TOWN OF ELIOT – BOARD OF APPEALS MEETING

October 17, 2013

ROLL CALL

Present: Chairman Edward Cieleszko, Vice-Chairman Peter Billipp, Secretary Bill Hamilton, Jeff Cutting, Ellen Lemire and Associate Member John Marshall.

Others Present: Code Enforcement Officer Jim Marchese; Michael Hennessey and Donna York, appellants; abutters and other interested parties.

CALL TO ORDER

Chairman Cieleszko called the meeting to order at 7:00 PM. He stated that the meeting was being streamed live on the internet.

Chairman Cieleszko stated that the procedure for the public hearing would be as follows:

- The meeting will be opened.
- Voting members will be determined
- The request will be summarized.
- The parties to the action will be determined.
- The jurisdiction, timeliness and standing of the appellants will be determined.
- The appellant will present uninterrupted testimony and may present anything she would like to present as long as it is pertinent to the case.
- The Board will question the appellant.
- The Code Enforcement Officer will present testimony.
- The Board will question the CEO.
- Other parties to the action, including abutters, will present testimony.
- The Board will question the parties.
- Other interested observers will have a chance to testify.
- The appellant will make the last statement and take any last questions from the Board.
- The public hearing will be closed.
- The Board will begin deliberations starting with the findings of fact. They will discuss their duties and what authority they have. They will then make a motion, discuss the motion and, hopefully, come to a conclusion.

- If the decision goes beyond the current hearing, the next date to hear the case will be determined and that determination will be the only notice given. There will be no mailings to abutters regarding further meetings.
- If a decision is reached, the appellant will receive a Notice of Decision within seven days.
- Anything granted must be recorded with the York County Registry of Deeds and a copy of the paperwork delivered within 90 days to the Code Enforcement Officer. If this is not accomplished, the decision becomes moot.
- Any decision can be appealed to the Superior Court within 45 days.

Ms. Lemire recused herself from the Board because she had issues with the case. Chairman Cieleszko stated that she would be considered an interested party if she wanted to make comments regarding the case.

Chairman Cieleszko stated that the voting members would be John Marshall, Bill Hamilton, Peter Billipp and Jeff Cutting. He stated that he would vote only in the event of a tie.

REQUEST SUMMARY

Chairman Cieleszko stated that the request was for a variance request to Article 1, Section 45-405, side setbacks, by Michael Hennessey and Donna York of 65 Wildlbrook Lane, Tax map 89, Lot 17.

TESTIMONY FROM APPELLANT

Michael Hennessey stated that their issue is a simple one. He stated that they are 20 inches too close to the property line on the front of the garage and that the back of the garage foundation was poured before that discovery was made.

Mr. Hennessey stated that the information he used consisted of conversation with neighbors and walking the entire property with the developer. He stated that he got an aerial map from the Code Enforcement Officer which lined up with what the neighbors and developer had said. He stated that there was a pin in the road which he assumed was a property marker and that that was what they had measured from.

Mr. Hennessey stated that he thought they had the correct information so they measured in 20 feet from the pin and added a few feet just in case. He stated that the lot was narrow in the front and he was so afraid to make an error on the side of the garage that they measured 20 feet and then added a few more feet just to be safe. He stated that he did not just guess and that he did use the information he had been given. He stated that he even asked the developer to walk the entire property with him.

He stated that the walk with the developer, the statements from the neighbors and the map from the CEO sealed his decision and he measured from what he thought was an accurate pin in the road.

QUESTIONS FOR APPELLANT FROM THE BOARD

Mr. Marshall asked if the appellant had to have an inspection by the Code Enforcement Officer before the footing was poured, another inspection before the foundation was poured and another inspection before back filling. Mr. Hennessey stated that that was correct. Mr. Marshall asked if any of those inspections caught the discrepancy and Mr. Hennessey replied that they had not.

Mr. Billipp asked if the appellant had a boundary survey of the lot. Mr. Hennessey replied that they did have one currently. He stated that the bank where they applied for a loan told them they had to have a survey before they could close on the loan. He stated that when the bank did the survey, they had already started on the house.

Mr. Hennessey stated that the bank called him and told him that they had the side setback issue. He stated that he called the CEO on the day the bank informed him of the issue and that the CEO said that he had to stop work immediately. He stated that as soon as he knew about the issue, he did let the CEO know and did not withhold information. He stated that before that, he had not heard about a foundation certification.

Mr. Billipp stated that the neighborhood is a subdivision and asked if Mr. Hennessey had seen a subdivision plan that shows the specific boundaries. Mr. Hennessey stated that he saw the developer's plot plan and that the information agreed with the information he had received from the CEO and with what the neighbors had said. He stated that he assumed his measurements were correct and that that was an assumption he would never make again.

Mr. Billipp asked if Mr. Hennessey was the general contractor as well as being the owner. Mr. Hennessey concurred. He stated that his business is in rehabbing old buildings but that he has never built a house and would probably never do it again. He stated that most of the contractors he works with go to his church, Eliot Baptist Church.

Mr. Hennessey stated that he made the best decision he could make based on the information he had.

Mr. Billipp asked for the name of the bank's survey company and Mr. Hennessey replied that it was Norway Plains. Mr. Hennessey stated that he had been referred to TJM but

that it would have been $3000 to do the work and that his budget was tight so he decided to wait. He added that then the bank used Norway Plains.

Mr. Hennessey stated that the surveyor could only find one pin located in the stone wall at the back of the property. He stated that the developer had a lot of issues.

Mr. Cutting asked if Mr. Hennessey started the project before he arranged bank financing. Mr. Hennessey stated that he went to the bank after he started the project because he had a line of credit. He stated that in hindsight he now realized that if he had gone to the bank first, before he poured the foundation, he would have realized that he needed a foundation certification and he would then not have had the current problem.

Mr. Cutting clarified that Mr. Hennessey started the project with his own cash and then went to the bank when he reached the point where he needed financing. Mr. Hennessey concurred.

Chairman Cieleszko asked if Mr. Hennessey had the survey from Norway Plains. Mr. Hennessey stated that he had the large to-scale copy and that he had included a miniaturized copy in the BOA packet of information. Chairman Cieleszko asked how accurate the information was. Mr. Hennessey replied his large copy was stamped and that it should be completely accurate.

Chairman Cieleszko clarified that the appellant was 20 inches closer to Wildbrook Lane than the ordinance allowed. Mr. Hennessey concurred but stated that the distance excluded the overhang because he did not realize that the overhang was not included. He stated that an additional 8 ½ to 9 inches would be needed for the overhang and that he could reduce the overhang but that the electrical mast was already installed and framed. Chairman Cieleszko clarified that the 20-inch measurement was to the sheathing. Mr. Hennessey concurred and added that an additional 8 ½ to 9 inches were added when the last piece of trim was installed.

Chairman Cieleszko asked if the measurement needed was 29 inches. Mr. Hennessey stated that there needed to be 29 inches in the front corner and 13 inches to the back corner including the overhang. He stated that if a few inches make a difference, he could cut off the overhang.

Chairman Cieleszko stated that by State law, the appellant has to meet four criteria if the variance was to be granted. He noted that the appellant had provided written responses. He stated that he was having a bit of trouble with the first criteria which states that the land in question cannot yield a reasonable return without the variance.

Chairman Cieleszko asked the appellant how he had gotten the Stop Work Order. Mr. Hennessey stated that when he first told the CEO about the discrepancy, the CEO told

him that he had to stop work immediately. He stated that he then wrote a letter to the CEO asking if they had to stop work on the house.

Mr. Hennessey stated that his framer also talked to the CEO to explain how they could reduce the structure if necessary by taking a saw to it, digging up the foundation, redoing a new footer and that that process would be expensive. Chairman Cieleszko asked whether there was a cellar or a pad under the house and Mr. Hennessey replied that there was a pad. He stated that it included a four-foot frost wall.

Ms. York stated that they also cannot close on their loan until the situation is resolved.

Chairman Cieleszko clarified that once the CEO saw a plan to address the issue and fall within the proper setback, the Stop Work Order was rescinded. Mr. Hennessey concurred. He stated that he told the CEO that he either needed a variance or that he would either have to cut 20 inches off of the building or buy 20 inches from a neighbor. He stated that that was not his desired plan, but the resolution would be by one of those three avenues.

Chairman Cieleszko stated that the fourth criteria to be met for a variance requires that the hardship is not a result of action taken by the appellant or a prior owner. Mr. Hennessey stated that he made the decision and made the measurement but that it was based on information that he had received. He stated that he did not rely only on the neighbors or the developer because the map from the CEO showed the line.

Mr. Hennessey restated that even though the decision to build the house was ultimately his decision, he based that decision on information he had received from the CEO and that he made an assumption that the information was accurate. Chairman Cieleszko asked if the CEO had told him that he was within the setback. Mr. Hennessey stated that he told the CEO that he was within the setback because the map showed where the property line was and he based his measurement on that, adding a few extra feet to be safe. He added that he made the measurement based on information that was given to him rather than on information he researched himself.

Mr. Marshall asked what the neighbors' responses had been. Mr. Hennessey stated that it has been stressful. He stated that he tried to resolve the issue by purchasing some of the land from the neighbor but that they could not come to an agreement. Mr. Marshall stated that similar problems had been resolved by a land swap. Mr. Hennessey stated that he would be open to that.

Mr. Billipp stated that he noted that the deed the appellant received from JMACK Builders refers to an Exhibit A, Legal Description, and it refers to a Standard Boundary Survey Subdivision Reconfiguration of Tax Map No. 89 by J.A. Davis & Associates dated 2000. He stated that he did not have that plan in front of him, but that it refers to a

recorded subdivision plan which would have very exact dimensions even if it did not have pins. Mr. Billipp stated that that document should have been consulted to determine where the boundaries were.

Chairman Cieleszko asked if the appellant had seen the subdivision plan. Mr. Hennessey stated that he did not remember.

Mr. Marshall asked if his own relationship to the previous owner of the property made a difference to the Board. Chairman Cieleszko stated that it would make a difference if it would bias Mr. Marshall's opinion. Mr. Marshall stated that it did not appear that it would. Chairman Cieleszko stated that he also did not see the appearance of bias. He added that Eliot is a small Town and everybody knows everybody. Mr. Billipp stated that if Mr. Marshall felt that he had an issue, the Board would respect that if Mr. Marshall wanted to step down. Mr. Marshall did not think there would be any issue with bias.

Mr. Cutting referred to the sketch provided by the appellant and asked what was located to the side of the garage. Mr. Hennessey replied that the property next to the house was theirs for 18 feet. He pointed out the location of the neighbor's driveway and his own driveway.

TESTIMONY FROM CODE ENFORCEMENT OFFICER

Mr. Marchese presented the Board with a full-size survey which the appellant had provided that afternoon and also presented the original subdivision plan. He stated that there is no indication of any markers on any of the boundary plans for the lot in question. He stated that typically the surveyor would have some type of symbol showing but that there is none on the plans.

Mr. Marchese stated that he thought that Mr. Hennessey did make an honest mistake and that it was not intentional. He stated that Mr. Hennessey had had an inspection done, as required, for the foundation and that a copy of the inspection report had been included in packet of information for the BOA. He stated that it was done on June 26, 2013.

Mr. Marchese stated that at that time, he asked Mr. Hennessey how he laid out the foundation and the appellant indicated that he had had TJW survey do the work in agreement with the abutter. He stated that the appellant showed him where the line was located and the CEO measured the distance as 24 to 25 feet from that line to the foundation. He stated that later Mr. Hennessey dropped off the Mortgage and Loan Sketch and that the CEO called the surveyor to find out what the accuracy of the loan

sketch was. The surveyor stated that the accuracy of the line was pretty good and that they would stand behind their number of 18.4 feet to the sheathing of the building.

Mr. Marchese stated that once he had received the information from the Mortgage and Loan survey, he issued a Stop Work Order. He stated that a week later Mr. Hennessey came in with a set of plans that showed a revision in which they would move the wall back to meet the requirement. He stated that in order to save time and money, Mr. Hennessey was seeking a variance for relief from the situation.

QUESTIONS FOR CEO FROM THE BOARD

Mr. Marshall stated that he had a problem with the fact that there had been three inspections and the problem did not get noted. The CEO replied that his function was as Code Enforcement Officer and that he is not a surveyor and that he must rely on the word provided by the people on-site. He stated that if there is a construction stake in the ground, he has no way of knowing whether the stake is accurately located. He stated that is not the responsibility of a CEO to make sure that a building is located properly on the lot. He stated that he does not have the equipment or necessary tools to do that type of work.

Chairman Cieleszko asked if the mortgage survey was of lesser accuracy that a registered survey. The CEO replied that it was a Class D Survey. He stated that that was the reason he called the surveyor to determine the level of accuracy. Chairman Cieleszko stated that it appeared that the surveyor overlaid the old subdivision plan and then put in the house lot. The CEO stated that they would have measured with a much greater level of accuracy than that which was shown on the sketch.

Mr. Marchese stated that boundary line has now been monumented. Chairman Cieleszko asked who performed that work and the CEO replied that he believed it was done by Norway Plains.

Chairman Cieleszko asked if the reason the Stop Work Order was rescinded was that a plan was presented which demonstrated that the appellant could meet the setback requirement. The CEO concurred. Chairman Cieleszko asked if an estimated value of the changes had been determined. The CEO replied in the negative.

Mr. Hamilton asked if there had been any work done after the Stop Work Order was rescinded. The CEO stated that work proceeded on the structure at the owner's risk. The CEO stated that he wrote a letter to the appellant, dated September 12, 2012, which informed the appellant that he could proceed with the work. He added that, "An occupancy permit will not be issued until a stamped survey of the parcel that includes all setbacks to the structure is obtained." The CEO stated that he would not issue an

occupancy permit until a survey was done to determine that the requirements had been met.

Mr. Billipp asked if the plan submitted by Mike Cooper indicated that the appellant was going to make the required changes. The CEO replied that the contractor's plan was to make the building smaller to meet the required setback.

Mr. Billipp stated that he visited the property today and that he noticed a string very tightly drawn between some pins opposite the side of the garage and asked if that was the boundary line that had been established by Norway Plains. The CEO stated that when he did the framing inspection the day before the string was not there. Mr. Hennessey stated that he had put the string there in order to measure from it.

TESTIMONY FROM ABUTTERS

Ron Bohunsky of 66 Wildbrook Lane stated that the measurement of 18 inches was pretty immaterial to him. He stated that he heard about juggling of the lines around and that just moving the string was not an option. He stated his property line went right to the edge of the cul-de-sac and that he owns Mr. Hennessey's driveway. He stated that just moving the string a foot or two or even just several inches would not correct the problem.

Mr. Bohunsky stated that the other problem is that one needs 100 feet of road frontage in a cul-de-sac and that he has 101 feet. He stated that one also needs three acres as a minimum building lot in the Town of Eliot and that he has 3.165 acres and that therefore he has no room to move. He stated that he could not give any property up front and that he was not going to adjust their deed or have the property resurveyed for something that could become really complicated.

Mr. Bohunsky stated that he was willing to let the issue proceed but that he thought the driveway issue should be brought into the picture.

Sherry Davis of 66 Wildbrook Lane stated that she feels that she has been put in a really awkward position with her new neighbors-to-be and that she surely does not want to create bad will and that she had said that right from the start. She stated that there had been some misstatements made during the hearing.

Ms. Davis stated that Mr. Hennessey made lines that she did not even know existed and that she never agreed to the lines. She stated that she was just watching him proceed. She stated that the lines have been moved three or four times and that it has been stressful for her. She stated that she did not want to cause Mr. Hennessey any bad will or heartache and she wanted to make that clear.

Ms. Davis stated that the reason she and Mr. Bohunsky did not want to negotiate was that they did not want to get involved and that they just wanted to have their property clean with no cut-outs. She stated that they just wanted to be doing their own thing and not to have conflict with their neighbors. She stated that she did not wish Mr. Hennessey bad will but that she wanted to make sure she was not being misrepresented or misstated.

Ms. Davis stated that they had just been observing what had been going on and that there had been lines pulled all over their yard and people all over the place. She stated that the problem originates with the Town's lack of support of the whole project from the beginning. She stated that they had been destroyed over and over again with the project. She stated that they don't have Town plowing and have to pay for their own plowing. She stated that she has had conflict with the neighbors from the start and that it has been frustrating to feel unsupported. She added that all of the neighbors went into the project with good will and that it has been nothing but heartache for 10 years.

Mr. Bohunsky stated that the 18-inch setback was a "done deal" and that he did not want the Hennesseys to spend a small fortune to cut such a small portion of their building off. He stated that he just wanted his lines to be correct as they are currently surveyed.

QUESTIONS FOR ABUTTER FROM THE BOARD

Mr. Billipp stated that Mr. Bohunsky had mentioned that the Hennessey driveway goes across his property. Ms. Davis stated that since this issue was raised, they had spoken to a surveyor on their own behalf to continue to mark their property. She stated that it made sense to do it currently since it was never done originally. She also spoke to an attorney and to a friend in real estate.

Ms. Davis stated that the surveyor told them that part of Mr. Hennessey's driveway is on her property. She stated that that constituted the second line of dimensions which had been pulled. She stated that there were pins in her interior lawn up until about a week or two ago and that they have been moved back out closer to the edge of the property. She stated that as it is pinned currently, it is different than it was two weeks ago.

Mr. Billipp stated that from the information presented to the BOA, he did not see how the Hennessey driveway could be on Ms. Davis' and Mr. Bohunsky's property. Mr. Bohunsky replied that none of the plot plans would show Mr. Hennessey's driveway because the plans are not current. Ms. Davis stated that they were not aware of the

problem until a day or two ago when the surveyor brought it to their attention. She stated that the situation is causing fall-out for them that they were not even aware of.

Mr. Billipp stated that he had seen the preliminary driveway when he visited the neighborhood and asked if that driveway was partially on Mr. Bohunsky's property. Mr. Bohunsky stated that if the surveyed line went straight out to the cul-de-sac, then the driveway was partially on his property.

Ms. Davis stated that they were going on the basis of what the surveyor told them and that she did not have the dimensions. She added that the surveyor was forewarning them and that is what she was relaying. She stated that she and Mr. Bohunsky were caught in the middle of several conversations.

TESTIMONY FROM ABUTTER

Jessica Donahue of 63 Wildbrook Lane stated that her driveway is on Mr. Hennessey's property. She stated that most of her front lawn is on Mr. Hennessey's property which became known when the survey was done. She stated that she had not been aware or the issue according to the original plans she reviewed when she bought the house in February. She stated that all of the lines that the Town and her realtor had were inaccurate.

QUESTIONS FOR ABUTTER FROM THE BOARD

Chairman Cieleszko asked if Ms. Donahue had any road frontage. She replied that she did not.

Chairman Cieleszko asked Mr. Hennessey if he would like to explain the driveway plan. Mr. Hennessey stated that the very end of his driveway crosses the neighbor's property and that he plans to move the end of the driveway over 5 feet and will re-seed. Mr. Hennessey stated that he had asked Norway Plains to set pins and that the driveway pin was included.

TESTIMONY FROM INTERESTED PARTIES

There was no testimony from interested parties.

FINAL STATEMENT FROM APPELLANT

Ms. York thanked everyone for their support and stated that she wanted to do the best for everybody. She stated that their plan which they proposed in order to start work again was a three-tier plan. She stated that the first tier was going for a variance, the second was to purchase or swap land and the third was reconstruction.

FINAL QUESTIONS FOR APPELLANT FROM BOARD

Chairman Cieleszko asked if there was an estimated price for reconstruction. Mr. Hennessey replied that the framer thought it would cost about $12,000 to $15,000. He stated that he would have to have an excavator dig out the footing, cut the cement back, build a new frost wall and cut one of the garage doors. He added that the design would then look weird as a seven-foot door when the two other doors are nine feet. Ms. York stated that it would unfortunately change the balance.

Mr. Hennessey stated that they would also have to have the electrical system removed, all of the mast and disconnects removed.

Ms. York stated that reconstruction would detract from the overall appearance.

Chairman Cieleszko asked for the value of the full property currently. Mr. Hennessey stated that he had been quoted $495,000. Chairman Cieleszko asked if that value included the current construction as it stands right now. The appellants stated that they did not know.

Chairman Cieleszko asked what the taxes are on the property. Mr. Hennessey stated that he thought they were $1900 but that they had not gotten a tax bill yet. He stated that it was a messed up deal from the beginning because when JMACK had to buy the land back from the Town so that the Hennesseys could buy it, the Town made JMACK pay the taxes for a year ahead. He stated that they had been paid through the next two billing cycles. Mr. Marshall clarified that those taxes were only against the land not including the structure.

PUBLIC HEARING CLOSED

The public hearing was closed at 7:48 PM.

FINDINGS OF FACT

- The appellants are Michael Hennessey and Donna York.
- The mailing address of the appellants is 65 Wildbrook Lane, Eliot, Maine 03903.
- The property in question is 65 Wildbrook Lane, Eliot, Maine.
- Ownership of the property is proven by Deed Book 16603, Page 417 of the York County Registry of Deeds.
- The lot is identified on the Eliot Tax Maps as Map 89, Lot 17.
- The lot size is 9.6 acres.
- The lot is located in the Rural Zone.
- The appellants request a variance to the east side setback.
- The ordinance in Section 45-405, Dimensional Standards, requires a 20-foot side setback for the property.
- The ordinance in Section 45-49(b) grants the Eliot Board of Appeals the authority to hear and decide the variance appeal based on regulations specifically provided by the Chapter to meet an undue hardship as determined by four criteria.
- The lot is part of a surveyed subdivision identified in a plan entitled "Standard Boundary Survey Subdivision of Reconfiguration of Tax Map 89, Lots 16 and 17, Wildbrook and Johnson Lanes" by the surveyor J.A. Davis & Associates, 5 Heather Road, Eliot, Maine dated May 16, 2000.
- A bank Class D mortgage loan drawing 13104/M1-1, dated September 2, 2013, by Norway Plains demonstrated that the established side setback of the building did not meet the side setback requirement.
- The application for the variance was dated September 29, 2013.
- The application was accepted by the Town on September 30, 2013.
- A Stop Work Order was issued by the Code Enforcement Officer on September 15, 2013.
- The CEO testified that the owner did resume work after the Stop Work Order was rescinded.
- The CEO stated in a letter to the appellant, dated September 6, 2013, that an occupancy permit would not be issued until a stamped survey of the parcel is obtained and shows that all setbacks to the structure meet the ordinance requirements.
- The Stop Work Order was rescinded on September 15, 2013 based on information received by Mike Cooper, the contractor, that the proposed structure would be revised to meet the 20-foot side setback requirements.
- Several inadequacies or discrepancies in the markings on the subdivision plan were noted in testimony from abutters.

Chairman Cieleszko stated that the duty of the BOA was to make sure that the appellant met the four criteria and then to grant them, if possible, the minimum relief needed. He stated that he wanted to be clear about what the appellant was asking. He stated that

the current measurements are to the sheathing and that there would be siding and eaves going on over that. He stated that he was having trouble with the idea of adding a couple of inches here and a different couple of inches there.

Mr. Marshall stated that having an overhang is an essential part of a house. Chairman Cieleszko agreed and stated that that was the reason he wanted to include the overhang. Mr. Marshall stated that the distance should allow for the 20 inches that the appellant is already over the setback requirement and an additional 12 inches for the overhang, making the total 32 inches.

Chairman Cieleszko stated that he did not want an angle and that the same variance distance should be carried all the way across the property. Chairman Cieleszko asked whether the motion would be asking for 32 inches or 36 inches, which would give the setback a distance of 17 feet.

Mr. Marshall asked if the CEO had the room to waive some of the requirements. Chairman Cieleszko stated that he had none.

Chairman Cieleszko stated that he would like to either grant or deny a definite number of inches. Mr. Cutting and Mr. Marshall both agreed that the number should be 36 inches. Chairman Cieleszko stated that he would go along with 36 inches as being the number necessary to meet the side setback requirement.

MOTION

Mr. Cutting moved to grant a variance to 17 feet for the east side setback on 65 Wildbrook Lane, Eliot, Maine. Mr. Marshall seconded.

Mr. Cutting stated that in regard to the first criteria (*The land in question cannot yield a reasonable return unless the variance is granted)*, reasonable or unreasonable return is not the issue at this point but rather the cost of undoing what had already been done would be the problem. He asked for time to consider his response.

In regard to the second criteria (*The need for a variance is due to the unique circumstances of the property and not the general condition of the neighborhood)*, he stated that there are other issues in the neighborhood and nobody is sure where the lines are, so he believed that it was a unique circumstance.

Mr. Cutting was in agreement with the third criteria (*The granting of a variance will not alter the essential character of the locality*) because it is a residential area and all of the houses are similar.

Mr. Cutting stated that in terms of the fourth criteria (*The hardship is not a result of action taken by the appellant or a prior owner)* he thought that the need was due to an honest mistake and was not the fault of anyone.

Mr. Marshall stated that on the first criteria, the word "reasonable" was the one they had to use and that he did not think it was reasonable to tie up the land and make it impossible to get a bank loan to finish the project. He also thought it was very unreasonable to tear off part of the house that was already built and turn it into an eyesore at another huge expense and for what he could see, after listening to the abutters, as providing absolutely no gain.

Mr. Marshall agreed with Mr. Cutting on the second and third criteria. In terms of meeting the fourth criteria, Mr. Marshall stated that he thought the appellant acted on the best information he had and that the appellant had no reason to believe that the information was in error. He stated that by the appellant's testimony, it appeared that he had more drawings than he knew what to do with, that the property had been surveyed and that he acted in the best way he knew how. Mr. Marshall stated that the appellant did not act with fraudulent intent. He stated that he thought that everybody in the neighborhood was finding out new things about their property in the last few months. Mr. Marshall stated that he thought the appellant met all four criteria.

Mr. Billipp agreed with Mr. Cutting and Mr. Marshall that the appellant met all four criteria.

Mr. Hamilton stated that he did not think the appellant met either the first or the fourth criteria. He stated that it is the land that is the issue, not the mistakes that were made. He stated that the land can still yield a reasonable return. He stated that the property is a unique property because of its narrow width, meeting the second criteria. He stated that the variance would not alter the essential character of the neighborhood, meeting the third criteria.

Mr. Hamilton stated that the hardship was the result of action taken by the appellant by the lack of due diligence. He stated that even though it appeared that there would be no problem, he still felt there was not enough due diligence and that the appellant, therefore, did not meet the fourth criteria.

Chairman Cieleszko asked if Mr. Cutting had made a decision and Mr. Cutting agreed that the appellant met the first criteria.

As a synopsis and the last Finding of Fact, Chairman Cieleszko stated that the voting was as follows:

#1 – The land in question cannot yield a reasonable return unless the variance is granted.

Mr. Cutting, Mr. Marshall and Mr. Billipp agreed that the appellant met this criteria. Mr. Hamilton did not agree.

#2 – The need for a variance is due to the unique circumstances of the property and not the general condition of the neighborhood.

All agreed that the appellant met this criteria.

#3 – The granting of a variance will not alter the essential character of the locality.

All agreed that the appellant met this criteria.

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

Mr. Cutting, Mr. Marshall and Mr. Billipp agreed that the appellant met this criteria. Mr. Hamilton did not agree.

CONCLUSION

Based on the above stated facts and the provisions of the ordinance cited, the Board of Appeals concluded that the appellant met the four necessary criteria as determined by the majority of the voting BOA members. Chairman Cieleszko stated that if the appellant gets the variance, that decision would stand up in court. If the BOA denied the variance, they would be overturned because of the quality of the answers to the four criteria.

DECISION

Based on the above facts and conclusions, the Board of Appeals voted to grant the request for a variance to lessen the east side setback to 17 feet for the property on Tax Map 89, Lot 17. The vote was 3-1 with Mr. Cutting, Mr. Billipp and Mr. Marshall in favor and Mr. Hamilton opposed.

Mr. Cutting stated that he was concerned because he heard more and more people come before the BOA stating that "Kate Pelletier said 'this'" or "The CEO said 'this'" and that the BOA was taking that information and making the statement part of the minutes when the speaker had no back-up for what they were saying. He stated that an appellant could say that the CEO had told him he could build the biggest building in the world on a small piece of property and unless the appellant had a note with him that

clarifies that, Mr. Cutting did not know whether or not the BOA should take the statement into consideration.

The CEO stated that he did not want to accuse an appellant of lying. Mr. Cutting stated that the undocumented statement should be considered hearsay. Mr. Hamilton stated that it was still testimony and Ms. Lemire agreed. Mr. Marshall asked if Mr. Cutting had meant that the appellant's testimony should not be recorded.

Mr. Cutting stated that in the prior BOA meeting he heard things that were absolutely off the wall. He stated that the speaker was listened to and that he thought there needed to be some sort of filter and that the appellant needed to be able to prove his case.

Chairman Cieleszko stated that most of the information that he values is in written correspondence. He stated that there had been attempts to sell the BOA a bill of goods before but that the appellant has to be given the right to do that.

Mr. Marshall stated that even though he is not in the business anymore, if he was still building houses he would be bringing a tape recorder to every meeting with the CEO. Mr. Marshall stated that would be the only way to document the conversation.

Mr. Cutting stated that it is the appellant's responsibility to do due diligence before pouring a foundation on property. Mr. Marshall stated that he point was that any testimony on either side is hearsay.

Mr. Hamilton stated that he thought an appellant wanted to think that what he believes is also right and that in the prior case there had been a lot of discussion about what the CEO said and that the appellant was referred to the minutes which clearly said no such thing. He stated that what he would do if he was building a house would be to get everything in writing.

Mr. Marshall stated that the problem was that making changes, like tearing part of a house down, costs a lot of money. Mr. Cutting stated that the appellant chose not to get a survey. Mr. Marshall stated that he had every reason to believe that the subdivision survey was correct and that surveys cost about $2000. Mr. Hamilton noted that that expense was minor if the house is worth half a million dollars.

Mr. Hamilton stated that the BOA is not in the business of determining whether an appellant has to pay more or pay less. He stated that they are in the business of determining whether the appellant meets the four criteria and also meets code. He stated that he understood the other issues and that they tore at his heartstrings but that it boiled down to making a decision on what is written as ordinance.

Mr. Cutting stated that when the CEO sees something wrong he is supposed to stop a project and that he did everything right in the current case. He stated that the appellant was the one who erred and the CEO had a right to stop the project because that is how the system works.

The CEO stated that people hear what they want to hear and don't hear what they don't want to hear. He added that that was why it was important to follow whatever documents are received and why he tries to follow up a meeting with a document whenever possible so a person can understand everything he had to say.

Mr. Cutting stated that he thought the BOA should look for more for what was actually written or said because the appellant's statements can be just one person's opinion.

APPROVAL OF MINUTES

The minutes of September 19, 2013 were approved as amended.

OTHER BUSINESS

Chairman Cieleszko stated that he requested a BOA budget of $4400 for the 2014/2015 year, the same amount as requested for the past two years.

Chairman Cieleszko stated that the BOA had received correspondence from the CEO as a result of his request for information regarding Section 45-406(c) from the Planning Board. The CEO stated that the section had been deleted as part of the updates on the zoning ordinance for streets and sidewalks which were approved on June 16, 2012.

Mr. Marshall asked if the section got moved to a different location. The CEO replied that it had been stricken as part of the amendment to the streets and sidewalks section of the ordinances. Chairman Cieleszko noted that the Town voted for the amendment and that the change was dramatic.

Mr. Hamilton stated that basically Section 45-406(c) addressed the presence of an existing subdivision. It addressed the impact of a new access road to a subdivision and would prohibit the CEO from issuing a building permit on a road if it accessed more than 14 lots on a road that connected to a public street which did not meet current Town street standards. Mr. Hamilton stated that he discussed the issue with Kate Pelletier who was under the impression that it was covered under the changes of June 2012. He added that it still had not been determined whether or not that situation would be covered. Mr. Hamilton stated that the changes made in June 2012 did not revise the section but just eliminated it. Mr. Hamilton agreed that it was a drastic change.

Mr. Hamilton stated that in his conversation with Ms. Pelletier, the planning department assumed that the situation was covered under subdivision ordinances. He stated that it had previously been under the street section, was addressing a previously approved or grandfathered subdivision and that the Planning Board has no jurisdiction over that situation. He added that the authority to grant a new access road to a previously approved subdivision resided with the CEO.

Mr. Hamilton stated that no section replaced the protection of Section 45-406(c) and that if another situation arises there is no protection.

The CEO clarified that the Town does not have a planning department and that there is a Planning Board assistant who is a planner.

The CEO stated that he sent the BOA a memo on September 27, 2013 referencing a State law that allows a CEO to issue a variance under certain conditions (handicap accessible structures) so that an appellant did not have to wait for an appeal. He stated that if the Board agrees with going in that direction, he will forward it to the Planning Assistant so that she can get it confirmed with the Planning Board. Chairman Cieleszko and Mr. Marshall tentatively agreed wholeheartedly but they had not seen the memo.

The CEO stated that the law allows the CEO to issue a variance under certain conditions but each Town has to adopt that law. Chairman Cieleszko asked if the appellant would have to meet the same four criteria as required by the BOA. The CEO concurred and stated that there many rules the CEO has to follow.

Mr. Hamilton stated that he read in Saturday's Portsmouth Herald that the Board of Selectmen had granted a Consent Agreement to Sweet Peas. Ms. Lemire clarified that a motion was made that if they could not get a permit through the CEO, the BOS would look into granting a Consent Agreement to Sweet Peas and that the motion passed on October 17, 2013.

The CEO stated that from information provided by the Town's attorney, it appears that the CEO will have the means of approving a growth permit for that lot. He stated that prior to this time he was looking at the ordinances as a whole for back lots. He stated that the attorney's opinion was that the CEO could focus on that particular section for existing, non-conforming back lots and non-conforming access roads.

Chairman Cieleszko stated that it was not the business anymore of the BOA. Mr. Hamilton stated that the BOA made a decision based on quite a bit of testimony and on understanding of the code and on other issues which were brought up by the CEO's testimony. He stated that his understanding was that there is a mechanism available to reverse the BOA decision only instead of being called Superior Court it is now called the Board of Selectmen. He added that he thought that it concerns the BOA.

Ms. Lemire stated that the decision was made based on a non-conforming access way.

Mr. Billipp asked if the BOS had the legal authority to overturn the BOA decision. Chairman Cieleszko and Mr. Marshall thought that they did. Mr. Hamilton asked why the BOA bothers to even hear a case and wondered why they don't just give the BOS the information they need. Chairman Cieleszko stated that he did not think the BOS even looked at the BOA information, had not seen the minutes and that he thought it was a travesty. Mr. Hamilton stated that the issue affects the credibility of what the BOA does. He stated that maybe at the end of every meeting instead of telling the appellant that he has 45 days to appeal to Superior Court, the BOA should also add that the appellant could go to the BOS and get a Consent Agreement.

Mr. Billipp stated that maybe the previous discussion and decision on Consent Decrees should be reviewed. Chairman Cieleszko stated that there is a series of events that is supposed to occur. He stated that that series includes the CEO turning someone down, the BOA turning them down, the Superior Court turning them down, and then taking the issue to the Supreme Court. He stated that Jack Murphy did a lot of work on the Consent Decrees and it seemed like a workable plan.

Mr. Billipp suggested that the BOA Chairman attend the next BOS meeting to inquire how this procedure took place and then report back to the BOA. He stated it appeared that the BOS could do an end run around the BOA if they did not like the BOA's decision. Chairman Cieleszko stated that he would pursue the issue to the ends of the earth.

Chairman Cieleszko asked the CEO if he would notify all of the members if he got a meeting with the BOS set up.

Mr. Hamilton questioned why the BOA should spend three hours discussing a case and making a decision unless the next step was Superior Court. Mr. Marshall stated that they may find when they went to the BOS meeting that the BOA did make a mistake. Mr. Hamilton stated that it was for the Superior Court to decide that, not the BOS.

Chairman Cieleszko stated that when the BOA had made a decision based on an interpretation of an ordinance for that case and that CEO has made a decision on that case then a judge is supposed to look at it. The next step would be the Supreme Court and their interpretation is what the BOA has to live with whether they agree or not. He stated that the Town is circumventing that whole process and are deciding what they want the ordinance to be instead of what is actually written.

Mr. Cutting stated that perhaps the BOA should decide what the BOS would like and then vote that way.

Mr. Hamilton stated that the BOS action seemed to demean the time he invested in the BOA. Ms. Lemire stated that the current case was a hard one on which they all spent a lot of time.

Chairman Cieleszko stated that he would get an appointment with the BOS, get on the agenda and have the CEO and Barbara Thain notify everyone. Mr. Billipp asked if it was intended to be a private meeting. Mr. Marshall stated that unless a meeting is an Executive Session, there is no such thing as a private meeting. Ms. Lemire stated that it would be a public meeting and would not qualify as an Executive Session and that all of the meetings are recorded live anyway.

ADJOURNMENT

The meeting adjourned at 8:58 PM.

Respectfully Submitted,
Linda Keeffe
Recording Secretary

Approved by: _____

Ed Cieleszko, Chairman, Board of Appeals

Date Approved: _____