

TOWN OF ELIOT – BOARD OF APPEALS MEETING

February 20, 2014

ROLL CALL

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

Absent: Jeff Cutting

Others Present: Interim Code Enforcement Officer Kate Pelletier, attorney J.P. Nadeau, abutters' representative; abutters and other interested parties.

CALL TO ORDER

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

Chairman Ciesleszko 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 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 Cielezsko stated that the hearing was a request for Administrative Appeal by John Brigham of 36 Littlebrook Lane, Eliot, Maine against the decision of the Code Enforcement Office for growth permit number 14/2 issued to Sweet Peas, LLC, located at Littlebrook Airpark, 107 Littlebrook Lane, Eliot, Maine, Map 46, Lot 3.

Chairman Cielezsko stated he had been made aware that there was someone or some group that considered there to be bias on the Board of Appeals or bias by a few of the members of the BOA.

Chairman Cielezsko stated that Jeff Cutting had recused himself from the last meeting and that he had done so on his own because he had a perceived interest in the case and therefore sat away from the Board. Chairman Cielezsko stated that the rest of the members sat on the podium and that five of the members, including himself, voted on the request last month.

Chairman Cielezsko stated that he was very concerned if it could be currently shown that there is a bias. He stated that he wanted to be very careful before deciding to vote someone off the podium because a bias was not shown at the last meeting and it had not occurred since the last meeting. He added that any bias shown at the hearing or proven to exist within the Board would mean that the member would be removed from the Board.

Mr. Marshall asked how bias was to be defined. Chairman Cielezsko cited the Standards of Conduct-Conflicts of Interest Policy from the Maine Municipal Association handbook. Under Standards of Conduct, the policy states, "All officials of the town of Eliot shall engage standards of conduct which prohibit engaging in any criminal, infamous, dishonest, immoral, disgraceful or other conduct prejudicial to the government or affairs of the Town of Eliot or adverse to the health, benefit and welfare of its residents. This includes any action which might result in or create the appearance of using an official position for private gain, giving preferential treatment to any person, impeding

Town government efficiency or economy, losing complete independence or impartiality, making decisions outside official channels, or adversely affecting the confidence of the public in the integrity of the Town government.”

Chairman Cielezsko stated that Conflict of Interest is defined as, “All officials must refrain from discharge of official duties when an acquired retained financial or personal interest would disqualify them or appear to disqualify them from performing their duties with total freedom of any conflict of interest. Any official who represents the Town of Eliot should refrain from accepting favors or being entertained by anyone seeking to do official business with the Town. All Town officials are prohibited from using, either directly or indirectly, any ‘inside information’ to further a private interest or to obtain private gain for themselves, other persons, or other entities. ‘Inside Information’ is defined as information which has not become a part of the body of public knowledge. Further, officials of the Town of Eliot shall not use their official position to induce or coerce any person or entity in such manner as might produce any financial or personal benefit to themselves or any person or entity with whom they have family, business or financial ties.”

Chairman Cielezsko also cited the Title 30-A of the MMA Manual regarding Conflict of Interest; Bias; Family Relationships. He stated that the section on Statutory Test “applies to a board member who 1) is an officer, director, partner, associate, employee or stockholder of a private corporation, business or other economic entity which is making the application to the board or which will be affected by the Board’s decision and 2) is directly or indirectly the owner of at least 10% of the stock of the private corporation or owns at least a 10% interest in the business or other economic entity.”

Chairman Cielezsko cited the MMA Manual as stating that if a board member does not fall into a category discussed in Title 30-A, there is common law standard which is “whether the town official by reason of his interest, is placed in a situation of temptation to serve his own personal interest to prejudice of the interests of those for whom the law authorized and required him to act.”

Also citing the MMA Manual, Chairman Cielezsko referenced the section of Failure to Abstain as, “If a board member who has a legal conflict of interest fails to abstain from the discussion and from the vote and fails to note the nature of his or her interest in the record of the meeting, a court could declare the board’s vote void if someone challenged it.”

Chairman Cielezsko stated that under the section of Appearance of Impropriety, the Manual says, “Even if no legal conflict of interest exists, a board member would be well advised to avoid even the appearance of a conflict by abstaining in order to avoid the appearance of impropriety and maintain the public’s confidence in the board’s work.”

Chairman Cielezsko stated that the MMA Manual also addressed bias based on blood and on state of mind. He cited the latter as "Various court decisions also have established a rule requiring a board member to abstain from the discussion and the vote if that board member is so biased against the applicant or the project that he or she could not make an impartial decision, thereby depriving the applicant of his or her due process right to a fair and objective hearing."

Chairman Cielezsko stated that the Manual quoted from a case "where the developer alleged that proceedings were tainted by the board's predisposition against development of the site, but the court found that there was ample record to support the board's decision to deny approval" so the court did not uphold the bias.

Chairman Cielezsko cited the section on Burden of Proof as stating, "The burden of proving bias is on the applicant. If a board member reaches a conclusion based on the application and expresses that opinion to the press before the board has voted, a court probably would not find that the board member was biased against the project. This would also be true where a board member has expressed an opinion regarding the proper interpretation of the applicable ordinance or statute."

The section continues by stating, "However, if, for example, the applicant could show (1) that the board member had a personal grudge against him because they were involved in a lawsuit relating to another matter or (2) that the board member in question had repeatedly stated in public that he personally found all projects of that type to be offensiveor (3) that prior to becoming a board member, the member in question had testified against the application in earlier proceeding" those would all be grounds that would have to be proven by the person making the case.

Chairman Cielezsko stated that any bias that had been brought to the BOA's attention through a member stating that he/she had a problem and could not hear the case would be brought to a vote by the Board. He added that if the BOA did not feel that the member was showing a bias, that member would be kept on for the case. If the BOA felt that it would be better to have the member removed, the vote would be to take the member off of the Board for that hearing.

Chairman Cielezsko stated the ordinances require that, "A board, commission or committee chairman or spokesman shall advise the Selectmen when excessive absenteeism or suspected violation to the standards of conduct or conflict of interest has occurred. Private citizens of Eliot may also advise the Selectmen of suspected violations of standards or conduct or conflict of interest. The Selectmen will hold a public hearing before terminating any appointment. A record of the complaint and the final action taken shall be placed on file in the Eliot Town office."

Chairman Cielezsko stated that there is an amendment elsewhere in the ordinance which states that the Selectmen can also make a decision in Executive Session.

Chairman Cielezsko stated that the ordinance regarding Commissions, Boards and Committees specifies that a member be removed from even being on the Board of Appeals if the BOA hears a case with a conflict of interest or a bias.

Chairman Cielezsko asked Mr. Nadeau if he had any problem with any member of the BOA being biased. Mr. Nadeau replied that he did not. Chairman Cielezsko asked Ms. Pelletier if, as the CEO, she had any problem with a perceived bias or conflict of interest with the BOA. Ms. Pelletier stated that she did not think it was appropriate for her to make a comment and that she did not know what the members of the BOA were personally involved in or what the relationships had been in the past with the appellant. Chairman Cielezsko asked if she had any knowledge of any bias and she replied that she did not.

Chairman Cielezsko asked if any abutters or interested parties had any issues with the BOA. Jean Hardy of 2 Littlebrook Airpark stated that she was an abutter and that she did believe that there was bias with the BOA. Ms. Hardy stated that Peter Billipp had a financial interest in the sale of the land between ARC Aggregate Recycling and her husband, John Hardy, which happened in 1999 or 2000. She stated that regardless of whether Mr. Billipp received any financial remuneration for his actions, he did put the two parties together. She stated that she thought Mr. Billipp should have at least disclosed that fact and that she was, therefore, asking that he be removed. Chairman Cielezsko asked if that was all of the evidence she had regarding Mr. Billipp. Ms. Hardy concurred and stated that the issue for her personally was that he did not disclose the transaction.

Chairman Cielezsko asked Mr. Billipp if he wanted to make any statements. Mr. Billipp stated that he would like to respond. He stated that he is a real estate broker and is active in the State of Maine and in the Town of Eliot and that he did participate in the transaction many years ago between Jack Hardy and ARC. He stated that the transaction had nothing to do with Sweet Peas and had occurred long before Sweet Peas was created. He added that the transaction occurred many, many years ago and had no bearing whatsoever with his actions on the BOA and he did not accept or agree with Ms. Hardy in any sense. He stated that he did not feel it was necessary to mention it because the parties in the current case were different and that transaction had occurred 14 or 15 years ago between Jack Hardy and ARC and had absolutely nothing to do with the current case and Sweet Peas.

Chairman Cielezsko stated that the BOA had to vote on the issue and he asked if any members of the Board would like to question Mr. Billipp about a conflict of interest. Mr. Hamilton stated that he did not see any conflict with the current case and that he felt

very comfortable that there was no bias present. Mr. Marshall stated that he did not have any problem. Ms. Lemire concurred.

Chairman Cielezsko stated that if a member recused himself for any business transaction with anybody in Town, there would no Boards.

Mr. Hamilton made a motion that there was no bias with Mr. Billipp's position on the BOA and that he be retained as a voting member for the case. Ms. Lemire seconded the motion. All voted in favor of the motion.

Ms. Hardy stated that she had two other concerns and stated that the first one was an issue with Chairman Cielezsko. She stated that Chairman Cielezsko had yelled at her personally and on the telephone in regards to the motion for reconsideration which Sweet Peas had filed. She stated that Sweet Peas had filed a motion for reconsideration and Edith Breen had brought the application to the Town Hall. She stated that Chairman Cielezsko was insistent that Sweet Peas had to pay a \$150 fee and had to fill out a reconsideration request. She stated that when she spoke to him on the telephone and explained that there was nothing in the ordinances, he got very angry and yelled at her.

Ms. Hardy stated that Chairman Cielezsko also spoke with Dr. Breen about the variance that had been filed by Sweet Peas and that he basically called her a liar. She stated that that behavior was unacceptable to them.

Mr. Hardy stated that Chairman Cielezsko and the BOA also exhibited bias when they heard an appeal on an expired permit, something that she did not believe the Town had ever done.

Mr. Rankie suggested, since the bias testimony was directed toward Chairman Cielezsko, that he step down for a moment and let the Vice Chairman deal with the issue. Chairman Cielezsko stated that Mr. Rankie was absolutely correct and that he did not think any damage had been done because he had said absolutely nothing. Mr. Billipp stated that he would lead the discussion and asked Chairman Cielezsko if he would like to respond.

Ms. Hardy asked that she be allowed to continue. She stated that when the hearing started out that evening, Chairman Cielezsko referenced an appeal that was heard in the past month and that mentioning a totally different appeal that had nothing to do with the current appeal. She added that that was an exhibition of bias and that it greatly concerned her. She added that, therefore, she believed that Chairman Cielezsko should recuse himself.

Mr. Nadeau asked if, at some point, the appellants would be able to offer their opinion because they wanted to be able to reference the appeal of the prior month. Ms. Hardy

stated that she was not talking about the appeal at this point but that she was talking about the bias. She stated that Mr. Nadeau had had his opportunity to address any concerns. Mr. Billipp stated that the discussion was getting off of the point and that he wanted to respond to the issue of bias.

Mr. Billipp asked Chairman Cielezsko if he would like to respond. Chairman Cielezsko stated that he did not remember the details of the conversation with Ms. Hardy. He stated that he remembered having a conversation with either her or Ms. Breen. He stated that the Town had charged Ms. Mills \$150 for reconsideration and that he had thought it was precedent. He stated that when Sweet Peas wanted a reconsideration of the September variance decision, he had told her on the phone that they would have to fill out a proper form and pay \$150.

Chairman Cielezsko stated that he does not usually get angry with anybody but his kids. He stated that upon mulling it over during the next couple of days, he asked (then CEO) Jim Marchese to check with an attorney to find out where the Town stood. Chairman Cielezsko stated that the attorney did not support the decision to require \$150. He apologized to Ms. Mills and stated that she might want to talk to the Selectmen. She stated that she would.

Chairman Cielezsko stated that at that time, he respoke with Ms. Breen and told her to just give the BOA the information and that testimony would not be allowed. He stated that the application would be reviewed and the BOA would vote on whether or not to reopen the case if some member who had supported the motion made a decision to change his mind. He stated that the stated requirement for \$150 had been wrong and that he did not like it even when he was requesting it, but that it had been precedent. He stated that the request was retracted but that there was no return of information from Sweet Peas.

Chairman Cielezsko stated that it had been inferred that he would not allow the request for reconsideration. He added that it would be unlike him to have stated that he was not letting Sweet Peas have reconsideration.

Mr. Billipp asked if Chairman Cielezsko thought that he had a bias for the case. Chairman Cielezsko stated that he did not have any bias toward Sweet Peas and that he did not even know what Sweet Peas was and that he had never had any dealings with them other than through the BOA.

Chairman Cielezsko stated that people might think he was angry and that the BOA might think he was angry, but that he did not feel angry at all ever. He stated that there are other ways to handle things and that being angry is not in his nature.

Ms. Breen stated that she would like to add her recollection of that time. Mr. Billipp stated that testimony had already been presented by her representative. Ms. Hardy stated that she was not a representative of Sweet Peas and had been speaking as an abutter.

Edith Breen stated that she is the manager of Sweet Peas and that she had a slightly different recollection of what had happened. She stated that she had received a written statement from Mr. Cielezsko regarding the fact that Sweet Peas would have to pay \$150 and file a new application. She stated that when the letter was received, Jean Hardy called Chairman Cielezsko to say that she could find nothing in the zoning or any of the legal documents for the Town that would require those.

Ms. Breen stated that she was standing right beside Ms. Hardy and that she heard the conversation. She stated that what she heard was, "I know the zoning, I know what I'm doing and this is what is required and you are wrong and I just know that this is what you have to do." She stated that he spoke in very loud, angry tones and that it was not professional. She added that there was no reason for the anger that came forth. She added that she tried very carefully to say that she had been over all of the ordinances and that there was nothing in them that said that that type of application was needed. She stated that the next day they received a phone call to inform them that the application would not be necessary. She added that she did not remember from whom the phone call came but that there had been no apology.

Mr. Rankie stated that he did not think it would be productive to continue the testimony. Ms. Breen stated that she had filed a motion for reconsideration that was never addressed.

Mr. Billipp stated that the BOA had heard some additional testimony and asked if the Board members would like to weigh in on whether or not they felt that Chairman Cielezsko had a conflict or bias and that they would then have a motion and a vote. Mr. Marshall stated that he had no questions. Mr. Billipp asked Mr. Marshall if he felt that there was a bias and Mr. Marshall responded that he had questions but that he did not see enough information to make a determination that there was bias. Mr. Hamilton agreed.

Mr. Rankie stated that as the newest member of the BOA, it had taken him a little bit of time to understand and work with Chairman Cielezsko. He stated that when he first started working with him, he found him to be a very enthusiastic individual, that he is passionate and talks a bit louder and is more direct. He stated that Chairman Cielezsko says things and comes to closure. He stated that he had not seen Chairman Cielezsko ~~to~~ be angry. He added that in his own professional career it seemed that there were times when he told people things that they did not want to hear, they thought that he was yelling at them. He stated that he thought that was the case with the current issue,

adding that he felt very comfortable with Chairman Cielezsko's statement that he had no bias and that he had not made the statement that he had no emotion.

Mr. Billipp asked if there was a motion to allow Chairman Cielezsko to stay seated to hear the case. Mr. Hamilton so moved, Ms. Lemire seconded and all voted in favor.

Ms. Hardy stated that at a meeting on January 16, 2014 after a public meeting, the BOA met again and discussed Consent Agreements and Sweet Peas. She stated that Mr. Hamilton had stated that he did know about Consent Agreements and that the Selectmen were trying to solve a problem that Sweet Peas had created. She stated that she found that statement to be very prejudicial against Sweet Peas. She added that she took exception to the BOA having another meeting discussing Sweet Peas and that she considered that to be ex parte communication and that, therefore, Mr. Hamilton should recuse himself from the hearing.

Chairman Cielezsko asked Mr. Hamilton if he would like to respond. Mr. Hamilton stated that Ms. Hardy's statement was correct about a discussion that the BOA had had while they were still in the public hearing and that it had been recorded. He stated that he had a particular interest in Consent Agreements because he had been involved with at least observing them in the past 10 or 15 years and he had strong opinions about them. He added that he certainly did think that the Selectmen were attempting to consider a Consent Agreement with a party that had already appeared, Sweet Peas LLC, in front of the BOA and a decision had been made at the BOA meeting.

Mr. Hamilton stated that issuing a Consent Agreement is an inappropriate use of any public resolution between an appellant and the Board of Appeals. He stated that appearing before the Superior Court should be the next step in the process. He stated that he had a passion about when a Consent Agreement should and should not be used and that his opinion had nothing to do with Sweet Peas LLC.

Mr. Hamilton stated that the issue with Sweet Peas was another example of an inappropriate use of that sort of authority and he felt that the Selectmen had no right to that use. He added that he had asked the Charter Commission to investigate the use of Consent Agreements. He added that his statements really had nothing to do with Sweet Peas except as another example of the sort of thing about which he feels very strongly.

Mr. Hamilton stated that he felt no bias against Sweet Peas LLC at all. He stated that his only consideration in that case or any case which comes before the BOA is whether the code is being met strictly, whether there are arguments regarding interpretation and whether a different interpretation should apply. Mr. Hamilton stated that in the appeal by Sweet Peas, it was felt that code issues were not being met and that is why he voted to deny the appeal for a variance.

Ms. Hardy stated that she might withdraw her motion but that she would like to explain some of the background. Chairman Cielezsko asked if she was going to withdraw her motion and she replied in the negative. She stated that she would like to clarify a few things for Mr. Hamilton. Chairman Cielezsko stated that it was not the time or place for such clarification and Mr. Hamilton stated that he did not think it was necessary.

Mr. Rankie clarified that when Mr. Hamilton used the term Sweet Peas LLC, he was using that to describe a type of case and had nothing to do with the appellant in any way. Mr. Hamilton stated that it had no bearing other than the fact that it was another example of a Consent Agreement being used inappropriately.

Chairman Cielezsko stated that he wanted to verify that Mr. Hamilton's statements had not been part of an ex parte communication because the BOA was in public session. Mr. Hamilton stated that that was correct. Mr. Hamilton added that ex parte communications are those held beyond the meeting areas among members, whether it is a quorum or not a quorum.

Mr. Billipp made a motion to allow Mr. Hamilton to remain seated for the hearing. Ms. Lemire second. All voted in favor.

Mr. Rankie stated that in the interest of total disclosure, he needed to disclose that in his professional career he had been an engineer for the New England Telephone Company through Verizon and at some time during that period, probably in the late 1980s to 1990s, he served Mr. Hardy a letter from Verizon and Central Maine Power notifying him that until he had professional engineering drawings, they could not extend utility lines.

Mr. Rankie stated that he had also been at Attorney Nadeau's house because an abutter was trying to relocate the utilities next to Mr. Nadeau's house. Mr. Rankie stated that he did not think he had any bias.

Chairman Cielezsko asked if everyone was comfortable with Mr. Rankie's statements and the BOA members concurred.

Chairman Cielezsko stated that the voting members for the hearing would be Mr. Marshall, Mr. Hamilton, Mr. Billipp and Ms. Lemire.

Chairman Cielezsko stated that the BOA had the jurisdiction to hear the case through Section 45-49, Administrative Appeal.

Chairman Cielezsko asked if anyone had any reservations about the appellants represented by Mr. Nadeau. There were none. He stated that they had standing.

TESTIMONY FROM APPELLANT

Mr. Nadeau stated that, for the record, at the January 16, 2014 BOA meeting there had been no issue of bias raised by the appellants. He stated that Ms. Hardy had referred to something from the meeting of January 16 in regard to Mr. Hamilton. Mr. Nadeau stated that on behalf of the appellants, he complained in a letter to the Selectmen about bypassing the BOA regarding Consent Agreements. He stated that he was glad that the BOA had made the decisions that they had just made because he saw no bias on the part of the BOA.

Mr. Nadeau stated that the current hearing before the BOA was very similar to what had happened before. He stated that it was another growth permit application that had been issued and that the appellants, as alleged in their application, had said that the Interim Code Enforcement Officer issued the January 6, 2014 growth permit in a manner clearly contrary to the codes and provisions of the Town of Eliot.

Mr. Nadeau stated that he had prepared a memorandum to attempt to explain their position and to support that position with documents. . He stated that the memorandum set forth that the application for a growth permit must be submitted according to Article II, Section 29, Subsection 41 through 49 of the Eliot Code.

Mr. Nadeau stated that Exhibit 1 was a copy of the Growth Permit Application. He stated that there is a statement on the form which indicates there are requirements for the issue of a growth permit. He added that he thought that those requirements had been referenced at the last hearing by either Mr. Marshall or Mr. Hamilton. Mr. Nadeau stated that the form includes the statement, "Growth permit subject to lots and structures in all districts to meet or exceed minimum requirements of Section(s) 44-35 & 44-405 of the Eliot Ordinance."

Mr. Nadeau presented the BOA with a copy of the January 6, 2014 Growth Permit Application. He stated that the permit requires deed information and that the application for the permit which was issued did not include any recorded deed information because there is no recorded deed.

Mr. Nadeau stated that the memorandum from the CEO stated that the lot had been in existence since the 1970s. He stated that the lot that had been in existence is the 90-acre lot of land, not a two acre lot of land. He stated that the current permit was for the same two-acre lot that the BOA considered for a variance request and for the growth permit appeal. He added that the two-acre lot does not exist.

Mr. Nadeau stated that the appellants were at the January 16, 2014 meeting to appeal the prior growth permit that had been issued on November 8, 2013. He stated the significance of that was that at that meeting the appellants learned for the first time that a new growth permit had been issued.

Mr. Nadeau stated that Exhibit 2 (a copy of Section 29-47) showed that part of the requirements on the growth permit application form require that certain minimum standards be met. He stated that this lot of land is in the suburban district which requires a minimum street frontage of 150 feet and must comply with the Back Lot ordinance which he presented in Exhibit 3.

Mr. Nadeau stated that Exhibit 4 (sketch of proposed lot) shows a 2.089-acre lot which is the lot that Sweet Peas wants to separate from the 90-acre lot. He stated that the lot which has existed since 1970 is the 90-acre lot. He stated that the application that the CEO had been given identified a two-acre lot and Section 29-47 requires that the growth permit application be site specific. Mr. Nadeau stated that even by giving some leeway to the lot being either a two-acre lot or a 90-acre lot, there is not street frontage.

Mr. Nadeau stated that it is just not common sense to issue a growth permit application when existing conditions prevent compliance with the requirements of a building permit. He stated that it was not fair for other residents of the Town who want to get a building permit because a growth permit was tied up.

Mr. Nadeau stated that the CEO's statement in her memorandum to the BOA that Sweet Peas could comply was a fiction. He stated that Ms. Pelletier had stated in her memo to the BOA that she was satisfied that Sweet Peas could comply. Mr. Nadeau stated that the reality was that there is no street frontage for the property. He added that the property had been a piece-meal development forever in the Town.

Mr. Nadeau stated that in Exhibit 5, the requirements for all back lots are specified.

Mr. Nadeau stated that in Exhibit 6 (a page from the BOA minutes of September 19, 2013) Ms. Breen stated that there was no plan to extend Everett Lane. He stated that Everett Lane does not exist and that Sweet Peas had no plans to extend it and that, therefore, there is no street frontage for the fictitious lot of land.

Mr. Nadeau stated that Exhibit 7 (Section 45-287) demonstrated that the founding principles and purposes for a suburban district includes item 2), "Encourage growth that can best be served by existing highways and new subdivision streets with ready access to municipal services." He stated that the Town does not want piecemeal development where there are no safety patrols but that they want things built to Town specifications. He added that that is the reason the Town has the ordinances.

Mr. Nadeau stated that Exhibit 8 (page 8 from the BOA minutes of September 19, 2013) shows that two prior Code Enforcement Officers of the Town had denied a growth permit. He stated that he thought the only reason there had been a growth permit issued in November 2013 by Mr. Marchese was because some sort of influence had been brought upon him after the BOA denied the variance requested by Sweet Peas. He stated that somehow the issue went from the Selectmen's office to the Town attorney for an opinion. He added that fortunately the BOA had upheld the appellant's appeal in January 2014.

Mr. Nadeau stated that Exhibit 9 (page 12 from the September 19, 2013 BOA minutes) again demonstrated how the BOA had voted in the past by always holding up the 1,000-foot limit for a dead-end street.

Mr. Nadeau stated that there were many reasons why the appellants felt that the growth permit was clearly contrary to the spirit and intent of the zoning laws and to many specific ordinances. He stated that it did not even make common sense to issue the permit. He stated that he did not see how that lot of land could have been granted a growth permit.

QUESTIONS FOR APPELLANT FROM THE BOARD

There were no questions.

TESTIMONY FROM THE CODE ENFORCEMENT OFFICER

Ms. Pelletier stated that to make the argument that the lot does not exist is absurd. She stated that the lot does exist and that a person cannot be forced to create a new lot just to accommodate a new dwelling unit. She stated that Ordinance 45-405 allows more than one principle structure to be constructed on a lot as long as the applicant can show that it could be divided off and still meet the dimensional requirements. She stated that the applicant had provided a survey which indicated that either situation was possible. She added that she could not tell them that they had to create a separate lot because the ordinance does not require that.

Ms. Pelletier stated that she objected to any consideration being made at all to the memorandum that was received two days prior to the hearing from the appellants. She stated that the memorandum made an entirely different case than the application which had been submitted in a timely fashion. She stated that the latest document is a completely different appeal and she urged the BOA not to take it into consideration because it was not timely.

Ms. Pelletier stated that the ordinance requires that the appellant submit the forms provided by the Town within 30 days of a decision and the latest document was not received in a timely manner.

Ms. Pelletier stated that Mr. Nadeau was attempting to argue that her issuance of the growth permit had not been in the spirit or intent of the ordinances. She stated that those words do not appear in the ordinance and therefore she could not enforce them or apply them to anything. She stated that the words are too vague and subjective and do not apply to a CEO's review of an application. She stated that applying such a vague standard would create constitutional problems for the property owner and would basically give the CEO the broadest authority to approve or deny any growth permit just because he or she does not feel that it meets the spirit of the ordinance. She added that spirit and intent are not defined and are far too vague to be applied objectively.

Ms. Pelletier stated that the one standard that the appellants had to prove is that she acted clearly contrary to the ordinance. She stated that Mr. Nadeau had not cited one ordinance provision to which she had acted clearly contrary. She stated that he had manufactured ordinances or review standards that simply do not exist within the language of the ordinance and that she cannot apply a standard unless it exists in black and white. She added that she does not read between the lines but only interprets what is in black and white.

Ms. Pelletier stated that she did not believe that Mr. Nadeau had met his burden of proof. She stated that he had not cited a single ordinance to which she had acted clearly contrary.

QUESTIONS FOR CEO FROM THE BOARD

Mr. Hamilton stated that the CEO had approved a growth permit application for Tax Map 46, Lot 3 and asked if that 2.089 acre-lot had existed since 1970. Ms. Pelletier stated that the permit was for the center of a 90-acre parcel. Mr. Hamilton stated that not only did the CEO approve Tax Map 46, Lot 3 but that she had also approved the 2.089-acre lot which had not existed since 1970. He clarified that the Tax Map 46, Lot 3 refers to the 90-acre lot. Ms. Pelletier concurred. He stated that she issued the growth permit for a lot which was identified as 2.089 acres.

Ms. Pelletier stated that the Town has no authority to approve lot divisions unless it is a subdivision. She stated that the Town's role is to approve land use and that the applicant has to show that they could divide off a lot but that if they did not wish to divide off a lot, they could have two houses on one piece of property if they wanted to. She stated that the Town cannot force an applicant to sell or convey property. She stated that the Town is only involved in land uses and that the Town gets involved when

an applicant wants to do something on a lot to see that minimum standards are met. She added that the Town could not force the applicant to divide off the lot and that the ordinance allows two principle structures.

Mr. Hamilton asked if the 2.089 acres bothered the CEO at all and she replied in the negative. He asked if she had advised the client to put 90 acres on the application instead of the 2.089 acres. She stated that that had not been her choice and that if Sweet Peas wanted to keep the land all in one parcel that would be their right.

Mr. Billipp stated that the application was signed by Elizabeth Todak and asked who that was. Ms. Pelletier replied that she believed Elizabeth was Jean Hardy's daughter. Mr. Billipp asked what Ms. Todak's relationship was to Sweet Peas LLC and Ms. Pelletier stated that she did not know. Ms. Breen stated that Ms. Todak is the owner of Sweet Peas LLC. Mr. Billipp replied that he had thought Ms. Breen was the owner. She stated that she is the manager. She added that Elizabeth Todak owns the property and that neither Ms. Breen nor Ms. Hardy owns it.

Ms. Lemire stated that Ms. Pelletier had stated that she had seen an engineering survey plan. She asked if that survey plan had shown Everett Lane. Ms. Pelletier concurred. Ms. Lemire asked where Everett Lane went. Ms. Pelletier showed the BOA the survey plan.

Ms. Lemire asked if the CEO utilized use permits. Ms. Pelletier stated that typically use permits are processed through the Planning Board and that there are very few reasons for the CEO to issue use permits. Ms. Lemire clarified that the CEO was primarily involved in the issuance of growth and building permits. She added that historically use permits had been incorporated into building permits for a single-use building.

Mr. Rankie stated that on the Growth Permit application form the last sentence states, "Growth permit subject to lots and structures in all districts to meet or exceed minimum requirements of Section(s) 44-35 & 45-405 of the Eliot Ordinance." He asked the CEO how she dealt with that. Ms. Pelletier stated that she addresses basic dimensional requirements which would be lot size and street frontage. She stated that for a back lot, direct street frontage is not necessary because the street frontage can be the rear lot line of the front lot.

Mr. Rankie asked the CEO how she related the growth permit request to Section 45-405. Ms. Pelletier stated that when she looks at the permits she is only looking for the basic dimensional requirements, whether or not the owner is the actual owner and whether the lot is a front lot or a back lot. She stated that at this point, that information is all she needs. She stated that the growth permit is just the initial step in a process that includes many, many other permits that would be needed in order to build a new home. At the growth permit initial stage, the only requirements which need to be met according to ordinance are basic dimensional standards and street frontage.

Chairman Cielezsko asked the CEO if her position was that the BOA should not be using the information provided by the appellant two days prior to the hearing. Ms. Pelletier concurred. Chairman Cielezsko stated that the information from the CEO was provided at 4:00 PM the afternoon of the hearing. Ms. Pelletier stated that she is not bound by ordinance to submit information within any time frame. Chairman Cielezsko stated that neither was Mr. Nadeau. Chairman Cielezsko stated that he wondered why the BOA was having the meeting if the only information they could use was that which was supplied at the beginning of the month other than that from the CEO. He stated that there would be testimony at the hearing and that appellants could submit information all month. He added that he disagreed with the CEO's concept and that the BOA had never held to that standard before, even though they have complained about late information, including that from the CEO and from the appellants.

Ms. Pelletier stated that the only person who is required by law to submit information within 30 days is the appellant. She added that no one else is under that same requirement. She stated that for an appellant to make an entirely different case only two days before the meeting did not seem appropriate. Chairman Cielezsko stated that the BOA would decide whether or not the information was relevant because the hearing is an appellate review not a de novo review.

Chairman Cielezsko asked the CEO why she thought the recent information from the appellant made the case de novo. She replied that the requirement was not in the ordinance and that the Maine Supreme Court had ruled that if it is not in the ordinance, the case is de novo. She added that it is outside of the ordinance to review it unless it is in the Shoreland Zone.

Chairman Cielezsko stated that there was a decision a few years ago where the BOA was reprimanded by the Superior Court for looking at a case de novo. He added that the BOA hears all cases, except ones that are clearly identified as de novo, as appellate review. He stated that she had referenced the Shoreland Zone as being the only appellate review. She replied that that is the only place where it is so stated. Chairman Cielezsko replied that that is the only place where it is stated that the review is de novo. He added that he was not going to belabor the point because the current property is not in the Shoreland Zone.

Ms. Pelletier cited the MMA Manual as, "When a local ordinance provides that the board of appeals' role is strictly an 'appellate review,' the board's job is to review the record created by the original decision...." Chairman Cielezsko asked when the rule changed. Ms. Pelletier stated that it had been in effect since she started working for the Town.

Chairman Cielezsko stated that the BOA had not heard any decision changing what was forced on the BOA by a court decision. He stated that the BOA would hear the case under appellate review. He stated that the BOA had been hearing cases that way ever since the decision by the court and he did not want to change that now.

Chairman Cielezsko asked the CEO if she would have issued a growth permit to Sweet Peas if Everett Lane did not exist. She stated that that was not the application she was tasked with reviewing. She stated that if she had an application that presented it that way, she would give a determination but that she did not have such an application and that it would not be appropriate. She stated she was reviewing the application in hand and she would not speculate.

Chairman Cielezsko asked if the CEO was standing by her statements that there is no requirement to show that the lot in question would be able to be built upon and that the requirement is only that the lot is owned. Ms. Pelletier stated that she had never said that.

Chairman Cielezsko asked the CEO for the minimum requirements for her to issue a growth permit. Ms. Pelletier stated that she looks at basic dimensional standards, lot size, frontage, whether the lot is a back or a front lot and whether the lot is part of a subdivision. She stated that all she looks for under the Growth Management Ordinance is that the application is complete and is filled out by the owner of the property and that the owner has standing to apply. She stated that she could not read into the ordinance things that are not there. She stated that the standards that she applies are the standards that the ordinance specifies.

Chairman Cielezsko clarified that looking at whether the lot is a back or a front lot is done for street frontage purposes. Ms. Pelletier concurred and stated that the frontage requirements for a back lot are different than those for a front lot.

Chairman Cielezsko clarified that the CEO was not looking into whether the lot met any other ordinances than those she stated. Ms. Pelletier concurred.

Mr. Billipp asked how the CEO interpreted the lot to be a back lot and where she had determined the frontage to be. Ms. Pelletier stated that Everett Lane is a 50-foot right-of-way and that is what is required for access to a back lot. She stated that the frontage could also be the rear lot line of the front lot and does not have to be taken from a road. She stated that the applicant met that standard in several different ways.

Mr. Billipp asked if Everett Lane as shown on the submitted plan exists that way currently. Ms. Pelletier stated that that was not what she was looking at. She stated that she was just looking at very basic things as to whether or not the lot can meet standards. She added that she was not conducting an investigation because it is not the

time for those issues to come into play and that those issues would be looked at for a building permit, not for a growth permit.

Mr. Marshall asked if the growth permit application was proposing to create a back lot. Ms. Pelletier stated that the permit was for building a house. She stated that she does not approve lot division unless it is a subdivision. Mr. Marshall asked whether it would be more accurate to say that the growth permit was for a 2.089-acre lot or the 90-acre lot. Ms. Pelletier stated that the growth permit was to construct a house on one of those lots. She stated that if the applicant wanted to divide off a lot they could do that or they could have two houses on one lot. She stated that the applicant only has to show that it could be done.

Mr. Marshall clarified that on the strength of the size of the 90-acre lot and its characteristics the CEO issued a permit. He asked if reference to the 2.089-acre lot could have been left out of the application. Ms. Pelletier stated that if the applicant wanted to go that route that would be her prerogative. Ms. Pelletier stated that it was not up to her to determine that the lot could have been left out and that she dealt with what was given to her to review. She added that she does not design the application. She stated that when she looked at the application, whether or not it applied to the small or to the large lot, either way the applicant could meet the standards.

Mr. Marshall clarified that the lot is not a subdivision but a division which the owner is allowed to do up to two times in any five year period. He added that where the owner divides is not up to the CEO provided the division meets requirements. Ms. Pelletier concurred and added that, when the owner wants to start using the lot, that is when she gets involved. She stated that if the owner wanted to build a house or have a business on the lot, then the lot would have to meet standards.

Mr. Marshall stated that he was confused on the frontage situation. He stated that he was not arguing about whether or not there was frontage but that if there is frontage would not the lot be considered a back lot. Ms. Pelletier stated that that would not necessarily be the case. She stated that a lot could have frontage on a road and still be a back lot. Mr. Marshall asked how a lot could be a back lot if it had frontage. Ms. Pelletier stated that she was going by the definition in the ordinance which allows a back lot to take frontage from several different ways, including directly on the right-of-way or on the lot line of the front lot.

Mr. Rankie asked if the lot plan showing Everett Lane had been part of the growth permit application package. Ms. Pelletier stated that it had been part of the application package going back to the days when Jim Marchese was CEO. Mr. Rankie stated that the plan shows a lot that is drawn up. Ms. Pelletier stated that the applicant only had to show that they could divide off the lot as a separate piece. She added that they do not actually have to divide it. She stated that at this point in the process everything is

proposed and the application does not have to be for a new lot which has been conveyed or have its own deed. She stated that she cannot force someone to convey a parcel. Mr. Rankie stated that he understood that point but asked why the plan had accompanied the growth permit application if that was not the lot the applicant had applied for. Ms. Pelletier stated that the applicant had to show that they could create a lot that would meet the basic dimensional standards.

Mr. Hamilton asked the CEO if she had determined that the lot was a back lot. Ms. Pelletier concurred. Mr. Hamilton asked her if she had taken into consideration any of the additional requirements for a back lot. She stated that she did. He asked if she had thought the lot met all of those requirements. Ms. Pelletier stated that she felt that it could meet them and that the applicant did not need to show that the lot met all of the standards at this point in the process. She added that those standards would come into play when an application for a building permit was received and that that was when it would be reviewed with a fine-toothed comb.

Mr. Hamilton clarified that the CEO had based her decision on the fact that she determined that the lot was a back lot and that she felt that it could meet the requirements of the Back Lot Ordinance. Ms. Pelletier stated that she felt that the lot could meet the basic dimensional standards. She stated that the applicant proposed what they wanted to do and she acted on that proposal. She stated that she is not the one to determine whether it is a front lot or a back lot.

TESTIMONY FROM PARTIES TO THE ACTION

Jean Hardy stated that she had a letter from Elizabeth Todak, the owner of Sweet Peas, which appointed Ms. Hardy to act on her behalf. She stated that Dr. Breen was also present at the meeting.

Ms. Hardy stated that she would like to object to the BOA acceptance of the new information presented by Mr. Nadeau because Sweet Peas had not seen the information. She added that the only information Sweet Peas had seen was that which had been filed in the appeal. She stated that according to the MMA Code Enforcement Officer's Training and Certification Manual dated December 10, 2013, "It is important to remember that an applicant and other parties to the proceeding must have accurate time to address any information provided to the board." She stated that Sweet Peas had not seen any new information and that she did not even know what document had been filed two days prior to the hearing.

Ms. Hardy stated that she also had an issue with timeliness. She stated that an appeal is not timely if it is not filed in accordance with the municipality's procedures, including whatever appeal application form is required by the municipality and the payment of

any fee. She stated that decision was rendered in a case by Washburn against the Town of York, CD 92-11, Maine Superior Court, November 10, 1992 and Breakwater and Springpoint Condominium Association vs. Doucette, AP-97-28 rendered on April 8, 1998.

Mr. Hardy stated that she strongly objected on behalf of Sweet Peas the BOA acceptance of any submission raising additional issues by the appellant.

Ms. Hardy read a letter from Sweet Peas directed to the BOA. In the letter, Elizabeth Todak stated,

1. Sweet Peas takes issue with Attorney Nadeau's document to the Board of Appeals (BOA) titled Statement of Facts.
2. The facts are that Sweet Peas applied for a Growth Permit according to the Eliot Zoning regulations and a Growth Permit was issued.
3. Sweet Peas questions how John Brigham et al, will be directly or indirectly affected by the granting of a growth permit to Sweet Peas. The property in question is zoned residential and is located between two existing house lots.
 - a. Sweet Peas questions how specifically the appellants have demonstrated they will be adversely affected.
 - b. While there is a group of five or more residents, this group has yet to demonstrate their adversity in the granting of a Growth Permit.
 - i. According to the Maine Manual for Board of Appeals 'To meet the particularized injury test, the person must show how his or her actual use or enjoyment of property will be adversely affected by the proposed projects or must be able to show some other personal interest which will be directly affected which is different from that suffered by the general public. (This is followed by a list of legal citations.)
 - ii. Where a person claims that a project will cause him potential harm because he drives by the site daily and will be exposed to greater safety risks due to traffic generated by the project.
 - iii. The court has held that such harm is not distinct from that which will be experienced by many other members of the driving public and therefore was not sufficient for the purposes of the particularized injury test. (This is followed by legal citations.)

- iv. If an appeal is brought by a citizens' group or some other organization, the test for the organization's standing to appeal is whether it can show that any one of its members would have standing in his/her own right and that the interests at stake are germane to the organization's purpose.
- 4. In the appeal the appellants stated the 'Code Enforcement Officer's decision to issue the January 6, 2014 Growth Permit was clearly contrary to Article , section 29, Subsection 41 through 49 of the Eliot Code, contrary to Sections 43-45 and 45-405 of the Eliot Ordinance and contrary to the subdivision regulations of the Town of Eliot'.
 - a. In item #1, the appellant states the Code Enforcement Officer issued Growth Permit for a non-existent lot of record.
 - i. Statement #1 is false. The lot is a proposed lot, which is being broken off of a larger lot. This is common practice in the Town of Eliot. There is a parcel of land, which is taxed by the Town of Eliot, which is easily found on all tax maps.
 - ii. The appellant failed to clearly identify which section of the Growth Permit process requires a house lot to have a recorded deed for specific 2 acres of land being broken off of a larger tract of land prior to the issuance of the growth permit.
 - b. Section 29-19 (a) states 'It shall be a violation of this chapter for any person to build or place a dwelling unit within the town without first having obtained a growth permit in accordance with the zoning chapter.' Sweet Peas has complied with this section by applying for and receiving approval for a Growth Permit.
 - c. According to Section 29-41(a) 'a growth permit application must be completed by the lot owner or record, including all endorsements and certifications.' This was done by Elizabeth Todak, owner of Sweet Peas LLC.
- 5. The appellant makes an allegation under item #2 that the proposed lot 'could not become a legal lot of record prior' to the expiration of the Growth Permit.
 - a. The appellant has not presented any information to back up this allegation and again makes a false claim.
 - b. Section 29-47 states 'growth permit application shall be site-specific, and shall be valid for construction only on the lot specified on the application.'

- c. Ms. Todak and Sweet Peas has submitted a certified plan with site-specific information, thereby complying to section 29-47(a).
6. Under item #4, the appellant states that the 'issuance of the Growth Permit number 14/2 is clearly contrary to the spirit and intent of Eliot's Growth Permit Ordinance.'
 - a. The appellant has made an allegation, but did not state how the issuance of the Growth Permit is contrary to the spirit and intent of the Eliot Growth Ordinance. All he does is make a general statement with no supporting documentation in his appeal to the Board.
 - b. The purpose of the Growth Management Ordinance is 'to provide for the local housing needs of the town's existing residents and to plan for the continued residential population growth of the Town at a rate which would be compatible with the orderly and gradual expansion of community services, including education, fire and police protection, road maintenance, waste disposal, health services, etc.'
 - c. The purpose of the Growth Permit is to 'insure fairness in the allocation of building permits'.
 - d. It is worthy to note that the Kaichens received a growth permit in 2005 after the zoning change in the location next to and further away from the road than the proposed Sweet Peas lot. The Bryants received a growth permit in 2003 and the Cuttings received a growth permit in 2002. All of these people have access over Everett Lane, which is recognized, established access way that has been in existence for many years and has appeared on the subdivision plans submitted by the previous owner, John Hardy.
 - e. Steve Wing, an abutter to Sweet Peas, also received a growth permit in and building permit for a house lot off of Lamplighter Lane, which was more than 1,000 feet off of Littlebrook Lane, which is an established access way and that was done in 2008.

The Eliot Board of Appeals should deny the appeal by John Brigham et al. as there is no supporting evidence in the appeal of this Growth Permit. Sweet Peas has more than complied with the Eliot Zoning requirements, Growth Permit process and Growth Management Ordinance.

Ms. Hardy gave a copy of the letter signed by Elizabeth Todak to the BOA members.

QUESTIONS FOR INTERESTED PARTY FROM THE BOARD

There were no questions.

TESTIMONY FROM ABUTTERS

There was no testimony from abutters.

TESTIMONY FROM INTERESTED PARTIES

Vicki Mills of 42 Old Farm Lane, Eliot, Maine stated that she had a question regarding the last sentence of the Growth Permit application which references two ordinances where the second one, Section 45-405, includes the Back Lot Ordinance. Chairman Cielezsko stated that 45-405 is a chart of the dimensional requirements and the last specification states that for back lots the requirements are listed in Section 45-466. Ms. Mills stated that within the Back Lot Ordinance, it clearly states that no dead-end road shall exceed 1,000 feet. She asked if the road was longer than 1,000 feet.

Chairman Cielezsko asked the CEO if she used Section 45-405 as the basis for the growth permit's acceptance. She stated that she used 45-405 for basic dimensional standards, frontage and lot size requirements.

Chairman Cielezsko asked if she had used Section 45-405(m) by going to Section 45-466 to see if the property met the Back Lot Ordinance. Ms. Pelletier stated that she did not because that was not appropriate at this time. She added that that ordinance would be looked at during the building permit process.

Chairman Cielezsko told Ms. Mills that he thought that statement from the CEO had already mooted the question about the 1,000-foot limit because it had not been addressed by the CEO for the growth permit application.

Ms. Mills stated that she had been told by previous Code Enforcement Officers that there is a provision to break apart two separate lots within a five year period but that the criteria of the ordinance must be met in order to do so. She stated that the lots cannot just be broken off but also have to be in compliance with the overall ordinance.

Michael Fielders, 18 Barnard Lane, Eliot, Maine stated that he thought that the proposed project would add extra traffic and that the road is already inadequate for the traffic that is there. He stated that a long time ago it had been decided that no further building permits would be allowed down the road until the road had been brought up to

Town specifications. He stated that adding another lot would add even more traffic to the road. He stated that it does affect him and affects his family and that the road is not safe now. Chairman Cielezsko stated that the standing of the group had already been established and that the road condition had been addressed in previous meetings.

Fred Barbour of 15 Barnard Lane, Eliot, Maine stated that he is a concerned neighbor. He stated that the CEO used a plan when issuing the Growth Permit which showed Everett Lane. He asked if the plan showed a non-existent part of Everett Lane or Everett Lane as it currently exists. Chairman Cielezsko asked the CEO if she would want to answer the question. Ms. Pelletier stated that at this point when issuing the Growth Permit, she was not looking at the entire length of any road.

Mr. Barbour stated that the CEO had used the plan showing Everett Lane when she issued the Growth Permit. He asked if that plan showed the existing part of Everett Lane. Chairman Cielezsko stated that the CEO had stated that she did not base her decision on that plan. He added that the CEO had already said that she stopped at dimensional requirements without looking at the Back Lot Ordinance. He stated that doing so was not part of the process at this point and that the CEO had testified that only minimum standards had to be met.

Mr. Barbour stated that he had been at the Selectmen's meeting the previous night and that the CEO had stated then that for a growth permit there are no requirements but at the current hearing it appeared that there were requirements for dimensions, street frontage and lot size. Chairman Cielezsko stated that the Selectmen meetings have an array of different topics but that the CEO would be held to testimony at the current hearing. He stated that he did not want to entertain what she had said at the Selectmen's meeting.

John Brigham of 36 Littlebrook Lane, Eliot, Maine stated that he felt that it was wrong to issue a growth permit when it is very well known that the lot does meet the requirements of the ordinances. He stated that he was referring to the 1,000-foot limit as well as some other requirements. He added that those requirements had been established in previous meetings.

Denise Long of 15 Keith's Lane, Eliot, Maine stated that she had a question regarding the bias discussion and asked if was appropriate to ask that question. Chairman Cielezsko stated that it was not appropriate.

FINAL TESTIMONY FROM APPELLANT

Mr. Nadeau stated that he did not really know where to begin. He stated that, stripping everything that had been said away, he thought the BOA must grant the appeal because the interim CEO had stated that she did not consider back lots and did not consider Everett Lane and that those were both clearly required under the growth permit application. She stated that the CEO had stated on the record that she did not consider those and that that was clearly contrary to the ordinances.

Mr. Nadeau stated that he wanted to address the issue of his memorandum which he submitted two days prior. He stated that it was difficult to sit there and watch what he felt was an attempt to obstruct the representation of 17 taxpayers of the Town by saying that the memo could not be accepted. He stated that the application was submitted setting forth everything. The memorandum was meant only as an aid for the Board. He stated that everything that was in the memorandum was supporting evidence for what was in the application with no new issues. He stated that that was a fiction from the CEO and Ms. Hardy and that it was just not true.

Mr. Nadeau stated that he tried to document everything to give the BOA evidence regarding why the appeal needed to be granted. He stated that what bothered him somewhat was that the Town had an interim CEO who is also a Planning Assistant. He stated that she knows the history of the property. He stated that there were multiple records that he could have presented to the BOA but that they were not needed. He stated that there was not supposed to be any more development on this land until Littlebrook Lane was brought up to Town standards. He stated that that fact was in the Planning Department records. He stated that he was not asking the BOA to deal with that in the hearing but that they would be opening up 90 acres of land to piecemeal development like that which had been done since 1977.

Mr. Nadeau asked that the BOA grant the appellants their rights under the Town's ordinances. He stated that the proposed project does not comply with the back lot requirements and that it does not have frontage because Everett Lane does not exist. He stated that a growth permit application has to be converted to a building permit within 90 days. He stated that the reason for that provision is that other people in the Town want to build on their lands that are ready to be built on. He stated that the proposed project would require subdivision approval.

Mr. Nadeau stated that the proposed project could not qualify because Sweet Peas had tried before for a variance from the 1,000-foot limit to back lots, that that was already a dead issue and that he did not see any other option since the back lot issue had already been decided.

Mr. Nadeau stated that what was interesting to note was that the CEO had stated that she did not consider the back lot ordinance and did not think she had to consider it because the Growth Permit was issued on January 6, 2014. The prior appeal (for the

expired Growth Permit on the same project) came before the BOA on January 16, 2014 and he thought that the CEO assumed that the BOA would deny the appeal. He stated that at the January 16 meeting, the BOA held true to what they had done in the past on the back lot requirements. He added that the CEO was now saying that she did not consider that requirement on the current application. He stated that it does need to be considered and that that is stated on the application form itself. He stated that that fact alone mandated that the BOA uphold the appeal.

Nr. Nadeau stated that he had not taken the position that Ms. Hardy could not submit Ms. Todak's letter to the BOA. He stated that the meeting was supposed to be fair and that everybody should be heard. He stated that the CEO had said that his memorandum was subjective. He stated that it was the furthest thing from subjective and that he had given documents to support every argument contained in the memorandum.

Nr. Nadeau stated that the CEO had not looked at Everett Lane. He added that his memorandum included a plan that she was given about Everett Lane. He stated that the memorandum included a document in which Ms. Breen stated that they were not going to extend Everett Lane. He stated that Everett Lane does not exist and that there is no frontage to the lot of land.

Nr. Nadeau stated that he did not know what the appellants had to prove in order to stop the nonsense and that it really was nonsense because the property owner goes from one board to another board, that they have tried to bypass the BOA and that they tried to get a Consent Agreement. He stated that the appellants had to hire an attorney to defend their rights and that that did not seem fair to him. He stated that the appellants were just as important as any other taxpayers in the Town.

Nr. Nadeau stated that at the January 16, 2014 meeting of the BOA, Ms. Pelletier had stated that in order to issue a growth permit, no documents were needed. She stated that she used documents for the current permit because they were submitted to Jim Marchese previously. He stated that Ms. Pelletier had given him a copy of the growth permit application and that the plan was not part of the application. He stated that he really did not care because the property did not qualify for a growth permit application.

Nr. Nadeau stated that the growth permit application requires specific information on the recording of deed and that from the application he did not know whether it was for a 90-acre parcel or a two-acre parcel. He added that it had been stated that the lot was between two other lots and that it was not clear what was being asked for. Nr. Nadeau stated that the BOA had the map and lot numbers but that they did not know what recorded portion was under discussion.

Nr. Nadeau stated that meeting the back lot ordinance specification is required under the growth permit application process.

FINAL QUESTIONS FOR APPELLANT FROM BOARD

Ms. Lemire asked the appellant to explain why he had stated that the lot could not become a legal lot of record prior to the expiration date of the growth permit. Mr. Nadeau stated that he thought it was because in order to be a legal lot of record the property would need to have legal frontage and road access. He stated that he did not believe the property could be a legal lot of record because if the Town does not recognize it as such, then it is not a legal lot. He added that anybody would report anything he wanted.

Ms. Lemire stated that her issue was that he had used the words “could not” and that that statement told her that he knew for sure that the property could never become a legal lot of record. He stated that that was because there had already been a decision regarding the property and the 1,000-limit for back lots, of which it is one. He questioned how an applicant could get around that. He added that he thought Sweet Peas would have to get subdivision approval, which could not be done within the 90-day time period.

Mr. Marshall asked Mr. Nadeau to clarify why he had mentioned twice that the property would have to go to a subdivision review. Mr. Nadeau stated it was because of the history of the land and the decision that had been made that there could be no more development without going through the subdivision process. He stated that they had started with a minor subdivision. Mr. Marshall stated that, to his knowledge of subdivision rules, a subdivision would be three or more lots in less than a five year period. He added that anything less than that would not be a subdivision. Mr. Marshall stated that unless someone had said something about wanting that to happen, it was somewhat off the wall unless it was written in the Eliot code. He added that the code states that anything less than three lots is not considered a subdivision.

Mr. Nadeau stated that because of the history of the land and the past development, he did think that the current situation is an unusual one and would require further subdivision or they should not get any permits for anything, including a building permit. Mr. Marshall stated that unless a property is being divided into three lots or more, it does not go to subdivision. Mr. Nadeau stated that he understood but that the property had already been divided into ten lots and that had been done piecemeal. Mr. Marshall stated that they still had to deal with the five-year period. He stated that every five years, an owner can take two lots off and that that would not fall under the definition of subdivision as far as the Eliot ordinances. He stated that to state that the current proposal is a subdivision would be a misuse of term.

Mr. Nadeau stated that he thought that the records of the Town treat the property a little differently because it had been decided that there could be no more development there without completing the road to Town specifications. Mr. Marshall stated that there could be records that express someone's opinion but that he did not think the Town runs on opinion but on what the codes say. He stated that the codes in Section 45-466 indicate that the project is a non-subdivision situation.

Mr. Hamilton stated that he did not think it was germane to the issue, but that there was a possibility that at some point during the division of land there may have been a Planning Board requirement that no further subdivision be accomplished without upgrading the road. He stated that that may well be part of the deed. Mr. Hamilton stated that the subdivision issue was not critical.

Mr. Rankie stated that he thought the growth application permit submitted by the applicant was accompanied by the drawing which depicts Everett Lane. He stated that, based on that, the growth permit application specifically states that the permit is "subject to lots and structures in all districts to meet and exceed the minimum requirements of Section(s) 44-44 and 45-405." He stated that in looking at Section 45-405 and the drawing of Everett Lane, if it is accurate, the property could reach 50 feet of frontage but that the ordinance states that the frontage needs to be 150 feet.

Mr. Rankie stated that Section 45-405(m) states that back lot requirements are specified in Section 45-466. He stated that Section 45-466(g)(5) requires that the access not exceed 1,000 feet. He stated that as submitted, the property exceeds that limit. He stated that if he were to vote, he would vote to uphold the appeal.

PUBLIC HEARING CLOSED

The public hearing was closed at 9:06 PM.

FINDINGS OF FACT:

- The public hearing was held on February 20, 2014.
- The lot in question is identified as Tax Map 046, Lot 003.
- The application for the Administrative Appeal was received on January 21, 2014.
- The application is appealing an approved growth permit number 14/2, granted on January 6, 2014, to Sweet Peas LLC.
- 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 or more members

of the BOA.

- The case is being held and heard under Appellate Review.
- The current growth permit must be converted to a building permit within 90 days of issue or it will expire.
- The appellants showed standing and timeliness in their application.
- The growth permit application was noted as being incomplete because of a lack of information regarding the registration of the deed with book and page number of the recording.
- The growth permit application was signed by the interim Code Enforcement Officer, Kate Pelletier, who also represented the Code Enforcement Office at the public hearing on February 20, 2014.
- The growth permit application's last sentence states that "Growth permit subject to lots and structures in all districts to meet or exceed minimum requirements of Section(s) 44-35 & 45-405 of the Eliot Ordinance."
- The Code Enforcement Officer and the growth permit applicant objected to the BOA's acceptance of a late submission of material from the appellant.

DISCUSSION

Chairman Cielezsko stated that the BOA had the power to hear the appeal under Section 45-49(a), Administrative Appeals which states that, "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 of 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 a finding that a decision is clearly contrary to specific provisions of this chapter." He stated that the BOA was under that rule and asked whether any member had any inclination toward a motion or whether they wanted to discuss aspects that were confusing.

Mr. Hamilton stated that he wanted to address the objection to the memorandum which was delivered two days before the meeting. He stated that in looking it over carefully, he saw no new information but simply a reiteration of other material that was in the application. He added that he did not see that it was an addition to the application and was just supportive of the application. He stated that the information did not change the application at all and he thought it should be considered.

Chairman Cielezsko stated that during the meeting, he had already vocalized his opinion of the complaint. He asked if there were any reservations on the part of any BOA member on using the information supplied two days ago by Mr. Nadeau. Mr. Hamilton stated that the information was in the same vein as the material that had been read by

the Sweet Peas LLC in defense of their position. He added that that was something the BOA had not heard before and that it was of equal standing. He stated that he thought both of those should be considered.

Chairman Cielezsko stated that whatever they heard, the only information they could use was that which was available to Ms. Pelletier when she made her decision. He stated that they could not use any new information from beyond the date of January 6, 2014 in the deliberations.

MOTION

Mr. Hamilton moved to grant the appeal on the basis that the CEO acted clearly contrary to code. He stated that the application was not complete because it did not have the deed information. He stated that, contrary to code, he thought that the CEO did not carefully scrutinize the requirements that he thought the growth permit should have. He stated that it may not be stated in the growth permit ordinance, but it does state in the application that, "Growth permit subject to lots and structures in all districts to meet or exceed minimum requirements of Section 45-35 & 45-405 of the Eliot Ordinance." He stated that he did not think that had been done and that it was contrary to code.

Chairman Cielezsko stated that Mr. Hamilton's statements made a very long motion. Mr. Hamilton restated the motion and moved to grant the appeal on the basis that the CEO acted clearly contrary to code. Mr. Billipp seconded the motion.

Mr. Hamilton stated that the application for the growth permit was incomplete because it did not contain deed information. He added that he did not know why the deed information was not provided. He stated that the application was confusing to him and was not complete.

Mr. Hamilton stated that he was confused between Lot 46, Map 3 being 2.089 acres or 90 acres and did not know if the deed information would have helped. He stated that he was sure there was no new deed for the 2.089-acre parcel. He stated that that was a minor point and that the major point was the need to satisfy what the growth permit application clearly states. He added the requirements on the form are not stated equivocally but are stated non-equivocally and that they must be met or exceeded. He stated that he did not believe that the CEO performed that test.

Mr. Billipp stated that he concurred with Mr. Hamilton's justification for making the motion.

Ms. Lemire stated that she did not agree that the CEO acted clearly contrary to the code. She stated that she thought that was a very high standard, was unreasonable and was at cross purposes. She stated that she was completely free from doubt that the CEO did not act contrary to what she was supposed to be doing.

Mr. Marshall stated that he concurred with Ms. Lemire's statement. He stated that his first issue was with the statement that the growth permit was issued on a non-existing lot of record. He stated that the lot is a lot of record because the larger lot is a lot of record and the permit was given on that lot. He stated that the statement that the CEO acted contrary to the spirit and intent of the ordinance was a non-issue.

Mr. Marshall stated that in looking through the back lot ordinance (Section 45-466), it references new back lots under Section 45-466(e) which talks about lots that were created prior to June 14, 2005. He stated that he thought that the original lot was created a great, long while ago, probably even prior to the existence of the ordinances.

Mr. Marshall stated that now the Town was going to tell the owners that they could not use the land because it is more than the 1,000-foot limit. He stated that it would not be dissimilar to telling someone that his savings account or retirement account could not be used because it is under a certain amount or in the wrong form. He stated that the money belonging to the owner was now restricted.

Mr. Marshall stated that when someone buys a piece of land, they buy that piece of land with the idea, given what the ordinances were at the time, that it was a good investment or a good use of his resources under the rules in existence. He stated that if the rules change, there are grandfather clauses that do not allow the rules to change for the owner.

Mr. Marshall stated that, though it might be legal, he considered it unethical to take away the use of someone's property. He questioned whether the appellants were aggrieved. He stated that might be possible. He stated that he thought there was something else going on in the case other than whether a back lot is usable or not. He added that he would not get into that issue.

Mr. Marshall stated that the issue under discussion was whether or not the person's land could be used. He stated that it was pretty obvious that there was bad blood in the case but that there was a precedent going on that could affect many people in the Town on the 1,000-foot limit. He stated that the issue was whether or not it was proper to take away the use of an existing lot of record and which may have existed for hundreds of years. He stated that because of that, he would be voting against the motion to grant the appeal.

Chairman Cielezsko stated that Mr. Marshall's argument for voting against the motion did not address the ordinance. He stated that Mr. Marshall had talked about the taking of land and grandfathering of lots. Mr. Marshall replied that he did discuss the ordinance and had stated that most of the ordinance deals with the creation of new back lots. Chairman Cielezsko stated that there are sections in the ordinance on all back lots and on old back lots and that it is the Back Lot Ordinance.

Chairman Cielezsko stated that the CEO had testified that she did not use the back lot ordinance in determining whether or not the growth permit should be granted. He added that she had testified that she did not look into the fact of whether the lot met the back lot ordinance or not.

Mr. Marshall stated that his major argument had been addressing the three issues in the growth permit application but that he did go beyond that and that it had been well within his purview to be able to do so.

Chairman Cielezsko stated that he did not want an appellant to take a denied appeal to the Superior Court and make a statement that he had lost the appeal because a BOA member had stated that it was a "taking of land." He added that if it came down to that, the decision would be overturned on those grounds. He stated that the BOA members needed to keep their minds on what had been presented and the ordinance.

Chairman Cielezsko stated that he agreed with Ms. Lemire that the CEO had testified to using only the bare bones minimum needed for a growth permit and that she did not look at the back lot ordinance. He stated that he wanted to see things work out the way they were supposed to work out. He stated that in Ms. Pelletier's mind that there were not the requirements for a growth permit that others thought would be necessary, such as a buildable lot.

Chairman Cielezsko stated that the intent of the growth permit is only for stable growth in the Town and that is the only thing the growth permit represents. He stated that he did not want to have a fight about a building permit because of a growth permit.

Chairman Cielezsko stated that the former CEO, for the prior appeal, wrote that the property had passed the back lot ordinance in his decision. He stated that the CEO had been wrong because the property did not meet the back lot ordinance. He added that the current CEO, in a new decision, had determined that she did not need to look at whether the property met the back lot ordinance. He stated that she actually granted the permit to the 90-acre lot. Mr. Marshall stated that his point had been that the permit was for an existing lot of record and Chairman Cielezsko concurred.

Chairman Cielezsko stated that the current permit was granted on January 6, 2014 and the meeting regarding the prior appeal was held on January 16, 2014. He stated that

Ms. Pelletier did not have the results of that meeting to fall back upon. He added that it was past practice for the Town to use the acreage of the lot which was going to be used in the attempt to develop. He stated that he had a difficult time seeing that the CEO was clearly contrary to the ordinance.

DECISION

The motion to grant the appeal was denied by a vote of three to two with Mr. Billipp and Mr. Hamilton voting in favor and Ms. Lemire and Mr. Marshall voting against. Chairman Ciesleszko, as the tie-breaker, voted against.

HEARING CLOSED

The public hearing was closed at 9:39 PM.

APPROVAL OF MINUTES

The minutes were approved as amended.

OTHER BUSINESS

Chairman Ciesleszko stated that the BOA members do not conduct any business with each other using email. He stated that it is not a steadfast law but that any emails should go through Barbara Thain with any questions about process. He stated that the members take up everything at the meetings. He stated that he had seen a couple of emails from the newest member on his computer but that he had not read them because he only checks his email about once or twice a month and by then they were late. He restated that the members do not do emails to each other.

Mr. Rankie stated that he understood and that if he wanted to send something to the chairman, he should go through Barbara and then it is a matter of record. Chairman Ciesleszko stated that he would not answer much unless Barbara called him in to the office and asked him a question on behalf of Mr. Rankie.

Mr. Rankie stated that one of the emails he had sent was a job description for the Town manager and the other was a question about whether members of the Board had gone to training. He stated that there was a class opening on March 25, 2014 and he had wondered if anyone wanted to enroll.

Chairman Cielezsko stated that if Mr. Rankie sends an email to all of the members, they would all of a sudden be in meeting. He stated that for as long as he remained Chairman, there was not supposed to be any talking to each other except at meetings. Mr. Rankie stated that some items are time-sensitive. Chairman Cielezsko stated that Barbara could always notify others.

Mr. Billipp stated that the point was that there should be no discussion of important business except at meetings. He added that that was why they do not go out together after meetings. Mr. Marshall stated that any gathering of more than two members is considered an unannounced, non-agenda meeting and that three is a quorum of the BOA. Chairman Cielezsko stated that the communication can never be more than one at a time unless in a meeting.

Chairman Cielezsko stated that there is to be a MMA workshop in Kennebunk and that it had been a good one the last time he had gone.

Chairman Cielezsko asked the CEO if she had any questions to address with the BOA. She stated that she did not.

Mr. Billipp stated that he had been surprised when Chairman Cielezsko brought up the issue of bias. He added that he thought Chairman Cielezsko had handled the situation well. Mr. Marshall stated that he was in agreement and thought that the issue had arisen "out of the blue" and was in agreement that Chairman Cielezsko handled it right.

Ms. Lemire asked if the BOA should suggest that the Planning Board review the application process for clarity. She stated that they are supposed to review it every few years and that the ordinance actually says that. She stated that she did not know how long it had been since the last review.

Ms. Pelletier stated that the Planning Board reviewed the process every year and published the number. Chairman Cielezsko clarified that Ms. Lemire had referred to a review of the process itself rather than to the numbers. Ms. Lemire concurred.

Chairman Cielezsko asked if the process was also reviewed. Ms. Pelletier stated that it had never been an issue before but that they could look into it. Ms. Lemire agreed that it had never been an issue before because no one had ever appealed a growth permit but that there appeared to be a misunderstanding about what a growth permit actually is. Chairman Cielezsko stated that the prior Code Enforcement Officers also had a misunderstanding, as the BOA establish at the January 16, 2014 meeting.

Mr. Marshall stated that growth permits had been a "moving target" over the years. Chairman Cielezsko agreed and stated that Don LaGrange might have "written their next of kin." Ms. Lemire stated that it would be nice to have some minimal standards.

Chairman Cielezsko stated that there were and that he felt the growth permit had met them.

Mr. Billipp asked the CEO for a rough number of homes being built this year. Ms. Pelletier stated that in 2014, there are 20 allowed and that the Town was out for non-subdivision or affordable housing lots. She stated that in the 12 years she had worked for the Town that had never happened before. She stated that they were out of permits except for those that had been saved. She added that it was definitely something that would need to be looked at again.

Mr. Billipp asked if the allowable number of permits was based on a ten-year average. Ms. Pelletier stated that they take the mean of the prior 10 years of permits for single dwelling units and the number is 105% of that mean. Ms. Lemire stated that the Town had not met that limit for a while. Ms. Pelletier stated that this is the first year that the permits were gone so early and that 2013 was the first year that they were all used. She stated that that was good news and that the economy was turning around for people.

ADJOURNMENT

The meeting was adjourned at 9:55 PM.

Respectfully Submitted,
Linda Keefe
Recording Secretary

Approved by: _____

Ed Cielezsko, Chairman,

Date Approved: _____