

TOWN OF ELIOT – BOARD OF APPEALS MEETING

July 17, 2014

ROLL CALL

Present: Chairman Bill Hamilton, Ellen Lemire, Ed Cielezsko and Associate Members John Marshall and Charlie Rankie.

Absent: Vice-Chairman Peter Billipp and Jeff Cutting

Also Present: Appellants Stephen and Rhea Sanborn, Code Enforcement Officer Kate Pelletier, abutters and interested parties

CALL TO ORDER

Chairman Bill Hamilton called the meeting to order at 7:00 PM. He stated that the meeting was being video streamed. He asked that all electronic devices be silenced.

REQUEST SUMMARY

Chairman Hamilton stated that the first item on the agenda was a variance request by Sanborn Development, LLC to allow a drive-through window for a future take-out restaurant at 11 Sanborn Lane on property identified as Tax Map 23, Lot 14 located in the Commercial/Industrial Zoning District.

PROCEDURE

Chairman Hamilton stated that the procedure for the public hearing would be as follows:

- The meeting will be opened.
- Voting members will be determined
- The request will be summarized.
- The parties to the action will be determined.
- The jurisdiction, timeliness and standing of the appellant will be determined.
- The appellant will present uninterrupted testimony and may present anything he would like to present as long as it is pertinent to the case.

- The Board will question the appellant.
- Other parties to the action, including abutters, will present testimony.
- The Board will question the parties.
- Other interested observers will have a chance to testify.
- The appellant will make the last statement and take any last questions from the Board.
- The public hearing will be closed.

Chairman Hamilton stated that the appellant would have plenty of time to describe the reasons for the variance request and there would also be plenty of time for others to respond to the request.

Chairman Hamilton stated that the voting members for the hearing would be Ed Cielezsko, Ellen Lemire, John Marshall and Charlie Rankie, with Chairman Hamilton voting in the event of a tie. He asked if any of the voting members had any conflicts of interest. Ms. Lemire stated that she knew the appellant but that she did not think that instituted a bias.

Chairman Hamilton stated that the parties to the action were the appellant and the Zoning Board for the Town of Eliot and that the Code Enforcement Officer and Planning Board were not involved. He stated that the application was received on June 24, 2014 and that there was no time frame involved for the decision.

Chairman Hamilton stated that appellant had standing as the owner of the property.

JURISDICTION

Chairman Hamilton stated that one of the jurisdictions of the Board of Appeals applies to the appellant's submission of two definitions from Sections 1- 2 He stated that the primary jurisdiction is Section 45-49(b) which grants the BOA the power to hear a variance request.

(The definitions are:

“Restaurant” means an establishment where meals are prepared and served to the public for consumption on the premises entirely within a completely enclosed building; and where no food or beverages are served directly to occupants of motor vehicles or directly to pedestrian traffic from an exterior service opening or counter, or any combination of the foregoing; and where customers are not permitted or encouraged by the design of the physical

facilities, by advertising, or by the servicing or packaging procedure to take out food or beverages for consumption outside the enclosed building.

“Restaurant, takeout” means an establishment where food and/or nonalcoholic beverages are prepared and served to the public for consumption on or off the premises; where food and/or beverages may be served to pedestrians from an exterior opening or counter but not to occupants in motor vehicles whether parked or in a drive-through lane or similar arrangements; and where use of exterior loudspeakers is not permitted. The licensing authority may approve service of alcoholic beverages within an enclosed service area for on-premises consumption.)

Chairman Hamilton stated that Section 45-290, Table of Permitted and Prohibited Uses, was also applicable to the variance request, since essentially what the appellant was asking for was a variance from that part of the code.

Chairman Hamilton stated that the other Ordinance which related to the jurisdiction of the BOA was Section 45-402, Land Use Review, which is referred to in the Table of Land Uses. He stated that ordinarily the Planning Board would review something in the Commercial/Industrial Zone.

TESTIMONY FROM APPELLANT

Stephen Sanborn stated that he was asking to have a variance granted where a take-out would be allowed in the Commercial/Industrial Zone because otherwise there is a restriction on the sale of his property. He stated that there were take-out situations “all over the place” and that it seemed strange that there would be a limitation on a restaurant. He stated that if someone wanted to put a sandwich shop with a take-out on his property, they could not do so.

Mr. Sanborn stated that Dunkin’ Donuts has a take-out and that they serve food. He added that there had been a gas station in that location years ago. He stated that before Dunkin’ Donuts was built, there had been a Down East Donut shop at that location.

Mr. Sanborn stated that he found it strange that the Town would limit one type of industry and put a handicap on a piece of property. He stated that years ago, his wife had worked with lawyers researching deeds prior to purchasing the land and that they did not expect the limitation. He stated that he was surprised when a realtor brought it to his attention. He stated that the realtor told him that there was a restriction on his property. He added that if someone wanted to build a building on the property and

lease to a sandwich shop with a take-out, they could not do so. Mr. Sanborn stated that that creates a hardship on them.

Mr. Sanborn stated that the approved building permit has a 180-foot setback from Route 236. He stated that he has two approved Maine DOT curb cuts and that they have been there for years.

QUESTIONS FOR APPELLANT FROM THE BOARD

Mr. Marshall asked if Mr. Sanborn had a particular business he was currently working with. Mr. Sanborn replied in the negative. He stated that he has a realtor who is dealing with the property. He added that, at this point, the realtor had brought to his attention the fact that he has a “nagging thing” on the property right now in that there could be no type of food operation with a take-out at the location because they are not allowed, even though all other types of take-outs are allowed.

Mr. Sanborn stated that Irving Gas probably has 25 spots where people drive up to get their own gas and don’t even enter the building. Mr. Marshall concurred that that could almost be considered a take-out. Mr. Sanborn stated that the bank and the post office also have drive-through situations, with the post office having a location where someone can deposit mail without leaving their vehicle.

Ms. Lemire asked Mr. Sanborn when he had purchased the property. Mr. Sanborn replied that the purchase was in 1984 or 1986.

Ms. Lemire asked Mr. Sanborn to clarify what he had meant by stating that the situation caused a hardship for him. Mr. Sanborn replied that it causes a hardship because he and his wife are trying to slow down and that they both have health problems. He stated that they are trying to sell the property and the hardship is caused by the exclusion of a whole industry. He added that if someone wanted to build a larger building with multiple tenants, certain tenants would not be allowed because of the restriction.

Ms. Lemire asked about other industries purchasing the land. Mr. Sanborn stated that the Commercial/Industrial Zone is quite encompassing for different industries but that there are certain industries that he would not want on the property, such as a recycling industry.

Mr. Cielezsko asked if the highway department had weighed in on a drive-through or if there had been any communication with them. Mr. Sanborn stated that when he filed for permits for the entrances, the Highway Department had no problems. He stated that they looked at the design for the cuts and approved the design. Mr. Cielezsko asked if

the Highway Department had asked what business would be using the entrances and Mr. Sanborn replied in the negative.

Mr. Cielezsko stated that the second criterion for a variance addresses the unique circumstances of a property. He stated that what Mr. Sanborn had described was 436 feet of highway frontage with DOT curb cuts and that that does not appear to be unique to lots on that road. Mr. Sanborn stated that many of the lots are very small and that they lack two entrances. He stated that Irving Gas and Eliot Automotive have two entrances.

Mr. Cielezsko stated that he was looking for something unique that exists only on Mr. Sanborn's lot and not on the other lots. Mr. Sanborn stated that he has access to sewer. Ms. Lemire asked if that was because he was so close to the Kittery line. Mr. Sanborn replied that he had to pay for the connection and that the Eliot Sewer Department granted him permission to tie in to the private line. Mr. Marshall asked if the connection was already in place. Mr. Sanborn stated that he had permission to tie in with an allocation. He stated that he believed his property is the only one with that permission.

Mr. Cielezsko asked if it would also be possible to look at neighboring businesses that have drive-throughs and conclude that Mr. Sanborn's property is the only one on which that is not allowed. Mr. Sanborn stated that the businesses that have drive-throughs can use them but that if he had a tenant who wanted a sandwich shop or a Subway or pizza place, they would not be allowed to have a take-out, even though other locations can have them.

Mr. Rankie asked Mr. Sanborn if he was familiar with the four criteria for a variance when he filled out his application. Mr. Sanborn stated that he was and that Ms. Pelletier had helped him and that she thought his answers were adequate. Mr. Rankie asked if Mr. Sanborn was aware that he did not meet any one of the four criteria that are grounds for a variance. Mr. Sanborn stated that he had the indication that he had met them and that if there was one which he had not met, he was not aware of it.

Mr. Rankie stated that his question was primarily whether or not Mr. Sanborn understood how the criteria work and how the appeal process works. Mr. Sanborn stated that he was aware that he had to meet all four of the criteria.

Mr. Rankie stated that in the first criterion, "The land in question cannot yield a reasonable return unless a variance is granted," the definition of a reasonable return does not necessarily mean a maximum return. Mr. Sanborn stated that there are restrictions on the development of the property. Mr. Rankie stated that his question was whether or not Mr. Sanborn understood how the criteria work, the first one in particular. Mr. Sanborn stated that there would be greater value on a piece of property

if limitations were not placed on it. Mr. Rankie concurred but stated that a reasonable return does not mean maximum return.

Mrs. Sanborn stated they had owned the property for a very long time and had put a lot of their personal effort and money into it. She stated that with the real estate market being the way it has been for the past few years, and still is for commercial property, the situation is not ideal. She added that they would prefer to be able to hold onto the property longer for the market to change but that under their circumstances, they cannot do so.

Mrs. Sanborn stated that with the For Sale sign out, they have not had the response that they expected. She stated that when they have had interested people, there are still limitations and requirements that the prospective buyers have to have, which has put further stress on the Sanborns. She stated that they were not trying to get maximum return from the property. She stated that they were trying to get back what they had put into the property by building both buildings, putting in another foundation and putting money into the development of the property.

TESTIMONY FROM ABUTTERS

There was no testimony from abutters.

TESTIMONY FROM INTERESTED PARTIES

Roseanne Adams of 657 Goodwin Road, Eliot, Maine, stated that she has known the property for years and that the businesses that are there have been very good neighbors for the Town of Eliot. She stated that the Sanborns keep their property in wonderful condition and that the buildings look as new as they did on the day they were put there. She added that she would hate to think that the only businesses that Eliot is going to get in the Commercial/Industrial area are going to be things like auto salvage, auto sales and repair or the storage of wood and landscaping materials.

Ms. Adams stated that a take-out restaurant is unique to the Commercial/Industrial area. She stated that she knew that the BOA had the ability to remove the restriction. She stated that she thought that a restaurant with a take-out would fit very well in the Commercial/Industrial District. She stated that otherwise the owners would be limited as to what businesses could be located on the property. She stated that, presently, the two buildings are office buildings but that it would be nice to have something different for the Town in that area. She stated that she thought the Town would want to do everything that it could to promote and allow the take-out sort of business venture and that it would be very good for the Town.

Bob Fisher of 74 Frost Hill Road, Eliot, Maine, stated that Mr. Sanborn is a good person and that he runs a good business. He stated that Mr. Sanborn has pre-paid power for the location where he wants to locate a store. He added that he has two driveways that are each two lanes in width so that there are four lanes going into the area.

Mr. Fisher stated that what bothered him the most was that almost directly across the street, Dunkin Donuts does exactly what Mr. Sanborn wants to do. He stated that a customer can eat inside or there is a drive-up window where the customer relays his order by phone. He added that not allowing the same thing across the street is something that should not happen. Mr. Fisher confessed that years ago, he probably would have encouraged the BOA not to give the Sanborns a variance. But, he added, things have changed since the Sanborns bought the property and that the way restaurants work now has also changed.

Mr. Fisher stated that what Mr. Sanborn had done so far on the property has been a credit to the area. He stated that Mr. Sanborn worked hard to negotiate access to the Kittery sewer line. Mr. Fisher stated that when he first came to Town, there was nothing but a low field at that location and that Mr. Sanborn spent lots of money grading the property up to the level of Route 236.

Mr. Fisher stated that, in this particular case, he would recommend that the BOA make arrangements somehow to let Mr. Sanborn operate within the market the way it is. He stated allowing a restaurant to come in on the bottom floor with some type of manufacturing upstairs would be good. He stated that the existing property probably employs between 20 and 25 people. He stated that it is good for the community and that Mr. Sanborn is the type of guy one would want to do business with.

QUESTIONS FOR INTERESTED PARTIES FROM THE BOARD

There were no questions.

TESTIMONY FROM CODE ENFORCEMENT OFFICER

Ms. Pelletier stated that she wanted to give some historical perspective. She stated that Dunkin Donuts was able to have a drive-through when other restaurants are not because Down East Donuts had one prior to the definition being enacted. She stated that when Dunkin Donuts came in, they were allowed to continue. She stated that there is no restriction on banks or pharmacies and that the definition only applies to restaurants.

Ms. Pelletier stated that the Planning Board is currently working on the suggestion that a General Business District be established from Beech Road on Route 236, with reduced lot sizes to one acre. She stated that the take-out restaurant is exactly the type of smaller business they would be trying to attract.

QUESTIONS FOR THE CEO FROM THE BOARD

Mr. Marshall asked when the restriction was added to the Zoning Ordinance. Ms. Pelletier stated that she thought it was in September of 1989.

Mr. Cielezsko asked if Down East Donuts was present in 1989. Ms. Pelletier stated that she believed that it was.

Mr. Cielezsko asked if Ms. Pelletier knew the justification for allowing a walk-up take-out and not a drive-through take-out. Ms. Pelletier stated that she thought it was in order to get an Ordinance passed and that it may have gotten watered down so that people would not be afraid of having take-out restaurants in Town, resulting in the restriction of drive-throughs. She stated that such restrictions were quite standard in the 1970s and 1980s. Mr. Cielezsko clarified that the Ordinance is not unique to Eliot and Ms. Pelletier concurred. She stated that most of the time, the restriction is unique to a village area rather than a commercial zone.

Ms. Pelletier stated that the Town has never received a single complaint about the speakers at the bank or the speakers at Dunkin Donuts being too loud. She stated that Mr. Sanborn's property is probably at least 300 to 400 feet from the closest residence and that a speaker would not even be audible at the property lines. She stated that the Sanborns would obviously need to comply with the Town's noise standard, just like everyone else.

Mr. Marshall stated that the Zoning Ordinance differentiates between a regular drive-up, such as an ice cream establishment, and a drive-through. Ms. Pelletier stated that a pedestrian window would be allowed for a take-out restaurant.

Mr. Cielezsko referenced Ms. Pelletier's statement that there were changes in the works using the Comprehensive Plan. He asked if any of the changes would result in getting rid of restriction on drive-through windows. Ms. Pelletier stated that she could not say that anything had been discussed specifically but that typically the way the Planning Board works is to get the meat of the Ordinance together and that the definitions would be the last issue addressed.

Ms. Pelletier stated that the Planning Board had talked about restaurants being allowed but not about removing the actual restriction. She stated that she was not sure many

people even know that the restriction exists. She stated that, in light of the current hearing, they would certainly bring the issue up for discussion.

Mr. Cielezsko stated that it was testified that Ms. Pelletier helped the Sanborns fill out their application and that she referenced the definitions as the location of the problem with the Ordinance. He stated that, hypothetically, if the BOA granted the Sanborns a change of definition so that a restaurant could have a drive-through window on that property, that would not alleviate them because further restrictions could be added.

Mr. Cielezsko stated that instead of adding to the list of allowed uses in the Ordinance, if the definition was changed for that lot only, the result would be the least amount of change in order for the Sanborns to get the variance. Ms. Pelletier concurred as long as they met all of the other requirements.

Mr. Rankie stated that the definition of a restaurant is established very clearly in the Ordinance and the part that is the issue of the hearing specifically states that, "Restaurant means an establishment where meals are prepared and served to the public for consumption on the premises entirely within a completely enclosed building; and where no food or beverages are served directly to occupants of motor vehicles or directly to pedestrian traffic from an exterior service opening or counter, or any combination of the foregoing; and where customers are not permitted or encouraged by the design of the physical facilities, by advertising, or by the servicing or packaging procedure to take out food or beverages for consumption outside the enclosed building."

Mr. Rankie stated that the definition is very specific. He stated that in the definition below that, it is stated that, "food and/or beverages may be served to pedestrians from an exterior opening or counter but not to occupants in motor vehicles whether parked or in a drive-through lane or similar arrangements..."

Mr. Rankie stated that, regardless of what the name is of that part of the Ordinance, the definition is very specific.

Chairman Hamilton noted that the two definitions were part of the appellant's application for the variance. He stated that that fact made the BOA aware that the appellant was also aware of the definitions. He added that the definitions do specifically exclude motor vehicle drive-throughs.

Mr. Marshall asked Mr. Sanborn when he bought the property. Mr. Sanborn replied that it had been in the early part of 1986. Mr. Marshall noted that the zoning change had been made after the purchase and was, therefore, a sort of ex post facto. Mr. Sanborn stated that when he bought the property the CEO at the time had said that there were no restrictions and that Mr. Sanborn could pretty much do anything he wanted to do.

Mr. Sanborn stated that he received permits from the State and from the Army Corps of Engineers and that everything was done above board. He added that he was the only property in compliance on the highway. He stated that before his purchase, the property had been a field that was part of a farm.

Mr. Sanborn stated that if someone was handicapped and came by the restaurant to pick up their food, it would not be allowed for someone to take the food out to the car to deliver it to the customer. Chairman Hamilton stated that he did not see that as an issue. Ms. Lemire stated that the definitions referred to more consistent behavior. Chairman Hamilton stated that a handicapped person could access the restaurant by using a ramp.

Mrs. Sanborn asked when the restriction had been written into the Ordinances. Mr. Hamilton stated that the CEO had cited the date as being 1989. Mrs. Sanborn stated that the Ordinance seemed outdated today to her. She stated that things were going to change on Route 236, either in a good way according to protocol or in a haphazard way, as has happened in some areas of the route currently.

Ms. Lemire asked the CEO if there was a period of time between the time Down East Donuts was closed and Dunkin Donuts was opened. Ms. Pelletier stated that there was a period of time between the two but that Dunkin Donuts had put in an application and that that process usually secures the vested right of the property. Ms. Lemire asked if the application had been submitted within a specific period of time. Ms. Pelletier stated that it had been within a year and that she did not think the Planning Board could have allowed it otherwise.

Chairman Hamilton asked if the CEO recalled what year that was and she replied that it was 2002. He noted that it was after the definition was in place. Chairman Hamilton clarified that what the CEO was saying was that if there was no continuation of the allowable use within a year, it would not have been permitted. Ms. Pelletier concurred and that by Ordinance, an owner loses the right after the year has passed.

Mr. Cielezsko asked Mr. Sanborn how long he had been trying to sell the property. Mr. Sanborn replied that it had been four or five years. He stated that he had had inquiries but that there were businesses he did not want on the property. He stated that currently school buses don't stop there in the morning, the dumpsters are taken care of and the police don't have to keep checking the property because there is security in place.

Mr. Cielezsko asked Mr. Sanborn how much of the property he was trying to sell. Mr. Sanborn stated that he would like to sell the whole property. He stated that since the comprehensive zoning was done in 2009, they have not done much to the property. He

stated that the property cannot be subdivided. He noted that there is discussion about moving toward smaller lots, but that right now the property cannot be broken up.

FINAL TESTIMONY FROM APPELLANT

Mr. Sanborn stated that he could not think of anything he needed to add to his testimony and that he was asking the Board to do the right thing for the Town.

PUBLIC HEARING CLOSED

Chairman Hamilton closed the public hearing at 7:42 PM.

FINDINGS OF FACT

- The appellant is Sanborn Development, LLC.
- The address of the property is 11 Sanborn Lane, Eliot, ME.
- The property is 4.3 acres.
- The property is identified as Tax Map 23, Lot 14.
- The property is in the Commercial/Industrial Zone.
- The property is listed in the York County Registry of Deeds, Book 10432, Page 347.
- Ownership of the property is established by the tax bill of September 23, 2013, submitted with the application.
- The authority of the Board of Appeals to hear the request for a variance is granted under Section 45-49.
- Ordinance Sections 45-290 (Table of Permitted and Prohibited Uses), 45-402 (Land Use Review) and Section 1-2 (Definitions) are also referenced.
- The appellant is asking for a variance to the Eliot Code for a drive-up window (not for pedestrian use), which is a prohibited use in the Table of Permitted Uses (45-290).
- The property was purchased in 1986.
- Testimony from the Code Enforcement Officer stated that the change in the permitted use ordinance occurred in 1989.
- It was testified that the owners have been trying to sell the property for four to five years.
- It was testified that there are businesses in the surrounding area that have drive-through windows that are similar to what the appellant is asking for.
- There has been no input from the Highway Department on a drive-through.

Chairman Hamilton stated that before beginning deliberations, he would like to read the State statutes that the Board is required to follow in the case of a variance. He cited 30-A §MSRA 4353(4), which, “authorizes the board of appeals to grant zoning variances (including shoreland zoning variances) ‘only when strict application of the ordinance to (the person seeking the variance and his or her) property would cause undue hardship’. The ‘undue hardship’ test applies to use variances and dimensional variances to the extent each type is allowed under a particular zoning ordinance. The statutory four part ‘undue hardship’ test appears below. Each of these statutory standards must be met as well as any additional requirements imposed locally. The board of appeals may not grant a zoning variance which is governed by the ‘undue hardship’ test unless it finds that:

- a. The land in question cannot yield a reasonable return unless a variance is granted;
- b. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
- c. The granting of a variance will not alter the essential character of the locality; AND
- d. The hardship is not the result of action taken by the applicant or a prior owner.

Chairman Hamilton continued citing from the MMA Manual as follows: “The Maine Supreme Court has stated in numerous cases that a Board of Appeals must grant the variances to the Zoning Ordinance sparingly and that they are the exception rather than the rule. The test for ‘undue hardship’ outlined above is a very strict one and very difficult to meet. No matter how harmless the variance may seem and regardless of whether there is no opposition from neighbors, the board must remember that its decision is governed by the legal requirements for ‘undue hardship’” and only those requirements.

“The court in Maine has made it clear that ‘undue hardship’ relates to a problem created by some feature of the property itself... The fact that a landowner has a personal problem which prompted the request for the variance is not legally relevant to the standard of ‘undue hardship’ test, no matter how sympathetic the board may be.”

Chairman Hamilton stated that, in that vein, he would like to ask each of the BOA members to state his or her opinion on each of the four criteria.

Mr. Marshall asked if the citation Mr. Hamilton had just read had been part of the Maine Revised Statutes or if it had been part of the MMA statement. Chairman Hamilton stated that it had been part of the MMA Manual. Mr. Marshall stated that the MMA is a lobbying group and that its statement does not necessarily constitute an unbiased opinion. Mr. Marshall stated that he brought that up so that it would be part of the record.

Chairman Hamilton stated that he had cited from the MMA Manual written for the Board of Appeals. Mr. Marshall reiterated that the MMA is a lobbying organization. Chairman Hamilton stated that the MMA was citing Supreme Court cases which had stated the position that they are advising Boards of Appeals to follow. He stated that he did not believe that that was a lobbying effort but was a reflection of facts supported by decisions made by the State Supreme Court in cases of other communities facing variance requests.

Chairman Hamilton asked each of the board members to state his/her opinion on the four criteria. Mr. Marshall asked if Chairman Hamilton wanted to hear the opinions before a motion was made and Chairman Hamilton concurred.

Mr. Marshall stated that the appellant very easily met the first criterion due to being impeded from a reasonable return. He stated that he did not think it was unreasonable that the appellant could expect a return on his investment and on his \$3,500/year tax bill which gets paid whether or not anybody moves into the property.

Mr. Marshall stated that, in terms of the need for the variance to be due to the unique circumstances of the property and not to the condition of the neighborhood, he thought the property was unique because it has sewer. He added that he was not sure that was pertinent in the particular situation. Mr. Marshall stated that most of the businesses in the area do have drive-throughs, not just take-outs. He stated that the most unique circumstance for the appellant was the fact that when he bought the property, the restriction was not in place and was put on his property ex post facto. Mr. Marshall stated that he thought the appellant met the second criterion.

Mr. Marshall stated that in terms of the granting of the variance not altering the essential character of the locality, the bank, Dunkin Donuts, Irving Gas and the Post Office all have drive-throughs. He stated that another drive-through would fit in quite well and that he thought the appellant met the third criterion.

Mr. Marshall stated that in terms of the hardship being the result of action taken by the appellant or prior owner, the appellant had not done a thing to have the restriction placed on his property and that the restriction had just landed on him.

He stated that the peculiar situation on the property is not due to something the appellant has done but is the result of something that has been done to him. He stated that he thought the appellant met the fourth criterion.

Ms. Lemire concurred with Mr. Marshall.

Mr. Cielezsko stated that very rarely does the BOA have such a clear-cut case. He stated that he wanted to address the four criteria. In terms of the first criterion, that the land cannot yield a reasonable return, it was testified that the appellant sank a lot of money into the property and he needs the best sale condition possible to get his return back. He stated that that was the perfect answer to the first criterion and that the appellant met the first criterion.

Mr. Cielezsko stated that there was almost a catch-22 circumstance between the second and third criterion because the unique circumstance of the appellant's property is that all of the properties around him have some degree of a take-out or drive-through window. He stated that the appellant's property seems to be the only one that is stuck with the restriction.

Mr. Cielezsko stated that in terms of the variance not altering the essential character of the neighborhood (the third criterion), the neighbors are all having drive-throughs already and that there would be no difference. He added that the appellant would just join the club.

Mr. Cielezsko stated that the appellant bought the property before the definition of the Ordinance, so he thought that the appellant met all four of the criteria.

Mr. Rankie stated that there have been Supreme Court cases that have clearly illustrated that a reasonable return is not a maximum return. He stated that he did not think the appellant met the first criterion. He stated that he did not agree that there are a lot of restaurants with take-outs on Route 236. He stated that there is a grandfathered take-out that came from Down East Donuts and that all of the other take-outs are not food take-outs. He stated that the residents of Eliot have entrusted the BOA to uphold their Ordinance which very clearly states that they do not want a restaurant take-out. He stated that to have a restaurant take-out, the Ordinance would need to be changed.

Mr. Rankie stated that he did not think the appellant met the second criterion but that he did meet the third and fourth criteria. Mr. Rankie stated that the appellant has not met the first criterion because in order to receive a reasonable return, there is no requirement for a drive-up. He stated that, in terms of the unique circumstances of the property, it is quite similar to other properties with two accesses and that the sewer line that goes down Route 236 is a private sewer line known as The Bolt Hill Sewer, that there are many people connected to it and there is still some spare capacity and so the

appellant does not meet the second criterion. He added that the appellant does meet the third and fourth criteria.

Chairman Hamilton stated that he did not think that the appellant met the first criterion because there are many court decisions that say that a maximum return is not something that a Town guarantees. He stated that most states have the same four criteria. He stated that he thought that there were other uses for the property in spite of the restriction, that the land could yield a reasonable return without a variance and that the appellant did not meet the first criterion.

Chairman Hamilton stated that he thought that the property was not unique and that there are a number of other properties that are similar and not unlike the appellant's property. He stated that his sense was that the ordinance was proposed to try to eliminate the difficulty of people entering from and exiting to Route 236 in a take-out situation. He stated that although other take-outs had previously been permitted, they were not take-out restaurants, which was the topic of the hearing. He added that he did not think the appellant met the second criterion.

Chairman Hamilton stated that he thought the appellant met the third criterion because the district is in the Commercial/Industrial Zone and the essential character of the locality will not be altered by the request.

Chairman Hamilton stated that the appellant's hardship was due to his request to grant a variance to the permitted uses of land in that zone and that the appellant did not meet the fourth criterion.

Mr. Marshall asked what the definition of a reasonable return would be. Chairman Hamilton stated that any other business that is allowed in the Commercial/Industrial Zone would give a reasonable return. He stated that, unfortunately, the BOA has to apply the variance to the land in question rather than to the owner. He added that the variance would be granted to the current owner of the land but that it would carry through to all of the future owners. He stated that variance would be applied to the change of use for that particular land.

Mr. Marshall stated that he understood that, but that he did not understand the definition of reasonable return. Chairman Hamilton stated that there would be other uses for the property, such as expanding the businesses he already has and that there are other businesses which could utilize the property, even though they may be businesses that the appellant does not really like. He stated he could appreciate the fact that the appellant does not want an auto service bay or something like that, but that that would be allowed in the zone. He added that there are other reasonable uses for the property without having to make a change in the Ordinance.

SUMMARY

As the last Finding of Fact:

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

Mr. Marshall, Ms. Lemire and Mr. Cielezsko agreed that the appellant met this criterion. Mr. Rankie and Mr. Hamilton did not agree that the appellant met this criterion.

#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, Ms. Lemire and Mr. Cielezsko agreed that the appellant met this criterion. Mr. Rankie and Mr. Hamilton did not agree that the appellant met this criterion.

#3 – The granting of a variance will not alter the essential character of the locality.

All agreed that the appellant met this criterion.

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

Mr. Marshall, Ms. Lemire, Mr. Cielezsko and Mr. Rankie agreed that the appellant met this criterion. Mr. Hamilton did not agree.

MOTION

Mr. Cielezsko moved, seconded by Mr. Marshall, to grant Sanborn Development, LLC a variance to the definitions in Ordinance Section 1.2 for restaurant and restaurant take-out for this lot, to allow service to occupants in motor vehicles in drive-through lanes.

Chairman Hamilton stated that it sounded as though Mr. Cielezsko was trying to change the Ordinance. He stated that the variance request, if granted, would essentially allow the definitions to be suspended in this particular case only. Chairman Hamilton stated that the motion appeared to be asking for the change in definitions to happen in general. Mr. Cielezsko stated that the motion was just for the lot in question. Ms. Lemire concurred.

DISCUSSION

Mr. Cielezsko stated that he thought that the BOA should only grant the minimum necessary to meet the requirements of the appellant. He stated that if they started dallying with Section 45-290, they would be taking away from the Planning Board what should be in their purview. He stated that the appellant is stymied right now because the definition does not allow take-out. He added that if the BOA granted the appellant that ability, the Planning Board would still have full authority. He stated that there are unique circumstances to that property which should be looked at by the Planning Board and that they have the authority to do a site plan review. He stated that the appellant had met the variance requirements and that he was totally comfortable with granting him the minimum, but that it had nothing to do with changing the Ordinance.

Mr. Rankie stated that he wanted to restate that the people of Eliot had entrusted the BOA to enforce the rules. He stated that it is very, very clear that a restaurant with a take-out window is not permitted in the Commercial/Industrial Zone and that it was the BOA's job to uphold that rule. Mr. Rankie noted that Mr. Hamilton had mentioned that the rule may exist because of traffic, but it also could be that the people of Eliot who voted for the Ordinance do not want fast food. He stated that he thought that the proper way to deal with the situation would be to put it before the people. He added that it was not up to the BOA to take away what the citizens of Eliot had decided.

VOTE

Chairman Hamilton stated that a motion had been made and seconded to grant the variance requested by the appellant. He asked the BOA members to vote. Three members (Mr. Marshall, Ms. Lemire and Mr. Cielezsko) voted in favor and one (Mr. Rankie) voted against. The motion was passed by 3:1.

Chairman Hamilton informed the appellant that he would have a written decision within seven days and that he must record his certification in the York County Registry of Deeds and a copy (with Book and Page) returned to the Code Enforcement Officer within 90 days. He stated that if anyone disagreed with the decision, he could file an appeal within 45 days.

APPROVAL OF MINUTES

Mr. Marshall moved, seconded by Ms. Lemire, to accept the minutes of June 19, 2014, as written. All voted in favor.

OTHER BUSINESS

Mr. Rankie voice thanks to Ms. Pelletier for the background information for the hearing and added that her information had been very helpful.

ADJOURNMENT

Mr. Marshall moved, seconded by Ms. Lemire, to adjourn the meeting. All voted in favor. The meeting was adjourned at 8:11 PM.

Respectfully Submitted,
Linda Keeffe
Recording Secretary

Approved by: _____

Bill Hamilton, Chairman

Date Approved: _____