

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

December 20, 2012

### **ROLL CALL**

Present: Chairman Edward Cielezsko, Vice-Chairman Peter Billipp, Secretary Bill Hamilton, Philip Lytle, Jeff Cutting and Associate Members Ellen Lemire and John Marshall.

Others Present: Code Enforcement Officer, Jim Marchese; Heidi Jordan, Appellant; Cynthia Saklad, abutter; David and Mary Fournier.

### **CALL TO ORDER:**

Chairman Cielezsko called the meeting to order at 7:00 PM. He asked for all electronic devices to be silenced and stated that the procedure for the meeting would be:

- The meeting will be opened.
- The voting members will be determined.
- The request will be summarized.
- The jurisdiction of the Board will be determined.
- The standing of the appellant will be determined.
- The appellant will have the floor to present testimony in regard to getting the waiver.
- The Board will question the appellant.
- The Code Enforcement Officer will present testimony.
- The Board will question the CEO.
- Any abutters will be allowed to make comments.
- The Board will question the abutters.
- Other interested parties in the general public will offer comments if they wish.
- The appellant will make the last statement and take any last questions from the Board.
- The public hearing will be closed.

- The Board will work together to make a decision.

Chairman Cielezsko stated that the voting members would be Peter Billipp, Jeff Cutting, Bill Hamilton and Philip Lytle.

### **SUMMARY OF REQUEST**

The waiver request is for a six-foot sideline setback on an existing garage to accommodate a 650 square foot ADU by Heidi Jordan for the property located at 15 Park Street, Eliot, Maine

### **JURISDICTION**

Chairman Cielezsko stated the Board had jurisdiction to hear the case under Section 45-49(b) variance appeals. He added that, because the lot is non-conforming, jurisdiction is provided in Section 45-194(c)(2) to grant the waiver.

### **APPELLANT STANDING**

Chairman Cielezsko stated that the appellant had provided a Purchase and Sale Agreement between Heidi Jordan and David Anderson. He asked if there were questions regarding the standing. Mr. Cutting stated that he had never done a waiver request before and was unsure what constituted standing. Chairman Cielezsko replied that standing was either ownership or a demonstrated legal interest.

Mr. Cutting asked if the Purchase and Sale Agreement was adequate documentation of legal interest. Chairman Cielezsko stated that the Board had used the Purchase and Sale Agreement previously as a valid showing of legal interest in the property.

Mr. Cutting asked who the beneficiary would be if the waiver were granted by the Board, the existing owner or would the decision follow the sales agreement. Chairman Cielezsko stated that within State law, waivers are a special type of variance and variances follow the land. He added that regardless of the result of the financial arrangements between the appellant and the current owner, the land will have the waiver if granted.

## **OPENING OF PUBLIC HEARING**

The public hearing was opened at 7:06 PM.

## **TESTIMONY FROM APPELLANT**

Ms. Jordan stated that she was very nervous and not good at public speaking. She thanked the Board for hearing her waiver request.

Ms. Jordan stated that she was purchasing the house because it has a detached garage with a finished space upstairs over the garage with a ¾ bath and a large bedroom area. She stated that it was her understanding that the status of the space above the garage was already known by the Town. She thought she would be asking only to have the existing dwelling unit expanded to the full 650 square feet, which is what is allowed for an Accessory Dwelling Unit (ADU).

She added that the reason that she was buying the property with the detached garage was that her parents had recently sold their home, in which she had grown up, that they are older and that they cannot afford to buy another house. It has been their thought that Ms. Jordan would buy something with an apartment for them. She stated that she cannot afford to buy something with an apartment already in place. She found the current property with a space that was half finished.

She stated that there was a little money from the sale of the home that could be used to fill out the apartment, so they thought the house would be perfect. The space above the garage already has plumbing and electricity. She stated that she had put a contingency in the real estate contract that she must be able to obtain a legal building permit to do the work that she wants to do.

Ms. Jordan stated that on the day she signed the Purchase and Sales Agreement, she went to the Town Hall to obtain a building permit. She spoke with Jim Marchese. He showed her the GIS map and told her that she needed to have 20 feet as a sideline setback and that he could waive 25%. The Code Enforcement Officer told her that he could give her the building permit if she had 15 feet or more as the sideline setback. He told her that if she had between 10 and 15 feet, she would have to appear before the Board of Appeals who could grant a 50% waiver.

The CEO printed out the GIS map and drew a line down the side of the garage, measured it and wrote 14 feet as the sideline setback, which she included in her application.

She stated that he also told her she needed to have a survey. She stated that from all of the research and homework she had done, she did not see any reference to the need for a person to have a survey. She had been told the size of her lot, had checked the Registry of Deeds in Alfred and had done her due diligence. She stated that, based on the GIS Tax Map that showed that she had 14 feet, that was the measurement she included in her application. She figured she needed a 6-foot waiver to put the ADU in the garage for her parents.

She restated that the research that she had done did not indicate that she needed a survey. She added that she was not planning to change the footprint of the garage at all. All she wanted to do it make the downstairs where the car would be parked into a kitchen/living area with a one-half bath and with a stairway connecting the upstairs and downstairs on the inside. Currently, there is an exterior stairway.

Because she is not planning to change anything on the footprint and because she did not find any reference to a need to have a survey done in order to do the work, she felt that it was fine to move forward without having a survey done for the cost of \$1800, which she stated she did not have.

Ms. Jordan decided to come before the Board of Appeals to see what they thought and also had read many past BOA transcripts looking for cases that were similar to hers where the question had come up before about whether or not a survey needed to be done. The results on the ones she had read all indicated it was not required, not by State law and not by something that the BOA is responsible for regarding the disputes of where property lines fall. She stated that if it were required of her to have a survey done, then it should be required of each and every individual who steps forward with an application such as hers.

She stated that she was appearing before the Board without a survey, despite the fact that the CEO suggested that she get a survey, so that she would know exactly where the boundary line falls. Based on the included GIS map and others that she had printed out of the property in many different scales, she measured the property line in every way she could. She stated that all of the GIS maps show the property at different times of the day, which show different shadows, making it harder to measure. The larger the map was, the grainier the image became, making it even harder to see the exact edge.

She added that in all of the maps she looked at, she thought that the CEO was correct in his first conclusion that she had 14 feet. She stated that she bought the proper measuring devices and architectural things and measured and remeasured all of the different maps, and 14 feet is what it looked like to her as well. She said she came to that conclusion based on the CEO's initial measuring and on her research and homework.

She stated that if she could not get the approval for the ADU, it would not be good for her. She added that she was approved for the house, the mortgage was all clear and the closing date was to be on December 27, 2012. She stated that her family is in a bad financial situation and she cannot afford the house alone. With her parents living there, they would have a place to live for the rest of their lives and the appellant would be able to take care of them, they would contribute toward the mortgage and it would be affordable for the three of them. She added that she was hoping that it would all go well at her waiver hearing so that she and her parents could have a great house to live in.

She stated that she was very grateful that her neighbors had been very supportive. Cindy Saklad, the abutting neighbor on the rear side, was there with her. Her side abutters (the Andersons) and Ms. Saklad had both written letters in support. Doug Anderson had told Ms. Jordan he would be at the meeting, but she stated that he was not there.

Ms. Jordan stated that after she had submitted the application packet to the BOA, the CEO found a partial "survey" of an abutting lot belonging to Cindy Saklad. She stated that the partial survey had no stamp from a surveyor, no name and no date. She added that Cindy had said she has never had a survey done or seen a survey on that lot, which she has owned since the 1980s.

As far as Ms. Jordan could tell, the drawing that shows her lot and Ms. Saklad's lot with no structures on them but only shows the directions (north, south, east and west) and a drawing of the roads is no more valid than a GIS map. She stated that she would like to think a GIS map is more valid, since that is what they are being taxed by. She stated that the recommendation for the survey was presented by the CEO after she had presented the application packet.

Ms. Jordan stated that the CEO did give her anything that was in the file for the property, which included past building permits and the building permit for the garage, which showed the garage being built in 1986. She stated that she had the building permit with her and that the owner who built the garage in 1986 got a building permit for it to be built 10 feet from the sideline. She stated that whether or not the distance was exactly that was difficult to tell because the property line runs at a diagonal through the hedges, which are about 10 feet tall and four feet wide, separating Doug Anderson's property from hers. The building permit was approved for the garage and given to the previous owner. The garage was built and was signed off on by a previous building inspector or code enforcement officer of the Town.

She added that she hoped it would not be held against her if the actual measurement ended up as 9 feet or 14 or 15 feet instead of the permitted 10 feet. She stated that it was a prior action that she was not responsible for and that someone in the Town had approved where it was to be built.

## **QUESTIONS TO APPELLANT FROM THE BOARD**

Mr. Marshall asked if the property had any corner lot line markers. Ms. Jordan answered that she thought that on Cindy Saklad's property there are two cement markers, though her property is at the rear of Ms. Jordan's property. She stated that on one side of the garage is Doug Anderson's property and that what is on the other side of her property is a right-of-way that is basically the Saklad's driveway.

Mr. Marshall stated that he was interested in the line between the garage and the house next door to her property and he asked if there were a pin along the road somewhere to mark the property line. Ms. Jordan stated that she did have a surveyor come out to walk the property lines with her. He used a metal detector and looked for a pin in front on Park Street between her property at 15 Park Street and Doug Anderson's property at 9 Park Street and that there was nothing there to indicate the line. She added that at the back of her lot there are two cement markers and that there is another monument marker at the back of her property. She added that there is nothing to mark the lot line on the side front where her driveway and Mr. Anderson's driveway come together, with the hedge between.

Mr. Marshall asked if she and Mr. Anderson agreed about where the lot lines are and she stated that they do agree and that he is supportive of whatever she would like to do with the garage and apartment. She stated that she had submitted his letter of support in her application. She added that she had been meaning to ask him whose job it was to trim the hedges because she did not know but would be happy to do it.

Mr. Marshall stated that in looking at the pictures, he was surprised to hear that there is a second story on the garage. Looking from the top one cannot tell. He asked if Ms. Jordan had any ground-level pictures of the garage. She stated that she did not but that on the home inspection report she could show photos of the house itself. She presented the pictures to Mr. Marshall and he thanked her.

Mr. Hamilton asked if the measurement of 14 feet for the sideline setback came from the CEO initially. Ms. Jordan replied in the affirmative.

Mr. Hamilton noted Ms. Jordan had stated that in the 1986 building permit for her lot, a 10-foot side setback was indicated for the garage. Ms. Jordan stated that whoever was building the garage had just drawn a sketch to bring to the building inspector or Code Enforcement Officer. She stated that it looked like the owner just drew a sketch indicating where he intended to build the garage.

Ms. Jordan stated that Ms. Saklad had provided the information that the previous owner replaced an already existing garage. The sketch had been given to the CEO in

order to get the building permit to replace the garage. She showed the original request for the garage to Mr. Hamilton who noted that it indicated a setback of 10 feet. Ms. Jordan mentioned that the property line does run on a diagonal through the hedges and that the measurement was from a sketch, not from a survey.

Mr. Hamilton stated that the other requirement for an ADU for one off-street parking space had not been mentioned in Ms. Jordan's presentation. He asked if that requirement could be met. Ms. Jordan stated that she had been told that for ADUs and primary structures in that area there is no parking requirement. She added that there is enough room right now on her driveway for at least four vehicles. Mr. Hamilton noted that she would meet the requirement. He added that from the photos taken from the air, it looked like there would be plenty of room. Ms. Jordan stated that even four SUVs could fit tightly in her driveway.

Mr. Cutting asked if the original garage was smaller than what is currently there. Ms. Saklad stated that it was difficult to tell and that it was dilapidated when it was replaced and it was built as a home office for Mr. Hodgden's wife. She stated that Mrs. Hodgden was a psychologist and she saw clients in her office which was why the stairway was exterior to the building.

Mr. Cutting asked if the building permit reflected that there was living space above the garage. Ms. Jordan replied that it did not but that the property was being taxed as having living space over the garage. Mr. Cutting asked if living space had been part of the original building permit. Ms. Jordan replied that it doesn't reflect that on the building permit and that it only showed the garage.

Ms. Jordan stated that she was confused because she assumed the living space was permitted by the Town because it was being taxed and two realtors did not mention anything about the issue. But, when she went to the CEO, he did not know about the living space and said that it must have been constructed without permits.

Mr. Cutting stated that as far as Ms. Jordan knew, the living space was not on the permit so the space above the garage is not acknowledged as living space per se according to the permits. Ms. Jordan clarified that the building permit of 1986 just showed a garage and she did not know which owner (out of several previous owners) created the space. She stated she was trying to make it legal by going through the appeal process because that living space would be part of the 650 square feet of the ADU she wants to create.

Mr. Cutting stated that the 1986 building permit was to rebuild the existing garage with dimensions of 13 feet by 21 feet. He asked if there were a bathroom in the living space currently and Ms. Jordan replied that there is a  $\frac{3}{4}$  bathroom. She stated, "You can understand why I was excited when I saw this place."

Mr. Billipp stated that Ms. Jordan has referred a couple of times to the property lines being a little bit askew. He asked her how she knew that they were, since she did not know where the actual corners of the lot were. Ms. Jordan stated that she went by the Registry of Deeds plot plan, which she included in her application packet. She stated that she also referred to the dimensions of the lot and the GIS map. Based on the information that she had been given and that which she had researched, it seemed like it was askew but that she did not know 100% for sure.

Ms. Jordan stated that she only knows what the dimensions of the lot are according to the deed that she had purchased. Mr. Billipp stated that the deed refers to lots numbered 23 and 36 on the plan that she had provided which was a subdivision plan.

Mr. Billipp asked if Ms. Jordan knew the square footage of the garage. Ms. Jordan stated that the existing garage, without finished walls, has a downstairs of 397 square feet. Mr. Billipp asked what Ms. Jordan was using as a reference and she replied that it was measurements supplied by an architect who would be doing the work for Ms. Jordan. She stated that she is also a general contractor and that she told the architect where she thought the stairs needed to go and he came out and looked at the garage.

Mr. Billipp stated that what he was looking for were the dimensions of the footprint. He referred to information from Ms. Jordan that showed the dimensions as 26 feet 4 inches by 16 feet 3 inches and ask if anyone had a calculator. Ms. Jordan stated that the measurements of an ADU are defined as livable space and would be different because they would account for the interior finished wall space. Mr. Marshall stated that the square footage looked like it would be 427 feet 8 inches. Mr. Billipp stated that an ADU can only be 650 square feet.

Chairman Cielezko asked Ms. Jordan to provide copies of the documents to the CEO and she stated that he already had copies. She added that she would be willing to send copies of the information to the BOA via an email attachment.

Chairman Cielezko stated that the building permit of 1986 for the rebuilding of the garage showed a plan for a 22 foot by 16 foot structure. He asked if Ms. Jordan knew why the dimensions were different from that and she replied that they were the dimensions the garage measures now. Chairman Cielezko clarified that the actual measurements of the existing building are 26 feet 4 ½ inches by 16 feet 3 inches. Ms. Jordan stated that the interior dimensions are 15 feet 6 inches by 25 feet 5 ¾ inches. She stated that those were unfinished dimensions and once sheet rock and insulation were added, the measurements would be less.

Chairman Cielezko stated that even the eave applies to setback requirements.

Ms. Jordan stated that the upstairs square footage would be smaller than the downstairs because there is a dormer on one side and eaves on the other side with a

slanted ceiling. Anything inside of the eaves and less than 5 feet does not count as living space. Chairman Cielezsko stated the interior dimensions were not being considered in the waiver request.

Chairman Cielezsko asked for the measurement of the front setback. Ms. Jordan stated that she thought it was 31 feet but that she did not measure the front setback because the garage already exists and she was going by the building permit. She stated that it was back further than the house from the street.

Chairman Cielezsko stated that the building permit granted in 1986 was for a smaller structure than what currently exists. He stated that if they built it larger in the front that would create problems. He asked Ms. Jordan if she knew the distance of the garage from the road and she replied that she did not. He asked if she was aware that the setback requirement was for a 30 foot minimum and she replied that she was aware.

Ms. Jordan stated that the GIS map could be measured with an architectural ruler but that she did not have hers with her at the moment.

Chairman Cielezsko asked if Ms. Jordan had done any measurements from the cement markers she had mentioned in her testimony in order to get some bearing as to whether the lot lines were accurate. Ms. Jordan replied that there was no front marker so there was nothing to measure toward. She stated that there were back markers. Mr. Marshall stated that the front setback appeared to be well in excess of 30 feet and is probably at least 35 feet.

Chairman Cielezsko stated that Ms. Jordan had an application for a garage that showed a side setback of 10 feet. Ms. Jordan stated that the GIS map shows the photo with the lot lines and the hedges on it and the 14 foot setback measurement came from that map.

Ms. Jordan stated that the building permit for the garage that was approved in 1986 does not reflect exactly what they said they were going to build.

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

Chairman Cielezsko asked Jim Marchese to state his understanding of the process.

The CEO stated that the last sentence of his letter (supplied in his packet to the BOA) pretty much explains it all. He quoted, "It is the opinion of this office that the board may want to hold off on making a decision in this matter until the current unknowns are ascertained." He stated that they don't know where the boundary line is so they don't know what they would be approving. He added that it is all guesswork.

The CEO stated that the permit for the garage was for an accessory structure and accessory structures require a 10-foot setback. The proposed owner wants to convert the current garage into an ADU, which means that it must meet the setback requirements for a principal structure of 20 feet. He added that the fact that there is a living space there now would more than likely be considered an illegal use of the property.

He stated that currently the minimum size of a room is 120 square feet with a minimum ceiling height of 7 feet. That is a sloped ceiling according to his information.

The CEO stated that based on his information, he considers the current use to be an illegal use of the property. When the property was connected to the sewer system, it was connected as a single-family dwelling and one betterment fee was paid. He added that there is very limited evidence and that it is not the assessment officer's job to correct illegal uses. He stated that perhaps there could have been better coordination between the assessor and the code enforcement officer to correct the usage. He added that the assessor does not indicate whether or not a parcel of land has an apartment or an ADU. Only living space is counted.

The CEO addressed the issue of the code enforcement office, the planning board or the BOA requesting a survey. He stated that it is the appellant's burden to demonstrate their attempt to meet the requirements. When an appellant is maximizing the use of the property, the Town needs an opinion of a professional surveyor so there is something to rely upon.

He added that the current case is not one in which the boundary is in dispute. The Town cannot resolve a dispute of the boundaries between land owners. That would be an issue of the court system.

The CEO stated that he had asked the Town's attorney and other area Code Enforcement Officers and they all agree that the Town has the right to request that the appellants demonstrate their intent to meet the requirements. It is at the CEO's discretion. He stated there is a need to be reasonable, but that when someone is maximizing the use of the property and the boundary lines cannot be ascertained, there needs to be a survey. That would be the only way to determine exactly what the needs are. He stated that in this particular case, the issue may not need a waiver at all.

#### **QUESTIONS TO THE CODE ENFORCEMENT OFFICER FROM THE BOARD**

Mr. Lytle stated that if Ms. Jordan were granted a 50% waiver, she would have some wiggle room. The CEO asked if it would be enough.

The CEO stated that the GIS numbers cannot be used because the GIS is just a pretty picture. He stated that the sketch that he made also cannot be used. He made the sketch from the deed which references the lots on the plan and the plan does not indicate where the boundaries are. He stated that the prior code enforcement officer did not have the ability to determine where the boundary lines were between abutters. He added that the CEO has to rely on information provided by the appellant. Mr. Lytle stated the BOA also has to rely on the same information.

Mr. Hamilton asked, as a curiosity factor not a determining factor, whether a sewer betterment fee would be initiated for a separate dwelling unit. The CEO stated that it would be.

Ms. Jordan stated that the CEO had told her, when she informed him that the apartment was there, that she would have to pay \$860 total betterment fee and she said "of course, because I want to make this legal." She stated that she has no problem paying the betterment fee and she knew that was part of the process.

Mr. Billipp asked if the space above the garage would be called an apartment. He asked if someone lived there. He asked the CEO if he had any evidence that the second story of the garage was being used as living space. The CEO replied that he had no knowledge because he had not seen it.

Mr. Marshall asked the CEO if he had been onsite of the property. The CEO stated that he had been by the site many times. Mr. Marshall asked if he had been onsite in regard to the application. The CEO responded that he had been by the site but had not been on the site. He stated that he had not been invited onsite.

Chairman Cieleuszko stated that the CEO had indicated that the sloped roof might not fit under the current rules for living spaces. He asked if developing the downstairs would take care of spacing concerns. He asked if they could adjust downstairs to keep within the 650 square-foot requirement and make it legal. The CEO stated he had received a drawing from an architect illustrating the proposed use.

Chairman Cieleuszko stated that the current garage was permitted with a 10 foot setback, which is still within the waiver requirements. He asked if they would still be within the waiver requirements if they asked for 10 feet, which would be 50%. He stated that if the garage is at 10 feet, coupled with the appellants acknowledgement that it is at 10 feet, it would still be a waiver. He asked the CEO whether it would still be a waiver, whether the BOA approved the application or not. The CEO replied that it would be.

Chairman Cieleuszko asked the CEO if he had done any measurements on the property. The CEO replied that he had not and that he was not a surveyor.

Chairman Cieleuszko stated that the CEO had made marks on his package that was given to the BOA. He asked the CEO to describe the process a little better. He asked if the measurement of 100 feet (for the property width) was from the GIS. The CEO stated that the tax map shows the frontage to be 100 feet. The measurement of 91.5 feet was derived from the plot plan. He stated that the 16.5 right-of-way width was developed from the subdivision plan.

The CEO stated that if he brings the lines across, based on modification, he comes up with an approximate 7-foot setback from the garage. He stated that the information was just as faulty as taking a dimension off of the tax map. He added that it demonstrates the need for a survey in order to provide the information that the proposed use is meeting the requirements.

Chairman Cieleuszko stated that in the lower caption of the Eliot GIS there is a disclaimer that the information is provided as a reasonably accurate point of reference but is not to be used for conveyances. He stated that he thought that statement backed up what the CEO had said.

#### **QUESTIONS FOR APPELLANT**

Mr. Cutting clarified that the garage currently contains a semi-living area with a bedroom and bath. He asked if there is currently a heated area. Ms. Jordan stated that there is a propane type of heater and two propane tanks. She stated that the space is one large open space which she has called a bedroom because currently there are two beds in it. She stated that the upstairs is one large living space or office space. She added that Ms. Saklad had mentioned that one of the previous owners used the space as an office. In addition, there is a  $\frac{3}{4}$  bath and that is all that currently exists upstairs.

Mr. Cutting asked if Ms. Jordan had tried to correct the current situation by getting a permit. She stated that she did not want to get a permit for the living space that is currently there. She added that she does not own the property and does not want that particular living space. She wants an ADU with the entire 650 square feet of living space. She stated that that was what she was doing with the current application because she is trying to get a permit to make an apartment in the garage.

Mr. Cutting stated that apparently there is no permit for what is there already and he had wondered if she had tried to get a permit for that. She stated that that issue never came up and that there had never been a suggestion that she needed to do that. She added that because nothing came up, she had not even thought about it. She assumed that she was currently making the situation right.

She stated that whatever exists currently may not be permitted, but that she likes to do things by the book and she wants to make sure that what is there complies with code and is legal. She had thought that being specific about wanting a 650 square-foot ADU for her parents would take care of the whole issue.

She stated that if she is not granted the waiver, she would have to figure out if she could get out of buying the house before the contract comes to a close. She stated that she didn't think she could do that without losing a lot of money.

Mr. Cutting asked if she would consider getting a survey. Ms. Jordan stated that it had been an issue of time and money. She stated that the two surveyors she had talked to could not do a survey by December 20<sup>th</sup>. She stated that the survey would require about \$1800.

Ms. Jordan stated that she had read past minutes and stated that there had been a very similar situation in 2010. She asked whether or not the BOA would like her to read it or if they would like to see it. She stated that it seemed relevant to her application.

Chairman Cielezsko stated that she could present the minutes but that the BOA was well aware that they had been people with similar issues.

Mr. Hamilton stated that previous decisions by another Board of Appeals have no bearing on the current decision and do not establish precedent. Ms. Jordan stated that she just wanted to demonstrate that there was no requirement for a survey and that the Board had to make their decision based on what had been presented. She stated that she provided the information that she had found or had been given.

Chairman Cielezsko stated that only the Superior Court sets precedent for the Board of Appeals. He added that each case is totally unique.

Mr. Marshall stated that if Ms. Jordan and Mr. Anderson agreed on a boundary decision between the two of them and placed a marker, then that would be the marker of the boundary. He asked if he were incorrect on that assumption. Chairman Cielezsko stated that he was incorrect. Mr. Marshall asked what the surveyor would use to determine the boundary if there is no marker. Chairman Cielezsko stated that it would be possible to have a long conversation on that issue.

## **TESTIMONY FROM ABUTTERS**

Cindy Saklad of 1 Marjorie Way, the property on the back lot line, stated that they had had Third Avenue changed to Marjorie Way when they bought the property. She stated that Heidi Jordan introduced her information to her and her husband and that they are in favor of her being allowed to use the existing footprint of the garage for an ADU

dwelling for her parents. They have no problems with that idea. She added that she had also spoken with Doug Anderson and he told her that he intended to be at the meeting for the waiver. She stated that he is also in favor of the ADU.

## **TESTIMONY FROM INTERESTED PARTIES**

Chairman Cieleuszko stated that the BOA had a packet of information that was sent by Kate Pelletier, the Assistant Town Planner. He stated that her standing in the hearing was that of an interested party.

He asked if anyone had any questions, even though Ms. Pelletier was not present at the meeting. He stated that there really was not much to question but that he did not want to read it all into the record. He stated that probably any conversation in regard to Ms. Pelletier's information would be conducted during the BOA's deliberation unless someone had questions first that could be addressed either through the CEO or the appellant.

Ms. Lemire stated that on the first page of Ms. Pelletier's memo, she said "If an applicant has submitted reasonable evidence of ownership or boundary location then the application may only be denied for reasons related to the review criteria spelled out in the ordinance. A survey is not part of that review criteria." Ms. Lemire asked the CEO if that statement were true.

The CEO stated that the statement applies if the information provided by the appellant was reasonable and he did not think it was. Ms. Lemire stated that that was not the question she had asked. He restated that he did not believe the information supplied by the appellant was reasonable. Ms. Lemire restated that that that was not the question she asked. She stated that she asked if the survey was part of the required criteria in the Town ordinance.

The Code Enforcement Officer stated that if the CEO feels that the information supplied is unreasonable, the CEO or the Planning Board or the Board of Appeals can require a survey. Ms. Lemire asked if that requirement was listed in the criteria. The CEO stated that that was the information he had received from the Town's attorney and it was also backed up by the Maine Municipal Association.

Chairman Cieleuszko stated that when the memo from Ms. Pelletier speaks about criteria, it is referring to all of the ordinances and the BOA has the ability to ask for a survey. He asked the CEO if that was a reasonable interpretation and the CEO stated that he believed it was.

Mr. Cutting cited from the memo that "local boards and officials have no legal authority to resolve boundary disputes, title disputes or other constitutional matters." He stated

that the memo notes that the MMA recommends inserting language in the board decision to clarify that the approval in no way resolves any boundary disputes.

Chairman Cielezsko stated that the memo was more concerned with the Board of Appeals overreaching its authority in deciding civil disputes in regard to lot line boundary problems. He stated that the BOA's authority is to decide whether the appellant's information is reasonable. He stated that most of the memo does not address that issue and added that it discusses issues that are really not relevant to the current case.

He stated that if there were a glaring inaccuracy, such as Ms. Jordan stating that she had 200 feet of side setback, that statement would not be acceptable. He stated that there has to be some assumption that the information is correct. He stated that he thought that was the general rule.

Mary Fournier of 16 High Meadow Farm Road, Eliot, Maine stated that Chairman Cielezsko stated at the beginning of the meeting that the BOA would take comments from the general public and she wanted to be able to make a comment because she is a member of the public. She stated that she realized the BOA was trying to decide if they could grant Ms. Jordan a waiver without a survey being done. She stated that she could not help but think of a situation having to do with surveys that is impacting her. She stated that fairly recently, the Planning Board issued an arguable building permit to a large company to build transmission lines that go over her property.

She added that the permit for the transmission lines was considered under Shoreland zoning ordinances. She stated that her point was that the permit was granted to a large company, not to an everyday person. The company, she stated, was building on the property of others and that they only have certain easement rights. She added that the Planning Board, the CEO and the Planning Assistant never once mentioned anything at all about a survey.

Mrs. Fournier stated that they had had two surveys done at their own expense by two separate companies to mark the easement boundaries. She stated that there was a difference between what Central Maine Power puts on an aerial photograph with computer lines and where those easements actually exist.

She stated that even if the situation were different than her situation, she felt that it was important that the Town dealt with people coming before the BOA fairly. She added that she thought that if the BOA required Ms. Jordan to get a survey that that would be an undue burden on her. She stated that what the appellant wanted to do was to develop the interior, which would require an additional permit for an ADU, so that she could have a usable living space. She added that it was her opinion that Ms. Jordan had presented reasonable information and that she thought the BOA should use common

sense considerations when making their decision. She stated that if the BOA had the ability to grant a 50% waiver, they should do that.

Mr. Billipp stated that there had been no discussion about Ms. Jordan's meeting the five criteria and that it would seem that they should address those. Chairman Cielezsko stated that if anyone had any concerns about any of the criteria to ask questions about those.

Mr. Hamilton stated that Ms. Jordan did not have to meet the criteria requirements in order for the BOA to grant her a waiver. He stated that the five criteria were simply pieces of information that she had been asked to provide and that she did so and that they were included in the packet. He did not think they needed to be discussed since she did not have to defend each item in order for the BOA to grant the waiver because they are not required.

Chairman Cielezsko stated that he did not agree with Mr. Hamilton. Mr. Billipp asked if it were not similar to a variance. Chairman Cielezsko stated that it was very similar to a variance. He stated that the five criteria are variances that are found in State law. Mr. Hamilton stated that they are not required. Chairman Cielezsko replied that the BOA has used them as guidelines. Mr. Hamilton stated that, as guidelines, he thought they were very well represented.

Mr. Hamilton stated that, unlike a variance which requires a discussion and vote on each individual requirement, in the current situation that is not necessary. He added that he did not feel the need to discuss the criteria. Mr. Billipp stated that perhaps that was something that would come up in discussion once there was a motion and the BOA was deliberating.

Chairman Cielezsko recommended that any concerns be voiced during the open hearing because the criteria lend support to the decision-making process. He stated that any reservations anyone had about the criteria should be raised during the open hearing.

Mr. Billipp stated that he had thought the criteria would be reviewed in the same way as they would be in a variance situation. Chairman Cielezsko stated that they do not carry the same weight in a waiver situation.

Chairman Cielezsko asked Ms. Jordan if she had any final words. She stated that she could not think of anything to add. Chairman Cielezsko stated that she had given a fine presentation.

The public hearing was closed at 8:12 PM.

Mr. Cutting asked if the five criteria would be used in determining the setback. Chairman Cielezsko stated that whether or not the waiver was granted would be all-encompassing. He stated that if Mr. Cutting did not like the answers Ms. Jordan gave,

that could be grounds for denying the waiver. He stated that poor information in regard to the setback could also be grounds for denial. He added that the purpose of the five criteria was to help Ms. Jordan in her pursuit of the waiver and that they were designed to help the BOA to reach a conclusion.

Chairman Cielezsko asked the appellant if she would go to 10 feet, which would still be a waiver. She stated that she would. Mr. Marshall asked what difference that would make. Chairman Cielezsko stated that that amount would be all the BOA could grant.

#### **FINDINGS OF FACT:**

- The appellant is Heidi Jordan of 225 Highland Street, Apartment 5, Portsmouth, NH.
- The owner of the property is David Anderson.
- The location of the property is 15 Park Street, Eliot, Maine.
- The property is identified as Lot #6-27 on the Eliot Tax Map.
- The property is located in the Village District.
- The property is registered in York County Registry of Deeds, Book 14761, Page 876 and 877.
- The deed was registered on February 23, 2006.
- The lot size, according to the application, is 91.5 feet by 114 feet and is .25 acres.
- The Purchase and Sales Agreement copy was supplied in the packet from Heidi Jordan and has a closing date of December 27, 2012.
- The request for a waiver is dated November 20, 2012.
- The request was accepted by the Town on November 21, 2012.
- The hearing of the case was December 20, 2012.
- Included in the application packet was a recorded subdivision known as Plan of Lots of Ransom M. Derick, Eliot, Maine which was recorded on September 19, 1924, Plan Book 9, Page 69. It was a hand-written note and was not verified.
- The lot is a non-conforming lot by virtue of at least its lot size. The Village District is a one acre minimum.
- The Board of Appeals has the authority under Section 45-49 to hear variance appeals.
- Because of the non-conformity, the Board of Appeals can grant a waiver of up to 50% of the setback requirement under Section 45-194(c)(2)
- Under Section 45-459(c)(1) "Any structure containing an accessory dwelling unit must meet minimum yard and setback requirements for principal structures.
- A principal structure in the Village District requires a 30-foot front setback, 20-foot side setback and 30-foot rear setback.

- The Town ordinance for an accessory building requires a 10-foot front setback, a 10-foot side setback and a 10-foot rear setback.
- An application was presented at the December 20, 2012 hearing for a rebuilding of a garage that was dated April 28, 1986. The application shows a garage designed to be built with a 10-foot side setback and a 31-foot front setback with outside dimensions of 22 feet by 16 feet.
- The existing structure already contains a partial apartment with and room and a ¾ bathroom upstairs.
- The existing structure has outside dimensions of 26 feet four and one-half inches depth and 16 feet and three inches width, according to measurements provided by the appellant.
- The packet from the appellant included answers to the five criteria for a waiver.

## **DISCUSSION**

Mr. Marshall suggested that the setbacks be described as being “at least” 10 feet for the side and at least 30 feet for the front setback rather than “at” 10 feet or 30 feet. He stated that if the owners wanted to make the setback more, they could do so. He stated that he thought it could be interpreted as being necessary to move the setback to specifically 10 feet. Chairman Cielezsko stated that he was referring to the 1986 garage building permit, not to the general code dimensions.

Mr. Cutting quoted from Section 45-459(c)(7) that, “Apartments built prior to November 2, 1982 and existing on March 16, 2002, shall be considered lawful nonconforming uses which may continue pursuant to section 45-191. Any apartments existing on (effective date of section 45-459) and built on or after November 2, 1982 shall not be considered lawful nonconforming uses, unless the property owner applies for a building permit for the ADU.” He then stated that, upon reconsideration, the citation was not applicable to the current case.

Chairman Cielezsko stated that in the analysis of existing maps, it looks as though the garage was built larger and further into the back yard than what the 1986 permit stated. Mr. Marshall stated that if the GIS map is accurate, the garage is also built further back from the side boundary. He stated that if the front is accurate as a measure from the GIS map, the side should also be accurate. Mr. Billipp and Chairman Cielezsko stated that they had no way of knowing how accurate the measurements were but that it had already been presented that the 1986 permit had a 10-foot side setback.

Chairman Cielezsko stated that the duty of the BOA was to take the evidence that had been presented and either grant or deny a waiver. He stated that the appellant asked for a 6-foot waiver. He added that if the BOA were going to state an amount, they had

the ability, through section 45-194, to grant up to 50%, which would be 10 feet. He stated that they had evidence that it is at 10 feet.

Chairman Cielezsko stated that he could not see any benefit to granting a 6-foot waiver. He stated that the appellant had acknowledged that she would accept 10 feet, so he thought that if the waiver were granted, it should be granted at 50% (10 feet). He stated that if she found down the road that there was a problem, maybe she could build within those standards. He added that if the waiver were granted, he recommended granting the whole 50%, giving a 10-foot side setback.

Mr. Cutting cited the memo from Ms. Pelletier, which stated "If there are concerns as to the boundary location, MMA recommends inserting the following language into its decision to clarify that the approval in no way resolves any boundary disputes." The memo cites the MMA recommendation as follows:

*"This permit is approved on the basis of information provided by the applicant in the record regarding his ownership of the property and boundary location. The applicant has the burden of ensuring that he has a legal right to use the property and that he is measuring required setbacks from the legal boundary lines of the lot. The approval of this permit in no way relieves the applicant of this burden. Nor does this permit approval constitute a resolution in favor of the applicant of any issues regarding the property boundaries, ownership or similar title issues. The permit holder would be well-advised to resolve any such title problems before expending money in reliance on this permit."*

Mr. Cutting stated that he thought the statement should be included if the waiver was granted. Chairman Cielezsko stated that are many releases of responsibility for the Board and many layers that may stop the appellant in her tracks down that the road. He stated that, for instance, in her efforts to refinance, if the lender found anything wrong, she would not get the funds and they would do a survey. He stated that the refinancing process could be quite enlightening as a way to find out where one stood in terms of the ordinances.

Chairman Cielezsko stated that if the BOA granted the waiver, they would only be granting a waiver for a lot line. They would not be granting permission for an ADU or anything other than granting a waiver. He added that there would be no guarantee that she could get an ADU.

## **MOTION**

Mr. Hamilton moved that the BOA approve the waiver in the full amount of 50%. He stated that he believed the appellant had provided enough information that granting the waiver would be a reasonable decision. Mr. Lytle seconded the motion.

## **DISCUSSION ON MOTION**

Mr. Hamilton stated that the reason he felt strongly about the issue was that the appellant had essentially inherited what may or may not be an issue down the road. He stated that there was nothing to prevent another landowner, after she sells her property and the neighbor also sells her property, from making a dispute on that boundary. He stated that would have to be resolved in a civil action and was not the purpose of the BOA.

He stated that if the appellant had appeared before the BOA and stated that there was no existing structure and no existing footprint and that she wanted to build a structure, he would have a problem. But, he stated, that did not have a problem with the fact that the appellant is simply using an existing permitted structure, even though the structure had not been permitted as an ADU. He stated that she was currently asking that the structure be permitted as an ADU with the required setback.

Mr. Hamilton stated that the fact that there is an existing structure and the appellant inherited issues that may be related to that did not disqualify her from receiving a waiver. He restated that if she had asked for a new structure with a new footprint, he would probably have been more circumspect. He added that he felt very comfortable with the waiver being granted.

Chairman Cielezko stated that the GIS mapping was irrelevant in his mind. He stated that he had seen lines going through a dozen houses on the long row of single lots and that everyone had built on the lot line in the information that had been presented. He stated that what he was basing his opinion on was the 10 feet from the existing garage. He stated that there was a 10-foot line in the building permit that was accepted by the Town. He stated that there is evidence that the width would fit the ADU, so he felt comfortable with that.

## **DECISION**

The motion passed unanimously with Mr. Hamilton, Mr. Lytle, Mr. Billipp and Mr. Cutting voting in favor.

Chairman Cielezsko informed the appellant that the waiver for a 10-foot side setback had been granted. He stated that she still had a lot of hurdles to go over and that there are a lot of rules about ADUs. He recommended that she work with the CEO and that they would come to a good conclusion.

## **APPROVAL OF MINUTES**

Prior to approval of the minutes from the November 15, 2012 meeting, Chairman Cielezsko stated that the appellants from that meeting, Mary and David Fournier, were present and that Mrs. Fournier would like to make some comments.

Mrs. Fournier stated that she and her husband had prepared a letter, a copy of which she presented to each BOA member. She stated that she had received a copy of the draft minutes of the November meeting which the BOA would decide whether to approve or not to approve. She stated that the subject of her letter was the draft of the minutes.

Mrs. Fournier stated that had also obtained a copy of the recording of that meeting which Linda Keeffe made. She stated that she had made disc copies of the entire audio recording for each BOA member. She requested that the members read the letter and listen to the audio recording before they decided whether or not to accept the minutes.

She added that the letter stated that, due to the legal nature of the hearing, she felt that there was too much left out of the draft minutes, though she realized the minutes did not have to contain every spoken word. She stated that what was left out changes the meaning of the many discussions which occurred during the hearing and which were used when the Board made their decision.

Mrs. Fournier stated that it took ½ hour for the BOA to actually decide whether or not the Fourniers were aggrieved parties and abutters to the wetlands. She stated that it was obvious to the Fourniers that they were abutters. She stated that it took an hour for the BOA to decide whether or not they had filed the administrative appeal within the 30-day time period required by the ordinances.

She stated that they she and her husband were still deciding whether or not to take the issue to court but that they were likely to do that. She added that that was the only recourse they had to appeal any of the BOA decisions. She stated that if they do go to court, they would be using a transcript of the actual audio recording in court. Therefore, they didn't need to depend on the minutes being more accurate than what they were. She stated that she did want to give the BOA the opportunity to decide to postpone the approval to the next meeting and take the time to listen to the actual recording. She stated that she would feel comfortable either way.

Mr. Hamilton stated that if she was proceeding to court, she did have the audio recording as evidence. He stated that he agreed with her statement, that the minutes do not have to reflect every word that had been spoken at the meeting. He added that if she noted some problems with the minutes, he would prefer that she address those problems specifically.

Mr. Hamilton stated that he did not feel a need for the BOA members to go through the audio vs. the transcription. Mrs. Fournier stated that she thought they could listen to the audio in their spare time.

Chairman Cieleuszko stated that the BOA was going to approve the minutes tonight, amended or not. He added that they were not going to listen to the audio before they approved the minutes and that they would go on their recollections. He stated that they could not make an exception in her case, no matter how legal it was. He added that they had much bigger cases that had been done the same way and that they were going to discuss the minutes among themselves and get them approved.

Mrs. Fournier stated that she could not fill in the blanks of the minutes and that the kinds of things she was talking about was that there were a lot of people talking at once, with a discussion going on at one end and another going on at the other end at the same time.

Mr. Hamilton stated that he is the secretary of the Board of Appeals and he reviews the minutes that Linda sends him for any inaccuracies that he can pick up and any typos that he spots. He stated that he does not make any changes to the substance of the content. He added that he felt that the minutes reflected very truthfully and accurately the proceeding of the last Board of Appeals meeting and he did not see any need to postpone the review and approval of the minutes.

He stated that if there are some serious objections as to what was transcribed versus what is in the audio, then that would be an issue for the courts to decide. He added that he feels very comfortable with the way the recording secretary does the minutes.

Chairman Cieleuszko stated that the BOA members go over the minutes among themselves. Mrs. Fournier asked if they listened to the recording and he stated that they do not. He stated that he would listen to her CD at his leisure at home but that they would go over the minutes using their recollection. He stated that he had read the minutes and he thought they reflected well on what the meeting consisted of.

Chairman Cieleuszko stated that he appreciated Mrs. Fournier's CD of the audio because he does not receive those. He added that she would never have to make copies again because the meetings are being video streamed and that she was currently on camera.

The minutes of the November 15, 2012 were approved as amended.

## **OTHER BUSINESS**

Chairman Cielezsko stated that he wrote a letter to the Board of Selectmen (copies of which were sent to the BOA members) after the BOA November meeting because he thought he had to address an issue. He went to the Board of Selectmen meeting as Chairman of the Board of Appeals and on behalf of his own personal integrity. He wanted verification that the Board of Selectmen members were acceptant of the way Chairman Cielezsko performs his role. He stated that he wanted to make sure, for his own personal satisfaction, that they were OK with him.

Chairman Cielezsko stated that he did get approval from everybody but one BOS member, adding that that member was not acting as a Selectman that night.

He added that he had a second dilemma and is the situation where any Selectman is on multiple boards. He stated that he had great reservations about that and it had come to light at the November BOA meeting. He stated that he found that disturbing.

Mr. Hamilton asked if there were anything in the Town ordinances that would prevent that situation.

Chairman Cielszko stated that there is a State law that says that Selectmen cannot be on the Board of Appeals but no State law that states they cannot be on any other board. He mentioned that in a small town, three or four people might be running the whole town.

Mr. Hamilton stated that if there was no State law against someone holding double positions within a town, the BOA discussion would be somewhat moot because whatever they decided would not make any difference.

Chairman Cielezsko stated that there is a perceived bias when a Selectman who is elected to a position is on another committee or board where decisions affect the population.

Mr. Lytle stated that he thought Chairman Cielezsko's letter stated the issue and explained it to the BOS very well. He added that the BOS gave the people involved some direction and he did not think the BOA needed to take the issue any further.

Mr. Hamilton stated that when a "point of order" was made at the BOA November meeting the public hearing had already been closed. He added that a point or order made by a person in the public at that point does not need to be recognized under *Robert's Rules of Order*.

Chairman Cieloszko stated that guidelines for points of order in *Robert's Rules of Order* were brought up at the BOS meeting and that Jack Murphy explained the process. Chairman Cielezsko and the BOS members all verified that the only points of order that have to be recognized are from the members of the board. He added that it is only in a Town meeting where everybody is a voting member that points of order are recognized from the public. He stated that, however, he tries to recognize everybody.

**ADJOURNMENT**

The meeting was adjourned at 9:02 PM.

Respectfully Submitted,

Linda Keeffe  
Recording Secretary

Approved by: \_\_\_\_\_

Ed Cielezsko, Chairman, Board of Appeals

Date Approved: \_\_\_\_\_