lot above hers, water is going to go into her house.

Peter Stanley said the site would be problematic for the construction but not for the crossing. He remarked that it was at a low elevation and that they would be building at the same elevation as a wetland. He opined that it is possible to engineer anything in theory, (add retaining walls, build up the house, etc) but that any buyer would want to know about the lot and its history. Chair Green asked if the lot met the ordinances. Mr. Stanley said that it would be difficult to build on, but that there is nothing to preclude it and they just have to meet the setbacks.

Ms. Jensen said that when Mrs. Perry sold the home that she and Mr. Allison live in, the piece of property in question was never mentioned to be a house lot. Mrs. Perry had showed the tree line as the lot line. Ms. Jensen said that some years later they offered to purchase the land from the Perry's and even they didn't know there was a driveway to come.

Mr. Allison said all the towns are getting permits for nonconforming lots. He has been in the business in New London here for 36 years and has never seen this sort of a permit for this kind of property. He suggested that the Town take a stand at this time to prohibit this sort of thing from happening. He added that if the exception were given for the driveway, that he would like a 12' fence erected at the expense of the builders, so that he wouldn't have to see the lights from vehicles every night. He said that he could not believe that there would be a house allowed to be built on the lot.

Mr. Todd asked Peter Blakeman what happened to Audry Perry. He asked where she was. Mr. Blakeman said that she was living in a nursing home and that her son in law had power of attorney. Mr. Todd explained that he heard someone mention "her estate" and he wondered of her condition.

Mr. Todd noted on the plan that there was a 25' path owned by the Lake Sunapee Country Club. He asked if it was true that Mrs. Perry has a right to walk on that path or to travel on that path. Mr. Blakeman said that he assumed anyone in the development has the right.

Mr. Todd asked if it was true that a little less than half of the lot is delineated wetlands. Mr. Blakeman said it was less than half. He explained that there were two areas that measured .6 of an acre. Once a second area added, it would be .75 of an acre.

Mr. Todd asked Councilor Hankenburke who she represented in this case. She said that she represented Mrs. Perry.

Mr. Todd then asked Mr. Blakeman if, to his knowledge, the Perry's made an inquiry of the Country Club to tie into the sewer lines. Mr. Blakeman answered in the affirmative.

Mr. Todd asked if they had asked the Country Club about expanding the access on the footpath. Mr. Blakeman said that they had done this and that they did have permission from Country Club. He added that at one time an application was submitted to run the sewer lines down the footpath. Mr. Todd said that from looking at this plan, it seems possible to pass down this footpath and get to the building site using one crossing site that is already a man-made ditch. He asked Mr. Blakeman if this was an option. Mr. Todd said that expanding an already permitted right of passage to include a driveway to the property to access would seem to be a better approach. He explained that this was a deeded right of passage, requiring negotiation with the land owner. Mr. Todd saw this as an option with only one wetland crossing that would be across one man-made ditch. Mr. Blakeman said that the delineation stopped near that area and could not say if there were wetlands beyond the ditch into Mrs. Ward's property. He opined that if the use of that area would be considered by the Country Club, they would not have labeled as "footpath." Chair Green said that for the sake of time and expediency, they want to focus on what the request was and make a decision about, rather than suggesting talking about another owner of an abutting property to see if they could negotiate a driveway crossing from their property.

Mr. Todd stressed that if they already have a right of passage on that land/footpath, then that is a possible option that doesn't seem to have been explored.

Ms. Jensen interjected, saying that the footpath would not be a possibility. She said that it wasn't even passable by foot because of the water.

**Chair Green made a MOTION TO DISCUSS. The MOTION WAS SECONDED by Doug Lyon.
THE MOTION WAS APPROVED UNANIMOUSLY.**

Mr. Lyon said that they were at the meeting to consider a special exception and not a variance. He explained that there are strict rules when it comes to an exception. They are to determine whether the special exception being requested can be permitted in this zone. They also have to determine whether the special exception requested meets the criteria of the ordinance. If they are in the affirmative, they have no choice but to grant the special exception. He concluded that a passage over a wetland for a driveway is a permitted exception in this zone. The second issue is the criteria to be met to approve the driveway crossing. He stated that there were a number of criteria they should be looking at.

Mr. Todd said that first they have to answer "yes" to the question under a proposed crossing of wetlands for any reason. The first one says there is not a layout of the access and utilities which conforms to the regulation and does not cross a wetland and the proposed crossing is the least impact. Mr. Todd didn't believe that they had met the criteria yet. To have met the criteria, he believed that Mr. Blakeman would have to have received a letter from Lake Sunapee Country Club to deny access to have a driveway. Mr. Lyon said they have never suggested to an applicant, an alternative to purchase land from an abutter on which to put a driveway. Mr. Todd said that there wasn't any mention of purchasing land. He stated that they haven't demonstrated that, for sure, the land belonging to Lake Sunapee Country Club couldn't be used as a driveway.

Chair Green said Mr. Blakeman is responsible for the delineation of wetlands on the property in question, but not the neighbor's property. Mr. Todd said that the way he is looking at it, they haven't moved past question #1. Mr. Lyon said that if they follow Mr. Todd's logic, whenever they are asked for a driveway, they'd have to consider buying land from someone else to cause less impact to a wetland. Mr. Todd said that the Country Club doesn't have fee

simple. The country club doesn't own the land and has given a right of passage to everyone else in the development. To solve this access problem, why not consider this entry? Chair Green said that for the sake of argument, could they cross in that area without having the fee simple ownership? Mr. Todd said that through negotiation, they could expand the right of access. If the property owners wanted to pursue this at a minimum wetland access they could work with the Country Club to find another way that is less invasive. Mr. Todd said they are asking for a special exception because they have a burden, but he felt that they have yet to prove the burden. He believed that the Zoning Board needs to take every case on its facts and merits. He added that they need to explore all the possibilities and, in his view, they haven't.

Mr. Cross asked Mr. Todd if there was an attempt to negotiate with the Country Club and it was fruitless, then his argument would go away. Mr. Todd answered in the affirmative. He felt that they hadn't met the burden.

Mr. Lyon read through the first criteria for a driveway, and highlighted the fact that it must be "in harmony with the surrounding area." He said that the issue of water that is present in this case doesn't seem to promote harmony in the area. Mr. Todd said that the driveway wasn't going to improve the issue of standing water on the lot. All the testimony had shown that it would make it worse. He said that they have to assure themselves that what they approve is not going to worsen the situation on the lot. Chair Green asked what Mr. Todd's argument was. Mr. Todd said that they haven't heard any indication of improvement of the issue of standing water on the lot. None of the testimony given said that that would happen. Because of this, they can only conclude that what they approve would have a reversed and detrimental effect.

It also seemed to Mr. Lyon that there would be detrimental situation if the driveway went in. Chair Green asked Mr. Stanley if a driveway was considered a structure. Mr. Stanley said that it would not.

Mr. Lyon said that essentially, the driveway had to meet the criteria and he kept coming back to it causing a "detrimental condition," impairing the value of surrounding properties, etc. He said that it looked to him that from the testimony of neighbors, that it could be problematic. Chair Green asked if just driveways were a detriment to properties. Mr. Lyon said that from the testimony in this particular case, the driveway would be a detriment to the properties. Chair Green asked how this could be. Mr. Cross said that there were concerns from the neighbors. Chair Green said that he was looking at concerns and added that this case was not very different compared with other driveway crossings over wetlands. He added that his question was "what are the circumstances here, neighbors aside." Mr. Lyon said that there was nothing but anecdotal evidence about adverse conditions, but the applicant has not given any evidence that it would not be detrimental.

Ms. Hankenburke said that the evidence that the crossings would not be detrimental could be found on page two of Mr. Blakeman's packet of information. In it, it said that the two crossings proposed will not adversely impact the flood storage capacity of the wetlands nor will they result in any measurable increase in peak flows leaving the property during rainstorms. She said that this was all coming from Peter Blakeman, as his professional opinion. Mr. Horton asked if Mr. Blakeman was a paid assessor. Mr. Blakeman said that he was. Mr. Horton commented that they had heard from the abutters, that things could be impacted. The flip side was that a study was paid for by the applicant, to say that from the crossings proposed it does not appear that they won't impact some of the anecdotal thoughts that have been shared at the meeting.

Mr. Horton asked Peter Stanley if the assessment that had been done was sufficient. Mr. Stanley said that as far as the driveway is concerned, he didn't feel that it would present the problem, but that it was the development that would. He stated RSA 674:33, which states that the Zoning Board could make special exceptions but that the exceptions "shall be made in harmony with the general purpose and intent of the zoning ordinance..." His opinion was that the Zoning Board has a broader appeal to study this because they can look beyond the wetland crossing and are not narrowly focused on the crossings, as the State was. Chair Green asked if, relating to engineering, it was within the realm of engineers to do some calculations, before the driveway is installed. He wanted to know if this was a normal engineering task. Mr. Stanley said that yes, this was considered a "normal" task and that the calculations could be figured in two ways: One is calculating the rate of runoff. The other is figuring the total volume of runoff. Chair Green asked Mr. Stanley if there was any reason to be concerned about Mr. Blakeman's assessment of this particular site from other sites that he had seen. Mr. Stanley said that there was no reason for concern. He said that the crossing themselves wouldn't be the issue. He added that a driveway would increase impervious surfaces on the lot, as would the structure(s) on the land over and above what it is currently receiving naturally.

Mr. Lyon asked that when doing the calculations, did they deal with the impact of driveways as an impervious surface. Mr. Blakeman said that he did not, and only calculated the impact of just crossing of wetlands. He said that he didn't put any further calculations in at this point because they haven't been asked for in the past.

Mr. Todd asked if in the process of creating the driveway, would they have to cut some trees and vegetation. Mr. Blakeman said that they would. Mr. Todd asked if the presence of trees on a lot would slow runoff. Mr. Blakeman said that it would. Mr. Todd remarked that by building a driveway on the lot, they could see an increase in runoff for two reasons: 1. Fewer living vegetation to absorb the water, and 2. Driveway surface has to be made of something that will cause water to run off and not drain through. Mr. Blakeman said that his words were that any additional water would not make any *measurable* increase leaving the property. Mr. Todd asked Mr. Blakeman if he quantified the construction of the driveway through the wetlands. Mr. Blakeman said that he did not.

Mr. Lyon clarified by saying that not only did he not quantify the impact of the property because it wasn't his professional responsibility; his responsibility was to minimize the amount of impact by the crossings. Mr. Lyon explained that Mr. Blakeman didn't bother to measure it because it wasn't his job. Mr. Blakeman said that if they put a culvert under this driveway, they will detain water above the driveway. Mr. Todd said that the fewer trees present, the more runoff would be seen. Mr. Blakeman agreed, but said that it would be a very small scope.

Mr. Ellison said that he was hearing words like "calculating" and "rough plans." He opined that a drainage study should have been done. Mr. Blakeman noted that there was water on the property, but there was not a large perennial-type stream that flows there.

Chair Green said that it was a tough situation. The lay of the land in the neighborhood is comprised of small lots. Every lot in the development is just about one acre and they are all substandard because they are below four acres. Most of the lots share the common excess water issue, and almost all of them are wet. Every member of the board in the past has been attentive to the neighbors' feelings and the issues that have been raised. He said that that was the tough part. The flip side of it, he went on to say, is where it was much easier for him. He puts himself in the place of the property owner or, better yet, if this was anybody's lot in this room and they've owned the property and the property meets the regulations. Right, bad or indifferent in going down the list, the property was probably meeting the regulations. As a member of the board he is faced with the decision to say the lot is not buildable and the owner can't do anything with the land. He doesn't know how the rest of the board felt, but that was how he felt. If they go through the steps and meet the regulations, someone could make the argument that the regulations aren't strict enough, but they have to deal with the present. He can't say that it is a non-usable lot. They need to determine this.

Mr. Cross said that because the proposed layout of the crossing of wetlands was an issue, wasn't precluding that the approach to the property may make the lot usable? He said that he heard Chair Green say that as the proposal had been presented he felt that it meets the criteria. He asked if that precludes a different approach to solving the problem of access to the part of this lot that would potentially include a house. Would it preclude the approach to solve the problem? Chair Green said that it is their request and doesn't feel it is good policy for the board to suggest to an applicant go try and negotiate an access from an abutter. And if it isn't acceptable as presented, so be it. It is their request that they have to respond to.

Ms. Gooding commented that as the board they had the ability to decide what to do. She added that she has lived in this area of town for many years and has known that the Perry lot was not a buildable lot for a long time. It [rejecting the special exception] just seems to be the right thing to do because the land, the property, and the issues that will come up down the line for building on it.

Chair Green said that if they use the abutters' same standard for deciding if land could be built on, how many fewer houses would be built on Fairway Lane? Ms. Gooding said that this lot in particular was very wet and there were little creeks that run through it. Ms. Jensen said again that their lot was the lowest in elevation, and that they would also have to deal with the light from cars at night. She believed that these factors would create a devaluing of her property and that this proposed driveway and probable construction was going to impact them in every direction.

Mr. Lyon asked Mr. Stanley if the request was denied by the Zoning Board, if it would be non-appealable. Mr. Stanley said that it could be appealed if they have new information to present for their case. They could also appeal

it to Superior Court.

Mr. Lyon respectfully disagreed with Mr. Todd and didn't feel that negotiation with another property owner should be suggested to an applicant. He felt that the board had a responsibility to consider the use that is being requested. Mr. Lyon understood that Mr. Blakeman had not done a calculation that would determine that the driveway wouldn't increase the runoff of the property; that was not his responsibility. However, under item B of the criteria, he felt that he hadn't seen sufficient evidence that the petitioner had demonstrated a negative or detrimental condition. He would like to see a calculation done to show that an increase in permeability won't cause a detriment. He added that at this point, he would vote to deny the special exception.

Mr. Todd said if they were to deny and the petitioner was to appeal, the matter would go to Superior Court with the notes that the recording secretary had taken during the hearing. They would be confined with the information in the record. Mr. Lyon said that if they did the calculation, they could come back to the Zoning Board and then they could decide from there.

Mr. Todd went on to say that were they to deny the special exception and were it to go to Superior Court for review, the record shows that there was an opinion on the wetland impact from a professional. The Zoning Board has the right to get their own professional opinion, but at the moment they don't have that. Mr. Lyon said all Mr. Blakeman had done calculations for was the 1100 sq foot for the crossings. Mr. Todd explained that if reviewed by Superior Court, and the Zoning Board had no expert opinion of their own, they would most likely side with the applicant.

Mr. Stanley commented that something the Zoning Board could do was to add conditions to the special exception.

Chair Green said that the difficulty in making the decision was based on lack of information. He asked that, in calculating runoff, what was the scale within the benchmark of engineers; is it little, medium or a lot? He wanted to know that once the calculation was done, what would the lingo be. Mr. Blakeman said that it all depends on the focus. The culvert size is based on how much water is going to run through that area. He couldn't say that on previous residential houses like this one they have done a lot of calculations like this because you can usually tell just by looking at the wetland, itself that an 18' or 24' is plenty adequate. If they were to look at a 100 sq foot area and say it is permeable earth and we put gravel on it, it would change, there is no question on that. Looking at an entire watershed, there will be far less impact below the culvert looking at the overall area. Chair Green asked what info would the Zoning Board be interested in hearing about and to what extent. He commented that they were venturing into uncharted territory. Mr. Lyon said that what he was looking for was a calculation to provide some comfort that the driveway wasn't going to increase runoff into the neighbors' property. He agreed with Chair Green that he was uncomfortable with denying the right to develop the property when it appears that he has met all the requirements to go forward. At the same time, he was trying to take into account the testimony by neighbors that the proposed project would adversely impact their properties. He wanted some evidence.

Mr. Todd asked if when Mr. Blakeman returns with his calculations, would they accept these calculations or would the Zoning Board get their own professional to do a similar study. Mr. Stanley said that the ZBA cannot go out and get their own professional and pay for it. The applicant has to pay for this sort of thing. Additional information from the applicant could be requested and this could push off the dates of the next meeting until they can get the requested information.

Mr. Lyon said that he was willing to accept a professional judgment by an engineer. Chair Green asked if they should suggest a scope of what the calculation should entail. Mr. Lyon opined that it should entail the driveway to be proposed. He stressed that he was looking for some evidence that would provide comfort for neighbors.

Peter Stanley said they could grant the exception with the condition that the driveway be impervious so that it wouldn't make a change in the water runoff. He reminded the Zoning Board that they could have conditions of approval that safeguard the ordinance. He also suggested taking the matter into advisement for 30 days.

Mr. Ellison asked if they would do a drainage plan. Mr. Todd said they were trying to assess that. Chair Green said that they were looking for more information. The board agreed that more information was necessary in order to make a ruling on the case. Chair Green suggested giving the applicant some type of direction in a specific scope of what that additional information should convey.

Chair Green asked Mr. Blakeman what the calculation would include. Mr. Blakeman said that they would first pick an evaluation point. In this case, it would be the outlet of the property, in the ditch. They would evaluate the runoff at that point. They would then evaluate the undeveloped lot, and then again with it developed. It would show results from both pre and post development. Mr. Blakeman said that the calculations would show that the culverts were sized properly.

Mr. Cross asked if they would consider the permeability of the materials being used. Mr. Blakeman said that they would, and also that he didn't disagree with Mr. Stanley's suggestion of using a pervious surface.

Chair Green asked Mr. Blakeman how long it would take to put together such a study, assuming they were interested in taking that route. Mr. Blakeman said that it would take a few weeks. Chair Green announced that a continuation of this hearing would need to be scheduled. After some discussion between Mr. Blakeman and members of the Zoning Board, they agreed to meet on November 17th at 7:30pm. Mr. Stanley announced that notices would not go out regarding the continuation of the hearing, as it was not a new meeting, but a continuation of one that had already been noticed.

Chair Green asked for a motion to adjourn.

IT WAS MOVED, (Court Cross), AND SECONDED (Doug Lyon) to adjourn the Zoning Board hearing of September 28, 2009. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting adjourned at 9:28pm