

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

May 17, 2012

### **ROLL CALL**

Time: 7:00 PM

Present: Chairman Edward Cieleuszko, Vice-Chairman Peter Billipp, William Hamilton, Phillip Lytle, and Associate Member Ellen Lemire

Absent: Jeff Cutting and Associate Member John Marshall

Others present: Charles LeCompte, appellant; Bennett Holmes, representative for appellant; Grant Hirst.

### **CALL TO ORDER**

Voting members will be Phillip Lytle, Bill Hamilton, Peter Billipp and Ellen Lemire. Chairman Cieleuszko will vote in the event of a tie.

Chairman Cieleuszko asked if all fees had been paid and Mr. LeCompte replied that they had been.

Chairman Cieleuszko stated that the procedure would be as follows:

- The facts of the case will be summarized.
- The appellant will present the case.
- The Board will question the appellant and include their comments.
- The Code Enforcement Officer will give his input.
- The Board will follow his presentation with questions.
- If interested parties come to the meeting, there will be testimony from them.
- The appellant will have the last input.
- The public hearing will be closed.
- The Findings of Fact for the case will be determined.
- A motion will be made.
- A vote will be taken.

Chairman Cieleuszko opened the public hearing at 7:00 PM. The hearing is an Administrative Appeal of a denial by the Code Enforcement Officer for a building permit based on ground coverage because non-vegetative coverage will be over the maximum.

## **TESTIMONY FROM APPELLANT**

Bennett Holmes, owner of Rye Beach Landscaping stated he was representing Charles LeCompte, who was also present, on behalf of his proposed landscaping project. Mr. Holmes had sent a package of information to the Board of Appeals and stated he did not feel the need to summarize every bit of information, but that he would answer questions after his presentation if more details were needed.

He stated that they would like to put up a retaining wall, the top surface of which would increase the lot coverage by 90 square feet. This is the issue which resulted in the denial of the building permit based on the applied Eliot zoning rules. As calculated the maximum lot coverage had been reached. As part of that calculation, the driveway was considered and the Town of Eliot does not make allowance for a permeable paver driveway, which is what had been installed there.

Mr. Holmes stated that their request for the appeal was based on the assertion that the pavers are indeed permeable and should not be considered when calculating lot coverage. He stated that their request is that the Board of Appeals consider the installation of permeable pavers in this instance and grant them the ability to put in the rear retaining wall.

Mr. Holmes stated that the driveway encompasses 420 square feet of coverage and they would like to have that amount reconsidered. The retaining wall project will only require 90 square feet.

He stated that in support of the permeable pavers, he had submitted a lot of documentation and industry information with regard to the fact that they are not a new product and have been in use for about 10 years, have been extensively tested and are actually more permeable than topsoil and grass. Therefore, he stated, he would like the driveway to be taken out of the calculation of the lot coverage, allowing them to move forward with the rest of the project.

Mr. Holmes stated that unless the Board wanted him to recap some of the information in the package of information, he was ready for questions from the Board members. He stated that that might be the best way to proceed and apologized for including a lot of information.

## **QUESTIONS FROM BOARD OF APPEALS MEMBERS**

Mr. Lytle asked if there were pictures or diagrams of what Mr. Holmes wanted to do. Mr. Holmes answered that they were on the plan which was included in the package of information submitted.

Mr. Hamilton asked if, when the driveway was first installed, any mention had been made at that point of excluding it in the lot coverage because of the use of permeable pavers. Mr. Holmes replied that there had been no mention of exclusion at that time.

Mr. Billipp asked if Mr. Holmes thought that the Code Enforcement Officer was in error in any of his mathematics in terms of lot coverage. He asked if Mr. Holmes agreed with the percentage figures the CEO presented in his letter dated to the owner on April 11, 2012. Mr. Holmes stated that he could not disagree with the calculations and that they were accurate.

Ms. Lemire asked Mr. Holmes why they wanted to build a retaining wall. Mr. Holmes stated that there are two reasons. One is that there was an existing hillside there which will be better supported if there is a retaining wall there. There would be no chance of erosion of that hillside later on down the road. He stated that the other reason is cosmetic. Currently, there is just a dirt hill which comes down immediately behind the house and they want to put up a retaining wall in the same fashion as they did on the roadside last fall because it would be nice to look at and would be a feature that would increase the value of the home. Primarily, it would hold back some earth which would otherwise move down the road.

Mr. LeCompte stated that there would be a third reason which is that they have had some water in the basement. The theory is that the wall will divert the water away from the house.

Ms. Lemire asked how deep under the ground the wall would be. Mr. Holmes answered that typically the wall would start about one foot below the surface and will only extend up about 2 ½ feet because it is not a big hillside. The upper level of the grass rolls down to what is the lower level of the foundation of the home. He stated there had been some drainage issues which would be assisted by the construction of the wall, which would reduce the water flow toward the home.

Mr. Billipp asked if there were other materials that could be used instead of the stone wall that would not count against the owner in terms of lot coverage. Mr. Holmes replied that there were no options for a long-lasting wall except stone or concrete, neither or which can be considered permeable. He stated there could be an option of timber retaining wall, but if you count the top of a 4x6 timber, the calculation would still be over the allowed lot coverage. In addition, that would not be a long-lasting solution.

Chairman Cielezko stated that the lot coverage is currently 20.05%, so there is no room at all for any addition to that percentage. He asked why Mr. Holmes installed the permeable paver type of driveway.

Mr. Holmes stated that the decision was ultimately decided once it became clear that they were going to be maxing out the lot coverage. It was not an initial design at all. It

was not under consideration when the project was first started. It was the change they put in after they found out how tight they were on the lot coverage and knowing what they wanted to do in the back of the house. They decided to proceed with the permeable pavers as being an acceptable option, as opposed to solid surface.

He stated that they made the driveway as small as they possibly could and decided on the permeable pavers in the hopes that they would be able to have them considered. He stated that he was not aware at the time that the Town of Eliot is following the State of Maine guidelines. He had implied it was a local prerogative. He stated that, as he understands it, they are guidelines rather than law and it is left to local jurisdiction to interpret.

Chairman Cieleuszko stated that he would clarify, but assumes the ordinance of the Town is based on the guidelines. He stated that the Administrative Appeal is asking the Board and the Town to accept the permeable pavers as having the same qualities as a vegetative, permeable surface.

Chairman Cieleuszko stated that he had not seen any information in the brochures about how the permeable paver surface relates to grass or sod coverage. He stated he did not see any information regarding the percentage of permeability. He stated that although he did not see any comparison, there was a conclusion that it would be up to 100%. He asked if there were some standard or some relative figure. He asked if grass and sod as vegetative coverage would also be 100% or is there a range of permeability for vegetative coverage. If so, where do the paving stones fall within that range.

Mr. Holmes stated that permeability is measured in the amount of rain fall per hour that the soil will absorb rather than running off or shedding water. The permeable pavers are rated for 4-9 inches per hour, even when it has been in place for a few years. He stated that he did not have documentation which directly compares top soil and grass to permeable pavers and the open-graded aggregate, which is what absorbs the water.

Mr. Holmes stated that he could speak to the issue with some authority because his degree is Urban Forestry and Landscape Horticulture and his minor in Soil Science, so this is part of his career. He stated he has made direct comparisons to vegetative top soil, whether that be sod or another ground cover. He stated that he did not have proof in writing from an independent laboratory which verifies his findings. However, he stated, his study concluded that if you had 9 inches of rain in one hour and put it on a sod surface and a permeable pavement surface, the permeable pavers will absorb that much water. He stated that when we have had that much rain here, which has not been very often, water will pool and run off of a grass surface. He stated that he did not have a study which actually states that one comparison.

Chairman Cieleuszko stated that he would assume that the pavers would be considered as 100% permeable. Mr. Holmes affirmed that.

Chairman Cielezsko stated he would assume that clay would be close to 0% permeable. He stated that he lives in “clay village” and water runs right off the grass even in a drizzle.

Chairman Cielezsko asked Mr. Holmes if he would testify that the pavers would fall on the high end of the kind of range in what the Town ordinance calls for. Mr. Holmes replied they would fall on the end of the highest permeability, which is backed up by the studies which claim 100% infiltration of rainfall.

### **TESTIMONY FROM CODE ENFORCEMENT OFFICER**

Chairman Cielezsko stated that the Code Enforcement Officer had presented the Board of Appeals with his letter of May 7, 2012 and a letter from the State. He asked if the CEO had anything to add to those letters.

The CEO stated that as far as the degree of permeability goes, the pavers may even provide better permeability than grass because one is allowing the water to drain out in a different direction, but it all depends on the soil characteristics. That would be the largest variable. He stated he had never seen brick pavers directly correlated to a lawn.

The CEO stated that his hands were tied because he had to address the ordinance and the ordinance, in his opinion, was pretty clear in this case. The appellant has maximized his ability to further modify his property. He stated that there is a section of ordinance 44-35-5 which pertains to retaining walls in a shoreland zone not counting toward non-vegetative surface, but that applies to a wall that is necessary or required. He stated that the appellant’s wall is more ornamental or cosmetic.

He stated that there is a very subtle slope at the rear of the property and that if the appellant is having problems with water in the basement, he could correct that by creating a vegetative swale and totally meet the ordinance and would keep the water away from the home.

The CEO stated that the appellant does have other options than a retaining wall. He stated that, in his opinion, the proposed stone wall would be ornamental.

### **QUESTIONS FOR THE CEO FROM THE BOARD OF APPEALS MEMBERS**

Mr. Lytle asked whether or not, if the driveway were paved, it would still be considered in the percentage of non-vegetative surface. The CEO affirmed that anything that is non-vegetative is counted.

Mr. Lytle asked whether the CEO had any contact with the Town's attorney. The CEO replied that he did not have any contact. He stated that once he got confirmation from the State that the State does not recognize the pavers and is not considering recognizing the new types of uses, he did not carry the issue any further.

Ms. Lemire stated that she did some research on the Maine Department of Environmental Protection (DEP) site and that one of the things she came across was the Storm Water Management Manual. She stated that they have what they call a LID (Low Impact Development). In that section, they talk about the use of porous pavement and pavers and there is actually a picture of what the appellant has in his yard. She stated that the DEP strongly encourages LID measures because they reduce storm water impacts by minimizing development of impervious areas on the site. There are big red letters on the front page that state "important."

She stated that she could not find anything else pertaining to the issue in the Storm Water Management Manual and did not know if that helps in the appellant, but it does indicate that they are thinking about porous surfaces or they would not have had it in the manual.

She stated that the State guidelines do not allow low retaining walls unless necessary. She stated they can be used for erosion control. She asked the CEO if he had any thoughts about the State guidelines for the low retaining walls.

The CEO stated that he did not research that area. He stated that he went to the Assistant Shoreland Zoning Coordinator for the State of Maine who also works with the Department of Environmental Protection.

Chairman Cielezsko stated that the CEO had mentioned an ordinance allowing a retaining wall. The CEO stated it was Section 44-35-5 that states "retaining walls that are not necessary for erosion control shall meet the structure setback requirement."

Chairman Cielezsko stated that the application had some missing information. He stated that the property is in the Shoreland Zone. The CEO stated that the District is Shoreland Limited Residential and the lot size is 10,007 square feet.

Mr. Lytle asked the CEO why he looked at Section 44.35-5 regarding retaining walls. The CEO responded that if the stone wall were required for draining purposes, the State would allow it to be removed from the lot coverage calculation. The wall would have to meet all of the requirements of Section 44-35-5 in order not to be counted. He stated

that, in his opinion, the wall does not meet the requirements.

### **QUESTIONS FROM PUBLIC**

Grant Hirst stated that he had no input and was a bystander only.

### **FINAL INPUT FROM APPELLANT**

Mr. Holmes stated that he wanted to reiterate that the permeable pavers are recognized on the Federal level and are EPA recognized as best-management practice. He stated that they do qualify for Green Credits, which is the green building standard and they are used to comply with the Clean Water Act, which is definitely a Federal level. They are used commercially to reduce the impermeable surface area at that higher level.

He stated that the permeable pavers were basically created to repress all of the problems for which impermeable surfaces are regulated. He stated that, in this case, one is taking what could be a paved driveway which would shed all of the water onto the road and directly down into the Piscataqua River (because there are no culverts or storm water management structures in place there). Instead, by putting this product in place (at additional expense to the owner), they are basically recharging the ground water and cleaning it at the same time by putting it through different levels of aggregate and letting it be absorbed back into the ground instead of running off and carrying pollutants.

Mr. Holmes stated that these were exactly the reasons why the pavers were created to address the problems that caused the lot coverage to be considered in the first place.

Mr. Hamilton asked the CEO if the driveway were constructed as a gravel or crushed stone driveway, would that also not be allowable and would that also be considered non-vegetative and not meet the standards. The CEO stated that was correct.

Mr. Lytle asked about a plain driveway. The CEO stated that if it were just a gravel driveway, it would be a non-vegetative surface and would be included in the calculation of lot coverage. He stated the driveway would be included unless it were just grass or they drove on the lawn.

Ms. Lemire stated that she wanted to follow up on Mr. LeCompte's statement that he had had water in his basement. Mr. LeCompte replied that last fall they had dug a trench around the house and installed a French drain. He stated that he was not trying to use that issue for allowing the retaining wall to meet a legal requirement for

modification of his property.

Chairman Cieleuszko stated that he had one more question for the CEO. He asked the CEO if, were he were not bound by the ordinance regarding vegetative coverage, the permeable pavers would provide practical drainage.

The CEO stated that he does not think his personal opinion should matter because ~~he~~ the rules dictate that he act as a code enforcement officer. In a prior career, he had used reciprocity in Massachusetts and New Hampshire for use of the pavers. He stated that that did not apply in the current situation.

Chairman Cieleuszko asked if he considered the permeable pavers as equal to vegetative coverage. The CEO stated that, in his mind, the pavers are equal to vegetative coverage and that is the way it should be. He stated that it is innovative technology and he thinks they should be accepted.

Ms. Lemire stated that it is not State law. The CEO replied that there is no State law but there are State guidelines and it is in the Town ordinance that it is not accepted.

Mr. Lytle asked the CEO if there were any plans to take the issue of permeable pavers to the Planning Board. The CEO stated that there were no plans at this time.

Chairman Cieleuszko asked the appellant if there were any further issues for him or anything he wanted to clear up.

Mr. Holmes said that he wanted to thank the CEO for giving him as fair a shake as he could. He stated that he understood that the CEO was caught in the middle and had to make the decision he made.

He stated that he realized what they were up against because there is a Town ordinance. Given the applications in other states and other parts of the country and the world, it was his hope that they would be able to bring the issue forward and have it be considered as the BOA believes it should be. It is being applied successfully in other areas of the country.

He thanked the BOA for hearing the case.

Chairman Cieleuszko asked if there were any further questions.

Ms. Lemire asked if New Hampshire regulates permeable surfaces. Mr. Holmes stated that New Hampshire recognizes permeable pavers as permeable surface. He stated that he has installed the product on the beach, literally, in the Town of Hampton just last year and it is taken out of lot coverage calculation.

Chairman Cielezsko asked if Mr. Holmes considered permeable pavers to have the same specifics and qualities as vegetative coverage. Mr. Holmes replied that in many cases, it is more permeable. He stated that he can take a garden hose and run it on a permeable paver driveway or patio or walkway and have every last bit of water go right through it and back into the ground water. He stated that he has done that for hours on end just to test the surface years ago when he first started installing it. He stated that he had no water come to the surface. He stated that he had done the same thing on a lawn and eventually had the water pool up and run off. He stated that that is where he drew his conclusions.

Chairman Cielezsko closed the public hearing at 7:40 PM.

### **FINDINGS OF FACT**

- The owner of the property is Charles LeCompte.
- The mailing address of the property is 8 Woodbine Ave.
- The location of the property is Eliot, Maine.
- The applicant is Charles LeCompte, being represented by Bennett Holmes, owner of Rye Beach Landscaping, LLC with a mailing address of P.O. Box 200, Rye Beach, NH 03871.
- The property is on Tax Map 1, Lot 151.
- Proof of ownership is demonstrated by Deed Book 15916, page 912, York County Registry of Deeds.
- The public hearing was held on May 17, 2012.
- The property is zoned Shoreland Limited Residential.
- The property consists of 10,000 plus or minus square feet.
- The applicant is asking for an administrative appeal of the removal of permeable pavers in the non-vegetative coverage of the lot.
- The current non-vegetative coverage is considered by the Code Enforcement Officer to be 20.05% of the lot.
- The proposed project will add 90 square feet to that non-vegetative coverage, making it 21.55%

Chairman Cielezsko stated that he had been looking at the appeal and had been trying to see how the BOA could help the landowner without going against the ordinance. He stated that there are a couple of places in the ordinance 45-290 where *similar uses* are up to the Board of Appeals to determine. He stated that there is a clear understanding of what requirements for vegetative coverage entails.

He stated that he has reservations because he thinks that the appellant has options other than the one proposed. He stated that he felt torn down the middle and that the BOA does not set precedent. What would work for the appellant for his 90 square feet might not be approved if he decided to ask for a 300-square-foot extension down the

road. He stated that this current decision is only for the 90 square feet and only for this particular lot.

Chairman Cielezsko stated that if anyone had a consideration of granting the appeal, he would limit it to just allowing 90 square feet of the pavers to be considered vegetative coverage. He stated that that was the only solution he could think of that would be in the appellant's interest.

Mr. Hamilton stated that the job of the BOA was to determine whether the Code Enforcement Officer acted clearly contrary to the code. He stated that he thought the CEO acted correctly by contacting the State to determine what their guidelines are. It was corroborated by the State which means that the Town's ordinance and State guidelines are consistent. He stated that the CEO did not have another option and would not have been correct if he had allowed the pavers to be considered vegetative.

Chairman Cielezsko stated that to grant the appeal, the BOA has to determine that the CEO was completely off the mark.

#### **MOTION**

Mr. Hamilton made a motion to deny the application for an administrative appeal based on the fact that the CEO did not act clearly contrary to code. Mr. Billipp seconded the motion.

#### **DISCUSSION**

Mr. Billipp stated that the CEO made the right interpretation and made the right decision. He stated that he thinks it is unfortunate that the amount of coverage is so close in that it is off by only 90 square feet, but the CEO's job is to follow the ordinance and he did a good job of that.

He stated that he thinks the landowner does have some options that he could pursue. He stated that, for example, when he looked at the permeable pavers in the driveway area, one thing that came to mind that was that by removing a strip in the middle, leaving a place for the car tires, that might give him 90 square feet. If the middle strip were grass, the owner would have space for the retaining wall.

Mr. Billipp stated that he thinks there are other ways the landowner could solve the problem and that is why he supports the motion.

Ms. Lemire stated that she concurred with Mr. Billipp.

#### **VOTE**

The vote to approved the motion was unanimous. Chairman Cielezsko stated that the administrative appeal had been denied. He stated that a letter would be sent out within the next seven days. He informed the appellant that if we wanted to appeal the decision to the Superior Court, he would have 45 days from the meeting date of May 17, 2012. He also stated that the BOA would have the Notice of Decision and minutes of the meeting for the appellant in the event that he did want to pursue the issue.

Mr. Holmes and Mr. LeCompte stated that they appreciated the time and consideration from the BOA.

Ms. Lemire stated that she has both a French drain and a swale at her property. She stated that it is all imperceptible and that it works really well.

Mr. LeCompte stated that they would figure out their options and restated his appreciation for the consideration of his appeal by the BOA.

## **BUSINESS**

The CEO asked if the BOA would have recognized the letter if the applicant had not been present. Chairman Cielezsko stated that they have accepted email letters from abutters and from townspeople. He stated that he was not sure whether the letter would have been accepted.

Mr. Hamilton asked which letter the Chairman was referring to. The CEO replied that there was an email sent just prior to the meeting in which the owner gave authorization to Mr. Holmes to represent him at the meeting. The CEO stated that it was not a hand-signed document. He asked, for the purposes of future reference, if that would be acceptable.

Chairman Cielezsko stated that they have had that issue arise before and that they have accepted email testimony.

Ms. Lemire asked if the letters had been from the owner. Chairman Cielezsko replied that they had been from abutters. Ms. Lemire stated that that is not the same level as one from the owner. Chairman Cielezsko replied that an abutter is a party to the action and that it is the same level.

Mr. Hamilton asked if the acceptance of an email was an issue which would require a vote. Chairman Cielezsko stated he would defer to the Board if they decided that they were not accepting an email, noting that they have accepted them in the past.

Mr. Hamilton asked if there were a time frame for submittal like there is for the material the BOA is supposed to receive. He stated that they tend to discourage material that

arrives the day of the meeting because that doesn't give a good chance to look at both sides of the issue.

Chairman Cieleuszko stated that there was no reason why the letter did not come with the original packet and that the owner had been told about it when the packet was prepared. He stated that if the owner had not been at the meeting, the vote would have been taken to consider it, but he did not know what the consensus would have been because it had not been done before.

### **APPROVAL OF MINUTES**

Ms. Lemire made a motion to accept the minutes of March 15, 2012, as written. Mr. Hamilton seconded the motion. The vote was unanimous. The minutes were accepted as written

Mr. Lytle mentioned that he was not recorded as being absent at the meeting. Ms. Lemire stated that in the future, if there were Board members not present, their names be noted as Absent.

### **OTHER BUSINESS**

Chairman Cieleuszko stated that, following the meeting in March, he did go to the Selectmen and referenced the BOA's statement on the use of the camera and told the Selectmen they could reference the minutes of the meeting if they needed more background. He also stated that the Board of Appeals would answer any questions they might have.

Mr. Billipp stated that the case at this meeting presents an opportunity for the BOA to recommend changes to the Planning Board regarding the zoning ordinance. He stated that they have talked previously about trying to make changes.

Chairman Cieleuszko asked if everyone was comfortable with the idea of the pavers or was it an issue that should be looked into. Mr. Billipp stated that there was recommendation from Mr. Marchese, both as the CEO and as an engineer, because they have been accepted in other areas.

Chairman Cieleuszko stated that the permeable pavers are accepted in surrounding communities. Ms. Lemire stated that the State of Maine is talking about it.

The CEO volunteered his services in writing a letter to the Planning Board asking that they consider permeable pavers. Chairman Cieleuszko stated that that would help the people in Mr. LeCompte's zone because the lots are so tight already and a lot of the

ground there is not good. A good system could improve conditions. He thanked the CEO for volunteering his services.

The CEO stated that there are alternatives that are not as good as the permeable pavers. He stated that one is a plastic mesh that is put down over the grade and grass is grown between the squares. He stated that that is a maintenance issue and is not good in the snow when the plow rips it. He stated that there are some innovative technologies that are great and some need work.

Chairman Cielezsko stated that there are parking lots at UNH that are 100% porous and that they have been working very well for three to four years.

Mr. Billipp stated that the technology has been proven and has quite a long track record. The CEO stated that there is pervious asphalt and pervious concrete.

Chairman Cielezsko asked what testimony the Planning Board would require. The CEO replied that there are tons of documentation available that he could easily get his hands on to help the Planning Board in their decision process.

Mr. Lytle asked for information on the status of the chicken coop issue. The CEO replied that the Planning Board is working on it and that they are moving away from a chicken ordinance. He stated they are moving into a definition for Animal Breeding and Care because they want to address more of a global issue than just chickens.

Mr. Lemire asked if the Planning Board had been differentiating between pets and breeding stock. The question was not answered.

Mr. Lytle made a motion to adjourn. Mr. Hamilton seconded the motion. All voted in favor.

The meeting was adjourned at 8:02 PM

Respectfully Submitted,

Linda G. Keefe