TOWN OF ELIOT BOARD OF APPEALS MEETING

January 21, 2010

PRESENT: Ed Cieleszko, Vice-Chair; Philip Lytle, Bill Hamilton, Jeff Cutting, Ellen Lemire, Alternate; John Marshall, Alternate

ABSENT: Peter Billipp

OTHERS PRESENT: Paul White, CEO; Barbara Boggiano, Recording Secretary; Tony Manero

1. **CALL TO ORDER / ROLL CALL:**

The meeting was called to order by Ed Cieleszko, Acting Chairman, at 7:00 p.m., who introduced new Board member, John Marshall. He stated that Robert Pierce had moved to Oregon and read a memo he received from Dan Blanchette, dated January 15th, 2010:

> *At the Board of Selectmen meeting on January 14, 2010, the Board voted to accept the resignation of Robert Pierce as Chairman of the Board of Appeals and appointed Jeff Cutting as a full member of the Board of Appeals, with a term to end in 2010 and further, appointed John Marshall as an alternate member with a term to end in 2011.*

Acting Chair Cieleszko thanked and congratulated Jeff and John. He said that all Board members are present, with the exception of Peter Billipp.

2. **PUBLIC HEARINGS: -**none
3. **WORKSHOP:** Further discussion on Consent Agreements

Acting Chair Cieleszko said the Board would discuss the written draft from Bill Hamilton and asked Mr. Hamilton to provide some background.

Mr. Hamilton said at one of the meetings, former Chair Pierce brought up to the Board and mentioned that there would be a discussion about consent agreements. Former Chair Pierce asked that Mr. Hamilton write something to discuss and that is what he has done, based on the Board's discussion at the last meeting with the Town Attorney, two selectmen and the CEO.

Acting Chair Cieleszko asked if other Board members would like to offer their comments.

Mr. Lytle said he read it over twice and his own personal feeling was that the Board of Appeals was getting into something that they should not be doing. He said the Board of Selectmen are the town fathers and they can do whatever they want. He emphasized that they are the Board of Appeals and their job is to apply the ordinances and to do that as a judicial Board, and they should continue to stay that way.

Mr. Lytle thought there were some good things in the draft that the Board of Selectmen should be looking at, but his general feeling is that the Board of Appeals should not tell the Board of Selectmen what to do.

Ms. Lemire said there is some really good stuff and some really important points were brought out, especially on the second page, in italics. She said that it is a good reminder and the fact that there is no appeal for approval of a consent agreement is one of her concerns. She said this consent agreement could happen without abutters knowing and she thinks that they should be notified.

Ms. Lemire said another concern she had was with definitions and that the Board of Selectmen should not draft anything without having any concrete guidelines. She asked what the impact of abutters' testimony would be in a public hearing and what kind of leverage that could have on whether or not the Consent Agreement will be approved or not. She did not think that the Board of Appeals should be writing consent agreements for the Board of Selectmen, but she said this document may trigger things they did not think about.

Acting Chair Cieleszko asked Mr. Marshall if he had an opportunity to look at this draft document and he replied no.

Mr. Cutting said he feels the way that Mr. Lytle feels about it. He said when the Board of Appeals turns down a variance request, the applicant should go through the legal channels. He said it should not be like "if you don't like what mother said, go see if father will change their minds." He said the only time a consent agreement should be used with the Board of Selectmen is when the money figure is high and the applicant cannot fix the violation.

Ms. Lemire said the intent of consent agreements is to avoid court proceedings and find a satisfactory resolution and she agreed that it should not be used for just anything.

Mr. Cutting thought the Board of Selectmen needs to set the bar and establish that and not the Board of Appeals.

Mr. Hamilton said at the last Board of Appeals meeting, Atty. Vaniotis mentioned, which is in the minutes, that the Board of Selectmen should discuss with the Board of Appeals how the consent agreements will be used. He said that it is not only a Selectmen issue, it is a Board of Appeals issue and that the Board of Selectmen are intervening between the Board of Appeals and the Court and the consent agreement is not in the ordinance.

Mr. Hamilton asked when is the use of a consent agreement appropriate and when should it be applied.

Mr. Lytle said he agrees with the other Board members' statements and felt that Mr. Hamilton had done a good job. He said the Board of Appeals' comments should go to the Board of Selectmen and the Board of Appeals should not be involved in interpreting it.

Mr. Hamilton agreed with Mr. Lytle.

Mr. Hamilton said what they are discussing is that these are the Board of Appeals members' thoughts and if all of them agree, then they should be presented to the Board of Selectmen.

Mr. Lytle had a question on the draft of the Consent Agreement that was provided to them by Mr. White. He wanted to know if this was a part of any ordinance.

Mr. White replied yes, and that this is the ordinance language from Chebeague Island. He said as you know Chebeague separated from Cumberland and there was a change in ordinance agenda to allow the CEO to enter into a consent agreement.

Ms. Lemire asked what have they [residents of Chebeauge] been doing regarding this.

Mr. White replied that he would need to look into it because he does not live in the town. He said they have a "Practical Difficulty" variance and they can do other things to allow what may be perceived as being too harsh on the public, which creates more need for consent agreements.

Mr. White referred to 603.12 Legal Actions – part of the ordinance for Chebeague Island and reviewed it for the Board.

Mr. White said it is a rare occasion when a Consent Agreement takes advantage of a Board of Appeals' decision. He said the Board of Selectmen think the Board of Appeals is doing a good job, and don't want to interfere.

Acting Chair Cieleszko thought the Board of Selectmen got caught off guard with the overhang issue and they are sorry and that should not have happened, but it was brought to a head and he thinks it may have been a mistake on their part.

Mr. White said he would have to take some responsibility for that because they look to him because they had no experience with consent agreements and how they dealt with it. He said that the former CEO, Don Lagrange did those in the past and other towns allow their CEO's to enter into consent agreements, or a letter of no action, which essentially means the town is not going to take any action on a violation.

Mr. White said the first experience he had with this was with {Christian Life} Church when they wanted the sign. He said they went through mediation and the church's attorney pulled out the law regarding freedom of religion. He remembered that Bruce Trott and he talked about it and he suggested they go to the Board of Selectmen and ask for a Consent Agreement. He said there was no mention of a settlement of money and they went to the Board of Selectmen and there was never a mention of a fine.

Mr. White said when the time came for the case about the roof overhang, he never thought they considered a fine. He said Bruce Trott came to the next Board of Selectmen's meeting and said they did it wrong. He said those people had not had experience with Consent Agreements either and they know it is not the common thing.

Mr. White said that Bruce Trott suggested developing a policy and Mr. White drafted something and sent it to Atty. Vaniotis, who sent it to the Board of Selectmen. Mr. White said Chebeague Island does mention it and did not have to go to the Board of Appeals, but in the case of the Town of Eliot, you are requesting to go first to the Board of Appeals.

Acting Chair Cieleszko said if the Board of Selectmen entered into a Consent Agreement, after the Board of Appeals had turned them down, it would have more to do with the characteristics of the case and not in pursuit of something more strenuous. He said the Board of Selectmen is not overruling the Board of Appeals by any stretch and the applicants still have to apply to the Board of Appeals first.

Acting Chair Cieleszko said that if people are in violation and have no merit in being granted a variance by the Board of Appeals, and the town has a base line to go on for granting consent agreements, it is not a moot point.

Mr. White asked the Board of Appeals if they had the Board of Selectmen's Consent Agreement policy. He said he did not think it is dealing with setbacks like Steve Friedrichsen's case.

Mr. White wanted to point out that the case involving Steve Friedrichsen has been resolved in that Mr. Friedrichsen wanted to come down to see the Board of Selectmen, but they did not want to discuss a consent agreement. Mr. White said he checked the ordinances further and found that a two family dwelling unit is allowed in that zone, so Mr. Friedrichsen plans to connect the two buildings and make it two separate dwelling units. He said Mr. Friedrichsen still has to bring in the plan.

Acting Chair Cieleszko said the Board of Appeals would not waste their time hearing the case.

Mr. Hamilton said it depends how often the Board of Selectmen are being asked to enter into a Consent Agreement with an applicant the Board of Appeals has ruled against. He said that if the Board of Appeals continues to turn down someone and they are following the code, then the next step is to Superior Court, not the Board of Selectmen, as is written in the Eliot Code.

Mr. Hamilton referred to the previous meeting which lasted until 2:30 in the morning and an applicant's potential to meet with the Board of Selectmen and said he did not see any guidelines. He read from the "Final Draft Policy on Consent Agreements" the factors for the Board of Selectmen to consider are: 1) whether, in the particular circumstances of the case, it would be a prudent use of the Town's resources to pursue enforcement litigation, 2) whether correcting the violation would be economically wasteful, 3) whether the violation is willful, 4) whether allowing the nonconforming situation to continue would have any significant adverse effect on the public health, safety or welfare and 5) whether the property owner is willing to agree to such conditions as the Board deems reasonable to avoid adverse consequences of continuation of the nonconformity.

Mr. Hamilton said he was concerned that a wealthy developer with resources could take his chances and pay a few thousand bucks, and that did not sit well with the Board of Appeals trying to make decisions based on the ordinances.

Ms. Lemire thought they (the Board of Selectmen) should have specific criteria. Mr. White said it is not like a variance. Acting Chair Cieleszko said they are doing the job of the Board of Selectmen. Mr. Hamilton said they are just trying to provide guidance to the Board of Selectmen, as outlined by Atty. Vaniotis.

Mr. Cutting wanted to know if it would be easier not to require people to apply for a variance if they do not need one. He cited the MB Tractor situation.

Mr. Cutting wanted to know if the owner should be made to come in for a variance or a no action letter. He thought maybe there should have been no action letters instead of variances.

Discussion continued on no action letters. Mr. White said he is authorized to issue permits and enforce the ordinances, but he does not have the right to make decisions reserved to the Board of Appeals.

Ms. Lemire said the Board of Selectmen could give the CEO authority.

Mr. White said the Municipal Officers are the only ones who can enter into a consent agreement in this town. He said the residents of Chebeague Island designated someone in their town.

Mr. Hamilton asked how would Mr.White like to be the abutter of the person he gave the no action letter to.

Mr. Hamilton said there is a constitutional process and felt the abutter has a right for his day in court. Acting Chair Cieleszko said he wasn't sure if "due process" is a term used for the abutter or the applicant.

Mr. White said it applies to the abutter too. Acting Chair Cieleszko said the abutter is not part of the equation. Mr. Hamilton said that is what he is saying – that the abutter has been taken out of the decision making process in consent agreements.

Mr. White said he is willing to put in a requirement that abutters must be notified. Acting Chair Cieleszko said that everyone found out during the Filmore and Tidy Road case and the abutters stopped the agreement.

Mr. Hamilton said there is no comprehensive policy for consent agreements and there is nothing in the ordinance where they would have the ability to do that. He thought discussions should be opened up to the public and not held in Executive Session.

Acting Chair Cieleszko said that Consent Agreements should be limited and have written guidelines of what the parameters are under what they can work under.

Mr. Hamilton asked to go through the Final Draft Policy and discuss what the Board of Appeals feels is appropriate.

Acting Chair Cieleszko said the Board members are all citizens of the town and they can present their ideas to the Board of Selectmen; however, the Board of Selectmen are working with the CEO and he felt they did not have the legal background to interfere, as the Board of Appeals. Acting Chair Cieleszko thought that as citizens they can.

Ms. Lemire thought that the Board of Selectmen should have some guidelines from the Board of Appeals. Acting Chair Cieleszko said that they do not have the legal background.

Mr. Lytle thought that Atty. Vaniotis is making a statement about involving the Board of Appeals. Mr. White said the Municipal Officers do not operate in a vacuum.

Mr. White said he does not hear the Board of Appeals talking about anything earth-shattering to present to the Board of Selectmen.

Ms. Lemire said the Board of Appeals makes their decisions based on the law.

Mr. Cutting said the Code Enforcement Officer is the perfect person as a liaison between the Board of Selectmen and the Board of Appeals.

Mr. Lytle thought that the Board of Appeals should present an outline to the Board of Selectmen, saying these are some of our concerns and not "this is what you will do."

Acting Chair Cieleszko asked Mr. Hamilton to go through his draft response dated January 4, 2010. Mr. Hamilton said he has zero ownership of this document so if the Board saw any issues with it, that is fine, as it is only a draft.

The first paragraph "Purpose" was acceptable.

Acting Chair Cieleszko asked if any member had issues with the "Background." Discussion ensued.

Ms. Lemire and Acting Chair Cieleszko did not have copies of the Draft Policy of Consent Agreements and Mr. White made them copies.

Mr. Lytle wanted to know where Mr. Hamilton got this information from. Mr. Hamilton said this came from the discussions between the attorney and the Board of Selectmen at the last Board of Appeals Meeting.

Mr. White wanted to know where #9 under "Guidelines" came from.

Mr. Hamilton thought it was mentioned by an appraiser and it came from a court record. He said an example was the violation of the overhang and how it was testified it would cost $70,000 to correct it. He asked if it was willfully done, and did the builder just build it anyway and would deal with it later. He said in his estimation that is where that part came from.

A lengthy discussion continued. Mr. Hamilton said these are guidelines and felt it should be difficult for people to remedy a violation.

The Board reviewed the Recommendations on page 4. #1 Written Guidelines – change "must" to "should." The Board agreed.

#4) Public Hearing. Mr. White will check to see if all deliberations can be held in public session and not executive session.

Discussion on abutters being allowed in Executive Session. Mr. Lytle said when he was on the Board of Selectmen, they had to call the person to have them attend the Executive Session, if they were talking about the person.

#5) Strike paragraph regarding Board Opinions. Acting Chair Cieleszko said the Board should not be a part of this process. The Board agreed.

On page 5, under "Guideline Suggestions" #1, 2 and 3 are not under the purview of the Board of Appeals. The Board agreed.

Strike #8. The Board agreed.

#9) Insert words "third party" so sentence should now read "Applicant must submit written, independent third party appraisal of the value of the violation and the economic benefit derived."

The Board discussed the policy for Consent Agreements. Mr. Hamilton thought there should be a timeline for applications. Mr. Marshall said that the Consent Agreements should be for old issues, not new situations.

Mr. Hamilton said that if an applicant applies for a consent agreement, he should waive his rights to appeal to the Superior Court. The Board did not agree.

The Board wanted to strike the second sentence in the second paragraph of the final draft for the policy for Consent Agreements, "Alternatively, the property owner may, in writing, acknowledge the violation and waive any right to appeal to the Board of Appeals."

Mr. White had to leave at 8:35 pm. The Board thanked Mr. White.

The Board continued to discuss the draft response. Ms. Lemire asked if Mr. Hamilton would send them another copy of the response with the revisions. Mr. Hamilton replied yes. The Board decided to continue discussing the revised response at their next meeting.

4. REVIEW AND APPROVE MINUTES AS NEEDED:

Acting Chair Cieleszko said the Board would review the minutes of December 17, 2009, page by page and offer their corrections.

Phil Lytle moved to accept the minutes of December 17, 2009 as amended, seconded by Ellen Lemire. Mr. Marshall recused himself. Vote taken by a show of hands – unanimous. Motion passed. The Chair concurs.

5. **ELECTION OF OFFICERS:**

Acting Chair Cieleszko said that the Board is required by law to have a Chair, a Vice-Chair and a secretary.

Phil Lytle nominated Ed Cieleszko for chair, seconded by Ellen Lemire. Phil Lytle moved nominations cease. Ellen Lemire seconded the motion.

Vote taken by a show of hands 5-0-1 (Ed Cieleszko abstained). Motion passed.

Chair Cieleszko said he was Vice-Chair and did not get the chance to talk to Peter Billipp. Ellen Lemire said that Peter is currently the Secretary.

Bill Hamilton nominated Peter Billipp for Vice Chair, seconded by Phil Lytle. Bill Hamilton moved that nominations cease, seconded by Ellen Lemire.

Jeff Cutting asked who has the most seniority. Chair Cieleszko said that Peter Billipp has a good handle on the code and he thought he could run the meeting. He added that he was not planning on being out.

Vote was taken by a show of hands and it was unanimous – motion passed.

Ellen Lemire nominated Bill Hamilton for Secretary, seconded by Jeff Cutting. Phil Lytle moved that nominations cease, seconded by Ellen Lemire.

Vote was taken by a show of hands, 5-0-1 (Bill Hamilton abstaining) and motion passed.

6. **OTHER BUSINESS AS NEEDED:**

Chair Cieleszko said that the members should have received a copy of what Bob Pierce prepared to give to the Board of Selectmen as a Budget request for the coming year. Mr. Lytle said that the Board of Selectmen has requested a zero percent increase from all the Boards.

Chair Cieleszko said the Board of Appeals has to be funded by the town and they will go with $4400 and if the Board of Selectmen deny the Board of Appeals' request and give the BOA flat funding, the Board of Appeals can ask for emergency funds. He said they are saving money in postage now.

Mr. Cutting asked if they were going to cut next month's meeting. Chair Cieleszko said that there might be a case next month.

The Chair moved to present this request to the Board of Selectmen as the Board of Appeals budget request for 2010-11, seconded by Phil Lytle. Vote taken by a show of hands – unanimous. Motion passed.

Mr. Cutting said he would like to request through the Chair, that they do not start hearing any new cases after 11:00 p.m. and if they could establish this as a procedure. He said they would make this the first case at the next meeting.

Mr. Hamilton said by law they have to open the case but they can continue it to the next meeting. Chair Cieleszko said he would look into it and get back to everyone at the next Board meeting.

Mr. Cutting said the applicant would be grateful so he would not have to pay the lawyer to sit at the meeting.

Mr. Marshall asked if this problem could be fixed with better scheduling. Chair Cieleszko said he would look into that. Mr. Cutting said the Board of Appeals could schedule another meeting if they had to, to stay within the allotted time frame.

Mr. Hamilton wanted to know how the Board wished to proceed with this request and asked if they needed to go through the Town Attorney. Chair Cieleszko said he would look into that and they could make it a policy. Mr. Hamilton said they could announce this at the beginning of the meeting, if they are not done by 11 the case will be rescheduled. Chair Cieleszko said it could be part of the procedural outline.

Mr. Marshall said the Board may have to schedule another meeting. Ms. Lemire said if they did change the date, would it meet the time frame for notification. Mr. Hamilton said the abutters would have to be considered.

7. **ADJOURN:**

Phil Lytle moved to adjourn the meeting at 9:50 p.m., seconded by Bill Hamilton. All were in favor by a voice vote.

Respectfully submitted,

Barbara Boggiano
Recording Secretary

Approved by:_____
Edward Cieleszko, Chairman,
Board of Appeals

Date approved: February 18, 2010