

## TOWN OF ELIOT – BOARD OF APPEALS MEETING

August 20, 2015

### ROLL CALL

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

Others Present: Code Enforcement Officer Heather Ross; Appellant representatives Sandra Guay, Attorney and Matt Leidner, Civil Engineer.

### CALL TO ORDER

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

Chairman Hamilton stated that this was a public hearing for Cumberland Farms, Inc., Map 29, Lot 27, 18 Levesque Drive, in the Commercial Industrial District. He stated that Cumberland Farms was requesting an Administrative Appeal to the terms of Sections 45-527, 45-528, 45-530 and 45-532, in order to install signage.

Chairman Hamilton asked the representatives for Cumberland to identify themselves. Sandra Quay, an attorney at Woodman Edmands in Biddeford, Maine, stated that she was representing Cumberland Farms and the developer. She introduced Matt Leidner, who was the engineer for the project.

Chairman Hamilton stated that he wanted to determine if there were any conflicts of interest regarding the topic of the hearing among any of the Board of Appeals members.

Mr. Cutting stated that he had a conflict, because he is an employee of Cumberland Farms. He stated that he would step down for the hearing and speak as an interested party.

Mr. Rankie stated that he did not feel that he had a conflict of interest, but that, for the purpose of transparency, he noted that he is the President of Baran Place, an abutter to the Eliot Commons property, of which the condominium is a part. He stated that if the BOA felt that there was a conflict of interest, he would step down from the hearing.

Mr. Cielezsko asked if Baran Place was also part of the Eliot Commons property. Mr. Rankie stated that Baran Place had had financial dealings with Mr. Forsely and that

Baran Place owns 15% of the sewer system that serves Eliot Commons. Mr. Cielezsko asked if Baran Place shares the road with Eliot Commons. Mr. Rankie stated that Eliot Commons owns Levesque Drive, off of which is the road to Baran Place. Mr. Cielezsko stated that he only had the very faintest reservation regarding a conflict of interest.

Mr. Billipp stated that he had no issue with Mr. Rankie's conflict of interest.

Chairman Hamilton noted that Mr. Rankie had recused himself from a former hearing for Aroma Joe's, which was requesting to locate on the Eliot Common property. He stated that he was unclear as to why Mr. Rankie would not recuse himself from the current hearing.

Mr. Rankie stated that since that recusal, he had had time to think about what his relationship is as an abutter, and that he no longer thought that he had a conflict of interest. He stated that he had reconsidered his previous thoughts. He stated that the hearing for Aroma Joe's involved signage, which could potentially obstruct the view from Levesque Drive. He stated that the residents of Baran Place are at the end of their driving ability, and that any obstruction could cause problems.

Mr. Rankie stated that he did not think that he would be a voting member for the hearing, but that, if there was any doubt about his being able to voice his thoughts, he would not hesitate to step down. Chairman Hamilton stated that he did not have reservations as long as Mr. Rankie felt comfortable with his ability to be objective. Mr. Rankie stated that he did feel comfortable.

Mr. Cielezsko moved, seconded by Ms. Lemire, that Mr. Rankie be seated for the hearing. All voted in favor.

Chairman Hamilton stated that the voting members for the appeal would be Mr. Marshall, Mr. Billipp, Ms. Lemire and Mr. Cielezsko. He stated that he would vote only in the case of a tie.

Chairman Hamilton stated that the appeal before the BOA was an appellant review. He stated that that means that the BOA reviews the decision of the Code Enforcement Officer to determine whether the CEO acted in accordance with, or contrary to, the code, as it is written. He added that the BOA reviews the record of the CEO in making the decision.

Chairman Hamilton stated that the applicable ordinance was Section 45-49, Powers of the Board of Appeals. Section 45-49(a), Administrative Appeals, states: "The Board of Appeals shall hear and decide where an aggrieved person or party alleges error in any permit, order, requirement, determination, or other action by the Planning Board or the Code Enforcement Officer. The Board of Appeals may modify or reverse action of the Planning Board or Code Enforcement Officer by a concurring vote of at least three

members, only upon a finding that the decision is clearly contrary to specific provisions of this chapter.”

Chairman Hamilton stated that the voting members had been determined. He stated that the parties to the action were the appellant and the CEO. He stated that the standing of the appellant was determined by letters from Cumberland Farms allowing Attorney Quay to represent the company. He stated that the decision of the CEO was issued on July 2, 2015, and the appeal was filed on July 24, 2015, meeting the requirement for timeliness.

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 appellants will be determined.
- The appellant will present uninterrupted testimony and may take as much time as he would like to present as long as it is pertinent to the case.
- The Board will question the appellant.
- Code Enforcement Officer will present testimony.
- The Board will question the CEO.
- Other parties to the action, including abutters, will present testimony.
- The Board will question the parties.
- Other interested observers will have a chance to testify.
- There will be rebuttal of any previous witnesses by all parties.
- The appellant will make the last statement and take any last questions from the Board.
- The non-voting members of the BOA will make statements regarding the appeal.
- The public hearing will be closed.
- The Board will begin deliberations starting with the findings of fact. They will discuss their duties and what authority they have. They will then make a motion, discuss the motion and, hopefully, come to a conclusion.
- If a decision is reached, the appellant will receive a Notice of Decision within seven days.
- Any decision can be appealed to the Superior Court within 45 days.

## **PUBLIC HEARING**

Chairman Hamilton opened the Public Hearing at 7:10 PM.

## TESTIMONY FROM APPELLANT

Sandra Guay stated that she was representing Cumberland Farms. She stated that she would like to start her testimony by saying that Cumberland Farms has really enjoyed working with the Town of Eliot. She stated that the Planning Board process, the review by the Town, and the welcoming comments that the Town made during that process had been great. She stated that, although she disagreed with the current CEO's decision, she did respect that the CEO has a difficult job and that the CEO was doing the job that she needed to do. Ms. Guay stated that she wanted the BOA to understand that Cumberland Farms was coming to the hearing with full respect for the process and with full appreciation of the experience that they have had up to this point with the Town of Eliot.

Ms. Guay stated that she had submitted a packet to the BOA, in which there is a lengthy statement. She stated that she was not planning to read through it and go over it, but that she wanted to talk about some of the key issues.

Ms. Guay stated that one of the key issues is that signage is extremely important to Cumberland Farms. She stated that signage is their image, their logo, advertises the cost of their product, and lets them compete with others, who also advertise the cost of their product. She stated that it was very important when Cumberland Farms initially came in to talk with Ms. Pelletier, the interim CEO at that time, about signage and that how the fact that the parcel is a condominium parcel would affect the project.

Ms. Guay stated that if anything had been said about signage not being allowed, that a free-standing sign would not be allowed, or any suggestions made regarding problems with signage, the project would not have gotten off the drawing board. She stated that Cumberland Farms would have looked for another site, hopefully in Eliot, and moved forward with that site. She added that, if they could not find an alternative site, they would perhaps have decided not to build a store in Eliot.

Ms. Guay stated that signage is so important that it is one of the first things Cumberland Farms discusses with a town when starting a project.

Ms. Guay stated that the first meeting Cumberland Farms had with Ms. Pelletier was on April 14, 2014. She stated that Matt Leidner was present, as was a representative of the developer, TMC CF New England, A. J. Barbato. She stated that the purpose of the meeting was to communicate and to introduce the project. She stated that they had brought the initial drawings and discussed the fact that it was a condominium parcel, the question about signage, and a lot of other aspects of the project. She stated that they talked about other projects which had been approved.

Ms. Guay stated that, in response to the Planning Board about signage, and to make sure that the plan conformed to whatever the Town was requesting, the signage was discussed at the Planning Board workshop on June 17, 2014. She stated that it was also discussed at the public hearing in October 2014, when the Planning Board voted to approve the project. She stated that she had minutes from that meeting, if the BOA would like to see them. She stated that the minutes contain notes about the discussion about the signage, so it is public record.

Ms. Guay stated that at the Planning Board meetings, Mr. Leidner responded to questions that the Board had about the project and also about allowable signage. She stated that the rendition in the BOA packet, located at Tab 2, had been presented since the very beginning of Cumberland Farms' discussions with the Town. She stated that the rendition shows the signage, both the free-standing sign, as well as the Eliot Commons free-standing sign, in the distance. She added that that rendition had always been part of the project plan reviews and had also been part of what Cumberland Farms had thought would be permissible.

Ms. Guay stated that Tab 3 of the BOA packet contained full-size plans, which include dimensions, layout, and drawings of what the project looks like. She stated that those plans were required as part of the Site Plan Review application. She added that the ordinance states that the purpose of that submission item is to give the CEO an opportunity to review and verify that the project is in compliance.

Ms. Guay stated that she thought it was important to mention that, in all of the discussions that Cumberland Farms had with the Town (Ms. Pelletier, the Planning Board and the public during the public hearing) about signage, at no point did anyone say anything about the signage. She stated that they had never been told that the signage would not be allowed, or that they would need a waiver or a variance. She reaffirmed that, had anyone heard those things at any point, Cumberland Farms would have pulled back on the project, because signage is too important. She stated that Cumberland Farms would not have moved forward without knowing that they were able to get the needed signage.

Ms. Guay stated that in October 2014, the Planning Board voted to approve the plans, which included the signage plans, dimensions and pictures. She stated that on November 18, 2014, the Planning Board issued its Findings of Fact, which were included in Tab 5 of the BOA packet. She stated that the Findings of Fact stated that the CEO was given the plans to review, that approval was given in accordance with those plans, and that no changes could be made to those plans without resubmittal to the Planning Board. She stated that that language was taken right out of the ordinance. She added that once the site plan approval has been received, the project had to be built exactly in accordance with the approval, and that Cumberland Farms had been so doing.

Ms. Guay stated that the last part of the November 18, 2014 approval specifically authorized the CEO to grant the necessary permits, so that the project could be built in compliance with the approvals.

Ms. Guay stated she thought that everyone had acted in good faith during the review process. She stated that there was never any suggestion that the proposed signage would not be allowed.

Ms. Guay stated that she had referred to a couple of court cases in the BOA packet. She stated that the underlying premise of the cases, and the court decisions, is that the purpose of the 30-day appeal period for an approval is because an applicant needs formality, so that the applicant knows that the project can move forward, and that the rug would not get pulled out from under it half-way through. She stated that it does not matter whether an appeal comes from an abutter or from someone within the municipality.

Ms. Guay stated that the ordinance, in the Site Plan Review section, mentions that a municipal officer has the same rights to bring an appeal as does any other person and that with those rights come the same requirement that an appeal must be brought within 30 days.

Ms. Guay stated that the Hudson case is particularly similar to the current case. She stated that, in that case, the Planning Board had granted an approval. She stated that, after the appeal period, the applicant started building in accordance with that approval, but that the CEO later denied a permit because the structure was being built within the 100-foot required setback, even though it had been approved by the Planning Board. She stated that the Board of Appeals Board denied the owner's appeal and the case went to court. She stated that the court decided that the appeal period was finite, and that when that period is over, the decision cannot be appealed, regardless of whether it comes from the CEO or whether or not there had been an error in the original approval. She stated that the court case determined that the approval becomes final once the appeal period is over.

Ms. Guay stated that she disagreed with the present CEO's interpretation of the ordinance. She stated that, once approvals stating that the building must be built according to the plans had been granted, the CEO had been authorized to issue permits, permits had been issued, the property had been purchased, and the building constructed. She added that all of those items had been done in reliance on the approvals, which were never appealed.

Ms. Guay stated that, nine months after the start of the project, a new CEO, who had not been part of the review of the original approval process, interpreted the ordinance differently than the prior CEO, who had been part of the original review. She stated that

the current CEO denied a permit for the signage, which had been approved by the Planning Board, because she did not think it satisfied the requirements of the ordinance.

Ms. Guay stated that there had been significant investment on the part of Cumberland Farms in reliance on the Planning Board approval. She stated that they bought the property, built the building, and did everything exactly as they need to under the approval. She stated that, even if there had been an error in the original approval, it would be too late to deny the sign permit now.

Ms. Guay stated that she wanted to emphasize that Cumberland Farms has appreciated the review process, that they had gotten additional permitting along the way when asked to do so, and had addressed the concerns of abutters. She added that Cumberland Farms prides itself in being a community member. She added that she had never seen Cumberland Farms come into a community and argue about zoning ordinances. She stated that if a project cannot be built where Cumberland Farms wants to build it, they move along. She added that it is not in their nature to argue about things like signage.

Mr. Guay stated that Cumberland Farms at no point asked for, and was not now asking for, any special treatment. She stated that they were only asking the Town to stand by the approvals that had been granted to Cumberland Farms to support the significant investment they had made in Eliot.

Ms. Guay stated that the CEO's position was that the condominium lot was not entitled to its own free-standing sign. She stated that that was not the decision that the prior CEO had made when the issue was brought to her. Ms. Guay stated that the parcel had always been treated as a separate parcel. She stated that State law treats condominium parcels as if they were any other parcel, except that they are under a different type of ownership, and that they are taxed as a separate parcel, have to maintain the same interior setbacks as a separate parcel, and have to be treated as a separate parcel by the Town. She stated that that treatment should not be different in terms of the ability to have a free-standing sign. She stated that, although that was not the interpretation of the current CEO, it had been the interpretation when the approval was granted by the Planning Board.

Ms. Guay stated that she would like to turn the meeting over to Matt Leidner.

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

There were no questions, pending testimony from Matt Leidner.

#### **TESTIMONY FROM CIVIL ENGINEER**

Matt Leidner of the Civil Design Group stated that he was the civil engineer for the project, had been involved since the beginning, and had been at the meetings referenced by Ms. Guay in her testimony. He stated that he would provide more specific details about the signs and would also give a recap of how he recalled the meetings and how he had interpreted the results of the meetings.

Mr. Leidner stated that the first meeting with the Town was the informal meeting with Ms. Pelletier in April, 2014. He stated that Cumberland Farms had requested that meeting proactively, which they do on almost every Cumberland Farms project. He stated that the purpose of that meeting was to scope out any requirements, to go through the project in general, and to vent out any items that could be major factors as to whether or not Cumberland Farms should proceed with the project. He stated that several significant factors had been discussed at that meeting, including signage. He stated that he left that meeting with the understanding that Cumberland Farms would be allowed one free-standing sign of 100-square feet in area and unlimited wall signage.

Mr. Leidner stated that the first formal step was a workshop meeting with the Planning Board for the sketch plan review. He stated that, for that meeting, Cumberland Farms had submitted additional plans beyond what had been shown at the April, 2014, informal meeting. He stated that the sketch plans submitted included the rendering showing the free-standing signs and the wall signs on the building. He stated that, on the rendering, the free-standing sign for Eliot Commons could be seen.

Mr. Leidner stated that architectural building elevations showing the wall signs on the building were also included in the sketch plan packet. He stated that signage was one of several items discussed with the Planning Board at the sketch plan workshop. He stated that at no point did anybody raise concern about the size or number of signs, and that there were no indications that Cumberland Farms should change course.

Mr. Leidner stated that, since all feedback was positive at the workshop meeting, Cumberland Farms proceeded to the Planning Board process for a public hearing. He stated that during the phase between the sketch plan workshop and the formal public hearing, Cumberland Farms developed a full set of design plans to go to the Planning Board for review. He added that the design plans included several sheets detailing all of the signage for the project, including the free-standing sign, the directional signs, the wall signs, dimensions, heights, areas, and colors.

Mr. Leidner stated that every detail about the signs were included in the plans that had been submitted to the Planning Board for review. He stated that those plans were based on what Cumberland Farms thought was allowed, based on the informal meeting, which was a 100-foot free-standing sign and unlimited wall signs. He stated that they did not do anything above and beyond what Cumberland Farms would typically do on any project, and that it was the standard wall-sign package. Mr. Leidner stated that he had

also presented the rendering showing the signs to the Planning Board during the formal public hearing.

Mr. Leidner stated that Cumberland Farms had submitted several copies of the sketch plans for distribution to the various departments of the Town for their review. He stated that, to his knowledge, no comments were brought up that pertained to any concerns regarding the number or area of the signs.

Mr. Leidner stated that Cumberland Farms proceeded through the Planning Board process, the public hearing was closed, and approval for the project granted. He stated that Cumberland Farms had gone forward with the project, as approved, since that time.

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

Mr. Marshall stated that there was mention of direction signs in the application. He asked if those signs were part of the appeal and also if the signs were just “in” and “out” signs with arrows. Mr. Leidner replied that the directional signs for entrance and exit for Cumberland Farms say “Welcome” and “See you soon.” He stated that he recalled that those were specifically discussed at the informal meeting as well, because there was a size limitation in the Town of Eliot, with a height of 30 inches and a width of 6 inches. He stated that the Cumberland Farms standard is slightly larger than that, so Cumberland Farms changed the dimensions to scale the area down, resulting in allowable signage for the Town. He added that the packet which went to the Planning Board contained the scaled-down version that meets the Town requirement.

Mr. Marshall asked if he was correct in assuming that, in the Planning Board meetings, there was a fair amount of discussion regarding signage. Mr. Leidner concurred and stated that that fact is reflected in the minutes contained in Ms. Guay’s BOA packet.

Mr. Marshall stated that it appeared that there were no surprises regarding the signage at the current point in time, because it is what the Planning Board previously agreed to. Mr. Leidner stated that the signs that Cumberland Farms would like to install on the project are the signs that were approved by the Planning Board. He stated that there was nothing different that Cumberland Farms was trying to do other than what was approved by the Planning Board.

Mr. Billipp asked if, despite having had a meeting with Ms. Pelletier, Mr. Leidner had gone through the zoning ordinance specifically on signage himself. Mr. Leidner stated that he had. Mr. Billipp asked if he was aware of the 50-foot limitation for one wall mounted identification sign. Mr. Leidner stated that he was aware, which was part of the reason the issue was discussed at the informal meeting, in order to vet that issue

out. He added that that was why Cumberland Farms specifically reviewed free-standing and wall signage.

Mr. Billipp asked if anyone noticed, during the Planning Board process, that the wall signage was above 50 square feet. Mr. Leidner stated that he did not recall that issue being raised.

Ms. Guay stated that she remembered a discussion at one of the Planning Board meetings about signage where the ordinance book was opened, so the limitations could be looked at. She stated that she wished she could remember more details about that discussion, but she did know that the ordinance was discussed during the review process.

Chairman Hamilton, referring to the sketch plan in the BOA packet at Tab 3, stated that the welcome sign is 19 inches wide and 2 feet 8 inches tall. He asked if that conformed to the code. He stated that he thought that the code read differently than what the signage looked like, because the signs looked bigger than what the code allows. Mr. Leidner stated that the measurement of 2 feet 8 inches is the distance from the concrete base up to the top of the sign. He stated that fill is put over the concrete base, with the finished height being 30 inches. He stated that he thought that the spirit of the ordinance was to limit the height of the sign above the ground. He stated that the rendering in Tab 3 included the structural and electrical aspects of the sign base, which results in the 2 feet 8 inches measurement.

Mr. Cielezsko asked if the proposed signage would meet the ordinance, in Mr. Leidner's interpretation, if the property was a one-owner property, rather than a condominium property. Mr. Leidner stated, given the way in which he understood the ordinance, after the informal meeting with the Planning Board, the signage would meet the ordinance.

Mr. Cielezsko asked whether that conclusion was the result of what Mr. Leidner heard at the meeting or from reading the ordinance. Mr. Leidner stated that his interpretation was a combination of the two. Mr. Leidner stated that what Cumberland Farms typically does is to go through the ordinance and then request an informal meeting, to clarify points about which they are unsure. He stated that the combination of reading the ordinance and listening to the Planning Board was what led him to believe that what was allowed was the 100-square-foot, free-standing sign and unlimited wall signs. He stated that he believed that the free-standing sign was separate from the Eliot Commons free-standing sign.

Mr. Cielezsko asked how much time had passed between the last meeting with the Planning Board, which resulted in the approval of the plans, and the denial of the sign permit. Ms. Guay stated that the Planning Board approval was in October, 2014, the building permit was issued in March, 2015, and the sign permit was denied in July, 2015. Mr. Cielezsko asked when the sign permit was applied for. Ms. Guay stated that it was

applied for in July, 2015. Mr. Cielezsko asked for the reason for waiting until July to apply for the permit. Ms. Guay stated that it was applied for when it was needed. She added that the signs had already been built, and that there was no reason for the timing.

Mr. Cielezsko asked if the signs had been in place at one time. Jeffrey Cutting, Division Vice-President of Cumberland Farms, stated that the signs came as part of the package, and that there had been the Cumberland Farms signs on the gas canopy. He stated that those signs are currently covered up.

Chairman Hamilton stated that the directional signs, according to the plans, are 19 inches by 24 inches. He stated that the ordinance, Section 45-532(d), states that, "directional signs which are free-standing or projecting, nonilluminated, conform to a standardized design, and do not exceed six inches by 30 inches in dimension may be erected in any district without a required permit."

Mr. Leidner stated that the six inches, scaled down from eight inches, is the width of the sign. Chairman Hamilton stated that he did not think that that was the intent of the ordinance. He stated that the surface of the sign is clearly limited to six by 30 inches, and that what Cumberland Farms was proposing was 19 by 14 inches. He added that the code is very specific.

Mr. Rankie asked if Mr. Leidner had read in the ordinance that unlimited wall signage was allowed. Mr. Leidner stated that that was his understanding, after the informal meeting with the prior CEO, Ms. Pelletier.

Mr. Rankie stated that he was originally troubled by the fact that neither an engineer nor a lawyer would have checked with the ordinance, but that Mr. Leidner had stated that he did check the ordinance. Mr. Rankie asked if, at any time, once Mr. Leidner saw the difference between what the ordinance allows and what the standard Cumberland Farms sign package contains, he had felt the need for additional correspondence, rather than relying on the hearsay to which he referred.

Ms. Guay stated that she did not believe that Cumberland Farms was relying on hearsay. She stated that they had spoken with both the planner and the CEO and that they had no reason not to rely on what the CEO had told Cumberland Farms at that time. She stated that the CEO pulled out the ordinance at that time. Ms. Guay stated that both Cumberland Farms and the CEO acted in good faith. She stated that the plans were vetted by the Planning Board and reviewed according to the Findings of Fact by the CEO.

Ms. Guay stated that there had been confusion by the engineer regarding the sections of the ordinance regarding signs, which was the reason Cumberland Farms met with the CEO. She stated that the CEO reviewed the ordinance with Cumberland Farms and that Cumberland Farms relied on that. She stated that she did not think that it was necessary

to get everything in writing from the CEO, who was advising them and helping them through the process.

Mr. Rankie stated that, even though the ordinance specifications are very far from the standard Cumberland Farms sign package, Cumberland Farms had seen no need to clarify the issue in writing. Ms. Guay stated that, from her understanding, there had been confusion about signage, which was the reason for the meeting with the CEO. She stated that, in good faith, she relied on the information provided by the CEO and did not ask for everything in writing.

Mr. Rankie asked if Ms. Guay had, at any time, noticed that the picture provided in the packet shows wall signs that exceed the ordinance. He asked if that had been an issue of discussion. Ms. Guay stated that it was not talked about, even though the picture had been presented to everybody along the way in the Town since the first meeting. She stated that the issue of all signs was never discussed with Cumberland Farms. She stated that if the issue had been discussed, Cumberland Farms would not have built on that location.

Mr. Leidner stated that part of the confusion with the 50-square-foot wall sign language in the ordinance is that the ordinance refers to two or more commercial or industrial establishments. He stated that his understanding, for the purposes of signage, was that the condo lot was being treated as its own, separate lot. He stated that that was the reason why Cumberland Farms was not clear as to what the wall signage limitation would be for this specific situation. He added that that was why they scoped out the situation before making decisions.

Mr. Rankie stated that the ordinance states that an establishment “may have one wall-mounted identification sign not exceeding 50 square feet in size.” He stated that the picture in the packet shows two wall signs, not counting the covering over the pumps. Mr. Leidner stated that the first part of the quoted sentence states that, “On any parcel containing two or more commercial or industrial establishments...” He stated that, from the standpoint of Cumberland Farms, the location is not a parcel which contains two or more commercial or industrial establishments.

Mr. Rankie asked if Cumberland Farms was aware that the BOA had heard an appeal for additional signage on the same property earlier in the year. Ms. Guay stated that her understanding was that there had been a variance request for additional signage, which she thought was different. She stated that if Cumberland Farms had been told that they required a variance, they would have known the prior request was not granted and, therefore, Cumberland Farms would not be interested in that location. She stated that Cumberland Farms was not asking for a variance. She added that the approvals had been granted, and that Cumberland Farms was never told they needed a variance.

Chairman Hamilton asked if Cumberland Farms was aware of the minimum lot size requirements for a commercial/industrial zone. Mr. Leidner stated that he was aware that the minimum is three acres. He stated that the Cumberland Farms parcel is 1.2 acres, and that they had never represented that they had met the minimum lot size. Chairman Hamilton noted that Cumberland Farms wanted the lot treated as a separate lot in terms of the free-standing signage. Mr. Leidner stated that Cumberland Farms understood that that was the way in which the Town would treat the situation. Chairman Hamilton stated that he did not think that that was the way in which the Town would treat the situation. He stated that perhaps there was a misinterpretation and no one caught it.

Chairman Hamilton stated that, even if the lot was over three acres, it would still be part of the condominium complex and would still not be treated as a separate lot, since the owner does not own the space below and only owns the air space. He stated that a condominium is unlike a conventional, three-acre parcel, which owns the land underneath the property.

Chairman Hamilton stated that he wanted to clarify the issue because Ms. Leidner had brought up the fact that he thought the lot was separate and, therefore, eligible for a free-standing, 100-foot sign and other signage. Chairman Hamilton stated that there was a contention. Ms. Guay stated that the contention may have been mentioned in 2014, but the determination was made by the then-CEO and the Planning Board. She stated that, again, had the Town come forward at that point to state that Cumberland Farms could not have a free-standing sign because the parcel is a condominium parcel, they would not be in that location. She stated that it was too late to undo that currently.

Chairman Hamilton stated that it was not too late. He noted that part of the Notice of Decision from the Planning Board, on page 7, states that, "The Planning Board has approved your application and the Code Enforcement Officer is authorized to grant you the necessary Permits of Certificates of Occupancy, as appropriate. It is your responsibility to apply for these permits. In exercising this approval, you must remain in compliance with all the conditions of approval set forth by the Planning Board, as well as all other Eliot, State, and Federal regulations and laws."

Chairman Hamilton stated that, even though the Planning Board approved the application, that fact did not guarantee the granting of any permits. Ms. Guay stated that she would respectfully disagree with that. She stated that the conditions of approval state that the entire project was reviewed by everybody, that there were no secrets, and that there was nobody asking for anything else. She stated that the project has to be built exactly as it was approved, that signage was a required submission item for the site plan approval, and that the CEO was specifically authorized to issue permits in accordance with the approval.

Ms. Guay stated that Cumberland Farms got every permit that was requested throughout the entire review and approval process. She stated that to let a project get approved, building permits issued, the building built and gasoline pumps installed per Planning Board approval, only to be informed that signage would not be allowed seemed to be a reversal of what the intent and meaning behind the approval had been.

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

Ms. Ross stated that Cumberland Farms submitted a sign permit application in order to install one free-standing sign, three building-mounted signs, and two directional signs on property located at 28 Levesque Drive, Map 29, Lot 27, in the Commercial Industrial district. She stated that Cumberland Farms owns a condominium unit labeled "condo unit 2" on the copy of the survey of 28 Levesque Drive.

Ms. Ross stated that Black's Law Dictionary defines a condominium as, "an estate in real property, consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential, industrial, or commercial building on such real property, such as an apartment, office or store." She stated that a full copy of the definition was included in her packet to the BOA.

Ms. Ross stated that, therefore, in review of the application for signs for the parcel, she reviewed the property as a single parcel, as Black's law defined condominium as a portion of a parcel of real property.

Ms. Ross stated that Section 45-527, Sign Area, states that, "the aggregate area of all signs upon a lot or premises, except where otherwise provided in this article, shall not exceed the maximum area permitted in that district." She stated that the proposed signage for Cumberland Farms exceeded the maximum signage allowed for a single lot in the Commercial Industrial zone.

Ms. Ross stated that Section 45-528(c), Measurement, states, "In a commercial or industrial establishment under separate ownership on one parcel within the commercial/industrial district, a common freestanding structure shall be permitted adjacent to a town way or interior street, provided that such sign:

- (1) Identifies establishments located within the parcel;
- (2) Does not exceed one sign per use;
- (3) Does not exceed ten square feet per sign in area;
- (4) Does not exceed 100 square feet in size."

Ms. Ross stated that Cumberland Farms has proposed to install a second, free-standing sign on the property, thereby exceeding the allowance for one free-standing sign on the property, because the property already has a free-standing sign.

Ms. Ross stated that Section 45-528(d) states that, "On any parcel containing two or more commercial or industrial establishments, each establishment may have one wall-mounted identification sign not exceeding 50 square feet in size. The sign may be placed on the exterior of the building housing the establishment. Signs which are placed inside store windows shall be exempt from the maximum allowable area requirement and do not need a permit."

Ms. Ross stated that Cumberland Farms had been permitted for one sign on the building. She stated that the proposed additional two signs exceed the maximum signage per establishment on a parcel containing two or more commercial or industrial establishments.

Ms. Ross stated that Section 45-532(d), Placement, states that, "Directional signs which are freestanding or projecting nonilluminated, conform to a standardized design, and do not exceed six inches by 30 inches in dimension may be erected in any district without a required permit."

Ms. Ross stated that Cumberland Farms has proposed two directional signs that do not comply with Section 45-532. She stated that the signs are illuminated and exceed the maximum size.

Ms. Ross stated that, upon nearing completion, when the canopies were erected on the property, the canopies also had two signs that reflected the Cumberland Farms logo. She stated that Cumberland Farms was told at that time that they would not receive occupancy unless those sign areas were somehow covered or masked, because that would exceed the maximum signage allowed for that property.

Ms. Ross stated that the proposed signs for Cumberland Farms were denied because the signs applied for do not comply with the Town of Eliot Municipal Code of Ordinances.

Ms. Ross stated that Cumberland Farms, as part of their appeal, had stated that the Planning Board approval was "all inclusive." She gave other activities that require additional permitting and compliance, including: electrical permits issued by the State Electrical Inspector; sewer connections issued by Public Works; building permits issued by the CEO; plumbing permits and sign permits, also both issued by the CEO; Fire Marshall permits; DOT entrance permits; and food and alcohol licensing, all issued by various State departments.

Ms. Ross stated that Planning Board, as part of its site plan review, looks at various aspects of the site plan, including the proposed entrance onto a public road, the plans for electrical, sewer connections, building, plumbing, and signage. She stated that, although those items are reviewed as part of the site plan review process, they require separate permitting and compliance with applicable codes. She stated that the Planning Board does not approve those items, as they are permits, required by ordinance or State

law. She added that the Planning Board does not have the authority to issue those permits.

Ms. Ross stated that, as CEO, she does not have the authority to issue permits that are contrary to State law or to the Town's ordinances. She stated that the Planning Board approvals are not all-inclusive, and that the Planning Board does not, in its approval, approve items that are otherwise required by ordinance to be permitted by other departments.

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

Mr. Billipp asked if Ms. Ross had been involved in the Planning Board review process. Ms. Ross replied that she was, at that time, an intern CEO on Fridays only. She stated that she was aware that Cumberland Farms was going through the review process, but she was not a part of that review process.

Mr. Billipp asked if Ms. Ross could explain how the Planning Board could have approved the site plan, including all of the signage with all of the dimensions spelled out, without questioning that signage, since they had the ordinance available to them.

Ms. Ross stated that, at that time, there was no full-time CEO to review the plans from a code enforcement perspective. She stated that the Planning Board was looking at more general aspects, such as zoning, setbacks, buffering requirements, and those types of issues. She added that it is not necessarily the finer points of a plan that are reviewed. She equated it to the approval of a building, where the particulars of how the building is constructed are not part of the approval. She added that construction issues are reviewed by the Fire Marshall's office and the CEO separately.

Mr. Billipp stated that he wanted to return to the condominium issue, where the lot is 1.2 acres versus the 3-acre minimum. Mr. Billipp clarified that the CEO thought that Cumberland Farms was building on a larger parcel, which included Eliot Commons, resulting in the one free-standing sign presently on the property being the only sign allowed for the development.

Ms. Ross concurred, stating that she looked at that particular issue when the application for the sign was submitted to her in June, 2015. She stated that both her research and the definition in Black's Law indicated that a condominium is a part of a parcel. She added that, therefore, she looked at the 1.2 acre parcel as being part of the larger parcel of Eliot Commons.

Mr. Cielezsko clarified that the CEO is not subservient to the Planning Board. He stated that if the Planning Board authorizes the issuing of permits, the CEO still looks at them through the eyes of a CEO. Ms. Ross concurred. She stated that she cannot issue a

permit that is contrary to the ordinance, unless the Planning Board specifically issues a waiver.

Mr. Cielezsko asked if the CEO had ever heard reasoning that indicated that denying a permit is, in effect, an appeal of the substance of the permit. She stated that she had not heard that reasoning.

Mr. Cielezsko asked if the parcel would be eligible for the proposed signage if it was an individual lot. Ms. Ross stated it would still exceed the maximum signage allowed.

Mr. Rankie clarified that, on the overall site plan, the remaining undeveloped portions is an area called "senior housing." Ms. Ross concurred. He asked if that area was also included in the signage limitations. Ms. Ross stated that it was, and that they would be under the same restrictions. Mr. Rankie asked if the free-standing sign on Eliot Commons was 100-square feet in area. Ms. Ross stated that it was, and that it was permitted.

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

Mr. Cutting stated that, in his role at Cumberland Farms, he is one of the first and last people who approve the lots. He stated that when Cumberland Farms wants to develop a new site, he looks at the lot to determine whether it is the lot Cumberland Farms was looking for, in the area they are looking into, with the demographics that they want. He stated that, if so, Cumberland Farms moves forward with the process.

Mr. Cutting stated that, at that point, the process moves up to senior management. He stated that the senior Vice President of the company, the CEO of the company, and other senior management people come out to review the property. He stated that, if senior management agrees that the property is what Cumberland Farms is looking for, then the process is started.

Mr. Cutting stated that Cumberland Farms vets the project from start to finish. He stated that part of that process is paying people, like the attorney and engineers, to meet with the Town officials. He stated that, after the meeting with the Town officials, if Cumberland Farms feels comfortable that they want to move forward, they begin the permitting process, which starts with the Planning Board.

Mr. Cutting stated that he oversees 265 sites in Massachusetts, Vermont, Maine, New York, and New Hampshire. He stated that Cumberland Farms has to feel comfortable that, once they have gotten through the permitting process, that there is something to work with. He stated that he has stores that look like Cape Cod villages, and that he has stores with signs on the sides of some of the buildings that are of a size that that particular planning board wanted. He stated that, if at some point during the process, a

deal-breaker came into play, such as the denial of a price sign, Cumberland Farms kills the project and walks away. Mr. Cutting stated that he had done that in many towns.

Mr. Cutting stated that Cumberland Farms had been relying on Town officials to tell them what they needed to do to get through the process. He stated that, once Cumberland Farms gets through the permitting process, they pretty much feel comfortable that they are OK. He stated that, at that point, Cumberland Farms buys a piece of property and then invests 2.7 million dollars in the building. He stated that Cumberland Farms has to hope that the Town is not going to pull the rug out from under them.

Mr. Cutting stated that, in his mind, the current situation sets a dangerous precedent. He stated that what it is really saying to people in Eliot is that, "You may build your building, but you may not be able to use it." He added that that is a scary thing to think about.

Mr. Cutting stated that, during the 1 ½-2 year process, everybody looked at the plans in good faith, Cumberland Farms moved ahead with the project, and now they are at a critical point in the project. He stated that the critical point is that Cumberland Farms is in business to do what they do, and they need to advertise to the public. He stated that the result of the gas prices in Eliot moving down had already been seen. He added that if Cumberland Farms cannot advertise that fact, that does not work well for the company.

Mr. Cutting stated that he hoped the BOA could take into account the fact that Cumberland Farms moved ahead in good faith, and the Planning Board moved ahead in good faith. He stated that the Planning Board had the same book of ordinances that the BOA has. He stated that they did not see a problem, and that they signed off on the project.

Mr. Cutting stated that there had been several CEOs in Eliot, and that these types of things have happened in the past. He stated that there has to be a cut-off period and that, after the 30-day-appeal process is over, it is over. He stated that a company has to be comfortable to move forward.

Mr. Cutting stated that, in his 38 years with Cumberland Farms, this is the first time he had seen a denial issued after the company had invested the money to build. He stated that Cumberland Farms had built 127 stores in his division during the last five years, and this is the first time he has seen something like this denial happen.

#### **QUESTIONS FOR INTERESTED PARTY FROM THE BOARD**

Mr. Marshall stated that the issue would be decided one way or the other during the hearing. He added that the outcome was not looking very good for Cumberland Farms.

He asked what Cumberland Farms would do if the appeal was denied. Mr. Cutting stated that they would have to try to move forward by finding another resolution, somehow, to do something. He stated that he did not know what that would be, and that that decision would be up to senior management and the attorneys.

Mr. Billipp stated that Mr. Cutting is on the BOA, that he has the zoning regulations that the other members have, and that Mr. Cutting lives in Eliot. Mr. Billipp stated that he was sure that Mr. Cutting followed the project through the Planning Board process. He asked if the issue of the proposed signage not matching what the ordinance requires had ever come up in Mr. Cutting's mind.

Mr. Cutting stated that he purposely did not follow the process, because he did not want to be involved in the process. He stated that he did have faith in the fact that most of the planning boards in the towns with which he has done business did a very good job vetting a project from one end to the other. He stated that in every town he had worked with, the planning board had asked the questions and told the people what they needed to do. He added that, once the papers had been signed, everybody walked out of the meeting feeling good about the decision. He stated that that was what he thought was going to happen in Eliot. He added that once Cumberland Farms had the Planning Board approval, he thought that they were "good to go."

Ms. Lemire stated that Mr. Cutting had referred to permits. Mr. Cutting stated that he had been referring to the Planning Board approval and the building permit for the building. He stated that once Cumberland Farms had been granted the permit for the building, the assumption was that the other permits would follow, because they had been approved by the Planning Board. He stated that the Planning Board approved the signage.

Ms. Lemire stated that there is a difference between permit approval and Planning Board approval. She stated that it is stated in the ordinance that written application to the CEO shall be made. Mr. Cutting stated that, as long as the construction was done as it had been approved, he did not see a reason why the permit was not granted. He stated that, in other towns, if the building was not constructed according to the approvals, the certificate of occupancy would not be issued.

Ms. Lemire stated that the Eliot ordinance does not define the process that way. Mr. Cutting stated he understood that fact, but that he felt that Cumberland Farms moved ahead in good faith, because the Planning Board approved the project. He stated that somebody has to put a name on the paper to purchase the property, and somebody has to put the money up in order to build the project. He stated that he would hate to think that the next time something like this happens, a CEO could say that the building was built as approved but was larger than allowed, so it could not be used, regardless of what the Planning Board had said.

Mr. Cutting stated that there has to be some place where the process stops, but that it was not a question for the BOA to answer.

Mr. Cielezsko asked the CEO if she had the authority to address a wrong done by the Planning Board. Mr. Ross stated that the Municipal Code Enforcement Officers Training and Certification Manual cites the case of Shafmaster vs. the Town of Kittery, Maine. She stated that the Superior Court decision specified that, “a Code Enforcement Officer has an independent responsibility to enforce provisions of the Zoning Ordinance, even where the Planning Board has approved a project. That is, Planning Board approval does not relieve the Code Enforcement Officer of the obligation to enforce, if the CEO finds that the building violates a setback requirement.” She stated that that case had resulted from the Planning Board’s approval for a building to be built in the Shoreland Zone, and the CEO stopped the building.

Mr. Cielezsko asked the CEO whether the BOA had the authority to address a wrong by the Planning Board. He stated that he did not think that the BOA had the authority to fix the situation. Ms. Ross stated that the BOA had the authority to overrule or modify the decision that she made, only if the BOA felt that her decision was clearly contrary to the ordinance. Mr. Cielezsko noted that Cumberland Farms was appealing the CEO’s decision, and that no one was appealing the Planning Board decision. He added it was his understanding that the BOA cannot fix a Planning Board error. Mr. Marshall noted that the BOA could appeal a Planning Board decision, as long as it was done within 30 days.

Mr. Cielezsko asked the CEO if the BOA had the authority to redress a wrong done by the Planning Board. Ms. Ross stated that she was somewhat confused by the question, since the BOA only had the authority, during the current hearing, to decide on the decision that she had made. Mr. Cielezsko stated that that was how he understood the situation. He stated that he wanted to make sure that the BOA did not get soft and decide that they could fix the situation.

Chairman Hamilton stated that Mr. Cielezsko’s question had been a good question, but that he did not think that the CEO was in a position to answer the question. Mr. Cielezsko stated that the CEO knew the BOA’s rights as well as he did, but that he had wanted a second opinion on what authority the BOA has.

Ms. Lemire asked whether either Ms. Guay or Mr. Leidner had had any discussions with Mr. Forsely to determine whether Cumberland Farms could put one of their signs in the existing, 100-foot, free-standing sign. Ms. Guay stated that they did not, because they had always been told that Cumberland Farms could have its own free-standing sign, and the whole project was based on that. She added that Cumberland Farms never had a reason to have that discussion.

Ms. Lemire asked if they had talked to Mr. Forsely since the denial of the permit. Mr. Leidner stated that the only thing Cumberland Farms had done was take Mr. Forsely up on his offer to put up a sign for help wanted on behalf of Cumberland Farms. He stated that the reason that there had been no discussion with Mr. Forsely about including Cumberland Farms in the 100-foot sign was that people go by on Route 236 and do not pay attention to that sign, because they are trying to drive. He stated that the sign is a muddle of stuff, which is why Cumberland Farms needed an independent sign that people could see, in order to designate the gas prices.

Ms. Lemire asked if Cumberland Farms had considered asking permission to place the sign in the DOT right-of-way. She stated that she thought that there was a DOT right-of-way at the intersection of Route 236 and Beech Road. Mr. Leidner stated that there is some right-of-way at that location. Ms. Lemire stated that the thought had crossed her mind that that might be a possibility.

The CEO stated that she believed that signs advertising a business have to be located on the property on which the business is located.

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

Ms. Guay stated that the current CEO was making an interpretation about the condo parcel and how it is treated for signage. She stated that, however, the entire project was based on, and Cumberland Farms relied on, the decisions made by the prior CEO at the start of the project. She stated that perhaps the prior CEO was not as qualified as Ms. Ross is, but that that was not something that Cumberland Farms had any control over.

Ms. Guay stated that Cumberland Farms made its decisions based on, and in reliance on, the decisions and interpretations that were made by the prior CEO. She stated again that Cumberland Farms would not have invested, would not have gotten to this point in the project, and that there would be no signage question, had the interpretations and decisions of that prior CEO been any different than they were.

Ms. Guay stated that Cumberland Farms went forward with a very sizeable investment of purchasing the property and constructing the store, based on the interpretations of the CEO, on the review by the Planning Board, and on the Planning Board's approvals, including the sign plans.

Ms. Guay stated that the only thing that has changed is that now there is a new CEO, who is applying a different interpretation to the code than the prior CEO, who reviewed the plans and with whom a discussion was held by Cumberland Farms on April, 2014. She stated that the discussion had specifically included signage and the meaning of the condominium parcel. She stated that it seemed innately unfair that a new CEO, with a

new interpretation, was resulting in Cumberland Farms being penalized, after the company acted in good faith and in reliance on what it has been told.

Ms. Guay stated that the other types of permitting that Ms. Ross brought up were not something that the Planning Board reviews, or that they have to make a determination on. She stated that those permits are reviewed by the State separately. She stated that those permits are items that Cumberland Farms gets separately from the Planning Board review and approval. She stated that, of course, the Planning Board would indicate that Cumberland Farms needed those permits. She stated that Cumberland Farms notified the Planning Board regarding what stages they were at in the various permitting processes. She stated that sometimes planning boards will issue approvals based on the acquisition of those permits, and sometimes planning boards will want those permits in hand before issuing approvals. She stated that those permits are not under the control of the Planning Board. She added that the Planning Board did have control over signage, and that signage had been part of the review process.

Ms. Guay stated that the legal case which had been referenced was a 1984 case. She stated that her recollection of the case was that it was an appeal of an approval for which the CEO refused to issue a building permit. The CEO's decision was then appealed, and that appeal was denied. Ms. Guay stated that the denial of the appeal was because the CEO had acted within the appeal period for the approval.

Ms. Guay referenced a case presented in the Cumberland Farms packet to the BOA, in which there had been a Planning Board approval. In that case, she stated, the person who been granted the approval had been unable to connect with the CEO, so he started building the structure. Well after the 30-day appeal period, the CEO stopped the project. The property owner appealed the CEO's decision to the zoning board, and the zoning board upheld the CEO's decision.

Ms. Guay stated that the property owner took the issue to court. She stated that the new CEO had issued the stop work order because the plan that was approved by the Planning Board actually violated the setback requirement. She stated that the court found that the refusal to issue a building permit was an untimely appeal of the Planning Board's earlier approval, and that, even if there was a setback violation, the CEO's issuance of the stop work order was "of no effect."

Mr. Guay stated that, once the appeal period is over on the approvals that were granted, the applicant is entitled to rely on that and to move forward. She stated that, if the CEO had acted within the appeal period after the Planning Board approved the plan, she certainly would have the right to appeal the Planning Board's approval if she thought that the plan was not in accordance with the zoning requirements.

Ms. Guay stated that the CEO's decision would be valid as long as it was made within the 30-day appeal period. She stated that, at that point, no investment would have been

made, the property would not have been purchased, no construction would have gone on, and it would have been early enough to stop the process. She stated, after the 30-day period has passed, the property has been purchased, the ground is cleared and the construction is erected, the owner is fully vested in the project. She stated that to pull the rug out from under his feet at exactly that point is exactly what the courts had been addressing. She stated that the CEO's decision is an untimely appeal of the Planning Board's approvals.

Ms. Guay stated that the referenced court case was very similar to the Cumberland Farms hearing, because it involved a prior CEO's actions in accordance with that CEO's belief and a new CEO's interpretation that the owner's property was in violation and that, therefore, she would not issue a permit. Ms. Guay stated that the CEO may have been correct, but the timing was too late.

#### **STATEMENTS FROM NON-VOTING BOA MEMBERS**

Mr. Rankie stated that he continued to be stunned that two professionals would read the four pages of signage ordinance and not put something in writing. He stated that he realized how important signage is to Cumberland Farms. He stated that if he were to vote, he would not see the issue as whether or not Cumberland Farms was a good citizen, because he thought that they were a good a citizen. He stated that the issue was about Eliot's ordinances. He stated that the job of the BOA is to uphold the Eliot ordinance.

Mr. Rankie stated that case law does not influence him one way or the other in terms of upholding the Eliot ordinances. He stated that case law may be applicable in court, but that it did not influence him in any way with respect to whether or not the ordinance is followed. He stated that he could not see that a variance in the Cumberland Farms issue would be appropriate.

#### **PUBLIC HEARING CLOSED**

Chairman Hamilton declared the public hearing closed at 8:34 PM.

#### **FINDINGS OF FACT:**

- The relevant sections of the Eliot Code are:
  1. Section 45-49(A), Administrative Appeals
  2. Section 45-130, Signs

3. Section 45-527, Signage Area
4. Section 44-528, Measurements
5. Section 45-530, Illumination
6. Section 45-523, Placement
7. Section 45-405, Dimensional Standards.

- The property is Unit 2 of a condominium known as “28 Levesque Drive Condominium,” Map 29, Lot 27
- The property comprises 1.21 acres of a 16.2-acre parcel, on which Eliot Commons is 9.46 acres, and Senior Housing is 6.06 acres.
- The property is located in the Commercial Industrial Zone.
- The minimum lot size in a Commercial Zone is three acres.
- The property at 28 Levesque Drive is owned by Sea Dog Realty, LLC, of Portland, Maine.
- Unit 2 of 28 Levesque Drive Condominium is owned by Cumberland Farms of Framingham, Massachusetts.
- Unit 2 was purchased on April 17, 2015.
- On the condominium plan at 20 Levesque Drive, dated April 14, 2015, signed and stamped by Attar Engineering, the general notes in Section 3 stated that, for the entire unit:

1. minimum street frontage is 300 feet.
2. the lot size is three acres.
3. the sign area is limited to 100 square feet.

- Section 10 states that “unit boundaries for all three units shall consist of the air space enclosed within the boundaries of the unit located immediately above bare earth.”
- Section 10 also states that “the land below the unit will be common element appurtenant to said unit.”
- The Planning Board Notice of Decision, dated October 21, 2014, stated, on Page 7, Permits, that, “It is your responsibility to apply for these permits. In exercising this approval, you must remain in compliance with all the conditions of approval set forth by the Planning Board, as well as all other Eliot, State, and Federal regulations and laws.”

Chairman Hamilton stated that the duty of the BOA was to determine whether or not the CEO acted in accordance with the Eliot code or clearly contrary to the Eliot code.

## **MOTION**

Mr. Cielezsko moved, seconded by Mr. Marshall, to accept the administrative appeal, because the CEO has acted clearly contrary to the ordinance.

## **DISCUSSION**

Mr. Cielezsko stated that, without looking at the background, his understanding was that, if the applicant had come to the current CEO with the signage plans and requested a permit, Ms. Ross had looked at the situation completely fairly and clearly. He stated that there was no question in his mind that the signs envisioned by Cumberland Farms are outside the ordinance requirements.

Mr. Cielezsko stated that he felt that Cumberland Farms had been wronged by the prior CEO and by the Planning Board, because Cumberland Farms was not alerted to the fact that they were so far out of the ordinance. He stated that that was his understanding, based on the material presented at the hearing. He added that the BOA does not, however, have the authority to fix that error, or even to decide whether the error has to be fixed.

Mr. Cielezsko added that it was also certainly not up to the CEO to fix the error. He stated that he did not think she should have allowed the permit because that would not be correct and would mean that she was shirking her responsibilities. He stated that he thought that the BOA had to deny the motion and reject the appeal.

Mr. Marshall stated that his thoughts were contrary to those of Mr. Cielezsko. He stated that he had built houses and had been on the receiving end of permits. He stated that, once an owner is granted a permit for a house, he needs to be assured that the process is not going to “go South” on him.

Mr. Marshall stated that he had been on the Planning Board and had seen packages presented in minute detail, especially in projects similar to size to that of Cumberland Farms. He stated that the signage for Cumberland Farms was detailed. He stated that to compare the sign permit to an electrical or plumbing permit would be similar to comparing apples to oranges. He stated that when one gets an electrical permit, a licensed electrician comes in to do the work, the inspector checks it out and, at that point, if something is wrong, the permit is still not denied. He added that a discussion would be held about how to fix the problem.

Mr. Marshall stated that the document presented by the Planning Board to Cumberland Farms was part of the conditions of approval, and the sign sizes were approved. He stated that the approval includes the statement, “The Code Enforcement Officer is authorized to grant you the necessary permits.” He stated that if Cumberland Farms had

been timelier and applied for the sign permit from the prior CEO, they would not have needed to appeal.

Mr. Marshall noted that there appeared to be no one who was objecting to the signage request. He stated that the appeal period of 30 days had passed, and he assumed that nobody objected to anything about the project. Mr. Marshall stated that he was led to believe that whatever the Planning Board did can stand, unless someone had taken the issue to court within the 30-day appeal period.

Mr. Marshall stated that he could see that perhaps the sign could be modified somewhat, but if an owner has a permit to run a business, he has to have the ability to do those things normally required to perform the business. He added that, if nobody knows you are in business, there is no sense opening a business.

Mr. Marshall stated that his argument was that there was sufficient language in the conditions of approval from the Planning Board to Cumberland Farms indicating that the project was approved "as documented," and that the BOA had those documents.

Mr. Billipp stated that he thought the situation was very unfortunate. He stated that Cumberland Farms did receive Planning Board approval, and that it was unfortunate that Cumberland Farms was now dealing with a new CEO. He stated that the approval does state that the applicant must remain in compliance with all of the conditions of the Planning Board, as well as all other Eliot, State and Federal regulations.

Mr. Billipp stated that the whole issue of signage is very important, and he found it amazing that the appellant put so much stock into what was said by the Planning Board and the prior CEO vs. what is written in the ordinance. He added that, obviously, what is written on the page is what needs to be adhered to. He stated that he also found it amazing that the Planning Board did not catch the fact that the signage did not meet the code requirements.

Mr. Billipp stated that he could not imagine that the fact that the lot is a condominium lot had not been discussed in great detail, because that is important in terms of the siting of the building and other decisions. He stated that lot is a 1.2-acre lot in a three-acre zone. He stated that there were a lot of issues that perhaps were not addressed correctly.

Mr. Billipp stated that the duty of the BOA was to decide whether the current CEO acted clearly contrary to the code, and he did not think that she had.

Ms. Lemire concurred with Mr. Cielezsko and Mr. Billipp. She stated that she was truly surprised that Cumberland Farms did not get written approval for the permits. She added that the written ordinance is very clear. She stated that she did not believe that

the Planning Board did do due diligence. She stated that she thought that they should have been more open in discussion about every aspect of the site plan.

Ms. Lemire stated that the current hearing was to decide whether the CEO acted clearly contrary to the ordinance. She added that she did not think that the current CEO had done so.

Chairman Hamilton stated that the former acting CEO, Ms. Pelletier, did submit a statement, dated July 13, 2015, saying very clearly that, "My recollection the discussions is slightly different than your account (referring to the hand-written notes of the informal meeting Cumberland Farms had with the Planning Board).

Ms. Guay asked if she would have an opportunity to respond to the written testimony being presented. Chairman Hamilton stated that his reading of the statement was part of the BOA discussion, that the appellant had essentially implicated the former CEO, and that there was no defense for her other than the letter she submitted. Ms. Guay stated that the CEO's statement should have come up during the open meeting so that she would have had an opportunity to respond. Chairman Hamilton stated that Ms. Guay had a copy of Ms. Pelletier's statement, and that Ms. Guay could have brought it up during the hearing as easily as he could have. She stated that she just wanted it in the record that new testimony was being introduced into the hearing process. Chairman Hamilton stated that it was not new testimony and was already part of the record, because it was part of the submission to the BOA packets.

Chairman Hamilton stated that his reason for bringing up the statement was that there had been no defense of the former CEO. He stated that, from his own thinking, the former CEO did not issue any permits and did not make any incorrect judgments.

Chairman Hamilton stated that perhaps the Planning Board missed something, but that due diligence is not the purview of the Planning Board, and is it certainly not the CEO's purview. He stated that it is the applicant's purview to look at the code to determine whether or not the code is in accordance with their plans. He stated that, in this case, the appellant did not do due diligence. He stated that the fact was that there was no permit issued, and until the permit is issued, there is no decision to be made.

Chairman Hamilton stated that he understood that, in good faith, somebody forgot to see something. He stated that that did not mean that it was wrong or that the Planning Board approved the design, because the Planning Board, in the Notice of Decision, made it perfectly clear that it was up to the applicant to do due diligence to get the permits. He stated that if the Planning Board had approved the project, but the Department of Transportation did not approve, the project could not be built without the DOT permit. He stated that the Planning Board is not responsible for issuing a DOT permit, and they are not responsible for the CEO issuing a permit.

Chairman Hamilton stated that there had been a lot of misunderstanding in this case, and he certainly did not think that any of it was intentional. He stated that he did think that it was all unfortunate, and that he did understand the investment that Cumberland Farms had put into the project. He stated that the BOA does not set precedent and could not make a decision based on what the Planning Board did. He stated that the BOA decision was very narrow.

Chairman Hamilton stated that there are a lot of condominium projects in the Town, and that if each condominium project was able to get 100-square-foot signage, then Route 236 would look like Saugus, Massachusetts, and that is not the intent of the code or the comprehensive plan. He stated that the CEO found the problem and addressed it, and that he thought she did it correctly.

Mr. Marshall stated that it had been brought up a couple of times that the appellant should have had things documented. He stated that, looking at the information provided in the packet, Cumberland Farms clearly did get documentation. Chairman Hamilton stated that Cumberland Farms had gotten some things documented, but that they did not get everything documented. Mr. Marshall stated that the colored picture rendering was part of the document, as were the pages of plans. Chairman Hamilton stated that those items do not mean that the project had been approved.

Mr. Marshall stated that the Planning Board specifically said, in the Notice of Decision, "The property may be developed only in accordance with the plans, documents, materials submitted and representations the applicant made to the Planning Board. All elements and features of the use as presented to the Planning Board are conditions of approval and no changes in any of those elements or features are permitted unless such changes are first submitted to and approved by the Eliot Planning Board." He stated that the NOD goes on to say that the CEO is authorized to grant these permits.

Mr. Marshall stated that Cumberland Farms did document the decisions, and that it is not hearsay. He stated that, for whatever reason the Planning Board decided to approve the project, they did approve it. He stated that, since nobody appealed the approval within 30 days, the approval stands.

Mr. Cielezsko stated that Planning Board approval can be appealed, and there was no appeal. He stated that part of the approval was for Cumberland Farms to get the permits. He stated that if Cumberland Farms had gone to the prior CEO, they would have been granted the permit. Ms. Lemire stated that he could not know that. Mr. Cielezsko apologized and stated that, without knowing, it is still very possible that the permit would have been issued. He stated that it was only his opinion, and that it was not the prior CEO's decision that was at issue. He stated that he was just setting the background. He stated that Cumberland Farms did not ask the prior CEO for a permit, but that they did ask the current CEO.

Mr. Cielezsko stated that the current CEO had looked at the ordinance and had seen the defects in the appellant's application. He stated that that was all there was to it, and that the BOA could not address what had happened to Cumberland Farms before. He stated that the truth was that the signage did not meet the ordinance. He stated that the BOA could not fix what had happened, but that Cumberland Farms does not meet the sign ordinance.

Mr. Marshall stated that, whether Cumberland Farms meets the ordinance or not, their approval is the Notice of Decision. He stated that if they were even to change the lettering style from the document they had presented to the Planning Board, they would not have met the conditions of the approval. He stated that if Cumberland Farms made any changes to the submitted plans, they would be out of conditional use.

Mr. Billipp stated that Mr. Marshall had read #1 in the list of conditions in the Notice of Decision. He noted that #4 states that, "The applicant authorizes inspection of premises by the Code Enforcement Officer during the term of the permit for the purposes of permit compliance." He stated that he thought that what everybody was trying to say was that, yes, the project was approved, subject to getting a number of permits from various people, one being the CEO. He stated that that statement spells out that the approval is subject to gaining other permits, one of which is the sign permit. He stated that in the process of discovery, the CEO discovered that the signage did not meet the ordinance requirements.

Mr. Marshall stated that he could give that some credit if there were people appealing the approval, but that nobody was and nobody had. Chairman Hamilton stated that he did not think that was relevant, and that the BOA decision was only to determine whether the CEO acted clearly contrary to code.

## **DECISION**

A vote was taken on the motion to accept the administrative appeal because the Code Enforcement Officer acted clearly contrary to the ordinance. An affirmative vote was an approval of the appeal. The motion failed by a vote of 3:1, with Mr. Cielezsko, Mr. Billipp and Ms. Lemire voting against, the chair concurring, and Mr. Marshall voting in favor.

Chairman Hamilton stated that the appeal was denied. He stated that a Notice of Decision would be issued within seven days and the appellant would have 45 days from the hearing date to appeal the decision.

## APPROVAL OF MINUTES

A motion was made by M. Cielezsko, seconded by Ms. Lemire, to accept the minutes of the July 16, 2015, as amended. All were in favor.

## OTHER BUSINESS

Mr. Rankie stated that when Chairman Hamilton opened the hearing, he had stated that the appeal would require a vote of three BOA members. He stated that three constitutes a quorum. He asked what would happen if there were two votes in one direction and one vote in the other. Chairman Hamilton stated that the motion would fail. Mr. Rankie stated that it is important to craft a motion with that possibility in mind.

Mr. Rankie stated that he was disappointed that Cumberland Farms could not have their signage, but that he could not help but return to the fact that Cumberland Farms paid a lot of money to some very expensive consultants, who did not do a good job.

Chairman Hamilton stated that it was noted at the last BOA meeting that there was an issue with corner lots regarding accessory structures in the front yard. Mr. Rankie stated that he thought that what the ordinance was addressing was having an owner on a main-street-type lot the size of a postage stamp being able to locate a garage in front of the house. He stated that Mr. Marshall had the classic case, with a house located on the back corner of his lot, resulting in a large amount of land on which he cannot build.

Chairman Hamilton asked what the BOA members wanted to add to or change in the letter to the Planning Board regarding the issue, which he had drafted to be sent to the Town Manager. Mr. Rankie stated that the statement in the ordinance that, "an accessory building shall not be located within a front yard," was questionable.

Ms. Lemire stated that the last case the BOA had heard was, essentially, a taking of land, because one-half of the owner's property was unusable for building. Mr. Rankie stated that the owner bought the property knowing that limitation, so he did not feel that Ms. Lemire's statement was accurate. He stated that the issue at hand was to pose the question about the ordinance to the Planning Board.

Chairman Hamilton asked for suggestions about how the draft should read. Ms. Ross stated that the ordinance could read that an accessory building shall not be built within a front yard **setback**. Mr. Rankie stated that there were two issues: the front yard setback, and locating an accessory structure in front of a house. Ms. Ross stated that this discussion had contained the issue of whether an accessory structure should be more clearly defined, but she thought that that might be difficult to do, and that stating that an accessory structure cannot be located in a front yard setback might be the easier route.

Mr. Rankie asked how that would be. Ms. Lemire stated that the setback language would be clear, but that defining an accessory structure, or limiting it to specific categories, would be pretty murky. Ms. Ross concurred. She stated that where the ordinance states that an accessory building, “shall not be located within a front yard,” would then read, “shall not be located within a front yard setback.”

Chairman Hamilton asked what the front yard setback typically was. Ms. Ross replied that it was 30 feet. Mr. Billipp stated that, if an owner had 60 feet of setback, he could essentially put an accessory structure in the front yard. Ms. Ross concurred, stating that a shed or a garage could be located between the setback and the house. She stated that she was not sure whether or not that was the Planning Board’s intent, so that to propose that solution would be a way to open up a discussion.

Mr. Cutting asked if a house was on a street with two corners, one on each side of the house, it would be better to say that the definition of a front yard would be the yard in front of the house with a parallel line going to both streets. He stated that with that definition, anything in back of that line would become side- and back-yard setback, as long as the line was within the front yard setback. Mr. Marshall stated that the more complicated it gets, the more unintended consequences could result.

Ms. Ross stated that, in that instance, a clarification of the definition of a corner lot could be used instead. Chairman Hamilton stated that it could also be a clarification of a front yard. He stated that in one of the cases before the BOA, the owner had had three front yards, and that that seemed unreasonable.

Chairman Hamilton stated that providing the Planning Board with a little bit of the background to the issue would be helpful. He stated that the Planning Board’s position may be that the intent of the ordinance was to prevent an accessory structure being placed in the front yard.

Mr. Rankie asked if Chairman Hamilton would be willing to present the letter to the Planning Board. Chairman Hamilton replied that he would rather have the letter speak for itself. He stated that he did not want to recommend to the Planning Board what they should be doing. He stated that allowing an accessory structure in a front yard might be good for an appellant, but that it might not be what the code had been written for.

Ms. Ross stated that she had had discussions with Ms. Pelletier on the particular cases that had come up, so that Ms. Pelletier would have that background when the issue is raised at the Planning Board meeting.

Chairman Hamilton asked what the BOA members thought should be changed, if anything, on his draft of the letter. He stated that the draft stated that the language of the ordinances, “may be in need of examination by the Planning Board for possible

revision,” proceeded to the wording of the code, and then stated that in recent BOA deliberations, the front yard was on three sides of the property, making the placement of any accessory structure extremely limited.

Ms. Lemire stated that the only thing she would change is that the deliberations also included a case with two streets, not just three streets. Mr. Marshall stated that with the ordinance worded the way it is, even if an owner is not on a corner lot, the ordinance bites him in the neck.

Mr. Marshall stated that his understanding from those who wrote the ordinance was that an accessory structure could not be located within the front yard **setback**. He stated that, within those 30 feet of setback, a structure cannot be built. He stated that he has 100 feet of setback and that the ordinance would not allow him to use any of it.

Mr. Cutting stated that the letter should suggest that the ordinance read that an accessory structure cannot be built within a front yard setback. Chairman Hamilton stated that it could read, “It has been suggested that front yard setback be substitute for front yard.”

Mr. Rankie stated, with Mr. Billipp concurring, that it could read, “We ask that you consider changing the current ordinance from, ‘An accessory building shall not be located within a front yard,’ to, ‘An accessory building shall not be located within a front yard setback.’” Chairman Hamilton stated that that change would allow the construction of an accessory building within a front yard, which would have taken care of the two cases recently heard by the BOA.

Chairman Hamilton stated that the next item of business was the draft of the Town of Eliot Board of Appeals Application, prepared by the CEO. He stated that he thought the application should say that an appellant should address each one of the four criteria necessary to be met for a variance. Chairman Hamilton noted that the statement was in the application, but that it did not say that an appellant should indicate, on a separate sheet of paper, how he met the four criteria. He added that the application needs to note that the appellant should include a written description.

Mr. Rankie stated that Ms. Ross had indicated that she would do something so that the BOA would get the four criteria filled out on a criteria form, rather than on a separate piece of paper. Ms. Ross asked if the BOA would like the application to include a separate section listing the four criteria and asking the appellant to describe how he meets them. Chairman Hamilton, Mr. Marshall and Ms. Lemire agreed, stating that if the appellant needed more room, he could add another page.

Ms. Lemire asked if the appellant was going to start paying for the abutter notification. Ms. Ross stated that, at this point, that expense is covered in the fee that is paid initially. She stated that she did include in the application that the appellant had to submit all 10

sets of copies, rather than taking up staff time and materials of the Town to provide them.

Mr. Billipp noted that the fee is mentioned on the form in two places and asked if the total fee was \$300. Ms. Ross replied in the negative.

Ms. Ross stated that she would explain how and why the form was put together in the way it was. She stated that the top part of the form was for the Town Clerk's office, to verify when the application came in, who received it, that all of the necessary documentation was included, and that the application was complete. She stated that the second section was for the CEO to indicate the date the fee had been paid, the date of the scheduled appeal, the date of the abutter notices, and the date of the newspaper notification. She stated that the application would then go to Ms. Albert, the Administrative Assistant, who would make sure that the notices got sent out.

Ms. Ross stated that she incorporated all three types of appeals into one application, because she thought it was easier and clearer that way. Ms. Lemire concurred. Ms. Ross stated that the form included the basic property information as well as the owner and applicant information, which are often different. She stated that the form has space for a brief narrative of the proposed project, in order for the BOA to determine the type of appeal they would be hearing.

Mr. Billipp asked if there was a place for the book and page of the deed. Ms. Lemire noted that the form asked for the map and lot numbers. Mr. Marshall stated that it would be good to include the deed information, rather than having the applicant bringing in the deed. Ms. Ross stated that the BOA had said that the deed had to be part of the packet. Ms. Lemire stated that it had always been done that way.

Ms. Ross stated that she had included information about lot coverage and vegetation coverage. She stated that the directions for determining coverage are described on the application. Ms. Lemire stated that that was a good idea, especially in shoreland applications.

Ms. Ross stated that in a shoreland application, normally there would not be an expansion within the setback, but there could be in the Shoreland Zone, where people might request projects that are outside the setbacks. She stated that that was the reason she had included a section on the application for information regarding setbacks. She stated that without the setback information, it is not always clear what the appellant wants to do.

Mr. Marshall stated that perhaps some of the information should be noted as necessary "where applicable," because if someone is asking for a change in plumbing, they would not need to provide information on lot coverages. Ms. Ross stated that she could note

that the information should be included in applications where an expansion of the footprint is proposed.

Mr. Billipp stated that it was not clear who was supposed to fill out parts of the application. He asked if the appellant was required to fill out the information on lot coverages and setbacks, adding that the appellant would not know that information. Mr. Rankie stated that the appellant could get help. Ms. Ross stated that that was the reason she had included the explanation on how to figure out those answers. She read the directions for figuring out lot coverage. Mr. Billipp stated that the chances of getting the form filled out correctly were very small. Ms. Ross stated that if there were parts of the application which were not filled out completely or properly, she would be able to help the appellant when she received the forms.

Chairman Hamilton asked if the application should state above the lot information questions, "The following should be filled out by the applicant." Ms. Ross stated that she could change the background color of the top sections on the first page, because those are the only sections that are filled out by anybody other than the applicant. Chairman Hamilton stated that changing the background color on those sections would help, but that he also thought it needed to be noted which information the appellant was required to provide.

Mr. Billipp stated that even he would not know what to do with the form. He stated that, although he had not studied it, he thought it was a lot of information and that most people would freak out.

Ms. Lemire asked how often an appellant would fill out the application without having any help. Ms. Ross stated that an appellant would usually meet with her first, at which time she would show them the application and indicate what needed to be filled out.

Mr. Cutting asked if it would be possible to have two different applications, one for the basic residential and another for businesses.

Ms. Ross stated that, if the BOA thought that the coverage information was not helpful, she could remove that section. Mr. Rankie and Ms. Lemire stated that they thought the information helpful.

Mr. Marshall stated that the BOA needed to remember that, for the appellant, the process was all very intimidating. Ms. Ross stated that, most of the time, by the time they get to the point of application, she has already walked them through the process. She stated that she would already have discussed the reasons the appellant could not get the requested permit, what the options were, how they could appeal, and what the results might be. She added that she always lets an appellant know that she is willing to walk them through the application.

Ms. Ross stated that, after the section on lot coverage and setback, the form contains a section noting required information to be included in the 10 sets of materials, including the plot plan, the property tax card, the property deed, and the fee for \$150.

Ms. Ross stated that she had included a section on the types of appeals: waivers, administrative appeals, and variances. She stated that she had attached a copy of the ordinance, Article II – Board of Appeals, so that if the appellant had any further questions, he could refer to that.

Mr. Cielezsko asked if there would be a separate section for the four criteria. Ms. Ross replied in the affirmative. He noted that the application would also be used for waivers and that waivers have five recommended questions which should be answered. He noted that waivers should also have a separate section to be filled out by the applicant. Ms. Ross asked if waivers have criteria by ordinance. Mr. Cielezsko replied that there are five recommendations proposed by State law. He stated that the applicant's answers help the BOA to draw a conclusion on the waiver request.

Mr. Cielezsko stated that the five recommendations for a waiver closely resemble the four criteria, but that there are five questions which should be answered.

Ms. Ross stated that she could have separate sheets of paper for each type of appeal; one for itemizing the four criteria for variance appeals, another with the five recommendations for waiver requests, and another asking for specifics as to why an appellant thought that the CEO's decision was contrary to the ordinance for an administrative appeal. Ms. Lemire stated that that would be a good idea, because often people do not understand what an administrative appeal entails.

Ms. Lemire stated that the first two pages of the application would be the same for all requests, but that there would be a separate additional page for each of the three types of requests.

The BOA thanked Ms. Ross. Chairman Hamilton stated that it was a great effort, and that it was good to have the information put together in a way that was clear, both to the BOA and to the applicant.

Mr. Rankie thanked the CEO for the great package she had put together for the BOA hearing.

Mr. Rankie noted that he had been sworn in as a BOA member. Chairman Hamilton stated that he also had been sworn in.

Mr. Rankie asked if anyone had noticed that the attorney alluded to a consent agreement in the paperwork she had provided. Chairman Hamilton noted that he had noticed. Mr. Rankie stated that the consent agreement issue was still out there.

Chairman Hamilton stated that it was still out there in her thinking. Mr. Rankie stated that it was an indication as to how people think, and that he had heard rumors about people wanting to create an ordinance about the issue. He stated that consent agreements must be operating procedure in some places.

Chairman Hamilton stated that he happened to come across something in the Maine Municipal Association Manual, which essentially indicated that the executive officers cannot overrule a decision by the Code Enforcement Officer or the Board of Appeals. Mr. Marshall asked who the executive officers were. Mr. Rankie stated that they were the Select Board. Mr. Marshall asked if it was the Town Manager. Mr. Rankie stated that the Town Manger was in Administration, as opposed to Executive or Legislative.

**ADJOURNMENT**

Mr. Cielezsko moved, seconded by Ms. Lemire, to adjourn the meeting. All were in favor. The meeting was adjourned at 9:32 PM.

Respectfully Submitted,  
Linda Keeffe  
Recording Secretary

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

Bill Hamilton, Chairman

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