

## **TOWN OF ELIOT - REGULAR BOARD OF APPEALS MEETING**

**December 16, 2010**

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

Absent: Jeff Cutting

Others present: Jim Marchese, CEO; Dan Bogannam, appellant and Attorney Patrick Bedard; Barbara Boggiano, Recording secretary and others

### **1. 7:00 p.m. Roll Call**

Chairman Cielezsko called the meeting to order at 7:00 p.m. and introduced the Board members and new Code Enforcement Officer, Jim Marchese. He outlined the proceedings, saying that if the meeting lasts past 10 o'clock they have a few options to extend it again.

Chairman Cielezsko stated that the voting members for the first hearing would be Phil Lytle, Peter Billipp, Bill Hamilton and Ellen Lemire and that he would vote in case of a tie.

### **2. PUBLIC HEARINGS:**

#### **A. Continuation of request by Dan Bogannam, 17 Eldredge Road, Eliot, Maine (Map 1, Lot 45) , for an Administrative Appeal of a Stop Work Order issued by the Code Enforcement Officer on September 27, 2010.**

Chairman Cielezsko read the first hearing request and said that jurisdiction was granted to the Board of Appeals by the Shoreland Zoning, Article IV, Sec. 44-47, part A, part 1 §20. He said standing for the appellant needed clarification as there was no deed offered as proof of ownership and asked if the appellant had any identification. Atty. Bedard, representing the appellant, gave a copy of the Warranty Deed to the chairman.

Mr. Marchese also had a copy of the tax assessment record and said it indicates Mr. Bogannam purchased the property in 2004 and the deed is recorded as book 14284, page 645. He said the tax records are found on-line.

Chairman Cielezsko said regarding timeliness, the appeals were applied for in time. He said at the meeting last month, a point was made by Mr. Marshall whether the 60-day clock had started if the Board continued the meeting. He said the meeting was opened and continued because of the attorney's absence. He said he was going to delay the meeting until this month, but when he opened the November meeting, the clock did start and now – instead of a 60-day window, we are down to a 30-day window for a decision and he apologized and he should have made that clear.

Chairman Cielezsko said that the appellant's attorney, Mr. Bedard, had sent a letter requesting a continuance and they could not have granted the continuance without opening the meeting.

Attorney Bedard, representing Dan Bogannam said the first request is for an appeal of the Code Enforcement Officer's decision to stop the work. He said the second request, if the first one is denied, is for the 30% expansion of the shoreland issue.

Attorney Bedard said that Mr. Bogannam resides at 17 Eldredge Road and purchased the property October 20, 2004. He said at the time, there was a deck. He submitted a sketch plan to the Board. He said the drawing shows what his client wants to do to enclose it, and what it would look like when it is completed.

Attorney Bedard said he also has a copy of a survey, which is more appropriate for the second appeal, and asked the Board to ignore the first two pages. He said it is stamped by Ken Markeley of Easterly Surveying. Chairman Cielezsko requested a copy of the survey and Atty. Bedard submitted copies to the Board.

Atty. Bedard said that Mr. Bogannam wanted to enclose the deck this past summer. He used an area below the deck as a patio area and has had it screened, held in ground by cement footings. He also wanted to add a 2.2 ft. bump-out area, so that he would be able to walk around the deck.

Atty. Bedard said Mr. Bogannam took out the fence and the walls down below when he got permission to construct the enclosure on the second floor. He said the Board has a copy of the Building Permit application dated July 28<sup>th</sup>, but was issued August 2<sup>nd</sup> by Acting CEO Kate Pelletier.

Atty. Bedard said that his client would like to enclose the deck and make it a 3-season room. Chairman Cielezsko asked if it would be heated. Atty. Bedard responded he did not believe that it would be heated.

Atty. Bedard said that the Acting CEO, Kate Pelletier and Administrative Assistant, Dan Blanchette visited the site because of a complaint received by an abutter who said the construction was being done too close in the Shoreland zone, and that it had to be 75 ft. from the Piscataqua River. He said his client would be able to enclose the deck within the 75 feet; however, he would not be able to add the bump out. He said his client got a survey done.

Atty. Bedard said that it was a mistake, but his client panicked and when he got the survey done by Ken Markley and looked at it, he realized he was within the 75 feet, so he altered the survey so that it would look like his project [including the bump-out] was within the 75 feet.

Atty. Bedard said that Mr. Bogannam did not do this when he first applied for the building permit, but he did do this when the (acting) CEO said he could not add the 2.2 ft. bump out. He said at some point Heather Ross {CEO from Kittery} got involved and was helping out the Town of Eliot, realized it was in the 75 ft. shoreland zone and put a stop work order on it, which suspends the building permit. He said that is what they are reviewing.

Atty. Bedard said that his client was honest when he first applied to the town and did not misrepresent anything. He said that a stop work order can be put on if the terms of the Building Permit are violated. Atty. Bedard said his argument is that if someone wanted to, they have 30 days to appeal to the town to stop what Mr. Bogannam was doing.

Atty. Bedard said that Mr. Bogannam did not misrepresent anything in the application, and if he had done so, it would be voided. He admitted that a few weeks later, Mr. Bogannam did change the survey, but at the time, the (acting) CEO did grant him the Building Permit and his client has to abide by the permit. He said that permit changed everything.

Atty. Bedard said the issue of the first appeal is that if someone wanted to appeal, they had 30 days to do it. He said Mr. Bogannam has spent money on carpenters, labor and all and that the CEO had to have a reason to issue the Stop Work Order.

Atty. Bedard said that their position is that Mr. Bogannam had a valid building permit and he has not violated it.

Chairman Cielezsko asked if there were any questions from the Board.

Mr. Marshall did not have any at this point.

Mr. Lytle wanted to know from the appellant when he applied, whom did he apply to. Mr. Bogannam replied he applied with Kate Pelletier, who was assigned by the town to be the zoning officer. He said he came in and asked for an application for a building permit and spoke with Kate.

Mr. Lytle wanted to know the time period it took to get the permit and when did Heather get involved and issue the Stop Work Order.

Atty. Bedard replied on September 27<sup>th</sup>, 2010 Heather Ross issued the Stop Work Order, but the permit was granted August 2<sup>nd</sup>. He said his client received a call 2-3 days after he applied and was told it was ready to pick up.

Mr. Lytle asked if the appellant had a lay-out at that time, showing what he was doing. Mr. Bogannam replied yes.

Mr. Lytle asked if it showed that he was 75 feet away from the shore on the plot plan? Mr. Bogannam replied he did not have a plot plan when he submitted the application nor was he asked for one.

Mr. Lytle stated that no one knew that the appellant's project was closer than 75 feet. Mr. Bogannam replied he would have to say yes. Atty. Bedard said they could say that there was nothing to indicate that Kate Pelletier knew or did not know. He said there was no plot plan and it was just a sketch for the building permit and not as "shoreland zone."

Atty. Bedard said that Mr. Bogannam was not asked for a plot plan.

Mr. Lytle asked if Mr. Bogannam submitted a sketch and Chairman Cielezsko showed him two drawings the Board received in their packets. He asked Mr. Bogannam if these drawings were what Kate Pelletier has. Mr. Bogannam replied yes.

Mr. Hamilton studied the drawing and said it was difficult to determine what the distance is from Mr. Bogannam's existing structure to the high water mark and mentioned that nothing was in the packet that indicated a measurement, nor is there anything on the appellant's application.

Mr. Hamilton asked Mr. Bogannam if he had any idea what the proximity is to the high water mark, if there was anything he could tell him as to what the distance is from the existing structure to the high water mark.

Atty. Bedard said it was done under the assumption that he did meet the setback and he told Mr. Bogannam that they met with the 30% expansion. He said there is a stamped survey from Ken Markley and it is on the third page of the notes that it is within the 75 feet setback.

Mr. Hamilton asked what is the distance from the deck to the high water mark. Ms. Lemire replied it was 58.9 feet.

Mr. Bogannam asked if he could show the Board his original drawing, which is in color. Chairman Cielezsko said he could approach the dais.

Mr. Bogannam showed Mr. Hamilton and the other Board members the drawing. There was some discussion as to the measurement to the former patio. Mr. Hamilton said it is 58.9 ft. to the former deck. Discussion continued.

Atty. Bedard had a letter from an abutter, who is in support of Mr. Bogannam's project and wanted to give it to Chairman Cielezsko, who asked him to wait.

Chairman Cielezsko asked if there were any other questions.

Mr. Billipp asked if the CEO had a copy of the Building Permit application and Chairman Cielezsko showed Mr. Marchese what they were discussing.

Mr. Marchese said he had the entire application packet.

Mr. Billipp asked him if he had two drawings of the expansion area and two cover pages, which was dated May 11<sup>th</sup>. Mr. Marchese replied yes. Mr. Billipp asked if the one page contained information that was called for. Mr. Marchese replied yes.

Mr. Billipp asked the CEO if a plot plan is required. Mr. Marchese responded he was not sure where it states that in the ordinance; however, when a building permit is issued, for the deck or if there are improvements in relation to the property line or setbacks, a plan should be required prior to the approval of the permit.

Chairman Cielezsko said the Board could ask further questions of the CEO later and wanted to know if any Board members had any questions. Ms. Lemire responded not yet.

Mr. Hamilton asked when Mr. Bogannam's house was built and he assumed it was prior to the shoreland zone being in effect. Mr. Bogannam responded in the late 50's or early 60's.

Mr. Billipp showed Mr. Bogannam the drawing and wanted to know which portion was being enclosed. Mr. Bogannam replied there are two sections. Mr. Billipp wanted to know if the structure was screened or was that an open porch.

Atty. Bedard replied the only area that was screened was underneath the deck and now it is partially completed with a roof and windows.

Chairman Cielezsko wanted to know if the deck was there and the improvements are sitting on the deck. Atty. Bedard said he was correct, the room is partially done.

Mr. Hamilton wanted to know if the deck is extended 2 ½ feet from its position. Atty. Bedard said yes, as part of the building permit, and that part is closer to the water.

Mr. Billipp wanted to know if there was a previous deck which the appellant replaced with the new deck.

Atty. Bedard replied there is no new deck, and that the deck was on the house on the side, but it is not being touched. Mr. Billipp asked if has been extended 2 ½ feet.

Atty. Bedard replied yes so that Mr. Bogannam can walk around the deck. Mr. Billipp wanted to know if the shaded area wraps around the new porch and is 2.2 ft. with the handrails.

Mr. Bogannam approached the Board with the colored drawing and showed the Board.

Chairman Cielezsko said that on the original application, presented to Kate Pelletier, Mr. Bogannam indicated there would be screens, but in the letter it mentions screens and windows. He said there was no mention of windows in this enclosed porch and wanted to know if there was a change to the original plan.

Atty. Bedard said Mr. Bogannam's intent is to enclose it, whether you call it "screen" or "window" – it is still the same thing as the code, and it will still have a roof and walls.

Chairman Cielezsko said the Board had a case where the enclosed porch had screens, but then the applicant wanted to put in windows, which changed the identification from an accessory porch to a living space, which was a drastic change, and this is almost the same scenario. He said it looks like the applicant is adding a room to the house.

Chairman Cielezsko asked if Mr. Bedard could identify anywhere in the original application where it mentioned windows. Atty. Bedard said he did not know if windows were mentioned or not, but Mr. Bogannam intends to enclose the deck, not add another room.

Mr. Bogannam said the power plant is adjacent to his house and he wants to try to screen the sound from the plant. He said conditions are better and that he spoke with a public service representative to make the plant quieter.

Mr. Bogannam said he is using the word "screen" to mean "to screen from the sound." He said he is adding doors and windows and the windows would have a mesh screen in them, so his interpretation is that the room would be screened from insects and sound.

Chairman Cielezsko said there is no mention of the windows in Mr. Bogannam's original application.

Mr. Bogannam agreed, saying that during the application process, he did what he felt he needed to do and was not asked to provide anything further at that time.

Chairman Cielezsko asked the applicant if he had a copy of the Building Permit application. Mr. Bogannam replied yes. Chairman Cielezsko read the paragraph under the "Acknowledgement" section:

*"The applicant/owner, by signing this permit, agrees to perform the work permitted according to the submitted information and within the laws of the State of Maine, the National Electrical Code and the Ordinances and the Codes of the Town of Eliot, as amended to the date of issuance of permit, whether the same be herein specified."*

Chairman Cielezsko said that paragraph is all-encompassing and that means the applicant has to follow all codes that are in the applicable to the project.

Atty. Bedard said yes, he read that, but it refers to laws that, for instance, the code requires 2 x 4's but the applicant would rather use 2 x 6's, but nothing was mistaken when the permit was given to the Board. He said if someone grants the permit, they cannot come back later and ask for more information and if you are suggesting that, he does not read it that way.

Chairman Cielezsko said the applicant is bound by what is written.

Atty. Bedard said he served 14 years on the Zoning Board of Appeals in Kittery and if someone misrepresented something, then that was the end of it, but if you represent everything correctly and the town objects, you cannot fault the person who applies and that they should have known. He said no one would ever get a building permit.

Mr. Lytle asked when the other existing deck was built. Mr. Bogannam replied he did not have a date.

Atty. Bedard had some aerial photos from the town files, dating back to the 60's and showed the Board.

Mr. Lytle wanted to know if Mr. Bogannam was aware of the 75 ft. when he built the deck. Atty. Bedard said the photos indicate it was built in the 60's or early 70's and the shoreland zone was not in effect.

Mr. Lytle said he went down to look at the property and the house was not built in the 60's. He said he saw a deck with a boat, and he is trying to determine whether or not Mr. Bogannam knew he had to be 75 ft. away on the old deck versus the new deck. Mr. Lytle asked Mr. Bogannam if he put that boat in on the side deck and if he got a building permit for that.

Atty. Bedard had a copy of the tax card from the town and in 1994 the deck was shown on the side of the house so Mr. Bogannam did not own the property at that time.

Chairman Cielezsko wanted to know if the latest deck with a permit was 1994. Mr. Lytle said he could not tell and wanted to know if anyone else looked at it.

Ms. Lemire said that she had gone down to look at the property too.

Chairman Cielezsko said that in 1994 there was a deck on the side of the house and asked Mr. Bogannam if he put any decks on the house prior to this permit.

Mr. Bogannam responded there is a hull of a boat and he put boards on it so he could sit there and that is on the deck that Atty. Bedard just showed the Board.

Chairman Cielezsko asked Mr. Bogannam if he built that deck and he said no, the boat is underneath the deck, up against it.

Chairman Cielezsko said the Board would hear from the Code Enforcement Officer.

Mr. Marchese distributed a packet of information to the Board members, Mr. Bogannam, Atty. Bedard and the Recording Secretary, giving a brief history of what the town knows about the lot. He said that a permit was issued for a deck addition, 10 ft. x 30 ft. on the northwest side of the house on August 1, 1994. He said he has a sketch where the deck was intended to be placed and passed around the original sketch.

Mr. Marchese said the sketch may help to clarify what was done in 1994 and as proposed, the deck would be on the northwest side of the existing dwelling.

Mr. Lytle said that is what he was talking about.

Mr. Marchese said in July 1999 a building permit was issued for a 28 ft. x 40 ft. barn and in 2006 a survey was completed by Easterly Surveyors.

Mr. Marchese said a question was asked by the applicant, but the permit was issued based on the information supplied by the applicant. Regarding the stop work order, a CEO does have the ability to issue a Stop Work order under Sec. 45-101 of the ordinance. Mr. Marchese said that Heather realized there was a violation; therefore, she issued the Stop Work order.

Mr. Marchese discussed the applicable section of the ordinance which applies to extensions of deck and the 75 ft. setback. He said Sec. 44-32, Nonconforming Structures (1), Expansions and read:

*“A nonconforming structure may be added to or expanded after obtaining a permit from the same permitting authority as that for a new structure, if such addition or expansion does not increase the nonconformity of the structure and is in accordance with subparagraphs (a) and (b) below.”*

Mr. Marchese said in his mind, the appellant cannot expand the structure in any way toward the river and that idea is verified in Sec. “C” of the setback, and read: *“No structure which is less than the required setback from the normal high water line of a water body, tributary stream or upland edge of a wetland shall be expanded toward the water body, tributary stream or wetland.”*

Mr. Marchese said there seems to be some confusion as to where the high water mark is and the request was made for survey, which the applicant had done. He said the town has a GIS system and he is utilizing it.

Mr. Marchese said he took a 100 ft. scale of the property, a map of the subject property and where the 75 ft. setback lies, and based on this information, it appears that the Stop Work order issued by Heather was without a doubt justified and that the expansion shows the deck is placed in the 75 ft. setback.

Mr. Marchese said he took some photos and the Board may find them helpful, especially to some Board members who did not have the opportunity to see what they were talking about and showed the Board the photographs. He said he pulled the tax measurement to see the 75 ft. setback and there was a 20 ft. drop off to the river. He said he took a distance from the trees on top of the hill on the survey of the area and the aerial photo is a true representation of the condition of the site.

Mr. Marchese also looked at the survey of the abutting property. He said it is up to the Board of Appeals to decide whether or not there was misinformation by the applicant. He said from his perspective, it is up to the applicant or homeowner to make sure things are done properly on their property.

Mr. Marchese said neither department has the authority to issue something that is not within the ordinance, whether it was intended or not, and that is the position they are in.

Mr. Marshall asked if the CEO neglects to ask for something relevant, he can go back and pull the permit, but if the applicant intentionally has old information, then he is at fault.

Mr. Marchese said unfortunately, the rules of the ordinance are defined, but this is happening after the structure has already been started when the information should have been requested prior to issuance.

Mr. Marshall said that Kate did not say anything to the applicant when he came in and issued he permit. Mr. Marchese agreed. Mr. Marshall said she had the map number and could have seen that. Mr. Marchese said that was correct.

Mr. Marshall asked what was Mr. Marchese saying, was he telling him that it was not the CEO's responsibility to look at the GIS map system and see there was a conflict at the time of application and issuance. Mr. Marchese said that was a difficult question and he does not believe it is the Code Enforcement Officer's responsibility to make sure the applicant's material is correct.

Mr. Marshall asked why does the Board have that information. Mr. Marchese replied it was up to the CEO to verify information. Mr. Marshall said the CEO should have looked at the application and tell the applicant that the project is in the shoreland zone map and she needed more information. Mr. Marchese replied that would be a reasonable approach.

Mr. Lytle said part of the problem is that all this information was given to Kate and she is the Planner, not the Code Enforcement Officer. He said that she may not have realized all this information she should have gotten until Heather Ross rejected it, which appears that is what happened.

Mr. Billipp asked if it was in Mr. Marchese's opinion that the applicant's contention, that once the 30 days has expired, the town will no longer have the right to put a stop work order and that the town does have the right to make the work stop because they realize that this section is more for non-conforming lots.

Mr. Marchese replied the CEO's position is that once a [building] permit is issued, the applicant has one year to act on the permit, and during that time, the CEO has the opportunity to question or take action. Mr. Billipp stated if needed.

Mr. Hamilton questioned that, if after one year, a violation is noticed, the CEO, could not at that point cite a violation if the construction had been accomplished incorrectly in the shoreland zone?

Mr. Marchese said that is the purview of the CEO on any application.

Chairman Cielezsko asked if Ms. Lemire had any questions for the CEO and she replied not at this time.

Chairman Cielezsko said they were discussing the shoreland zone and referenced Mr. Marchese's handout. He said according to Sec. 45-401 a stop work order has been issued by the CEO, who has the authority to do that.

Mr. Marchese said that Sec. 45-401 refers to zoning and the lot is in the village zoning district, which applies to the whole lot, and Shoreland Zoning is the correct section and that the shoreland overlay district is on top of it.

Chairman Cielezsko said that Sec. 44 the CEO enforces this section and asked Mr. Marchese if they could discuss that.

Chairman Cielezsko read from the Code. He said the CEO must notify the person of the nature of the violation and a copy of the notice must be submitted to the municipal officers. Chairman Cielezsko read from the ordinance the duties of the Code Enforcement Officer and asked if this

definition of the responsibilities includes issuing stop work orders. Mr. Marchese replied he believed so.

Chairman Cielezsko asked Mr. Marchese to explain what a Stop Work Order is if the CEO has the authority to issue it. Mr. Marchese explained that a Stop Work Order means that the CEO had a question which needs to be answered before the work continues.

Chairman Cielezsko said the stop work order is in effect until the reason for the order has been addressed and asked if it meant that the building permit is pulled.

Mr. Marchese replied yes.

Chairman Cielezsko said that the Building Permit is still valid, but the Stop Work Order means they need to address the issue. He asked, for the record, that the CEO agrees that Sec. 44-48 gives the CEO the right to enforce the ordinances. Mr. Marchese agreed.

Chairman Cielezsko asked if there were any abutters who wished to speak, either for or against the application.

Bob Grant, 13 Eldredge Road, said he is a builder, and has built many homes on the waterfront for almost 30 years, so he knows the rules and regulations very well. He said he has worked with DEP from Biddeford to Hampton.

Mr. Grant said that Dan Bogannam had one house where he made major renovations without ever getting a permit or having an inspection done and then he bought this house.

Mr. Grant said that he went away for the winter, and when he came back in the Spring, he looked up and noticed Dan {Bogannam} building a structure. He said he contacted Paul White in April to appeal and Mr. White visited the site. He said then Paul White got fired or whatever and the stop work order was pulled. He said that Kate gave Mr. Bogannam a building permit and he appealed to Kate because this is for the deck that is on the side.

Mr. Grant said that Kate Pelletier visited the house and then Heather Ross got involved. He said he showed Ms. Ross a copy of his survey and she agreed with him. He said she came up with 59 ft. and issued the Stop Work Order. He said that Heather Ross told Dan Bogannam she needed a survey and Dan will not bring it in because he knows {he is wrong}.

Mr. Grant said that he spoke with Dan {Bogannam} and this has been his disposition all the way.

Chairman Cielezsko said the survey had been refuted. Mr. Grant showed Chairman Cielezsko what Kate Pelletier had given him when he asked for a copy. Chairman Cielezsko asked if it was dated.

Mr. Marshall asked if Kate had put a date on it when she received it. Mr. Grant replied he did not know.

Mr. Marchese said he believed he had the original but it was not dated when it was received.

Mr. Grant said that Mr. Bogannam knowingly applied for the building permit application when he submitted misinformation and if this gets approved, he will make a phone call to DEP and Dan's project will be shut down.

Mr. Grant said that Dan can expand 30 % of the square feet, or volume, but he does not have volume there.

Chairman Cielezsko said the Board is discussing the administrative appeal of the Stop Work Order at this time.

Mr. Billipp interjected that Mr. Grant is giving testimony.

Mr. Grant said that Dan Bogannam admitted he submitted false information.

Chairman Cielezsko said it may not necessarily be false information, but we may have no information.

Mr. Hamilton asked, through the Chair, if Mr. Grant was willing to sign an affidavit that Kate Pelletier told him that was submitted with the original application. Mr. Grant replied yes, absolutely.

Mr. Hamilton told Mr. Grant that he is the only one who has informed the Board that it was submitted with the application.

Mr. Billipp said the Board was given three pages of calculations tonight that was part of the plan, and a survey stamped by Ken Markley and we were told that no survey was submitted.

Mr. Grant said that it is a survey and the survey he showed to Paul White and Heather Ross is his survey, which he had done to establish his property line.

Chairman Cielezsko said they have not seen it.

Mr. Marchese showed the Board of Appeals the plan but it was not dated.

Chairman Cielezsko asked Mr. Grant if he had seen the copy that was with the original.

Chairman Cielezsko asked the applicant about this and Atty. Bedard said that his client did not misrepresent anything. He said several weeks later, Mr. Bogannam got a visit from Kate Pelletier and Dan Blanchette and was told he could do the work, and enclose the addition, but not add the 2.2 ft. because he was within the 75 ft. He said that his client altered the survey and handed it in to the CEO.

Mr. Bogannam replied it was not submitted with the original request. Atty. Bedard said he assumed a day or two after the visit, his client submitted the survey. Mr. Bogannam said it was late August, early September.

Chairman Cielezsko asked if there were any questions of Mr. Grant.

Mr. Hamilton had a question for the applicant. He said the building permit was issued 8-2-10, but Mr. Bogannam just stated "in late August, early September" he submitted this {survey}.

Mr. Bogannam replied yes.

Mr. Billipp asked the applicant if this was the "doctored up" plan that was submitted by Mr. Bogannam and asked him what did he change?

Mr. Bogannam replied the distance from the water.

Mr. Billipp asked Mr. Bogannam how he did that and did he change the scale and move the house location.

Mr. Bogannam replied by cut and paste is the simplest way to say it.

Mr. Billipp continued his line of questioning by asking if Mr. Bogannam took the location of his residence and moved it back so it appeared that it was coming up to the setback and submitted that to the town.

Mr. Bogannam replied yes.

Atty. Bedard wanted to discuss what Mr. Grant had said and the Code Enforcement Officer's statement. He said if the town grants the building permit, in the Shoreland zone, and then later made a mistake and issues a stop work order does not make sense and asked how did the town allow this to happen. He said there is no reliability. He agreed that if something was misrepresented in the permit application when the permit was issued, then it should be pulled, but his client was following the permit application submitted to the CEO. Atty. Bedard said when the Stop Work Order was issued it essentially revoked the building permit.

Mr. Hamilton said what he was saying is that, i.e. once one receives a building permit, one must follow the ordinances and the code - not just electrical, building or plumbing issues, but setbacks and to continue his question, if the building permit was issued to build something not according to what the permit says, or to build something too close to someone else's property and the CEO issues a Stop Work Order would that not be a correct action?

Mr. Hamilton asked isn't it the responsibility of the Code Enforcement Officer that once a permit is issued and the codes are being contested and not followed correctly, don't you think that is the duty of the CEO if he was in arrears of the conditions of the permit, to issue a stop work order. He said if the ordinances were not enforced, then anyone could build anywhere.

Atty. Bedard said if he (Mr. Hamilton) was following the terms of the permit too close to the lot line, what he had just read, then he agreed, but Mr. Bogannam was performing the work the only way he could do it, exactly where he was doing it according to the submitted information. Atty. Bedard said if (Mr. Hamilton) he was saying rules were violated because no one asked him about such and such, he disagreed.

Chairman Cielezsko asked if there were any more questions of the applicant. Hearing none, he asked if the CEO wanted to comment.

Mr. Marchese said that it is his understanding that Mr. Bogannam came in and, in good faith, the building permit was issued, and a mistake had been made. He said he is not sure why the town was not supplied with the proper information; however, he did not think the applicant should be allowed to take advantage of the mistake by the acting CEO. Mr. Marchese said the CEO does not have the authority to allow a non-conforming use.

Mr. Marshall wanted to know what "LC" meant on the application. Mr. Marchese replied "Limited Commercial" in the shoreland zone.

Ms. Lemire asked if the CEO knew, or could he find out, if the survey includes coastal bluffs. Mr. Marchese replied the plan indicates coastal bluffs but he does not see in the ordinance where coastal bluffs come into play.

Mr. Lytle asked if the town had a tax map survey. Mr. Billipp replied it is in the other room.

Mr. Lytle said he would like to see it. Mr. Marchese said the GIS maps are tax maps, but tax maps do not show buildings.

Chairman Cieleuszko wanted to read two letters into the minutes from abutters, which he was taking out of order, and the first was received from Richard J. Shulman dated November 16, 2010, who lives on 40 Mitra Lane in Eliot, regarding Daniel Bogannam, 17 Eldredge Road.

*“Dear Chairman Cieleuszko and Board Members,*

*Although I am unable to attend the hearing because of prior commitments, I would like the Board to know my feelings on the matter of Mr. Bogannam’s Appeal.*

*Since moving to Eliot Mr. Bogannam has consistently shown little or no regard for the rules and regulations of our town. He has done major renovations to two homes, including electrical wiring and plumbing without permits or inspections.*

*The new enclosed deck is just the latest example of his total disregard for his neighbors and the town. While others follow the rules Mr. Bogannam apparently doesn’t think they apply to him.*

*Please do not reward this behavior.*

*Sincerely yours,*

*Signed Richard J. Shulman*

*P.S. I would respectfully {request} that this this letter be read into the minutes of your meeting”*

Chairman Cieleuszko then read a letter handed to him by Patrick Bedard, dated December 16, 2010 from Robert and Judith Duffy, who live at 31 Dixon Avenue, Eliot:

*“To whom it may concern:*

*Be it known that as residents of the neighborhood in which Dan Bogannam lives, we have no objection whatever to his completing a proposed project enclosing his deck area on the river side.*

*Whereas we can see Dan’s house from many points in ours, we find that the proposed construction has no deleterious effect to our view or to our enjoyment and peaceful possession of the property.*

*Respectfully,*

*Signed Robert R. Duffy and Judith Blaufuss-Duffy”*

Ms. Lemire read Sec. 44-45B and Sec. 44-17 and 18 regarding Bluffs and 13, Principal Structures and setbacks. Chairman Cieleuszko asked if it is a principal structure. Mr. Marshall asked if the deck was attached to the house.

Ms. Lemire clarified that the coastal bluff distance is shortened.

Mr. Marshall said that this does apply to a non-conforming structure. Chairman Cieleuszko said this is definitely a non-conforming lot and that “c” concerns a disconnected accessory structure.

Mr. Billipp said maybe he had a question about the coastal aspect. Chairman Cieleuszko asked what was it that Mr. Billipp was asking them to do.

Mr. Marchese said the Stop Work Order was issued by the CEO because she was telling the applicant to get answers to the question and that Mr. Bogannam cannot expand the use in the 75 ft. setback.

Chairman Cielezsko asked the CEO if he had any issue as to whether Mr. Bogannam went beyond what the permit called for or if he did not follow the permit.

Mr. Marchese replied that he can say that the applicant did not follow the ordinance, but not the permit. Chairman Cielezsko asked if he meant in regard to the expansion within the 75 feet and Mr. Marchese responded right.

Mr. Hamilton asked for a point of order. He asked if there were any other abutters who wished to speak.

Michael Donohue, 25 Simmons Lane, Portland, Maine, said he is looking to purchase a home in Eliot, and is familiar with Dan Bogannam. He said he has not heard from anybody else who has put in the time and effort that Dan has in order to meet with the Plant Manager across the Piscataqua River and get the sound level reduced appreciably. He said he stopped coming down to Eliot to look, but Dan has made tremendous contributions to getting the sound from the plant reduced.

Chairman Cielezsko asked if there was any other testimony. Hearing none, he closed the public hearing at 8:45 p.m. and stated the Findings of Fact:

- The applicant is Daniel C. Bogannam, identified as the owner by proof of a Warranty Deed, Book 14284, Page 645, recorded in the York County Registry of Deeds on October 21, 2004;
- The lot in question is identified as Tax Map 1, Lot 45 and the address is 17 Eldredge Road;
- The lot size is +/- .5 acres;
- The authority to hear the appeal is granted to the Board under Article IV; Sec. 44-47, a-1;
- The applicant is asking for an Administrative Appeal to the Stop Work Order issued by the CEO on September 27, 2010;
- The applicant applied for a building permit, on July 28<sup>th</sup>, but was granted August 2, 2010;
- The drawings accompanying the permit were testified to appear not to have dimensions to the shore, nor setbacks;
- The Building Permit application is #10/84;
- The Stop Work Order was issued September 27, 2010, by Heather Ross, Kittery CEO, because she found the existing deck did not meet the minimum required setback in the shoreland zone;

Chairman Cielezsko asked if there were any other findings of fact the Board wished to add.

Mr. Marshall referred to Sec. 44-35, b-2 and wanted to know if it was applicable, but it appears that Sec. 44-13 has to do with new structures.

Mr. Billipp said that Ms. Ross may have misstated the ordinance in her letter. Mr. Marshall wanted to know if the violation was correct. Chairman Cielezsko said that "b-2" is a height requirement. Mr. Billipp said that perhaps the finding of fact could state that it seems to not

have the correct part of the ordinance referenced. Chairman Cielezsko stated the finding of fact as:

- The Stop Work Order references the wrong section of the Code.

Mr. Hamilton said the Stop Work Order cited the lack of the minimum required setback as the violation, but cited the incorrect Chapter for the violation. The violation was that the minimum required setback was not met on the Stop Work Order.

- Chairman Cielezsko said the proposed new construction did not, as the letter states meet the 75 ft. setback required from the normal high water mark, but the letter references an inaccurate chapter and section number of the ordinance, which should be Sec. 44-32, C-1, Setbacks in the Shoreland zone;
- The Survey Sketch plan dated November 22, 2010 shows the 75 ft. setback from the high water mark running through the shore side of the main house, by Ken Markley, Register #1322, State of Maine Land Surveyor; received by the Board of Appeals this evening, December 16<sup>th</sup>;
- The original application drawings referenced screens to cover the openings and it has been testified to, by the applicant, that there are windows with screens going in, and that the applicant considers the definition of screen to be the “screening of sound;”

Mr. Marshall noted the reference on the application lists “sunroom” as circled which would indicate a roof and windows.

Mr. Hamilton said:

- The applicant testified that the survey was submitted in late August, early September, after the building permit was issued, indicating on the survey that the applicant met the setback requirements; and
- It was testified by the applicant that he falsified the survey and submitted it to the town after the building permit was issued.

Mr. Billipp offered:

- Further, the applicant testified that the revisions to the plan showed the property met the setback, when, in fact, he knew it did not.

Chairman Cielezsko asked if there was a clear reference because there was a contradiction as to when it was received.

Mr. Billipp stated:

- The abutter, Mr. Grant, testified that when he returned from being away, April 1<sup>st</sup>, he noticed that work had already begun on the structure in question and he notified the town offices, at that time, CEO Mr. White, who brought it to the town’s attention that the work had begun without a building permit;

Chairman Cielezsko said he would entertain a motion; however, there are a couple of things they could do. He said they mistakenly said it was an administrative appeal, but he would like to revise this to be a “de novo” hearing and they can take any information in the shoreland zone, because they have that authority. He said another option is they can remove the stop work order or put more conditions that have to be addressed and bring it back to a fresh pair of

eyes because there have been three CEO's taking action on this property. Board members Peter Billipp and Bill Hamilton asked for a five minute recess.

Chairman Cieleuszko declared a five minute recess at 9:10 p.m.

At 9:15 p.m. Chairman Cieleuszko reconvened and called the meeting back to order.

**Peter Billipp moved to deny the request for an administrative appeal by Daniel Bogannam of the Stop Work Order issued by the Code Enforcement Officer on September 27<sup>th</sup> 2010 based on the fact the CEO did not act contrary to the code.**

**Motion was seconded by Bill Hamilton for discussion.**

Mr. Billipp said he did not think they had to go further than that, even though there are a lot of different issues. He said the request is denied because he feels the CEO did not clearly make a mistake in issuing the Stop Work Order and even though the CEO has to work things out with the applicant, the Board should focus on what has been asked for. He said no further work will occur until something happens.

Mr. Billipp said, it is clear in his mind, that the evidence presented indicates there is a violation because the house is non-conforming and it is within the 75 ft. setback, but adding on to the deck and the work going on makes more non-conforming and he agrees with the Code Enforcement Officer. He said it does not matter when the violation was recognized or who identified it, it is the responsibility of the CEO to uphold the ordinance and to issue the Stop Work Order.

Mr. Hamilton said, under Shoreland zone, the Board cannot look at this as an administrative hearing, but in fact are holding a de novo hearing, which they hear and decide the matter by a different analysis, but under Sec. 44-47, Appeals, "C" this is an Administrative appeal.

Chairman Cieleuszko said we are denying lifting the work order, and stated the motion is to deny the request for an administrative appeal to lift the stop work order issued by the CEO on September 27<sup>th</sup> because the CEO did not act clearly contrary to the code and asked for a vote.

**Vote was taken by a show of hands to deny the request for an administrative appeal, and motion passed 4-0. The Chair concurs with the majority.**

Chairman Cieleuszko informed Mr. Bogannam that his appeal has been denied and that he would receive a Notice of Decision letter within seven days. Chairman Cieleuszko notified Mr. Bogannam that he has 45 days in which to appeal the Board's decision to Superior Court.

At 9:22 p.m., Chairman Cieleuszko opened the second public hearing and read:

**B. Continuation of request by Daniel Bogannam, 17 Eldredge Road, Eliot, Maine (Map 1, Lot 45) for an Administrative Appeal of the Code Enforcement Officer's interpretation of Eliot Zoning Code Sec. 44-32 (c ) (1).**

Chairman Cieleuszko announced the voting members for this hearing would be Phil Lytle, Bill Hamilton, Peter Billipp and John Marshall.

Atty. Bedard requested that everything he and Mr. Bogannam testified to, as well as the exhibits, be incorporated into this appeal without re-stating everything. Chairman Cieleuszko agreed and said that the letters from the abutters would also be included.

Atty. Bedard said this appeal was brought forward as an alternative, assuming that the first appeal was denied. He said under the code, up to 30% expansion is allowed in the shoreland zone, but what happened is his client did not have the survey work at that time that would give the Board a more accurate description of the area and he distributed copies of the floor area and volume calculations.

Chairman Cielezsko said the Stop Work Order involves the expansion to the shore. Attorney Bedard said he is referring to 2.2 feet. Chairman Cielezsko informed him that any expansion to the shore is illegal and asked Mr. Bedard why was he discussing this further.

Atty. Bedard said he wanted to make two points, the first is the major part is enclosing the deck, not expanding the floor area, and the 2.2 ft. that extends out is the patio that is already there, in the ground, that is closer to the water. Atty. Bedard wanted to know how it can be more non-conforming if it is replacing what was already there.

Atty. Bedard said if the Board cannot agree to the 2.2 is the reason why he brought up this appeal because he believes his client meets the 30% volume of expansion.

Chairman Cielezsko said he wants to make sure that the attorney is presenting nothing to them that will change even if he establishes that the deck has volume. He said that Atty. Bedard is not offering any help to the situation, only another problem that might come up and there is no mention of this in the Stop Work Order.

Chairman Cielezsko said if the CEO has not said that Mr. Bogannam's deck is over 30%, then the Board of Appeals should have reservations about hearing this appeal.

Atty. Bedard said when the Stop Work Order is based on the Building Permit not being violated, but yanking the permit because the Stop Work Order is based on the premise there is a violation of the code, they have no choice but to bring forward the second appeal.

Chairman Cielezsko asked if Atty. Bedard had the same understanding in that he agrees that the 30% will not remedy the Stop Work Order.

Atty. Bedard thought that it would give his client permission to go forward.

Chairman Cielezsko explained there are many aspects to the town ordinances and the attorney is looking at the 30% expansion, even if his client does not meet that requirement. He said the Stop Work Order involves building into the setback, not the 30%, and the actual distance into the setback made it more non-conforming, according to the Code Enforcement Officer.

Atty. Bedard said that Heather Ross issued the Stop Work Order, but he wanted to make sure the Board understood there are two points; namely, if the Board found 2.2 ft. cannot be done, then Mr. Bogannam could enclose the deck and would go forward and the Work Order would be overcome by his client now meeting the code.

Chairman Cielezsko said that only gives you the right with the 30% rule; however, the ordinance has to be met and the Board has not been told by the Code Enforcement Officer that your client meets the 30%.

Atty. Bedard said the Board should stop him now before he gets into a lengthy hearing and he will accept that.

Mr. Hamilton said the Board has no jurisdiction because there is no decision by the Code Enforcement Officer.

Chairman Cieleuszko asked the CEO if he had anything to offer for clarification on this appeal.

Mr. Marchese said in the shoreland zone, the 30% expansion applies to being 250 ft. from the high water mark, not 75 feet, but whether or not the Board has jurisdiction is the Board's call.

Mr. Marshall said the only point of relevance in this discussion on the deck, is the patio underneath being a structure as defined in the ordinance and 2.2 not going further; however, if it is not being considered as a structure, then the 2.2 ft. is a violation and we are back to square one.

Chairman Cieleuszko said that is the setback to the former deck.

Mr. Hamilton read Powers of the Board to hear administrative and variance appeals. He said there has been no action taken by either the Planning Board or the Code Enforcement Officer; therefore, there is nothing the Board of Appeals can decide on.

Ms. Lemire agreed.

**Bill Hamilton moved to deny the request by Dan Bogannam for an Administrative Appeal of the Code Enforcement Officer's interpretation of Sec. 44-32(c)(1) of the Eliot Town Code based on the fact the Board has no jurisdiction in this matter because there has been no action or written decision initiated by the CEO, seconded by Ellen Lemire.**

Mr. Billipp said that their hands are tied and asked if they can refuse to hear the case. Mr. Hamilton said the Board has to deny the request because they do not have jurisdiction.

Atty. Bedard said he has heard the courts use the word "dismiss" which he thinks is more appropriate because the case is not being adjudicated, but however the Board wants to act on his client's appeal, he understands.

**Mr. Hamilton withdrew his motion and Ms. Lemire withdrew her second.**

**Bill Hamilton moved that the Board of Appeals dismiss the Administrative Appeal because there is no action by the Code Enforcement Officer to appeal, seconded by Phil Lytle. Vote was taken by a show of hands and the motion passed, 4-0. The Chair concurs.**

Chairman Cieleuszko said that a Notice of Decision letter would be issued within seven days and that Mr. Bogannam had 45 days to appeal the Board's decision to Superior Court.

### **3. REVIEW AND APPROVE MINUTES AS NEEDED**

Chairman Cieleuszko asked if there were any corrections, deletions or additions to the minutes of November 18, 2010. Ms. Lemire cited a few typos.

**Ellen Lemire moved to accept the minutes of November 18<sup>th</sup> 2010 as amended seconded by Bill Hamilton. Vote was taken by a show of hands and motion passed unanimously.**

### **4. OTHER BUSINESS AS NEEDED**

Chairman Cielezsko said he submitted the Budget Memo to the Board of Selectmen requesting that \$4400 should be included for the 2011-12 budget, which is the same amount requested as last year.

Chairman Cielezsko said there was a decision by the Supreme Court on Eliot Shores, and that Barbara Thain could get the copy of that if requested. A brief discussion followed.

Chairman Cielezsko said that he did not copy the information on recusals from the workshop he attended, but he will get the copies out. Ms. Lemire said if Chairman Cielezsko would like to add this to the Board of Appeals by-laws to give the Board a copy of the draft language to review.

## 5. ADJOURN

**At 9:53 p.m., John Marshall moved to adjourn the meeting, seconded by Bill Hamilton. All were in favor by a voice vote.**

Respectfully submitted,

Barbara Boggiano  
Recording Secretary

Approved by: \_\_\_\_\_  
Ed Cielezsko, Chairman, BOA

Date approved: 3-17-11