

**Milford Board of Adjustment Minutes**  
**January 4, 2007**  
**Patricia Berntson**  
**Case #32-06 - Variance**  
*Tabled from December 21, 2006*

Present:        Len Harten  
                  Fletcher Seagroves  
                  Katherine Bauer  
                  Ron Pieper, Jr.  
                  Bob Levenson

Secretary:     Kathryn Parenti

**Case #32-06 Variance**

Patricia Berntson, owner of Map 43, Lot 26, located on Tonella Rd, in the Residential “B” district, is requesting a Variance from Article VI, Section 6.025.B.1.1 to allow the construction of a two-family dwelling within the wetland buffer; not exceeding 2,375 SF of buffer impact.

Motion to Approve: \_\_\_\_\_

Seconded: \_\_\_\_\_

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

L. Harten, chairman, began this portion of the hearing by stating that the hearings are held in accordance with the Town of Milford Zoning Ordinances and the applicable New Hampshire statutes. He continued by informing all of the procedures of the board. He then introduced the board. Patricia Berntson, applicant, Bob Kokko and Andrea Kokko, her representatives, were present. He read the notice of hearing into the record; he then read the list of abutters into the record. None were present.

L. Harten then read the letter from the Conservation Commission, dated November 29, 2006, into the record. He then invited the applicants to present their request for a variance.

A. Kokko read from the five criteria they responded to:

**1. The proposed use would not diminish surrounding property values because:**

A. Kokko stated that the surrounding properties are similar, being condominiums or Apartments, and most are densely populated.

**2. Granting the variance would not be contrary to the public interest because:**

A. Kokko replied that a duplex is acceptable in a Residential "B" district and the Property would be no different from those which surround it.

**3. Denial of the variance would result in unnecessary hardship to the owner because:**

**a. Please state why and in what manner an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property:**

A. Kokko stated that due to the amount of wetland on this specific parcel If a variance is not granted, the parcel will be an unbuildable piece of property.

**b. Please state why the benefit sought by the applicant cannot be Achieved by some other method reasonably feasible for the applicant To pursue, other than an area variance.**

A. Kokko stated that a special exception has been denied. There is not Enough land to build a structure suitable for habitating without placing a Portion of the property in the wetland buffer.

**4. Granting the variance would do substantial justice because:**

A. Kokko stated that the assessor's office has the property valued at between \$130,000 and \$150,000 and the owner is being taxed on that value. Since the owner is paying taxes on a buildable lot, as noted by the assessing office, she should be able to build on it.

**5. The use is not contrary to the spirit of the ordinance because:**

A. Kokko replied that she didn't feel this would diminish the surrounding values, it is An acceptable use and the impact to the wetlands buffer would be minimal. They have been careful to mark off the wetland buffer so they would not be affected by the project.

A. Kokko also wanted to address the letter from the Conservation Commission. In the letter, it refers to 1989. She stated she was aware that this piece of property has history but didn't feel that the history is enough to base a decision on. The decision should be based upon what they are presenting currently.

L. Harten stated that the lot had not changed since 1989.

K. Bauer stated she thought they had revisited the site last summer or fall, or maybe they didn't.

A. Kokko stated that the lot is described as buildable; if it wasn't buildable, it would be valued at \$4000 instead of its current value. Also stated in the letter from the Conservation Commission, it states that only wetland buffer will be disturbed. In the letter regarding Giorgio's Restaurant, dated June 14, 2004, they state only the wetland buffer will be impacted. Since they approved that project, they should approve this project, since the impacted area is the same. They are contradicting themselves by these statements.

K. Bauer stated they are not supposed to revisit the past.

A. Kokko stated she understood that the Conservation Commission received everything, including a map of the area, including where the heavy equipment would not be allowed to go. In the plan provided for this application, the temporary impact would be two thousand three hundred seventy five (2375) square feet, including all the area around the foundation, including eight hundred five (805) square feet of foundation. It's not going to go any place else.

L. Harten asked how would they prevent the residents from impacting the buffer.

A. Kokko asked if he meant the residents of the duplex after the construction.

B. Kokko replied that it would be the same way as with a house on a brook; you can't control them. It's usable land against a buffer.

L. Harten stated that the land abuts the wetlands.

K. Bauer replied that there were restrictive uses on the land.

B. Kokko stated they could build a structure without a special exception.

A. Kokko replied that the tenants would have to be told that they can't dig in the backyard but a shed would be allowed. They would hope the tenant would not build a permanent structure.

L. Harten said there is nothing to prevent them from putting up a temporary structure in the buffer.

K. Bauer stated that would be an enforcement issue.

L. Harten stated it was just a curiosity question.

K. Bauer commented on the Conservation Commission letter by stating that she didn't see where the applicants say the Conservation Commission is not familiar with the land in 2006. She refers to the third paragraph of the letter: "*Applications for construction on this lot have been consistently met with disapproval by the Conservation Commission. The Commission does not support construction of a building in a wetland's buffer zone.*" She states that with a larger construction, not only will the wetland buffer be dug into; the construction process would disturb the buffer zone. She again referred to the Conservation Commission letter by quoting: "...*does not support the construction of a building in a wetland's buffer zone*"; they are really against constructing a building in a buffer zone, versus paving in the zone. It is something they are very strict about.

L. Harten replied the intended purpose of a buffer zone is to protect the wetlands it abuts.

K. Bauer stated she thought the difference was the degree of disturbance with the construction of a building in a buffer zone rather than some other kind of disturbance.

L. Harten asked if there were any additional comments on the Conservation Commission's letter.

B. Levenson stated that he tended to rely on the Conservation Commission on matters of wetland issues; what this letter shows is that they are very adamant that construction on this lot should not happen. It is a very clear cut and a definitive no.

B. Kokko stated that they are opinions that go beyond the regulations.

B. Levenson stated that when reading from the Zoning Ordinance, it states what shall not be done in the wetlands buffer zone. If B. Kokko had any thing to show him that would prove that he was making the wrong conclusion, he would be happy to look at it; otherwise, he felt the Conservation Commission was correct in their conclusions.

K. Bauer, also reading from the Zoning Ordinance, Section 6.025.B, Buffer Zone: “*Any of the following uses that do no alter the surface configuration by the addition of fill, removal of soil, or obstruct in any manner, the natural flow of ground or surface water, or disturb in any manner the ground itself to any depth and that are otherwise permitted by the Zoning Ordinance*”. She stated what was allowed in the buffer zone: a shed, a deck. She also agreed that the letter from the Conservation Commission was very adamant and the strictness of the Zoning Ordinance makes this very difficult.

B. Kokko wondered why they supported other projects in other buffer zones and not in this one.

K. Bauer suggested they use that as a basis for an appeal. She said it was stated clearly in the handbook that the board should judge every case on it’s own merit and to not use comparison; that cannot be part of the board’s decision.

A. Kokko stated the Conservation Commission is very adamant about building in the wetland zone. She said they are not asking for precedence. She felt the board harps on building more than other forms of disturbance. She felt if they asked for a parking lot for that area, with the salt, sand, antifreeze and other types of runoff; that would have been allowed. The board even allowed a large retaining wall, dug into the buffer zone.

K. Bauer stated that she didn’t know how the Conservation Commission would vote.

A. Kokko replied that their impact would be very minimal, eight hundred five (805) square feet once the construction was finished. The house would not be leaking any substance, as cars on a parking lot would.

K. Bauer stated that the plumbing system could leak out into the buffer zone at some point.

A. Kokko replied that was like saying anyone building within twenty five (25) feet on river, if the plumbing went; that’s very hypothetical.

K. Bauer wanted to have her feelings why she feels so adamant about building in a buffer zone versus other possible disturbances put into the record.

F. Seagroves read the definition of a buffer from the Zoning Ordinance: “*An upland area adjacent to a wetland and/or surface water which serves to filter surface water flowing into the wetland*”. He said that taking away eight hundred five (805) square feet of buffer, when you look at what a buffer is, there is a problem.

L. Harten stated they should go through the five criteria for the area variance and reiterated they were not voting; they were just discussing them.

R. Pieper asked what kind of foundation the house would have.

B. Kokko replied that it would have an eight (8) foot foundation, preferably with a walk out basement.

R. Pieper asked if it had a means of egress, if it was on town water and sewer, if it would be setback ten (10) feet into the buffer and the house is seventy (70) feet by twenty six (26) feet. He also asked the peak of the roof was outside the buffer.

A. Kokko replied all the above were true.

L. Harten asked if there were any more questions.

K. Bauer asked if they could provide an elevation; show the drip line at the rear of the building and the drainage away from the building.

R. Pieper stated that the roof rechanneled the water back into the buffer.

B. Levenson replied that structures greatly change the flow of water, storm water runoff, retention ponds. The Army Corps of Engineers usually reviews Commercial projects and provides controls and protections that aren't provided here. There are different levels of wetlands and buffers and they require different kinds of protections.

K. Bauer stated that she wanted to affirm what B. Levenson said, that storm water runoff, does change the flow and type of water that flows into the buffer.

B. Levenson reiterated that the Conservation Commission letter was very adamant and strong.

R. Pieper wanted to know the definition of wetlands.

K. Bauer read from the Zoning Ordinance, section 6.024.C: *“Wetlands: A wetland area shall be delineated based on hydrophytic vegetation, hydric soils and wetland hydrology in accordance with techniques outlined in the Corps of Engineers wetlands Delineation Manual...”*

L. Harten asked if there were any comments on whether this application was for use or area variance.

B. Levenson wondered if they had established this as an area variance.

L. Harten stated they had just discussed that it was an area variance or a use variance.

K. Bauer replied that they had agreed it was an area variance and they would vote on that after the discussion.

K. Bauer stated they were looking at reasons why the vote on use or variance.

L. Harten stated that would help the board establish direction.

K. Bauer asked if the board could vote on whether this was an area or a use variance.

L. Harten agreed.

**Is the variance requested a variance from a dimensional requirement  
Zoning Ordinance?**

K. Bauer – yes      R. Pieper – yes      F. Seagroves – yes  
B. Levenson – no      L. Harten – yes

B. Levenson read from Section 6.025.B of the Zoning Ordinance: *“...uses that do not alter the surface configuration...”*; it was use, in his opinion.

K. Bauer stated that it was an area variance because they are applying to infringe on an area; it is dimensional.

B. Levenson stated that the use is not allowed.

L. Harten stated that the vote was four to one, stating this was an area variance. He continued by reading the criteria and calling for a discussion of each item.

**1. Could the variance be granted without diminishing the value of  
abutting property?**

F. Seagroves said yes, it would not diminish surround property values.

B. Levenson stated that he didn't know what degradation of the buffer and wetland would mean to the surrounding property.

L. Harten asked if that was over time.

B. Levenson stated that the potential is there; if the wetland is adversely affected it could diminish surrounding values.

K. Bauer stated that she thought it would not diminish the surrounding values.

R. Pieper stated he didn't think it would decrease the values; the lot is not necessarily buildable but if a variance was granted, he could certainly see the surrounding property values increasing.

L. Harten agreed; he didn't think granting the variance would diminish surrounding property values.

**2. Would granting the variance not be contrary to the public interest?**

R. Pieper stated there was an important separate concern with the environment and realizes this test is one where the applicant must show there will be no harm, no impact, no disorder. He stated he didn't believe the eight hundred five (805) square feet of impact with the roof draining the water into the wetland buffer to be of harm.

L. Harten asked if he didn't think it was contrary to the public interest.

R. Pieper replied that was correct.

K. Bauer stated that she felt the protection of the wetland district, which includes the buffer, is very important and that disturbing them would be contrary to the public interest.

B. Levenson agreed with K. Bauer.

F. Seagroves also agreed with K. Bauer. This would be contrary to the public interest.

L. Harten replied that he was divided. He was not sure building in the buffer zone would be contrary to the public interest. He stated he did share the same concerns with the wetlands disturbance and felt that it was important to protect them. Along those lines, the request would be contrary to the public interest.

**3. Would denial of the variance result in unnecessary hardship?:**

**a. Please state why and in what manner an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property:**

**b. Please state why the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.**

K. Bauer addressed a. first. She stated the special conditions of the lot are obvious and there are the large amount of wetlands on the property. This opposes hardship in that it comes close to being a self-imposed hardship by the person who purchased the lot. There is hardship but if the board says there is hardship but allow it, then the answer to a. is yes, but it is partially self imposed.

K. Bauer went on to b. She felt there was another solution, stated by the applicants, that two modular homes could go on the lot and maybe a single family home but not place them in the buffer zone. She felt there were other options. She stated that since half of the two part answer was no, she had to have a no vote for all of number three.

L. Harten clarified that there are special conditions of the property that may be self-imposed.

K. Bauer stated the property has a history of being difficult. It came before the board in 1989 and 1999. She felt since she wasn't able to answer yes to both, both hardship questions, her final answer would be a no.

B. Kokko said the property hadn't been purchased since 1988 or 1989.

L. Harten asked when the property was purchased.

- P. Berntson stated her husband bought it in October of 1989.
- K. Bauer stated that in the Conservation Commission letter, plans to construct on this land were discussed and withdrawn in 1989.
- C. Levenson stated that if the applicant does what she wants to do, there are alternatives. This is not the only solution for this property. This would be a no vote for him.
- L. Harten clarified B. Levenson was split on this question.
- B. Levenson stated that he agreed with a., that there are special features to the land but he did not agree with b, there are other things they can do with the property.
- K. Bauer stated that if a piece of property has a problem that no others have, then that's a hardship; if this hardship is not shared by any other surrounding property and it can be proved.
- B. Levenson stated that was not in the handbook.
- K. Bauer stated he had his reasons and she had hers for saying no.
- F. Seagroves replied that he would say no to both parts. He felt something could be put on the lot, something that would fit. The hardship regarding the high taxes, that was something they could talk with the assessor about.
- A. Kokko stated they had already done that and the assessment was lowered by \$6000. They were asked by the assessor if they had exhausted all of their efforts; she understood the assessor wouldn't adjust the taxes without a denial, several denials. The maximum size of a modular or single family home they could put on the lot would be twelve (12) feet to a maximum of fourteen (14) feet deep.
- B. Kokko stated it would be like a mobile home.
- A. Kokko stated it would be a mobile home with a foundation, in the middle of well-maintained condominiums, with the exception of some apartments that look like condominiums.
- L. Harten asked what the dimensions of the home were.
- A. Kokko stated it was 70 feet by 26 feet.
- K. Bauer stated that fourteen (14) feet would be the only size they could build to stay out of the buffer.
- A. Kokko stated they would still be impacting the buffer when building the home. The impact would be slightly larger than the fourteen (14) feet.
- L. Harten asked if they had taken into consideration the thirty (30) foot front setback.
- K. Bauer stated the lot was not unbuildable but it was practically unbuildable.
- A. Kokko stated that a fourteen (14) foot wide house would be impractical.
- K. Bauer stated that was just another option.
- A. Kokko stated that a fourteen (14) foot wide house would look odd surrounded by the other condominiums. That would interfere with the preservation of the surrounding area.
- K. Bauer stated that A. Kokko had stated they could put two modular homes there. That's another option besides what they are proposing.
- R. Pieper stated that on the application, they listed the property as having 57,504 square feet of wetlands. He wondered if that included the buffer.
- A. Kokko said the buffer was included in the larger number.

R. Pieper agreed with B. Levenson and felt that a. was frivolous and that was why the applicant was before the board, and that with b., he didn't care if there were other options. The options needed to be reasonable. They could not put two modular homes on the lot because that is not permitted. They could put in a two-family or a single family structure, that is an option. They could relocate the building into the front setback but they would need to come back before the board with a new application for a special exception. He didn't see where there were other reasonable options to pursue. He felt the size of the wetlands versus the size of the lot and the amount of buffer disturbance is minimal.

L. Harten asked if he had any problems with the hardship issue.

R. Pieper replied that he did not.

K. Bauer asked if you could have two separate residential units in Residence "B" or did they need to be attached.

R. Pieper read from the Zoning Ordinance that two-family dwellings and multi-family dwellings were allowed.

B. Levenson stated there were ways around it.

K. Bauer stated they could attach the homes with a covered walkway.

B. Levenson stated the eight hundred five (805) square feet of impact would potentially degrade the wetland buffer. The reason there is a prohibition is to protect the area from degradation that is due to construction. In Residence "B", reduced setbacks are allowed by special exception. It is a viable answer.

R. Pieper stated that it is a viable concern but the final impact is minimal, negligible. There are corners of wetland buffers that have been paved over on Tonella Road. The final impact on the wetlands would be minimal.

L. Harten agreed. Reason a. is why they are before the board; there are unusual conditions on the property. As for b., there are other viable alternatives like modular homes, reduced building size. He stated he agreed with R. Pieper that there is much disturbance of wetland area on Tonella Road already. The road itself exists. There was impact to the wetlands when Ledgewood was constructed. There is a lot of water in the area. He stated he was torn on the question. He felt there is hardship there and the denial of the variance would result in hardship.

#### **4. Would granting the variance do substantial justice?**

K. Bauer referred to The Board of Adjustment in New Hampshire – A Handbook for Local Officials, January 2006. She read from page 16: *"It is not possible to set up rules that can measure or determine justice. Each case must be determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. A Board of Adjustment cannot alleviate an injustice by granting an illegal variance."* She felt the gain to the general public, meaning the wetlands, outweighs the loss to the individual, the applicant. She felt this would not do substantial justice.

R. Pieper stated yes, granting the variance would do substantial justice. He submitted that it was impossible to identify the benefit to the rest of the residents by protecting the small area of buffer as a whole. Preserving the minimal eight hundred (805) square feet of buffer that is already impacted is not a measurable

benefit to the public. The impact of eight hundred five (805) square feet out of the large area of protected wetlands, does not provide a negative benefit.

K. Bauer stated she understood the disturbance of the construction itself. The actual permanent disturbance of eight hundred five (805) square feet would be adding to it. There would be two impacts on the wetland buffer zone; the first would be the eight hundred five (805) square feet of foundation and the second would be the impact by the actual construction.

R. Pieper stated the permanent construction disturbance of the wetland buffer may not exist, outside of the eight hundred five (805) square feet of the house, even though there are those restrictions to the property.

B. Kokko stated that all the buffer areas were flagged on the map and would be lined with a silt fence.

R. Pieper felt the disturbance would be temporary.

L. Harten stated that any disturbed area would have to be returned to its original state once construction is completed.

B. Levenson stated there were so many no's involved here that it was impossible for him to give a yes vote. There are so many things wrong with the site and the application. Eight hundred five (805) square feet of disturbed area for the structure is buffer area that is gone forever. The buffer would be altered dramatically.

F. Seagroves stated that he would have to answer no to this question due to the eight hundred five (805) square feet of foundation in the buffer. They would have to dig down ten (10) feet to build the foundation and that would change the flow of the ground water.

R. Pieper stated the argument is not that there is impact; the applicants want them to permit that. He felt the impact would be minimal and acceptable. Other similar uses were much more excessive and extreme.

B. Levenson stated he didn't know the background.

K. Bauer asked about the other wetland disturbance in the area.

R. Pieper stated that the road itself disturbed wetland areas.

K. Bauer replied she didn't know the restrictions in place in Milford when the road was constructed.

R. Pieper agreed.

K. Bauer stated they all agree there is disturbance; there is just no agreement on how much disturbance there would be.

L. Harten said he agreed with R. Pieper that the disturbance to the wetland buffer would be minimal. He stated he is a proponent for preserving the environment. He said he was struggling with the most was the existing lot and the disturbance of the buffer zone with a two-family structure. He felt the impact would be minimal and granting the variance would do substantial justice.

**5. Could the variance be granted without violating the spirit and intent of the ordinance?**

B. Levenson stated the ordinance states there should be no moving of earth in a wetland buffer zone. This request is in violation of the spirit and intent of the Zoning Ordinance. The only acceptable items in this zone are elevated structures that allow water to flow.

F. Seagroves said that he agreed with B. Levenson.

K. Bauer read from Section 6.021.A: *“The Wetland Conservation District shall be considered as overlaying any other district established by this ordinance.”* She said the overlay district takes precedence over the underlying district, in this case is Residence “B”. She continued by reading from Section 6.022 Purpose: *“...the purpose of the Wetlands Conservation District is to protect the values and functions of wetlands, surface waters and their associated buffer zones. It is further intended, but shall not be limited to: A. Protect the public health, safety, general welfare and property; B. Reduce sedimentation of wetlands and surface waters; C. Aid in the control of non-point pollution; D. Provide a vegetative cover in the case of the buffer zones for filtration of runoff and the prevention of erosion; E. Protect fish spawning grounds, aquatic life, and bird and other wildlife habitats; F. Conserve natural beauty and open spaces; G. Preserve ponds, rivers and streams in their natural state; H. Protect persons and property from flood damage by preserving the natural flood storage areas; I. Control the development of structures and land uses which contribute to the pollution of surface and groundwater by sewerage, hazardous substances or siltation.”* She stated she felt the purpose and intent of the ordinance is clear and this application would violate the spirit and intent of the ordinance.

R. Pieper stated he did not agree with the argument. They are permitted to impact three thousand (3000) square feet with a special exception. He didn't see what the difference was. The applicants will be disturbing eight hundred five (805) square feet. He felt you could argue that you are violating the spirit and intent of the ordinance but page 39 of the Zoning Ordinance says you are not.

L.Harten said that he agreed with R. Pieper.

B. Levenson said the disturbance in a wetland buffer area is not allowed, period. The use is not allowed and the ordinance says you specifically should not be doing so. Any disturbance must be returned to its natural state. If you disturb over three thousand (3000) square feet, you must go to the State, the Conservation Commission. This has not happened here. The Conservation Commission is advocating against it; the Zoning Ordinance advocating against it. For him, it is very clear.

R. Pieper stated that B. Levenson's argument supports his decision. The Zoning Ordinance has confusing language.

B. Levenson stated that neither case allows construction. A permanent, in ground structure is not permitted, not allowed by the Ordinance.

R. Pieper stated they could build a three thousand (3000) square foot home with a basement, per Section 6.026.B; he's not disputing that but he is inclined to err on the side of the applicant.

B. Kokko said that R. Pieper's conclusion is that they can do anything that is not listed in Section 6.0235 as long as it's over three thousand (3000) square feet. He wouldn't need to be approved by the Conservation Commission or get a dredge and fill permit because it would be in the wetland buffer and not the wetlands themselves. He stated he couldn't change the language, that's what it says. He stated that if anyone interpreted the ordinance differently, they were intentionally interpreting it in a different way.

K. Bauer pointed to page 38, Section 6.025.B.1 of the Zoning Ordinance is what the applicant is appealing, *“Buildings and structures not to exceed one hundred twenty (120) square feet and without sanitary plumbing and raised above ground on concrete or similar blocks placed on the ground surface in such a manner as to permit the natural flow of any surface water.”* It’s a very different thing from what the applicant is proposing.

B. Kokko stated that they needed a special exception. He wanted to clarify that it is in the spirit of the ordinance. They could come back to the board with a larger amount of disturbance and would be applying for a special exception. It would then be easier for them to get what they desire.

K. Bauer reminded him they would still need to get through the criteria for a special exception.

B. Levenson says it states what is allowed in the buffer without getting a special exception.

K. Bauer stated she was only clarifying, that B. Levenson was contradicting R. Pieper’s argument that this was not contrary to the spirit and intent of the Ordinance. A special exception would still be required, but not for a shed or any of the listed items.

L. Harten stated this was a difficult question to answer. He went back to the Conservation Commission’s letter stating that no construction should be done on this piece of land. He said he would reserve judgment until the final vote. He asked if there were any more comments before he closed the public portion of the hearing.

B. Kokko showed on the site plan where they wanted to put the house. He pointed to the corner where the culvert goes under the road. There are barely any wetlands in the area and they dry up in the summer. There is a drainage trench that collects any seasonal and runoff water. The area at the bottom of the lot is not on the edge of a marsh; it’s just a drainage trench. The impact on the buffer would be minor.

L. Harten asked if they would be adding any fill to bring it up to road grade.

B. Kokko stated they would probably add a little; they wanted a walk out basement.

R. Pieper asked if there was a slope on the property; he felt that building on a slope would result in less disturbance than building on level ground. He also asked if the twenty five (25) foot buffer was measured along the surface or linearly.

B. Kokko said he believed the measurement was made linearly. The land slopes slightly; if the impact were measured along the slope, the impact would be less.

R. Pieper stated since there was a slope, most water would run off the sloped roof and down the slope of the land into the wetlands and not result in a loss of rain water flow into the wetlands.

L. Harten asked what the slope of the property was.

B. Kokko said it would be fifteen (15) percent.

K. Bauer asked if they would have to dig as deeply with a walkout basement.

B. Kokko said they would still have to dig down four (4) feet to the frost line.

L. Harten closed the public portion of the hearing and called for a vote.

**1. Could the variance be granted without diminishing the value of abutting property?**

R. Pieper – yes      F. Seagroves – yes      B. Levenson – no  
K. Bauer – yes      L. Harten – yes

**2. Would granting the variance be contrary to the public interest?**

F. Seagroves – yes      B. Levenson – yes      K. Bauer – yes  
R. Pieper – no      L. Harten – no

**3. Would denial of the variance result in unnecessary hardship?**

B. Levenson – no      K. Bauer – no      R. Pieper – yes  
F. Seagroves – yes      L. Harten – yes

**4. Would granting the variance do substantial justice?**

K. Bauer – no      R. Pieper – yes      F. Seagroves – no  
B. Levenson – no      L. Harten – yes

**5. Could the variance be granted without violating the spirit and intent of the ordinance?**

R. Pieper – yes      F. Seagroves – no      B. Levenson – no  
K. Bauer – no      L. Harten – yes

R. Pieper asked a procedural question, did the board need to vote on the denial and the acceptance of the variance.

L. Harten said they did and asked for a motion to grant the variance.

R. Pieper made the motion to grant the variance for case #32-06.

L. Harten seconded.

B. Levenson – no      K. Bauer – no      R. Pieper – yes      F. Seagroves – no

L. Harten - yes

L. Harten asked for a motion to deny the variance, since the motion to grant the variance was denied.

B. Levenson made the motion to deny the variance for case #32-06 for all the reasons stated.

F. Seagroves seconded.

K. Bauer – yes      R. Pieper – no      F. Seagroves – yes      B. Levenson – yes

L. Harten – no

Case #32-06, a request for a variance, was denied by a 3 to 2 vote.

L. Harten reminded the applicant of the thirty (30) day appeal period.

B. Levenson stated they could appeal the first decision also.

B. Kokko stated that the proceedings seemed contradictory. He felt the main argument should have been no's , the impact on the buffers by Giorgio's was 5900 square feet.

F. Seagroves stated he wasn't at the hearing when Giorgio's came before the board.

B. Levenson and K. Bauer both stated they were there.

B. Levenson stated there were different classes of buffers.

A. Kokko replied they had a very big problem with the Conservation Commission stating that the property should not be built on. They stood behind both the hospital and Giorgio's construction of the retaining wall that goes down to a depth of ten (10) feet

K. Bauer replied that the Conservation Commission was not present to rebut their decisions.

B. Kokko stated there was no consistency.

K. Bauer said the details of each project were not the same.

B. Levenson said the board does not set precedent.

R. Pieper said they could come back and appeal or apply for a special exception for front setbacks. They did have thirty (30) days.

A. Kokko said she understood the appeal process but felt this did not make any sense. They weren't talking about building a parking lot. She felt the appeal process is relevant; precedent has been set and this should have been allowed. She felt it was a good way to go and it should be followed through.

K. Bauer recommended they go back and see what past observations were. Decisions were made and it was nothing personal.