

TOWN OF ELIOT - BOARD OF APPEALS MEETING

September 20, 2012

ROLL CALL

Time: 7:00 PM

Present: Chairman Edward Cieleuszko, Vice-Chairman Peter Billipp, Secretary Bill Hamilton, Philip Lytle, Jeff Cutting and Associate Member Ellen Lemire

Absent: John Marshall, Associate Member

Others present: Code Enforcement Officer Jim Marchese; Vicki Mills, appellant; Catherine Goodwin; Kevin and Lorilyn Barrett, owners of Ian's Way; Margaret Mitchell, real estate agent; Sally McKay, abutter and other interested parties.

CALL TO ORDER

Chairman Cieleuszko stated that the format of the meeting would be:

- The meeting will be opened and it will be determined who the voting members of the Board will be.
- The Chairman will summarize the request.
- The parties to the action will be determined.
- The jurisdiction that the Board has to hear the case will be determined.
- The standing and timeliness of the appeal will be determined.
- Testimony will be given from the appellant.
- The Board will question the appellant.
- Testimony will be given by the Code Enforcement Officer, followed by questions from the Board.
- Testimony will be given by the abutters, followed by questions from the Board.
- The appellant will be allowed rebuttal, followed by questions from the Board.
- Interested observers will have a chance to speak near the end of the hearing.
- The last statement will be from the appellant, followed by the last questions by the Board.
- The hearing will be closed, with no further exchange of information.
- Findings of Fact of the case will be itemized, followed by discussion.
- A motion will be heard and a decision made by vote.

Chairman Cieleuszko opened the meeting at 7:00 PM for the hearing of an administrative appeal by Vicki Mills, 42 Old Farm Lane, of the Code Enforcement Officer's decision to

grant permit #12/64 for the reconstruction of Ian's Way frontage (500 feet) issued July 11, 2012 and permit #12/72 for a building construction off Fernald Lane issued July 20, 2012.

The voting members for the meeting will be Philip Lytle, Bill Hamilton, Peter Billipp and Jeff Cutting.

The Board of Appeals has jurisdiction given by Code 45-49, part A, Administrative Appeals.

Ms. Mills has standing under Code 45-50, subsection B, section 2, as a person whose land abuts the land in question. Her appeal is timely in that it was received August 10, 2012 and the permits were issued on the July 11 and July 20, 2012..

TESTIMONY FROM APPELLANT

Ms. Mills stated that she had a petition that had been signed by other abutters and asked if the Board wanted the petition. The other abutters wanted to preserve their standing and legal right in the proceeding. Chairman Cielezsko stated that the abutters had to be present for the meeting and a list of those present could be presented to the Board and those names would be taken into consideration for a Superior Court review.

Ms. Mills stated that some people who could not attend had also signed the petition. Chairman Cielezsko stated that the current case is an appellate review and the right to appeal is determined by presence, not by a letter. A letter can be introduced as evidence. The letter would have no bearing on the Board of Appeals decision and would be of no help in an appeal because if whatever they wrote in a letter had not been presented to the Code Enforcement Officer when he made his decisions to grant the permits, the letter would be irrelevant to the Board.

Ms. Mills stated that the statement of the absent abutters was meant to agree with the material that she had presented. Chairman Cielezsko stated he would take the petition. He also restated that the petition does not give a right to appeal to anyone not present at the meeting.

Ms. Mills started her testimony with a story because it is her opinion that the experiences people have determine how they view life. She stated that her father's dream was to own a farm and that dream never came true because they didn't have the money. When he died, her mother bought their property with his insurance money. When she bought the land, it was in the early- to mid-1970s. Her intent was to allow her two daughters to live there and to benefit Ms. Mills' handicapped brother. It was never their intention to develop the land.

Ms. Mills stated that because the land was only for family use, they did not pay attention to rights-of-way. The prior owners of the land did not give the Mills family the same right-of-way that the owners had had. Where their right-of-way had been 40 feet, the Mills' was 20 feet.

She stated that in approximately 1982, the Mills applied for a permit for a house for herself. They were denied by the Code Enforcement Officer and Board of Appeals upheld it. The decision was based on length of road, width of road the need for two access points. The Mills accepted the decision because that was what the law stated.

As time went on, Ms. Mills' mother and handicapped brother could no longer afford the house or the taxes and were forced from their land. They were told that they could not sell a portion of their land, even though they had five acres in Kittery that abutted and was part of the parcel but had no frontage. Therefore, selling a portion of the land was not an available option.

The land was signed over to Vicki Mills. She stated that her daughter wanted to build on the land. She could not do so because of the length of the road, the width of the road and the need for two access points. She stated that three generations shared 61 acres of land, but only one family house was allowed.

Ms. Mills stated that from her own experiences on her own land she has concluded that rights-of-way are not grandfathered and are not necessarily granted in their entirety to the people who buy land. A 40-foot-wide road does not mean that everyone using the same road is entitled to the same width or length.

She stated that pieces cannot be broken off without meeting current ordinances. A non-conforming lot cannot be made more non-conforming. It has to meet the requirement for length, width and two access points. She stated that if a parcel is divided, the remaining portion is subject to the current ordinances.

Ms. Mills stated that she knew the above things because of her past dealing with the Town and because she had read the ordinances. She stated the Goodwins also knew the facts because she had had conversations with them when they were aware that they needed two access points because of the length of the road.

Ms. Mills stated that she presumed that everyone had read the material she had provided to the Board, so she wanted to highlight just a couple of quotes. The property under discussion (map 30, lot 50), cannot meet the subdivision requirements because it does not have two access roads which meet the street design requirements. The road from Beech Road down Fernald is over 1,000 feet. The connecting road, Keith's Lane, is approximately 700 feet and the new proposed road is an additional 500 feet.

She stated that the Code Enforcement Officer determined that the proposed road had

been an existing road. Ms. Mills stated that she has no knowledge of an existing road and she has lived there for almost 40 years. She had never known that road to exist. She supposed that if one owns property, one could build as many roads as one wants on that property. She stated that whether the Town acknowledges them is a different story. The fact still remains that the road exceeds 1,000 feet, regardless of the connecting road. She stated that the proposed road would be 1,500 feet from an existing road (Beech Road).

Ms. Mills stated that Fernald Lane has some issues because of the court decision that it cannot be widened to more than 15 feet. She stated there are 14 lots between Fernald Lane and Keith's Lane already.

Ms. Mills stated that back in 1980, the Code Enforcement Officer, Roland Geib, sent out a letter to Mr. Goucher where he stated that the existing property is considered one parcel in its entirety of 65 acres and was subject to local laws, regulations and ordinances. She stated that that was the same piece as is now being considered for division.

She stated that there was also a letter stating that any further development to the area of Fernald Lane required two access points meeting Town road standards.

Ms. Mills stated that she had cited the ordinances that the Code Enforcement Officer violated and that in addition to those, the standard 44-32A which states that a non-conforming lot cannot be made any more non-conforming was also violated. She stated that the roadway not being allowed to exceed 1,000 feet is addressed in the street standard, the back lot standard and the subdivision standard. She stated that the road cannot exceed 1,000 feet and be dead-ended. It makes a difference if there are two access points.

Ms. Mills stated that the tax assessment for Map 38, Lot 50 is listed to Zoe Galloway. She stated that the property of 35 acres is valued at \$23,000 and is recognized by the Town as being non-developable. She stated that the deed she had provided in the material for the Board had taken out all of the property that had been subdivided on Keith's Lane. The property produced the subdivision that is known as Keith's Lane. She stated that the deed stated "Together with the right to pass and repass by foot or vehicle for all manner of travel and conveyance over both the forty-foot right-of-way known as Keith's Lane, so-called, as laid out on Plan of Pleasant Meadows Subdivision, duly recorded in York County Registry of Deeds Book 67, Page 3, and Fernald Lane, so-called to and from Beech Road."

She stated that the deed did not specify Fernald Lane as being 40 feet and noted that the new deeds that they have recently recorded included 40 feet over Fernald Lane. She stated that if one didn't have 40 feet, one couldn't deed what one didn't have.

Ms. Mills made reference to a map in her packet which showed the lot in question. She stated that to the left are the Keith's Lane residents and underneath there is shown the subdivision that was taken out in 2005-2006, leaving the remaining 35 acres. She stated that the next map showed the same area with a different view.

She stated that the Code Enforcement Officer had said that there appeared to be a road on the map that he pulled up. She stated that on her map it also appeared that there was a road. But, she stated, they had never had a road there. She stated they had a horse path there, paths were created by four-wheelers and that kids created all kinds of paths through the woods. She stated that the property on one side of her had contained logging roads, but that did not mean they were accepted or approved roads. She stated that the people who had owned her property used to travel through that area because they thought that it preserved their right to Fernald Lane.

Ms. Mills referenced pictures in her packet that showed parts of Fernald Lane that are 14 feet wide and 12 feet wide. She stated that what was labeled Ian's Way was grown up with trees and grass and was definitely not a road.

The next attachment Ms. Mills referenced was the court order of December 20, 1989 in which the judgment stated that Fernald Lane was "laid out by the Town in 1826 as a Town Way and subsequently abandoned after more than 30 years of non-supervision and non-maintenance by the Town, no longer existed as a Town Way."

The final statement on the court order said that judgment be entered in Superior Court as follows: "Adjudged and declared that defendants and others associated with them in the use of the public easement over Fernald Lane, so-called, in Eliot, are justly entitled to enter upon said Lane to enlarge the same to a width of not exceeding fifteen feet, and to take such steps as may be necessary to make said Lane safe, suitable and convenient for travel; but having due regard for the fair and reasonable concerns of Plaintiffs and all other abutting owners without cost to any party."

Ms. Mills stated that at the time the proceeding took place, the same family in the current case was in ownership of that property.

Ms. Mills next referenced a letter dated March 30, 1989 addressed to Sally McKay from Code Enforcement Officer John Rothwell. The subject of the letter was the rights-of-way in the area. Mr. Rothwell stated, "I shall not issue Building Permits, nor will the Planning Board consider subdivision requests for development in the area of, and abutting Fernald Lane, Fernald Lane Extension, or Keith's Lane."

She stated that he later went on to say "It is to be hoped the Superior Court will come forth with a ruling which will allow Fernald Lane, Fernald Lane Extension and Keith's Lane to be brought into compliance with the 'Street Design and Construction Standards Ordinance of Eliot' by the Association on Fernald Lane. Upon completion of these roads

and acceptance by the Town, there should be no further barrier to Planning Board reviews or the issuance of Building Permits in this area.”

Ms. Mills stated that the above improvements did not happen because the court ordered that ~~the~~ Fernald Lane could only be widened to a width of 15 feet. She stated that the court ruling basically said that the road referenced by the Code Enforcement Officer and sketched out in October of 1989 would have been of no use because they were not going to issue any more permits since Fernald Lane could not be brought up to town standards. She stated that she assumed that the road was never constructed because it would have been a waste of time and money when the owners could not build on it.

Ms. Mills stated that her packet included the ordinances which were in place at that time and noted that they are much the same as those which are in place currently in terms of length and width of road and the requirement for two access points. She noted that even in 1989, the ordinance addressed the requirement that the road not exceed 1,000 feet.

Ms. Mills cited a letter from Code Enforcement Officer Roland Geib to John Goucher stating that “The abstract of that deed (38-50) does not show a right-of-way over this property to, or owned by other parties. This property, therefore, is one parcel in its entirety, subject to State and Local Laws, regulations and ordinances.”

She stated that in that same time frame (1980), the ordinance still stated that a dead-end street or cul-de-sac shall not exceed 1,000 feet in length. She noted that the current ordinance states that “the distance between the closed end of a dead-end access way and the nearest non-dead-end street shall not exceed 1,000 feet. The distance shall be measured using the dimensions of the access way beginning at the outermost edge of the closed end and following central lines to the nearest side line or extended side line of the non-dead-end street, including any intervening streets or portions of streets that must be traversed to reach the non-dead-end street.”

Ms. Mills stated that the current Code Enforcement Officer, Jim Marchese, addressed the issues she brought up in his response. She noted that he said that Ian’s way was non-conforming in that it was not constructed to meet current standards. Ms. Mills stated that it was non-conforming because it didn’t exist. She stated that the road exceeds 1,000 feet and, therefore, requires a second access point. She stated that, regardless of whether the road existed or did not exist, a current permit has to be in concurrence with current ordinances.

Ms. Mills stated that the Code Enforcement Officer referenced a letter from the civil engineer Thomas McCullom, making it sound like there is a right to the road. She stated that in his letter to the current owners, the Code Enforcement Officer said that “The survey plan dated October 1989 is unclear of any actual conveyance. The burden of

proof of this non-conforming lot which has no street frontage, Sec 45-405, is on the owner. Any lot division would be required to meet all current local and state requirements in order to obtain a building permit.”

Ms. Mills stated that what she noted in that letter was the statement that the parcel 38-50 included “ the right to pass and repass by foot or vehicle for all manner of travel and conveyance over both the forty-foot right-of-way known as Keith’s Lane so called and Fernald Lane, so-called to and from the Beech Roadtogether with a right-of-way to the public highway or beech road, so called.”

She stated that the letter does not mention a forty-foot width over Fernald Lane. She stated that Mrs. Downs actually owns the top portion of Fernald Lane, lots 38-10 and 38-46. She owns two parcels and the cemetery that Ms. Mills made reference to earlier. She stated that she could not figure where Fernald Lane could be 40 feet because, if one measured between stone walls, the width would be 25 feet, with the cemetery in the middle. She stated that , therefore, Mrs. Downs owns a good portion of Fernald Lane.

Ms. Mills stated that the Code Enforcement Officer had stated that there are 13 lots in the subdivision, but that the residents consider that there are 14 lots.

QUESTIONS TO APPELLANT FROM BOARD OF APPEALS MEMBERS

Mr. Lytle asked who owns Fernald Lane. Ms. Mills stated that the court order of 1990 states that the Downs control the top portion and that, therefore, they control whether or not it can be widened. The court order states that the residents own to the center line and that the road cannot be widened more than 15 feet.

Mr. Lytle stated that he was on the Board of Selectmen at that time and he recalled the issue. He stated that at that time, the residents were planning to start an Association and asked if that had been accomplished. Ms. Mills responded that it had been formed and that those residents were present at the current meeting.

Mr. Lytle asked if the residents maintain Fernald Lane and Ms. Mills responded in the affirmative. He asked if the actual width of Fernald Lane is known and she responded that in sections, the lane is only 12 feet wide and the width varies to 14 feet, but that there is nothing wider than 15 feet because that is what the court order requires.

Mr. Hamilton asked Ms. Mills to indicate the location of the 14th lot she had referenced in her testimony. She responded that there are two lots (38-10 and 38-46) on the corner of Beech and Fernald. Mr. Hamilton asked if they were separate lots. Ms. Mills stated

that she had spoken with Ms. Downs who stated that she owns land on both sides of Fernald.

Mr. Hamilton stated that the application mentions Ian's Way and he asked if she knew when that term was first coined. Ms. Mills responded that she had only heard of it when she filed the paperwork for her appeal. She stated that the tax bill for the parcel refers to Fernald Lane, not Ian's way.

Mr. Cutting asked if there were anything filed with the Town or Fire Department that would designate Ian's Way as a street. Ms. Mills stated that there was nothing to her knowledge.

TESTIMONY FROM THE CODE ENFORCEMENT OFFICER

Mr. Marchese apologized for his lateness in getting some of his material to the Board. He stated that he had received that afternoon a letter from Joe Moulton, Public Works Director which discussed what he found on site. According to the letter, he found that there were 12 inches of existing material in place and that the road had to be improved from that point. The letter does indicate that there was something there. Whether or not it was a roadway, there was material there that appeared to be related to the construction of a road.

Mr. Marchese stated that the case is complex and that the applicants were aware of the history of the area. He stated that he had forewarned them that their application had to be as complete as possible due to the history of the area.

He stated that the applicants did submit a document from a professional land surveyor indicating that they had the right of access over Fernald Lane. The information indicated that they were merely improving an existing way and were not creating something that would be considered non-conforming. He stated that the information was reviewed by the Town's attorney and he collaborated with the opinion that as long as they created frontage and improved Ian's Way to Town standards, they would have the ability to obtain a building permit for that lot. That was the course of action that was taken.

The Code Enforcement Officer stated that the information that had been presented to him was provided in a different manner than it had been in the past. The court case had stated that people have the right to use a right-of-way. He stated that everyone who lives in the development has an easement over the land that is owned by others. He stated that, according to documentation, the width is 3 rods (49 ½ feet). The residents have the right to improve it up to 15 feet in width.

QUESTIONS TO CODE ENFORCEMENT OFFICER FROM BOARD MEMBERS

Mr. Lytle asked what law referenced the length of 1,000 feet. The Code Enforcement Officer responded that the law would refer to new roads. He stated that in a new development, 1,000 feet is the limit of a dead-end street. Mr. Lytle stated that the ordinance in 1978 stated the limit was 1,000 feet. The Code Enforcement Officer stated that he had given some examples in his letter of other examples in Town that exceeded 1,000 feet to a dead-end street, Tidy Road being one of them.

Mr. Hamilton referenced Eliot code 45-466, *Additional requirements for all back lots*, part g5 which states "The distance between the closed end of a dead-end access way and the nearest nondead-end street shall not exceed 1,000 feet."

Mr. Hamilton asked if the Code Enforcement Officer knew how many test pits there were and their location on the length of the roadway and the CEO responded that he did not know. In the letter from the Public Works Director, dated September 20, 2012, Mr. Moulton cites a proposed 900-foot drive. Mr. Hamilton asked if the depth of the test pits was known and the CEO responded that he did not know. Mr. Hamilton stated that he was having trouble understanding what the letter means in terms of a preexisting road, referred to as Ian's Way.

Ms. Lemire asked the Code Enforcement Officer if there is a deed with a description of Ian's Way. Mr. Marchese responded that the surveyor highlighted the right-of-way in his letter of May 23, 2012. Ms. Lemire noted that it doesn't not reference Ian's Way. Mr. Marchese responded that he had not seen a written description of Ian's Way.

Ms. Lemire asked if a legal description were not required on a permit. Mr. Marchese responded that the applicants had submitted a plan in the permit package indicating Ian's Way.

Ms. Lemire stated that a copy of the deed and a legal description of the access way needs to be attached to any building permit application. She stated that in order to access the lot, Ian's Way would have to be built or would have to exist. She stated that there is no proof that it exists in any legal document. The Code Enforcement Officer said that that was correct.

Mr. Billipp asked whether there had been one or two lots created from parcel 38-50. He stated that in places he saw a parcel area of 4.1 acres and he also saw where it appeared that that part was two lots. Mr. Marchese stated that, based on the application for a home, it was the intent to create one lot for sale/purchase. Mr. Billipp asked if that creation would create a subdivision. Mr. Marchese responded that it would not. He added that a landowner is allowed up to two lots within a five-year period. He stated that if there were more than two lots, it would then be considered a subdivision.

Mr. Billipp asked if the lot had been surveyed and described by a deed or plot plan from

a surveyor. Mr. Marchese stated that the Town had a purchase agreement and description for the building application.

Mr. Billipp stated that he saw a lot identified as 2.13 acres and another with a pond of 2.05 acres. He stated that he was confused because it looked as though two small lots were being created. The lot size indicated on the building permit is 4.1 acres.

Chairman Cielezsko asked what the dimensions or acreage of lot 38-50 are. He stated that according to division statement, Lot 38-50 is 35 acres. According to the building permit, 38-50 is 4.1 acres. He asked what lot was being considered. The Code Enforcement Officer responded that a division of Lot 38-50 was being looked at. He stated that once the division occurs, the assessor will assign a new lot number.

Mr. Cielezsko asked if they were currently looking at a lot that was 35 acres. Mr. Marchese responded that they were looking at a lot that is 4.1 acres. Mr. Cielezsko clarified that the 4.1 acres is also being referred to as 38-50 until the assessor changes the designation.

Chairman Cielezsko asked when the 4.1-acre lot was created. The Code Enforcement Officer responded that it was created when the purchase and sale agreement was administered on July 23, 2012.

Lorilyn Barrett stated that they received a deed when they closed on the property. Mr. Cielezsko asked the Code Enforcement Officer if that deed had been available to him when he made the decision about the building permit. Mr. Marchese stated that the deed was not available to him when he made the decision to allow the purchasers to improve Ian's Way. He added that it was available to him when he issued the building permit for a home on that lot.

Mr. Cielezsko stated that, at the time of the decision, there was no deeded easement nor right-of-way for Ian's Way. Mr. Marchese stated that he based his decision on the information the applicant supplied on the existence of Ian's Way, which included the survey showing an existing easement. Mr. Cielezsko asked if there were dimensions stated for the easement. Mr. Marchese replied that the survey showed a 50-foot easement. Mr. Cielezsko stated that because the easement was all on one property, it did not have to be recorded exactly. Mr. Marchese concurred.

Mr. Cielezsko asked for the length of Fernald Way to the end of the extension. Mr. Marchese stated that, according to the Eliot GIS supplied in the package, the length is approximately 1,000 feet to the end of the existing way, not to the end of the extension. Mr. Cielezsko stated that the 1,000-foot measurement is inaccurate because the distance should be measured down the center line of the lane. Mr. Marchese stated that the measurement is an approximation. Mr. Cielezsko stated that because of a twist in the road, it is actually slightly longer to the intersection of Keith's Lane.

Mr. Cieleuszko asked for the length of Ian's Way. Mr. Marchese responded that it is 500 feet.

Mr. Cieleuszko stated that Mr. Marchese had given the Board a letter from the Public Works Director. He asked if the CEO had been in possession of the letter or known of its contents when he made his decision on the road improvement permit. Mr. Marchese stated that he had not know that there was physical evidence that a road existed at the time the permit was issued to upgrade Ian's Way.

Mr. Cieleuszko made the observation that any information had to be available to the Code Enforcement Officer when he made the decision in order to be relevant to the appeal. He stated that the letter from the Public Works Director was irrelevant to the case at hand.

Mr. Cieleuszko asked ~~the~~ Mr. Marchese if he had had access to all of the information supplied by Ms. Mills. Mr. Marchese stated that he did.

Mr. Cieleuszko stated that Mr. Hamilton had raised the issue of the Back Lot Ordinance which states that "The distance between the closed end of a dead-end access way and the nearest nondead-end street shall not exceed 1,000 feet." He stated that provision is an additional requirement for all back lots.

He asked if the lot under consideration was a back lot. Mr. Marchese stated that he did not believe it was a back lot. He stated that, from the evidence presented to him, the improvement of an existing lot was what was being considered. Mr. Cieleuszko stated that would apply to the road permit. He asked if 38-50, the lot under purchase/sale agreement, is a back lot. Mr. Marchese responded that he did not believe it is a back lot because it has frontage on a road. He added that the road is non-conforming because it is not constructed to meet Town standards.

Mr. Cieleuszko stated that a back lot is defined as a lot which does not have the minimum street frontage required in the zoning district but which is accessed by an access way which either passes over or has been divided out of one or more other lots separating all or part of the back lot from the nearest qualifying street. He stated that the minimum frontage requirement for the zoning district needs to be on a minor street.

He asked if Ian's Way is considered a minor street. Mr. Marchese responded that Ian's Way is a 50-foot right-of-way that needed to have the gravel lane improved to meet Town standards.

Mr. Cieleuszko asked if a minor street needed to be paved. Mr. Marchese replied that was not required. He stated that private ways can be gravel. Mr. Cieleuszko stated that a private way cannot be used as street frontage because it is not accepted by the Town as

a street. Mr. Marchese stated that he did not believe it had to be accepted by the Town to be considered street frontage. Mr. Cielezsko stated that a private road still had to meet standards by the Town and Mr. Marchese concurred.

Mr. Cielezsko stated that dirt roads had been removed from Ordinance 37. He asked the Code Enforcement Officer what he had referenced to determine that a dirt road, Ian's Way, could be used as road frontage to allow the lot to be found conforming. Mr. Marchese stated he did not have the answer. He stated he would try to find information during testimony from abutters.

Mr. Lytle asked the Code Enforcement Officer if he had reviewed the old Fernald Lane case before he issued the building permit. Mr. Marchese replied that he had and that the Town attorney had also reviewed the old court case.

Mr. Cutting asked if the road commissioner had ever signed off on Ian's Way as a road for the Town of Eliot. Mr. Marchese replied that on July 18, 2012, Joe Moulton indicated that he had completed the inspection of the roadway/driveway on Map 30, Lot 23, noted as that of John Goucher and Zoe Galloway. Mr. Moulton stated that the roadway was constructed to meet the minimum requirements under the zoning ordinance.

Mr. Marchese stated that the letter from Mr. Moulton did have the wrong designation for map and lot number, but that it was clear regarding Fernald Lane. Mr. Marchese stated that it was the only driveway that was constructed during that time and that Mr. Moulton did have the owners listed correctly. Mr. Hamilton stated that Mr. Moulton did not reference Ian's Way and Mr. Marchese stated that that was correct.

Mr. Hamilton clarified that the reconstruction permit was issued on July 11, 2012 and that the letter from Mr. Moulton was date July 18, 2012, after the road was completed.

Mr. Cutting asked if there were a road in that location prior to the permit being issued. Mr. Marchese responded that there was recognition of a road and he asked that Mr. Moulton provide the Board with documentation that stated that he found road bed materials present. However, that letter (dated September 20, 2012) has been found to inadmissible.

Mr. Cutting stated that the ordinance requires that all roadways be constructed according to road specifications in this division as overseen by the road commissioner prior to commencement of each major phase of road construction. He asked if there had been anything prior to the date that the permit that was issued that said that a road existed in that location. Mr. Marchese replied that there was not.

Mr. Billipp asked whether it would have made any difference if Ian's Way had not existed and the owners created a new 50-foot way and called it Ian's Way. Mr. Marchese stated that that scenario would have made a big difference because the

owners would not have met the rules of the ordinance. The rules of the ordinance state that they could only build 1,000 feet off an existing way, so they would not have been granted a permit.

Mr. Billipp asked if Mr. Marchese had accepted the fact that there was a pre-existing road. Mr. Marchese said that he had. Mr. Billipp stated that the appellant had stated that there had not been a road there. She indicated there may have been a path or a trail, but it was not a road.

Mr. Lytle noted that there used to be an old County road and asked if anyone knew where the old road went. Mr. Marchese stated that he had not seen any evidence of a County road.

Ms. Lemire asked Mr. Marchese if he knew how the Fernald Lane extension got approved. He stated that he did not know. She asked if he knew its length and he replied that it is 300-400 feet in length.

TESTIMONY FROM ABUTTERS

Sarah Goucher McKay of 496 Main Street, Amesbury, MA 01913 identified herself as John Goucher's daughter and Cathy Goucher's sister. She stated that her father bought their land in 1963. Ms. McKay stated that she bought her piece of the property, which is located on Ian's Way, in 1966.

In 1975, a month after her son Ian was born, her father deeded her a 40-foot right-of-way and named it Ian's Lane. She stated there had been a small sign there for a while to indicate where the right-of-way was. She stated that at that point, her father put down a gravel road that was probably 10-12 feet wide to formalize it.

Ms. McKay stated that for years and years there had been a farm path on that location for as long as she or her father had owned the land. She stated that the Sergeants used the path when they ran a cattle farm on the land. She stated it was formalized into a right-of-way by deed recorded in the York Registry of Deeds, Book 2107, Page 22 in 1975. She added that since that time, her father had improved the road by having a gravel base put down. She stated that they have maintained it as best they could and that the neighbors have used it quite often for their own purposes. She stated that there was definitely a road where travel by bicycle or four-wheelers was possible.

Ms. McKay stated that when they had the farm, they were told that there had been an old post road and that Fernald extension used to go all the way to Kittery and came off Cutt's Road. She added that there had been an old tavern there. She stated that was the only reference to a Town road that she knew about.

Ms. McKay stated that Ian's Way was definitely a formal way and that it had been deeded to her. She stated that her sister granted her 50 feet because that is currently what the Town ordinance requires to make it a viable road.

Mr. Billipp asked for clarification of the location of Ms. McKay's land. She stated that it is on the opposite side of the piece that had just been bought. She stated that she purchased her land in 1966 and that it had been owned by Jones at that time. Mr. Billipp asked if her piece had been part of the original 110 acres and she replied that it is a separate piece.

Mr. Billipp asked if the 40-foot right-of-way would be her access to her property and she indicated that it was. Mr. Billipp stated that he did not know whether or not the Code Enforcement Officer had been aware of the deeded right-of-way. He stated that, since the Board was considering an appellant review, the knowledge of the deeded right-of-way may not be germane.

Mr. Ciesleszko stated that he would ask the Code Enforcement Officer about that. He asked if the deeded right-of-way were across the lot that Ms. Kay abuts or across her own land. She stated that the right-of-way is on her father's property and that he had deeded her a part of that in order to have access to her own property.

Mary Lou Downes, 314 Beech Road, Eliot, ME stated that she owns two separate pieces of property on both sides of Fernald Lane. Mr. Ciesleszko stated that she is not an abutter. Ms. Downes stated that she never received any information about the building permit or the current appeal. She stated that since there would be a house constructed and an additional car going in out, she would be impacted. She wondered how she would not be considered as a person of interest who is going to be impacted by Ian's Way and a Fernald Lane extension. Mr. Ciesleszko stated that Ms. Downes' comments would be entertained when the Board talked to interested parties but that she was not an abutter.

Cathy Goodwin stated that she represented her father's estate (John Goucher) and his partner Glen Golloway (deceased) and his wife, Zoe Golloway, whose address is P.O. Box 605, York, ME and who is an abutter. She Goodwin stated that one of the missing pieces in the case is the survey which was done by a certified surveyor in 1989 during the time of the conflict over the access to Fernald Lane. She stated that it was a messy affair with very angry people and that it was a very unfortunate thing. She stated that the court was very clear.

Ms. Goodwin stated that during that time, her father anticipated that the opportunity might be there to sell lots after the court decision. He then had a survey done. She stated that although the survey does not mentioned Ian's Way, it does show Ian's way on the map. That road was a road which accessed many of the farms that were in that area at the time. When Cathy's family bought the land, she stated that they could see all

the way to Kittery. She stated that the road wound up and across Ms. Mills' property. She stated that the road was highly used and that was why her father decided to have Jerry Chase, a local contractor, do a gravel base on the road so that if Sally wanted to sell her lot, she would have that roadway. She added that at the time, it met the Town standard.

Ms. Goodwin stated that over the years, due to the lack of use of the property, the road became overgrown. She stated that at times, her husband and family would use chain saws to keep it cut back.

Ms. Goodwin stated that ~~the~~ Mr. Marchese did see the gravel base and she believed she gave him a copy of the survey.

She stated that the main point was that Keith's Lane was named after her father's first grandson and Ian's Way was named after Sally's first son. She stated that, regardless of whether or not it was established on a map, it exists as a family heritage. She stated that the naming of the roadway does not take away from the fact that it actually existed and had been improved to Town standard and that a 1989 survey shows it. She stated that it was their entire belief that Ian's Way was a valid roadway and that they had no reason not to believe that.

Mr. Billipp asked to see a copy of the survey. Ms. Goodwin showed the Board her copy. She stated that her father lived on the farm at that time and the rule at that time allowed division into thirds. As long as he lived there, he was allowed to divide the land into three pieces.

Mr. Cutting stated that if Ian's Way were a right-of-way, it would have to be recognized as such and not as a road unless it was recorded. Mr. Billipp stated that what mattered to the current appeal was what the Code Enforcement Officer knew when he made his decisions.

Mr. Billipp asked Ms. Goodwin if the survey plan was ever recorded and she replied that it was not.

Denise Long Letourneau of 15 Keith's Lane, Eliot, ME (lot 38-3) stated that she had lived there since 1986. She stated that they purchased the piece of property from John Goucher and that her piece of property was supposed to have been a right-of-way to the back piece of property. She stated that there was a road down her driveway cut into the back property, but there was nothing ever recorded. She stated that she did not see any difference between her unrecorded right-of-way and Ian's Way and added that she had never heard of Ian's Way as being in existence.

She stated that the right-of-way over her own property was used to access the back

property. She added that it was never recorded and that Mr. Goucher put in the road and then sold the property. She stated that Ian's Way was the same type of thing as far as she is concerned because she did not know it existed.

TESTIMONY FROM INTERESTED PARTIES

Mary Lou Downes of 314 Beech Road, Eliot, ME stated that she would be affected by any opening up of the back lots in the area. She wondered what impact that would have on the 49 ½-foot right-of-way that the judge in the 1989 Superior Court case limited to a 15-foot width. She stated that anything wider than 15 feet requires permission to cut down a tree that is larger than 4 inches. She said that it was her understanding that the road under discussion would not be able to meet Town standards.

Ms. Downes stated that opening up the back lot would have an impact on Fernald Lane and that everyone who is on that lane should be made aware and be provided information. She stated that she had not been made aware of a house going up or a road going in. She stated that she is going to be concerned about the issue, regardless of the fact that she is not an abutter. She stated that she would like to be kept better informed about the issue.

Mr. Cielezsko stated that he hoped Ms. Downes would find a way to keep herself in the loop, either through Ms. Mills or in some other manner. He stated that the Board did not have the authority to grant her request. He added that her recourse to guarantee up-to-date information on anything to do with Fernald Lane or any road is to make an ordinance that requires some sort of notification to everyone on a road. Ms. Downes stated that she thought ordinances were easily usurped or waived. Mr. Cielezsko stated that he thought she was wrong about that and she stated that she hoped she was wrong about that.

Mr. Marchese stated that on a weekly basis he prints out all of the building permits that have been issued and that there is also a link on the Town's website to view the building permits.

Margaret Mitchell, a real estate agent with Yorke Realty at 529 S Route One, Suite 101, York, ME 03903, stated that she was the listing agent for both the parcel that was sold and for the McKay parcel. She stated that as part of her listing process, she investigates whether or not she believes that a lot is buildable, although ultimately that is the Town's decision. She tries to do due diligence.

She stated that she had numerous conversations with the Code Enforcement Officer regarding the two parcels and the use of Ian's Way. She stated that he specifically discussed the deeds and that she assured him that they had deeded access that was stated in the deeds. He told her that he required a letter from Civil Consultants that

confirms that.

Ms. Mitchell stated that she found the easement to be public record and found the link online in the York County Registry of deeds. When she talked to Mr. Marchese, she told him that it was an existing right-of-way and there is a deed on record.

She stated that Mr. Marchese asked her if the right-of-way was in use and she told him that she had been driving on it. She said that she did not know how long the base had been there, but that she was routinely driving on it prior to the upgrade. She stated that she did note that there was an existing road of some type in the location. Mr. Marchese told her that it would need some type of inspection or verification prior to issuance of a building permit.

Ms. Mitchell stated that she also had a discussion with Ms. Mills regarding the right-of-way when Ms. Mills contacted her by phone regarding the parcel that was for sale and wanted to make an offer on it. Ms. Mitchell told Ms. Mills that the parcel was under contract but that the seller would entertain a back-up offer. Ms. Mills made an appointment and they did meet on April 13, 2012 at 10:00 AM at the office of Ms. Mitchell. At that time, Ms. Mitchell gave Ms. Mills a great deal of information on the parcel and they discussed the access to the parcel. Ms. Mills stated that she would have her attorney review the information and would make an offer the following week. Ms. Mitchell stated that the offer did not materialize but that they did continue to have phone conversations.

Ms. Mitchell stated that Ms Mills had told her she would like to have an easement to use the right-of-way. Ms. Mitchell stated that she was not an attorney but that she did not know if the right-of-way would be of use to her. Her own opinion was that the right-of-way was grandfathered to the two existing parcels of record.

Ms. Mitchell stated that there was never a specific price proffered for the easement but that she did make the seller aware of the interest. She stated that Ms. Mills told her several times that she would like the use of the right-of-way.

Ms. Mitchell stated that Ms. Mills had expressed an interest in purchasing or acquiring a portion of the McKay parcel, specifically the strip of upland that abuts her property. Ms. Mitchell stated that her opinion was that to strip off a portion would create an irregularly-shaped parcel and that towns don't usually like that. She asked Ms. Mills if she would like to purchase the entire portion across the back that abuts her property and she said that she would only be interested in the upland portion. When asked what she would offer for that portion, Ms. Mills stated that she did not think it had much value. Ms. Mitchell said that no price was ever proffered and nothing ever transpired.

Ms. Mitchell referred to the sketch plan included in the package, stating that the land was never intended to be two parcels. The sketch plan was an old, available sketch plan

that had been used for wetlands review and she included it as a way of defining the parcel. The land was offered and sold as one parcel with no intent to divide it.

Glenn Goodwin (Cathy Goodwin's husband) of 144 Cedar Road, Eliot, ME stated that he was present when the original Ian's Way was made. He stated it was not at that time called Ian's Way until after it was constructed. He stated that he saw the contractor put the gravel down and that the end which abuts the Mills property was formed like a cul-de-sac. He stated that the base was solid gravel about 14 feet wide and that he was also there when they did the second overcoat which was the recent upgrade. He stated that the original base was constructed in the mid-1970s.

Kevin Barrett of 4 Snoden Ridge, York, Me, who is the purchaser of the property under discussion, stated that their goal is to build a single-family home for their daughter, her husband and their three-month-old baby. He stated that they purchased the land because it was a great opportunity and they thought it was a beautiful piece of property in a great neighborhood.

Mr. Barrett stated that, as far as traffic goes, there would be another car or two. He added that during construction, there would be some trucks.

He stated that their deed requires membership in the association that was formed for Fernald lane for a fee of \$20/month. The association was formed in 1991 and he stated that they do accept the responsibility to help maintain the road which offset the use that they would have there.

Mr. Barrett stated that their desired process is a simple one and they are not trying to create issues. He stated that it was very confusing to them in the beginning when they found out that there were so many challenges. He added that the road known as Ian's Way is a beautiful road at this point and that, although it is not paved, it does have a great base. He stated that, prior to the road improvement, he had driven up the road and there was clearly material there that was completely different than anything on either side and it was completely flat and identifiable as a road.

Mr. Barrett stated that they planned to build a small house in which their daughter could settle and he hoped that it would all work out for them.

Denise Long Letourneau thanked Mr. Barrett for being willing to pay \$20/month. She stated that the fact of the matter is that those residents on Keith's Lane have a problem collecting that money and that they have no way of making people responsible for actually giving the association the money. She added that if more people come onto the lane and decide not to pay, they would not have to, even though the association exists. She stated that at times the lane has potholes that are 6 inches deep and so numerous that it takes from five to ten minutes to get down the lane. She stated that there is already so much traffic going up and down the lane that they cannot continuously

maintain it with the funds they have.

FURTHER QUESTIONS FOR CODE ENFORCEMENT OFFICER FROM THE BOARD

Chairman Cieleuszko asked Mr. Marchese if he had further information regarding his opinion that the property does not qualify as a back lot. Mr. Cieleuszko stated that Section 37-70 on streets and ways requires an 18-foot, paved way for a minor road with 15 lots or less.

Ms. Lemire asked where it was noted that the street had to be paved. Mr. Cieleuszko answered that the notation located in a column on page CD37-14 under Section 37-70.

Mr. Cieleuszko asked Mr. Marchese if there had been an error in judgment in determining the property to be a back lot. Mr. Marchese replied that there was an error on his part and that he had applied the back lot ordinance which allows a 15-foot-wide gravel surface. He stated that he should have required the purchasers to provide an 18-foot-wide, paved way to gain proper frontage.

Mr. Cieleuszko stated that once the consideration is not for a back lot, the rule limiting the length to 1,000 feet ~~still~~ applies and Mr. Marchese concurred.

Mr. Cieleuszko asked if the building permit had been improperly done with the information Mr. Marchese had had in hand. Mr. Marchese replied that in order for the roadway to be improved to create frontage, it should have been improved to be an 18-foot-wide, minor street. He questioned whether it made sense for someone to construct an island of paved roadway surface in the middle of the woods.

Mr. Cieleuszko stated that he did not understand why the lots under discussion were not back lots. He asked the Code Enforcement Officer if the only issue that was troubling him was that the surface of the road was not paved and Mr. Marchese said that that was correct.

Mr. Cieleuszko stated that frontage would need to be on a road which met Town standards and asked if there were any standards for a paved road in the middle of the woods. He had assumed the property was a back lot. Mr. Cieleuszko asked if the owners would meet requirements if they installed a paved road or would there be other aspects of code that preclude going from a non-conforming right-of-way to a tarred roadway, especially with the distance being over 1,000 feet.

Mr. Billipp stated that access to the property is along Fernald and turning onto Ian's Way with the frontage on Ian's Way, which is a reconstructed, previously-existing easement. He asked for clarification about the requirement in such a situation for an 18-foot-wide, paved road. Mr. Cieleuszko stated that the Code Enforcement Officer had

overlooked the fact that a gravel surface does not meet the requirements of a minor road.

Ms. Lemire asked if the access were a right-of-way or easement rather than a road. Mr. Cieleuszko stated that it is currently a road. Mr. Cutting stated that when the process began, it had been a right-of-way and that, somewhere along the way, it had been made into a road. Mr. Cutting stated that the roadway looked like it was in tough shape when the pictures in Ms. Mills' packet were taken.

Mr. Cieleuszko stated that in appellate review, the only consideration had to be what Mr. Marchese was looking at. He was told that Ian's Way existed. Mr. Cieleuszko stated that it was not far-fetched to think that Mr. Marchese believed the road existed, whether it was a right-of-way or not. He stated that the larger issue is that the roadway does not meet Town standards if it is covered with gravel and is over 1,000 feet.

Mr. Marchese stated that the back lot section of the ordinances states that, "in non-subdivision situations, one or two new back lots may be created and used if they can be provided with an access way that connects with a 'qualifying street'." He stated that Fernald Lane is not a qualifying street. Therefore, the back lot ordinance is not applicable for this situation.

Mr. Cieleuszko stated that Fernald Lane is part of the access way to the lot. He asked if there were a better possibility for the building to occur if the owners used the extension for frontage because any lot line can be used to meet the minimum requirements for frontage of 150 feet. He stated that as long as any lot line on the property has 150 feet of frontage, it can be considered a back lot. He asked if Fernald could have been used as a driveway for the entrance to the property. Mr. Marchese stated that that was not the way in which the information was presented to him.

Mr. Cutting referred to the residential and building and use permit that was issued on June 12, 2012 for reconstruction of Ian's Way frontage and asked for clarification that Ian's Way would have been allowable by the Town at that time. He stated that it was upgraded in order to be sufficient for the one-lot subdivision. The upgraded roadway was needed for the lot to be qualified. He asked if it were necessary for the Town to determine whether the lot was a subdivision or a back lot before the upgrade was done.

Mr. Cutting asked the Code Enforcement Officer how it was decided that the right-of-way could be a road that could be improved to meet Town standards. Mr. Marchese stated that he walked the site and documented what he saw.

Ms. Lemire referred to the Code Enforcement Officer's letter to Lorilynn Barrett dated June 22, 2012 which stated "The applicant needs to demonstrate that Fernald Lane will be improved to meet the minimum 18 foot travel way *or* will improve Ian's Way to meet this requirement." She stated that in order to get to Ian's Way the owners need to go

down Fernald Lane and that Fernald Lane is an access way or travel way, not a road.

Mr. Marchese stated that the issue of the *and/or* situation was brought up with the Town attorney and in his opinion, based on the rules of the ordinance, the owners have a choice to either improve Ian's Way or to improve Fernald Lane. Ms. Lemire stated that there would still be a substandard road between Beech Road and Ian's Way. Mr. Marchese stated that most connector roads that tie into an existing road meet Town ordinances.

Ms. Mills stated that the broker misrepresented their conversation. She added that she believed that Ian's Way existed on paper only. She stated that she saw Mr. Goodwin down there cutting trees and that there was no road at that time. When she asked him what he was doing, he stated that he was opening up that area so that people could come and use it if they wanted it because at that time they were trying to get a tax reduction. She stated that it still connects to Fernald and it is still part of the Fernald Lane 15-foot-wide criteria and is not a qualifying street. She stated that a dead-end road cannot exceed 1,000 feet, as addressed in street, back lot and subdivision ordinances. She stated that she had been in Board of Appeals meetings where applicants were denied permits based on the road limit.

She stated that Lot 38-50 had been considered one lot that could not be divided without meeting the town standards for the current ordinances. She added that they had been told all along that they had to meet Town standards and that was why they did not take the subdivision route. She added that they already had a subdivision with Keith's Lane and another regarding Sergeant's Lane. She stated that the owners of lot 38-50 were in the business of creating subdivisions but that they could not do that in the current case.

Ms. Mills stated that the current sale is a way to circumvent the subdivision rule and sell McKay's lot and a portion of the existing lot which cannot be legally broken apart because it does not meet the Town requirements to subdivide. She added that it still has to meet the basic ordinance which states that it is allowable to break apart two lots every five years.

David Hartman of 25 Keith's Lane, Eliot, ME stated that he collects the association dues and schedules the maintenance of Keith's Lane and Fernald Lane. He stated that Fernald Lane in parts is only eight feet wide. The dues collected pay for snow removal and two occasions of bringing in gravel and grading equipment in order control the potholes. He stated that the road does not drain well and the potholes quickly reappear. He stated that further traffic on the road would only make a bad situation worse.

Mr. Cielezsko stated that Ms. Mills had referenced the 1989 court referee's report Superior Court Civil #CV-88-319, Exhibit A. The report stated that the State is torn between the rights of the current owners on Fernald Lane and the person trying to get a place at the end. The established fact was that the public easement was 49 ½ feet in

length. The referee stated that "In Willband v Knox (1929) 128 ME 62, 71 our Court cited a number of State Court cases supporting its view of the extent of use a dominant estate may make of an easement not specifically limited. The Court quoted with evident approval Mahon v Tully, 245 Mass 571 in which it was stated, 'When an easement arises from an unrestricted grant or reservation, the measure of right or use is its availability for every reasonable use to which the dominant estate may be devoted, which may vary from time to time with what is necessary to constitute full enjoyment of the premises'."

Mr. Cielezsko stated that the decision of the referee at that time stated that a width of 15 feet was all that was necessary at that time. Because of the comment in the referee's report, Mr. Cielezsko wondered if the traveled way on Fernald could be widened to 18 feet if that is what is necessary at the current time in order for everyone to use the road successfully.

Mr. Cielezsko stated that Mr. Marchese had noted that access to Fernald Lane is a civil matter, as noted in Mr. Marchese's Attachment 1 in his package which stated "The applicant needs to demonstrate that Fernald Lane will be improved to meet the minimum 18 foot traveled way or will improve Ian's Way to meet this requirement." He stated that the 18-foot width is available through a court action.

Mr. Marchese stated that it seems as though the court is saying that in order for the access way to be enjoyed, the width may vary from time to time as necessary with minimum intrusion for the people who are already on the access way.

FINAL TESTIMONY FROM APPELLANT

Ms. Mills stated that the distance from Beech Road down to Fernald in the deeds that were just transferred was specifically stated as 1,002 feet to the new proposed road. That distance plus the proposed 500 feet for Ian's Way would exceed the 1,000-foot limit for a dead-end street.

Lorilyn Barrett, the owner of the property which was granted the building permit in question, stated that in reference to the deed, the length of 1,002 feet (plus or minus) is approximate and is not a point-to-point reference. It is her understanding that there is room for potential error. She stated that the Code Enforcement Officer did have the information on the deed before issuing the building permit.

Ms. Letourneau stated that she measured the distance with a wheel and that it measured over 1,000 feet.

The public meeting was closed at 9:20 PM.

FINDINGS OF FACT

- The Board has the authority under section 45-49, part A, on Administrative Appeals to hear and advocate this case.
- Ms. Mills has standing under section 45-50, part B2, as a person whose land abuts the lot 38-50.
- Ms. Mills' appeal is timely since it was dated as received August 10, 2012, by the Town clerk on permits #12/64 issued on July 11, 2012 and #12/72 issued July 20, 2012.
- The lot in question is identified as a portion of Map 38, Lot 50 in Eliot tax maps. The lot has been deeded but has not been assigned a map and lot number.
- The lot size is 4.18 acres.
- The owners of the property are Lorilyn and Kevin Barrett as of July 22, 2012.
- Frontage on Ian Way, as testified, is approximately 500 feet.
- The lot was established with a deed recorded on July 22, 2012. The lot is in the Suburban Zone.
- Suburban Zone requires two acres minimum with a 150-foot frontage minimum.
- It was testified that the Code Enforcement Officer had access to all information that Ms. Mills presented in her packet at the time he made his decision on the road improvement permit and the building permit.
- Fernald Way is an abandoned roadway and is not under the jurisdiction of the Town of Eliot.
- It appears, from information provided by the Code Enforcement Officer, that Fernald Lane is slightly over 1000 feet in length.
- No evidence was presented to support the correspondence between the Town's attorney and the Code Enforcement Officer.

DISCUSSION

Mr. Ciesleszko stated that they did not have access to the letter from the Town's attorney, only to the results that Mr. Marchese drew from that letter. The evidence of the letter had not been presented to the Board, though Mr. Marchese did state that he did talk to the attorney.

Mr. Hamilton stated that Mr. Marchese appeared to have made a decision to corroborate his own feelings based on what the attorney said. Mr. Hamilton stated that since the Board had not seen the documentation, the Board had to determine whether the decision was correct without the letter. He added that that was a big loss.

Mr. Ciesleszko stated that, in actuality, the attorney's opinion did not negate anyone's interpretation of the ordinance.

Mr. Cielezsko stated that in an administrative appeal, the Code Enforcement Officer had to violate or misinterpret the ordinance.

Mr. Hamilton stated that part of the reasoning Mr. Marchese had used in his decision would have been his interpretation of the attorney's letter. He stated that there may have been something in the attorney's letter that the Board might have interpreted differently, but that determination could not be made without evidence of the letter. He stated that the letter seemed to be weighing heavily in Mr. Marchese's decision. Mr. Cielezsko stated that the letter may not have been influential in the decision.

Mr. Hamilton asked the Chairman if he thought the Board should recall the attorney's letter and Mr. Cielezsko replied in the negative.

Mr. Lytle asked if the attorney had been involved in the issue the last time it arose in 1989. He wanted to know if the guidance given then by the attorney was different than that given currently. Mr. Billipp stated that it was the current decision made by Mr. Marchese that the Board had to talk about rather than what happened in 1989. Mr. Cielezsko stated that the Board had to make their decision based on the current ordinances and the information presented in the packages from the appellant and the Code Enforcement Officer.

Mr. Lytle stated that he wanted the absence of documentation of the attorney's letter listed in the Findings of Fact. Mr. Cielezsko stated that it is a valid Finding of Fact that there was correspondence between the attorney and the Code Enforcement Officer which the Board had no evidence to support.

Mr. Cielezsko stated that the Board of Appeals may modify or reverse an action of the Planning Board or Code Enforcement Officer by a concurring vote of at least three members only upon a finding that the decision is clearly contrary to specific provisions of Chapter 45.

He stated that there were two decisions and that he did not have any problems with construction of a road anywhere on an owner's property. He did have problems with the second one, the building permit, and did not agree with that decision. If looked at with the information that was supplied, that it was a regular house lot and not a back lot, the Code Enforcement Officer assumed that he had road frontage where there is none.

Mr. Cielezsko stated that the 1,000-foot limit for a dead-end road is insurmountable. Mr. Hamilton asked if that pertained to the building permit or the road permit. Mr. Cielezsko stated it regarded the building permit because Ian's Way is basically worthless. Mr. Billipp stated that the issue of Ian's Way did not trigger a wrong decision until it was decided to build a house on it.

Mr. Cielezsko stated that it would be possible for the Board to make both decisions in one vote by stating that the road was constructed within the ordinances and the building permit was not, by approving both or by denying both.

Mr. Hamilton stated that there was an issue of two necessary access points which had been raised by Ms. Mills during testimony. Under the streets and sidewalks section of the ordinances (37-69e), it states that "Subdivisions containing 15 lots or more shall provide a minimum of two access points to public streets or public roads previously accepted, acquired or laid out and taken by the town or state." He stated that he would interpret the word "subdivision" as meaning divisions of lots, not as a subdivision as a single entity. He stated that the ruling is not in the Subdivision section of the ordinances but is in the Streets and Sidewalks section. He stated that a separate subdivision is created as an entity with a plot map.

Mr. Hamilton stated that he thought the intent of the ordinance was to prevent inadequate roads from accessing more than 15 lots. He added that the ordinance tries to protect streets from overdevelopment by additional houses on substandard road and that in the current case, there are 15 lots being accessed by inadequate road systems.

Mr. Hamilton stated that the appellant had brought up the issue of two access points but that the issue had not been discussed by the Board. He cited from her package information that there are "14 house lots between Fernald Lane and Keith's Lane plus one with frontage on Beech now serviced by this inferior road" and that "further development requires two access points and upgrades to both roads to comply with current road standards." Mr. Billipp stated that there would be an additional house lot of the 4.1 acres on which the new owners want to build a house.

Mr. Billipp indicated that his initial determination would be that the area is not a subdivision. He stated that he thought the ordinance applied to newly-created subdivisions. He stated that as Mr. Hamilton interpreted the ordinance, it didn't matter whether or not the 14 lots were called a subdivision if they were served by a road. Mr. Hamilton replied that the sense of the ordinance was that the intent was to prevent streets and sidewalks from overuse, which is the reason the ruling appears in the Streets and Sidewalks section of the ordinances.

Mr. Billipp stated that the definition of a subdivision is "the division of a tract or parcel of land into three or more lots within any five-year period." Mr. Hamilton stated that the definition was for *a* subdivision but that he was looking at the word as a verb, as divisions of land rather than one division. Mr. Cielezsko stated that the ordinance uses the term "divisions of land" in discussing things that are not subdivisions.

Mr. Lytle stated that in his letter of 1989, John Rothwell addressed the issue of subdivision requests in the same area when he denied a building permit, stating "this position has been taken in order not to compound the problems already prevalent in

the area. Article #810 of the Town of Eliot Subdivision Ordinance charges both the Planning Board and the Code Enforcement Officer to regulate the land use in this manner. The Selectmen do not issue Building Permits but they do recommend to a Town Meeting denial or acceptance of a road.”

Mr. Billipp stated that the Board needed to get back to what information the Code Enforcement Officer had and whether his decision was the correct decision based on what was heard during the current hearing.

Mr. Cielezsko stated that the Board has the authority to modify or reverse an action of the Code Enforcement Officer. He recommended making a decision on both permits in a single motion and that the decision on the building permit be denied so that the owner could look at the situation as a new way and start the process over.

He stated that he thought there would be a way to build on the lot, but not in the way currently being considered. In the current situation, the length of over 1,000 feet and the frontage are wrong and he did not think the permit allowable. He added that the new owner could pursue the possibility of building a road or asking for a variance.

Mr. Hamilton stated that under the street standards, the distance between the closed end of a dead-end street and the nearest non-dead-end street shall not exceed 1,000 feet and the Planning Board may not waive the 1,000-foot limit. Mr. Cielezsko stated the standard did not say that it was not allowable for the Board of Appeals to waive the limit.

Mr. Cielezsko recommended that the decision regarding both permits be addressed in a single motion. Mr. Billipp stated that the permits are related in that the road reconstruction was being done in order for the lot to be sold. He stated that perhaps Mr. Marchese should have realized that the road reconstruction permit was not correct and that it should not have been approved.

Mr. Cielezsko stated that in the application, it stated that the owners had to meet all aspects of Section 37. He stated that there is no indication in the road permit that a building permit would be requested for the lot abutting the easement.

He stated that the Code Enforcement Officer would have to be clearly contrary to specific provisions for the appeal to be granted. The distance between the end of Ian’s Way and Beech road, under the road construction permit, becomes 1,500 feet and is against the ordinance for a buildable lot.

Mr. Hamilton stated that on the application for the road reconstruction, it states “reconstruction of Ian’s Way frontage.” He questioned the use of the word “frontage” if it did not imply a future building permit. He stated that it clearly implies frontage and not just reconstruction of Ian’s Way. He added that it appeared that the only reason for

improving the roadway was to sell the lot and that, therefore, the Code Enforcement Officer may have made a mistake by approving the frontage. He stated that it was clear that the road construction permit was designated for frontage and not just for use as a road.

Mr. Billipp stated that immediately upon completion of the roadway and inspection by the highway commissioner, the building permit was applied for.

Mr. Billipp brought up the point that Eliot's minimum house size is 650 feet according to the ordinance for Suburban Zoning, but that the owner's building permit requested a building of 320 feet with one story, one bedroom and one bath and no garage for the total of \$30,000.

Mr. Cutting cited Mr. Marchese's letter of June 22, 2012 which stated, "In regards to your question regarding the minimum house size the State of Maine has adopted the 2009 International Residential Building Code, Section 304 which indicates that every dwelling shall have at least one habitable room that shall not have less than 120 square feet of gross floor area."

Mr. Billipp asked which code would take precedent between the State and the Town. He stated that the Code Enforcement Officer seemed to be aware that there was a conflict and brought in the State code of 120 square feet to justify the permit. Mr. Hamilton stated that in Eliot's code, in a conflict between the State and Town ordinances, the stricter of the two shall prevail.

MOTION

Mr. Hamilton made a motion to grant the appellant's request for an administrative appeal and rescind both the road permit #12/64 and the building permit #12/72 because the Code Enforcement Officer acted clearly contrary to code in both instances. Mr. Lytle seconded the motion.

DISCUSSION

Mr. Hamilton stated that the prior discussion led him to the conclusion that, regardless of other issues, the building permit alone with the listed square footage does not seem justifiable. He stated that the construction permit for the road did not sound correct either because it allowed construction for frontage purposes.

Mr. Billipp stated that he agreed with Mr. Hamilton's comments and also felt that another major factor was the fact that the roadway including Ian's Way is close to 1,500 feet from Beech, which is clearly over 50% above what is allowed by code. He stated

that those considerations led him to believe that the permit was issued in error.

Mr. Cutting and Mr. Lytle were both in agreement with both issues.

Mr. Billipp stated that the reconstructed roadway is well over 1,000 feet and is not paved, which would be required as frontage for a regular lot (not a back lot). Mr. Cielezsko affirmed that Section 37-71 on street construction standards states that surface gravel is not allowed on a minor street and that Section 37-69f states that the distance between the end of a dead-end street and the nearest non-dead-end street shall not exceed 1,000 feet.

In considering the building permit, Mr. Billipp stated that the street as constructed does not meet code to support the frontage requirement on a conforming street for a building lot. The 500-foot frontage used to grant the building permit does not meet the requirements of Section 45-405.

The application referencing a building of 320 square feet does not meet the minimum standard of the Ordinance in Section 45-405 requiring the minimum size of dwelling units to be 650 square feet.

DECISION

Based on the above facts and conclusions, the Board of Appeals voted unanimously in favor of the appellant to grant the appeal and rescind both the road permit #12/64 and the building permit #12/72. Voting in favor were Peter Billipp, Bill Hamilton, Philip Lytle and Jeff Cutting, none voting against.

Mr. Cielezsko stated that Ms. Mills request had been granted. He stated that she would receive a Notice of Decision within seven days stating that the results of the appeal and that it would also be in the hands of the Code Enforcement Officer. He added that any abutter present in the room or the owner of the land could appeal the decision to the Superior Court within 45 days.

REVIEW AND APPROVAL OF MINUTES

Mr. Lytle made a motion to approve the minutes of August 16, 2012. Ms. Lemire seconded the motion. All voted in favor.

OTHER BUSINESS

Mr. Marchese thanked the Board and stated that he had had a few oversights in the

issuing of the permits and he appreciated the Board's comments.

Mr. Marchese stated that the fee schedule was discussed in the first public hearing by the Planning Board and that the Board of Appeals will have a \$150 fee for an administrative appeal.

He stated that the Planning Board decided to put the animal control ordinance on hold because in a public hearing, there was a large group that was against it and a large group that was for it. The Board thought it necessary to revisit the issue and come up with another solution.

He added that consideration of the Town's acceptance of innovative technologies regarding permeable driveway surfaces had also been tabled.

Mr. Cielezsko stated that he had attended a Board of Selectmen's meeting and that they recommended lessons on the video streaming camera. Although there is no order to have the meetings available, the Selectmen do recommend it highly.

Ms. Lemire stated that the streaming would be available on a designated web site. Mr. Cielezsko stated that the Board of Appeals meetings would be recorded starting with the next meeting. He agreed with Ms. Lemire that both he and the vice-chairman needed to be trained on the process first. She added that Boards and committees that are planning to be video streamed need to let the Town know so that the computer can be programmed.

The meeting was adjourned at 10:26 PM.

Respectfully submitted:

Linda G. Keefe, recording secretary

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

Date Approved: October 18, 2012