

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

May 16, 2013

### **ROLL CALL**

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

Others Present: Code Enforcement Officer Jim Marchese; Lorilyn and Kevin Barrett, appellants; Nathaniel Huckel-Bauer, attorney for the Barretts; Tim DeCoteau, Land Use Consultant; Vicki Mills, abutter; Sally McKay, abutter; Catherin Goodwin, abutter; other interested parties

### **CALL TO ORDER:**

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

- The parties to the action are Lorilyn Barrett and Kevin Barrett.
- The appellant will have the floor to present testimony.
- The Board will question the appellant.
- The other party to the action, the Code Enforcement Officer, will present testimony.
- The Board will question the CEO.
- There will be rebuttal from previous witnesses.
- The Board will question the rebuttals.
- Any abutters will be allowed to make comments.
- The Board will question the abutters.
- 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 then discuss their duties and, hopefully, a motion will be made and a decision rendered.
- Any conclusions made will be sent to the appellant within seven days.
- Any decision can be appealed to the Superior Court within 45 days.

Chairman Cieleuszko stated that for the first of two hearings, the voting members would be Phil Lytle, Bill Hamilton, Peter Billipp and Ellen Lemire. Chairman Cieleuszko will vote in the event of a tie.

## **SUMMARY OF REQUEST**

The first request was for an Administrative Appeal by Lorilyn and Kevin Barrett for relief from the decision of the Code Enforcement Officer in the denial of a permit and misinterpretation of the ordinance on property located on Fernald Lane, Tax Map 38, Lot 50. Chairman Cielezsko stated that the parties to the action are the Barretts and the Code Enforcement Officer.

Chairman Cielezsko asked for clarification, stating that it appeared that there were two administrative appeals and a variance request.

Mr. Huckel-Bauer, the attorney for the Barretts, stated that there were two administrative appeals regarding building permits submitted with two different scenarios. Both building permits were denied. He stated that they would be, alternatively, seeking a variance.

Chairman Cielezsko stated that he was under the impression that the second administrative appeal presented along with the variance request had mooted the first administrative appeal. He added that he was confused.

Mr. Huckel-Bauer stated that he would like the BOA to address the requests in the order in which they were submitted, considering both appeals because there is a factual difference for the parties. He added that Chairman Cielezsko was correct in that the second request superseded the first, but that the parties would prefer to have a permit based on the first permit application.

Mr. Hamilton asked for clarification that the request for the administrative appeal was submitted on April 30, 2013. Chairman Cielezsko stated the first request for an appeal was accepted by the town on April 25, 2012.

Mr. Billipp asked for clarification that the second request for an administrative appeal included a request for a variance.

Chairman Cielezsko stated that the request accepted by the Town on April 25, 2013 was not accompanied by a decision.

Mr. Huckel-Bauer stated that the CEO's denial is part of the public record so was not part of the material that was submitted with the appeal package. He stated that if there was not enough material to consider the first appeal, he would defer to the Board's decision as to whether it was something that may need to be re-noticed for proper consideration. He added that, if that were the case, they move ahead with the hearing and consider the second appeal.

Mr. Hamilton stated that it appeared that the appeal received by the Town on April 25<sup>th</sup> was accompanied by a letter from Drummond & Drummond outlining the nature of the appeal and was sufficient to meet the requirement of explaining what the appeal is about.

Chairman Cielezsko asked the Code Enforcement Officer if there had been payment for two administrative appeals and a variance request. The CEO replied in the affirmative.

The CEO stated that in his cover letter date May 10, 2013, he outlined the sequence of events of the two appeals and the variance. He stated that his letter was a simple way to see the process of the requests. He stated that the first application was submitted on February 16, 2013 and denied on March 27, 2013. The administrative appeal for that decision was filed on April 23, 2013.

Chairman Cielezsko stated that he was assuming the two applications were substantially the same. The CEO replied that there were major differences between the two applications in regards to land configurations.

Mr. Billipp stated that the Board had no supporting information, such as tax maps or aerials or copies of the building permits that had been denied. He stated that he was confused as to what the differences between the two building permits were. He added that he didn't know what the appellants were requesting and that he felt stymied by the lack of information. He asked if the Board normally received copies of the building permit request and the denial letter. Chairman Cielezsko replied in the affirmative.

Mrs. Barrett stated that the information is part of the public file.

The CEO stated that he did include the denial letter in the Board's package but that the Board did not have a copy of the original application.

Mr. Huckel-Bauer stated that when the appellants submitted the appeal, they went by the information provided by the Town itemizing what needed to be submitted. He stated that typically, the Town's file is a matter of public record. He stated that, in his experience, the CEO brings the file to the hearing and the Board members have access to that file.

Mr. Huckel-Bauer stated that the form for the request for administrative appeal says that the information needed was a detailed explanation of the facts surrounding the appeal on a separate sheet of paper, the reason for the appeal and certification of the appellant's standing. He stated that that was all that was required.

Mr. Huckel-Bauer stated that as part of the second appeal, there was a plot plan, maps, photos and some other information that give a sense of the area in question. He stated that he thought the Board had all of the information in front of them to be able to consider the appeal. He stated that if the Board felt that they did not have all of the necessary information in the first

appeal, they could figure out how to deal with that issue and then move on to the second appeal.

Chairman Cielezsko stated that the two administrative appeals regarded the same property and the same appellants, though the issues were different. He stated that he did not see a need to notify abutters of a separate case, since the appeals are for the same piece of property. He added that it should have been posted as a separate hearing. He stated that the generality of the appeals gives the Board the option to consider both. He added that he thought the BOA should proceed in order from the first administrative appeal to the second.

The CEO stated that he would make copies of both applications if the Board wanted a short recess. Ms. Lemire asked if the copies would verify the differences between the two appeals and the CEO replied in the affirmative.

A ten-minute break allowed the CEO to make copies of the building permit applications.

Nathaniel Huckel-Bauer, attorney with the law firm of Drummond & Drummond of Portland, Maine stated that he was present to help explain some of the legal rules involved in the case and to try to answer questions from the BOA.

Chairman Cielezsko stated that he wanted to clarify one thing first and stated that as a general rule of thumb, the Board does not go after information that is a public record. He stated that the BOA looks at information provided by the appellant and by the CEO. He added that the CEO usually gives the Board only his interpretation but that the Board expects information from the appellant. He stated that the Board does not go out and look through public records and that it is similar to doing a site review, which is not done before a public meeting. He stated that the Board looks at the package from the appellant and that the current package was incomplete.

Mr. Huckel-Bauer stated that he appreciated the attention to the notice issues and that he understood that the package appeared to be incomplete. He apologized for the fact that the package did not originally include all of the information that the Board felt was necessary. He added that after the copies were made, he thought the package was complete.

Chairman Cielezsko stated that the first hearing was for an Administrative Appeal of the decision of the Code Enforcement Officer denied on March 27, 2012 and accepted by the Town on April 23, 2012.

#### **TESTIMONY FROM APPELLANT**

Mr. Huckel-Bauer asked for the opportunity to consider the Administrative Appeals in the reverse order because the appellants felt that the second appeal was stronger on factual and legal grounds.

Chairman Cieleuszko stated that they could reverse the order.

## **SUMMARY OF SECOND REQUEST**

Chairman Cieleuszko stated that the hearing was for an Administrative Appeal of the Code Enforcement Officer's denial of a residential building permit that was denied on April 25, 2013. The request for the Administrative Appeal was accepted by the Town on April 30, 2013.

## **TESTIMONY FROM APPELLANT**

Mr. Huckel-Bauer stated that the appellants were seeking the Board's decision to grant a permit that would allow Lorilyn and Kevin Barrett to build a home on their lot off of Fernald Lane. He stated that the home was to be built for their son-in-law, daughter and their family. He stated that the BOA had considered the property and some of the issues around the property in September of 2012. He stated that at that time, the BOA looked at the question of whether Ian's Way qualified as a street to provide road frontage. He added that the BOA had decided that Ian's Way did not qualify.

Mr. Huckel-Bauer stated that, since that time, the appellants had worked with the seller, the seller's attorney and the CEO to reconfigure the lot or to re-propose the construction in a way that they felt complied with the ordinance. The current appeal was based on the theory that the lot could be a back lot. He stated that the back lot ordinance allows building on a lot that does not have direct road frontage as long as the building is on an access way that qualifies.

Mr. Huckel-Bauer stated that after the permit was denied, the appellants reached an agreement with the seller whereby they could acquire road frontage on Fernald Lane and Fernald Lane Extension, which are long-existing roads that have been recognized by the Town for a very long time. He stated that they took that approach because they believe that road frontage on a pre-existing road make the lot a conforming lot.

Mr. Huckel-Bauer stated the heart of the issue was less factual than it was legal. He stated that the BOA would interpret the ordinance and determine whether the current street standards also apply to a pre-existing road. He questioned whether the road had to be up to current road standards in order for the frontage to qualify the lot as a conforming lot. He added that the road would have to meet current road standards only if current road standards were applied retroactively to all pre-existing roads in the Town of Eliot. He stated that it is extremely uncommon for ordinances to apply retroactively.

Mr. Huckel-Bauer stated that the heart of the issue was for the BOA to consider whether the ordinance should be applied retroactively to require any lot to upgrade the road to current

standards. He stated that although Fernald Lane is a qualifying road, it is not up to current standards.

Mr. Huckel-Bauer stated that if the two Administrative Appeals were not successful, the appellants would seek a variance from the road standards to allow them to build on the lot. He passed out some information about the neighborhood and the road.

Kevin Barrett, co-owner of the lot, stated that they found the lot for sale in the summer of 2012. He stated that they thought it was a beautiful piece of property in a beautiful neighborhood. He stated that they started their due diligence by determining that the lot size was reasonable, had test pits done, had boundary confirmations completed and had a septic design done.

Mr. Barrett stated that Mrs. Barrett had met with the CEO and discussed the building application process. He stated that they determined by preliminary review that Ian's Way, which was the road they used for the initial frontage, was in existence but needed to be upgraded to meet the Town Road standards. He added that they conveyed that information to the seller who then went to the Department of Public Works to determine what the standards were. He stated that the road was in existence prior and that the Director of Public Works did test pits and sent a letter to the CEO confirming that there was a road in that location.

Mr. Barrett stated that additional gravel was put on Ian's Way by the seller to bring the road up to what she had been told was reasonable Town standards. He stated that a letter was sent to the CEO but that it was one of the items for the previous appeal that was not available at the time the decision was made so it was not used. He added that once he had seen that letter, the Barretts filled out an application and were granted a building permit on July 20, 2012, permit #12-72, to build a house based on minimum square footage determined by information from the CEO. He stated that at that point, they had a building permit and a buildable lot, so they purchased the lot, closing on July 22, 2012. He stated that they were planning to build a house as soon as they could for their daughter, son-in-law and baby.

Mr. Barrett stated that the appeal of the building permit arose from questioning of whether Ian's Way was ever a road. He stated that on September 20, 2012, the BOA made the decision to grant the appeal. He added that they were caught off guard because they had felt that they did not have any issues and had proceeded on information provided by Town officials which made them confident to purchase the lot.

Mr. Barrett stated that since the time of the September appeal, the appellants stepped back and brought on a land use consultant, hired an attorney and got as much information as they could in order to try to move forward. He stated that they were not looking to build a subdivision and were only trying to build a single-family house.

Mr. Barrett stated that the map provided to the BOA shows photos of Fernald Lane and the condition of the road. He stated that there was one picture of a truck and Mrs. Barrett's Jeep

on the narrowest point on the road. He stated there had been issues about the width of the road and whether or not it met the minimum 15-foot width but that the photo shows that there is clearly enough room for two vehicles to pass.

Mr. Barrett stated that the aerial photo was taken from the Town's GIS maps and that just prior to Keith's Lane, on the right, there is clearly a road on the left which is Ian's Way. He stated that the road, Ian's Way, was in existence prior to their purchase of the lot. He stated that at the time, the road had not had any new construction and was a pathway on which they drove their vehicles. He stated that he had been confused as to why there had never been a determination that a road was there, but that the picture shows the road.

Mr. Barrett stated that the photo also showed Fernald Lane Extension which is on all of the Town's tax maps and that it continues on past Ian's Way as well as past Keith's Lane. He added that the appellants consider the extension to be a Town-recognized road.

Mr. Barrett stated that they sent in their second application, with additional information for a stronger case recognizing Ian's Way as a pre-existing road. He stated that the first permit was for a house that was too small, so they modified the design to bring it up to what had been described as necessary to meet the requirements of the Town. He stated that the second permit was also denied, based essentially on the fact that there was not enough information that changed the original decision by the BOA.

Mr. Barrett stated that they then obtained 150 feet of frontage on Fernald Lane Extension and that they had a letter of intent from the owners of that lot and a revised site plan that shows the frontage on Fernald Lane Extension. He stated that they then submitted their third application based on the fact that they now had frontage on a Town-recognized, pre-existing road with no question that the road was there. He added that they had information that shows house numbers continuing on that road and a tax map that shows Fernald Lane Extension.

Mr. Barrett stated that they felt they had a strong case with new frontage on a pre-existing road that was there long before the new road standards were put in place. He stated that those standards did not include any language that indicated that they were retroactive. Since the road existed prior to the new standards, he had felt he was in good shape.

Mr. Barrett stated that the third application was also denied for essentially the same reason which was that the length of the road exceeded the 1000-foot limit of the road standards. He stated that the CEO's denial letter indicated that he did not feel he had the power to make the decision but that there would be room for the BOA to make the decision by accepting the fact that the road had been in place.

Mr. Barrett stated that they had done additional research to find that there had been permits issued on a number of private roads in Eliot since the new road standards were put in place which exceed the 1000-foot length and are questionable in terms of minimum widths. He stated that one of those roads is Keith's Way where, as far as he could determine, three permits

for new construction had been issued following the new road standards. He stated that that information had been included with the application.

Mr. Barrett stated that they had incurred a major amount of expense and had gone through a major process in order to build a single-family house which would create little additional traffic. He stated that Fernald Lane appears to be in decent shape and that Ian's Way is in better shape than Fernald Lane, even though Ian's Way had not been determined to be a road.

Mr. Huckel-Bauer stated that he would turn the hearing over to Tim DeCoteau who has had experience with similar ordinances, road standards and the history of Fernald Lane.

Tim DeCoteau stated that he is a Land Use Consultant and that his experience spans over one quarter of a century. He stated that he had been a selectman, an assessor, an overseer of the Board and a Code Enforcement Officer for the Town of York, Maine for a number of years. He stated that he has a strong background in dealing with pre-existing, non-conforming roads.

Mr. DeCoteau stated that when he started looking at Fernald Lane and whether or not it was pre-existing and met the ordinances, he used the experience he had in York. He stated that for York, he was called upon to make that type of determination many times. He stated that he was required to look at what kind of data was available.

Mr. DeCoteau stated that the Eliot ordinances for roads were adopted in 1978 and amended in 1982. He stated that basically those standards are similar to those that exist currently in terms of length and other considerations. The requirement of a 1000-foot limit to a dead-end road was added later than 1982. He stated that the ordinance of 1982 addressed width.

Mr. DeCoteau stated that the question was how other lots had been treated. He stated that Mrs. Barrett looked throughout the Town and saw that there were other substandard roads which had houses built on them. He added that on Keith's Way and Fernald Lane, there have been four houses built after 1982 when the road standards were adopted. If the standards were retroactive, people who built would have had to improve the road but that the road has not been improved. He stated that previous decisions by the CEO made it clear that the CEO did not think the ordinance was retroactive and did not require that the road be improved. He stated that the roads are legally-existing and non-conforming.

Mr. DeCoteau stated that a non-conforming use would be a use that would not currently be allowed but would be allowed because the use pre-existed the ordinance. He stated that both Keith's Way and Fernald Lane are legally-existing, non-conforming roads and that by past practice of the Town it has not been required of anyone to improve the standard of the roads. He stated that that had been true throughout the Town but that it was particularly important in regard to Fernald Lane because the Barretts had the right to believe that the standards which applied to the neighbors also applied to them. Mr. DeCoteau stated that there are four houses that were built after the new standards.

Mr. DeCoteau stated that the Town has recognized Fernald Lane and Fernald Lane Extension in a number of ways. He stated that the current GIS map shows Fernald Lane Extension, as does the 1986 tax map, the current zoning map and the Town street listing. He added that the ordinance talks about official street listings so it is clear that they are important.

Mr. DeCoteau stated that the top of the Official Street Listing has column headings for status, name of street, location of street, the map which shows the street and the range. He stated that range refers to what numbers are allowed on the street, indicating how long the Town thinks the street is. He stated that Fernald Lane is on map 38 off of Beech Road between 314 and 326 with a range of house numbers from 1 to 44. He added that according to the tax map, the location of the intersection of Fernald Lane and Fernald Lane Extension is number 42. He stated that since there are 44 numbers listed in the Official Street Listing, that fact implies that there is space for another house beyond that location.

Mr. DeCoteau stated that the road had been recognized by the Town in zoning maps, tax maps, GIS maps and the street listing and has also issued multiple building permits right in that area. He stated that that was pretty conclusive in his mind that Fernald Lane is a legally preexisting, non-conforming road and that the Barretts have a right to have frontage on that road.

Mr. DeCoteau referred to the subdivision of Keith's Lane and stated that the surveyor of that subdivision also identified Keith's Lane. He stated that there are aerial photos that show Keith's Lane.

Mr. DeCoteau stated that the zone requires 150 feet of frontage and that the measurement is difficult to determine with the Town's GIS system. He referred to the GIS map of Fernald with a green line that indicated a measurement of approximately 152 feet with vehicles beyond that point, indicating the road was suitable for the passage of motor vehicles and that it was a surface that could be driven on.

Mr. DeCoteau stated that by creating the frontage on Fernald Lane Extension and connecting to a preexisting, non-conforming street instead of the right-of-way, the Barretts felt they could meet the frontage requirements, that the lot size had never been an issue and the building size had been corrected. He stated that they felt that they had an application for a permit that the CEO could grant.

Mr. DeCoteau added that he realized that the CEO was in a difficult position because when the BOA has said no, it is difficult for a CEO to say yes because he would not want to be seen to be overturning the Board. He stated that he thought the CEO wisely let the BOA decide.

Mr. DeCoteau stated that he thought there was sufficient evidence that Fernald Lane and its Extension is an officially recognized road, that it is passable, that it has been used by vehicles and that the Barretts will have 150 feet of frontage on that road.

Mr. Huckel-Bauer stated that if the BOA had any questions about whether the ordinance might be retroactive or the language of the ordinance that talks about streets being built to standard, he would be happy to address those issues or any other aspects of the law.

#### **QUESTIONS FOR APPELLANT FROM THE BOARD**

Mr. Lytle referred to Mr. DeCoteau's statement that there had been three or four houses built after the ordinance and asked for the dates of those constructions.

Mr. DeCoteau stated that he had copies of the property cards. He stated that the dates and locations of the houses were:

- 37 Fernald Lane, map 38, lot 49, built in 1985
- 25 Keith's Lane, map 30, lot 42, built in 1985
- 21 Keith's Lane, map 30, lot 41, built in 1985
- 15 Keith's Lane, map 38, lot 3, built in 1987.

Mr. Lytle stated that the only tax maps in the package showing Fernald Lane do not show any lengths or dimensions. Mr. DeCoteau stated that the plot plan that had been submitted is a survey and shows surveyed distances along Fernald Lane. He stated that it shows the road as 40 feet in width between two stone walls, which is the only location where the surveyors labeled the distance. He stated that the measurement could be slightly more or less in other places. Mr. Lytle asked if the survey was a legal survey because there was no marking indicating that fact. Mr. DeCoteau stated that the copies were part of larger, legal survey.

Mr. Lytle stated that he knew of a Superior Court case that specified the width as 15 feet. Mr. DeCoteau stated that the travelled way is up to 15 feet but the road in that court case was 29 ½ feet wide. He stated that neither Fernald Lane nor Keith's Lane meet current standards but that the issue is that they are legally preexisting, non-conforming uses because both roads were created before the ordinance and that can be seen in aerial photos, in Town records and in a legal survey. He added that the roads were recognized by the Town and by a surveyor. He stated that a surveyor would never label something as a street unless he felt that he had the jurisdiction to do so.

Mr. Lytle brought up the 1989 court case regarding the property and the restrictions on the road. Chairman Cielezsko asked if the property was within 1000 feet from Beech and Mr. DeCoteau replied that it was not.

Mr. Billipp asked if the plan supplied by the appellant was intended to show the lot as it would appear if they acquired the extra piece of property. Mr. DeCoteau replied in the affirmative. Mr. Billipp stated that the lot would then seem to include Ian's Way and asked if that were correct. Mr. DeCoteau replied in the affirmative.

Mr. Billipp asked if other people also had rights to Ian's Way. Mr. Huckel-Bauer stated that there is legality in place to use Ian's Way as access to the lot that is shown as McKay's lot. Mr. Billipp stated that the 150 feet of frontage currently requested would be on a legal road and Mr. Huckel-Bauer concurred.

Mr. Lemire asked if the location of the driveway would change. Mr. Huckel-Bauer stated that it probably would not because the house location will probably remain the same. Mr. Barrett stated that Ian's Way would potentially be the driveway. The actual~~ly~~ driveway would come off of Ian's Way and lead directly to the house.

Chairman Cieloszko stated that not all houses in the area are in the same predicament because the houses on Keith's Lane were more than likely part of a subdivision. He added that subdivisions have a whole set of rules which are different than those for an individual lot. He stated that reference to those lots is irrelevant but still useful as part of the appeal. However, he stated that those houses do not add any credence to the premise that they should be a buildable lot in the location of the current appeal.

Chairman Cieloszko asked if the current application included 150 feet of frontage on Fernald Lane Extension. Mr. Barrett stated that the tax map indicates a combination of Fernald Lane where Ian's Way is and Fernald Lane Extension. He added that the result is 50 feet on Fernald Lane and 100 feet on Fernald Lane Extension. Chairman Cieloszko stated that that would be a slight problem because street frontage is required to be on one street and this would be making 150 feet of frontage on two streets.

Mr. DeCoteau stated that there was confusion in his mind as to how part of the road got to be called Fernald Lane Extension. It appears that it is a street because it is one straight road with no bend. He stated that usually referral to two streets means two intersecting streets with frontage going around a corner. Chairman Cieloszko asked if Mr. DeCoteau was presenting that Fernald Lane Extension is Fernald Lane. Mr. DeCoteau stated that it was unclear in his mind when it became an extension, whether it had always been an extension or if it became an extension when Keith's Road was constructed. He added that the records are not good enough to make that determination.

Chairman Cieloszko asked Mr. DeCoteau what his own assumption was and Mr. DeCoteau replied that it is one road because it is a straight line. He stated that there are straight roads that change names in the middle. He stated that, from a zoning point of view, he looks at one street as being a continuous straight edge, as opposed to a corner. He stated that if the name changed midway, he would still consider it the same street and that names are immaterial.

Mr. DeCoteau stated that Fernald Lane and Fernald Lane Extension were less of an issue than whether or not it was a legally non-conforming street. He stated that it was a legal road and did not go around a corner, which would be the only way the frontage could be considered as being on two streets. He added that he thought the appellants' application of 150 feet of frontage complies, even though the name of the street changes.

Mr. Huckel-Bauer stated that part of the issue would be a retroactive application. He stated that for a normal lot, which is not a subdivision, there must be frontage on one street. He asked if the ordinance were being applied retroactively to a pre-existing, legally non-conforming street.

Chairman Cielezsko stated that the biggest issue he had with the retroactivity issue was that the property was a new lot. He stated that new lots have to comply with new rules. The lot in question is not a pre-existing lot. He stated that there could be no retroactive application.

Mr. Huckel-Bauer would agree only if the applicants were trying to create more frontage than existed. The whole lot was 65 acres and had frontage on Fernald Lane Extension. He stated that when the owners divided part of it into a four-acre parcel on a pre-existing, legally non-conforming road they did not create a new road, lengthen the road or change the road. He stated that the road was there and they are trying to use frontage on it. He added that if they wanted to widen the road or extend the road, he would then think the new rules would apply.

Mr. Huckel-Bauer stated that when a large lot is divided to create a new lot, the road is a separate issue. The ordinance in question applies to the road, not to the lot. He stated that the appellant's lot ends at the edge of the road and they are not proposing to change the road at all. The frontage on the lot conforms because it was the required 150 feet of frontage. The road does not conform because it is a legally pre-existing, non-conforming road. He stated that if the appellants were proposing to change the road, he would agree that the new ordinance would apply.

Mr. Huckel-Bauer stated that the whole 65-acre lot is a lot of record. He stated that the divided parcel would still receive protection because it is on a lot of record. He referred to another parcel (No. 37) where a house is being built on a non-conforming road. He stated that the Barretts' lot is on a non-conforming road that is protected.

Chairman Cielezsko stated that it appeared that the appellants did not feel they had to meet Section 45-405, Dimensional Standards. Mr. Huckel-Bauer stated that they meet the standards. He stated that they must meet the standard either by having 150 feet of frontage on a new road that meets the new specs or on a pre-existing, legally non-conforming road.

Chairman Cielezsko stated that in Section 45-405, a suburban zone requires 150 feet of street frontage. Note (l) states that "Street frontage shall be measured along one street. The planning board is authorized to vary frontage requirements for new subdivision according to Section 45-255(g). Such lots shall be treated as conforming lots for the purpose of this chapter."

Chairman Cielezsko stated that in the definition section of the ordinances, "Street means any common access to three or more lots and shall meet the requirements of Division 2 of Article II of Chapter 37 of this Code, the Street Design and Construction Standards of the town." He stated that the ordinance defines a private right-of-way as, "a street that is not intended to be

offered to the town for acceptance as a public way.” He added that the definition of a qualifying street “means a public street or a private street meeting the standards of chapter 37, streets and sidewalks.”

Chairman Cielezsko stated that in the current case no mention is made of a qualifying street. He stated that in his mind, they could be looking at a substandard street and that they were not looking at any ordinance being applied retroactively.

Mr. DeCoteau stated that the appellants cannot look retroactively. He stated that if he wanted to create a new lot today, he would have to create a qualifying street. He referred to a house that had been built on a non-conforming lot after the rules changed. He stated that the definition of a non-conforming use applies to something which was allowed when it was created and was allowed to remain even though it does not conform to the rules. He stated that applied to Fernald Lane in a nutshell because it is a legally existing, non-conforming use.

Chairman Cielezsko stated that the appellants need the retroactivity in regard to the 1000-foot limit on the road. Mr. DeCoteau replied that they did not need the retroactivity. He stated that if it is a legally existing, non-conforming street, they should be able to use the whole street and they only want a portion of it for their frontage.

Chairman Cielezsko asked Mr. DeCoteau where the ordinance states that the 1000-foot limit can be bypassed. Mr. DeCoteau stated that it can be found in the definition of non-conforming use. Chairman Cielezsko read the definition of non-conforming use as, “use of buildings, structures, premises, lands or parts thereof which is not permitted in the district in which it is situated, but which is allowed to remain solely because it was in lawful existence at the time at the time this chapter or subsequent amendments took effect.”

Mr. DeCoteau stated that Fernald Lane would not be allowed today because it does not meet the rules. He stated that Fernald Lane is allowed to remain because it is a use. A road is a use of property. He stated that the situation involves the use of the property that would not be allowed today because it does not comply with the ordinances. He stated that the use is allowed because it predated the ordinances.

Chairman Cielezsko stated that he thought they were asking for a great deal in regard to non-conforming use. Mr. DeCoteau stated that it was really not asking a lot. He stated that they had talked about how the Town has recognized the road in at least four ways. Chairman Cielezsko stated that none of the ways applies to the 1000-foot limit. Mr. DeCoteau stated that when the Town said recently that a road could not be longer than 1000 feet, that did not invalidate the roads that were longer than 1000 feet if they were legally existing, non-conforming roads. He stated the ordinances state that a new road cannot exceed 1000 feet.

Chairman Cielezsko stated that if the appellants were building a house on the whole lot, it would be a very different story. Mr. DeCoteau stated that he thought they had proven that the road is a legally existing, non-conforming road. The new parcel meets dimensional

requirements because it has 150 feet of frontage on a legally existing road and it meets the minimum lot size. He stated that if the appellants were trying to create a non-conforming lot or trying to change the non-conforming use, they would have a problem. He added that they were not trying to change use of the road nor were they trying to change the road itself.

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

Mr. Marchese stated that he wanted to be sure the Board was clear on the progression of the application so he presented a recap.

- The first application was for a two-acre parcel of land that was north of the pond. Mrs. Barrett offered that it was never presented as a two-acre parcel and had always been presented as a four-acre parcel.
- The application was approved by the CEO.
- The application was overturned by the BOA on an appeal process.
- The second application was for a four-acre parcel. It was similar in circumstances to the first application. The Board had made it clear that Section 37-69(f) on street design was applicable for this location.
- The building permit application was denied.
- The third application indicated that the appellants had purchased an additional piece of property partially on Ian's Way and partially on Fernald Lane Extension.
- All three applications were substantially different which is why they were all accepted.

Mr. Marchese stated that his application denial letter, dated April 25, 2013, references the BOA's prior decision and the section of the ordinances that require the length of the road not exceed 1000 feet. He stated that there is a section under the ordinance for back lots, Section 45:466(e) which addresses the treatment of existing legally non-conforming back lots and for legally non-conforming access ways. He stated that the ordinance allows a permit as long as "the access way is at least 30 feet in width with a traveled way that is graveled or paved and at least 15 feet wide."

Mr. Marchese stated that the ordinance is only applicable where one or two back lots may be created. He stated that, in this particular case, there are 13 people currently using Fernald Lane. He stated that he did not think the appellants' property fit the definition of a back lot.

Mr. Marchese stated that under Section 45-466(g), additional requirements for all back lots, there is also reference to the 1000-foot limit. He stated that those were the reasons the permit was denied.

Chairman Cielezsko asked if there were any place in the ordinances that grants relief from the 1000-foot dead-end street. The CEO stated that the Planning Board has the authority to waive aspects under Section 35-57, Waivers and Deviations. He stated that the CEO does not have that authority. He stated that Section 35:57(1) states that one of the allowed circumstances is

“For streets existing prior to December 2, 1978. Where extraordinary and unnecessary hardships may result, or due to special circumstances, these streets may have certain requirements of this chapter waived by the planning board subject to appropriate conditions.” The CEO stated that is the only reference, to his knowledge, where anyone has the authority to grant a waiver that would allow an excess of 1000 feet.

Chairman Cielezsko asked if that section was in relationship to a subdivision. The CEO replied in the affirmative.

### **QUESTIONS FOR THE CEO FROM THE BOARD**

Mr. Marshall stated that when he looks at the list of streets, he sees a lot of private roads with dead ends that are over 1000 feet. He asked if those roads cannot be built on anymore. The CEO stated that according to the ordinances, that would be true. He stated that he had no idea how those streets were developed, whether it was through planning board review or an error by the prior CEO.

Mr. Marchese stated that he also looked at situations where people obtained a waiver from the BOA for lots that are in excess of 1000 feet from a through way. He added that that had occurred but that it was on a case-by-case basis.

Mr. Marshall stated that he sees a lot of pieces of land that are vacant and are owned by people who pay taxes on them and who probably bought the land with the idea that someday they could do something with it and now the opportunity is gone.

Mr. Lytle stated that since he has been on the BOA he has known of areas that are back lots being turned down by the Board. Chairman Cielezsko stated that some had also been accepted.

Mr. Hamilton stated that of the previous permits which were issued on Fernald Lane, one or two of them look like they exceeded the 1000-foot limit. He asked if the CEO felt that they were issued in error or had mitigating circumstances permitting a waiver. He stated that there were two permits issued since 1982 that were granted on Fernald Lane which appear to be beyond the limit. The CEO stated that he did not know how those lots were built.

Mr. Hamilton stated that the issuance of the building permit on a non-conforming road may have been done incorrectly. He stated that that does not imply that the issuance has to be continued. He stated that that BOA was there because there were things that had been done incorrectly and that the buck stops with the BOA. The CEO concurred.

Mr. Billipp stated that in one of the permit applications, the lot included Ian's Way and that the appellants had picked up 150 feet on Fernald Lane Extension. The CEO stated that was correct.

Ms. Lemire asked the CEO why he did not consider the appellants' property a back lot. The CEO stated that there are currently 13 residences using Fernald Lane to get to their homes. He stated that the definition of a back lot there can only be one or two lots. He stated that a back lot would be behind lots that are on a street. He added that the Barrett's property does not seem to fit the criteria of a back lot. Ms. Lemire asked if that was true even though the other properties are in a subdivision and the Barrett's property is not. The CEO replied in the affirmative.

Chairman Cielezsko stated that Keith's Lane has a subdivision but Fernald Lane does not. He stated that when the issue is the breaking up of a lot for a back lot, it is not the road that is the worry but instead the concern is the fact that the lot is being broken up. The CEO stated that a back lot is a lot which is behind lots that are on the street.

Chairman Cielezsko asked if a road could be a back lot if there were four sections on the road already. The CEO replied that it would depend on how it is divided.

#### **TESTIMONY FROM ABUTTERS**

Vickie Mills of Old Farm Lane stated that when she looked at the tax map, the piece of property in question is separated in one section by three lots in back of the qualifying road, Beech Road. She stated that in another section, there are actually four lots which sit in front of the piece of property. Ms. Mills showed the tax map to the BOA.

Ms. Mills stated that there were a couple of items that she wanted to clarify. She stated that section 44-32 of the ordinance states that one cannot make a non-conforming use any more non-conforming. Chairman Cielezsko stated that the referenced section referred to Shoreland Zone.

Ms. Mills stated that, in terms of being able to drive on the Barretts' lot, Eliot is either ledge or swamp land. She stated that she has had a semi parked in the middle of her field and that there is no official road sitting there.

Ms. Mills stated that she was not sure that the piece of property in question should have been legally subdivided because it did not meet any of the current ordinances. She stated that she had always been told that she could not separate a lot from her property unless it met all of the current ordinances.

Ms. Mills stated that she believed that the relief would be from the seller, not from the Town. She stated that Town records indicate that Fernald Lane was never recognized back in the 1970s as an official road. She stated that Keith's Lane was an approved subdivision, making their rules different in terms of length of road. She added that no house on Fernald Lane up to the point where Keith's Lane intersects is over the 1000-foot limit.

Ms. Mills stated that Mr. Goucher had planned to further develop his piece of property but that she was not sure when Fernald Lane Extension appeared. She stated that Denise Long had an old record that indicated it was not there in 1982.

Ms. Mills stated that the Barretts had talked about making Ian's Way into their driveway. She added that Ian's Way is 500 feet. She stated that with an additional driveway, the distance would exceed the limit of 500 feet for a driveway.

Ms. Mills stated that in 1989, further subdivision was denied and that at that time Fernald Lane Extension was actually the farm house driveway. She stated that when the maps were changed last year, Fernald Lane was moved over and extended beyond what it had been.

Ms. Mills stated that in terms of looking at things retroactively, she thought there were several instances in the ordinance where making changes require that the street meet qualifying standards all of the way to the qualifying street.

Chairman Cielezsko asked Ms. Mills if she had been referring to the Barrett lot when she stated that the driveway was 500 feet. Ms. Mills stated that they had been planning to use 500-foot Ian's Way as their driveway. She added that from Ian's Way they could not get to the location where they had positioned their house. She stated that because the house is not right on Ian's Way, a driveway to access it would exceed 500 feet.

#### **QUESTIONS FOR ABUTTER FROM THE BOARD**

There were no questions for Ms. Mills.

#### **TESTIMONY FROM SECOND ABUTTER**

Cathy Goodwin, the seller of the Barrett property, was considered an abutter. She stated that her family had owned the land for 50 years. She stated that her father left the land to the grandchildren in his estate. She stated that Fernald Lane was once a Town road and has been in existence for 150 years and had gone beyond Fernald Lane Extension when they first bought the property. She stated that they had been told the road went all the way to Kittery but eventually was abandoned. She added that the idea that the lane is something new is erroneous. She stated that the history books at the Fogg Library would confirm that.

Ms. Goodwin stated that the other issue is that of driveways. She stated that she wondered why Fernald Lane and Fernald Lane Extension could not be considered the driveway, since the property has frontage on those roads. She stated that in that case, the frontage for the lot would be Keith's Lane and Fernald Lane. She stated that Ms. Mills' argument was that the distance exceeded 1000 feet, but that it is 1000 feet to Keith's Lane and the driveway could begin there.

Ms. Goodwin added that the land and the road have both been there. She stated that she felt that there was an answer to the problem and that it would entail finding the words in the current ordinance which describe the situation correctly. She stated that historically, Fernald Lane is a non-conforming, legally existing road and one should be able to build if one owns land and has owned land for a long time on a road that has been used.

Ms. Goodwin stated that in the discussion in September 2012, the issue was whether or not Ian's Way had been in existence. She stated that it had been there for a long time. She stated that Ms. Mills knew that because she asked on a number of occasions about the right-of-way over it and also inquired of Ms. Goodwin's realtor the price for the right-of-way. She stated Ms. Mills had expressed an interest in purchasing it as early as last summer before the Barretts bought it.

Chairman Cielezsko stated that the issue of Ian's Way was not on the table for the current hearing. Ms. Goodwin stated that her issue was that Ian's Way is a road in the minds of some people and not in the minds of others. She stated that there was a road there, it was graveled and inspected by the road commissioner. She stated that it exists and has existed and should be allowed as a driveway.

Ms. Goodwin referred to the court decision rendered in 1989 which stated that it had been "adjudged and declared that the defendants and others associated with them in the use of the public easement over Fernald Lane, so called, in Eliot, are justly entitled to enter upon said lane to enlarge the same to a width not exceeding 15 feet and to take such steps as may be necessary to make said lane safe, suitable and convenient for travel but having due regard for the fair and reasonable concerns of the plaintiffs and all other abutting owners without undue cost to any party." Ms. Goodwin stated that the decision did not limit additional use by building. She stated that the argument had been about people who had been putting brush and rocks in the right-of-way and the issue had to go through court to get resolved.

Ms. Goodwin stated that her family supports the granting of the Barretts' permit because it makes logical sense, as Mr. DeCoteau explained.

#### **QUESTIONS FOR SECOND ABUTTER FROM BOARD**

Mr. Marshall asked Ms. Goodwin how long she had been on her property and she replied that she had been there since 1963. Mr. Marshall asked if all of the houses on Fernald Lane existed at that time. Ms. Goodwin stated that there were four, with her farmhouse at the end. Mr. Marshall asked if Fernald Lane was basically her driveway. She replied that it was everybody's road.

Chairman Cielezsko asked if Ms. Goodwin still owned the rest of the lot. Ms. Goodwin stated that she owns a 75-acre lot.

Ms. Lemire asked if any of the property owned by Ms. Goodwin abuts any other road. Ms. Goodwin stated that it does not. She added that Charles Lane comes in on the Keith's Lane side, but that the Town would not allow the roads to connect. Ms. Lemire noted that there is private property between the two roads.

Mr. Lytle stated that he recalled Ms. Goodwin's plan to do more building on her property but that she would have been required to have two accesses. Ms. Goodwin stated that she has an approved subdivision plan located on Sergeant's Lane but that that road is 1000 feet and does not connect.

### **TESTIMONY FROM THIRD ABUTTER**

Sally McKay, sister of Ms. Goodwin and daughter of Mr. Goucher, stated that she owns a piece of property on Ian's Way. She supported her sister's statement that they had owned the land for a long time and that Ian's Way had been in existence since their father purchased his property. She stated that the Barretts purchased their piece of property and did everything necessary to get a building permit for the land. She added that she had been paying taxes for 46 years and deserved the right to develop the property within the framework of Eliot's code. She stated that she was present at the hearing to support the Barretts in their application.

### **QUESTIONS FROM THE BOARD**

Chairman Cielezsko asked if Ms. McKay had a house on her property and she stated that she did not. He asked how long she had owned Ian's Way. She replied that her father named the two roads after his grandsons and he did so at the same time as Keith's Lane was created.

Mr. Lytle commented that the only thing the BOA was trying to do was to determine that the ordinances were being followed.

### **TESTIMONY FROM INTERESTED PARTIES**

Denise Long of 15 Keith's Lane, Eliot, Maine stated that her concern was whether or not Ms. McKay was planning to sell and develop another piece of property from the same lot from which she sold a piece to the Barretts. Chairman Cielezsko stated that that had no bearing on the current case.

Ms. Long showed a diagram that showed the width of Fernald Lane and stated that there are places which are only 37 feet 10 inches wide. She stated that the width had been referred to as being 49.5 feet. Chairman Cielezsko stated that the reference of 49 feet was at the end of

Fernald Lane Extension. Ms. Long stated that people would be traveling over a portion of the lane that is only 15 feet wide with trees on both sides.

Ms. Long stated that the 1000-foot limit was established in 1982. She stated that she had paperwork from John Goucher when he put in Pleasant Meadows. She stated that he got approval for Pleasant Meadows with the contingency that he was to upgrade Fernald Lane. She stated that after he got the approval and had all of the surveys done, nothing came to fruition. She added that the residents had been abandoned and now each of them owns to the mid-point of the road. Chairman Cielezsko clarified that Mr. Goucher did develop Pleasant Meadows but did not upgrade Fernald Lane.

Ms. Long stated that there were six new lots on Keith's Lane subject to approval from the road commissioner. Chairman Cielezsko stated that the Keith's Lane projects had no bearing on the current hearing. Ms. Long stated that her point was that all of those residents use Fernald Lane.

Mary Lou Downs of 314 Beech Road, Eliot, Maine stated that she had been part of the 1989 court case. She stated that the court case turned Fernald Lane over to the residents so that each owned to the middle of the road. She added that the court case specified that the road not be widened beyond 15 feet. She stated that for all of the years that Ms. Goodwin had owned property at the far end of Fernald Lane, Ms. Downs had been at the other end.

Ms. Downs stated that she felt very sorry for the Barretts. She stated that their purchase affects everyone on Fernald Lane and Keith's Lane because of the impact from people driving on the road, which is not a Town road. She stated that the private road is maintained by an association which plows and keeps up the condition. She stated that she noticed that a lot of work had been done on Fernald Lane this spring but that she did not know whether it was done by the association or by people who wanted to take pictures showing it as being wider than it normally is.

Ms. Downs stated that she did not want to see more impact on Fernald Lane because she does not want it paved due to the presence of a water supply, a spring, off Fernald Lane that is her source of water. She stated that there should be a study to determine how many people should be driving on the road and that there were already 13 residences. She stated that "the Town has already tried to do the zoning. Now, let's live up to the zoning."

Albert Hall of 2 Snowden Ridge Road, York, Maine stated that he was the son-in-law of the Barretts and hoped to live on their lot eventually. He stated that he is a law-abiding citizen and drives under the speed limit so there will not be any dust issues. He stated that he wanted the opportunity to be a landowner in the Town of Eliot because he thinks it is a beautiful place to raise a family and has a great school system. He stated that he wants the opportunity for his daughter to stand at the end of Fernald Lane while she waits for the bus.

He stated that he did not think the impact issue was as crucial as it had been made to sound. He stated that he is a hard worker with a lot of experience in construction, excavation and

landscaping. He added that he would absolutely love to help improve the road. He stated that he understands that he would also own to the mid-point of the road and would be expected to uphold his end of the bargain as being one of the people to pay for the maintenance of the road.

#### **FINAL TESTIMONY FROM APPELLANT**

Mr. Huckel-Bauer stated that anyone using Fernald Lane would be required to contribute to the association to pay for its maintenance. He stated that the concern was valid but had been addressed. He added that the addition of two cars would not significantly impact the road.

Mr. Huckel-Bauer stated that the appellants were not claiming that the road met current standards. He stated that the width did not matter and that what did matter was that the road had been recognized by the Town as a road and provides road frontage without complying with current standards. He stated that the issue was specifically whether or not the road needs to meet current road standards in order to supply frontage if the road was a preexisting road.

Mr. Huckel-Bauer stated that it would be easy to put in a driveway that would be less than 500 feet from Fernald Lane. He stated that the distance just past the pond would only be 300 feet.

Mr. Huckel-Bauer stated that the appellants were not seeking a waiver. He added that the Planning Board has the authority to grant a waiver but it does not have the authority to grant a waiver to the 1000-foot limit. He stated that what the appellants were seeking was an interpretation of the ordinances that a lot on a preexisting road does not require that the road meet current standards.

Addressing the concern that the frontage requested was on two different roads, Mr. Huckel-Bauer stated that there is no point on the map which shows where Fernald Lane ends and Fernald Lane Extension begins. He indicated a point on a diagram which a survey and deed description identified as the starting point of Fernald Lane Extension. He stated that the appellants have a letter of intent which would give them 150 feet on Fernald Lane Extension. He added that the frontage would be on a single road.

Mr. Barrett stated that nothing had been done to make the condition of Fernald Lane look better than it actually is for the pictures supplied by Ms. Barrett in the application. He stated that the sections that are less than 15 feet wide are that way because some of the landowners have planted lilac bushes there.

Mr. Barrett stated that they have a significant investment in their property. He added that the amount of the investment is much larger now that they have had to go through the appeal process than it was when they started. He stated that, one way or another, they were planning to do something with their piece of property. He stated that they could no longer get their money back and that if they could not build on it, they would find another use for it. He stated

that they were not going to just walk away and burn the money. He stated that they would continue to exhaust as many options as were available to get a reasonable return on the property.

Mr. Barrett stated that he appreciated the time and consideration of the BOA.

### **FINAL QUESTIONS FROM BOARD**

Ms. Lemire asked for clarification on the meaning of a previous statement that the division of the lot was not a legal one. Mr. Huckel-Bauer stated that he was not sure whether that comment had been referring to something in the past in relation to Keith's Lane subdivision. Ms. Lemire stated that the comment had been made in reference to the particular lot under consideration. Mr. Huckel-Bauer stated that he did not know the basis of the comment. He stated that the Barretts were creating a new lot and it was not considered a subdivision.

Mr. Huckel-Bauer stated that if the road frontage is satisfactory and on a preexisting road, then the lot would be a conforming lot. He stated that if the frontage is not satisfactory because it was determined that the road standards are effectively retroactive, then the lot could be considered an illegal division because the result is an illegal lot. The question of whether or not the lot is legal is determined by the BOA's decision or by the Town stating that an illegal lot had been created. He added that over the past seven months, the CEO had not made any statements that the lot was illegal or that the Town would seek to reverse the division.

Ms. Lemire asked if the lot had been recorded. Mr. Huckel-Bauer replied in the affirmative.

Chairman Cielezsko asked if there were any current litigation regarding the legality of the sale of the lot. Mr. Huckel-Bauer stated that there was not litigation and that the only dispute was whether or not the lot was buildable. He stated that he did not know if the Town's ever took action on illegal lots or new lots that do not conform, but he had not heard from the CEO that any action was proposed or likely.

### **PUBLIC HEARING CLOSED**

The public hearing was closed at 9:15 PM.

### **FINDINGS OF FACT**

- The request for an administrative appeal was made by Lorilyn and Kevin Barrett.
- The appeal was accepted by the Town on April 25, 2013.
- The property is identified as Tax Map Lot 38-51 in the Suburban Zone.
- The property is identified in the Administrative Appeal package as four acres.

- Ownership of the property is described in the Warranty Deed Book 16374, pages 917-920 received on July 26, 2012 at the York County Registry of Deeds.
- The appellants are appealing the Code Enforcement Officer's denial of a building permit which was presented to the Town on April 12, 2013 and was denied on April 25, 2013.
- The public hearing was held on May 16, 2013.
- The Board of Appeals has the authority to hear the case under Section 45-49(a), Administrative Appeals.
- The appeal is for denial of ordinances involving Section 37-69(f), Street Layout Requirements and Section 45-466(g) regarding back lots which limits the distance between the closed end of a dead-end access way to the nearest nondead-end street to 1000 feet.
- It was presented that the Barretts and the seller of the property have a letter of intent which will convey additional land from the seller to the Barretts to provide 150 feet of frontage on Fernald Lane Extension.
- The appellant testified that Fernald Lane Extension, along with Fernald Lane, is a pre-existing, legally non-conforming street.
- The appellant testified that the property is beyond 1000 feet from the nearest nondead-end street.
- In a Suburban Zone, 150 feet of street frontage is required.

## **DISCUSSION**

Ms. Lemire referred to Section 45-191, General Rule which states, "The use of land, building or structure, lawful at the time of adoption or subsequent amendment of this chapter, may continue although such use does not conform to the provisions of this chapter." She stated that the lot had been referred to as a legal lot of record. Mr. Billipp stated that he thought that the appellant was making the case that the use was non-conforming and should be grandfathered. Mr. Billipp stated that the lot is recorded but that it was up to the BOA to determine its legality. Chairman Cielezsko stated that using an existing nonconforming road does not negate the need to follow all other applicable ordinances.

Mr. Lytle referred to Section 45-466(g)(5), Back Lots. Chairman Cielezsko stated that the appellants were not asking for status as a back lot and it had not been presented as part of their case. He stated that the CEO had referenced it in terms of the 1000-foot limit and that the limit was addressed in multiple places in the ordinances and that it is not just a back lot that is bound to that limit. He stated that a lot is not a back lot if it has street frontage on Fernald Lane Extension, which is a non-conforming street. A lot is not required to have frontage on a conforming street to build.

Mr. Lytle asked for the definition of a conforming street. Chairman Cielezsko stated that such a street would meet all requirements of Section 37, Streets and Sidewalks, Part 2. He stated that

the back lot ordinance references the 1000-foot limit, but the limit is also found in Section 37 and in the definition of a dead-end street.

Chairman Cielezsko stated that the attorney, Mr. Huckel-Bauer, had also declared that the Planning Board does not have the authority to grant a waiver to the 1000-foot limit.

Chairman Cielezsko stated the appellants' position was that because the ordinance was not retroactive, the non-conforming road does not have to meet standards in order for them to use it as street frontage. If it is accepted that they do not need to meet street standards of Section 37, then they would also not have to meet the 1000-foot limit. He stated that the BOA is not required to give them a definition of the ordinance and they can decide on the merits of the current case only. He stated that the BOA does not set precedent.

Chairman Cielezsko stated that the authority of the BOA is to make the decision as to whether or not the Code Enforcement Officer acted clearly contrary to the ordinance.

Chairman Cielezsko stated that he has a hard time seeing that Fernald Lane has to meet all of the requirements of Section 37. He stated that if the ordinance in Section 405 stated that the street has to be a *qualifying street*, there would be no argument but that it just says *street*. He stated that the Town's definitions clearly show that there are many streets.

Chairman Cielezsko stated that the appellants meet many of the parameters necessary for that lot but that the one issue which he felt was insurmountable was the 1000-foot limit. He stated that the ordinance in Section 45-466 is a retroactive ordinance.

## **MOTION**

Mr. Lytle made a motion to deny the appeal because the Code Enforcement Officer did not act contrary to the ordinance. Mr. Billipp seconded the motion.

Mr. Billipp stated that he thought the BOA's job was to determine whether the CEO was clearly in error in interpreting the zoning code. He stated that the appellant wanted the BOA to look forward but he thought the limit of 1000 feet was important. He stated that the issue was whether or not the lot was over 1000 feet from Beech Road and it had been testified that it was. He stated that he supported the motion.

Ms. Lemire and Mr. Hamilton agreed with the motion.

The motion passed unanimously.

Chairman Cielezsko told the appellants that their administrative appeal had been denied. He stated that they would receive a Notice of Decision within seven days.

## **RECESS**

Chairman Cieleuszko called for a 10-minutes recess before the second hearing of the evening.

## **CALL TO ORDER**

Chairman Cieleuszko opened the next public hearing at 9:43 PM.

Mr. Huckel-Bauer stated that the appellant opted to withdraw the appeal based on the back lot issue. Chairman Cieleuszko stated that there could be no further appeal of that first denial.

## **SUMMARY OF REQUEST**

The request is for a variance by Lorilyn and Kevin Barrett to allow a preexisting road to be used for frontage purposes regarding property located on Fernald Lane, Tax Map 38, Lot 51.

Chairman Cieleuszko stated that the voting members were to be John Marshall, Phil Lytle, Bill Hamilton and Peter Billipp.

## **TESTIMONY FROM APPELLANT**

Mr. Huckel-Bauer stated that the request was for a hardship variance under Section 45-49(b) which states that the BOA has the authority to vary the standards of the ordinance to allow the owner to build on his property without meeting standards if the BOA finds that the criteria for a variance have been met.

Mr. Huckel-Bauer stated that the first criteria is that the land in question cannot yield a reasonable return without a variance, based on the cost of the lot and on what the lot can be used for without a variance.

Mr. Huckel-Bauer stated that the second criteria is that the need for a variance is due to the unique circumstances of the lot. He stated that the lot in question is at the end of a dead-end road which has been in existence and that other lots in the area were within the 1000-foot limit or were built before the new standards. He stated that the Barretts' lot is unique because the other houses in the area were either built previously or were within the 1000-foot limit.

Mr. Huckel-Bauer stated that the third criteria is that the need for a variance will not alter the essential character of the area. He stated that there had been testimony already in regard to the area and he hoped the BOA would consider some of what had already been stated. He stated that it is a residential neighborhood with 20 houses in the Suburban District and is relatively low density. He added that the appellants would only be adding a single house. He

stated that adding another home would not change the character of the neighborhood. He acknowledged that it would increase the use of the road, but that the road is already being used and the additional use would be paid for by a road assessment.

Mr. Huckel-Bauer stated that the final consideration for a variance is that the hardship is one that was not created by the current owners or prior owners. He stated that in this situation, the appellants' position was that the hardship was created after the Barretts did all of their due diligence to determine that the lot met current standards. He stated that they had an approved road which had been upgraded and approved by the Department of Public Works. He added that the Barretts did everything reasonable to confirm that the lot was a buildable lot, relying on the history of Ian's Way and Fernald Lane and the understanding that the roads had been recognized and used as roads. He stated that by an interpretation of the ordinance and a contrary finding of fact that was unexpected, they have lost their ability to build on the lot.

Mr. Huckel-Bauer stated that the Barretts had done everything they could to determine that their lot was buildable and through circumstances beyond their control it was determined that it was not a buildable lot.

Mrs. Barrett stated that she is a real estate broker with Coldwell Banker Realty and had been in business for eight years as a top producer in the State of Maine. She stated that she had a professional opinion as to the value of a lot that can neither be built on nor yield a reasonable return if it were logged and would be of value only to an abutter. She stated that she has seen some such lots sell for \$2500 and some for \$10,000 and that a realistic assumption was that their lot would possibly yield \$10,000 from an abutter if they wanted to expand their land for recreational use. She stated that if the variance were denied, there would be no other use for the property.

Mrs. Barrett stated that they had considered making an offer as abutters on the lot owned by Sally McKay and that they put a value on that lot of \$5,000-\$10,000. She stated that she thought it was a "reach" to expect that anyone in that neighborhood would pay up to \$10,000 for their lot. She stated that they paid \$63,500 for the lot plus the closing costs and the incurred costs from the past year.

Mr. Huckel-Bauer stated that the lot is unique because it is at the end of the road, because the other houses were within the 1000-foot limit and because the road standards changed over time and the other houses were exempt from the new standards. He stated that the Barretts lot is subject to the new standards and that they were seeking a variance because of the distance and because of the condition of the road.

Addressing the fourth criteria, Mr. DeCoteau stated that if the administrative appeal has been denied because ordinance is considered to be retroactive, the hardship is created by a change in the ordinance. He stated that the request for a variance would meet the criteria because the hardship is not self-created. He stated that the hardship is the road and the interpretation of the ordinance which was not created by the Barretts but was created by the BOA's

interpretation of the ordinance. He added that the Barretts meet the fourth criteria because they did everything they could to protect themselves, but the interpretation and change in the ordinance caused the hardship.

Mr. Lytle asked if the owner or the seller should have known what the outcome would be. Mr. DeCoteau replied that the owners did their due diligence and they could not have known how the BOA would vote on the appeal. He stated that, because of that, there is no way they could have protected themselves because the BOA decided that the ordinance looked backwards but the Barretts would not have known the outcome until the Board made the decision. He stated that they could not protect themselves from something they could not see. He stated that they did what they could, then got a permit and thought they were in great shape and so purchased the lot. He restated that it was the ordinance change and the ordinance interpretation that created the hardship, not the Barretts. Mr. Lytle stated that since Mrs. Barrett was involved in real estate, she should have known.

Mr. Barrett stated that the zoning ordinances in the Town can be very confusing and very conflicting. He stated that an ordinance will say one thing and another ordinance could say another. He added that a lay person, even a real estate person, can do his own research and then rely on a Town official who is responsible for the interpretation of the code for a decision. He stated that he considered those steps as due diligence.

Once they got the determination from the CEO that the lot was buildable, Mr. Barrett felt that was enough due diligence to move forward with the purchase of the lot. He stated that when the issue came to the BOA (on appeal by a neighbor), there were other pieces of information that the BOA found that indicated the CEO might have misinterpreted or had not had enough information. He stated that for a lay person or real estate person to be expected to understand the code better than the CEO is something he would consider to be a stretch.

Mrs. Barrett stated that she would like to address the real estate industry's standard of due diligence. She stated that she has represented many buyers over the years and that industry standard on a large piece of property entails a visit to the code office to determine whether the lot is buildable, making sure that water and septic can be obtained and that the lot is of record and can be conveyed. She stated that the closing attorney and the title company assist with that process. She stated that realtors do not wear a legal hat and can only interpret what they can understand and that they rely on the professionals.

Mrs. Barrett stated that she understands that, as a real estate broker, she should have or could have known that the lot was not buildable but that she went above and beyond what most average buyers do when purchasing a \$65,000 lot. She added that most buyers do not get a building permit before closing. Because of what she has seen happen in eight years in her position, she stated that it was part of their contractual agreement with the seller that the Barretts be able to pull a building permit. She stated that they also spent money on a surveyor and a septic design. She stated that that does not usually happen in the real estate industry and added that she could say that with conviction.

## QUESTIONS FOR APPELLANT FROM BOARD

Mr. Marshall asked if the Barretts actually got an issued building permit. Mrs. Barrett replied that on July 20, 2012, building permit #12-72 was issued. She stated that had been the last contingency in the contract and that they closed on the property on July 22, 2012. Mr. Marshall asked when the permit was revoked. Mrs. Barrett stated that it was revoked as part of the appeal that Ms. Mills had against the Goodwin/Goucher estate on September 20, 2012.

Mrs. Barrett stated that Ian's Way was not a road and that the permit that had been issued by the CEO to upgrade the road was overturned, which automatically overturned their building permit. Mr. Marshall clarified that the Barretts had a valid building permit between July 20, 2012 and September 20, 2012.

Mr. Marshall asked for the tax status of the property. Mrs. Barrett stated that it was assessed at \$87,000 as a building lot. She stated that prior to the transaction, the entire 35-acre parcel was assessed at \$23,000. She added that once they purchased their piece of property and it was conveyed, it was given its own map and lot, book and page and was assessed in the Town of Eliot as a building lot.

Ms. Lemire asked if the Barretts had any other feasible alternative. Mr. Barrett replied that there is no other access way and Ms. Goodwin had stated that there is no access way to the back piece of property which she still owns. He added that there would be no other way to get to the property that would be less than 1000 feet (from Beech Road).

Ms. Lemire asked if there were anything other than building that the Barretts could do with the property. Mrs. Barrett stated that it is a residential neighborhood.

Mrs. Barrett stated that they would not have closed on the property without a building permit. She added that they were scheduled to close prior to July 22<sup>nd</sup> but that when she met with Mr. Marchese to submit the building permit the first time, the house design she submitted was less than what was required by the Town of Eliot. She stated that she redesigned the house to make it bigger because the CEO indicated that it needed to be 325 square feet. She stated that that was incorrect and that it needed to be 650 square feet, which came up in the findings of fact on the appeal.

She stated that they had to extend their contract because of the condition of the road. She stated that the seller, without question, applied for a permit to upgrade the road, moving the closing date out because of waiting period for the sequence of events to occur. When the road had been upgraded and the DPW had approved it, she stated that the CEO was satisfied that it was a buildable lot and, therefore, they got their permit and closed on the property.

Mr. Marshall asked if the Barretts were told at the time they got the building permit on July 20<sup>th</sup> that the permit could be appealed. Mrs. Barrett replied in the affirmative. Mr. Marshall asked what the time limit for the appeal was and she replied that she believed the CEO had said 30 days.

Mrs. Barrett stated that she asked the CEO what causes an appeal and that he had replied that it would result from someone disagreeing with his decision. She stated that she asked if any of the neighbors had been in to see him. He indicated that they had been wondering what was happening.

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

Mr. Marchese stated that he sympathized with the appellant. He stated that he had done the best he could do with their initial application for a building permit. He stated that he did put the appellants on notice with a permit conditions letter dated July 20, 2012 and wrote down their options, informing them that any permit issued by his office could be appealed within 30 days. He stated that he put them on notice, both verbally and in writing, that an appeal could be made.

#### **QUESTIONS FOR CEO FROM THE BOARD**

Mr. Marshall asked when the appeal was submitted. The CEO replied that he did not recall the date. Mr. Marshall stated that the date was important. Mr. Hamilton stated that the date was irrelevant because the BOA already made a decision based on the fact that the appellants had standing and the appeal was timely. Mr. Marshall stated that his concern was the time frame of the appeal. The CEO then stated that the appeal was filed by Vicki Mills and was received on August 10, 2012.

Chairman Cielezko asked if the road had already been upgraded when the CEO issued the building permit. Mr. Marchese replied in the affirmative. Chairman Cielezko asked who pulled the permit for the road and the CEO replied that it had been the Goodwins.

Chairman Cielezko asked if there was an estimated price for the upgrading of the road. The CEO replied that it had cost \$6,000 and that the permit was #12-64 dated July 11, 2012.

#### **TESTIMONY FROM ABUTTERS**

Vicki Mills stated that there was enough documentation in the file folder in the Town office to indicate that the lot was not a buildable lot because it had been denied since 1989 numerous times. She stated that had the Barretts looked in the folder, they would have seen that documentation.

Ms. Mills stated that she spoke to the CEO about her feeling that the division of the property was illegal. She stated that he told her he had put the appellants on notice that there could be problems with it but that they were willing to go through the appeals process and move forward.

Ms. Mills stated that Mrs. Barrett works for the real estate company that sold the property. Ms. Mills stated that when she spoke to the listing agent, she tried to explain to the agent why the lot was not buildable and she would not hear of it.

Ms. Mills stated that there was enough information in the folder in the Town Hall to indicate that the lot was not buildable. She stated that she presented documentation in her appeal in regard to that.

#### **QUESTIONS FOR ABUTTER FROM BOARD**

Mr. Billipp asked for a description of the nature of the material in the file indicating that the lot could not be built on. Ms. Mills replied that there were several letters from different Code Enforcement Officers stating that basically the lot had to remain as one component or it had to comply with all of the current ordinances. She stated that Mr. Goucher had been denied further subdivision and a court case was cited stating that the CEO had ignored the fact that the Planning Board had said they would not issue any further permits for that area because of the condition of the area. She added that she had presented a package on that issue in her appeal.

Chairman Cielezsko stated that he was not sure Ms. Mills' statement was relevant because she had stated that at one time, Mr. Goucher had requested a subdivision. He stated that a subdivision's issues were beyond the topic of this hearing. He asked if the four-acre lot under discussion had been an issue before. She replied that it had not and that the references were for the entire 35 acres.

#### **TESTIMONY FROM SECOND ABUTTER**

Cathy Goodwin stated that she would never have put the lot out for sale if the CEO had not told her that it met the ordinances. She stated that they met with the CEO and that he gave them direction. She added that he is supposed to interpret the situation and help lay people understand. She stated that he did not put anything in writing but that he went through the code, looked at maps and made measurements. She asked what a person was supposed to do beyond what she had done. She stated that a paid professional had indicated it would be OK.

Ms. Goodwin stated that what Ms. Mills had been referring to was that one CEO had said that until the court decision was finalized, there would be no further building on the road. The statement does not discuss permits and only refers to the court case.

Ms. Goodwin stated that she was required to pull a building permit to improve Ian's Way. She stated that the appeal had been about Ian's Way, not against the Barretts.

Ms. Goodwin stated that she agreed with the Barretts' position that a hardship had been created that they did not cause. She stated that they did as they were told, got a building permit and moved forward. She stated that at some point, there has to be the onus of Town responsibility.

#### **TESTIMONY FROM INTERESTED PARTIES**

Denise Long stated that she would like to know whether or not the permit for putting down the gravel (on Ian's Way) occurred before or after she went to the CEO to inform him that gravel was being put on the road. She stated that when she asked him what was happening, he had replied that he did not know. Chairman Cielezsko stated that she could ask the CEO that question later because it was not relevant to the current case.

Ms. Long stated that she did not think that relief should come from the board or from the Town but should come from the seller.

Ms. Long stated that someone had said that because the road is a dead-end road, they should have a variance. She asked if that would mean that there would never be another road or another building lot allowed beyond the Barretts' house lot. Chairman Cielezsko stated that it was understood that the road was a dead-end road. He stated that what happens in the future was not on the table at this hearing.

#### **FINAL TESTIMONY FROM APPELLANT**

Mr. DeCoteau stated that the focus needed to be on the hardship criteria. He stated that other issues had been discussed which may be important to those who brought them up, but that the issue was the meeting of the four hardship criteria. He stated that the first three had been covered very well but that they got off track on the fourth criteria.

Mr. DeCoteau stated that the fourth criteria states that the hardship was not self-created. He added that Fernald Lane was a Town road that originally extended much further than the current Fernald Lane Extension. He stated that if it were recognized as a Town road, there would be no question as to whether the Barretts could build on it. He stated that because of changes in the Town's acceptance of the road, they abandoned it. Because of changes in the ordinance and its interpretation, the hardship was created. He stated that the hardship could not have been anticipated by the Barretts and that is why he thought they met the fourth criteria.

Mr. DeCoteau stated that he thought the Barretts met all four of the hardship criteria.

#### **FINAL QUESTIONS FOR APPELLANT FROM BOARD**

Mr. Billipp stated that the fourth criteria states that, "The hardship is not the result of action taken by the appellant or a prior owner." He asked the appellant to address the prior owner section.

Mr. DeCoteau stated that that he did not think the prior owner did anything wrong. He added that it was the Town that changed the road, the Town that changed the ordinance and the Town that came up with the interpretation of the ordinance. He asked what the prior owner did that created a hardship. Mr. Billipp replied that she created a four-acre lot and put it on the market to sell. Mr. Huckel-Bauer stated that that was done based on road information received from the Town.

Mr. Billipp stated that the Barretts are asking to build on a portion of the lot which the BOA thinks meets the 150-frontage and is large enough. He stated that the question would come up for the remainder of the lot later if someone wanted to build on that and got denied because of a self-created hardship. He added that they could refer to the prior variance and ask for one just like that.

Mr. Huckel-Bauer stated that the hardship was not created when the lot was created but was created when the BOA determined that the CEO had either misinterpreted the facts or misapplied the ordinance. He stated that the hardship was created at the current hearing when it was determined that the road did not provide the necessary frontage.

Mr. Huckel-Bauer stated that the Barretts did everything that was reasonable to determine that the lot was legitimate and for a period of time it was considered a completely perfect, conforming, buildable lot. He stated that at some time after that, the road standards were applied in such a way as to create the hardship. He added that the Barretts cannot build on the lot because the BOA determined that the road standards would apply. That was when the hardship was created by the BOA, not when the lot was created with a permit to build.

Mr. Marshall asked if the argument would be any different if the Barretts had bought the whole parcel instead of the four-acre portion. Mr. Huckel-Bauer stated that the entire lot would be a legal, non-conforming lot of record beyond the 1000-foot limit. Mr. Marshall clarified that the issue was the 1000-foot limit and not the fact that four acres were broken off. He stated that breaking off one lot does not create a subdivision.

Chairman Cielezsko asked for the number of feet needed for the variance. Mr. Huckel-Bauer stated that the measurement to the corner of the lot is 1002 feet. He stated that they were seeking a variance from the length standard.

Mr. Huckel-Bauer stated that Ian's Way has already been upgraded and that its use would not change substantially because the change is very low-impact. He stated that the variance request was a minimal variance from the standards.

Chairman Cielezsko stated that if the Barretts were going to use Ian's Way as a driveway it would approach the 500-foot limit. He stated that the driveway has to start at the 1000-foot point or at the point of the dimension granted in a relief. He asked whether the request were for the 1000 feet plus 500 feet for the driveway or was it for 1152 feet. Mr. Huckel-Bauer stated that they would be asking for 1152 feet so that the lot could be considered a conforming lot. Mr. Huckel-Bauer stated that the frontage on Fernald Lane Extension would then be considered acceptable frontage, even though it would vary from street standards.

Addressing the 500-foot issue, Mr. Huckel-Bauer and Mrs. Barrett indicated that the distance would be far less than 500 feet, which they showed on the plot plan. Mr. Huckel-Bauer stated that they would use Ian's Way right-of-way to approach the house rather than Fernald Lane Extension.

Mrs. Barrett asked if Ian's Way would be considered as the driveway or if the driveway would be considered as starting on Ian's Way and extending to the house. Chairman Cielezsko stated that, since the issue had not been addressed in the hearing, he would consider Ian's Way as the driveway. Mr. Huckel-Bauer stated that the entire driveway, either way, would be less than 500 feet.

Mr. Billipp asked if the Barretts would acquire the extra portion to provide the 150-foot frontage if the variance were granted. Mrs. Barrett stated that they had a letter of intent signed and dated by the attorney and it would be executed promptly with the approval of the variance. Mr. Billipp clarified that it would increase the lot to the size of 4.59 acres. Mrs. Barrett concurred.

Mr. Lytle asked for clarification of the location of the additional portion to be purchased. Mrs. Barrett demonstrated that portion on the plot plan.

Chairman Cielezsko stated that he wanted to make sure that the Barretts understood that if the variance was granted, the back lot ordinance requires 150 feet of frontage on an approved street. He stated that granting the variance would not open up the rest of the property and would apply only to the Barretts' lot. Mr. Huckel-Bauer stated that they were only asking for a variance on the Barretts lot to allow construction and that the variance would go with the property limited to only their lot. Chairman Cielezsko stated that a variance would not change the parameters of the street in any way, either in terms of its characteristics or in terms of the Town's understanding.

## **PUBLIC HEARING CLOSED**

The public hearing was closed at 10:35 PM.

**FINDINGS OF FACT:**

- The request for a variance is on property located at the end of Fernald Lane.
- The property is identified as Tax Map Lot 38-51 in the Suburban Zone.
- The property is owned by Lorilyn and Kevin Barrett.
- Ownership of the property is described in the Warranty Deed Book 16374, pages 917-921 received on July 26, 2012 at the York County Registry of Deeds.
- There is a letter of intent from Ryan Rayback of Pierce Atwood in Portland, dated April 5, 2013, describing additional land being conveyed in the advent of the passing of the variance.
- The sketch referenced in the letter of intent from Mr. Rayback to Drummond and Drummond is an accurate representation of the dimensions and boundary markers of the property.
- The public hearing was held on May 16, 2013.
- Testimony was heard that the appellants went above and beyond the normal amount of due diligence that you might expect when buying a house lot. Before purchasing the property they met with the Code Enforcement Officer for interpretation, had a soil test done for a septic system and received a building permit that was valid for a period approaching 60 days.
- It was testified that the sale price of the lot was \$63,500.
- It was testified that the road construction done previous to the building permit and sale had a cost of approximately \$6000.
- It was testified that in the appellant's estimation that without the variance the land would have a maximum value of \$10,000 because it would be only recreational land and only of value to an abutter.
- It was testified by an abutter, Ms. Mills, that the Town files contain information that would make it difficult or impossible to develop the land at the end of Fernald Lane.
- Other testimony contradicted Ms. Mills' statement.
- The request for the variance is to extend the length of the dead-end road to the lot to 1160 feet to make Fernald Lane Extension adequate street frontage for the Barrett lot, Map 38, Lot 51.

Ms. MacKay contradicted Ms. Mills statement that there had been a denial of a permit request in the Town file but that, instead, it was a letter from the CEO stating that until the court had settled, a decision would not be determined. Mr. Marchese stated that there are letters in the file.

Chairman Cielezsko stated that the responsibility of the BOA was to determine that the four hardship criteria were met.

## **MOTION**

Mr. Lytle made a motion to grant the variance to make Fernald Lane Extension 1160 feet to allow street frontage for the Barrett lot. Mr. Marshall seconded the motion.

## **DISCUSSION**

Mr. Lytle stated that he thought the appellants met all four criteria. He stated that he had questions about the fourth criteria but, due to the fact that the permit was issued, he thought they met the fourth criteria as well.

Mr. Marshall agreed that the appellants met all four criteria and to fail to grant the variance would be a violation of the constitution which states that laws cannot be created ipso-facto. He stated that when the Gouchers bought the lot in 1963, the land was buildable and now it is not. He stated that the appellants do have hardship and are not changing the character of the land. He stated that what was happening in the Town created a non-buildable lot. He stated that he was in agreement with Mr. Lytle, which is why he seconded the motion.

Mr. Billipp supported the motion and agreed that the appellants met all four criteria.

Mr. Hamilton stated that he thought the appellants met criteria 1, 2 and 3 and tried very hard to meet criteria 4. He stated that they did everything they possibly could to make the effort work correctly. He added that in any Town, when one applies for a permit which is appealable it opens up the issue. He stated that the appellants did due diligence, but the abutter also did due diligence in exercising her belief that there is a problem with the permit.

Mr. Hamilton stated the decision was a difficult one for him, but he thought the appellants had some awareness throughout the process that the lot had problems. He stated that there had been previous issues with the property. He stated that he did not think the Barretts created the hardship but that the prior owner created the hardship because she had knowledge that the lot possibly exceeded the 1000 foot limit.

Mr. Hamilton stated that he did not think the Town created the hardship primarily because the zoning ordinance was passed in 1982, the 1000-foot limit on length was on the books since 1982 and that people were aware of the problem. He stated that he thought the appellants did everything they could but that he could not say that the hardship was not the result of action by the prior owner.

Chairman Cielezsko stated that Mr. Marshall, Mr. Lytle and Mr. Billipp all agreed that all four criteria had been met. Mr. Hamilton agreed that criteria #1-#3 had been met and #4 had not been met.

Chairman Cielezsko stated that as a last Finding of Fact, the vote was taken in the following manner:

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

Mr. Marshall, Mr. Lytle, Mr. Hamilton and Mr. Billipp agreed that the appellant had met this criteria.

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

Mr. Marshall, Mr. Lytle, Mr. Hamilton and Mr. Billipp agreed that the appellant had met this criteria.

*#3 - The granting of a variance will not alter the essential character of the locality."*

Mr. Marshall, Mr. Lytle, Mr. Hamilton and Mr. Billipp agreed that the appellant had met this criteria.

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

Mr. Marshall, Mr. Lytle and Mr. Billipp agreed that the appellant had met this criteria. Mr. Hamilton decided that the hardship was the result of the prior owner and the criteria was not met.

## **DECISION**

The variance was granted by a vote of 3-1, with Mr. Marshall, Mr. Lytle and Mr. Billipp voting in favor and Mr. Hamilton voting against.

Chairman Cielezsko informed the appellants that they would receive a Notice of Decision within seven days. He stated that they would have to acquire the additional property and record the variance with the CEO within 90 days or the variance is invalidated. He also stated that the decision is appealable within 45 days by abutters or concerned citizens.

## **OTHER BUSINESS**

There was some discussion regarding limitations of a variance. Chairman Cielezsko stated that variances go with the land or with a use or occupation on the property. Ms. Lemire stated that the BOA manual and the Maine Planning & Land Use Laws book address the conditions that can be put on appeals.

There was discussion on BOA members viewing a property. Mr. Hamilton stated that, legally, an individual BOA member cannot view a property unless the other members have also done so, together. There was agreement that it was not always practiced and that the issue should be brought to the attorney. Ms. Lemire stated that an individual can go to look at the property but cannot speak to the people involved in an appeal. Mr. Hamilton stated that the rules were very specific.

### **APPROVAL OF MINUTES**

The minutes of the April 18, 2013 meeting were approved as written.

### **ADJOURNMENT**

The meeting was adjourned at 11:03 PM.

Respectfully Submitted,  
Linda Keeffe  
Recording Secretary

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

Ed Cielezsko, Chairman, Board of Appeals

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