BOARD OF APPEALS – TOWN OF ELIOT, MAINE

September 18, 2014

ROLL CALL

Present: Chairman Bill Hamilton, Vice-Chairman Peter Billipp, Ed Cieleszko, Ellen Lemire, Jeff Cutting and Associate Members John Marshall and Charlie Rankie.

Others Present: Kate Pelletier, Code Enforcement Officer; Nancy Graham, Appellant; Jeff Aleva, representative for Loren Goodridge, Appellant; abutters and other interested parties.

CALL TO ORDER

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

Chairman Hamilton stated that there were two public hearings, each for a variance request.

REQUEST SUMMARY

Chairman Hamilton stated that the first item on the agenda was the variance request by Nancy Graham for property located at 195 Pleasant Street, Eliot, Maine, identified as Tax Map 1, Lot 59. He stated that the request was to allow the construction and occupancy of an accessory dwelling unit (ADU) and garage on an existing vacant lot without a principal dwelling unit, until such time as a growth permit becomes available.

Chairman Hamilton asked if any of the BOA members had a conflict of interest with the request and there were no conflicts.

Chairman Hamilton stated that the voting members would be Jeff Cutting, Ed Cieleszko, Peter Billipp and Ellen Lemire, with Chairman Hamilton voting in the event of a tie.

Chairman Hamilton stated that the parties to the action were the appellant and the code of the Town of Eliot. He stated that the CEO and the Planning Board were not involved.

Chairman Hamilton stated that the request was for a variance and that a variance is something that is allowed by statute and by the Eliot code. He stated that the

jurisdiction in Section 45-49(b) grants the BOA the power to hear a variance request. He stated that a variance is usually a very difficult request and that it is designed, essentially, to allow the Board to make a decision that is not within code or upon which the code has a restriction that the BOA was being asked to vary to allow a certain use or a certain request to go forward.

Chairman Hamilton stated the standing of the appellant is determined by timeliness and by the relationship of the appellant to the request. He stated that there was no timeliness issue involved in the request because it was not the result of an action by either the Planning Board or the CEO. He stated that the request for a variance requires proof of ownership and that the appellant, Ms. Graham, had not provided that proof. He stated that a site location map is also typically required. He stated that the appellant had provided a map, but not a site map, as to where the property is located.

Ms. Graham provided the site location map and copies were made for the BOA members. She also provided the Warranty Deed which identified the property as registered in the York County Registry of Deeds, Book 16735, Pages 154 and 155. Chairman Hamilton stated that standing had been established.

PROCEDURE

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

- The appellant will present uninterrupted testimony and may present anything he or she would like to present as long as it is pertinent to the case.
- The Board will question the appellant.
- Other parties to the action, including abutters, will present testimony.
- The Board will question the parties.
- The CEO will testify.
- Other interested observers will have a chance to testify.
- The appellant will make the last statement and take any last questions from the Board.
- The public hearing will be closed.
- The Board will deliberate, review the Findings of Fact, and the powers and duties of the BOA in terms of variances.
- A motion will be made and a decision made of the variance request.

TESTIMONY FROM APPELLANT

Nancy Graham stated that her intent was to build a home on property located at 195 Pleasant Street. She stated that her hope was that she could build a garage with a rental

unit above it where she could live until her home is finished. She stated that she purchased the property in November of 2013 and that, at that point in time, she met with the CEO who had indicated that she would have no problem in getting a building permit for the property. She had intended to put her current house in North Berwick on the market and start building in the summer of 2014.

Ms. Graham stated that when she put in her application for a building permit in early May, it was indicated that there were no further growth permits and that the number of permits available had been reduced in the Town. She stated that she is currently fifth on the list for a growth permit and that she intends to start building as soon as a permit becomes available. She stated that her hope was that she could build a garage and live in an apartment above it until her house was built.

Ms. Graham stated that her home in North Berwick has been sold and that she is now renting a home in Kittery until she can access her property. She stated that she would like to be able to live in the apartment above the garage while her home is being finished. She stated that she intended for them to be started simultaneously and that she had discussed that with her builder so that there would not be a great delay in having her home built.

QUESTIONS FOR APPELLANT FROM BOARD

Mr. Marshall asked if Ms. Graham had talked to Mr. Marchese (then CEO) prior to purchasing the property. Ms. Graham responded that she had met with him in October 2013. She stated that her realtor had also told her that the lot was a buildable lot and that there would be no problem. She stated that she also did test pits on the lot to make sure it was reasonable to build there.

Ms. Graham stated that the CEO had told her that there would be no problem getting a permit to build on the lot. She stated that she then basically took her life savings and purchased the property.

Mr. Marshall asked if building an ADU was part of the original plan. Ms. Graham replied in the affirmative. She stated that she lost her husband 18 months ago and that the ADU income would help as an addition to her income.

Mr. Cutting asked if the lots had just been developed or had they been in existence for a long time already. Ms. Graham stated that Beth Bradstreet owned the original dwelling and that there were two lots tied off from that lot. She stated that the second lot had gone off the market and had never been sold because it is too close to the river. She added that her lot runs parallel to that of Ms. Bradstreet and was created two years ago.

Mr. Cutting noted that the appellant met with the CEO in October 2013 and bought the property in November 2013. He stated that growth permits become available every January and that the growth permits had been taken by the time she applied. Ms. Graham stated that she had to find a design of a home that would work on the land and that, clearly, she had not worked rapidly enough. She stated that she had not realized that there were only 22 growth permits available and that a number of those had been taken by a developer. Mr. Cutting asked if that had ever been mentioned to her and she replied in the negative.

Mr. Cutting asked if the appellant had received help from an attorney in purchasing the property. Ms. Graham stated that she used a title company. She stated that her own attorney was working with the selling party, but that she had reviewed the transaction and felt very comfortable with what she saw and approved of the title company that the appellant chose.

Ms. Lemire asked what the appellant had meant when she stated that she would like to build the garage and house simultaneously. Ms. Graham responded that she would like to be able to move as quickly as possible so that she could live on her own property instead of having to rent. She stated that if she was allowed to build the garage and the ADU over the garage, that that would be wonderful. She added that the home would require more time and work to build than would the garage and ADU. Ms. Graham stated that her intent was not to build a garage and ADU and wait a number of years before she built a home.

Mr. Billipp noted that the application referred to Map 1, Lot 59 but that, in the aerial provided in the packet, Lot 59 has dwellings on it. He stated that the appellant's lot appeared to be Map 1, Lot 185. Mr. Billipp noted what appeared to be squares drawn on the map. Ms. Graham stated that she thought that had been the location of a garden and is some sort of tilled land.

Ms. Pelletier stated that the error in the lot number is in the GIS system and that the lot number in the application, Lot 59, is correct. She stated that she had told the Town's GIS person about the problem but that it appears to be a labeling problem on the map itself. She stated that she checked with the Town Assessor who confirmed that the location is Map 1, Lot 59. Chairman Hamilton noted that it is described that way in the deed.

Mr. Billipp asked if a subdivision had been created. He asked if the land that went with the house had been divided. Ms. Graham stated that, to the best of her knowledge, the house lot was divided off from a piece of land to the back of that location and that, five years later, the property was again divided. Mr. Billipp stated that the land in question was not part of a new subdivision.

Lee Emery, owner of the property identified as Lot 4-1, testified that Steve Bowden, a resident of Eliot, had owned the appellant's property and had divided it about six years

ago. He stated that Mr. Bowden had tried to sell the property as one parcel, but ended up going before the Town and dividing the land into three parcels. He stated that, because of the stipulation that it was not a subdivision, Mr. Bowden could only sell one parcel every five years. He added that the land had been surveyed and approved and is a matter of Town record that the lot is a legal one.

Mr. Billipp stated that he had one additional question for the appellant. He asked if Ms. Graham would be prepared to get a growth permit when they become available on January 1, 2015. Ms. Graham stated that she has a plan and that she hopes that the November ordinance repeal occurs and, if so, she would apply for the permit sooner.

Mr. Billipp clarified that the appellant would be prepared to apply for a growth permit in January 2015, which would be two to three months from the hearing.

Mr. Cieleszko asked for clarification on the appellant's statement that she wanted to start the house and the garage simultaneously. Ms. Graham stated that her hope was that the builder could do both simultaneously. She stated that the focus would be on finishing the garage and closing in both structures as quickly as possible, since the construction would occur during winter months.

Mr. Cieleszko stated that it appeared that the appellant's request was not just for having an ADU, but also to bypass the necessity for the growth permit. Ms. Graham concurred. She stated that she was not under the impression that she needed a variance for an ADU because she has enough property and that it was in the original plan and application for a building permit.

Mr. Rankie stated that his understanding was that the appellant was asking to build the ADU before she builds the main dwelling. Ms. Graham concurred. She stated that she wanted to be clear that she was not asking to build a garage with an apartment over it and then leave it that way for a period of time. She stated that she is intending to build her home as quickly as she can. She added that she did not think the Town would want a garage with an ADU left standing alone because the ordinance states that a home being used as a dwelling unit is required before a garage and separate unit are allowed.

Chairman Hamilton stated that the appellant had purchased her property in November 2013. He asked when she applied for a building permit. Ms. Graham stated that she had finally found a plan, worked with the builder and finalized the plan and submitted the application for a permit in May. Chairman Hamilton clarified that it was then that the appellant was told that there were no growth permits available. Ms. Graham stated that she had lived in the same home for 34 years and the permit process was new territory for her.

Mr. Cutting asked if the appellant's builder was a local contractor. Ms. Graham stated that the builder's name is Scott Case and that he is from the North Berwick area. She

stated that she has known him for years and that he is currently building in Eliot as a subcontractor, building homes on a subdivision on Worcester Road. She stated that he has done building in Eliot, Kennebunk and York and had also built a camp for her and worked on her house in North Berwick.

TESTIMONY FROM ABUTTERS

Lee Emery stated that he had no problem with what the appellant wants to do. He stated that he thought it was foolish that she could not get a growth permit three months earlier than January 2015. He stated that he could understand that the appellant wanted to get a foundation in place before the frost.

TESTIMONY FROM INTERESTED PARTIES

Ben Brickett, of 208 Pleasant Street, stated that he wanted to speak on behalf of the appellant, whom he has known for many years. He stated that he thought that she had been put at quite a disadvantage due to, perhaps, a miscommunication. He stated that he had accompanied Ms. Graham last October when she met with the CEO and that there had been no "heads up." He stated that they had assumed that there would be a building permit and that there would not be any problem in building a house during 2014. He stated that he felt caught in the middle and that, if the appellant had known that she could not build, she might not have purchased the property.

Mr. Brickett stated that Ms. Graham is currently renting a seasonal place and that she would need to find a different place to live in April 2015. He stated that the opportunity to live on her own property in an ADU would buy her up to three or four months before the main house was built. He stated that he considered the appellant's request to be very reasonable. He added that he liked the layout she had planned and that the lot was a good lot.

Donna Tice of 191 Pleasant Street stated that her house is extremely close to the appellant's lot, separated from it by a fenced driveway. She stated that her concern was that, although she did not know anything about the proposed structure, it would probably obstruct her water view of the river. She stated that she was concerned that it would lower the value of her property. She stated that she had some pictures of the view. Chairman Hamilton stated that he did not think Ms. Tice's concern was totally relevant to the variance request, though he understood that the concern was very important to Ms. Tice.

Ms. Tice stated that when she found out that there was going to be an apartment on top of the garage, she assumed that the structure would be even higher and would obstruct even more than she had originally thought it might.

Ms. Tice stated that her other concern was potential problems with the issuance of a building permit, resulting in a garage with an apartment being stuck on the property until someone decides what can be built. She stated that she did not understand how any structure could be built without a building permit being issued.

Ms. Tice stated that she had concerns about the future of the ADU as a rental property. She stated that the house across the street from her had been a duplex and had recently sold to a new owner. She stated that Beth's house use to be a rental sporadically. Ms. Tice stated that she had seen a lot of problems over the past 15 years with tenants. She stated that the tenants generated a lot of noise and that their pets had basically lived on her property. She stated that a dog was on her property 90% of the time and that chickens lived on her porch, leaving tons of rotten eggs. She added that there was a lot of traffic flow from tenants, especially from a small apartment. She stated that the people across the street seemed to have job hours in the middle of the night, creating a lot of traffic.

Ms. Tice stated that she has a young child and had concerns that someone on the sex-offender list would rent right next to her house. She stated that that was a big concern for her.

Ms. Tice stated that she also had an issue with the location of the mailboxes. She stated that when she backs out of her driveway, she sometimes does not see Beth's truck arrive at the mailbox until the truck is directly behind her. She stated that the problem would occur much more frequently with two more mailboxes at that location. She stated that maybe the mailboxes could be located on the other side of the road.

Ms. Tice stated that there are a bunch of sticks on the appellant's property in what she assumed would be the approximate location of the house. She added that there is a cemetery on the land and she was not sure how far the dwelling could be from the cemetery. She asked if anyone had looked at that issue. She stated that it was her understanding that a right-of-way would be created before anything is built and that a lot of the sticks are close to the right-of-way. She added that she wondered if there was enough of a setback from the various boundaries for the proposed structure.

TESTIMONY FROM THE CODE ENFORCEMENT OFFICER

Ms. Pelletier stated that she had been working with Ms. Graham all along. She stated that the lot is certainly a buildable lot, the appellant can meet all the requirements and that the appellant has provided enough information that securing a building permit should not be a problem.

Ms. Pelletier stated that she would soon be issuing a foundation permit for the dwelling and that, even though she would still need building permit to build anything on the foundation, she could at least get started. She added that she did not see anything standing in the appellant's way toward getting a building permit once a growth permit becomes available.

QUESTIONS FOR CEO FROM THE BOARD

Mr. Marshall asked if the appellant was in line to receive a growth permit in January 2015 and whether there would be enough permits so that the appellant could receive one. Ms. Pelletier stated that the line for the growth permits starts all over again on January 1, 2015, and that they are issued on a first-come-first-served basis. She added that she did not know what the Town was going to do in terms of a growth ordinance and that there was no guarantee that there would be more growth permits available next year than there had been this year.

Mr. Marshall asked if the number of permits to be issued in 2015 was known. Ms. Pelletier stated that it was not known how the Town would vote on the issue. Mr. Marshall asked if, regardless of the vote, there would be 22 growth permits. Ms. Pelletier stated that the number of permits would be 105% of the mean number. Mr. Marshall asked if the number would decrease. Ms. Pelletier stated that, assuming that all growth permits were issued this year, the number for 2015 would decrease by two or three.

Mr. Marshall asked how many people were ahead of the appellant for a growth permit. Ms. Pelletier stated that there were five people ahead of her and 11 people behind her on the waiting list. Mr. Marshall asked if there would be any less than five permits offered in 2015. Ms. Pelletier stated that it did not appear so.

Mr. Marshall asked if the appellant could be given a permit to build just a garage. Ms. Pelletier stated that that would not be possible because, by definition, an accessory building cannot be built without a principal structure. Mr. Marshall asked if that meant that a farmer could buy a piece of property and be unable to build a barn on that property. Ms. Pelletier stated that that was correct.

Mr. Marshall asked if the issue would become moot as of January 2015, when growth permits become available. Ms. Pelletier stated that that would be correct if the appellant was in line with the rest of the people who want one and added that she imagined that the appellant would be the first person in line. Mr. Marshall asked if the line was currently formed. Ms. Pelletier stated that it was not. Mr. Cutting stated that the line starts anew at midnight on January 1, 2015. Mr. Marshall stated that it sounded like a form of Russian roulette.

Mr. Cutting asked the CEO if was her opinion that the appellant had no idea that she had to go through the growth permitting process. Ms. Pelletier stated that her opinion was that the appellant did not.

Ms. Lemire asked if a foundation permit could be issued without a growth or a building permit. Ms. Pelletier answered in the affirmative. Mr. Cutting clarified that the appellant could start building a house and an ADU simultaneously because the foundation would have been poured before winter. Ms. Pelletier concurred.

Mr. Marshall stated that he was still in a state of disbelief that someone could not build a barn or a garage on their property without a primary building, and yet Eliot is called an agrarian area. Ms. Pelletier stated that, if the principal use of the property was agricultural, that would be a different story. She added that that was not the case in the current variance request. She stated that a barn would be the principal structure in an agricultural area. Mr. Marshall asked if a garage could become a principal structure if it was the only *st*ructure. Ms. Pelletier stated that, by definition, a garage is an accessory structure and is secondary to a principal structure.

Mr. Billipp asked if the appellant could go forward with a foundation for both a house and a garage at the present time. Ms. Pelletier replied in the affirmative and stated that one cannot occupy a foundation and that that is the reasoning. She added that it would be at the appellant's own risk because it is not guaranteed that she can get a building permit.

Ms. Lemire asked how many ADUs had been issued in 2014. Ms. Pelletier stated that she thought there had been five so far. Ms. Lemire asked for the norm. Ms. Pelletier stated that the ordinance allows up to 12 ADUs. Ms. Lemire asked if that limit was ever reached and Ms. Pelletier replied in the negative.

Mr. Cieleszko stated that the appellant had said that she was planning to build the house and a garage simultaneously. He clarified that what the variance would allow would be the foundation for both the house and the garage and the construction of a garage with the ADU. Ms. Pelletier concurred. Mr. Cieleszko also clarified that the house and garage were two separate structures.

Mr. Cieleszko asked for the number of growth permits issued in 2013. Ms. Pelletier stated that she thought there had been 18 issued out of the 22 available.

Mr. Rankie asked whether or not, if Ms. Graham applied for a growth permit and one was available, a permit for a garage and a living unit above it would qualify as the only building on the property. Mr. Pelletier stated that that would not be a permitted building for the property and she would have to have a single-family residence on the property in order to have an ADU.

Mr. Rankie stated that the question he was asking was whether a permit could be issued if the garage with the living unit above was the appellant's primary dwelling. Ms. Pelletier replied in the affirmative because the building would then be the principal structure.

Chairman Hamilton noted that there had been 18 growth permits granted in 2013 out of 22 available. He stated that when the appellant talked to the CEO in 2013, there were growth permits available had she applied. He stated that in 2014, that was not the case. Ms. Graham stated that when she talked to the CEO in 2013, she was not ready to apply for a growth permit. The property that she purchased was land that her husband had loved, but she was not emotionally ready to build.

Chairman Hamilton stated that his point was that the CEO was not misinforming the appellant in 2013 because, at that time, there were permits available but that in 2014, the permits were used up very quickly and she did not apply quickly enough. Ms. Graham stated that in 2013 things were still tenuous in terms of building because the nation was newly emerging from a recession. She stated that she would not have been ready at that point, but she was ready and wanted to build in the summer of 2014.

Ms. Pelletier stated that an applicant only has 90 days to convert a growth permit into a building permit. She confirmed that at the end of the recession, the business of building became extremely busy and the growth permits were all taken by March of 2014.

FINAL TESTIMONY FROM APPELLANT

Ms. Graham thanked the BOA for their time and consideration on her behalf.

CLOSING OF PUBLIC HEARING

The public hearing was closed at 7:49 PM.

FINDINGS OF FACT

- The appellant is Nancy L. Graham.
- The appellant's mailing address is P.O. Box 215, Eliot, Maine, 03903.
- The appellant's physical address is 37 Walker Avenue, Kittery, Maine.
- The property is identified as Tax Map 1, Lot 59.
- The property is listed in the York County Registry of Deeds, Book 16735, Pages 154-155.
- Proof of ownership was provided by Warranty Deed.

- The application was received July 31, 2014.
- The property is in the Village District.
- The jurisdiction of the Board of Appeals to hear the request for a variance is granted under Section 45-49(b), which states that, "the board of appeals shall hear and decide cases involving the relaxation affecting height, area, size or structures, size of yards or open spaces, or other types of variance specifically provided by this chapter. On a case-by-case basis the board of appeals may elect to hear cases involving establishment or change to a different nonconforming use. A variance shall be as limited as possible to relieve a hardship. The board of appeals shall grant a variance where a party establishes that the strict application of this chapter will cause undue hardship. The words *undue hardship*; mean:

  (1) That the land in question cannot yield a reasonable return unless a variance is granted;
  (2) That the need for a variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood.
  (3) That the granting of the variance will not alter the essential character of the neighborhood; and
  (4) That the hardship is not the result of action taken by the applicant or a prior owner

- The variance request is for an Accessory Dwelling Unit (ADU), which is defined in Section 1.2 (Definitions and Rules of Construction) as meaning "a separate living area which is part of an existing or new single family owner-occupied residence, and which is clearly secondary to the existing single family use of the home and that meets the requirements of Section 45-459. *Accessory structure or use* means a use or detached structure that is incidental and subordinate to the principal use or structure. Accessory uses, when aggregated, shall not subordinate the principal use of the lot. A deck or similar extension of the principal structure or a garage attached to the principal structure by a roof or a common wall is considered part of the principal structure."
- Ordinance Section 45-459(a) also pertains to the variance request. Section 45-459(a) stated that, "an accessory dwelling unit (ADU) is a small apartment which is part of an existing or new single family owner-occupied home, and which is clearly secondary to the single family home. The accessory dwelling unit may be rented so that the owner-occupant may benefit from the additional income. The owner may also elect to occupy the accessory dwelling unit and rent the principal dwelling unit."
- The definition in the code and repeated in the Ordinance is that an ADU is part of an existing or a new owner-occupied structure.
- The variance request is for the BOA to interpret an ADU definition differently than that which is referred to in the code.

MOTION

Mr. Cieleszko moved, seconded by Mr. Cutting, to allow a variance to construct and occupy an accessory dwelling unit and garage on the lot identified as Map 1, Lot 59, until such time that a growth permit to construct a single-family home becomes available and the primary dwelling is completed.

Mr. Cutting stated that his concern was that the garage with the ADU could be constructed and the primary structure never built. He stated that someone could decide that living in the ADU with no mortgage was convenient and that that would be a problem. He added that he thought that was the reason for requiring a single-family dwelling as the first step. Mr. Cutting stated that he thought there should be some sort of condition attached to the motion. Mr. Cieleszko stated that he would vote for an amendment that would add a time limit to the motion.

AMENDMENT TO MOTION

Mr. Cutting moved, seconded by Mr. Cieleszko, to amend the motion to require that construction be started within 13 months from the first of the year.

Chairman Hamilton asked what would happen if the time limit was not met. Mr. Cieleszko stated that the appellant would then lose the variance. Mr. Cutting stated that the lot would still have value and could be sold.

Mr. Billipp stated that he could support neither the motion nor the amended motion. He stated that he did not think the appellant had met the four criteria. He added that within a few months, the appellant would have everything that she needed in order to proceed without a variance. He stated that he could not support the granting of a variance.

Mr. Billipp stated that the land in question has value and is worth a lot of money. He stated that it is unfortunate that the appellant cannot build on it currently, but she can put in a foundation for the ADU as well as the house. He stated that he did not see much of delay. He stated that he did not think the appellant met three out of the four criteria for a variance.

Mr. Cieleszko stated that he wanted to have a time limit added on to the motion because he would not like to see the motion pass without a time limit imposed.

Chairman Hamilton stated that there was a motion and an amendment to the motion and that the amendment would need to be voted on before the motion.

DISCUSSION

Mr. Cieleszko stated that he thought the appellant met the four criteria. He stated that the land cannot yield a reasonable return because she already has invested $130,000 and every month of delay means she has to spend money to live somewhere else. He stated that the appellant is losing money every month of delay and that the land is losing value every month. Mr. Billipp stated that the property itself was not losing value every month. Mr. Cieleszko stated that *reasonable return* refers to both the owner and the property. He stated that if an owner went broke with a million-dollar piece of property, everything would be lost on the property. He stated that there had recently been a case where a person put so much money into trying to get a property sellable that he lost all return on it.

Chairman Hamilton stated that the court has not allowed undue hardship to relate to an individual but only to the property. He cited the MMA Manual as stating: "The court in Maine has made it clear that *undue hardship* relates to a problem created by some feature of the property itself." He cited the MMA regarding the case of Lippoth versus the ZBA of South Portland: "The fact that the landowner has a personal problem which prompted the request for the variance is not legally relevant to the standard *undue hardship* test, no matter how sympathetic the board may be. It is relevant where the need for the variance stems from a physical or mental disability."

Mr. Cieleszko stated that the courts have allowed the consideration of personal problems in New Hampshire and that the State of Maine follows the same procedures. He stated that the MMA Manual was written many years ago. Chairman Hamilton stated that the Eliot town attorney had also given the BOA the same information as the MMA Manual. Mr. Cieleszko stated that that also happened years ago and that the courts are constantly changing. Mr. Cieleszko stated that the MMA Manual was prepared when Maine was tightening restrictions. At the same time, New Hampshire was lessening their restrictions. Chairman Hamilton stated that the BOA has to follow the State of Maine rules and that the court set the precedent. Mr. Cieleszko stated that when cases wind up in the court, that is when decisions get made. Chairman Hamilton stated that, until a new court decision is made, the BOA has to follow the precedents that previous courts have decided. He stated that the decision had been made by the court that any personal hardship is not part of the undue hardship test and that it never has been. He stated that boards could consider personal hardship, but that there was no legal ground to stand on.

Mr. Cieleszko stated that the appellant met all four of the criteria.

Ms. Lemire asked if land values had been impacted by the lack of available growth permits. Ms. Pelletier stated that she had heard from realtors that they are unable to

sell vacant lots because everyone knows that they cannot get a growth permit. Ms. Lemire asked if the CEO had seen assessed values of the vacant properties. Mr. Pelletier replied in the negative. She stated that if an impact had been made, it would appear in the assessed values in 2015.

Mr. Billipp did not think the appellant met the first criterion that the land could not yield a reasonable return. He stated that he saw nothing about the property that was unique or that was causing a problem, that the lot appeared to be conforming and, therefore, that the appellant did not meet the second criterion. Mr. Billipp stated that he would agree that the appellant met the third criterion because the building of a house or an ADU on the lot would not alter the essential character of the residential neighborhood. He stated that the hardship was a result of inaction or misunderstanding on the part of the appellant, that a timeliness issue was causing the problem, and that the appellant did not meet the fourth criterion.

Mr. Billipp stated that 2015 is just around the corner and the appellant is in an excellent position to get whatever paperwork is needed and to move forward. He stated that the third criterion was the only one the appellant had met.

Ms. Lemire stated that she thought that the appellant had met criteria two, three and four and was still considering the first criterion. She stated that she did not think the proposed building would change the character of the neighborhood.

Ms. Lemire stated that she also did not think the hardship was the result of action taken or of inaction because it cannot be assumed that everyone knows all of the rules, that timely information is being given, or that everyone knows that there is a growth permit issue in Town. She added that she did not think the fourth criterion was an issue for the appellant. She stated that a variance goes with the land and the growth ordinance is the reason that the appellant was asking for a variance. Chairman Hamilton stated that the growth ordinance was in place way before the appellant applied for a permit. Ms. Lemire stated that there was no equity and that the law was based on equity.

Mr. Cutting stated that he thought the appellant met criteria two, three and four. He stated that, in terms of the fourth criterion, he thought that the appellant might have changed her timing if she had had information which she did not have.

Mr. Cutting stated that he was stuck on the reasonable return referenced by the first criterion because the reasonable return standard does not mean maximum return. He added that it is extremely difficult for an appellant to prove that he or she cannot realize a reasonable return and that no other permitted use could be conducted legally to realize such a return. He stated that it was possible that someone else would desire the property for a different reason or perhaps for the water view. He stated that he did not think the appellant met the first criterion.

Chairman Hamilton stated that he thought that the appellant met the third criterion but did not meet the first, second or fourth criteria.

Mr. Cieleszko stated that he wanted to change his statement because he felt that the appellant did not meet the first criterion.

Mr. Billipp stated that the property could be put back on the market for the value of $130,000. Ms. Lemire asked who would purchase the property with no available growth permits. Mr. Billipp replied that 2015 was approaching and that the current lack of growth permits is not a handicap because there is nothing wrong with the property. He added that the property has not diminished in value.

Ms. Lemire stated that the appellant did not meet the first criterion.

As the last Finding of Fact, the votes on the four criteria were:

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

Mr. Cieleszko, Mr. Billipp, Mr. Cutting and Ms. Lemire agreed that the appellant did not meet this criterion. Mr. Hamilton concurred.

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

Mr. Cutting, Ms. Lemire and Mr. Cieleszko agreed that the appellant met this criterion. Mr. Billipp stated that the appellant did not meet this criterion. Mr. Hamilton concurred.

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

All agreed that the appellant met this criterion.

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

Ms. Lemire and Mr. Cieleszko agreed that the appellant met this criterion. Mr. Billipp and Mr. Cutting agreed that the appellant did not meet this criterion. Mr. Hamilton concurred with Mr. Billipp and Mr. Cutting.

DECISION ON AMENDMENT

Chairman Hamilton asked for a vote on the amendment to the motion to limit the time before which a primary dwelling was built to 13 months from January 1, 2015. Voting in

favor were Mr. Cutting and Ms. Lemire. Voting against were Mr. Cieleszko and Mr. Billipp with Chairman Hamilton concurring in order to break the tie. The motion failed to pass with a vote of 3:2.

DISCUSSION ON MOTION

Chairman Hamilton asked for a vote on the motion to construct and occupy an ADU and garage on property identified as Tax Map 1, Lot 59 until such time as a growth permit becomes available and the primary residence is completed.

Chairman Hamilton stated that he thought the BOA was treading on incredibly dangerous ground in trying to change or reinterpret the definitions that are in the Eliot code book. He stated that the definition of an ADU is that it is a secondary structure to a primary residence. He stated that he thought that the BOA had no right to consider the motion. He stated that he thought that the BOA was overstepping its bounds by even considering allowing an accessory dwelling unit to be developed without a building permit and to essentially do an end-run around the growth permit.

Chairman Hamilton stated that he thought the BOA's duty was to determine whether or not there is undue hardship which meets the definition in the Eliot code and is responsible to the code and to the State of Maine before granting a variance. He stated that granting a variance is an incredibly difficult thing to do. He stated that the four criteria are designed to be difficult because the Zoning Ordinance stands as it should. He stated that if the ADU ordinance or the growth permit ordinance is not liked, then the vote should be to change the ordinance and should not be done through the BOA.

Mr. Cieleszko stated that he disagreed with Chairman Hamilton to some extent. He stated that the BOA has a duty to an appellant to consider any request before it. He stated that whether or not the members could act on the request is totally dependent on the details of each case. He stated that, as mentioned in the beginning of the hearing, the BOA has the authority to hear the case. Chairman Hamilton stated that the BOA had the authority to listen to the case, though he initially questioned whether or not they did have the authority. He stated that he thought the request should be heard in order to get the information out there and to create the discussion.

Mr. Cieleszko stated that it was his opinion that whether or not a BOA member liked an ordinance should not influence the vote and that only the appellant's ability to meet the four criteria should be considered. Whether or not an ordinance is fair or illegal, it would be up to the Town to change it. He added that each case is unique.

Mr. Cieleszko stated that he thought that the winds are changing in the State of Maine. He stated that if one follows the cases carefully, the State of Maine Supreme Court is

looking more liberally at a lot of decisions. He stated that the BOA did not have to exceed common sense in determining what a reasonable return is. He stated that it is within the BOA's purview to determine a reasonable return.

Mr. Cieleszko stated that he was not being disingenuous when he stated that the appellant had met the first criterion but that he saw the error of his thinking as the discussion progressed. He stated that he does not make the decision lightly. He stated that each case should be looked at individually and that the BOA should not be stuck in such a formula that nobody could be granted a variance.

DECISION ON MOTION

The motion was denied with a unanimous vote.

Chairman Hamilton told the appellant that he was sorry the variance was not granted and that he hoped she would get a growth permit and a building permit at the first of the year. Chairman Hamilton informed the appellant that she would have a written decision within seven days and could file an appeal with the Superior Court within 45 days of September 18, 2014.

SECOND PUBLIC HEARING

Chairman Hamilton opened the second public hearing at 8:28 PM.

Representing the appellant was Jeff Aleva of Civil Consultants who was accompanied by Maryna Shuliakovskaya of 16 Maple Avenue in Eliot, a partner in Aroma Joe's business. Mr. Aleva stated that he works for the engineering firm which prepared the application for the variance.

VARIANCE REQUEST

The variance request was by Loren Goodridge to allow a 40-square-foot, freestanding sign on the Eliot Commons property located at 28 Levesque Drive, Eliot, Maine identified as Tax Map 29, Lot 27.

Chairman Hamilton asked if there were any BOA members with a conflict of interest with the request. Mr. Rankie stated that he is the president of Baran Place, which is an abutter, and that he would like to recuse himself so that he could speak as an abutter. Chairman Hamilton asked if Mr. Rankie felt that he could not judge the request fairly.

Mr. Rankie stated that he had issues with the signage at Eliot Commons and that he could not deliberate without a conflict.

Mr. Cutting stated that his company has similar lines of business as that of the appellant but that he did not have any thoughts on the request one way or the other. Chairman Hamilton asked Mr. Cutting if he felt he could review the request objectively. Mr. Cutting stated that he felt that he could but that he had wanted to make his statement to the BOA before he did review.

Chairman Hamilton stated that he wanted to ask the board whether or not the members felt Mr. Cutting could be impartial in the situation. Mr. Cieleszko stated that he knew that Mr. Cutting was impartial and would not be biased in any way, but that the appearance of bias is fairly strong in the case where Mr. Cutting's business might even want to move into the same location. He stated that Mr. Cutting's business has a financial bearing on their success or failure. He added that he thought that the appellant might feel wronged.

Chairman Hamilton stated that Mr. Cutting should step down to avoid the appearance of conflict.

Chairman Hamilton stated that the voting members would be John Marshall, Peter Billipp, Ed Cieleszko and Ellen Lemire with Chairman Hamilton voting in the event of a tie.

TESTIMONY FROM APPELLANT

Mr. Aleva stated that the appellant was looking to potentially develop an Aroma Joe's on the property. He stated that the location would be where the old drive-up for the bank used to be. He stated that, thinking of future development on the lot, the appellant was proposing to have a 40-square-foot, free-standing sign as indicated on the plan submitted.

Mr. Aleva stated that the existing sign has already reached the 100-square-foot limit. He stated that, as a result of the ordinance, free-standing signs can only be 100 square feet or 10 square feet for a single business. He stated that the property has room for more potential units and that what the appellant was looking for was a free-standing sign which would direct traffic from Route 236 and allow customers to realize that the business was tucked in a corner of the property on the side of the building.

QUESTIONS FOR APPELLANT FROM THE BOARD

Mr. Marshall asked if there was any space left on the existing Eliot Commons sign for the appellant's sign. Mr. Aleva stated that there is no space left on the existing sign and that he would be limited to a 10-square-foot area if there was space. He added that discussions with Ms. Pelletier indicated that there is no further space available.

Mr. Marshall asked if the appellant would be allowed signage on the building. Mr. Aleva stated that he would be allowed 50 square feet, as is allowed in the Commercial Zone, on the building, which would be separate from a free-standing sign. Mr. Marshall clarified that 100 square feet was the limit in signage for the property. Mr. Aleva concurred.

Mr. Aleva stated that he did not think the ordinance regarding signage envisioned that Eliot Commons would be divided into as many units or potential developments on a piece of property. Mr. Marshall indicated that in the last comprehensive planning, it was indicated that there might be a hotel on that location in the future and that, at this point, they would not be allowed to have a sign. He stated that he thought that would mean that a hotel would not be interested in building on that site. Mr. Aleva stated that they could have a 50-square-foot sign on the building, but that most hotels want something more than that.

Mr. Aleva stated that what he was looking for was something that would help locate the business with a sign which is not right on the corner of Beech Road and Route 236 but is toward the middle to allow the ability to pull customers off of Route 236. He stated that the traffic light is helpful in directing people into the Common and they could also come into the park from the corner by Kennebunk Savings Bank and traverse through the park, or they could come down Beech Road and come in from that direction.

Mr. Marshall asked if a 50-square-foot sign on the building would be sufficient. Mr. Aleva stated that the way the location is situated back from the roadway, the building sign would not be sufficient to allow getting enough traffic from Route 236. Mr. Marshall asked if the 50 square feet was for one side or for both sides of the sign. Mr. Aleva stated that a 50-square-foot sign is allowed on the face of the building or somewhere on the structure below the eave line. He stated that a sign could be two-sided and can protrude 6 inches from the building.

Mr. Aleva stated that building-mounted signs are covered in Section 45-531, Structural Characteristics, which states that wall signs and parallel signs shall not be higher than the eave line or parapet wall of the building. No part of the wall sign, including cut-out letters, shall project more than six inches from the building wall and no part of a parallel sign, including display surface, shall project more than 12 inches from the building.

Mr. Marshall clarified that what is allowed is a sign on the wall which can be viewed only from one side. Mr. Aleva concurred.

Mr. Aleva stated that the ordinance states that if a free-standing sign had a thinner dimension, which he was proposing, it could be two-sided and the area of both sides did not have to be added to determine the total area.

Mr. Marshall clarified that the appellant was looking for a variance to construct another free-standing, 40-square-foot sign because the present signage had been used up. Mr. Aleva stated that the appellant also needs that amount of signage to drive customers to the business.

Mr. Marshall asked if the appellant had already purchased or made arrangements on the property. Mr. Aleva stated that there is an agreement in the packet. Mr. Marshall stated that he had seen the Letter of Intent, but that that was different than a lease. He stated that before signing a lease, the appellant needs to have all of the ducks in a row and the signage is one of those ducks.

Mr. Billipp stated that even if there was space available on the main sign, which would be 10 square feet, the appellant would not think that was adequate for Aroma Joe's. He clarified that even if a 10-foot space was available, the appellant would be seeking something more than that. Mr. Aleva stated that he was looking for 40 square feet and that that is the signage that Aroma Joe's has been using for their recent developments.

Mr. Billipp stated that he was in Dover and saw a sign at an Aroma Joe's that he was quite sure was not 40 square feet. Mr. Aleva stated that the Dover sign is 32 square feet. Ms. Shuliakovskaya stated that the Dover location is one of the grandfathered locations. She stated that there are locations opened by the founders of Aroma Joe's, and the current requirements for the business do not apply to those locations.

Ms. Shuliakovskaya stated that she is the current owner of the location in Saco, Maine, and that she had to go through the same procedure and was required by the franchising to comply with what was requested. Mr. Billipp clarified that the signage size is a current requirement of the franchise.

Mr. Billipp stated that he was not sure that all of the businesses indicated on the Eliot Commons sign were actually in the plaza. Mr. Aleva noted that there is obviously no Holiday Inn in the plaza, but all of the signs are taken up on the space. Ms. Shuliakovskaya stated that Fred Forsely, owner of Eliot Commons, had indicated that there is no space on the sign for Aroma Joe's.

Mr. Cieleszko asked if the franchise would accept a 10-foot space if it was available. Ms. Shuliakovskaya stated that it would not and that the signage was the reason that they had not moved forward with a lease as yet.

Mr. Cieleszko asked if the space underneath the proposed sign was considered in the overall dimensions of the sign. Mr. Aleva stated that it was considered to be part of the structure and was not included in the signage dimensions. He stated that sign area is the five-foot by eight-foot area.

Mr. Aleva stated that Mr. Forsely had told the appellant that there was no more room on the Eliot Commons sign.

Chairman Hamilton stated that the ordinance in Section 45-528(a) states that the sign measurements should be based upon the entire area within a single contiguous perimeter enclosing the extreme limits of the actual sign surface. He stated that the sketch of the proposed sign included in the packet indicated a 45-square-foot sign when the frame around the sign was included in the calculation. Mr. Aleva stated that the square footage of the sign provided by the Alfred Sign Company is actually not correct based on the ordinance. He stated that including the frame in the measurement results in an area that is 5' by 9'1". He added that the pylon below the sign is part of the structure and is not included in the area measurement.

Chairman Hamilton clarified that the owner of the property is Fred Forsely and that the appellant was intending to be a lease tenant. Chairman Hamilton stated that when a variance request is determined, the variance would be issued to the property owned by Sea Dog and would not be issued to the appellant. Mr. Aleva concurred and stated that the tenant would still have to go through site plan approval for other items.

Chairman Hamilton stated that he wanted to make it clear that the variance is granted to the property itself.

Ms. Lemire asked if there was any compromise that Aroma Joe's would be willing to make on the 40-square-foot sign requirement to allow for a smaller sign. Ms. Shuliakovskaya stated that she does not represent the franchise but that she thought that the franchise was concerned about a large building possibly being built in the front of the Eliot Commons location. For that reason, she stated, the franchise would not allow a smaller sign.

Ms. Lemire asked if the Aroma Joe's sign in South Berwick was 40 feet. Ms. Shuliakovskaya replied that that location was also grandfathered. She stated that there are 18 locations that have been grandfathered because they were started by the founders of Aroma Joe's. When the franchising was started in September of 2013, every location that was opened since that time was required to follow standards.

Chairman Hamilton asked for clarification of the location of the building on the map the appellant had provided. Mr. Aleva provided clarification and stated that there would be a drive-through with windows on either side. He stated that the appellant looked at

redirecting and reworking the landscaping and the parking area to direct traffic through the site.

Chairman Hamilton asked about another area on the provided map. Mr. Aleva stated that the indicated area was a landscape area where there would be changes in the site plan in order to direct traffic and to create a buffer from the parking area. He stated that, currently, the space is open without any islands or buffers or controls and the proposed development would control those issues in the Aroma Joe's location.

TESTIMONY FROM ABUTTERS

Charles Rankie, the president of Baran Place, stated that appellant's site plan indicates that the cul-de-sac at the end of Levesque Drive is part of Eliot Commons. He stated that, actually, the cul-de-sac is part of Baran Place and is recorded in the York County Registry of Deeds in Book 8240, Page 339. Mr. Rankie stated that the residents of Baran Place exit the property using Levesque Drive.

Mr. Rankie stated that the provided copy of the existing sign was a misrepresentation. He stated that, as noted, there are advertisements for business which do not exist. He stated that on the bottom, right-hand side of the sign it states, "Space Available 207-361-2617."

Mr. Rankie stated that he believed that there is an illegal, free-standing sign on the corner of Levesque Drive which was placed there by the property owner. He stated that the area of the sign was approximately 2.5'x5' and it says, "Fresh-made Lobster Rolls now on Special" with a picture of the Shipyard Brew Pub. He stated that the sign is an obstruction for the residents of Baran Place as they attempt to look at oncoming traffic from Kittery on Route 236.

Mr. Rankie stated that the Baran Place residents asked the Eliot Police Department about the sign because the sign gets moved. He stated that at times the sign is located close to the Eliot Commons sign and at other times is moved closer to the highway.

Chairman Hamilton asked Mr. Rankie to explain the relevance of his statements. Mr. Rankie stated that the appellant was asking for a variance for a sign and there is already a sign on the location that is illegal. He stated that he thought the relevance was a good-faith issue on the part of the property owner because there is a variance being requested and yet there is an existing, illegal sign which has been in place since spring.

Mr. Marshall stated that it sounded like an enforcement issue rather than a zoning issue.

Mr. Rankie stated that it appeared that the Aroma Joe's sign would be advertising a drive-through. He stated that a drive-through is not a permitted use for that property and asked if the BOA would be approving a sign for a use that is not permitted. Chairman Hamilton stated that the variance was for the sign only and that the permitting process for the structure was not part of the request. He stated that whether or not the sign is allowed has no relevance to the structure.

Mr. Rankie stated that the BOA would be permitting a blank sign rather than allowing the appellant to think that he could erect a sign for a business that would not be permitted. Chairman Hamilton stated that the building was not part of the variance request. Chairman Hamilton stated that the appellant would have to apply for a building permit and that the issue may come back to the BOA at that point.

Ms. Shuliakovskaya stated that are options for Aroma Joe signs and there is an option which would not mention a drive-through. She stated that if it was determined during the building permitting that a drive-through was allowed, the sign would so indicate. Mr. Aleva clarified that the proposal was for a 40-square-foot, free-standing sign in the style presented.

Jeff Cutting of 22 Everett Lane, Eliot, stated that if the variance was granted, it would be granted to Sea Dog Realty. He asked if Sea Dog would still be allowed to have a 40-square-foot sign if Aroma Joe's decided not to pursue the project. Mr. Billipp stated that he thought that would be true unless the language of the variance limited the sign to be used specifically by Aroma Joe's, to be rescinded otherwise.

Mr. Cieleszko stated if the requirements for the sign included the structural foundation. Mr. Aleva stated that the measurements were for the sign itself and the stanchion is separate and was designed to hold the sign.

Mr. Cieleszko asked the appellant if he was comfortable with the criteria for the variance as presented and that it was clear that the variance would be granted to Sea Dog Realty or Mr. Forsely rather than to Aroma Joe's. Mr. Aleva stated that the criteria reflect the appellant's requirements.

Ms. Lemire asked how low the base could be and still support the sign. Mr. Aleva stated that he was not sure what the franchise requirements for overall height are. He stated that the thought process had been to look for exposure from Route 236 and also to anticipate future developments on the corner of the property. He stated that the need was to notify customers that the appellant's business was located behind any future development.

Chairman Hamilton noted that Section 45-528(d) states that each establishment shall have one wall-mounted identification sign not to exceed 50 square feet. He asked if the

appellant thought it likely that Aroma Joe's would be willing to see that footage as their sign. He added that the total square footage would approximate what the appellant was asking for, although the sign would have to be on the side of the building. Mr. Aleva stated that the ordinance does not restrict to one option or the other because a business is allowed to have both. He stated that he did not think that Aroma Joe's would be happy with just having a building-mounted sign.

Mr. Billipp noted that Section 45-528(c) states that a commercial or industrial establishment "under separate ownership on one parcel within a district" when it describes the sign requirements. He asked what the term *separate ownership* meant. Mr. Marshall stated that it referred to the property being owned by one entity and the businesses on the property being owned by others. He stated that each business would be a separate owner and that there are presently several separate businesses in Eliot Commons.

TESTIMONY FROM CODE ENFORCEMENT OFFICER

Ms. Pelletier stated that she had nothing to add officially. She added that, in her personal opinion, signage is crucial to the survival of a business and that the 100-square-foot sign is not adequate for such a large property. She stated that the neighborhood already has many signs and that the Aroma Joe's sign would not alter the character of the neighborhood.

FINAL TESTIMONY FROM THE APPELLANT

Mr. Aleva stated that, after listening to the discussion, it made sense to indicate in a motion that the sign would be for Aroma Joe's so that the variance was limited to the proposed development and that if the development went away, the variance also went away. He stated that he thought that there was a concern about the property owner being able to use the 40-square-foot sign willingly. He added that he thought the variance should be tied to the proposed lease.

FINAL QUESTIONS FROM THE BOARD

Ms. Lemire asked Ms. Pelletier if the sign on the corner of Route 236 and Beech road was a permanent sign. Ms. Pelletier stated that it appeared to be so but that it probably should not be there. Ms. Lemire asked if approval had been granted for the sign. Ms. Pelletier stated that to her knowledge, it had not. She added that people take advantage of the temporary sign ordinance frequently.

Mr. Cieleszko stated that the variance had been shifted from Aroma Joe's to Sea Dog Realty as the owner of the property so that the entire property was now under the purview of the criteria, not just the area for Aroma Joe's. He stated that, in terms of the first criterion, that the land in question cannot yield a reasonable return unless a variance is granted, Aroma Joe's might fail without the sign but Sea Dog Realty would live on with no change. He stated that he could not even begin to come up with a solution and asked for help.

Mr. Aleva stated that that criterion was a difficult one to discuss. He stated that a property owner has the ability to develop his property as the ordinance allows. He stated that perhaps the fact that additional signage is not permitted would stem the development potential of the property. He stated that, historically, the first criterion is the most difficult one to meet.

PUBLIC HEARING CLOSED

The public hearing was closed at 9:11 PM.

FINDINGS OF FACT

- The appellant is Loren Goodridge.
- The mailing address is Pine Tree Coffee, LLC, 352 Warren Avenue, Suite 7, Portland, Maine 04103.
- The owner of the property is Sea Dog Realty, LLC.
- The address of the property is 28 Levesque Drive, Eliot, Maine.
- The property is listed in the York County Registry of Deeds, Book 15265, Page 353.
- The property is identified as Tax Map 29, Lot 27
- The property is in the Commercial/Industrial Zone.
- The sign requested is actually 45 square feet in dimension, rather than the 40 square feet as indicated in the application.
- It was testified that the signage allowable on that property has already been accomplished on the existing 100-square-foot sign.
- By Eliot Code, there is no other allowable signage.

MOTION

Mr. Billipp made a motion, seconded by Ms. Lemire, to deny the variance.

DISCUSSION

Mr. Billipp stated that in terms of the first criterion, *the land in question cannot yield a reasonable return unless the variance is granted,* the property is a 17-acre parcel with numerous businesses. He stated that the variance, if granted, would be granted to the owner of the property, Sea Dog Realty, and that the addition of a business would add only a bit of revenue to Sea Dog. He added that the land has great value just the way it is without adding Aroma Joe's.

Mr. Billipp stated that in terms of the second criteria, *the need for a variance is due to the unique circumstances of the property and not the general condition of the neighborhood*, he could agree that the appellant met that criterion because the building sits back from the road and is not highly visible. He stated that the owner would only be allowed to have a 50-square-foot sign on the building so that there might be a need for a sign up on Route 236.

Mr. Billipp stated that he thought the appellant had met the terms of the third criterion; *the granting of a variance will not alter the essential character of the locality*. He stated that the property is on a commercial strip and that one more sign would not alter the character of the locality.

Mr. Billipp agreed that the appellant did not meet the terms of the fourth criterion; *the hardship is not a result of action taken by the appellant or a prior owner.* He stated that that the request is actually made on behalf of the property owner. He stated that there is an ordinance in place which limits the signage to 100 square feet and that it is not up to the BOA to determine whether the ordinance is right or wrong. He stated that he did not see anything wrong with the owner wanting to increase his business, but that the request is still due to his actions.

Mr. Cieleszko stated that he did not think the appellant met the reasonable return criterion. He stated that he did think that the additional business could be quite profitable for the property owner, but that the property would retain its value whether or not the new business survived. He added that he did agree that the appellant met the second and third criteria.

Mr. Cieleszko stated that he thought that, although the zoning ordinance did not anticipate the additional businesses, the sign ordinance clearly did anticipate them and wanted to limit the amount of signage. He stated that he thought there had been a clear agenda in the sign ordinance. He agreed that the appellant did not meet the fourth criterion; *the hardship is not a result of action taken by the appellant or a prior owner*.

Ms. Lemire stated that she concurred with Mr. Billipp and Mr. Cieleszko.

Mr. Marshall stated that he thought that the original ordinance did have an intention to limit the number of businesses on a property. He stated that, in the last comprehensive plan, the ordinance had not yet been worked on. He stated that he thought the amount of signage allowable was ridiculous but that, unfortunately, that was the ordinance the BOA had to work with. Mr. Marshall stated that, "Any that know me know that I can stretch on criteria 1, 2, 3 and 4. But, unfortunately, on this one I can't get past 1 and make that pass the straight face test."

Mr. Marshall stated that since the appellant did not have a contractual agreement as yet, he agreed that the appellant did not meet the first criterion. He stated that he did agree that the appellant met the second, third and fourth criteria.

As the last Finding of Fact:

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

Mr. Marshall, Ms. Lemire, Mr. Cieleszko and Mr. Billipp agreed that the appellant did not meet this criterion.

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

All agreed that the appellant met this criterion.

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

All agreed that the appellant met this criterion.

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

Mr. Marshall stated that the appellant met this criterion. Ms. Lemire, Mr. Cieleszko and Mr. Billipp stated that the appellant did not meet this criterion.

DECISION

The vote in favor of the motion to deny the variance for a 40-square-foot sign was unanimous. Chairman Hamilton concurred.

The appellant was notified that he had 45 days to appeal the decision to the State Superior Court and that he would receive a Notice of Decision within seven days.

APPROVAL OF MINUTES

Mr. Marshall moved, seconded by Ms. Lemire, to accept the minutes of July 17, 2014, as amended.

OTHER BUSINESS

Mr. Rankie stated that, at his first meeting as a BOA member, he had been severely scolded for speaking out of turn because he would be given an opportunity to speak before the public hearing was closed, since he would not be a voting member for that application. He stated that he thought it would be helpful if the non-voting members were notified before the public hearing was closed in order to add their thoughts. He stated that he did not get an opportunity to express his sympathy with Ms. Graham's application during the hearing.

Chairman Hamilton stated that he been following policy and that he would investigate the policy.

Mr. Rankie stated that he appreciated the way Chairman Hamilton has asked for an expression of conflict of interest on behalf of any of the BOA members prior to the hearing.

Mr. Cieleszko stated that he thought it had been established that the non-voting members have been given the last statement before the closing of the hearing. He stated that their insights are more important than the insights of the general public once deliberations begin.

Ms. Pelletier stated that Mr. Marchese had gotten a legal opinion in 2013 on the issue of attaching a variance to a specific use. She stated that the Town attorney had stated that, "The general rule is that a variance runs with the land and passes with the land to a subsequent purchaser. The Board of Appeals can impose certain conditions on a variance relative to a specific use or duration that can be rationally related to minimizing any adverse impacts but generally may not limit a variance to a particular owner."

Chairman Hamilton stated that a variance could be limited to a use or a time period. Mr. Marshall stated that in the prior hearing, the duration of the variance could have been limited to the time during which Aroma Joe's was operating. Ms. Lemire asked if that meant that the BOA could have granted the variance. Ms. Pelletier stated that the appellant still could not have met the first criterion. Ms. Lemire concurred.

ADJOURNMENT

Mr. Marshall moved, seconded by Ms. Lemire, to adjourn the meeting. All were in favor. The meeting was adjourned at 9:35 PM.

Respectfully Submitted,
Linda Keeffe
Recording Secretary

Approved by: _____
Bill Hamilton, Chairman

Date Approved: _____