

TOWN OF ELIOT, MAINE
BOARD OF APPEALS REGULAR MEETING
JANUARY 20, 2011

Present: Chairman Ed Cieleuszko; Vice-Chair Peter Billipp; Secretary Bill Hamilton; John Marshall, Alternate and Ellen Lemire, Alternate

Absent: Phil Lytle and Jeff Cutting

Also Present: Jim Marchese, CEO; Recording Secretary, Barbara Boggiano; Rev. Michael Stephens, Elizabeth Stephens, Mr. and Mrs. Ed Vetter, Tom Clayton, Gary Berg and Ron Gurmond

1. 7:00 p.m. ROLL CALL

Chairman Cieleuszko called the meeting to order at 7:00 p.m. He asked if the appellant was present and Rev. Stephens indicated that he was.

Chairman Cieleuszko outlined the proceedings: open hearing, summarize request, determine parties to action (the applicant, CEO, abutters), and said the Board has jurisdiction to hear the case, and the applicant has standing up to this moment, testimony will be heard – by parties to the action, time for questioning, rebuttals, letters will be read from abutters, close public hearing, list findings of fact, discuss motion, conclusion, decision made and a Notice of Decision letter will be sent within seven days.

2. PUBLIC HEARING:

Chairman Cieleuszko opened the hearing at 7:03 p.m., introduced the Board members, and informed those present that all members would be voting tonight. He said he will vote in case of a tie.

A. Variance Request by Rev. Michael M. Stephens, Seacoast Baptist Church /Helping Hands Preschool, 1274 State Road, Eliot, Maine (Map 15, Lot 13), to allow the use of Daycare in the Village Zone, Art. 6, Sec. 45-290.

Chairman Cieleuszko summarized the appeal and said the Board of Appeals has jurisdiction to hear the case under Article II, Sec. 45-49(b). Chairman Cieleuszko asked Rev. Stephens if the church owned the property. Rev. Stephens replied they did, and he represents the church and is chairman of the Board.

Chairman Cieleuszko asked if there was a deed on file and if the CEO could check the Assessor's files. While Mr. Marchese left the room to check the file, Chairman Cieleuszko told Rev. Stephens that a copy of the deed is a requirement and must be submitted in the Board's packet as proof of standing. Mr. Marchese returned and said he had a copy of the deed and the church owns the property.

Chairman Cieleuszko turned the floor over to Rev. Stephens, who read from a statement he had prepared.

Rev. Stephens began his testimony by giving a brief history: Seacoast Baptist has been operating as a non-profit organization since 2002 under his direction, providing services to the community. He said he has been the Chaplain of the Portsmouth Naval Shipyard since 2005, a Volunteer Chaplain of the Eliot Police Department and his wife Elizabeth, along with himself, are volunteers for Seacoast Hospice. He said they have run a day care business for over 10 years and are clearly invested in the Town of Eliot.

Rev. Stephens said their purpose is to better the community and, in February 2009, he purchased the Bank Building. He said they hoped to add a day care/preschool ministry to the other church programs.

Rev. Stephens said when he went before the Planning Board, they were told only a pre-school could be approved in the Village zone. He said the state only allowed a nursery school license, which limits the amount of children and up to 3-4 hours per day, but the state looked at their application for a day care, under nursery, which would not be allowed.

Rev. Stephens said they continued to try to get people to come drop off their children under those constraints, but are not able to get enough business to cover their expenses.

Rev. Stephens said that over the summer, they had a larger septic system installed, which was quite expensive, to meet the regulations for a day care facility, they closed the drive through and put up 400 feet of fencing for the children.

Rev. Stephens said the State Inspector came down, and he has a copy of a letter from him, which supports his application. He said he asked the CEO to review the zoning to provide a remedy for this issue, and Mr. Marchese suggested the next course of action would be to appeal to the Board of Appeals.

Rev. Stephens said that he would like the Board to allow commercial zoning for the property which would allow them to operate a full-time day care and the State would give them a day care license.

Rev. Stephens said he has contacted his abutters and everyone is in agreement they should have a full day care program, and most people thought that it was already operating as a full day program. He said they need the Board's help so they can go forward because they are financially strapped and cannot pay their bills at this point.

Rev. Stephens distributed a copy of the letter from Charles LaFlamme. Chairman Cielezsko said it is not on letterhead. Rev. Stephens replied Mr. LaFlamme hastily wrote it after completing his inspection. Chairman Cielezsko asked what Mr. LaFlamme's title is. Rev. Stephens said he is the State Child Care Licensor. Mrs. Stephens added that Mr. LaFlamme is a licensed Social Worker.

Mr. Marshall asked if Mr. LaFlamme is employed by the State. Mrs. Stephens replied yes.

Mr. Marshall asked if Mr. LaFlamme worked for the Department of Human Services. Mrs. Stephens replied yes.

Rev. Stephens said if they were granted a day care license, it does not exist in the State's regulations and gets ambiguous. He said he was not aware the property was not in a commercial zone as other properties in the area are commercial lots.

Bill Hamilton asked what is the maximum number of children that are allowed to attend the program? Rev. Stephens replied the license they are going for would be 20. He said if they were to go above that number, the State inspector would have to come again to validate the next license.

Peter Billipp said according to the Table of Land Uses in 45-290, a day nursery in the Village zone requires a site plan review, which is a Planning Board function. Mr. Billipp asked the applicant if he had made an application to the Planning Board for that.

Rev. Stephens replied that the site plan review is for people with home occupations, but according to the CEO's interpretation, this requirement would not apply to them because they do not live there.

Mr. Billipp asked whether or not the applicant has been to the Planning Board on this issue.

Rev. Stephens replied they tried to get approval for a day care, but were turned down. He said the Planning Board gave them approval to operate a pre-school.

Mr. Billipp said that the Code Enforcement Officer felt it was appropriate for the applicant to come to the Board of Appeals. Rev. Stephens responded that Mr. Marchese pointed out that it may lead to that.

Mr. Billipp asked if the applicant was aware that he had to meet the four criteria for the Board to grant a variance and wanted to know if Rev. Stephens wanted to explain his responses on his application to the Board. He said, in his opinion, this is what the Board of Appeals has to go on in to make a decision.

Mr. Marshall thought that was an obvious point for the Board to work on. He said the building used to be an office, a bank and a store and was not clear why it is not being considered commercial.

In response to the criteria, Rev. Stephens replied:

1. That the land in question cannot yield a reasonable return unless a variance is granted.

The use of the property is restricted because most people go off to work and need a full day care program for their child. Rev. Stephens said that a lot of people want their younger children closer to the Elementary School, but they need more hours. Some people have indicated to him they drive past their facility on their way to Portsmouth because they need more than 3 ½ hours of day care for their children.

Rev. Stephens said the economy is suffering and both parents have to work, and according to Mr. Laflamme's letter, many pre-schools are closing in the area.

2. That the need for a Variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood.

The property is located on the main road, close to the school, which already has been approved for a pre-school. He said the Elementary School has a day care, run by the Recreation Department, for several hours a day, and is in the same zone but they are allowed to operate a day care facility because they are under MSAD #35. Rev. Stephens said they take 2 and 3 year olds but the school's day care does not.

Rev. Stephens said the property has been a commercial property and taxed as such since 1977 when it was built. He said if they go back to the zoning, it has been concurrent for use and he does not want to put in a big day care there. He said the property has been used commercially for many years and that makes it unique to other village properties.

3. That the granting of a Variance will not alter the essential character of the locality.

Rev. Stephens said the request for a day care will not change the essential character of the area because it will not add more traffic flow than what is already permitted with the existing use.

4. The hardship is not the result of action taken by the applicant or a prior owner.

Rev. Stephens said the hardship is a result of the ordinance and the zoning conflicting with the State rules for a day care center in that part of town. He said it is not a result of actions they have taken. He said no one understands the regulations and they could not find "day care" so it is a nursery school.

He said this service is needed centrally in town and the people he has spoken to do not understand why this use {day care} is not allowed.

Bill Hamilton asked the applicant when he purchased the property, did he assume that a day care would be permissible.

Rev. Stephens replied that when they applied for a church, a day care program is in their by-law's and is in their schools and this was attached with their licenses as a church.

Rev. Stephens replied their goal is to impact the community for the good, and he would like to see that over time.

Mr. Hamilton asked if the applicant was providing that function as well, providing a service to the town.

Rev. Stephens replied they have all types of uses for the community facility.

John Marshall asked if it was a pre-school now. Rev. Stephens responded it was. Mr. Marshall asked if it was a full day care program. Rev. Stephens replied it was only for 3 ½ hours a day.

Mr. Marshall asked if that was a restriction for the church's facility or all facilities. Rev. Stephens replied pre-school is at the level of 12 and limited to only 3 ½ hours a day. Mr. Marshall wanted to know if Reverend Stephens was referring to children who are 12 years old. Rev. Stephens replied 12 children.

Mr. Marshall asked if Rev. Stephens can only have 12 children for 3 ½ hours each day. Rev. Stephens responded yes, but that is not what they thought, and they thought they would be able to get the next level. Rev. Stephens said he was told it was not a commercial zone.

Mr. Marshall said that most people who run day care programs are not in schools, and the ordinance states they can have a day care in their homes.

Mr. Billipp asked if the property is used for a number of activities, such as a church, nursery, and other community activities. Rev. Stephens responded yes, such as Red Cross Blood drives, dinner for academy graduates, and they do not charge a fee.

Mr. Billipp asked if any one lived on the property. Rev. Stephens replied no.

Chairman Cielezsko asked if the applicant originally applied to the Planning Board for a church and Rev. Stephens responded yes. Chairman Cielezsko asked if Rev. Stephens went back to the Planning Board for pre-school approval. Rev. Stephens replied yes. Chairman Cielezsko asked what years did the applications occur. Rev. Stephens responded in 2002 for the church and in 2009 for the pre-school.

Rev. Stephens said they originally leased the building from the bank, which owned it. He said the bank made them maintain the facility like a bank, and that was a requirement.

Chairman Cielezsko asked if Rev. Stephens was planning on this use in order to pay off bills. Rev. Stephens responded yes.

Chairman Cielezsko said he would like to hear from the Code Enforcement Officer.

Mr. Marchese said he does have a copy of the deed so Rev. Stephens does have a legal interest (and gave a copy to Chairman Cielezsko).

Mr. Marchese asked if the Board had the opportunity to review his letter dated December 28th to Rev. Stephens (Seacoast Baptist Church). Chairman Cielezsko said the Board did not receive a copy of the CEO's letter in their packets. Mr. Marchese read his letter to the Board.

Mr. Marchese said that Rev. Stephens came to his office on December 3rd to discuss a change of use to his property. He said according to Sec. 45-290, nursery schools are allowed for up to 12 children and that was the closest term he found in the code.

Mr. Marchese said that the requirement for a site plan review, must be associated with Sec. 45-456.1 for home businesses, and does not apply in this case because Rev. Stephens and his family do not live at this site.

Mr. Marchese stated his opinion is that both a private school and day care facility are income-generating businesses; however, they are substantially different in their purpose and are, therefore, not inter-changeable. He said if Rev. Stephens disagreed with this determination, he could appeal his decision through Sec. 45-50 to the Board of Appeals.

Mr. Marchese informed the applicant that a Change of Use Variance, per Sec. 45-49 through the Board of Appeals may also provide direction in this matter but advised Rev. Stephens that any revisions to an approved Planning Board application may be required to go back in front of the Planning Board, based on Sec. 33-140 of the ordinance.

Mr. Marchese said he looked at the Table of Land Uses and does not understand why the school is different from day care but he had to deny Rev. Stephens' request.

Mr. Marshall said that the CEO should look at the day-care at the school, under MSAD #35, and perhaps he needs to review their day care under Sec. 33-140.

Mr. Billipp asked the Code Enforcement Officer what was the applicant seeking when Rev. Stephens came to his office.

Mr. Marchese replied approval for the use.

Mr. Billipp asked if Mr. Marchese determined he could not provide that and suggested Rev. Stephens come to the Board of Appeals to seek relief. Mr. Marchese replied yes.

Ellen Lemire asked if the CEO was able to find out the number of prior commercial uses prior to them retaining it. Mr. Marchese replied on August 15, 2002 it was purchased as a bank.

Ms. Lemire asked when did the bank officially stop operating?

Rev. Stephens replied it remained as a bank because the owner intended to re-open and that Seacoast Baptist Church could not alter it.

Rev. Stephens said they brought the electric up to commercial code, and it is taxed commercial, but when he tried to get a day care approved it is different. He said according to the Planning Board it is not one "use" for commercial and one for residential. Rev. Stephens said one is a higher price.

Ms. Lemire said the valuation is higher and it is because it is a commercial use, or equivalent to a commercial lot.

Mr. Marchese said it is listed as a commercial use.

Rev. Stephens asked at what point did the zoning come in if the bank was not in existence and it was determined it was a church. He asked if it was grandfathered? He wanted to know why was it operating as a commercial use and now it is in the Village zone.

Mr. Billipp thought they were having interesting issues of discussion, but he wanted to limit the Board's discussion to the four criteria for a variance.

Mr. Hamilton wanted a point of clarification. He said the bank can operate in a commercial zone because banks are allowed with a Planning Board site review, and so is a day care facility, if it is a home occupation.

Ms. Lemire said if you can have commercial uses, then it should be commercial zoning.

Mr. Marshall said the Board did not have copies of the letters (being read) and there are a lot of numbers and sections to digest.

Mr. Marchese said in his opinion, he felt this is the best direction for the applicant to take. He said a school is similar, but a day care facility is not an allowable use.

Mr. Marshall said when he read the request for a variance, it is nebulous and wanted to know if it was in the Board's jurisdiction to make that determination.

Chairman Cielezsko asked the CEO if he felt the Board had the authority to grant this request.

Mr. Marchese said the Board can disagree with his determination, but he thought the use more closely relates to a school.

Mr. Marshall asked if the use was approved as a school. Rev. Stephens replied it is approved as a preschool, but it is in the Village district.

Chairman Cielezsko wanted to clarify what was the remedy the applicant was asking for, was it to be considered as a school instead of a day nursery.

Mr. Marchese said the applicant's intended use most closely resembles day care.

Chairman Cielezsko said that the CEO was looking at this as a day nursery without them being on the premises. Mr. Marchese replied right.

Chairman Cielezsko said in one sense, the applicant is limited to day care/nursery. He asked if the Board grants Rev. Stephens some kind of remedy in 45-290 as a school, then would the CEO want the Planning Board to look at a site review plan as well.

Mr. Marchese replied yes, if the Board grants any remedy, the applicant should go back before the Planning Board because they have jurisdiction.

Chairman Cielezsko asked for copies of the CEO's letter. Mr. Marchese distributed copies of his letter to the Board and Recording Secretary.

Chairman Cielezsko asked if the applicant applied for, and received, limited use as a pre-school.

Mr. Marchese replied yes, on January 23, 2009.

Chairman Cielezsko asked if the applicant came to see him on December 3, 2010 and Mr. Marchese replied yes.

At this point, Chairman Cielezsko read the letters he had received from abutters into the record, the first was not dated, but was received from Robert Perham who said that he has no objection to Rev. Stephens operating a day care across the street from him and he lives at 1275 State Road.

Chairman Cielezsko said the second letter is dated January 13th 2011 and it is from David Drymon, 1271 State Road, who is in favor of the Board granting Rev. Stephens a variance request so he can operate a day care at the church.

Chairman Cielezsko noted the third letter, received from Richard and Marion Dixon and also is dated January 13th has the same wording, but not the same handwriting and they too are in favor of the Board granting Rev. Stephens a variance request to operate a day care at the church.

Chairman Cielezsko said the next letter, dated January 14th from J. Peter Dennett, regarding the variance request reads: *"Please be advised as an abutter, I have no objection to the use of the property as a day care."*

Chairman Cielezsko said he had a letter dated January 7, 2011 from Ed and Ruth Vetter, indicating that both were in agreement with the use of the property as requested by Rev. Stephens.

Chairman Cielezsko read the last letter dated January 10, 2011 from the State Inspector, Charles LaFlamme, who is not an abutter, but is licensed as a social worker:

"To Whom It May Concern:

In order to receive a license to operate a child care for 20 children of pre-school age, Helping Hands Pre-school would need approval from the Town of Eliot.

The building and operators, Michael and Elizabeth Stephens, meet all state regulations to do so at this time from what I have observed during my inspections of the premises and checks into the backgrounds and history of the applicants.

With the recent closings of child care facilities in the area and the location of this potential child care center, it would seem to fill a need for this area. Signed, Charles E. LaFlamme, LSW, MRT"

Chairman Cielezsko asked if there were any abutters who wished to speak at this time.

Gary Berg, 3 Beech Road, Eliot said he has seen the building go to a bank and to Rev. Stephens' church and he would like to see him continue on with the plan as a day care. He said from what he has seen, Rev. Stephens has improved the property and he has no problem with his request. Mr. Berg said it will be a great benefit to the town.

Ed Vetter, 1266 State Road said he feels the same way that Gary does, and that Rev. Stephens has put a lot time into that property and he deserves all the help he can get. He said that Rev. Stephens is doing wonderful things for the children to help the parents.

Mr. Vetter said their granddaughter is in this business and believes it is extremely important for parents to leave their children in a good program, especially when both parents have to work, because if they do not, Lord knows what happens to a child without a proper place to go to.

Ruth Vetter said she agreed with her husband. She said the biggest thing is why there would be a problem if it is commercial, which it was. She said also, it is needed now that they have closed two day care facilities in town. She said if she was a parent close to the school, she would leave her child there. She said the children could be there and back safely after school as necessary, and children need a safe place.

Mrs. Vetter said she has seen children stay at home without parents and it is a scary thing. She said she cannot see why the Board would not agree to give Rev. Stephens this variance.

Chairman Cielezsko asked if there were any more questions, and hearing none, wanted to hear from interested parties.

Tom Clayton of 16 Clayton's Way said he is wearing two hats, first as a Commander of the Post and retired from the Navy, he has known Chaplain Mike for a number of years. He said secondly, he is a Physician's Assistant and has seen young people with kids and the results of kids not taken care of, brought into the Emergency Room.

Mr. Clayton said he is not a native of Eliot, but has lived in town since the 80's. He said he remembers when it was a bank and wanted to know how come the school has a day care if it is in the same zone as the church. He said it makes sense and would be appropriate in this area and would benefit folks in town.

Ron Gurmond, 16 Bayberry, Portsmouth spoke in favor of the request for a day care. He thought Rev. Stephens was doing a fantastic job and would like to see his plan go forward.

Chairman Cielezsko asked Rev. Stephens if he had anything else he wanted to add.

Rev. Stephens replied that he loves the town and they have received a lot of support from the residents. He said he would like to thank the new CEO, Jim Marchese. He wanted to reiterate that he is coming before the Board, representing Seacoast Baptist Church, which is a non-profit organization and that he has not taken a salary in nine years.

Rev. Stephens again stated he needs help from the Board of Appeals.

Chairman Cielezsko asked the CEO to run off copies of his letter for the Board to review and declared a five minute recess at 8:04 p.m.

At 8:10 p.m., Chairman Cielezsko called the meeting back to order.

Chairman Cielezsko asked the Board if they had any questions on the letter they just received.

Mr. Marshall replied no.

Ms. Lemire said she does not see a change of use variance in the ordinance and was wondering what is the intent.

Chairman Cielezsko said there is a change of use variance. Mr. Marshall said it is 45-17. Ms. Lemire said she saw that, but it is not capitalized.

Chairman Cielezsko asked the CEO if the original decision of the Planning Board was that Helping Hands Pre-school could have up to 12 children. Mr. Marchese replied yes.

Chairman Cielezsko asked the CEO if this was a change of use? Mr. Marchese replied yes.

Chairman Cielezsko asked the CEO if the applicant has to go back to the Planning Board if they approve the change of use variance.

Mr. Marchese replied the Board has to understand they can grant the minimum relief possible; however, in this situation, the applicant has been to the Planning Board several times and if the change of use is permitted, then how will it change the property and the Planning Board will need to look at that.

Mr. Billipp said that currently 12 children are allowed and now Rev. Stephens is requesting 20, so with more kids, there will be more traffic.

Rev. Stephens said the reason for 12 children was based on the license for a nursery school and the water usage was a concern. He said that is why he put in a 10,000 gal. system. He said he spoke with Town Planner, Kate Pelletier, who informed him they may go before the Planning Board and change the number and that is a different process. He said she spoke to that issue.

Chairman Cielezsko asked the CEO if the applicant's understanding of the process, that there will be a quick re-check by the Planning Board and Rev. Stephens' request will be granted or not, but they will look at it briefly.

Mr. Marchese replied ultimately time is needed for the Planning Board to look at any application.

Mr. Billipp said the applicant mentioned he put in a septic system and asked Rev. Stephens if his property was on town sewer. Rev. Stephens replied no, it is not.

Mr. Billipp wanted to know if the limit of the 12 children a function of the size of the square footage.

Rev. Stephens replied no, the licensing request did not come up with a figure but it was based on the size of the leech field. He said there was a concern by the Fire Department and that the kitchen had a design made to take this all into 100 communicants, and they would be able to cook everything.

Mr. Hamilton wanted to know if 20 children was based on the state license.

Rev. Stephens replied yes, that is the next level.

Ms. Lemire said she is still stuck on the commercial use of the property and asked the CEO if this is a commercial use already, then is this use not similar enough to what was there.

Mr. Marchese replied that for clarification, the assessment records indicate his model is a commercial, use.

Mr. Marshall wanted to know what does that mean. Mr. Marchese replied he did not know, but on the assessment card, the style of the building is listed as church but the model is commercial.

Chairman Cielezsko advised the Board to not confuse the zones with uses of the lot.

Ms. Lemire said that it is her understanding that the commercial use goes with the land unless the use of the property has lapsed for at least a year.

Chairman Cielezsko said it could have re-opened as a bank.

Ms. Lemire said that use is not similar enough.

Chairman Cielezsko said that every lot has its own set of "use" requirements.

Mr. Marshall wanted to know if it would be easier if Rev. Stephens put in a bed downstairs.

Rev. Stephens replied he has had a couple of new preachers up for the summer and there is a bed downstairs.

Chairman Cielezsko asked if there were any more comments. Hearing none, he closed the public hearing at 8:20 p.m. and stated the findings of fact:

- The Owner of the property: Seacoast Baptist Church;
- The Ownership proven by Deed: Book 15474; Page 541 recorded 8-15-08 at the York County Registry of Deeds;
- The property is located at 1274 State Road, identified as Tax Map 15, Lot 13 in the Village District and is a one (1) acre;
- The applicant is Reverend Michael M. Stephens, Pastor of Seacoast Baptist Church/Helping Hands Preschool;
- The applicant has requested a variance appeal to allow the use of Daycare in the Village Zone (Art. VI, Sec. 45-290);
- A completed application was received by the town on January 3, 2011;
- The public hearing was held Thursday, January 20th, 2011;
- The relevant sections of the ordinance are: Art. II, Sec.45-49(b); Art. VI, Sec. 45-290 (note 8); Sec. 45-17;
- The applicant testified the property was granted a use as a pre-school, limited to 12 children, for up to 3 ½ hours a day on January 20, 2009 by the Planning Board (Case #08-19), but he needs to increase the amount of children and hours serviced in order to pay his expenses;

Chairman Cielezsko asked if there were any other findings the Board wanted to add.

John Marshall asked if he wanted to include testimony as to how, as stated in the applicant's letter, he is complying with the qualifications. Chairman asked how did the Board want to address that.

Ellen Lemire said that the letters are included as part of the findings of fact.

John Marshall indicated a finding should be the Board is looking at the conflict between the Eliot code and the State regarding the definition of "nursery/pre-school" and "day care."

Additional findings:

- A letter was introduced from Charles LaFlamme (a licensed social worker) describing the Stephens' full compliance in meeting all State regulations for a Day Care.
- Letters were read into the minutes from abutters in support of the proposed use of the property as a day care, which would allow up to 20 children;
- There are discrepancies between the Eliot code and the State regulations regarding the licensing of a "nursery/pre-school" and a "day care" facility.

Chairman Cielezsko said the Board has to consider if the four criteria have been met for the Board to grant the variance and the poll results will be included in the Findings of Fact.

Peter Billipp wanted to add the property has been used as a church since the beginning of 2002.

Chairman Cielezsko said the applicant testified that it is specified in the church's by-law's that a school is included.

Mr. Billipp offered that there is no residential use of the property; no one lives there.

Two other findings of fact were added by the Chairman:

- The property has been used as a church since the beginning of 2002;
- There is no residential use of the property.

Ms. Lemire suggested the property was purchased in February 2009 and approved by the Planning Board as a pre-school.

Ms. Lemire said the applicant testified that Seacoast Baptist Church is a non-profit organization and that he {Rev. Stephens} is not being paid a salary. Chairman Cielezsko said that finding is not really relevant.

Peter Billipp asked if Chairman Cielezsko wanted a motion to approve or disapprove the variance request and then the Board could discuss the four criteria. Chairman Cielezsko said that discussion will be part of the findings of fact.

Chairman Cielezsko reminded the Board that they are authorized to grant the variance that is minimally necessary to give the applicant relief. He said he feels uncomfortable changing the definition in the ordinance for this one case, but they could grant them relief from the Home Business requirement because they do not live there to have that business. Chairman Cielezsko said the applicants would need to go back to the Planning Board either way because of the amount of people who will be going back and forth if the number is increased to 20.

Peter Billipp moved that the Board of Appeals deny the request for a variance by Rev. Michael Stephens, Seacoast Baptist Church Helping Hands Preschool to allow the use of day care in the Village Zone. There was no second. MOTION FAILS.

Bill Hamilton moved that the Board grant Rev. Stephens his request for a variance, seconded by John Marshall for discussion.

Mr. Marshall asked if the Board needed to list their response to whether or not the applicant met the requirements. Chairman Cielezsko said the Board would discuss each of the four criteria.

Mr. Billipp said he would like to discuss the motion. He said what they have before them is a variance for Sec. 45-290 and he did not see how the Board could approve what was before them.

Chairman Cielezsko suggested the motion be modified to include the approval of the variance is based on a relaxation of the standards from Home Occupation, Article VI, Sec. 45-290, note 8.

Bill Hamilton agreed to amend the motion to include the approval of the variance is based on a relaxation of the standards from Home Occupation, Article VI, Sec. 45-290, waiving note 8. John Marshall agreed to the modification as the second of the motion.

Chairman Cielezsko said this becomes one motion, to grant the variance for Seacoast Baptist Church to allow the use of day care as stated in Art. VI, Sec. 45-290, by relaxing the standards regarding a "day nursery" by waiving Note 8.

Bill Hamilton read from Section 45-49, Powers, (b), Variance Appeals: *"On a case by case basis, the board of appeals may elect to hear cases involving establishment or change to a different non-conforming use"; "where a party establishes that the strict application of this chapter will cause undue hardship."*

Mr. Hamilton said that although they may have an issue with #1 (that the land in question cannot yield a reasonable return), in most cases the applicant is a commercial enterprise and the land would be able to yield a reasonable return. He said in his opinion, in this case, it cannot.

Regarding #2 (the need for a Variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood), Mr. Hamilton felt the applicant met this requirement because it is an unusual section of the neighborhood, surrounded by other commercial uses.

Mr. Hamilton said that the applicant met Criteria #3, the granting of a variance will not alter the essential character of the locality.

Regarding #4, Mr. Hamilton said it is not the result of action taken by the applicant or the prior owner, but is due to the difficulty of the requirement that is imposed by the ordinance. He thought that even though the applicant has applied for this variance request, it is the zoning ordinance definition that it has to be a home occupation that creates the hardship.

Mr. Marshall said he concurs with Bill Hamilton's statements.

Chairman Cielezsko said this is the poll.

Mr. Billipp stated that he did not feel the applicant has met all four criteria, and as much as they have heard from the abutters, he encouraged the Board to look at the ordinance and what their duties are.

Regarding #1, Mr. Billipp thought the applicant did not meet this requirement. He said it is used as a church for 7-8 years and currently is being used as a preschool, so it has at least two functions. The way he is interpreting it, it would be able to yield a reasonable return.

Regarding #2, although the property is located in the Village zone, there are some businesses located around it and that it is another one does not make it unique.

Mr. Billipp agreed that the applicant met #3, and that by granting the variance it would not alter the essential character of the locality.

Regarding #4, Mr. Billipp said currently the conversion of "pre-school" to "day school" is the wish of the applicant and the need for a change precipitates the need for a variance. He said he would like to see that use in town and he cannot support this request.

Ms. Lemire said she is struggling with #1 and she cannot decide at this point, but she agreed with Bill Hamilton's statements on the other three criteria.

Mr. Hamilton said the applicant is coming before the Board for a change of use, and not really for a reasonable return. He said if the applicant had commercial property, it would be different.

Mr. Hamilton said the applicant is appealing to the Board for a change of use. He said if the Board does not allow the change of use, the applicant has no chance of the property yielding a reasonable return.

Mr. Marshall said they do not have a definition of the requirement and what does it mean. He said the Board has to look at it from the standpoint of the applicant, which is they are in financial distress and need to use the property in an effective way.

Chairman Cielezsko said those are his sentiments. He said in his mind, the applicant has shown that he meets #1 and he did testify that because of the upgrades to the property, the downturn of the economy, and losing what he has because no one wants a 3 ½ hour day and offering services gratis.

Mr. Billipp said he is referring to the land in question and the primary use is a church, which is unchanged, that is the reasonable return. He said he is not talking about money in that sense.

Chairman Cielezsko said the church is multi-faceted and he is not collecting dues once a month. He asked if Ms. Lemire was set on #1.

Ms. Lemire replied yes, and she agreed the applicant met #1 to allow for a change of use.

Mr. Marshall said he could make a similar argument in regard to the property being unique because there is a conflict between the State regulations and the town ordinance.

Ms. Lemire said okay, that is where she was going with that.

Chairman Cielezsko said the bank lot is a unique lot.

Mr. Marshall said the property is surrounded by commercial lots.

Ms. Lemire said there is a conflict between the state regulations and the town's zoning ordinance. She agreed that criteria #2, #3 and #4 were met.

Chairman Cielezsko said that he was finished polling the members and asked if there was any more discussion on the subject.

Chairman Cielezsko added the results of the poll as another finding of fact:

- #1, 2,4: Peter Billipp thought applicant did not meet, but he met #3; #1,2,3,4 = Bill Hamilton, John Marshall and Ellen Lemire think applicant does meet all four criteria (for undue hardship) and the Chair concurs with the majority.

Mr. Hamilton said the Planning Board already approved this as a school. He said the zoning ordinance does provide the Board to review each appeal on a case-by-case basis and this is not a usual case. He said the Board grants this variance it would be strictly for this request.

Mr. Billipp said the variance goes with the property. Chairman Cielezsko said the Board has discussed this topic before and stated that if another church comes in, and because it is a perfect location, wants to continue with the same thing the Baptist church is doing, it runs with that.

Mr. Hamilton asked what happens if it is a private use?

Ms. Lemire did not think that was a good analogy.

Mr. Billipp noted there were two names on the application – Seacoast Baptist Church and Helping Hands Preschool and wanted to know if that was an LLC (limited liability corporation)?

Chairman Cielezsko replied that this is a business.

Mr. Hamilton asked if the Board grants the variance, it will go with the property.

Chairman Cielezsko replied yes.

Mr. Billipp asked if the Board could require them to go back to the Planning Board and if that could be included in the motion.

Chairman Cielezsko thought that the applicant would have to go back to the Planning Board for approval.

Mr. Marshall said the only reason they are discussing this is because the applicants do not live there.

Ms. Lemire said there may be consequences.

Chairman Cielezsko said the CEO will hold them to those requirements.

Mr. Marshall said there are state requirements.

Mr. Billipp said they would be granting them something they have not requested.

Mr. Hamilton repeated that the motion is to grant the variance and waive Note 8.

Vote was taken by a show of hands and motion passed, 3-1 (with Peter Billipp voting in opposition) to grant the variance requested by Rev. Stephens, for relief to the standards of Art. VI, Sec. 45-290 for a day/nursery, by waiving requirements in Note 8, to allow a day nursery in the Village Zone without the property being a primary residence. The Chair concurs with the majority.

Chairman Cielezsko informed Rev. Stephens that his variance request has been granted and that he would send him a Notice of Decision letter within seven days. He said that Rev. Stephens should set up a hearing with the Planning Board and get his next approval.

Rev. Stephens said it is Seacoast Baptist Church, operating as Helping Hands preschool and thanked the Board.

3. REVIEW AND APPROVE MINUTES AS NEEDED:

Chairman Cielezsko asked if everyone had received the minutes of December 16, 2010. Because the minutes were not received in time for the Board members to review, Chairman Cielezsko said they would be tabled until the next regularly scheduled meeting.

4. OTHER BUSINESS AS NEEDED:

The Board discussed the Supreme Judicial Court's decision in the case of Eliot Shores LLC vs. the Town of Eliot. The judgment was vacated and the case remanded to the Superior Court with direction to dismiss the appeal from the decision of the Eliot Board of Appeals.

Mr. Billipp commented on the conclusion “that the NOV and the Board’s decision were advisory in nature and not subject to judicial review, we vacate the judgment of the Superior Court and remand with instructions to dismiss the Rule 80B claim.”

Chairman Cielezsko said because the subdivision is not in the Shoreland zone, the CEO had the right to issue Stop Work orders, which could lead to a consent agreement.

Mr. Billipp said some of the subdivision was in the Shoreland zone.

Chairman Cielezsko said the CEO looked under Chapter 45 and can only bring reservations to the Board of Selectmen.

Mr. Marchese said the Board of Selectmen can take action on it.

Chairman Cielezsko said their duties are once the CEO tells them they are doing something wrong, we can look at it and ask if he was right bringing this to the Board of Selectmen and the BOA’s opinion goes to the Board of Selectmen.

Ms. Lemire said the Board of Appeals is a step in the process.

Mr. Hamilton asked if this would not have gone to the CEO if this was a shoreland case.

Chairman Cielezsko said the Notice of Violation goes to the owner.

Mr. Marchese said they are fined from the day the stop work order is placed.

Mr. Hamilton wanted to know what was the difference and asked if a stop work order follows a Notice of Violation?

Mr. Marchese replied that a Notice of Violation is mailed to the owner, and a stop work order is placed on the site.

Ms. Lemire said the Notice of Violation gives the owner time before the Stop Work Order.

Discussion continued.

Mr. Hamilton was concerned with timeliness issues involved in the process.

Mr. Marchese said he received a letter from Atty. Vaniotis, who suggested something be added to the Notice of Violation that in effect says the applicant has to right to appeal this notice to the Board of Appeals, but it must be within 30 days of receipt of this letter. He said any decision would be advisory in nature; however, the Board of Selectmen could take that into account.

Mr. Hamilton said he still was not clear and wanted to know how the issues of timeliness for appeal to the Superior Court would be addressed in the future in light of the Law Court’s decision.

The Board continued to discuss stop work orders and appeals to the BOA.

Chairman Cielezsko asked if the Board got a chance to review the material on recusals, which is not in the BOA by-law’s. He said they do have “conflict of interest” mentioned, where once they recuse themselves from a particular case, they take a seat in the audience and can still take part in the hearing as a citizen of the town.

Chairman Cielezsko said he would like to provide a draft of this by-law change and bring it forward for Board discussion. The Board agreed.

Mr. Billipp wanted to bring up the fact the Board is receiving incomplete packets, like tonight, where they were not provided a tax map, which is a requirement. He asked where was the proof of ownership or a site plan and suggested that the Chairman speak with the Code Enforcement Officer about this issue.

Mr. Billipp said that this information needs to be given to the Board members at least 10 days in advance of the meeting and the CEO should verify that the packet is complete.

Mr. Hamilton said that the Chairman should reiterate to the CEO that the Board members do not normally look at information the night of the meeting, which should have been included in their packets.

Ms. Lemire said the next workshop is May 26th and the Board could bring up those appeals. The other Board members said they did not get that notice.

5. ADJOURN:

At 9:38 p.m., Ellen Lemire moved to adjourn the meeting, seconded by John Marshall. All were in favor by a show of hands. Motion passed.

Respectfully submitted,

Barbara Boggiano,
Recording Secretary

Approved by: _____
Ed Cielezsko, Chairman, Board of Appeals

Date approved: _____ 3-17-11 _____