

TOWN OF ELIOT – BOARD OF APPEALS MEETING

April 18, 2013

ROLL CALL

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

Others Present: Code Enforcement Officer Jim Marchese; Melissa Magdziasz, appellant for self; Tom Horner, appellant's husband; Kenneth Wood and David Bateman, representatives of appellant Sea Dog Realty, LLC; three observers.

CALL TO ORDER:

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

- The meeting will be opened.
- The voting members will be determined.
- The request will be summarized.
- The parties to the action will be determined.
- The jurisdiction of the Board will be determined.
- The standing of the appellant will be determined.
- The appellant will have the floor to present testimony.
- The Board will question the appellant.
- Other parties to the action will present testimony.
- The Board will question the parties.
- The Code Enforcement Officer will present testimony.
- The Board will question the CEO.
- Any abutters will be allowed to make comments.
- The Board will question the abutters.
- Other interested parties in the general public will offer comments if they wish.
- The appellant will make the last statement and take any last questions from the Board.
- The public hearing will be closed.
- The Board will begin deliberations starting with the findings of fact. They will then discuss their duties and, hopefully, a motion will be made and a decision rendered.
- Any decision made will be sent to the appellant within seven days.

- Any decision rendered, either regarding a waiver or a variance, must be sent to the York County Registry of Deeds and their acceptance must be sent to the Code Enforcement Officer within 90 days or the waiver or variance is invalidated.
- Any decision can be made to the Superior Court within 45 days.

OPENING OF PUBLIC HEARING

The public hearing was opened at 7:05 PM.

Chairman Cieleuszko stated that the voting members for the first appeal would be Peter Billipp, Jeff Cutting, Bill Hamilton and Philip Lytle.

SUMMARY OF REQUEST

The first hearing is for a waiver request by Melissa Magdziasz for a 50% reduction from the required 30-foot setback to a 15-foot setback along the front yard line of the property located at 16 Alvin Lane, Eliot, Maine to allow the home business use.

Chairman Cieleuszko stated that the parties involved in the waiver are the appellant and any abutters.

Chairman Cieleuszko stated that the BOA has the jurisdiction to hear the case by authorization of Section 45-194, Non-Conforming Lots of Record, and that the BOA is granted the authority to offer a waiver for the property.

Chairman Cieleuszko stated that the appellant's standing was demonstrated through a purchase and sales agreement.

TESTIMONY FROM APPELLANT

Melissa Magdziasz stated that she was a new owner of 16 Alvin Lane and requested a 50% reduction of the front yard setback as the first step in obtaining the right to have her home business on the property. She stated that the Village District zoning for a home business requires a 30-foot setback on the front property line and that the property only has 15 feet as a front setback.

Ms. Magdziasz stated that the waiver was necessary because without the 50% setback reduction on the front yard property line, she would be unable to meet the requirements for dimensional standards set forth in the Village District zoning and would not be able to move forward to meet with the Planning Board.

Ms. Magdziasz stated that the part of the home that would be used for the business is attached to the main structure, thus providing the unique circumstances that require the waiver. She stated that the Village District contains many non-conforming properties which she demonstrated in the maps she provided in her packet.

Ms. Magdziasz stated that all of the other property setbacks do meet the requirements for home business zoning. She added that all of the property lines are wooded and she did not believe that granting the waiver would substantially reduce or impair the use of any abutting property. She stated that she has no other alternative than to request the waiver due to an easement on the property by PSNH which does not allow her to construct a building where she would like to build one, nor does she have the financial capability to do so.

Ms. Magdziasz stated that she was requesting the waiver so that she could make reasonable use of her land and she requested that the BOA consider granting her waiver.

QUESTIONS FOR APPELLANT FROM BOARD

Mr. Marshall asked the appellant to state the nature of her business. She replied that she was hoping to open a small dog daycare facility.

Mr. Marshall asked if it would be totally enclosed in that section of the building that she had demonstrated as the business. Ms. Magdziasz stated that the diagonal marks on the map indicate the large room that she would like to use. Mr. Marshall clarified that the room is in the center of the long building. Ms. Magdziasz stated that the room is off of the kitchen and also off of the garage.

Mr. Marshall asked the appellant how many dogs she planned to have at one time. She replied that her insurance will cover 12 dogs at a time.

Mr. Marshall asked for clarification on the exact location of Alvin Lane in relation to the property. Ms. Magdziasz stated that Alvin Lane stops at the right front of the property line.

Mr. Hamilton asked how the 15-foot front setback was determined. Ms. Magdziasz stated that the home next door was recently purchased and the new owners had a survey done on their property. That property line was marked with stakes and the appellant measured with a long tape measure from the stake to her own property line and found the measurement to be 15 feet. Mr. Marshall clarified that the measurement was made with a tape measure from a survey line provided by the neighbor. She stated that was correct.

Mr. Billipp asked if the appellant had a copy of the survey she could provide to the BOA. Ms. Magdziasz stated that she could. She added that maps she provided had been updated after the property sale.

Tom Horner, husband of the appellant, stated that the property line in question is on record at Surveyor's office and that the appellant was told that she could stop in at the office and be provided with information on that property line. Ms. Magdziasz added that there are still existing stakes identifying the property line. Mr. Billipp stated that it would be very helpful to have the property line indicated on a piece of paper with a surveyor's stamp to establish the line.

Mr. Billipp asked if the appellant's measurement from the front of the house included any overhanging eaves. Ms. Magdziasz replied that there are no overhangs.

Mr. Cutting referred to Document 1 provided in the packet and asked if it indicated a fenced-in area behind the house. Ms. Magdziasz stated that it was fenced and that she had purchased the property with an existing fence.

Mr. Cutting asked the appellant what her hours of operation would be. She replied that the open hours would be from 7:00 AM until 6:30 PM. Mr. Cutting asked if the dogs would be let out in the fenced yard when they arrived in the morning. Ms. Magdziasz replied that the dogs would be outside weather permitting and inside in inclement weather. She added that during the day, the dogs would be in and out depending on nap schedules, etc.

Mr. Cutting stated that the map indicated that the fenced area is about 55 feet from the nearest neighbor's property. Mr. Cutting stated that the GIS map indicates the distance is a little greater. He added that the appellant's measurement of 55 feet included the length of the house on the fenced side plus the 15 feet of setback to the property line.

Mr. Cutting asked if the appellant had talked to the neighbors to determine whether they were comfortable with the proposed business. Ms. Magdziasz replied that they are comfortable and that she actually already walks their dog.

TESTIMONY FROM CODE ENFORCEMENT OFFICER

Mr. Marchese stated that he had tried to update the BOA on exactly what had transpired on the parcel. He stated that there was a Notice of Decision by the BOA in 1989 that determined the location of the back, side and front property lines. The former BOA authorization was to provide two principal dwellings on the uniquely-shaped parcel.

Mr. Marchese stated that there is a requirement for a 30-foot front setback in the Village Zone and that in requesting a home business, all parts of the structure need to meet that requirement. He stated that, for example, if one has a deck on a home, the deck has to meet the setback for the principal structure. He added that a garage that is attached to a home also has to meet the setback requirements for the principal structure. Because the appellant's business would be located in the middle of her home, the whole structure needs to meet the setback requirements.

Mr. Marchese stated that he was unaware about the survey on the neighboring property. He stated it may be a simple thing to obtain in order to determine the actual measurements. He added that there was a significant difference between a survey of the ground conducted in 1989 and what is shown on the tax map currently. The tax map indicates the distance from the property line to the structure to be approximately 15 feet. He stated that it would be pretty easy for a surveyor to verify the setback distance.

Mr. Marshall referenced a page in the addendum that the CEO provided the BOA. He asked if the green building shown in the picture was the one on the other side of the parking lot. Mr. Marchese stated that that was correct and that he labeled them in his diagram as Building #1 and Building #2 because that is how the assessor's office has them listed.

Mr. Marshall asked which structure was the main structure and the CEO responded that the one closest to Alvin Lane was the main structure.

Mr. Marshall asked for the measurement of the side setback and the CEO responded that it measures 20 feet. Mr. Marshall stated that Alvin Lane is located on the side of the house. He asked if there were any reason that that particular boundary could not be called the side yard. Mr. Marchese replied that in 1989 the owner asked for a reduction of the sideline setback which was applicable to Building #1 and it was reduced to 12.5 feet from 20 feet. The CEO stated that the Notice of Decision in 1989 already established the side of the lot. He added that the lot has to have frontage somewhere. Mr. Marshall stated that perhaps the BOA was in error back in 1989 when they called that part of the property the side.

Mr. Marshall stated that he had done some work in the building in 1972 and that he was aware that the building predates zoning by a fair amount of time. He stated that the building is already deemed a principal structure and he wondered why the change of use requires an appeal. Mr. Marshall restated that he wondered why there was a need for a current appeal because the property is already an existing house and lot of record that predates zoning. He stated that it is already legally built as a principal structure. He questioned the need to go through an appeal to establish the building as a principal structure when it already is recognized as a principal structure.

Mr. Marchese stated that the requirements of a home business state that the structure has to meet the requirements of a principal structure and the structure in question is non-conforming and does not meet those requirements.

Mr. Marshall questioned why, if an owner had a house that was built in 1950 on a tiny lot or was built prior to zoning or was on 50 acres but was built close the boundary and they wanted a business in what was already a principal structure, the owner would need a waiver.

Mr. Marchese replied that the current use is that of a single-family residence and the owner wants to amplify the use by adding a home business. He added that under the Home Business section of the ordinances, the building housing the home business must meet principal structure setback requirements.

Mr. Marshall noted that the part of the building that would be used for the home business is set back far enough to meet requirements. He restated that the building was already established as a principal structure and was built prior to zoning, so he questioned the need for the current hearing.

Mr. Hamilton noted that the issue was a change of use for the structure.

Mr. Hamilton clarified that the current request was for a 50% reduction on the required front yard setback which is normally 30 feet. The owner currently has a 15-foot setback. He stated that the side setback does not change and is currently 12.5 feet under a previous waiver.

Mr. Billipp stated that he noticed that Section 456, Home Office, states that a home office shall not exceed 200 square feet in floor area. He stated that the measurements the appellant provided in the package indicate quite a bit more than that.

The CEO stated that the request was for a home business rather than for a home office.

Mr. Cutting asked if, other than the front setback, the appellant met all other criteria. The CEO responded in the affirmative.

Mr. Marchese stated that the one of the considerations for the BOA is that the request is a current application in front of the Planning Board. The Planning Board cannot authorize the business until a waiver is granted for the front setback. The application will go back to the Planning Board to iron out the particulars of the situation.

Ms. Lemire asked for the location of the access to Lot 4-13. Ms. Magdziasz responded that the driveway on Lot 4-13 goes out to Pleasant Street, so it passes between Lots 4-12 and 4-14.

Chairman Cielezsko stated that structure has to meet the dimensional requirements for a primary residence. The CEO stated that Section 45-456.1(d) states, "All structures used as part of a home business must meet minimum yard and setback requirements for principal structures."

TESTIMONY FROM ABUTTERS

There were no abutters present at the meeting and the appellant stated that she did not have any written statements from any of the abutters.

LAST STATEMENT FROM APPELLANT

Ms. Magdziasz thanked the BOA for hearing her application and stated that she hoped to be able to move forward with the Planning Board.

The public hearing was closed at 7:26 PM.

FINDINGS OF FACT:

- The appellant is Melissa Magdziasz.
- The lot in question is 16 Alvin Lane in Eliot, Maine.
- The lot is identified as Map 4, Lot 28 in the Eliot Tax Map.
- The standing of the appellant is established by a Purchase and Sales Agreement provided in the package.
- The lot has an area of 2.07 acres.
- The lot is within the Village District.
- The Village District requires a one acre minimum lot size with a 30-foot front setback, per Section 45-405, Dimensional Standards.
- The Board of Appeals is authorized to hear the waiver request under Section 45-194, Non-Conforming Lots of Record.
- The Board of Appeals is authorized under section 45-194 to grant a waiver of up to 50% reduction of the setback requirement.
- The appellant is asking for a 50% reduction in the front setback from 30 feet to 15 feet to meet primary structure dimensional requirements for a home business.
- The business envisioned is a small dog daycare with, at most, 12 dogs.
- The Board of Appeals granted a waiver to the sideline setback on this property on October 19, 1989.
- A partial survey dated August 26, 1989, stamped by James Rogers, Land Surveyor, described dimensions from the lot line to a structure on the lot that are approximately 3.5 feet short of what is depicted on the Eliot GIS Map.
- Further evidence supplied to establish the position of the lot line in question consisted of the appellant's measurement from a neighbor's surveyed lot line to the appellant's house.
- The house was built in 1950.
- The appellant testified that she purchased the property last week.

DISCUSSION

Chairman Cielezsko stated that the duties of the BOA were to review the package of information provided by the appellant and the testimony presented at the hearing and to grant the minimum waiver that the appellant would need if a waiver were to be granted. He stated that any motion made should take into account the fact that the application is for a business. He added that in a motion for a waiver or variance, the BOA can add provisions specifying that the waiver or variance only goes with the business. If a waiver or variance is granted to go with the land, the current front setback would be remain at 15 feet.

Chairman Cielezsko stated that if the waiver in the current case went with the land, a new owner could tear the current house down and build a new house 15 feet from the lot line with the waiver on the books. Mr. Marshall stated that a new owner could build it that way anyway. Chairman Cielezsko stated that they could not do so if the waiver were granted only for the business. He stated that the BOA had done that before, that the practice is within their purview and that it would meet the minimum standards necessary.

Mr. Billipp stated that the waiver could be limited to the term of ownership of the current owner. Chairman Cielezsko stated that they could limit the waiver to the establishment of the dog business or another business and have the waiver only applicable to the business. The waiver would then have nothing to do with changing the parameters of the structure.

Mr. Hamilton asked if Chairman Cielezsko could cite the source of his information. Chairman Cielezsko replied that he had not been quoting a rule. Mr. Hamilton stated that he was confused because he had thought that the granting of a waiver or variance follows the property, not the use of the property. Chairman Cielezsko stated that they could grant the waiver either way. He added that the BOA has the authority to grant only the minimum necessary for what the appellant needs. He stated that the appellant is not building a house on the property but is requesting a business on the property, so the waiver could follow the business and not the house.

Mr. Hamilton asked if Chairman Cielezsko could state the ordinance that would allow the BOA to grant a waiver for just the business. Chairman Cielezsko stated that he could not. Mr. Hamilton stated that he wanted to be clear on the issue the BOA would be voting on before making a motion.

Chairman Cielezsko stated that when the BOA makes a motion for a variance for a structure to be built, they would definitely be granting it to the structure and to the land. In the current case the structure already exists and the question is whether to allow a new structure to be built under the guidelines that it would be just for a business.

Mr. Cutting stated the current appellant is requesting a waiver for a home business from a 30-foot front setback to a 15-foot front setback. He added that the waiver would not be for a new building but would be for a home business in the existing building.

Chairman Cielezsko stated that if the BOA does not narrow the scope of the waiver, it would mean that they would be granting a waiver for a front setback of 15 feet to the house for eternity. If the waiver is specific to the home business and the business is not there anymore, the waiver would be dismissed.

Mr. Billipp stated that if the waiver were specific to the business and an owner wanted to do something else with the property, the owner would have to come back and ask for another waiver.

Mr. Hamilton stated that he thought a waiver applied to the property, not to the structure or business or individual. He stated a waiver that was granted previously by another Board of Appeals to allow conformance with a 12.5-foot side setback instead of a 20-foot side setback. The prior waiver was already granted for the property, not for a business.

Chairman Cielezsko stated in the BOA decision for the York Hospital Development the variance granted was to be invoked only to the extent necessary to support the specific medical building. That variance was granted on April 19, 2007. The decision also stated that the variance would be vacated upon suspension, change or termination of the specific medical office building. He stated that in that case, the BOA was granting a variance not to a building but to that specific medical office building. If the owner changed use, the variance would be vacated.

Mr. Hamilton stated that the BOA does not set precedent and the decision by the previous board may have been a mistake. He stated that he would like to know the source of the information that the BOA can apply a waiver specifically and change the waiver when the specific use changes.

Chairman Cielezsko stated that Section 45-50, Variance Appeals, states, "A variance shall be as limited as possible to relieve a hardship." Mr. Hamilton stated that to him that means that if the appellant wanted a variance of a 10-foot front setback, the 50% reduction rule would not allow that variance. He added that if the BOA had a choice, the waiver would be granted to a minimum standard rather than a maximum standard and that he understood that limit. He stated that he did not know the source of the information regarding the limitation to use.

Chairman Cielezsko stated that the BOA had not been overruled in the use of granting the type of variance or waiver that would be held specifically to a business. He added that the Town had been burned in the past by not limiting a waiver or variance.

Mr. Hamilton asked if there were a possibility that the BOA could research the issue further. Chairman Cielezsko stated that he could pursue that with the Town's attorney.

Mr. Billipp stated that if the use of the property changed, for example by ending the dog daycare business, and either the current owner or a new owner wanted a business somewhere

on the property, they would have to go before the Planning Board. He added that the structure may meet the standards, but the owner would still have to satisfy the Planning Board.

Mr. Hamilton stated that that did not affect the current case which is a waiver request for a setback.

Mr. Billipp stated that he was pointing out the issue because Chairman Cielezsko had been concerned that the waiver would stay with the property forever. The setback waiver may go with the property, but the owner would have to appear before the Planning Board again if the use changed.

Mr. Hamilton stated that the duties of the BOA in the current case were not to determine the appropriateness of the use. The waiver request is strictly for the front setback reduction.

Chairman Cielezsko restated his concern that the waiver be as limited as possible.

Mr. Cutting quoted the guidelines in the BOA Manual, under Conditions of Approval, "A board has inherent authority to attach conditions to its approval of an application. Any conditions imposed by the board on its approval must be reasonable and must be directly related to the standards of review governing the proposal."

MOTION

Mr. Hamilton made a motion to grant the waiver for 50% reduction in the front setback as requested in the application. Mr. Billipp seconded the motion.

Mr. Billipp made a motion to add an amendment to the motion. He stated that the appellant had testified that the property line had been surveyed. He added that he would like to make the waiver contingent upon the appellant providing the survey information to the CEO so he can verify that the distance is 15 feet. Mr. Hamilton stated that he would agree to that contingency.

Chairman Cielezsko mentioned that Mr. Horner had stated the survey was in Kittery. Mr. Billipp stated that the surveying company, Easterly Survey, is located in Kittery. Chairman Cielezsko asked if the company would supply the survey. Mr. Horner stated that Emily Staples, their neighbor who sold the abutting property to Alex Brickett, had said that she would have no trouble getting the appellant the property line information.

Mr. Hamilton seconded Mr. Billipp's amendment motion.

Mr. Cutting stated that if the survey showed a front setback of 15 feet or greater, the appellant would not need to come back and verify the information. Mr. Hamilton stated that the

information would be difficult to verify because the appellant measured the lot line from the survey.

Mr. Billipp asked the appellant if her house was indicated on the plot plan provided to the BOA. Ms. Magdziasz stated that Kate Pelletier help in providing the maps included in the package and that Ms. Pelletier had done a measurement and had concluded that the front setback was 15 feet.

Mr. Billipp stated that the issue was becoming too complicated and he withdrew his amendment to the motion. Mr. Hamilton withdrew his second to the amendment.

DECISION

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

Chairman Cielezsko advised the appellant that she would receive a Notice of Decision within seven days and that she would need to record the waiver with the York County Registry of Deeds. The recording must get back to the CEO within 90 days or the waiver would be invalid.

The first public hearing was closed at 7:50 PM.

SECOND PUBLIC HEARING

The second public hearing was opened at 7:57 PM.

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

Chairman Cielezsko stated that the agenda was a variance request by Sea Dog Realty LLC, to allow a building height of 55 feet for the proposed Eliot Commons Senior Housing Facility H.L. Dow Highway, Eliot, Maine. He added that the BOA had a letter from Fred Forsley of Sea Dog Realty to Kate Pelletier of the Planning Board giving Ken Wood and Ed Brake authority to represent them in the proceedings.

Chairman Cielezsko stated that ownership had been established. He added that the BOA has jurisdiction to hear the case under Section 44-47(b)(1), Variance Appeals.

TESTIMONY FROM APPELLANT

Mr. Wood stated that the project proposes a senior living center at the end of Levesque Drive. He stated that the project would be a partnership between Sea Dog Realty LLC and David Bateman Partners LLC.

Mr. Wood stated that the project meets the Low Income Tax Credit – Qualified Allocation Plan through the Maine State Housing Authority. He stated that in the past year, 16 projects applied for the plan and only six were awarded for having met the point qualifications for the plan and that two of those projects were Dave Bateman's.

Mr. Wood stated that the need for the variance is because the Town zoning map has the project located adjacent to a freshwater wetland, which the zoning map indicates is in a Shoreland Zone. He stated that it is actually not in Shoreland because the freshwater wetland does not meet Eliot's definition for a freshwater wetland because it is not 10-acres or greater and forested. He added that the issue had come up in the past, including in 2004 for a 4,000-square-foot office building and again during the York Hospital project in 2007.

Mr. Wood stated that when ATTAR Engineering came before the BOA in 2007 on behalf of York Hospital, the BOA decided that they did not have the authority to change the map because the map had been adopted by the Town, but in York Hospital's case, they did have the authority to grant a variance. He added that the variance in that case was not for height but was for the amount of impervious coverage because less coverage is allowed in the Shoreland Zone than is allowed in the Commercial Industrial District.

Mr. Wood stated that the zoning was the same issue in the current case because Eliot recently adopted a 55-foot height in the CID, which is the underlying district in the case, but that in the Shoreland Zone, there is a 35-foot height limit. He added that they needed to have a 55-foot height to make the project work.

Mr. Wood stated that he and Mr. Bateman had visited the wetlands, as had Mr. Marchese and Mike Morse of the DEP. He stated that he thought everyone was in agreement that the property does not meet the 10-acre, non-forested definition. He added that forested is described as having woody vegetation with trees at least 20 feet or more in height. He stated that Eliot's definition for a freshwater wetland excludes non-forested wetland.

Mr. Wood stated that there is a forested wetland and a partially non-forested wetland located adjacent to the site and he indicated that with photographs that he had taken. He stated that one of the photographs looked from the back of Eliot Commons toward the CMP transmission lines (which he noted as being located in Upland areas) and the other photograph looking outward from the transmission lines.

Mr. Wood stated that the area that is non-forested is not large enough (ten acres or greater) to meet the definition of wetland. He added that he hoped he had provided enough evidence as

to why they feel that the project qualifies for a variance, which is the only way to grant them the height allowed in the overlying district which is Commercial Industrial.

Mr. Wood stated that David Bateman would speak regarding the justification for the variance and the need to building the building to 55 feet.

QUESTIONS TO APPELLANT FROM THE BOARD

Mr. Hamilton asked for clarification on the location of the edges of the wetland. Mr. Wood stated that in sketch plan of the project (which he had on an easel for the BOA to view), the dashed line indicated Shoreland Overlay Zone inside the lines and Commercial Industrial outside the lines. Mr. Hamilton stated that the area within the dotted lines appeared to be the majority of the parcel. Mr. Wood clarified the position of the wetland as being in the CMP easement and as being behind Dunkin' Donuts. He stated that the Shoreland Zoning issue arose when Dunkin' Donuts was built in 2004 and again in the York Hospital variance in 2007.

Chairman Cielezsko stated that there was not enough detail in the sketch called Overall Site Plan for him to understand the situation. Mr. Marshall stated that he was also confused as to where the boundary of the wetland was. Mr. Wood demonstrated the lines in the diagram that indicated the boundary between Shoreland Zoning and Commercial Industrial. He indicated the location on the map of a constructed detention pond that had been constructed by the original developer.

Mr. Wood also demonstrated the location of the wetland that constituted the Shoreland Zone. Mr. Marshall asked for the location of the boundary and Mr. Wood replied that the boundary was off of his site, adding that the wetland was adjacent to his site. Resource Protection of Shoreland is defined as within 250 feet of freshwater wetlands which are 10 acres or greater rated "high" or "moderate" by Inland Fisheries and Wildlife. He stated that the wetland does not have to be on his site because if the site is within 250 feet of a correctly defined wetland, it would be in the Resource Protection District.

Mr. Marshall asked how the edges of the wetland had been determined. Mr. Wood replied that they had made the determination based on past testimony and also from aerial photographs. Mr. Marshall stated that he thought when the plan was done it was assured that the map was not detailed to the foot and that each individual site would have to be evaluated by soil scientists or wetland scientists to determine the boundaries from which to measure.

Mr. Wood stated that he believed that when the Town did the maps, they hired someone from the original Planning Commission to classify the wetlands. He stated that they had used older Inland Fisheries and Wildlife maps to determine which wetlands were 10 acres or greater and non-forested. He added that he had had a project called Sawgrass Subdivision on State Road near the Kittery town line that had approval from the Planning Board. He stated that subsequent to the approval, the wetlands map was issued.

Mr. Wood stated that the wetlands map shows that there is a 10-acre or greater wetland, non-forested, located to the rear of the property. He added that Don LaGrange was the Code Enforcement Officer and that he determined that he could not issue certain building permits on the lots on the plan approved by the Planning Board because the map had the wetland in a Resource Protection District. He stated that the wetland itself was four acres in area so Mr. LaGrange took it out of the Resource Protection District.

Mr. Wood stated that when he sought information as to why the wetland was shown as ten acres when it was actually four acres or less, he spoke to J.T. Lockman at Southern Maine Regional Planning Commission who prepared the map. Mr. Lockman told Mr. Wood he did not visit all of the wetlands but had used older Inland Fisheries and Wildlife information to determine the size of the wetlands and that there could be some errors.

Mr. Marshall stated there had been assurance that when the Town made such measurement determinations, they would be made specifically on site, not from maps. Mr. Marshall stated that there appeared to be a quandary between what the map shows and what had been determined about the site.

Mr. Marshall asked if Mr. Wood had consulted with a soil scientist to determine the boundary of the wetland. He asked if someone qualified to evaluate the site had done so. Mr. Wood replied that he is a Certified Wetland Scientist in the State of New Hampshire. He added that he had determined that the wetland was not ten acres or greater by walking its boundaries and putting the measurements on an aerial map and then measuring off the map.

Mr. Wood stated that the issue is not whether or not the site is in the setback but that the wetland does not qualify as a Shoreland wetland because it is not ten acres or greater. He added that he also had a letter from the CEO stating that the wetland is not ten acres or greater.

Chairman Cielezko clarified that the area in question was not a Great Pond. Mr. Wood stated that there is a difference between a Great Pond and a freshwater wetland. A Great Pond in a natural state is open water, ten acres or greater. In an impounded state, it is 30 acres or greater.

Mr. Marshall asked if a variance would be needed if the Great Pond or wetland were less than ten acres. Mr. Wood stated that he believed they needed a variance because the map shows that the wetland is in the Shoreland District. He stated that in the Town of Eliot's definition, "Freshwater wetland means freshwater swamps, bogs and similar areas other than forested wetlands, which are of ten or more contiguous acres or of less than ten contiguous and adjacent to a surface water body, excluding any river, stream or brook, such that in a natural state, the combined surface area is in excess of ten acres."

Mr. Wood stated that the key words in the definition are *other than forested wetland which are ten acres or greater*. He added that if you have a wetland that is forested or is less than ten acres in area, it is not a freshwater wetland and should not be in Shoreland Zone. He stated that the wetland in question is less than ten acres.

Mr. Lytle stated that he wanted clarification as to where the Shoreland Zone was in reference to the proposed development. Mr. Wood moved the map on the easel closer to the BOA and demonstrated the boundary between Commercial Industrial and Shoreland zoning, the position of the roads, the position of the constructed wetland (detention pond), the position of the wetland he had measured and the location of the building.

Chairman Cieleszko asked how the 250-foot setback from the wetland was measured. Mr. Wood stated that the measurement would be a line drawn perpendicular to the wetland from the adjacent property boundary. He stated that it may have been determined by a Flood Zone because sometimes in Resource Protection Districts, a Shoreland Zone would be determined by a Flood Zone. He stated that the current property had originally been in the flood zone but years ago the map was amended to remove the property from that zone. Mr. Wood added that when the maps were updated, they did not include all of the information that was available at that time.

Mr. Wood demonstrated the lines for the medical office building for which York Hospital was granted a variance when the setting was determined to be outside of the Shoreland Zone.

Ms. Lemire asked if the map of the National Wetlands Inventory included in the package was another rendition of the Shoreland Zone. Mr. Wood stated that it was an enlargement from the Eliot zoning map, showing what the Town claims is a non-forested wetland and the 250-foot buffer. He stated that the NWI maps indicated that the majority of the wetland is forested. He added that even the information from the State agencies is conflicting about the wetland.

Mr. Wood stated that the DEP determined that the boundary was inaccurate. Mr. Wood stated that he walked the boundaries of the wetland and put the measurements on an aerial view. The measurements determined the non-forested portion to be less than ten acres. Mr. Billipp asked for a copy of the aerial. Mr. Wood stated that he did not have the copy with him. Mr. Hamilton asked for the size of the wetland area and Mr. Wood stated it was 8.5 acres.

Mr. Wood clarified the various types of wetlands shown on the National Wetlands Inventory map.

Ms. Lemire asked for clarification of the impact of the Letter of Map Amendment from FEMA as it relates to the current project. Mr. Wood stated that the letter of map amendment removed the majority of the parcel from the Flood Plain. He explained that the soil samples and elevation are what determine the Flood Plain. He stated that when the parcel was in Zone A, they did a flood study at Great Creek. When they put a 100-year flood on the creek and

determined the elevation in relation to the parcel, the parcel was higher and would not be flooded.

Ms. Lemire stated that she was curious about the elevation of the property. She stated that she drove to the location and noticed the hill. She asked if that were the particular area where the structure would be built. She asked for the elevation at the building site. Mr. Wood stated that he had not brought the elevation maps to the meeting. Mr. Cutting stated that the measurement was 32 feet according to the site map. Mr. Marshall concurred.

Chairman Cielezsko asked for clarification on the relationship between the FEMA map amendment and the Resource Protection District. Mr. Wood stated that the Official Eliot Zoning map identifies the property as Resource Protection, Zone A and AE. He stated that both zones are approximate in relation to floods.

Mr. Wood stated the FEMA flood plain map contains Zones A and AE. He stated that by removing the property from the flood zone, the property had been determined to be in neither zone. He added that the Town map uses an overlay of flood data and other data to determine where the non-forested wetlands were located.

Chairman Cielezsko stated that the current Town map still indicates that the property in question is located within the setback of the Resource Protection or wetland zone. Mr. Wood agreed that the current map still shows the property in the Shoreland Zone and that if it did not, the current appeal would not be necessary.

TESTIMONY FROM INTERESTED PARTY

David Bateman stated that he has been an Eliot resident since 1982 and is also Mr. Wood's neighbor. He stated that he and Mr. Wood have worked on a number of projects together over the years. He stated that he had never done a project in Eliot, though he has been a real estate developer since 1986.

Mr. Bateman stated that he is particularly interested in the current project because it is one of the areas in which he has been very active with the Maine State Housing Authority for over 30 years and that the area of his interest is the problem with elderly housing. He stated that it is very difficult to develop that type of project in communities such as Eliot rather than in larger communities where it is much easier to compete for very limited funds. Mr. Bateman stated that the request for a variance is driven strictly by economics.

Mr. Bateman stated that the State Housing Authority program is the only one which has been in existence for the last ten years in the State of Maine that provides economic resources for the development of affordable elderly and family projects. He stated that there are a number of private developments which have rates which far exceed the ability of many people in communities such as Eliot to pay.

Mr. Bateman stated that on an annual basis, the Maine State Housing Authority has very limited funds which are monitored directly by the Housing Authority. He stated that the sites in which they elect to invest their monies are very limited and it is an extremely competitive process. He added that in the last two years, it has become even more competitive because funds have decreased.

As an example of the competitive nature of the process, Mr. Bateman stated that last year there were 70 points in various categories within a point system. Developers submit applications once a year. He stated that last year there were 18 submissions and only enough funds available to fund six projects. He added that there was only one point differential between the top scoring project and the bottom.

Mr. Bateman stated that the competitiveness of the process is the reason to look at construction costs and total development costs. He stated that the current project would be new construction and that the levels across the State for total development costs are about \$180,000. He stated that in order to be competitive, the developer needs to be 10-15% below that ceiling. He stated that construction costs alone would be anywhere from 68% to 78% of the total cost. Therefore, he stated, the construction costs are a majority category in the ability to be competitive.

Mr. Bateman stated that their proposed four-story building would be about 10-15% more cost effective than a three- or two-story building. The cost is determined by the amount of foundation, the roof structure and the mechanicals. He stated that the other piece of the cost estimate on which the project is rated is the operational cost.

Mr. Bateman stated that the reason Mr. Forsley of Sea Dog Realty asked him to become involved is that Mr. Bateman has been very successful in navigating the way through the competitive process. He stated that when he looked at the way the Maine State Housing Authority rates Eliot on the statewide scale of between 1 and 5, Eliot rates a 3.

Mr. Bateman stated that there are not a lot of sites that have water, sewer and a location available to amenities that provide needs of daily life like a bank and medical facilities which are available in Eliot Commons. He stated that their site is a great site because it is surrounded by a small village with many support facilities.

Mr. Bateman stated that he hoped to be able to bring the project into the statewide competition in October, but they still need to get Planning Board approval and they need to have a shovel-ready project. He stated that without the ability to build a four-story building, they would not get the necessary points in the rating system to compete and would be required to look for another site or another town. He added that he hoped to move forward because he sees a need for additional elderly housing in Eliot.

QUESTIONS FOR INTERESTED PARTY FROM THE BOARD

Mr. Marshall asked for confirmation that the cost of the project would be \$180,000 per unit. Mr. Bateman concurred. Mr. Marshall asked if the units would be similar to those at Kittery Estates. Mr. Bateman stated that they would probably be slightly larger, ranging from 600 to 750 square feet per unit. He added that the cost figure is misleading because in a Federal program, the overhead load (financing fees, processing fees, etc.) make the situation an extremely competitive process. He stated that the developer not only has to deal with local codes but also with Housing and Urban Development codes and Maine State Housing Authority codes.

Mr. Marshall stated that the project would cost approximately \$9,000,000 and Mr. Bateman stated that it would cost slightly over \$8,000,000.

Mr. Lytle asked if the buildings in place at Eliot Commons would also support the foundation for the new project. Mr. Wood replied that they would, adding that the new project is on the sewer and does not need soils for waste water but only needs to support the foundation. Mr. Lytle asked if the current sewer system would support the new project.

Mr. Lytle asked for the status of the proposed hotel at Eliot Commons. Mr. Wood stated that the hotel had been approved. He stated that Mr. Forsley had not found a development partner to build the hotel, a problem which is tied to the past six years of the economy, but that the approvals are still valid and if someone felt they could make the hotel work, he would build it with them. Mr. Lytle stated that he thought that within the Town ordinances, if the project was not started within a year, the approval expires. Mr. Wood stated that if that had happened, Mr. Forsley would probably seek reapproval from the Town but that the DEP approvals are still valid.

Mr. Lytle asked if the new project would be under the TIF system. Mr. Wood stated that he did not believe the TIF allowed for residential housing and that the building was not described in the TIF documents. He added that the TIF documents were for the hotel.

Mr. Hamilton asked for clarification that the TIF was contingent on commercial use in the CI district, not for residential buildings. Mr. Wood stated that the building is an allowed use in the CI district but that the TIF was tied to residential use. The current project was not described in the TIF documents because it had not been planned when the TIF was written.

Mr. Hamilton stated that if both the hotel and the current project materialized, the issue of the sewer would be critical. Mr. Wood stated that if the changes for sewer project under consideration in Eliot were not approved, the current system could handle the new project. Mr. Wood stated that there was a study done by SEA Consultants which showed that the total capacity of the common system alone, with changing of the pumps, could accommodate 106,000 gallons per day. He stated that currently Eliot Commons is generating about 8500 to

9000 gallons per day total, including the Commons, the bank and the Kingston Kline building. He added that when the hotel was designed it was allocated 30,000 gallons per day and that would have gone on the Commons system.

Mr. Wood stated that the Commons system could handle both the hotel and the housing project. He stated that what the TIF system does is to install a gravity sewer from Dunkin' Donuts down Levesque Drive to a pump station on Beech. If the TIF system were installed, all of the Commons buildings would be on the gravity sewer and the pump station at the end of Levesque Drive would be decommissioned.

Mr. Hamilton asked for the projected flow into the sewer from proposed project. Mr. Wood replied it would be about 9,000 gallons per day for the 51 units.

Mr. Hamilton stated that the adjacent wetland was estimated by Mr. Wood to be 8.5 acres and that a letter from the CEO indicated that is it probably not ten acres. He asked if there were any other way to officially determine the acreage. Mr. Wood stated that he has been a Certified Wetland Scientist in New Hampshire for 15 years. He stated that he walked the boundaries, projected the measurements onto an aerial photograph and measured the acreage off of that projection. He stated that the result agreed with Mr. Marchese's determination that the wetland was less than ten acres. He stated that he thought everyone was in agreement that it should not be in the Shoreland Zone, including Don LaGrange and Mike Morse who also walked the boundary.

Mr. Billipp clarified that the project would be composed of 51 units of housing for elderly over 55. He asked if all the units were for those with low income. Mr. Bateman stated that they are "affordable" which is very different. In a low income project under Section 8, the government is providing subsidies. In affordable housing projects, all of the tenants pay rent determined by what their income is.

Mr. Billipp asked if there were tax credits for the developer in affordable housing. Mr. Bateman confirmed, stating that the tax credits are administered by the Maine State Housing Authority. He added that there is only a limited amount per state per year and they flow directly from the U.S. Treasury. He stated that those are the funds which allow a developer to build the projects at affordable rental rates because the mortgage does not have to cover the total project cost and can be a small mortgage. He stated that the mortgage on the proposed project would probably be only approximately \$2,000,000 vs. the \$8,500,000 development cost.

Mr. Billipp asked if the tax credits would be sold as in New Horizon. Mr. Bateman stated that the credits are sold to major corporations like banks. Mr. Billipp stated that with interest rates as low as 3-4%, there is money available for borrowing. Mr. Bateman stated that the rates would not remain that low over the long term. He stated the program provides 30-year mortgages so that there is a very stable cost structure. He added that in the projects he has built with private financing, the buildings have income streams which can fluctuate with the economy. As interest rates move, there is the ability to raise rental rates.

Mr. Bateman stated that with affordable projects the goal is to keep the rental rates low for an extended period of time. He stated that the developer signs agreements with the Housing Authority to keep the units in the program for 90 years. He added that if a community were awarded a program, it would remain in place for a long time.

Mr. Billipp asked if the units were to be dedicated to the residents of Eliot. Mr. Bateman stated that they would not be specifically for Eliot residents because that is not possible under Fair Housing regulations. Mr. Billipp asked if people from outside the State could apply. Mr. Bateman stated that typically people do not migrate from New Hampshire to Maine. Mr. Bateman stated that he owns and operates over 800 units in the State of Maine under affordable programs and they are typically filled with people within the market area. He added that the developer has to provide a market study to show that there is actually need within the community. The Housing Authority has already rated Eliot as a 3 out of a possible 5 in their own market study and that rating indicates a higher than average need. He stated that it is difficult for tertiary communities to compete on a point scale because larger communities rate higher because they have greater need.

Mr. Cutting asked if there had been any conversation with the Fire Department about the project. Mr. Wood stated that the sketch plan has been shown but that it still has to go before the Planning Board. He stated that he did not think there would be any problem because when the hotel was first proposed for the Commons it was proposed to have 65-foot height. Mr. Wood stated that when he talked to Chief Muzeroll he did not see a problem because he relies on mutual calls from other fire departments. Mr. Wood stated that he did not think Chief Muzeroll would have a problem with the 55-foot height because that is allowed in the underlying Commercial Industrial District.

Mr. Wood stated that as part of the Planning Board process, the plan is sent to the department heads and that meetings would be held with both the police and fire departments.

TESTIMONY FROM THE CODE ENFORCEMENT OFFICER

Mr. Marchese stated that he had gotten a comment from the Department of Environmental Protection in which they stated that they did not expect to comment on the appeal after reading the information. He stated that he thinks the DEP is basically granting the BOA the authority to grant the appeal. Chairman Cielezsko asked if the comment was a written statement from Mike Morse and the CEO replied in the affirmative and added that it was dated either April 17 or April 16, 2013.

Mr. Marchese stated that it is a tough situation because everyone agrees that the parcel should not be in the Shoreland Zone but the map supersedes the definition in the Zoning Ordinances. He stated that, as the CEO, he has the ability to adjust the Shoreland Zone based on

information supplied by an evaluator and a survey, but the adjustment would only be 50-100 feet. He added that he cannot take a large area off the map.

Mr. Marchese stated that the only way to properly amend the map is by Town vote. He stated that the current map was approved by the Town in 2011 and should be current information but that it obviously needs to be adjusted. He stated that currently on the Town's website and GIS, there is a new layer that has been added and it is a proposed Shoreland overlay zone. He stated that the GIS maps show what areas have been expanded or shrunken down based on a new inventory of the Town's Shoreland Zone and a comparison on the definition and what was actually witnessed in the field. He added that the Town still has to formally vote on the changes.

The CEO stated that the best way for the appellant to get relief is through the Board of Appeals with a variance.

QUESTIONS FOR CEO FROM THE BOARD

Mr. Marshall asked for the source of the map. The CEO replied that it was prepared by the Southern Maine Regional Planning Commission.

Mr. Hamilton stated that in the CEO's letter of March 17, 2013 to Mr. Wood it was noted that since the particular area in question has been designated forested wetland since 2007 and the zoning map updated in 2011, it appears that the Town wants the wetland area to be regulated under the Shoreland Zone. The CEO stated that that was the only interpretation he could make. He stated that the minimum requirements are established by the Maine Department of Environmental Protection. He stated that the Town has the ability to protect more area if it so chooses. He added that in reviewing the zoning, it is possible that the Town wants the definition to include more areas in the Shoreland Zone.

Mr. Marchese stated that the area under discussion is important because it is the headwater of Great Creek. He stated that all of the water that falls on that area then winds down Route 236 and comes out at Cedar Road crossing. He added that it is possible that the Town wants to protect that because it is a considerable distance.

Mr. Hamilton stated that the second paragraph of the CEO's March 27, 2013 letter to Mr. Wood states, "The method of revising the location of the Shoreland Zoning District boundaries can be found under Section 44-22, the Board of Appeals has the final authority as to the location of districts within the Shoreland Zone. This would not accomplish your goal as the BOA does not have the authority to adjust the Shoreland Zone under this ordinance."

Mr. Billipp noted that in the appellant's application for a variance, the first criteria, Nature of Variance, addresses the wetland issue. He stated that the second criteria, Justification for Variance, addresses the financial aspects due to funding from the Low Income Housing Tax

Credit plan. He added the BOA would have to make their decision based on the appellant's ability to meet all of the criteria.

TESTIMONY FROM ABUTTERS AND INTERESTED PARTIES:

There were no abutters present. The observers had no comments to make.

FINAL TESTIMONY FROM APPELLANT

Mr. Wood stated that he believed the only reason for the necessity of the variance request was that the map is incorrect. He stated that the Shoreland Zoning ordinance, Section 44-33, states that Resource Protection Districts are areas within 250 feet, horizontal distance, of the upland edge of freshwater wetlands, salt marshes and salt meadows and wetlands associated with great ponds and rivers which are rated of moderate or high value by the Maine Department of Inland Fisheries and Wildlife. He added that the key words are "within 250 feet of freshwater wetlands" and the wetland under discussion does not meet the definition of freshwater wetland.

Mr. Wood stated that he had found that the wetland does not meet the 10-acre definition and that he thought the CEO was in agreement. He stated that the definition of the Stream Protection District uses similar language and states that the Stream Protection District includes all land areas within 75 feet, horizontal distance, of the normal high-water line of any stream or freshwater wetland. He added that the BOA found in 2007 that the wetland did not meet the 10-acre criteria. He stated that it still does not meet the 10-acre criteria.

Mr. Wood addressed the second criteria, the need for the variance being due to the unique circumstances of the property and not the general condition of the neighborhood. He stated that the need is due to the unique circumstance that the map does not show the wetland correctly.

Mr. Wood stated that the third criteria requiring that the granting of a variance not alter the essential character of the locality is met because the location is buffered from most other areas with the exception of Eliot Commons and it is in the Commercial District. He stated that the 55-foot height already meets the requirement the Town approved for the CI district.

Mr. Wood stated that the fourth criteria which requires that the hardship is not the result of action taken by the appellant or a prior owner is met because the correct Resource Protection is not shown on the map. The hardship is solely due to the height requirement in the Shoreland Zone. Mr. Wood stated that when the map was issued, he counted 12 wetlands that are shown as Shoreland Zone which do not meet the 10-acre definition.

FINAL QUESTIONS FROM THE BOARD

Mr. Lytle asked who owns Levesque Drive. Mr. Wood replied that Sea Dog Realty owns the road and that it is part of Eliot Commons. Both Mr. Lytle and Mr. Marshall mentioned the potholes in the road. Mr. Wood stated that Sea Dog is planning to fix the road but that if the sewer goes in the road would be torn up anyway and would need to be rebuilt. He stated that the gravity sewer goes right down Levesque Drive.

Mr. Hamilton stated that he was trying to understand the advice from the CEO to the BOA written in his letter of February 10, 2013. He referred to the statement in the letter, "If the Shoreland Zone district at this location is presently a Resource Protection District (based on the currently effective map approved by the DEP, map dated 6/9/09), then the proposed use is prohibited based on the town's zoning ordinance 44-34(13)(b), Table of Land Uses. The BOA cannot grant a use variance within the Shoreland Zone." He asked for clarification.

Mr. Marchese stated that the statement had been superseded by the Maine DEP. He stated that the DEP basically gave the BOA the authority to grant the variance. He stated that in Section 45-290, Table of Land Uses, a multi-unit residential facility is not allowed but if the location is not in the Shoreland Zone, it can be constructed in the CI District.

Mr. Hamilton asked if the BOA had the authority to determine whether or not the location is Shoreland. The CEO replied that the BOA has the authority to grant that as a variance.

Chairman Cielezsko stated that the appellant was not asking for a change in zone. He stated the appellant was asking for relief from the height requirement within whatever zone applies to the location.

Mr. Hamilton stated that the decision does involve determination of whether or not the location is part of the Resource Protection Zone. He stated that they had heard testimony that it may not be and that the wetland is possibly only 8.5 acres. He added that there is a 15% certainty that it is not in the Resource Protection Zone.

Mr. Wood stated that in 2004 and in 2007 and in the current application, the issue was that the wetland is not ten acres. He stated that it was his understanding that the BOA does have the authority to grant a variance for the height but he did not think the BOA had the authority to remove the location from the zone or change the map.

Mr. Wood stated he hoped that he has substantiated well enough that the map was not drawn correctly. He stated that the current need for a variance was similar to that in 2004 and 2007 and he thought it was time for Eliot to get their maps in order.

Chairman Cielezsko clarified that Mr. Wood was not asking for relief from the map requirement.

The public meeting was closed at 9:14 PM.

FINDINGS OF FACT:

- The appellant is Sea Dog Realty LLC.
- Sea Dog Realty is being represented by Ken Wood and Edward Brake per letter of September 16, 2011 from Fred Forsley of Sea Dog Realty to Kate Pelletier and Jim Glasgow.
- The owners name is Sea Dog Realty LLC.
- Ownership is shown by Deed, Book 15265, Page 353-354, registered in York County on September 26, 2007.
- The property is located around and beyond Levesque Drive.
- The property is identified as Map 29, Lot 27 on Eliot tax maps.
- The lot size is 17.14 acres.
- The application was received on April 1, 2013.
- The authority is given to the Board of Appeals to hear variance requests under 44-47 (2)(b)(1) Variance Appeals which states, "Variances may be granted from dimensional requirements including, but not limited to, lot width, structure height, percent of lot coverage and setback requirements."
- The public meeting was held on April 18, 2013.
- It was testified that the proposed structure will have public water and sewer and will not have a well or any type of septic system.
- It was testified by the representative that this project will not be part of the TIF.
- The Code Enforcement Officer testified that Mike Morse, MEDEP Assistant Shoreland Zoning Coordinator, has written that the DEP will not take a position on this variance request.
- The representative for the appellant estimated the area of the wetland adjacent to the property is approximately 8.5 acres.

Mr. Lytle asked for clarification regarding the involvement of Mike Morse of the Maine DEP. Chairman Ciesleszko stated that any application that has anything to do with the Shoreland Zone, the Maine DEP is notified and in that way, they become a party to the action. He stated that for the current variance request, the DEP decided not to take a position.

Chairman Ciesleszko stated that the BOA has the authority to grant the least necessary variance if it is found that the appellant meets the requirements. He stated that the only request is a request for the height of the building. He stated that the BOA had learned a lot about the project, but that he was not sure much of it was directly related to the request.

MOTION

Mr. Hamilton made a motion to deny the request for a variance. Mr. Billipp seconded the motion.

DISCUSSION

Mr. Hamilton referred to the letter from the CEO to the BOA dated February 10, 2013, in which he stated, "The wetland area is at the headwaters of Great Creek. The State's minimum requirements may not be sufficient to adequately protect this natural resource. It may be in the Town's best interest to be more restrictive than the minimum requirements established by the MEDEP and provide better protection of these sensitive areas."

Mr. Hamilton stated that he thought that the application was for a great project, but he was not sure about the location. He stated that the project is the type of project that is needed in the Town. He stated that his struggle was that the Town's wetlands are diminishing significantly and that he appreciated the CEO's admonition about being vigilant in protecting the wetlands.

Mr. Hamilton stated that the appellant was asking for a height change from 35 feet to 55 feet and that was a 55% increase in height. He stated that he understood that the height requested was the height approved by the Town for a Commercial Industrial Zone, but that in the current case there is an overlay of a zone that has been designated to be Resource Protection.

Mr. Hamilton stated that the area of concern is in the vicinity of Great Creek which flows to an estuary by Cedar Road and Sturgeon Creek. He stated that he was sure that the engineering was adequate to protect the estuary and that would be addressed in the Planning Board stage, which addressed the storm water run-off issues. He stated that his concern was that those locations are diminishing and they keep being attempted to be developed.

Mr. Hamilton stated that he did not think the location was a great area for the project. He stated that the project would increase density in the area with 51 units and the parking area with possible impermeable surface. He stated that it would be another step that would diminish the qualities people seek when they move to Eliot in the first place.

Mr. Billipp stated that his concern relates more with the appellant meeting the first criteria that the land cannot yield a reasonable return without the variance. He stated that the land is already part of a 17-acre parcel which already supports Eliot Commons and other business activity. He stated that the reason the appellant was asking for a height variance was to make the project qualify for Maine State Housing and he does applaud the reasoning. He added that the project could be built at a height of 35 feet which might not then qualify for Maine State Housing, but something could still be built on the location that would be 35 feet or less in height.

Mr. Billipp stated that his concern was that the appellant did not meet the first criteria. He stated that the appellant may also not meet the fourth criteria (that the hardship is not the result of action taken by the appellant) because the height request is what is creating the hardship.

Mr. Cutting stated that the project is something that the town of Eliot needs. He stated that there is not a lot of low-income housing for the elderly in the Town and that people are getting older. He added that he hoped those people would stay in the town but that without something like the proposed project, he was not sure they would be able to do that. He stated that he thought that should be something the BOA looked at as part of their consideration in the decision.

Mr. Lytle stated that he did not think the appellant met criteria 1 or 4.

Chairman Cielezsko addressed the criteria requiring that the hardship not be a result of action taken by the applicant or a prior owner. He stated that the project is in the Commercial Industrial Zone. He stated that the height allowed in the CI Zone is 55 feet. He stated that the appellant has fairly well established evidence that they are wrongly accused of being in an area that does not allow a height of 55 feet. He added that that could be the culprit in the hardship addressed in criteria 4.

Chairman Cielezsko stated that he could argue both ways as to whether the appellant met the first criteria. He stated that he would be willing to give him the benefit of the doubt. He stated that Mr. Forsley and Sea Dog Realty have been trying to get Eliot Commons to be profitable. He stated that it is obviously a struggling section of Town.

Chairman Cielezsko stated that a successful project would be very nice way to put Sea Dog in a better position. He stated that when a business is working that close to the edge, the statement in the first criteria, that the land cannot yield a reasonable return unless a variance is granted, begins to look fairly real. Mr. Billipp stated that there had been no testimony about the finances of Sea Dog and Chairman Cielezsko agreed that there had been no testimony. He added that he could tell just by driving by the Commons that the area appears to be just making it.

Chairman Cielezsko stated that every house or development that is built in the Town has an effect on the environment. He stated that the site has been determined by the Town to be in the Commercial Zone. He added that if the appellant built a building with a 35-foot height on the same footprint, nothing would change. He stated that the CI Zone does allow a building with a 55-foot height and that the proposed project would be on both Town water and sewer. He stated that there would be nothing going into the ground. He added that the project would not be covering wetland and has been wrongly determined to be in a setback.

Mr. Hamilton stated that another consideration is that the issue has been going on for quite a while and had come up in 2004 and in 2007. He questioned why the Town did not try to amend the wetlands map at that time, adding that it started ten years ago. He stated there had been

plenty of time to amend the wetlands. Mr. Hamilton stated that he did not think it was up to the BOA to determine whether or not the area is a wetland.

Mr. Hamilton stated that he appreciated Mr. Wood's estimate and evaluation of the wetland. He stated that he thought Mr. Wood's expertise needed to be looked at in the context of his goals. He stated that he did not mean that disparagingly, but Mr. Woods is a soil engineer and also involved in the project. He stated that it should be up to the Town to determine whether or not the map is correct based on public hearings and other testimony.

Mr. Hamilton stated that he had not heard any opinions other than that of the CEO who also thinks the wetland may not be ten acres, but that there is an ordinance that the BOA is supposed to uphold. He stated he would have difficulty making a determination that the project is not in a protected area. He stated that the area is not a Commercial Zone because it is a CI Zone with an overlay and that until the overlay was amended by the Town, he would not be prepared to approve the variance.

Mr. Cutting stated that there had been a lot of discussion about the wetland but that the variance request was to allow a building height of 55 feet, not to decide the location of the building or where the wetlands are. He stated that the location is in the center of town where the commercial center is. He stated that if the appellant had proposed the project on Pleasant Street, it would be a different issue, but that the area in question is on Route 236 where there is a lot of construction.

Chairman Cielezsko stated the ordinance states that the wetland is ten acres but that testimony from two reputable sources has indicated that it is not ten acres. He said the map is astray. He stated that the incorrect map only affects a few people and that after they receive relief from the requirements of the ordinance, the map does not get changed. He stated that Mr. Wood had mentioned 12 areas on the map that are incorrect but that he had not approached the Planning Board to change the designation because his projects are not in those areas.

Chairman Cielezsko stated that the BOAs role is to help people get around a fairly obvious problem.

Mr. Billipp stated that whether the wetland is 8.5 acres or ten acres is a critical determination but no information had been provided to prove the 8.5-acre measurement. He stated that Mr. Wood is a licensed soil engineer in the State of New Hampshire but that the proposed project is in Maine. He added that no proof was given as to the size of the wetland. He stated that although the BOA had been told the wetland was only 8.5 acres, they did not really know and he found that disquieting because the whole decision hinges on the wetland being either over or under ten acres.

Mr. Lytle agreed with Mr. Billipp and added that he had concerns with the area under consideration.

Mr. Hamilton stated that the proper way to resolve the issue is to take it through the Town meeting process because that is the legislative body. He stated that he realized that would create a delay but that he thought it was the proper thing to do.

DECISION

The motion to deny the request for a variance to raise the height of the building from 35 feet to 55 feet passed by a vote of 3-1, with votes in favor by Mr. Billipp, Mr. Hamilton and Mr. Lytle and a vote against by Mr. Cutting.

Mr. Wood stated that he did not feel he had to provide proof on the size of his wetland measurement because the CEO had agreed with him that it was not ten acres. He also stated that he is licensed in the State of New Hampshire because it is one of the only states that licenses wetland scientists and that he can practice in Maine, New Hampshire and Massachusetts.

OTHER BUSINESS

The minutes of the February 21, 2013 meeting were approved as amended.

Chairman Cielezsko asked if there were any changes to the report he had written for the Town Report on the activities of the BOA in 2012. There were no changes.

Chairman Cielezsko stated that there is a workshop to be held at the Ogunquit Town Hall on July 13, 2013 given by the Zoning Board and that he was planning to attend. He stated that his BOA term ends in 2014 and that he will attempt to move to the Planning Board and that there are plenty of opportunities in the Town for other board membership.

ADJOURNMENT

The meeting was adjourned at 9:50 PM.

Respectfully Submitted,
Linda Keeffe
Recording Secretary

Approved by: _____

Ed Cielezsko, Chairman, Board of Appeals

Date Approved: _____

May 16, 2013