TOWN OF ELIOT – BOARD OF APPEALS MEETING

January 16, 2014

ROLL CALL

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

Others Present: Code Enforcement representative Kate Pelletier, attorney J.P. Nadeau, abutters' representative; 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 Planning Board and the Code Enforcement Officer will present testimony.
- The Board will question the Planning Board and 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.
- Any decision can be appealed to the Superior Court within 45 days.

REQUEST SUMMARY

Chairman Cieleszko stated that the first hearing was a request for an Administrative Appeal by John Schnitzler and/or Laura Pope of 144 Depot Road, Eliot, Maine, against the decision of the Planning Board to approve XNG Project application at 525 Harold Dow Highway, Eliot, Maine, Map 53, Lot 8.

Chairman Cieleszko stated that previous to the meeting, he received a letter from the appellant. He read the first paragraph which stated, "Dear Mr. Chairman, With Respect to our recently filed Administrative Appeal regarding the Planning Board's approval of the XNG Maine site development on Route 236, we reluctantly withdraw this appeal." Chairman Cieleszko stated that the letter stood and the appellants were not present.

PUBLIC HEARING CLOSED

The public hearing was closed at 7:06 PM.

PUBLIC HEARING OPENED

The second public hearing was opened at 7:07 PM.

Jeff Cutting recused himself from the Board because he is an abutter to the appellant.

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

REQUEST SUMMARY

Chairman Cieleszko stated that the request was an Administrative Appeal by John Brigham of 36 Littlebrook Lane, Eliot, Maine and others against the decision of the Code

Enforcement Officer regarding a growth permit issued to Sweet Peas LLC located at Littlebrook Airport, 107 Littlebrook Lane, Map 46, Lot 3.

Chairman Cieleszko stated that Mr. Brigham is not an abutter. Mr. Brigham stated that he is an abutter to Littlebrook Lane and had originally thought that that qualified him as abutter but that he had since learned that it did not. Chairman Cieleszko stated that that was alright because there were multiple appellants named.

Chairman Cieleszko asked if any BOA member had any reservations that there were at least five qualified appellants. He cited Section 45-50 as , "An aggrieved person or party is a group of five or more residents or taxpayers of the town who represent an interest adverse to the granting or denial of such permit variance, waiver, or appeal." None of the BOA members had reservations that the appellants were qualified. Chairman Cieleszko stated that there was standing for the group of appellants.

Chairman Cieleszko stated that the growth permit was granted on November 8, 2013 and the appeal was dated December 6, 2013 with a supplemental cover page dated December 11, 2013. He stated that timeliness had been established.

TESTIMONY FROM APPELLANT

Attorney J.P. Nadeau (J.P. Nadeau Professional Offices, 507 State Street, Portsmouth, NH, 03801) stated that he represented 17 residents and taxpayers of the Town of Eliot. He stated that they were John and Sheila Brigham, Don and Sallie McKenney, Mike and Cindy Fielders, Larry and Maryl Kilbourn, Fred and Ann Barbour, Dan and Janice Perkins, Pat and Jen Chaise, Charlie and Maribeth Hathaway and David Lincoln. He stated that all reside on either Littlebrook Lane or on Barnard Lane.

Mr. Nadeau stated that he had some materials to pass out to the BOA members to expedite the hearing. He added that the first set of materials was background information and the second set was a memorandum setting forth the facts of the laws as he sees them.

Mr. Nadeau stated that in Section 45-466, the issue was what, if any, of the provisions of the ordinance apply. He stated that the BOA acted on the application for a variance in September 2013 because Sweet Peas LLC was told that they needed a variance for Section 45-466(g)(5) which limits the distance between the closed end of a dead-end access to back lots as not exceeding 1,000 feet.

Mr. Nadeau stated that Section 45-466 relates to back lots. He stated that in his presented material, he had highlighted the sections which he thought were important

because he thought there could be some confusion and arguments and that there had already been confusion and arguments.

Mr. Nadeau stated that the BOA had dealt with the back lot ordinance many times in the past, as was noted in the minutes of the meeting on September 19, 2013, when the BOA denied Sweet Peas the requested variance. He added that the appellant's position was that Section 45-466(a), (b) and (g) applied and that they must have recognized that fact because that is why they filed for a variance.

Mr. Nadeau stated that the appellants he represented were not arguing that the CEO's position was undermining the authority of the BOA. He stated that he had mentioned that the BOA had denied a variance because the appellants agreed that Sweet Peas had needed the variance and they were aware that the BOA had denied that variance.

Mr. Nadeau stated that what had happened was that, after the September 19, 2013 meeting, there was some communication from the Board of Selectmen's office. He stated that he was not sure why or how that came about, but the BOS became involved and they contacted the Town attorney and one of the principals of Sweet Peas LLC stating that they now had the opinion that Sweet Peas could proceed under Subsection (e) of the ordinance.

Mr. Nadeau stated another piece of information provided in his packet contained a copy of the issuance of the growth permit by the CEO. He added that the CEO had originally told the appellant that they had to get a variance and that 45-466(e) did not apply. Mr. Nadeau stated that he was not sure why there was a change in Mr. Marchese's position, but that that was the reason the appellants in the current case were asking for an administrative appeal.

Mr. Nadeau stated that he was going to argue that the CEO's original position and the position long held by the BOA regarding other appellants that the 1,000-foot limit does apply and that what was being proposed in the growth permit application does not even qualify under Section 45-466(e).

Mr. Nadeau stated that he had presented a summary of the appellants' position in memorandum form in his packet. He stated that it was the appellants' position that it is clear from the wording on Section 45-466(g)(5) that that provision applies in the current case and that subsection (e) does not apply in the current case. He stated that Section 45-466(g) regulates *all back lots*. He stated that the ordinance does not refer to any lots created either before June 14, 2005 or after that date. He stated that the State required that the provision apply to all back lots and that he did not see any other interpretation that could be given.

Mr. Nadeau stated that there has been a great deal of thought that went into the preparation of the provision because it does not allow any latitude. He added that it states that the distance of the dead-end access way *shall not* exceed 1,000 feet. He stated that not only does the provision relate to all back lots, but that it is also mandatory that the access way not exceed 1,000 feet. He stated that the rule is for good reasons, even for safety alone.

Mr. Nadeau stated that even if the lot in question qualified as a preexisting back lot, it is 2,500 feet away from Beech Road and another 1,000 feet to the lot.

Mr. Nadeau stated that he had attached page 12 of the BOA minutes of the September 19, 2013 meeting in which the CEO's testimony noted that there had been other appellants who requested relief from the 1,000-foot limit and that the BOA had regularly upheld that requirement. He added that permits which had been granted had been overturned by the BOA. He stated that he was confused as to why a growth permit had been issued after the variance had been denied.

Mr. Nadeau stated that it was clear in the wording of Section 45-466(e) that it applied to existing legally existing, non-conforming lots of record. He added that the lot had to be in existence and had to have been recorded with the Registry of Deeds. He added that Sweet Peas wants to create a two-acre parcel of land and that there is no deed of record for that lot, that it was not created prior to June 14, 2005 and that, therefore, it cannot qualify under subsection (e). He stated that it is a new lot being created and that he could not conceivably see how it qualified. He added that on that basis alone, Ordinance 45-466(e) cannot be said to apply to the granting of the growth permit issued by the CEO to Sweet Peas on November 8, 2013.

Mr. Nadeau stated that even if the new lot did apply, Sweet Peas LLC does not even have the requirements for proper access to the lot. He quoted Ms. Breen from page 17 of the BOA September 19, 2013 minutes as stating that there is no plan to extend Everett Lane. He added that the plan submitted to get the growth permit shows Everett Lane going around the property. He stated that that road simply does not exist.

Mr. Nadeau stated that on page 20 of the September 19, 2013 BOA meeting, Ms. Hardy, who had owned the property for years, stated that there was an agreement that access to the lot is off Littlebrook Lane and will not go down the taxiway.

Mr. Nadeau stated that the only way to get to the proposed lot is to go down the taxiway, which she had said they were not going to do, or they would have to extend Everett Lane and build a road to the property. He added that the proposed lot does not have direct access to Littlebrook Lane and he does not see how Ms. Hardy could say that access would be off Littlebrook Lane.

Mr. Nadeau stated that, in summary, the lot in question is not a legally existing lot of record created prior to June 14, 2005. He stated that on that basis alone, the appellants argue that the CEO's decision to issue a growth permit was erroneous.

Mr. Nadeau stated that the area of the lot in question is only part of the larger back lot. Even if it was a legally existing lot of record created prior to June 14, 2005, the distance between the closed end of a dead-end access way used to access the lot and the nearest nondead-end street shall not exceed the 1,000-foot requirement.

Mr. Nadeau stated that what is intended by Sweet Peas LLC is the creation of a new lot. He added that in addition to all other subdivision regulations that may apply, at a minimum it must have 150 feet of road frontage on a 50-foot-wide road. If the taxiway is used, it is still only a 30-foot-wide access way and it does not even abut the proposed lot.

Mr. Nadeau stated that for all of the reasons which he had summarized to the BOA, the only decision that the Board should make would be to find that the decision made by the CEO on November 8, 2013 to issue a growth permit #13-17 was in error and should be voided.

QUESTIONS FOR APPELLANT FROM BOARD

Chairman Cieleszko clarified that the proposed lot has not been recorded. Mr. Nadeau confirmed.

Chairman Cieleszko asked what the requirements are for a growth permit. Mr. Nadeau stated that they were outlined in the CEO's November 8, 2013 letter to Sweet Peas granting the permit. Chairman Cieleszko clarified that the CEO's letter stands as having stated that the appellant met the requirements for the growth permit. Mr. Nadeau stated that that would be true if the land in question qualified under Section 45-466(e). The appellants' position is that it does not qualify. He stated that if the lot did qualify, it would have to meet the regulations of subsection (e) as well.

Chairman Cieleszko clarified the appellants' position as being that if the lot did not meet the regulations, it should not have been granted the growth permit. Mr. Nadeau confirmed.

TESTIMONY FROM THE CODE ENFORCEMENT OFFICER

Kate Pelletier stated that she could not speak for what the previous CEO was thinking when he issued the growth permit. She stated that when she looks at the permit against the requirements for the Growth Management Ordinance, she does not see that there are any requirements to meet back lot standards simply for a growth permit. She stated that those requirements are addressed when a building permit is issued.

Ms. Pelletier stated that there is nothing in the Code of Ordinance chapter on Growth Management that states that an applicant has to comply with all of the other requirements. A growth permit is only permission to add a dwelling unit in the Town of Eliot under Growth Management provisions. She stated that it is just one step in getting a permit to build a new house or getting an electrical permit and that each permit is its own process with its own application and its own standards.

Ms. Pelletier stated that the CEO is given fairly broad leeway to request whatever he or she desires to issue a growth permit. She stated that there is nothing in the ordinance that says the CEO can't change his mind. She stated that Mr. Marchese may have thought that he could not issue the permit and sought legal advice which resulted in his thinking otherwise.

Ms. Pelletier stated that the growth permit in question expired on December 31, 2013. She stated that whatever the outcome of the hearing, it would not have an effect on the permit because it has expired.

QUESTIONS FOR THE CEO FROM THE BOARD

Mr. Hamilton clarified that the growth permit had expired on December 31, 2013. He asked if that meant that the person to whom it was issue could not go forth with a building permit in 2014.

Ms. Pelletier stated that an applicant has 90 days to convert a growth permit into a building permit. Any growth permit that has not been converted into a building permit by the end of the calendar year expires regardless of when it was issued. She added that the permits do not carry over into the following year and that it has to be converted to a building permit by the end of the year to avoid expiration. In the current case, the applicant had less than 90 days because the permit was issued in November and the end of the year came before the 90 days did.

Mr. Hamilton noted that Ms. Pelletier had stated in her packet of information to the BOA that, "the ordinances do not give the Board of Appeals any role in the review of growth permits, nor do they hinge the approval of a growth permit on the approval of a variance, so it would be incorrect to conclude that the CEO's approval of the growth permit undermined the actions of the Board of Appeals."

Mr. Hamilton stated that the BOA's duty is to review all decisions by the CEO, whether that is a decision to issue a growth permit or any other decision. Ms. Pelletier stated that she was only referring to the issuance of a growth permit, not to the appeal procedure. She stated that the BOA obviously has a role in the appeals.

Mr. Billipp asked if Sweet Peas had reapplied for a growth permit in 2014. Ms. Pelletier replied that they have and that they were given a new growth permit that is currently valid.

Mr. Billipp asked the Chairman and the BOA members what relevance there was to hearing an appeal to a permit that was now void. Chairman Cieleszko stated that they would get to that issue.

Mr. Billipp stated that he wanted to clarify that the two-acre lot does not currently exist and is contemplated subject to a building permit. Ms. Pelletier concurred and stated that under the Maine law, a lot is not technically created by the approval or the recording of a plan but by the conveyance or transfer of an interest in the land. She added that that would not happen until there is an approved building permit.

Ms. Pelletier stated that the plan is all theoretical but that the applicant had supplied an example of the attachment that they would use if they get the approvals. She stated that they described the right-of-way, which is a requirement of the Back Lot Ordinance. She stated that she did not see anything conflicting with the Back Lot Ordinance. Mr. Billipp asked if that was true even if the lot was created after 2005. Ms. Pelletier stated that it would apply to the lot, not to the access way. Mr. Billipp asked if it was correct that the access way would have to be extended to reach the property. Ms. Pelletier stated that when one looks at the property from an aerial photograph, it is clear that there is a road there and that other people access their property from that same road, which has been there for decades. Mr. Billipp asked if Ms. Pelletier was referring to Everett Lane and she concurred.

Ms. Pelletier stated that the applicant had shown that they could provide a 50-foot-wide easement that is legally enforceable by deed which gives the property its frontage and meets the requirements of the Back Lot Ordinance.

Mr. Billipp stated that there is another lot on the submitted plan that is identified as 46-3. Ms. Pelletier stated that 46-3 is the airport's map and lot number and that it is the main parcel that is being divided. Mr. Billipp noted that above the roadway on the submitted plan was another lot that he believed was the lot in question and was noted as 2.089 acres. He stated that there appeared to be another lot next to that parcel. Ms. Pelletier stated that it was just a piece of a much larger piece of airport property.

Mr. Lemire asked when Everett Lane was actually created. She stated that in the notes on the Division of Land there is reference for a Plan of Land Prepared for John E. Hardy Jr. by Thomas F. Moron, Inc., dated November 22, 1982. Ms. Lemire asked if there was a survey of that plan in the Town offices. Ms. Pelletier stated that she was not sure if there was a survey of the whole airport property.

Mr. Rankie stated that what he was hearing was that the Town had authorized a growth permit for a huge lot, Map 46, Lot 3, but that it was not clear where on that lot the growth permit would be applied. Ms. Pelletier stated that a growth permit is to add a dwelling unit to the Town of Eliot. She added that it is not permission to construct and is not permission to divide but is only permission to add a dwelling unit because there is a Growth Management Ordinance. She added that there is no requirement to show where the building would be sited on the lot.

Mr. Rankie asked if the growth permit was specific to lot 46-3 or could a growth permit be applied to any lot. Ms. Pelletier stated that the applicant has to own the property and that the growth permit in question is specific to Lot 46-3.

Mr. Rankie stated that the submitted packet of information insinuated that Everett Lane is a road of record that predates the Town Ordinances, but he did not see any proof of that. He stated that he thought there would be registered plan or something in the Registry of Deeds to prove that Everett Lane is a road of record. Ms. Pelletier stated that it is not a requirement of the Road Management Ordinance that the appellant prove that. She stated that it is too soon in the process and that those requirements get reviewed in the building permit application, not in the growth permit application.

Ms. Pelletier stated that there has been a Maine Supreme Court decision that allows roadways that may be private and substandard if it can be shown that they are used for public access. She stated that Everett Lane appears on the subdivision plan and appears in deeds.

Chairman Cieleszko asked if a building permit had been issued. Ms. Pelletier replied in the negative. Chairman Cieleszko asked if there was a current growth permit and Ms. Pelletier replied in the affirmative.

Chairman Cieleszko asked whether or not the growth permit that was issued in 2014 had any bearing on the BOA's consideration regarding the CEO's decision on the 2013 permit. Ms. Pelletier stated that she did not believe that it did. She stated that every approval starts its own running process and appeal period. She stated that she did not think one could be hinged on the other. Chairman Cieleszko asked when the current growth permit was issued. Ms. Pelletier stated that she did not have the exact date but that it was at the beginning of January.

Chairman Cieleszko stated that the BOA was hearing the case as an Appellant Review and the only information that could be used was the information which was available to the CEO when he made his decision. He asked if the structure of the new permit was the same as that of the old permit. Ms. Pelletier stated that it was the same form. Chairman Cieleszko asked if Mr. Marchese's accompanying analysis was also included with the new growth permit. Mr. Pelletier replied in the negative.

Chairman Cieleszko asked if Ms. Pelletier's estimation was that the only requirement for the issuance of a growth permit is that the ownership of the land for which the permit is requested had to be proven. Ms. Pelletier stated that the applicable ordinance, Section 29-42, is pretty basic and that there is no linkage to complying with Back Lot standards or any other standards. It is only permission to grant a new dwelling unit in Eliot. Chairman Cieleszko asked for the cost of a growth permit. Ms. Pelletier replied that there is none. Chairman Cieleszko asked for the cost of a building permit. Ms. Pelletier stated that it is based on square footage and that she believed it was 50 cents per square foot for finished area and 20 cents for unfinished area. Chairman Cieleszko stated that it was substantially more than that for a growth permit.

Mr. Marshall asked if the BOA was wasting its time if it made a decision at the hearing, regardless of what the decision might be. He also asked if a decision would affect the growth permit in effect currently. Ms. Pelletier stated that the BOA would not affect the current permit and would be taking action on a decision that was no longer valid. She stated that the judicial process includes a certain period of time after a decision is made for an appeal to be made and each decision has its own ruling. Mr. Marshall stated that the feeling that the BOA is spinning its wheels may be correct. Ms. Pelletier stated that she would say that was true.

Chairman Cieleszko stated that there were at least two who had reservations and referred to Mr. Nadeau for an explanation for the appeal. Mr. Nadeau stated that he found it very surprising and very disappointing that 17 taxpayers had come to the meeting and that there had been no mention beforehand that the new growth permit had been issued. He stated that Ms. Pelletier had issued her information packet on January 14, 2014 and that there was no mention at all in that information about the new permit. He added that the appellants did not know what the basis was for the granting of the new permit. He stated that apparently the appellants would be back before the BOA again.

Mr. Nadeau stated that it was not a waste of the BOA's time because he thought the appellants were entitled to a decision as to whether or not the decision made on November 8, 2013 to issue a growth permit was proper. He stated that he did not think a possibility for extraneous litigation should be opened. He stated that he did not want to argue, nor did he think the Town would want to argue, over whether or not the appeal was valid.

Mr. Nadeau stated that another option would be to continue the hearing. He stated that he did not know how to express how he felt about the fact that the appellants had not been given the information by the CEO regarding the new growth permit. He stated that if he had known, he might have filed a motion to continue in order to provide time to file another appeal. He stated that unless there is some major difference in the basis for the new growth permit, they would be arguing the same thing again.

Mr. Nadeau stated that he thought it was misguided to say that there is no regulation for the issuance of a growth permit or any standard to be met. He stated that a growth permit cannot be issued if the property does not qualify as a back lot. He added that the Town has all sorts of ordinances and it is incorrect to say that a growth permit can be issued without looking at anything else.

Mr. Nadeau stated that he did not know when the new growth permit had been issued. But, he stated, he thought it was only fair play and decent treatment of the appellants to have been informed of that. He stated that he did not know what the basis for the new permit was but that he would be willing to bet that it is the same provision unless the decision had been made not to look at any other ordinances. He stated that there had to be standards that applied in order to issue a permit for a lot that Sweet Peas is trying to create without any other approvals.

Mr. Hamilton asked for the difference in purpose between issuing a growth permit as opposed to a building permit. He stated that there did not seem to be any requirements listed in the issuance procedure, that there is no fee involved and no legal requirement other than the need to show title to the land and he wondered why the Town issued growth permits. Ms. Pelletier stated that they are issued because there is a Growth Management ordinance which only allows a certain number of new dwelling units to be built in the Town of Eliot in any calendar year. She added that the number is based on an average number of dwelling units built during the ten years prior. She stated that there has to be a mechanism for tracking those numbers and that that is done through the permitting process.

Ms. Pelletier stated that a growth permit is just one step in a process of many steps. She stated that there are many permits needed in order to build a new home and an applicant has to meet each of those requirements separately and that they are not all hinged on each other. She added that getting an electrical permit does not give someone permission to grant a new dwelling unit. She stated that the permits are completely separate approvals with completely separate authorities to grant the approvals and their own process for issuing the permits.

Mr. Hamilton stated that he understood that the only reasons not to grant a growth permit would be that there is no indication that there is title or that the growth permits

were already gone for that calendar year. Ms. Pelletier concurred. Mr. Hamilton stated that essentially a growth permit is a reservation to proceed with a building permit. Ms. Pelletier concurred. She stated that a growth permit does not imply any other approvals.

Mr. Marshall asked if the current hearing was premature because there was nothing concrete that the BOA could address. He asked if the hearing should have been at the issuance of a building permit as opposed to the issuance of a growth permit. He stated that it appeared that there was no basis at this point to deny a growth permit and that the process would need to proceed to the issuance of a building permit before there was something that could be denied.

Mr. Billipp stated that the job of the BOA was to determine whether or not the CEO acted clearly contrary to the code. He stated that the issuance of the growth permit involves so little that the only thing that has to be proved is ownership of the property. Mr. Marshall stated that that was his point and that until a building permit is issued, there is nothing that can be argued against.

Mr. Billipp stated that the appellants' appeal is to a growth permit that is void. Mr. Marshall stated that there is also no basis to deny the permit based on the Growth Management ordinance. Ms. Pelletier stated that before issuing a building permit, she would check against every single applicable standard, including the back lot ordinance and the building code and that that is when all of the details get ironed out.

Chairman Cieleszko stated that there was an issue in the case that had not been addressed. He stated that the growth permit is recorded with a letter from Jim Marchese outlining the reasons it was granted. He asked Ms. Pelletier if that letter accompanied the 2013 growth permit and she concurred. Chairman Cieleszko stated that the letter was alarming to him because a growth permit that has no requirement had, in the letter, a drawn-out description of how the appellant had met various requirements and, therefore, were given a growth permit.

Chairman Cieleszko stated that the BOA had the authority to grant the appeal because the permit was issued incorrectly and that if the appeal was granted, the permit would be pulled off of the record. He stated that the permit had expired but that it was never good to begin with. However, he stated, that growth permit is on the record as being granted with Mr. Marchese's accompanying letter.

Chairman Cieleszko stated that the CEO's letter would help the appellants when they pursue a building permit because it has already been established that they met certain requirements because of the letter accompanying the growth permit issued in 2013. He added that if the BOA rescinded or modified the permit, then the appellant would not have the legal standing or leg-up on the process.

Chairman Cieleszko stated that the BOA had turned down the appellant already for exceeding the 1,000-foot limit. He stated that then the CEO turned around and gave them a permit. He added that the letter stating that the appellant had met requirements should not have accompanied the growth permit.

Chairman Cieleszko stated that the BOA could rescind or modify the expired growth permit. He stated that he thought there was a window of opportunity to modify the growth permit by rescinding the CEO's accompanying letter, saying that the letter is moot and does not apply to the growth permit.

Mr. Marshall stated that because the letter was describing requirements that do not apply to a growth permit, it was moot anyway. Chairman Cieleszko stated that it was not moot if it accompanied the growth permit. Mr. Marshall asked whether the letter accompanied the permit or just was given to the BOA. Ms. Pelletier stated that it accompanied the permit.

Chairman Cieleszko stated that the Town has a code enforcement decision that states that the appellant can meet certain standards and that the growth permit was granted because they met those standards.

Mr. Rankie stated the CEO who wrote the letter which accompanied the growth permit no longer works for the Town of Eliot. He stated that the letter is also totally inapplicable to a growth permit, particularly when it is not clear to which lot it refers. He stated that the letter mentions Lot 46-3, which is not a lot of record. He stated that the reference was to a broad lot and the growth permit could apply to any site on that lot. He stated that the BOA did not know if the lot was a back lot or if it abutted the airport because they did not know where it was.

Mr. Rankie stated that the CEO's letter was in error but that it didn't have anything to do with the BOA because the permit it was attached to has expired.

Mr. Billipp stated that the letter starts off saying, "Dear applicant, Your recent request for a Growth Permit Application has been granted." He stated that the rest of the letter is window dressing.

Chairman Cieleszko stated that the CEO also wrote, "Important aspects of the permit: 1. This application has been approved based on the interpretation of the following ordinance: Sec. 45-466 Back Lots." Mr. Billipp stated that it was irrelevant. Chairman Cieleszko disagreed.

Mr. Billipp asked Chairman Cieleszko if his concern was that that the growth permit and letter might come back somehow. Chairman Cielezko concurred.

Mr. Rankie stated that if the CEO had said that he would like to caution the appellant that when there was interest in obtaining a building permit, then the following requirements would have to be considered, that would have been appropriate. He added that the requirements are not appropriate for a growth permit.

Chairman Cieleszko stated that there was an error, tentatively, by the CEO. Mr. Marshall stated that even if there was an error, that error was not sufficient to prevent the issue of a growth permit. He stated that if the letter accompanied a building permit that would be a different story. He stated that the growth permit is simply a reservation.

Mr. Hamilton stated that Section 29-42, Issuance Procedure, cites two qualifications for the issuance of a growth permit by stating, "The code enforcement officer shall review all growth permit applications for completeness and accuracy." Mr. Hamilton stated that the only reasons for denying a growth permit would be incompleteness, inaccuracy or the unavailability of further growth permits. Chairman Cieleszko stated that an applicant must also demonstrate ownership.

Mr. Hamilton stated that the question was whether or not there was anything in the application that had been inaccurate or incomplete. Mr. Rankie stated that the application was incomplete because there is no lot of record for the property listed on the application, Tax Map 46, Lot 003 of 2.089 acres. Mr. Billipp stated that Lot 46-3 is actually much larger than two acres.

Mr. Hamilton stated that the application was for a specific lot that had not been delineated which makes the application inaccurate. He asked if it was possible to review the permit as an inaccurate issuance. Mr. Marshall stated that the BOA could make that decision but that they would only be denying a permit that is no longer in force.

Chairman Cieleszko stated that the permit exists in the Town files and that the BOA had a duty to the appellant to remedy it if the permit was defective. He added that they could remedy by rescinding or by adjusting. He stated that the BOA could hear the case even though the permit had expired and a new one exists. Mr. Marshall stated that the current acting CEO could make corrections in the new permit and that would mean that BOA would probably be back again on the same appeal.

Mr. Hamilton stated that the BOA would be reviewing a decision that was made in the past whether that decision was in effect or not. He stated that the BOA was still obligated to determine whether or not the decision had been correct.

Chairman Cieleszko asked Ms. Pelletier to respond to the input from the BOA members. Ms. Pelletier stated that she disagreed that any of the information in the permit was

unclear or inaccurate. She stated that the process is all hypothetical until the end. She stated that when a building permit application is submitted, the plans show a building on a lot in a certain configuration even if the building does not exist yet but that the plan would show what would happen if all approvals went through and until then it is all hypothetical. She stated that she would strongly disagree that the application submitted had been inaccurate or incomplete to meet the requirements of a growth permit.

Chairman Cieleszko asked if the lot size of two acres was accurate. Ms. Pelletier stated that that was what the lot would be when it was divided. She stated that the submitted plans were showing what the lot was going to look like when all is said and done.

Mr. Marshall asked if the number given for the lot in the application was the number for the existing lot or for the new lot. Ms. Pelletier stated that the new lot would not get its own map and lot numbers until a building permit application. Mr. Marshall stated that it sounded a little Catch-22. He stated that it sounded peculiar. He stated that he could understand if a permit had been granted to the 90-acre lot. He asked what the next procedure would be for dividing that lot after the growth permit was issued.

Ms. Pelletier replied that the applicant does not need permission from anyone to divide off one lot. She stated that an owner can divide off anything he wants when it is conveyed, whether that be through building, lease or sale. Mr. Marshall stated that an owner could just draw the meets and bounds of the lots and file it with York County as a separate lot. Ms. Pelletier stated that it is not the recording that creates a separate lot but the conveyance which creates a lot under Maine law.

Mr. Marshall stated that it appeared that Sweet Peas could put a different name on the lot and it would be conveyed. Ms. Pelletier stated that she supposed they could but that then when they came in to get a building permit and the lot did not meet the standards of the ordinance, they would be denied. She added that an owner is allowed to divide off one lot every five years.

Mr. Marshall stated that the CEO had given a growth permit to the main lot but that is not yet a two-acre lot. Ms. Pelletier stated that that is how the application works. She stated that if all approvals go through the result would look like what was on the submitted plan but that the new lot does not exist until an action of conveyance happened. She added that that was how every application works for subdivisions or site reviews through the Planning Board. She stated that those things do not exist on lots until they get all of the approvals including building permits and until that point, it is all theoretical.

Chairman Cieleszko clarified that the growth permit has no requirements other than ownership. Ms. Pelletier stated that she had worked for the Town for 12 years and had worked with many CEOs and she had never seen them ask that an application meet the

requirements listed in Mr. Marchese's letter in order to issue a growth permit. She stated that that had not been the history in the issuance of growth permits.

Chairman Cieleszko stated that the permit was a reservation on Tax Map 46, Lot 3 and yet the lot area in question was 2.089 acres.

FINAL TESTIMONY FROM APPELLANT

Mr. Nadeau stated that Mr. Hamilton's argument about the permit inaccuracy touched on what the appellants' position was. He stated that if one reads the CEO's letter, he said that, "This application has been approved based on the interpretation of the following ordinance." Mr. Nadeau stated that the best solution for the Town and the appellants would be to grant the appeal. He stated that the holders of the current permit would not suffer from so doing. He added that granting the appeal would take the permit off of the record as a possible precedent for the future.

Mr. Nadeau stated that the CEO issued the growth permit based on many inaccuracies. He stated that he thought the appeal should be granted and that the appellants would come back another time if there is a basis for doing that.

Mr. Billipp asked if the appellant would like to withdraw the application for a request for an administrative appeal since the permit is null and void because the year of issuance had ended and there is a new growth permit. He stated that he wondered if the appellants wanted to withdraw the appeal and re-appeal on the new growth permit.

Mr. Nadeau stated that he looked at the issue in reverse. He stated that he wanted the appeal granted to put end to the issue because he did not want the issue to come back to haunt the appellants in the future if the issuance of a building permit referred back to the statements in the original permit. He stated he would like to close the chapter and that the appellants were entitled to have the BOA take action.

FINAL QUESTIONS FOR THE CEO FROM THE BOARD

There were no final questions for the appellants.

Mr. Rankie noted that Ms. Pelletier had stated that the issuance of the growth permit was done the way it had always been done. He stated that just because things were done in a certain way does not invalidate that they may have always been done wrongly. He stated that he understood that a growth permit is a very broad thing but that the lot in question is not a lot of record. He stated that the issue was a growth

permit for Lot 46-3 that is clearly much larger than the proposed lot of 2.089 acres and that the application was for the smaller lot.

TESTIMONY FROM ABUTTERS

Mr. Jeff Cutting of 22 Everett Lane, Eliot, Maine stated that to give some background on Everett Lane, he was the first to move onto Everett Lane. He stated that they bought the property from Dawn Hardy's mother and that at that time, there was no Everett Lane. He stated that there was an existing road that was used for the gravel pit which Jack Hardy used to transport gravel in and out. He added that the road was a single-lane road in very bad shape on which one could hardly get up and down.

Mr. Cutting stated that he created Everett Lane in 2003. He stated that in October 2013 Don LaGrange measured the road and rated it a back lot road. He added that Mr. LaGrange measured a 15-foot width on the entire road. Mr. Cutting stated that the road went to his driveway.

Mr. Cutting stated that in 2004 when the Bryants came they had to continue Everett up to their driveway at which point Everett Lane stopped. He stated that there is no road past that point, that the area is all overgrown and there is nothing past the Bryants' driveway. He stated that the road is 975 feet from the main road to the end of the Bryant's driveway. He added that that distance is probably the furthest the road would go under the current ordinance.

Mr. Cutting stated that he is the sole owner of the road. He stated there is a 50-foot right-of-way that was on his plot plan. He stated that he put in the road at his own cost, put in the utilities at his cost and spent $15,00 to put in the road. He added that he maintains the road and has his own tractor to keep the road up at this time. He stated that the road is a 15-foot back lot road that under the ordinances of the Town of Eliot should end at 1,000 feet.

Mr. Cutting stated that the road is not passable at times because the water sheds down his driveway and the Bryants' driveway. He stated that many times there have been oil trucks or heavy vehicles stuck on the road during wintertime unless it is sanded and he has to pay for the sand himself. He stated that emergency vehicles going up and down the road are an issue and that adding more people onto the road could also be a problem.

Mr. Cutting stated that he was surprised that the current hearing was the first to mention Everett Lane. He stated that at the last meeting involving the property, the variance request, Jason Bryant had asked Sweet Peas about Everett Lane. Mr. Bryant was told that they were absolutely not coming down Everett Lane but that now there

seemed to be a plan to use Everett Lane, which had not been brought into play until this hearing.

Mr. Cutting stated that when he applied for a growth permit with Don LaGrange he waited in the parking lot from 3:00 AM with three others who all waited until 6:00 when Mr. LaGrange arrived to issue the growth permits because the permits were so scarce. He stated that he had to have everything including the plot plans, the subdivision plans and the house plans because Mr. LaGrange wanted to make sure he was giving a growth permit to somebody who could build a house in the Town of Eliot.

Mr. Cutting stated that he was surprised to hear that now the growth permits are just passed out, especially when he has heard of a subdivision that is currently taking up all of the growth permits for the year. He stated that he did not understand how someone could get a growth permit without knowing whether they were going to be able to build a house or not.

Mr. Cutting stated that he thought the process was being conducted with smoke and mirrors and that he did not understand how it had not been mentioned before the hearing that there is a new growth permit and that the old one had expired. He stated that there were many appellants at the hearing paying their attorney to represent them only to find out that they did not even have a case.

QUESTIONS FOR ABUTTER FROM THE BOARD

Mr. Billipp asked if Everett Lane was a deeded, 50-foot wide, 15-foot right-of-way. Mr. Cuttng concurred and stated that it is only developed to a 15-foot width. He stated that the right-of-way is deeded both to him and to the Bryants. Mr. Billipp asked if the deeded right-of-way ended at the Bryant's driveway and Mr. Cutting concurred.

Mr. Marshall asked if the right-of-way was part of Mr. Cutting's property. Mr. Cutting stated that it is a right-of-way given to both properties and they both realize that if the road was ever completed, they would lose part of their properties.

TESTIMONY FROM INTERESTED PARTIES

John Brigham of 36 Littlebrook Lane, Eliot, Maine stated that at the September 19, 2013 BOA meeting the variance request by Sweet Peas was denied. He asked how a growth permit could be issued after that denial and asked what had changed since September 19, 2013. Chairman Cieleszko stated that he could not answer that question.

Mr. Brigham stated that he thought the growth permit probably never should have been issued because of the variance denial on September 19, 2013. Ms. Pelletier stated that each permit has its own approval process and every decision gets its own day in court. She stated that if a new application is submitted, the CEO has to act on it and decide one way or the other. She stated that the denial of a variance and the issuance of the growth permit are not linked.

Fred Barbour of 15 Barnard Lane, Eliot, Maine asked whether or not, if the 2013 growth permit was found to be inaccurate, the 2014 growth permit would also be inaccurate. Chairman Cieleszko stated that because they were two different applications and two different permits issued by two different CEOs, one would not invalidate the other. He added that without the accompanying letter from Mr. Marchese, the reasoning for the 2014 permit is unique to the new application and would have to be treated separately.

Don McKenney or 7 Barnard Lane, Eliot, Maine stated that he agreed with Mr. Cutting's statement that the process felt like smoke and mirrors because they could not get an answer as to what happened after September 19, 2013. He stated that he did not think that was fair to the appellants. He stated that he thought the BOA would be proper in making a decision on the appeal one way or the other.

Mr. McKenney also recommended that the BOA take into consideration what Mr. Cutting had said about safety. He stated that there is no one taking care of the road. He stated that the ultimate result of the growth permit would be a building permit so he thought the process should stop because there is simply no road.

Vicki Mills of 42 Old Farm Road, Eliot, Maine stated that she was concerned that the BOA was looking at Sweet Peas LLC breaking off a piece of land without even knowing whether or not it qualified. She stated that she did not believe Maine State law allows an owner to break off a piece of land because he feels like it without meeting criteria and qualifications. She stated that that is why the ordinances exist.

Ms. Mills stated that it has been her experience that the CEO looks at various parts of the ordinance and that an applicant has to meet certain criteria. She stated that if Sweet Peas is allowed to divide the piece of property and record it, then there would be a non-conforming lot on which a permit could not be issued because it does not meet the ordinances. She stated that that would result in a whole different set of problems because if the lot is non-conforming, it is allowed privileges if it is a lot of record. She stated that a piece of property cannot be broken off unless it qualifies to be broken off.

Mr. Rankie asked Ms. Mills if she was looking at a problem with the ordinance that allows for the issuance of a growth permit. Ms. Mills stated that she had been told by previous CEOs that when a piece of property goes up for sale, the CEO looks at the property to determine if it qualifies as a buildable lot. She stated that she had been told

that if the CEO is doing a proper job, he contacts the owner or seller stating that he had an issue with the sale.

Ms. Mills stated that there is a problem in the Town because people are doing whatever they want and are not meeting the 1,000-foot limit and are exceeding that. She stated that they are doing whatever they want outside of the ordinance.

Mr. Hamilton stated that there was another ordinance section that preceded Section 29-42 about the issuance of growth permits. He stated that Section 29-41 addresses the application and that Section 29-41(b) states that, "Applications shall be on forms provided by the Town. The code enforcement may request additional information and shall have the authority to require that the application be revised or supplemented in order to meet state or local requirements." He stated that even though the procedure appears to be cut and dried and that anybody can get a growth permit, including someone who owns a wetland, on which to build a house, it apparently is incumbent on the CEO to request additional information and he has the authority to require that the application be revised or supplemented to meet state and local requirements.

Mr. Hamilton stated that the procedure does seem fuzzy but that is also appears to put a burden on the CEO if the CEO chooses to look at the situation as opposed to simply issuing growth permits for properties that potentially cannot be built upon. He stated that that would use up growth permits for other people who own property on which they can build.

Ms. Pelletier stated that the permits are not good forever and expire after 90 days. Mr. Hamilton stated that he understood that but that there is a competitive situation in the Town and that it might be incumbent to spend more time determining whether a growth permit could be issued. Chairman Cieleszko stated that even though the permit is only valid for 90 days, it is locked up for that time on a possibly non-buildable lot.

Mr. Hamilton stated that the statement that the CEO can require additional information is in the ordinance and he thought that that was what Mr. Marchese was trying to do to justify the growth permit based on his interpretation of the ordinance. Mr. Hamilton stated that he thought that the BOA could make a ruling on whether or not his interpretation was wrong.

Ms. Pelletier stated that she speaks to many people who pose theoretical uses of land or lot division and that she tries to advise everyone as soon as possible that there may be issues in the future if they decide to proceed. She stated that her job is to usher people through the process. She stated that at the moment she is doing the job of two people and that she does not have the requirement to broadcast to an applicant's neighbors as to what is happening. She stated that there was no requirement to notify everyone who might be interested that a new growth permit had been issued.

Ms. Pelletier stated that to say that the approval of the growth permit implies approval of all of the rest of the issues that need approval is not true and that she would be reviewing every single step of the process.

Chairman Cieleszko asked if Ms. Pelletier thought that Mr. Marchese was in error when he accompanied the growth permit with the accompanying letter. She stated that she could not say that because the ordinance gives broad authority of the CEO to require whatever he needs to issue the permit. She stated that she would not have required all of the things that he required because the ordinance does not specify the need to do so.

Chairman Cieleszko asked if Mr. Marchese had been wrong when he stated in his letter that the application was approved based on his interpretation because the applicant did not meet the requirements that he listed. Chairman Cieleszko stated that the CEO had cited an ordinance whose requirements the application met, even though the applicant did not meet them. He stated the question was that if the CEO made the statement in a letter that an application had met a definitive ordinance and he was wrong about that fact, would that make him wrong in issuing a permit. Ms. Pelletier stated that she could not answer that question and would not feel comfortable trying to do so.

Larry Kilbourn of 37 Littlebrook Lane, Eliot, Maine stated that when Mr. Marchese first came to the code enforcement office, he went to him seeking to put a trailer on his non-conforming back lot and showed the CEO the plot plans on two pieces of property, one of which is an eight-acre back lot. He stated that he told the CEO what he would like to do and that the CEO looked at the lot lines, the right-of-ways and the amount of property that Mr. Kilbourn had and informed that him that he could not be granted a growth permit because he did not conform to the codes in the Town.

Mr. Kilbourn stated that he did not see how one could ask for a growth permit regardless of whether the requirements to build on the property were met. He stated that that was not right and that it put people at a disadvantage. He stated that if he was a builder in the Town and wanted to make sure that he had enough, he would just apply for growth permits and cut everybody else out. He stated that a growth permit should not be granted without consideration as to whether or not the lot is buildable and that he thought that that would be irresponsible.

Chairman Cieleszko stated that he did not hear a question in the testimony. Mr. Kilbourn restated as, “Is it responsible to the Town and the people of the Town to not consider whether that would be buildable?” Chairman Cieleszko stated that all of the officials of the Town try to follow the ordinances. He stated that an ordinance may be defective but that all of the Town officials try to do the best job possible.

Mr. Kilbourn stated that he thought the BOA should consider whether the lot is buildable or conforms to what needs to be done to build on the property and if it is insufficient then the permit should be denied.

Jean Hardy of 2 Littlebrook Airpark, Eliot, Maine stated that she thought that Sweet Peas would be allowed to speak after everybody else had spoken. Chairman Cieleszko stated that she was an interested party and that he thought he had overlooked her and that she now had the floor. He added that he did not know that she wanted to speak.

Ms. Hardy stated that she was speaking on behalf of Sweet Peas and that she had a letter from Elizabeth Todak, the owner. She stated that Dr. Breen was not available because she had had a heart attack and was in recovery. She added that because of her own knowledge of the property, Ms. Todak had asked her to speak on behalf of Sweet Peas.

Ms. Hardy stated Everett Lane has existed for a long time and that it was built before Mr. Cutting even touched it. She stated that her husband, Jack Hardy, drew that road. She stated that he was out there on a 1977 bulldozer in the pouring rain while he was dying of cancer and that that was in October 2000. She stated, "I'm sorry, Mr. Cutting, but that is the way it is, through you, Mr. Chair."

Ms. Hardy stated that it was her understanding that the hearing was for an Administrative Appeal on a growth permit issued to Sweet Peas LLC on November 8, 2013. She stated that Sweet Peas had been trying to conform to whatever moving target that the CEO decided he wanted Sweet Peas to meet. She stated that the BOA should have in their packet a survey. She stated that there is no requirement in a growth permit for a property to be surveyed by a licensed surveyor before a growth permit is issued, yet the CEO demanded a survey of the property, which is two acres, and also demanded a soil suitability test. She added that Sweet Peas had met both of those demands.

Ms. Hardy stated that she disagreed that the application was inaccurate. She stated that the survey was done by a licensed surveyor and the growth permit was issued on the surveyed lot.

Ms. Hardy stated that she agreed with everything that Ms. Pelletier had said. She stated that the land is zoned for single-family homes and is not commercial and cannot be used for anything other than a house. She stated that she would like to remind the BOA that there is a land-use regulation that states that a ruling cannot be so restrictive that a land owner is deprived of all reasonable use of the property being regulated. She added that otherwise the ordinance cannot be enforced unless the municipality compensates the landowner because it would be an unlawful taking of the landowner's property.

Mr. Hardy stated that if there is ambiguity in the zoning, the ambiguity should be construed in favor of the landowner. She stated that if restrictions in a zoning ordinance run counter to the law which allows a person to do virtually anything wanted with the land, the restrictions must be strictly interpreted against the municipality and should be construed in the landowner's favor.

Ms. Hardy stated that a dispute between co-owners of a property for a proposed use should not be grounds for denial of a permit nor should the fact that the proposed use could violate the restrictions. She stated that the court had determined that it was not appropriate for local officials to attempt to resolve title problems as part of the decision process to grant or deny a permit. She stated that if an applicant has submitted reasonable evidence of ownership and boundary locations, it is not up the CEO or a board to resolve the dispute between the applicant and an abutter. She stated that the court decision states that those battles must be fought through the courts through separate civil suits.

Ms. Hardy stated that the court also stated that the CEO cannot refuse to act upon or deny approval of a permit because of the existence of a pending law suit by the applicants on a related issue.

Ms. Hardy stated that her concern though out the entire fiasco has been process. She stated that Sweet Peas filed a request for reconsideration to the variance appeal of September 19, 2013. She stated that the request was received by Wendy (the Town Clerk) on September 25, 2013. She stated that the Chairman of the BOA called Dr. Breen and told her that she had to file an entire new appeal and pay a new appeal fee, even though there was no such requirement in the Town of Eliot. Ms. Hardy stated that when Dr. Breen tried to tell the Chairman that fact, he got angry and yelled at her.

Chairman Cieleszko stated that what Ms. Hardy had said was not true. He stated that the issue at hand was a growth permit and that he did not want to have a diatribe. He stated that she was not going to be allowed to go down that road. He stated that the issue under discussion was what information Mr. Marchese had at the time that he issued the growth permit.

Ms. Hardy stated that she did want to bring up that Sweet Peas had filed a request for reconsideration and that the BOA did not follow the process. She stated that the Board should have taken some action, even if it was to deny the reconsideration, and that the Board did not. She stated that the process had not been followed. Chairman Cieleszko stated that that was irrelevant to the growth permit.

Ms. Hardy stated that there are no requirements for a growth permit and that the permit had expired. She stated that the original appeal had been filed within the time frame, but there was an amendment and there is nothing in the zoning that allows an

amendment to something that has already been filed. She stated that there is no amendment to an appeal.

Ms. Hardy stated that her concern was that the BOA had been discussing the growth permit and may be making incorrect assumptions.

Ms. Hardy stated that Ms. Todak wanted to remind the BOA that Mike and Jill Kaichen were issued a growth permit and a building permit off of Everett Lane. She stated that was the original application which meant that the road went all of the way to the Kaichens.

Mr. Hamilton stated that Section 45-5 states, "Whenever the requirements of this chapter and any other ordinance, code or statute conflict, the more restrictive requirements shall apply." Mr. Hamilton stated that people keep bringing up that the applicant should be favored over the code and that is not what the ordinance states. Ms. Hardy stated that that was not what she was talking about and Mr. Hamilton stated that maybe he had misunderstood.

Ms. Pelletier clarified that an ambiguous ordinance must be decided in favor of the applicant according to the Supreme Court decision. She added that conflicting ordinances are different from ambiguous ordinances.

FINAL TESTIMONY FROM APPELLANT

Mr. Nadeau stated that the CEO had required additional material as part of the growth permit he issued and he had been provided inaccurate information with regard to the roadway. He stated that the CEO issued the permit based an interpretation of Section 45-466(e) which was completely in error because that provision restricting the distance of the road to 1,000 feet applies to all back lots. He stated that he thought the appeal should be granted.

PUBLIC HEARING CLOSED

The public hearing was closed at 8:50 P.M.

FINDINGS OF FACT

- The public hearing was held on January 16, 2014.
- The Board of Appeals has the authority to hear the case under Section 45-49(a),

Administrative Appeals.

- An Administrative Appeal requires a concurring vote of three members of the BOA.
- The case is being held and heard under Appellant Review.
- The appellants showed standing and timeliness in their application.
- The owner of the property in question is Sweet Peas, LLC.
- The address of the owner is P.O. Box 243, Eliot, Maine 03903.
- The lot is identified as Map 46, Lot 3.
- The lot is approximately 90 acres.
- The Growth permit application was dated October 15, 2013 and received on October 15, 2013 by Jim Marchese, the CEO at the time.
- The Growth permit number is 13-17.
- The Growth Permit was approved on November 8, 2013.
- The Growth permit expired on December 31, 2013.
- Accompanying the Growth permit was a letter from the CEO detailing the granting of the permit. The letter was dated November 8, 2013, the same day that the permit was granted, and it was delivered with the Growth permit.
- It was testified by Ms. Jean Hardy that a survey and a soil analysis were required by the CEO previous to granting the permit.
- There is not a current building permit issued to the envisioned two-acre lot.
- It was noted that there were two applications for the appeal submitted. The first was received on December 6, 2013 and the second, a supplemental cover sheet, was received on December 11, 2013.

Mr. Billipp stated that he thought the letter in the appellants' package dated October 18, 2013, from the Board of Selectmen to Ms. Kit Breen, as the representative of Sweet Peas, LLC was relevant. He stated that the letter lays out the rationale for the CEO's granting of the growth permit. He stated that all of the supplemental information in the letter pertains more to a building permit than to a growth permit, but the BOS had to find a way to make it happen.

Mr. Billipp stated that the letter made the chain of events clear. The letter stated, "As was discussed at the Board of Selectmen's' meeting on October 10, the board had agreed to review with the code office and see if this lot could be permitted, or, enter into a consent agreement." He stated that the letter also stated that, based on information from the Town's attorney, a growth permit could be issued as long as all other requirements of that section of the ordinance could be met.

Mr. Billipp stated that he thought Mr. Marchese was showing that as long as the applicant met the list of criteria, they would probably get a building permit. Mr. Billipp stated that he thought the attorney was confused because the requirements listed are not needed for a growth permit but are only needed for a building permit. Mr. Billipp

noted that the requirements for a growth permit are only accuracy, completeness and ownership and that all of the other criteria that Mr. Marchese outlined are not relevant to a growth permit.

Chairman Cieleszko asked Mr. Billipp if he wanted to include the letter as a Finding of Fact. Mr. Billipp replied that he wanted to make sure all of the BOA members were aware of the letter because they had just received it at the hearing. He stated that the letter explained a lot as to why they were deliberating the issue. Chairman Cieleszko stated that he did not think the letter needed to be a Finding of Fact. Mr. Billipp agreed as long as it was in the record.

Chairman Cieleszko stated that in an Administrative Appeal the BOA can deny the application, rescind a permit or correct an error in a permit. He cited Section 45-49(a), Administrative Appeals as, "The board of appeals shall hear and decide where an aggrieved person or party alleges error in any permit, order, requirement, determination, or other action by the planning board or code enforcement officer. The board of appeals may modify or reverse action of the planning board or code enforcement officer by a concurring vote of at least three members, only upon finding that the decision is clearly contrary to specific provisions of this chapter."

Chairman Cieleszko stated that if the CEO had done something clearly contrary to the ordinance, the BOA could either fix what he had done wrong or reverse the action and nullify the growth permit.

Mr. Billipp stated that he did not think any decision was required regarding a reversal because the permit was no longer a valid permit. He asked how a permit that was granted but was no longer in effect could be reversed. Chairman Cieleszko stated that the state of the permit is that of an expired permit, not a denied permit. Mr. Marshall noted that a denial would occur after the expiration. Mr. Billipp stated that he thought they could take no action.

Mr. Hamilton stated that he thought the BOA was reviewing an action by the CEO regardless of whether or not it was in effect.

Mr. Billipp stated that the only issue was the growth permit and that all of the other conditions listed were those that would be required to grant a building permit. Mr. Marshall agreed, stating that the CEOs letter pointed out that for the growth permit to become a building permit, those requirements would need to be met.

Chairman Cieleszko stated that the CEOs letter stated that he was granting the growth permit *because* they met certain requirements. He stated that it would have been more usual to state in the letter that the applicant had to be aware that there were conditions

that were an issue but instead he stated that they had met the conditions and that that was why he was granting the growth permit.

Mr. Marshall noted that the ordinance states that existing, non-conforming back lots of record that are accessible only by existing, non-conforming access ways may be built upon only if the following conditions are met.

Chairman Cieleszko stated that the CEO said that the applicant did meet them by stating that "This application has been approved based on the interpretation of the following ordinance" and then quotes Section 45-466(1). He added that at the variance appeal hearing in September 2013, it was determined that the applicant did not meet those conditions. He added that prior to the CEO's decision; there had been a denial of a variance request.

Mr. Billipp stated that the lot in question is not a legally non-conforming back lot created before 2005 so the letter must be referring to a legally non-conforming access way created prior to 2005. Chairman Cieleszko stated that the CEO had not specified and just listed the whole ordinance. Mr. Billipp stated that all of the references refer to either a back lot or an access way. He added that the BOA was looking to see if the CEO was correct or incorrect and that would be the place to look for an error.

Mr. Marshall stated that in actuality, the BOA was only looking at a growth permit. Chairman Cieleszko stated that it had been testified that some people get run over the coals for a growth permit but that now the Town has a new CEO who grants a growth permit if the applicant owns the land.

Chairman Cieleszko stated that the ordinance states that a CEO *can* ask for additional information. He stated that if an applicant had been required to provide more information, they were granted the permit with all of the reservations that had been requested. He stated that the Hardys had to provide a soil analysis and a survey in order to get a growth permit.

Chairman Cieleszko stated that the CEO's letter had stated that the permit was granted because the application met the conditions of the "following ordinance" and then just listed it rather than interpreting it. He stated that they met the ordinance but did not specify how they met the requirements.

Mr. Billipp stated that the CEO made the decision he made because he had received a letter from the Town attorney stating that one way of interpreting the ordinance is that Section 45-466(e) allows the use of existing, non-conforming access ways created prior to 2005. Mr. Hamilton noted that the Board of Selectmen's letter to the CEO also pointed out the same justification. Mr. Billipp stated that Mr. Marchese had done as he had been told.

Mr. Billipp stated that he thought the BOA needed to look at the narrow issue of the growth permit only and that the rest is either moot or does not apply. He stated that the issue was whether or not the CEO had been correct in granting the permit or had acted clearly contrary to the ordinance.

Mr. Hamilton stated that if the CEO based granting of the growth permit on his interpretation of the ordinance then he had been incorrect. Chairman Cieleszko stated that there is written evidence that he based the issuance on an incorrect interpretation of the ordinance. He added that if the CEO had issued a growth permit without the accompanying letter it would have been a different issue because there are no requirements for a growth permit. Chairman Cieleszko stated that the CEO had written his reasoning and his reasoning was defective and does not follow the ordinance. He stated that the CEO had stated that the applicants met the ordinance and that they do not.

Ms. Lemire noted that the CEO had stated "based on the interpretation" when referring to the ordinance. She added that she thought it was based on the Town attorney's interpretation.

Chairman Cieleszko stated that the BOA could modify the growth permit by removing the letter from it or they could rescind the permit.

Mr. Hamilton stated that he did not think the BOA could modify the evidence by removing the letter and could only modify the decision that was made to issue the growth permit. Mr. Hamilton stated that he thought that modification was not something that should be considered in this case but that the determination should be whether or not the CEO acted contrary to the code. Mr. Hamilton stated that as an appellant review, that would be the only determination the BOA could make and that the information that had been supplied was all that they could base their decision on.

Mr. Billipp asked where the CEO's error was. Ms. Lemire stated that the provisions of a growth permit allow the CEO to request information but it does not specify what information. Chairman Cieleszko stated that a growth permit does not require information. Ms. Lemire stated that it does not require but it does allow the CEO the authority to get more information.

Mr. Billipp stated that he was looking for what Chairman Cieleszko thought specifically that the CEO got wrong. He stated that there does appear to be a 50-foot-wide right-of-way provided that it is extended to a newly created lot but that right now it stops short of the lot. Chairman Cieleszko stated that the ordinance only allows the use of an existing, non-conforming access way and that is for existing, non-conforming lots of

record. Ms. Lemire stated that the right-of-way does exist but that it has not been brought up to standard.

Chairman Cieleszko stated that there is no access way to the property, as testified by the appellant. Mr. Billipp stated that the lot does not exist yet. Chairman Cieleszko stated that the existing, non-conforming back lot of record is the entire airport.

Mr. Billipp stated that the language in the ordinance cited by the CEO refers to the requirements for getting a building permit. Chairman Cieleszko stated that the CEO had used the ability to get a building permit as the reason to grant a growth permit.

Mr. Billipp asked if the reference to an existing, non-conforming back lot referred to the 90-acre lot or to the two-acre lot. Chairman Cieleszko stated that the reference was to the 90-acre lot. Mr. Billipp clarified that the lot is an existing, non-conforming back lot.

Mr. Billipp asked if the lot had to have an existing, non-conforming access way. Ms. Lemire concurred. Chairman Cieleszko stated that Littlebrook Lane stops just a bit beyond Everett Lane. He noted that the survey requested by the CEO did have Everett Lane. Mr. Billipp stated that the plan was shown on a piece of paper but in order to be granted a permit, there has to be a physical road.

Mr. Billipp stated that the CEO was describing what would be needed to get a building permit and asked if the lot already had those provisions. Mr. Hamilton stated that the lot exceeds the 1,000-foot limit in the back lot ordinance but that the CEO had avoided that issue.

Mr. Billipp stated that it could be said that the CEO used the letter from the Town attorney as the basis for his approval of the growth permit and questioned how the BOA could dispute that. Mr. Hamilton noted that the attorney had said in his letter of October 24, 2013, ”This is not the only conclusion that could be reached on this issue, but it is a reasonable one.” He added that to him that meant there could be a number of other interpretations and that the courts are probably going to be the ones who decide. Mr. Hamilton stated that the attorney was only issuing one interpretation. Mr. Marshall stated that only one was needed.

Mr. Hamilton stated that the attorney’s letter also said, “The Town may want to clarify the intent of the language in this section of the ordinance in a future amendment.”

Mr. Billipp stated that he kept coming back to the question of which was the existing, non-conforming access way. He asked if that referred to Littlebrook Lane, Everett Lane or something else. He stated that if Littlebrook Lane qualified as an existing, non-conforming access way, the attorney’s letter could be accepted and agreed with.

Chairman Cieleszko stated that there are multiple sections to the back lot ordinance but that he was looking at the 90-acre parcel as an existing, non-conforming back lot of record. Mr. Hamilton stated that what the applicant was proposing would be a new lot. He stated that the issue was the creation of a new lot which would be created after June 2005. He stated that Section 45-466(g) states that the 1,000-foot limit applies to all back lots.

Chairman Cieleszko stated that the lot does not meet the back lot ordinance because of the 1,000-foot limit. He stated that there is no gray area.

MOTION

Mr. Hamilton made a motion that the BOA grant the appellants' request for an Administrative Appeal and rescind the permit because CEO acted clearly contrary to the ordinance. Mr. Billipp seconded the motion.

DECISION

The Board voted to grant the appeal and rescinded the appeal with three votes in favor and two opposed. Voting in favor were Bill Hamilton and Peter Billipp. Voting against were John Marshall and Ellen Lemire. Chairman Cielezko voted in favor as the tie-breaker.

APPROVAL OF MINUTES

The November 21, 2013 minutes were approved as amended.

OTHER BUSINESS

Chairman Cieleszko stated that that he had not heard anything official as a result of the letter the BOA sent to the BOS on December 3, 2013 in which the BOA asked to be included in discussions about Consent Agreements. Mr. Lemire stated that the BOS is not quite sure what the BOA wants. Chairman Cieleszko stated that he would talk to the BOS Chairman.

Mr. Hamilton stated that he attended the Charter Commission meeting and that he asked the Charter Commission to clarify the BOS issue. He stated that he did not think the Selectmen should have a policy to determine whether or not they should enter into

legal agreements with people who come before the appeal board. He stated that that should be a determination by the Charter of the Town.

Mr. Hamilton stated that the BOS cannot set up a policy that is against State law. He stated that the appeal process begins with the Board of Appeals and then goes to Superior Court and then to the Supreme Court and does not go to the Selectmen anywhere in that process.

Mr. Hamilton stated that if there is a violation in a zoning issue, then the Selectmen have a judgmental function. He stated that they do not have any function to go into developments or a developer's problems or zoning problems or Sweet Peas problems. He stated that he thought that type of action subverts the authority of the BOA and that the functions of the Town Manager, the Selectmen, the BOA and the judicial branch should be clearly spelled out.

Mr. Hamilton stated that he did not know where the Selectmen got their notions. Chairman Cieleszko stated that there is home rule granted to the Selectmen and the ordinance grants them….. Mr. Hamilton asked what the ordinance granted. (The question was unanswered.)

Mr. Rankie, who is the Chairman of the Charter Commission, stated that the Charter Commission asked Mr. Hamilton to propose what he would like to see in the Charter. He stated that between what the ordinance says and what the Charter says, if the Charter is approved, the Charter will carry the day. He stated that there is an opportunity to present to the Charter Commission what it is that they would like the Charter to say.

Mr. Hamilton stated that it would be fine to meet with the BOS but that they could just say the same thing they had said at the last meeting, which was that they were working on a policy. Mr. Rankie stated that if there was no Charter, the BOS could do that and that they did not need to confer with anyone.

Chairman Cieleszko stated that they had had a series of meetings and had come to a consensus with the Selectmen which resulted in Jack Murphy's writing of a policy regarding Consent Agreements and that the policy had not been used, so he did not know if it worked or not.

Mr. Hamilton stated that the BOS had no business in proposing what they were proposing to do with Sweet Peas. Chairman Cieleszko stated that that had not been a part of Jack Murphy's writing. Ms. Lemire concurred and stated that in reality the BOS is not supposed to use Consent Agreements for anything other than violations. Mr. Hamilton stated that it did not sound as if that was the way the BOS was using the policy and that he would like to see the Charter address that issue.

Mr. Hamilton stated that a Charter establishes which authorities deal with what functions in the Town and that each authority has its own function. He stated that when the authorities start getting mixed up, it is difficult for anybody to do his job right.

Mr. Rankie stated that the Charter takes the legislative authority and states when executive session is appropriate and when it is not. Mr. Hamilton stated that some towns have one or two executive sessions a year but that the Eliot meeting room has a sign on the door that states an executive session is being held behind the door. Mr. Hamilton stated that the BOS has executive sessions so many times that they went as far as to have something printed up to post.

Chairman Cieleszko stated that he would talk with Mr. Moynahan to determine what the BOS need or wants from the BOA. Mr. Billipp recommended making the BOA position clear that the Consent Agreements should only be used in cases of violations.

Mr. Rankie stated that he went to Lewiston to the Maine Municipal Association public service training and requested reimbursement for tolls and mileage. He stated that the course was specifically for board of appeals training. Chairman Cieleszko stated that he had never been asked for that before. Mr. Rankie stated that the Town profited because he drove his truck up there, spent his time up there and paid $10.50 in tolls and that mileage would come to $69.52. Mr. Rankie stated that reimbursement is standard policy but that he had never asked for it before. Chairman Cieleszko stated that he would take care of it. Mr. Rankie stated that the BOA had the authority to approve the expense and that Mr. Rankie would then present it. He stated that he had offered the Maine Municipal Association a personal check because he had not pre-approved his attendance, but that the Association billed the Town instead for the $50.00 fee.

Ms. Lemire stated that she thought BOA members did not have to pay to attend workshops and that the Town always pays those fees. Chairman Cieleszko stated that BOA did not make motions for approval but that Mr. Rankie could take the receipt to Barbara Thain who would call Chairman Cielszko for approval. Chairman Cieleszko requested that in the future the approval be requested prior to the event.

Mr. Rankie stated that he thought it would be appropriate for Chairman Cieleszko to send a letter to the new Town Manager and ask that he direct the CEO to immediately post any building permits that had been granted to the Town website. He clarified that a building permit has a 30-day appeal limit. He stated that if the CEO issued a building permit and a person did not take any action for 30 days, that person would no longer have any grounds for appeal. He stated that an aggrieved party would not know the information was available if he did not know that a neighbor had applied for a permit.

Ms. Lemire stated that she thought it was a good idea. Mr. Rankie stated that the Town Manager would start on February 15, 2014 and that it was just a matter of his directing the CEO to post the information.

Chairman Cieleszko stated that the BOA was dealing with the BOS and that the BOS is still the authority in the Town and that the BOA letter should be directed to them. Mr. Rankie disagreed, stating that he had helped write the job description for the Town Manager and that it was part of that description. Chairman Cieleszko stated that the Town Manager had not yet started working. Chairman Cieleszko stated that the posting idea was great but that it should be directed to the Selectmen currently. He stated that they could delegate to the manager when he begins but that right now the BOS is the authority.

Mr. Rankie stated that he thought the citizens and board members would have to learn to go through the Town Manager and when the issue is beyond his authority he then takes it to the BOS. Mr. Marshall stated that he did not think the Town had changed its form of government. Mr. Rankie stated that the form had not changed but that there was a Town meeting and election of a Town Manager form of government. He stated that the BOS had signed a contract with the Town Manager.

Mr. Marshall stated that the Town legislative body is the Town meeting. Mr. Rankie stated that Town executives signed a contract with the Town Manager outlining what his job description is and what his responsibilities are and they have therefore delegated those responsibilities.

Mr. Rankie stated that he thought the packet of information given to the BOA members regarding the hearing just addressed had been too little and too late. He stated that other BOA members had been familiar with the Sweet Peas situation but that he had never dealt with it before. He stated that the packet presented by the Town CEO had not provided enough information in sufficient time for him to feel informed. Mr. Billipp stated that a lot of the information comes from the appellant and that he thought it was not smart of them to hand the members of the BOA information right at the start of the meeting, giving the members no time to review it. Ms. Lemire stated that she really did not like it when appellants did that.

Chairman Cieleszko stated that neither the appellants nor the CEO were at their best at the hearing. He stated that Ms. Pelletier was just starting as CEO. Mr. Hamilton stated that Mr. Marchese would also give the BOA information the day before the meeting.

Mr. Hamilton stated that he attended the Planning Board meeting in December and reported that they are working on changing the back lot ordinance to eliminate the 1,000-foot limit issue. The current draft states that for access ways to back lots created after June 14, 2005, “The distance between the closed end of a dead-end access way

and the nearest nondead-end street shall not exceed 1,000 feet." Access ways to more than two back lots created after June 14, 2005 have the same provision.

Mr. Hamilton stated for the existing, legally non-conforming dead-end access ways of more than 1,000 feet, the access way may be utilized if all of the other requirements have been met. Mr. Hamilton stated that if one were building a new road to a back lot, it cannot exceed 1,000 feet. If there is an old road that is probably in worse condition than one that would be currently built, that old road can be used.

Mr. Rankie asked for the definition of old road. Ms. Lemire stated that it would refer to one built before June 14, 2005. Chairman Cieleszko stated that a road is defined by law and that there had been decisions where pathways used for passage were considered right-of-ways. He stated that if there is an established use, the road is considered passable.

Chairman Cieleszko stated that the arguments have to be reviewed carefully. He referred to an earlier Sweet Peas hearing where someone was sold a piece of land with the airport runway as access.

Mr. Hamilton asked how the BOA members felt about the new Planning Board ordinance. Mr. Billipp asked for the rationale for not allowing a new road to exceed the 1,000-limit when an old road which is probably in much worse condition be allowed to exceed the limit. Ms. Lemire stated that it would be allowed because the access way would have to meet all of the other criteria. Mr. Hamilton agreed but stated that the limit is a big criteria and is the one hanging up Sweet Peas.

There was further discussion on the access way issue. Ms. Lemire stated that Jay Muzeroll said that there are not the same safety issues as there used to be because of the kind of technology available today. Mr. Hamilton and Mr. Rankie did not agree, stating that trucks were bigger and heavier. Mr. Marshall stated that the access issues for big trucks are not because a road is longer than 1,000 feet.

Ms. Lemire stated that there are roads in the Rural District of the Town that are miles and miles long with huge chunks of property that currently cannot be built upon. Mr. Cutting stated that he thinks some of that land needs to be opened up but that the Planning Board needs to make sure there is a road association to maintain the road. Ms. Lemire stated that there should be standards. Mr. Rankie stated that it is a sort of slippery slope because some people are upset that they pay taxes and yet have to maintain their own road.

ADJOURNMENT

The meeting was adjourned at 10:01 PM.

Respectfully Submitted,
Linda Keeffe
Recording Secretary

Approved by: _____

Ed Cieleszko, Chairman,

Date Approved:_____