

TOWN OF ELIOT – BOARD OF APPEALS MEETING

October 15, 2015

ROLL CALL

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

Others Present: Code Enforcement Officer Heather Ross; Appellant representative Sandra Guay, Attorney; Appellant George Beland; interested parties.

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 there were two public hearings, the first a request for a variance and the second a request for a waiver.

PUBLIC HEARING

Chairman Hamilton stated that this was a public hearing for Cumberland Farms, Inc., Map 29, Lot 27, 28 Levesque Drive, in the Commercial Industrial District. He stated that Cumberland Farms was requesting a variance to the terms of Sections 45-130, 45-527, 45-528, 45-530 and 45-532, to exceed the maximum square footage allowed for multiple commercial industrial signs.

Chairman Hamilton asked if anyone on the Board had a conflict of interest in the hearing. Mr. Cutting stated that, given that he is an employee of Cumberland Farms, he would recuse himself.

Mr. Rankie stated that, in the interest of transparency, he is the President of Baran Place, an abutter to the property which contains the condominium lot of Cumberland Farms. He stated he had had business dealings with the owner of Eliot Commons, Mr. Forsely. He stated that he did not feel that there was a conflict of interest, but that he sought approval from the BOA. He added that, if they did not agree, he would step down.

Mr. Cielezsko stated that he would prefer that Mr. Rankie recuse himself, both because of his relationship as an abutter, and because signage had been brought up in former

cases as a bane to the tenants of Baran Place. Mr. Cielezsko stated that he did not have any doubt that Mr. Rankie could be fair, but that he thought that a court could see the situation as a biased one.

Chairman Hamilton stated that, even if a member was an abutter to an appellant, it would not necessarily mean that there was a conflict of interest. He stated that abutters may have opinions, but that would not necessarily preclude them from making a judgment on the nature of the appeal.

Ms. Lemire moved that Mr. Rankie be a voting member for the appeal. There was no second and the motion failed. Chairman Hamilton stated that, since the motion failed to achieve a second, he would take that as an advisement.

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

Mr. Rankie asked whether he should step down or stay seated. Chairman Hamilton stated that Mr. Rankie had not been found to be biased in any way, so he could remain on the Board. Mr. Cielezsko stated that he thought that Mr. Rankie should sit the hearing out.

Mr. Rankie stated that, in fairness to the Board, given that there could be actions involving litigation against the Town by the appellant, he thought that he could say the same things sitting in the audience that he could say sitting on the Board. He stated that if he was sitting in the audience, he would not jeopardize the Town's case in court. He stepped down.

Chairman Hamilton stated that the jurisdiction for the BOA to hear the variance under code Section 45-49, Powers, states in section (b), Variance appeals:

“The board of appeals shall hear and decide cases involving the relaxation of regulations affecting height, area, size of 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 in 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.”

Chairman Hamilton stated that the appellant must meet all four criteria. He stated that the criteria are legislative requirements for the State of Maine and are requirements that refer to the deliberations of the BOA.

Chairman Hamilton stated that the parties to the action in the hearing are Cumberland Farms and the ordinance.

Chairman Hamilton stated that the appellant has standing and that there was no issue of timeliness for a variance.

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

- 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 appellant will address the issue of undue hardship and present evidence of such.
- 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.
- Testifying parties will state their name and address for the recording secretary.
- 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 would then make statements regarding the appeal. There were no non-voting members for the first hearing.
- 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.

TESTIMONY FROM APPELLANT

Sandra Guay, the attorney for Cumberland Farms, stated that she appreciated the BOA's hearing of the variance request and appreciated the unusual nature of the request. She stated that, in the packet provided to the BOA, she had given an outline of the process to date.

Ms. Guay stated that the Cumberland Farms project was approved in October 2014. She stated that the permit application for the signs was denied by the CEO in July 2015. She stated that Cumberland Farms came before the BOA in August 2015 to appeal the administrative decision, and the BOA denied the appeal.

Ms. Guay stated that, in September 2015, Cumberland Farms went before the Board of Selectmen, the Town Manager, and the Town's attorney to discuss the possibility of a Consent Agreement. She stated that the hope of Cumberland Farms was to come to some sort of amicable arrangement.

Ms. Guay stated that, because the BOA denied the administrative appeal in August, Cumberland Farms also had filed a court appeal, because there was a timeline by which that appeal had to be filed. She added that the Town's attorney had answered.

Ms. Guay stated that in the meeting with the BOS, the Selectmen requested that Cumberland Farms go through the full administrative process, including the request for a variance, before they could discuss the Consent Agreement possibility.

Ms. Guay stated that she understood the decision-making the BOA had to go through and understood the criteria that needed to be addressed. She stated that, of the four criteria, there are always a couple that are more difficult than others.

Ms. Guay addressed the first criterion, that the land in question cannot yield a reasonable return unless the variance is granted. She stated that, obviously, the Cumberland Farms store has been built at the location. She stated that the store would not have been built if Cumberland Farms had not been able to get the signs that it needed in order to have a profitable business there.

Ms. Guay stated that, in terms of reasonable return, any developer who came into Eliot in order to make the sort of investment that Cumberland Farms had made in that location would be in the same position. She added that without signage in order to make the investment successful, no other business would have located there. For that reason, she stated, that particular location for a business similar to Cumberland Farms could not yield a reasonable return. She stated that the location is a shopping center for commercial use and that somebody is going to have to use the Cumberland Farms property in a commercial way. She stated that, again, without the signage, it is unlikely

that any reasonable developer willing to make a significant investment in Eliot would have used that parcel.

Ms. Guay addressed the second criterion, that the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood, stating that the area is a commercial area, and what is unique is that the property is a condominium parcel.

Ms. Guay stated that throughout the process of permitting, it was certainly Cumberland Farms' understanding that they were complying with the ordinance, and that included the disclosure that the parcel was a condominium parcel. She stated that the site plan package included signage that was in the application, what it looked like, where it was going to be located, and what type of signage it was.

Ms. Guay stated that if the property was not a condominium parcel, Cumberland Farms would not be having the current discussion. She stated that the condominium parcel is what makes the property unique.

Ms. Guay addressed the third criterion, requiring that granting a variance would not alter the essential character of the locality, stating that the area is a commercial area. She stated that adding a sign is not going to change the look of the area in any way.

Ms. Guay addressed the fourth criterion, that the hardship is not the result of action taken by the applicant or a prior owner, stating that Cumberland Farms did purchase a condominium parcel. She stated that the reason for the variance request was because of the signage. She stated that Cumberland Farms did not come before the BOA to request a variance in order to get the signage prior to the site plan approval. She stated that Cumberland Farms was always of the understanding that they could get the signage that was included in the site plan approval process.

Ms. Guay stated that what was causing the current hardship was that eight months after the site plan approval, Cumberland Farms was denied the signage permit because the current CEO had a different understanding of the language of the ordinance than the prior CEO had had. She added that she understood that there was some disagreement about what had been said, but that that did not pertain to the hearing.

Ms. Guay stated that the issue was that, from the time Cumberland Farms started the application process, they moved along because the signage had been approved. She added that when it came time to install the signs, the permit was denied. She stated that the hardship began at that point.

Ms. Guay stated that she understood that the request before the BOA was unique and that Cumberland Farms hoped that they could work with the Town, either through the variance process or through the Selectmen, so that they did not need to continue

through the courts. She added that that was certainly not Cumberland Farm's first choice. She requested that the variance be granted.

QUESTIONS FOR APPELLANT FROM BOARD

Mr. Marshall stated that, in looking at the application, deeds and sales agreements, it looked like Cumberland Farms bought the property. He asked what the technical difference is between a condominium, outright ownership, and rental. Ms. Guay responded that a condominium is just another form of ownership. She stated that it really is no different from buying the lot outright. She stated that Cumberland Farms owns the condominium parcel.

Mr. Marshall asked if there was a time limit on the condominium. Ms. Guay replied that there was no time limit, that it was not a lease, and that Cumberland Farms had purchased the parcel and now owns it.

Ms. Guay stated that when the parcel is a condominium, the owner owns the ground and the air space above the ground, and that the owner has the right to install their structure in the ground. She added that the entire under-the-ground space is part of the condominium complex.

Mr. Marshall referred to Ms. Guay's statement that Cumberland Farms owns from the ground up, and stated that he had seen some pretty deep holes during construction. He stated that it appeared that Cumberland Farms had the right to use more than just the ground up. Ms. Guay stated that they have the right to use the underground to install the tanks and infrastructure.

Mr. Marshall asked if the situation was similar to a 99-year lease. He asked if Cumberland Farms paid any rent or lease-holder fees to Sea Dog Realty. Ms. Guay stated that there was probably a condominium fee of some sort, which goes toward shared expenses, such as plowing and things of that nature.

Mr. Cielezko referred to Ms. Guay's statement that the hardship began with the denial of the sign permit. He clarified that Cumberland Farms had been unaware, prior to the denial, that there would be any trouble with signage. Ms. Guay concurred.

Mr. Cielezko stated that some people say that reasonable return, as required by the first criterion, is just about any return. He noted that Cumberland Farms was in business currently. He asked if Cumberland Farms was incurring losses right now. He added that the first criterion deals with the financial characteristic of the land. He asked what was currently happening and what Cumberland Farms foresees without the signage.

Mr. Guay replied that, in order for Cumberland Farms to be able to compete with other gas stations in the area, and in order for Cumberland Farms to bring the maximum number of people into the facility, they need to be able to advertise their presence. She stated that the more important need was the ability to advertise the pricing. She added that that ability was crucial.

Ms. Guay stated that, without being able to have the free-standing sign to advertise the pricing, Cumberland Farms would not have built the store.

Jeffrey Cutting stated that he is the Vice President of Cumberland Farms at 291 Central Ave, Dover, New Hampshire. He stated that signage in any convenience-store type of situation is a crucial part of the business. He stated that the lack of signage is a hardship in many ways.

Mr. Cutting stated that gasoline is a commodity, and that people will drive ten miles to save five cents on a gallon of gas. He stated that during the last few weeks, gasoline prices in Eliot have been even lower than Portsmouth prices, because of the gasoline situation in the competitive marketplace in the area of Cumberland Farms' location.

Mr. Cutting stated that the disadvantage for Cumberland Farms is not right now, because they do have a small sign out on the street. He stated that the disadvantage will be this winter, when the snow banks are six feet deep and there is no sign because of the snow. He added that that would be a disadvantage, because Cumberland Farms could not advertise like others on the same street. He stated that they would need a sign of the appropriate height, which would involve the embankments, so that Cumberland Farms could advertise their price as the same as or better than those of everyone else.

Mr. Cutting stated that there was also an issue of safety. He stated that Cumberland Farms no longer has employees go outside to change signs, because it is a safety issue to cross the parking lot, due to customers who are coming in and out. He added that in the winter, the parking lot has ice and snow, so that to get to the sign to change the price would be very dangerous.

Mr. Cutting stated that the pricing is changed electronically and remotely through the register system inside the store. He stated that currently, without the free-standing sign, Cumberland Farms has to send an employee out every single time the gas price changes, which can be as much as three times a day. He stated that the prices get sent electronically from the corporate office and that each and every time the price changes, an employee has to be sent out to physically change the sign. He added that that sign could not be seen in the middle of a snow bank.

Mr. Cutting restated that the hardship is not current, but that it will happen when the snow embankments are high and signage becomes a problem. He stated that, at that

point, the business would be a competitive disadvantage in the marketplace in Eliot and also in Portsmouth, because of the fact that Cumberland Farms does not have the signage which other businesses have.

Mr. Cutting stated that it is a standard, traditional thing in every gas station across the United States that there is a sign in order to maintain a competitive edge. He stated that when losing that advantage, profitability goes down. He added that when profitability goes down, it becomes harder to pay for the investment put into the site.

Mr. Cutting stated that Cumberland Farms does not pay any fees on the site and that they pay for all of their own snow plowing. He stated that there is a trench across the site, and that Cumberland Farms is fighting with Sea Dog Reality to get that taken care of, because it was done by Unitel. Mr. Cutting stated that Cumberland Farms is just another neighbor in the plaza, and that they own and maintain their property.

Mr. Cutting stated that Cumberland Farms is trying to be competitive in order to pay off the price on the lot, which was \$69,000. He stated that the property is treated as a separate entity, and that the property was viewed as a separate lot by the Planning Board during the site plan review process.

Mr. Cielezsko stated that his next issue was the amount of signage. He stated that he did not want to revisit the issue of the appeal of the CEO's decision, but that he thought that the sign request was for a sign with more square footage than what is allowed by the Town. He asked if that issue was either being addressed through the variance request or by Cumberland Farms downsizing the sign to make it correct.

Ms. Guay stated that Cumberland Farms' understanding was that it made a difference whether the parcel was treated as a separate parcel or as a condominium parcel, because that determines the amount of additional signage that is allowed on the property. She added that the issues are all interconnected.

Ms. Guay stated that the free-standing sign is essential. She stated that Cumberland Farms is willing to discuss some of the other signage, if that would make the plan work with the Town, but that the free-standing sign is absolutely crucial.

Chairman Hamilton asked if the free-standing sign was 100 square feet. Ms. Guay stated that it was either 100 or 90 square feet. Chairman Hamilton stated that the plan included two additional signs plus entrance and exit signs, where code specifies one additional sign. He stated that the allowed signage was essentially used up, because the parcel is part of the condominium association. He stated that he believed that Cumberland Farms would be limited to 10 square feet of signage.

Ms. Guay stated that if the parcel is not being treated as a separate parcel, that would obviously change the amount of permissible signage. She stated that the variance

appeal, the administrative appeal, the discussions with the Selectmen, and the court appeal all refer to the parcel being treated as a separate parcel with its own signage.

Chairman Hamilton stated that zoning in the district requires a three-acre minimum and that the Cumberland Farms property is 1.2 acres, so the parcel in no way could be considered as a separate parcel.

Ms. Guay stated that if that was an issue for the appeal, that would go back to the way the issue was treated during the review and approval of the application.

Mr. Marshall stated that he still did not understand the condominium issue. He stated that, driving down the road, he wondered what the difference was between allowing the Irving Gas Sign, the Dollar General sign, the Agway sign and other signs, and not allowing Cumberland Farms to have a sign. He stated that he could see the small lot size being a possible issue. He stated that everybody else has a sign, and that it looked like a little bit of favoritism.

Ms. Guay stated that she agreed that everybody else has a sign, and that the Cumberland Farms sign would not change the character of the locality.

Ms. Guay stated that it was Cumberland Farms' understanding, from the beginning of the process, that the sign would be allowed. She stated that they never asked for waivers or variances for anything other than what they understood they were permitted to do under the ordinance. She stated that the Cumberland Farms sign was certainly not unique and was similar to the signs of other businesses in the area.

Chairman Hamilton stated that he wanted to address the issue raised by Mr. Marshall regarding favoritism. He stated that Irving, Agway and the other business are individual lots with the square footage allowed under the current zoning ordinance.

Chairman Hamilton used the example of a condominium complex with 10 units. He stated that he thought that what Mr. Marshall was asking would be to allow each of ten condominium owners to erect a 100-square-foot sign. He stated that the Eliot code states that a condominium association is allowed one 100-foot sign, which can be divided. He stated that Eliot Commons wanted to give Cumberland Farms 90 square feet and use the remaining ten square feet for themselves, they could do so. He stated that there already is a 100-square-foot sign on Eliot Commons.

Chairman Hamilton stated that the issue is not favoritism, but that it is adherence to the code the way it is written. He stated that each of the other properties Mr. Marshall talked about is an individual parcel, meeting the three-acre minimum. He stated that Cumberland Farms does not meet the minimum requirement and is also part of a condominium association, which the other properties are not. He added that the other properties are not in violation and are not non-conforming.

Mr. Marshall stated that it sounded like Cumberland Farms owns the property outright. Chairman Hamilton concurred but stated that they are part of a condominium association. Mr. Marshall stated that he was still fuzzy on what the difference was. He stated that there was not a substantial difference to invoke which would allow Cumberland Farms to have a business but not a sign.

Chairman Hamilton stated that the difference was that the code states that, if a parcel is part of a condominium association, the aggregate total of signage is 100 square feet in the Commercial Zone. He stated that the difference is very clear.

TESTIMONY FROM THE CODE ENFORCEMENT OFFICER

Ms. Ross stated that the Cumberland Farms property is a conforming lot with conforming structures. She stated that on June 10, 2015, Cumberland Farms applied for a building permit to construct signs. She stated that those signs included a free-standing sign, two building-mounted signs, and entrance and exit signs, all of which exceeded the ordinance. She stated that canopy signs were not applied for, but that they were on the building and were currently covered with a tarp-type structure.

Ms. Ross stated that the temporary sign that has been erected on the parcel is also not allowed by ordinance, but that she did not want to pick on anybody in particular, because such signs will be part of her assessment of the Route 236 area. She stated that she will issue letters to all of the businesses who are out of compliance.

Ms. Ross stated that on July 2, 2015, a Notice of Decision was issued for the property, denying the requested signs. On August 20, 2015, the Board of Appeals held an administrative appeal regarding the Notice of Decision and denied the application.

Ms. Ross stated that on August 27, 2015, Cumberland Farms submitted a letter to the Town Manager and Selectmen requesting a Consent Agreement. In September of 2015, the Board of Selectmen denied the Consent Agreement, because Cumberland Farms had not exhausted all options, as required by Consent Agreement policy. At that time, a statement from the Code and Planning Office stated:

“The Town of Eliot Consent Agreements Policy states that ‘a consent agreement may be appropriate when a property owner is informed by the Code Enforcement Officer (CEO) that there is a zoning violation, which cannot be easily corrected, such as the building in question does not meet the setback requirement. The first avenue for someone in this position is to request a waiver, variance, etc. from the Board of Appeals.’”

Ms. Ross stated that there was no zoning violation on the property. She stated that the request of Cumberland Farms for a Consent Agreement was for signs that are not on the property but are only proposed to be on the property. She stated that the Consent Agreement Policy refers to properties with an existing violation, not easily corrected, and the ability, under those circumstances, to issue a Consent Agreement.

Ms. Ross stated that it was the opinion of the Code Enforcement and Planning offices that a denial of a building permit application for signs on a property that **is** in compliance with the Town of Eliot Municipal Code of Ordinances is not in agreement with the Consent Agreement Policy.

Ms. Ross stated that in September 2015, Cumberland Farms filed the Variance application.

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."

Ms. Ross stated that the Cumberland Farms property was looked at as a portion of a parcel, not the parcel in entirety.

Ms. Ross stated that the Maine Municipal Association Board of Appeals Manual states, in the section Personal Hardship, "The court in Maine has made it clear that 'undue hardship' relates to a problem created by some feature of the property itself. The fact that 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."

Mr. Marshall asked for an explanation as to what Black's Law means. Ms. Ross stated it means that a condominium is a portion of a parcel. She stated that when looking at zoning, one looks at the property or the parcel itself. She stated that the sign ordinance states that a property is allowed a certain amount of signage.

Mr. Marshall states that it appeared that Cumberland Farms bought their property. Ms. Ross stated that they bought a condominium, and that their site plan refers to a unit on the property, not to a separate parcel. Mr. Marshall asked if Cumberland Farms could sell the property. Ms. Ross stated that they could sell it as a condominium. She stated that it would be the same as selling a residential condominium. She added that, if Sea Dog Realty decided to condominiumize all of the other units in Eliot Commons, they could do so, resulting in the ability of each unit's owner to buy and sell.

Mr. Marshall asked if the Chinese restaurant in Eliot Commons was purchased or rented. Ms. Ross stated that she believed that they leased. She stated that there are three

condominium units on that property; one owned by Cumberland Farms; one that is the longer strip of the Eliot Commons; and another unit, which is located at the back of the property.

Mr. Marshall stated that the businesses in the longer strip get ten feet of signage, but that they don't own their property. Mr. Marshall clarified that if the Chinese restaurant or another business in the strip wanted to sell their business, they could do so, but that they could not sell the slot in Eliot Commons. Ms. Ross stated that they could sell the slot if they had a condominium form of ownership. She stated that a condominium is just a different form of ownership, but that there is not enough land area to divide the property to sell as a separate piece to Cumberland Farms.

Chairman Hamilton stated that the condominium situation in that zone, which requires a three-acre minimum, allows a number of businesses to locate on a parcel which normally would not allow that many businesses.

Chairman Hamilton stated that each individual owner or lessor has the right to part of the signage which is allowed for the entire parcel, regardless of whether they lease or purchase. He stated that the requirements of the zone state that a business, whether owned or leased, is still allowed a portion of the overall signage permitted for the entire parcel. He added that each business is not allowed its own 100-square-foot sign, and that they have to share the single 100-square-foot sign with the entire property.

Mr. Cielezsko stated that he thought Ms. Ross was completely correct in her interpretation of the ordinance and that her explanation was clear. He stated that he had some questions for the CEO but asked for some time to regroup, because he had gotten lost in the prior conversation.

TESTIMONY FROM INTERESTED PARTIES

Charles Rankie of 147 Brixham Road, Eliot, Maine, stated that he had heard a testimony a few times for the attorney that insinuated that the Planning Board had approved the signage. He stated that he did not believe that that was the case, and that the Planning Board did not approve anything to do with signage. He stated that their approval had to do with the building and what was on the parcel. He added that he believed that anything to do with signage must be approved after the site plan is approved by the Planning Board. He stated that he believed that the plans which were approved by the Planning Board did stipulate that. He directed a question to the CEO, through the Chair, to determine whether or not his beliefs were accurate.

Ms. Ross stated that Mr. Rankie was correct, in that a separate sign permit is required to be reviewed and approved by the CEO. She stated that it is part of what the Planning

Board looks at when reviewing the overall project, but that it is not something on which the Planning Board has the authority to issue a decision.

Mr. Rankie stated that Mr. Marshall had referred to the pizza shop and the other business in Eliot Commons. He stated that there are three current condominiums on the property. He stated that he thought it was critical how the BOA looked at the issue and what they decided to do, because a dangerous precedent could be set.

Mr. Rankie stated that, if the BOA chose to overrule the Town's ordinance that says that a single 100-square-foot sign is allowed for a property, in order to give a condominium unit of that property permission to erect a 100-square-foot sign and other signage, then the pizza shop could be sold as a separate condominium and they, too, would be able to have another 100-square-foot sign out on Route 236. He stated that Eliot would become closer to Saugus, Massachusetts, which he did not believe was the intent of the ordinance.

Mr. Rankie stated that the Cumberland Farms' presentation stated that the hardship was created because they assumed that they had been granted the signage. He stated that both the chief engineer and the attorney, in testimony from a prior hearing, had testified that they were completely aware of the four pages regarding signage in the ordinances.

Mr. Rankie stated that Cumberland Farms was completely aware that the signage they presented with their project was in violation, but they assumed that the officials in Eliot were approving the signage by approving the site plan package. He stated that they did not feel a need to follow up with paperwork. He stated that anyone who is a professional who did not follow up with paperwork was in error.

Mr. Rankie stated that, in negotiations with the owner of Eliot Commons, Cumberland Farms should have negotiated to get some space on the existing 100-square-foot sign, which is electronically controlled.

Mr. Rankie stated that the Cumberland Farms attorney and engineer had either made a mistake or had not been truthful about reading the four pages of the ordinance, because the ordinance very clearly spells out what signage is allowed.

Mr. Cutting stated in the prior hearing referred to by Mr. Rankie, the situation was not ownership of property. He stated that the appellant was going to do a ground lease for a number of years on a piece of property. He stated that, in that case, the Planning Board sent the applicant to the BOA in order to get the variance for the sign. He added that the Planning Board, in that case, knew the difference and sent the applicant back to the BOA for the variance.

Chairman Hamilton asked which case Mr. Cutting was referring to. Mr. Cutting stated that it was a variance request by a donut shop, and that they did not purchase the property as a condominium. He stated that the situation was a ground lease. He stated that the donut shop pulled out of the lease after the denial of the variance.

Mr. Rankie stated that he had been referring to a prior administrative appeal heard with Cumberland Farms, not to any other case.

Jaleh Dashti-Gibson of 185 Beech Road, Eliot, Maine, stated that she lives directly across the street from the Chinese Restaurant in Eliot Commons. She stated that she and her family bought their home in the summer of 2014, and that they see a lot of what is happening traffic-wise and business-wise. She stated that she appreciated Mr. Rankie's comments, because, as property owners, they are concerned about the value of their home.

Ms. Dashti-Gibson stated that Cumberland Farms was not constructed when they purchased their home. She stated that they enjoy Cumberland Farms and have bought gas or shopped at the convenience store many times. She stated that they do not object to the business being there, but that she is concerned if there is a possibility of a precedent being set, allowing that area to become much more intrusive into the neighborhood. She stated that her concern regards her property value.

Chairman Hamilton stated that the BOA does not set precedent with any of its decisions. He stated that the only entity that sets precedent is the Superior Court. He stated that the BOA reviews each case on its individual merits. He added that, even though there may be similarities, each case may have a different resolve.

Ms. Dashti-Gibson stated that the other side of the issue is that the gas station should be able to have a sign to communicate its prices, so she was sympathetic to the challenge. She stated that she wondered if there was a creative solution that would be in compliance with the ordinance and also allow the business to function.

Mr. Rankie stated that, if the BOA granted the variance for the signage, he wondered if that could be used in the court by another appellant to get a similar additional signage granted in the Town of Eliot. He asked if that would not be a precedent, which could be cited by an attorney.

Chairman Hamilton stated that Boards of Appeal do not set precedent, and that each case is decided on its own merits. He stated that, even though there may be similarities, there is no guarantee that another condominium would get a sign.

Mr. Cielezsko asked Ms. Ross if the CEO had been sent parts of the package as Cumberland Farms was going through the Planning Board process. Ms. Ross concurred. Mr. Cielezsko stated that he saw no evidence anywhere that Cumberland Farms was

ever told that the signage was going to be denied. Ms. Ross concurred. She stated that that was during the nine-month period of time when there was no full-time CEO for the Town of Eliot. She stated that she had worked on Fridays and another gentleman worked a couple of days a week, but that she did not have a copy of the packet and did not review the issue at that time.

Mr. Cielezsko asked if there was any evidence that Cumberland Farms knew that they were doing something illegal or were trying to put something over on the Town regarding signage. He asked if there was ever any hearsay, even, that Cumberland Farms was trying to pull a fast one on the Town. Mr. Ross stated that she did not believe there was such evidence.

Mr. Cielezsko stated that Mr. Rankie had indicated that the attorneys knew that they were doing something wrong during their pursuit of building permits, and that they happened to get caught in the sign permitting process juncture. He asked Ms. Guay if she understood that. Ms. Guay stated that she did understand, and that she took some offense at that statement.

Ms. Guay stated that Cumberland Farms came in initially to meet with the Planner and the acting CEO, moving forward based on that meeting. She stated that the Town ordinance requires that full plans, with signs, be submitted with the application. She added that the ordinance stated that the reason for that is so that the CEO can review the package and make sure that everything is OK. She stated that that was done and that the signage was in the application. She stated that as far as they knew, the Findings of Fact went to the CEO twice for review during the process, and that they were approved.

Ms. Guay stated Cumberland Farms always believed that what they were doing was in compliance with what was required by the Town's ordinance, and that they had had assistance from staff.

Mr. Marshall stated that he had more questions for the appellant. He stated that he believed he had heard that Cumberland Farms had spent roughly \$3,000,000 on the property. Ms. Guay concurred. Mr. Marshall asked what the approximate yearly tax would be on the property. Ms. Guay stated that the property is in the TIF, so the tax would be minimal.

Mr. Marshall asked if that meant they would not pay tax because they are in a TIF, or that the tax would go into a different fund. Ms. Ross stated that, because they are in a TIF, the tax would be minimal. Mr. Marshall stated that he wondered how minimal the tax is.

Mr. Cielezsko stated that property in the TIF does not pay into the Town coffer, but they do pay tax. Mr. Marshall stated that they were going to pay some tax somewhere, and

they he really did not care whether it went to the Town or to the TIF. He stated that Cumberland Farms would be given a tax bill, and he wondered what the amount would be.

Mr. Cutting stated that the property is assessed at \$1,083,000. Ms. Ross stated that she did not believe that the taxes for the property are assessed at the current tax rate, and that they have something to do with the property being in the TIF district. She added that she did not know the details, but that it is not taxed in quite the same way as other properties.

Mr. Marshall asked what the current tax rate and TIF rate are. Ms. Ross stated that she did not know what the TIF rate is, but that she could look up what the tax rate is. Ms. Lemire stated that the current rate is \$13.80.

Mr. Marshall stated that the BOA was looking at reasonable rates of return and hardship, and he thought that it was important to know what has been invested in order to consider whether there is any hardship. He wondered if Cumberland Farms was taxed differently because it is a condominium, as opposed to a personal piece of property. Ms. Ross stated that she did not know the details. She stated that property is separated as condominium parcels by the Assessment Department, but that she did know how that is regulated.

Mr. Cutting stated that he did not know the tax amount, and that that is a function of Cumberland Farms' finance department.

Chairman Hamilton stated that there is no question that Cumberland Farms would be paying tax and that he did not think the amount or designation was important. He stated that taxation has nothing to do with a reasonable return on the property. He stated that the four criteria for the justification for a variance have nothing to do with the fact that the owner of the property cannot make it work. He stated that it has to do with whether or not the property can make it work.

Ms. Ross read the section, The Reasonable Return Standard, from the MMA Manual concerning reasonable return, which states,

“Most court cases in Maine pertaining to zoning variances and the ‘undue hardship’ test have focused on whether the applicant can realize a ‘reasonable return’ on the property without the variance. The court has made it clear that ‘reasonable return’ does not equal ‘maximum return.’ It is extremely difficult for an applicant 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. A landowner cannot be forced to sell his land to an abutter as a way to realize a ‘reasonable return.’ However, where an applicant for a variance owns adjoining land which he or she could use to avoid the need for a variance, the court has

held that a variance should not be granted. The typical request for a setback variance to allow a deck, porch, garage, storage building or addition to an existing structure will have to be denied on the basis of the 'reasonable return' standard, absent proof that the person has tried to sell that property 'as is' and no one will buy it unless the proposed construction can occur or that the property cannot be used for any other legal purpose under the zoning ordinance without a variance. The Maine court has held in some cases that a 'reasonable return' can be realized by recreational uses and lake access."

Mr. Marshall stated that he would like to remind folks that MMA is not part of the State government, but that they are a lobbying group with their own agenda. He stated that reasonable return would be a return that is reasonable. He stated that, in this particular case, to give someone permission to construct a convenience store and then to hobble them is not reasonable. He stated that it would almost be like saying that, "You can have a gas station, but you can't put any tanks in."

Chairman Hamilton stated that the rest of the discussion should probably be in the deliberation phase, as opposed to the phase of questions for the appellant. Mr. Marshall concurred, but stated that he felt it was important to realize the MMA status.

Ms. Lemire stated that she could understand where the appellant was coming from in terms of sign approval, because after going through the Planning Board process, the appellant thought that anything that was in the review was approved. She stated that Cumberland Farms could have gone through the whole process assuming that the signs were approved, when only the CEO can approve them.

Ms. Lemire asked why the appellant did not submit an application a lot sooner than she did. Ms. Guay stated that Eliot has a unique ordinance, specifically with the requirements of what has to be submitted in the site plan and the reasons for that. She stated that the Eliot ordinance requires the full set of plans for the signs and does so in order that the CEO can review the signs as part of the plan review process.

Ms. Guay stated that it was Cumberland Farms' understanding, which was never corrected throughout the whole process, that all of the site plan was being approved and was being reviewed by the CEO, whose approval was part of the whole process. She stated that when the Findings of Fact came out from the Planning Board, it again said that the signage plans had been sent twice to the Code Office. She stated that there was no reason to think otherwise than that the signs had been approved, based on the Eliot ordinance.

Ms. Guay stated that the process is different from municipality to municipality, so they do rely on assistance from staff. She stated that they had read the ordinance and understood what they thought it said, but that then they went to the staff to make sure that they had it right. She stated that, from the very beginning, Cumberland Farms

believed that they had gone through the process that the Town required, and at no point during that entire process did anyone say there was anything additional that should have been done.

Ms. Lemire clarified that no one ever indicated that the signage may not be up to code. Ms. Guay replied in the affirmative.

Mr. Cutting stated that he could answer the question as to why Cumberland Farms did not pull the sign permit earlier. He stated that as soon as Cumberland Farms is awarded a project, it goes out to the general contractor. He stated that the general contractor starts by bringing the subcontractors in one at a time, each one of whom is required to pull their own permits. He stated that when the electric people came in, they pulled their permit, as did the plumbers and the other subcontractors.

Mr. Cutting stated that on the day that Cumberland Farms was getting ready to open, the signs showed up. The sign builders went to pull the permit and were denied, and that that is when the whole show stopped. He stated that there was not anything that anybody meant not to do.

Mr. Cutting stated that Cumberland Farms, because of the current situation, has changed the process, and that the general contractor now has to pull all permits at the start of a project.

Ms. Lemire asked whether Cumberland Farms used local or regional contractors. Mr. Cutting stated that Cumberland Farms used a Maine contractor for the Eliot project, but that they could use any contractor. He stated that Cumberland Farms brings supervisors to the site, and that they then hire contractors based on the bid process. Ms. Lemire clarified that the contractor may not be familiar with local ordinances. Mr. Cutting concurred. He stated that, as long as the contractor is licensed in the State, Cumberland Farms can bring them in to do the work.

Mr. Cutting stated that that was how the permits got pulled so late. He stated that the subcontractor showed up with the signs, prepared to set them up according to the site plan, and were denied a permit by the CEO.

Ms. Ross stated that there were two instances when she was on the site, toward the end of May and the beginning of June, when she told the contractor who was on site that the sign company had contacted her, but that there were no sign permits issued for the property, that she had no designs, and that there could potentially be an issue. She stated that she knew that it was the intent to install another free-standing sign, and that that would not be allowed by ordinance.

Mr. Cutting stated that he did not know whether or not the general contractor said anything regarding the signs. He stated that Cumberland Farms does not build the sites

themselves, because they give the project to a general contractor. He stated that he could not answer as to how the sign permitting was communicated.

FINAL TESTIMONY FROM APPELLANT

Ms. Guay stated that she appreciated the opportunity to respond to some of the questions which had come up.

Ms. Guay stated when the CEO visited the site in May and June, the store was almost complete. She stated that the site visit had not been in the beginning of the project, when Cumberland Farms could have stopped the project and reversed everything, because the building had already been erected.

Ms. Guay stated that the CEO's statement (during the meeting) was the first time she had heard that the signage was brought to anybody's attention. She stated that she was not questioning the CEO, but stated that it was the first time that she had heard about the CEO's mention of signage during the site visit.

Ms. Guay stated that she wanted to clarify that when Cumberland Farms went to the Selectmen, they actually did not deny the Consent Agreement. She stated that they stopped the discussion of the Consent Agreement and stated that, before they could discuss it, Cumberland Farms needed to go before the BOA for a variance request.

Ms. Guay stated that she believed that the Chairman was correct in his statement that the BOA does not set precedent. She stated that every decision the BOA makes is unique, based on the set of facts before it. She added that that was the reason for the Findings of Fact. She stated that every decision that is made is made on the circumstances and the facts for the specific application, and that no two variance requests or appeals which come before the BOA are exactly the same. She stated that the decisions are made based on the specific facts.

Ms. Guay stated that it had been brought up that, at the time the application was approved and when it was going to the CEO for approvals, there was not a full-time CEO. She stated that she knew that the Planner was acting as an interim CEO and that there was also another interim CEO.

Ms. Guay stated that she could appreciate the difficulties of being in between CEOs, and the gaps that may happen because of that. She stated that she appreciated that the Cumberland Farms case was an example of what can happen—that things fall between the cracks. Ms. Guay stated that there had been one person who had not been a full-time CEO, followed by a full-time CEO, who perhaps had had better training, and things had changed.

Ms. Guay stated that Cumberland Farms was caught between the two CEOs and has been harmed by that. She stated that Cumberland Farms was asking the BOA to take that into account when it considered the variance request.

Ms. Guay stated that, in terms of hardship, she would say that, at this point, with the store on the property, there really is no other use for the property. She stated that Cumberland Farms cannot just sell the store to somebody else, because they just invested a large amount of money to build the building, and yet they cannot operate the business in the way in which it was intended to be operated, because they cannot get the signage.

PUBLIC HEARING CLOSED

Chairman Hamilton closed the public hearing at 8:10 PM.

FINDINGS OF FACT

- The appellant is Cumberland Farms.
- The property is located at 28 Levesque, Map 29, Lot 27.
- The property is located in the Commercial Industrial District.
- The property is a 1.2-acre parcel in a three-acre zone.
- The property is part of a condominium association.
- Cumberland Farms is requesting a variance to the terms of Sections 45-130, 45-527, 45-528 and 45-532 to exceed the maximum square footage allowed for multiple commercial industrial signs.
- The authority of the Board of Appeals to hear the variance appeal is granted by code in Section 45-49(b).

Chairman Hamilton re-emphasized that the BOA was not there to right a wrong. He stated that there might have been wrongs or missteps along the way during the application. He stated that the BOA's job was to determine whether the appellant qualified for a variance, meeting each and every one of the standards that the legislature of the State of Maine has given in order to meet the standards. He stated that, if there were wrongs done, it was not the BOA's job to fix things. He stated that the BOA was there to determine whether or not the appellant met the qualifications of the code.

MOTION

Mr. Cielezsko moved, seconded by Mr. Marshall, to grant the variance.

Mr. Cielezsko stated that, before he continued with the motion, he wanted the statement to note that the variance was the minimum acceptable to meet the appellant's needs. He stated that he was not sure how to word that and asked for discussion. He stated that he could just state the variance and then add an addendum. Chairman Hamilton stated that the wording should be included in the motion.

Mr. Cielezsko stated that the premise is that Cumberland Farms is under the condominium rule, but that that was not accurate either. He stated that he wanted to grant Cumberland Farms a variance that would give them the rights of a free-standing, commercial, buildable lot. Mr. Marshall asked if Mr. Cielezsko would be willing to have his motion modified.

Mr. Marshall stated that he wondered if the appellant would be willing to look at a modified size of their sign. Mr. Cielezsko stated that the appellant had already stated in testimony that they would be open to a modification. Mr. Marshall stated that he thought the motion needed a little more specificity.

Chairman Hamilton stated that he would recommend against considering the parcel as an individual property, rather than as a condominium parcel, because that would essentially reinterpret the ordinance, which is not allowed.

Mr. Marshall stated that the BOA does have the ability to waive the ordinance. Chairman Hamilton stated that they did not have that ability. Mr. Marshall stated that the BOA has the ability to vary the ordinance. Chairman Hamilton stated that the ordinance states that a variance shall be as limited as possible to relieve a hardship.

Mr. Marshall stated that they were looking to vary the ordinance, and that the BOA could put some specifications on the variance. Chairman Hamilton stated that they probably could do that by saying, perhaps, that the sign be not more than 50 square feet, but that Cumberland Farms had already bought the sign, which was sitting in storage somewhere. He stated that that did not seem like a likely solution. He stated that it was a difficult situation.

Mr. Cielezsko moved, seconded by Mr. Marshall, to amend his motion, and to grant a variance to allow the signage as included on the package which was accepted by the Planning Board.

DISCUSSION

Mr. Cielezsko stated that Cumberland Farms met the four criteria. He stated that the four criteria exist to help the BOA address zoning problems that affect an appellant. He stated that the need for the variance is not a result of Cumberland Farms' action. He

stated that the signage was OK'd by the Planning Board and that Cumberland Farms was OK'd through the whole process.

Mr. Cielezsko stated that Ms. Guay had stated the situation succinctly when she stated that the hardship started when the sign permit was denied. He stated that Cumberland Farms had had plenty of time to get the sign permits.

Mr. Cielezsko stated that the Planning Board made the donut shop get sign permits, and asked them to get adjustments as the process proceeded. He stated that the donut shop did not build a store and then ask for a sign permit, because they were told right in the beginning that they needed to go to the Board of Appeals. He stated that Cumberland Farms was never told to go to the BOA and that there were mistakes made by many people. He stated that the Town made some big mistakes.

Chairman Hamilton stated that it was not the BOA's job to fix mistakes. Mr. Cielezsko stated that the BOA would not be fixing a mistake. He stated that it was not the error of the appellant, because the situation is a result of the action of the Town. Chairman Hamilton stated that he disagreed.

Mr. Cielezsko stated that if Cumberland Farms had been told that they could not have their signs, and they had responded by stating that they thought the signs were legal and built the store anyway, that would be a whole different cup of tea, because then the situation would be the result of the appellant's action.

Mr. Cielezsko stated that Cumberland Farms did not buy the property without the knowledge that the store was going to be there. He stated that, once the store was there, the property was not just land, because the store was part of the property. He stated that the property could not be made into a camp ground now. He stated that Cumberland Farms did not invest all of that money in order to have a grassy field. He stated that they wanted a store.

Mr. Cielezsko stated that the Cumberland Store is there, that they were told it could be there, and now, because of a misinterpretation in the beginning, they now have a store that is not going to be competitive. He stated that when one is driving down the street and sees a big sign in front of Irving and no sign in front of Cumberland, anybody who does not know the history of Cumberland Farms is going to think that the store is closed, until he drives by and sees that there are lights on inside the store.

Mr. Cielezsko stated that Cumberland Farms has to protect their part of the competition. He stated that he saw very clearly that Cumberland Farms cannot get a reasonable return out of the Eliot Cumberland Farms, because they cannot get the sign as envisioned.

Mr. Cielezsko stated that the reason the donut shop did not build was because they could not get their signage approved. He stated that that was the proof of the pudding. He added that the donut shop walked because they could not get their signage. He stated that Cumberland Farms had testified that they would have walked as well, if they knew that they could not get their signage approved.

Mr. Cielezsko stated that the property is unique because it is a condominium, and it is unique because Cumberland Farms was not told that they had to follow a specific set of rules.

Chairman Hamilton stated that it was still not the BOA's job to fix the situation. Mr. Cielezsko stated that it is the BOA's job, as long as the situation meets the four criteria. Chairman Hamilton disagreed.

Mr. Cielezsko stated that granting the variance would not alter the essential character of the neighborhood.

Ms. Lemire stated that she was sitting on the fence with the issue. She stated that she agreed with some of what Mr. Cielezsko had said, but that she did not agree that the hardship was not a result of action taken by the appellant. She stated that she definitely saw culpability in the Town. She added that the signs do not meet the criteria, and that the signs are outside the scope of the limitations. She stated that, from her point of view, there was culpability on both sides.

Chairman Hamilton asked whether or not Ms. Lemire thought that the appellant was getting a reasonable return on the property. He stated that he was saying reasonable and not maximum return, and that the courts have decided throughout history that reasonable return does not mean maximum return.

Mr. Marshall stated that the concept of a reasonable return is a nebulous, subjective issue. He stated that after investing \$3,000,000 on a property, selling it for \$100,000 would still give the owner something. He stated that the \$100,000 would not be a maximum return, but it would be a return of something.

Chairman Hamilton stated that if Mr. Marshall did not like the ordinance wording, he should take the matter up with the legislature, because they are the ones who came up with the set of criteria. He stated that that was not only true in the State of Maine, but also in other states who subscribe to the criteria, including New Hampshire, Massachusetts and Rhode Island.

Chairman Hamilton stated that a variance is not like a candy bar, and that it is not given to people who need it. He stated that it is given to people who qualify. He stated that, clearly, Cumberland Farms needs the variance.

Chairman Hamilton stated that it is not the job of the BOA to fix problems that may have arisen through the Planning Board or the Code Enforcement Office prior to the arrival of the current CEO. He stated that in the prior administrative appeal by Cumberland Farms, the BOA supported the decision of the CEO, because it was felt that her decision was correct. He stated that if the BOA was going to be consistent in their thinking, what they had to deal with was not to fix the problem that was created, but to determine whether or not the appellant met the four criteria. He stated that the appellant has to meet each one of the criteria, and that he did not personally feel that they met the first criterion. He stated that there could be a reasonable return, because it is an on-going business, even though it would not be a maximum return.

Chairman Hamilton stated that there may be creative ways for Cumberland Farms to solve the problem, such as making a deal with the owner of the condominium to shift things around. He stated that there may be some other ways of illuminating a 10-square-foot sign or other possible ways of solving the problem. He restated that he did not feel that the appellant met the first criterion, because there could be a reasonable return.

Chairman Hamilton stated that there are people buying gas at Cumberland Farms every day, resulting in a return on the investment, even though it was not a maximum return.

Chairman Hamilton stated that the problem may be the result of a fault of the Town, or it may be the fault of the appellant for not doing due diligence. He stated that the appellant might have thought that, since nobody said anything about the signage, they could move forward, seeking the sign permit after the store was built. He stated that, if he was building a project of that scale, he would have made sure that he had a sign permit before he built the sign. He stated that that is how things work in the Town, getting a permit first and then building.

Chairman Hamilton stated that a permit is requested, and then the applicant can deal with the specifics of the application for that permit. He stated that an applicant does not build a property first and then look for a permit second. He stated that part of the responsibility rests on the shoulders of the appellant.

Chairman Hamilton stated that in terms of the first criterion, the appellant does not get a maximum return. He stated that he had a problem with the fourth criterion (that the hardship is not the result of action taken by the appellant). He agreed that the appellant's property was unique, meeting the second criterion. He stated that the sign would not alter the character of the locality, except that it would add another big sign on a property, which the Town of Eliot believes should be restricted in terms of signage.

Chairman Hamilton stated that if the BOA wanted to change the ordinance, they could make suggestions to the Town Manager and to the Planning Board to revisit the ordinance, which they have done in other instances. He stated that he thought that the

sign ordinance, when applied to condominium use, was to try to avoid the congested look along Route 236. He stated that there are already projects that have big signs, and that, if the BOA approved the variance, there would be another big sign. He added that that was not what he saw as the intent of the ordinance, and that it was certainly not what he saw as a justification for granting the variance.

Chairman Hamilton stated again that the BOA was not hearing the variance request in order to solve a problem created by some other board, some other person, or some other corporation.

Mr. Cielezsko addressed the fourth criterion that the need for the variance is not the result of an action taken by an owner or a prior owner, stating Cumberland Farms' need for a variance is not a result of their action, nor that of the previous owner. He stated that there has been no evidence that they maliciously or underhandedly tried to pursue the signage permit. Chairman Hamilton stated that that had not been implied by anybody, but that the situation had been the result of poor thinking.

Mr. Cielezsko stated that he agreed with the intent of the sign ordinance, and that he was not envisioning 100-foot signs all up and down the property. He stated that the problem is the result of an error by the Town. Chairman Hamilton stated that the BOA was not there to fix errors. Mr. Cielezsko agreed. He stated that they could not fix the error, because they would have to give Cumberland Farms their money back.

Mr. Cielezsko stated that if one did not agree that the appellant met the first criterion, it would be difficult to determine that the appellant met the fourth criterion. Chairman Hamilton stated that they are two separate issues. Mr. Cielezsko agreed, but stated, that in this unique circumstance, they were very related issues.

Mr. Cielezsko asked why Cumberland Farms would build the store if they could not have the signs. He stated that it was not the doing of Cumberland Farms that put them in the situation. He stated that they went through every process with the Town, went over every hurdle with the Town, proceeded with the Town all of the way. He added that Cumberland Farms had done their duty.

Mr. Cielezsko stated that Chairman Hamilton's position was that attorneys failed, owners failed, and everybody failed. He stated that the people who failed that counted were the Planning Board and the CEO. He stated that what that boiled down to was that Cumberland Farms could not get a reasonable return on their property.

Mr. Cielezsko stated that he had been in retail, and that signage is necessary. Chairman Hamilton stated that, if one looked at the profit and loss statement for Cumberland Farms for the past few months, one would probably find that they have a reasonable return. Mr. Cielezsko stated that he was not thinking about the past few months, but that he was thinking about 10 years down the road.

Ms. Ross stated that she wanted to remind the BOA that it was not just one free-standing sign that Cumberland Farms was seeking in the variance. She stated that there were an additional two signs on the building than were normally allowed, as well as two entrance and exit signs, which exceed the maximum size required by ordinance and are illuminated, where the ordinance specifies that they are not to be illuminated, and for canopy signage that was not requested through a permit, but was part of the Planning Board application.

Mr. Cutting stated that Cumberland Farms could cut the signage down with no problem. He stated that if the existing signage on the building could remain, that would be great. He stated that the only other sign they would be looking for was the street sign. He stated that none of the other signage would go up, including the entrance/exit signs. He stated that those limits could be part of the motion.

Chairman Hamilton asked if the sign on the canopy would come down. Mr. Cutting stated that Cumberland Farms would be willing to remove the sign if that was a real sticking point, and that the exit signs and two end gable signs would not be put up. He stated that, basically, all they would end up with would be the Cumberland Farms sign on the building, which is already there, and the stanchion sign as shown on the plan. He stated that those would be the only two signs on the property.

Mr. Cielezsko stated that he could amend his motion. Mr. Marshall stated that he would agree with a modification, but that he did wonder whether the BOA should be insisting on the entrance/exit signs for safety reasons. Mr. Cutting stated that there are already arrows on the pavement to direct traffic. He stated that the signs would make it easier for the customers to see in the winter.

Ms. Guay stated that perhaps the issue could be part of a discussion between Cumberland Farms and the CEO because, if it is a safety issue and there is a way to erect the signs, the CEO would then be OK with it. Mr. Marshall asked if there was a way to bring the signs into size compliance. Mr. Cielezsko stated that they could not be illuminated. Ms. Lemire concurred. Mr. Cutting stated that he would prefer to forget the signs as a part of the package. Mr. Marshall asked if the signs could be luminescent so that light would reflect off of them. Mr. Cutting stated that that design becomes a mess with snow, and that he would rather not put up the signs.

Mr. Cielezsko amended the motion, seconded by Mr. Marshall, to grant the variance to include only the free-standing sign as drawn in the site plan approved by the Planning Board. Chairman Hamilton stated that the Planning Board does not approve signs.

Mr. Cielezsko asked if Cumberland Farms had made changes to the signage from the approved site plan package. Mr. Cutting stated that he believed that the sign was built according to the plan.

Chairman Hamilton stated that an amendment had been made to limit the signage to one free-standing sign, which was viewed by the Planning Board in its approval process, and the sign that is currently attached to the main structure.

Ms. Lemire asked if they were going too far. Chairman Hamilton stated that what the amendment was doing was to make the variance as limited as possible in order to relieve the hardship.

Chairman Hamilton stated that the BOA had not addressed the variance issue specifically. Mr. Cielezsko stated that there needed to be a record of the votes on the four criteria. The tally was as follows:

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

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

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

DECISION

A vote on the amendment to the motion passed with all voting in favor.

A vote on the motion with the stipulations of the amendment included, carried 2:1, with Mr. Cielezsko and Mr. Marshall voting in favor and Ms. Lemire voting against.

Chairman Hamilton notified Cumberland Farms that they had been granted the variance, with the limitation that the signage be restricted to the single, free-standing sign as specified in the original Planning Board project approval and one existing sign on the front of the main building.

Chairman Hamilton stated that a Notice of Decision would be issued to Cumberland Farms within seven days and that there is a right to appeal by parties to the action within 45 days.

SECOND PUBLIC HEARING

Chairman Hamilton opened the second public hearing at 8:47 PM. He stated that the hearing was a waiver request by George Beland, Map 1, Lot 54, 186 Pleasant Street, Eliot, Maine, in the Village District. He stated that the request was for a waiver from Section 45-456.1(d) for the purpose of meeting minimum setback requirements for a home business.

Chairman Hamilton stated that the voting members would be Mr. Rankie, Ms. Lemire, Mr. Cielezsko and Mr. Cutting, with the Chair voting in the event of a tie. He asked if there were any conflicts of interest among the BOA members, and there were none.

TESTIMONY FROM APPELLANT

Mr. Beland stated that he was requesting a waiver for the front setback on Cross Street. He stated that the property is a corner lot, with two frontages, both of which are non-conforming. He stated that the building that is currently an accessory building, where he would house the business, has frontage on the Cross Street.

Mr. Beland stated that an accessory building in which to locate the business has to meet the setback requirements for the principal structure, vs the accessory building setback requirements. He stated that the setback requirement is for 30 feet, and the setback is actually 16 feet on the corner of the lot and increasing as one proceeds down the lot.

Mr. Beland stated that he would like to have his business in his home, and that he does not propose to alter the location or dimensions of any of the buildings on the lot.

Mr. Beland stated that the property is a non-conforming lot in terms of size, and that the setback is non-conforming in terms of the principal structure. He stated that the accessory building structure is attached to the principal structure and mimics the principal structure in terms of justification on the lot.

Mr. Beland stated that there were five questions on the waiver application. He stated that his answers were as follows:

1. *Is the need for the Waiver due to the unique circumstances of the property and not to the general conditions of the neighborhood?*

The request for the waiver is due to the setback of the structure already existing on the lot.

2. *Will granting of a waiver alter the essential character of the locality?*

There are other businesses in the district and, if this waiver is granted, he will be applying for a manufacturing business, which is in the list of businesses or uses which are acceptable in the Village District.

3. *Is the hardship the result of action taken by the applicant or a prior owner?*

The location of the accessory building was driven by the location of the original structure and the size of the lot, because there was not enough space in the rest of the lot for that building.

4. *Will the granting of the waiver substantially reduce or impair the use of abutting property?*

No changes will be made to the property, and it will be fully able to apply to all of the laws regulating a business. Mr. Beland stated that the location where his current business is located directly abuts a bedroom of a condominium building, which is directly attached to the building where his business resides.

5. *Is the granting of a waiver based upon demonstrated need, not convenience, and is there no other feasible alternative available?*

There is no other place on the property on which to locate the business, and there is no feasible alternative.

Mr. Beland stated that he would answer any questions.

QUESTIONS FOR APPELLANT FROM BOARD

Mr. Cutting asked what kind of business Mr. Beland would operate. Mr. Beland replied that his business was furniture making. Mr. Cutting asked if the business would be accessible to the public, if he was making furniture himself, and would the furniture be shipped to another location. Mr. Beland stated that he makes the furniture himself, and that he sells through farmer's markets, a series of craft shows, and the internet. He stated that he does custom pieces, which are designed in the customer's house. He

stated that he meets the customer in the customer's home, and that he also delivers the furniture.

Mr. Cutting asked if the business had employees. Mr. Beland stated that he has one employee. He stated that the law would allow up to two employees, but that he did not anticipate having any more than one employee at a time. He stated that he currently has one employee, a student who has an increased caseload this semester, so he is looking for a second employee. He stated that his overall three days of work per employee would not change.

Mr. Cutting stated that he noticed that there was no designated employee parking and asked if there was space for the employee's car. Mr. Beland stated that the Pleasant Street side of the lot is where the driveway enters. He stated that there are two spaces in front of the location for the proposed business, and that the spaces are within the setbacks for a business.

Mr. Cutting clarified that the employees would not be parking in front of the building, but would be parking on the side. Mr. Beland showed the parking location on the map provided in the packet.

Mr. Cutting asked if the business followed the other required criteria for a home business. Mr. Beland stated that, to his knowledge, there were no criteria that the business did not meet. He stated that the waiver was not the application for the business. He stated that he needed to get the waiver before he could put in an application for his business. He stated that from his reading of the ordinances, the business would meet the requirements.

Mr. Rankie stated that, from looking at the packet provided by the appellant, it appeared that the appellant does not own the parcel, and that he has a Purchase and Sale Agreement that is contingent upon getting the waiver. Mr. Beland concurred. Mr. Rankie stated that, essentially, a hardship does not exist, because the appellant does not own the property. Mr. Beland stated that a hardship exists because he wished to purchase the building, but that he could not do so without the opportunity to locate his business on the property.

Mr. Cutting stated that, because the application is for a waiver, the hardship criterion does not matter as much as it would for a variance. Chairman Hamilton stated that that was correct, and that the five questions are guidelines to be used by the BOA to determine the nature of the waiver. He stated that they are not absolute criteria like the ones the variance is required to meet.

Chairman Hamilton stated that he was assuming that Mr. Beland knew that the proposed business had to be secondary to the principal structure. He asked if Mr. Beland had a sense of the square footage for the business as opposed to the principal

structure. Mr. Beland replied that his current business operates in an area that is 1,000 square feet. He stated that he proposes an area of 1,200 square feet for the business, and the principal structure's area is 1,251 square with an unfinished second floor, which he would finish.

TESTIMONY FROM THE CODE ENFORCEMENT OFFICER

Ms. Ross stated that the appellant's lot is a non-conforming lot, with non-conforming structures on the property. She stated that the Town of Eliot Code of Municipal Ordinances, Section 45-456(1)(d) states that all structures used as part of a home business must meet minimum yard and setback requirements for principal structures. She stated that the accessory building in which Mr. Beland proposes to conduct his home business does not meet the minimum yard and setback requirements for principal structures. She stated that the property is located in the Village District, which has a 30-foot front yard setback.

Ms. Ross stated that the appellant was seeking a waiver from the front yard setback, which the BOA does have the authority to grant under Section 45-194(c)(2) which states, "The code enforcement officer is authorized to permit a 25 percent reduction in frontage, setback, and yard requirements only. Any other deviation in frontage, setback or yard requirements to a maximum 50 percent reduction may be granted, as a waiver after public hearing by the board of appeals."

Ms. Ross stated that the required front yard setback is 30 feet, and that Mr. Beland was requesting a waiver of just over 16 feet. She stated that the BOA has the ability to waive 15 feet. She stated that the appellant's request was so that his structure would be in compliance for the minimum yard and setback requirements for a principal structure in that zone and, subsequently, so that the Planning Board can hear his application for a home business.

QUESTIONS FOR THE CODE ENFORCEMENT OFFICER FROM THE BOARD

Chairman Hamilton asked if Ms. Ross saw any issues with the request. Ms. Ross replied that she did not. She stated that in speaking with the Planner, Ms. Pelletier had said that this request is the type of waiver that the BOA had heard before, and that the Planning Board could only move forward with the application for the business with approval from the BOA.

Ms. Lemire clarified that Ms. Ross did not see any issues with parking or traffic in and out. Ms. Ross stated that those issues would be addressed by the Planning Board. Chairman Hamilton stated that the job of the BOA was essentially to look at the setback.

Mr. Cielezsko stated that the accessory structure was actually a non-conforming principal structure that is connected to the house. Ms. Ross concurred that if the structure was connected to the house, it would be consider a principal structure, not an accessory structure. She clarified that the principal structure would have to be conforming, either by variance or by waiver.

Mr. Cielezsko asked if there were any problems relating to yard coverage. Ms. Ross stated that the structure exists, so that even if it exceeded the lot coverage, it is "existing- non-conforming." Mr. Cielezsko stated that he realized the requirement was for the lot, not for the structure.

TESTIMONY FROM ABUTTERS AND INTERESTED PARTIES

Christine Jurgielewicz of 190 Pleasant Street, Eliot, Maine, stated that she lives across from the appellant, on the other corner of Pleasant Street and Cross Street, Lot 1-61. She stated that she thought that she was affected a bit by the proposed business, because there are no trees between them, and that the houses are just feet apart from each other.

Chairman Hamilton stated that Ms. Jurgielewicz was the closest resident to the principal structure, but the location where the appellant was proposing the shop is a little further away. Ms. Jurgielewicz concurred.

Ms. Jurgielewicz stated that she questioned if it was possible, if the waiver was granted, that the Planning Board could deny the business. Chairman Hamilton replied in the affirmative.

Ms. Jurgielewicz stated that she had met with the appellant and shared her concerns with him, and that he seemed to answer her concerns. She stated that she had been concerned about noise from sanding and sawing and fumes from painting and finishing. She stated that the appellant assured her that the business would not impact her, and that it would be conducted with closed doors.

Ms. Jurgielewicz stated that she had wanted to know what the next step was. Ms. Lemire stated that it would be Planning Board approval, and that the appellant would have to submit a package for them to review.

Chairman Hamilton asked whether Ms. Jurgielewicz had specific remarks as to whether she was in favor or opposed to the BOA's granting of the waiver. Ms. Jurgielewicz stated that her concerns were more for the Planning Board. She stated that Mr. Beland had assured her that he wanted to be a good neighbor, as all of the neighbors do, and that that meant a lot.

Mr. Rankie stated that it was his understanding that, if the waiver was granted, it would go with the property, regardless of what person or what business owns the property. He asked if that was correct. The CEO replied that it was correct that the waiver would go with the property, but that any future businesses wanting to locate in that building would also have to go before the Planning Board. She stated that the Planning Board would review each business, and that a new owner would have to be reheard by the Planning Board.

Mr. Rankie asked, if the current owner sold both the property and the existing business, the business would have to be reheard. Ms. Ross replied that if the business stayed the same, it would not have to be reheard. She added that if the business were to change to another kind of business, then that would have to go back to the Planning Board.

Ms. Lemire asked if the approval of the business would lapse if the business was inoperable for a year and there was no activity. Ms. Ross replied that that would apply only if the business was a non-conforming business or a non-conforming use.

Mr. Rankie asked whether, if the waiver goes with the property, the Purchase and Sales Agreement is not executed, and the property is sold to somebody other than the appellant, the new owner could go directly to the Planning Board to apply for a business. Ms. Ross concurred.

Chairman Hamilton stated that basically the BOA was determining whether or not to grant a waiver on setback, regardless of the business. Mr. Rankie stated that it was important in his mind that if the BOA was granting something to the property, he wanted to be clear as to what that meant. Mr. Cutting stated that a waiver would not be granted to an individual, but would be granted to the property.

Chris Blair of 15 Cross Street, Eliot, Maine, stated that he and his wife had met with Mr. Beland, who answered a lot of their questions. He added that they felt comfortable with the business, and with what Mr. Beland had said he wanted to do with it. He stated that they had no problems with Mr. Beland opening a business and making furniture. He stated that they felt that Mr. Beland would make a great neighbor and be an asset to the neighborhood.

Mr. Blair referred to the third guideline, that the hardship is not the result of the action taken by the applicant or prior owner. He stated that he had lived on Cross Street since 2003 and that his wife had lived there since childhood, and that their house was her great-grandmother's house. He stated that the previous owner of the appellant's house was Elma Richardson, who had a plumbing and heating business as part of the house. He stated that that had been a bigger business than what Mr. Beland was proposing. He stated that Mr. Richardson's business did not entail a lot of trucks going in and out, so that it did not increase traffic in the neighborhood. He added that he did not see the appellant's proposed business as being any different.

Milton Hall of 182 Pleasant Street, Eliot, Maine, stated that he had no complaints about the proposed business and that he thought it would be an improvement to the house.

Pamela Newland of 14 Park Street, Eliot, Maine, stated that she owns the property. She stated that she was hoping that the waiver would be granted so that Mr. Beland could start his business.

Ms. Jurgielewicz stated that she wanted to make the point that she thought that plumbing was different from manufacturing furniture, especially since the business could be passed on to the next owner. Chairman Hamilton stated that he understood her concerns. He stated that it was certainly something that the Planning Board would like to hear about. He added that the job of the BOA was only to determine if it was a suitable location for any business, and that it would be up the Planning Board to decide on the business itself.

Mr. Cielezsko stated that he was glad that the owner of the property was at the hearing, and questioned whether it would be remiss to hear the case without the owner. Chairman Hamilton stated that a Purchase and Sale Agreement allows the application.

FINAL TESTIMONY FROM APPELLANT

Mr. Beland stated that he thought he had said everything that he needed to say.

PUBLIC HEARING CLOSED

Chairman Hamilton closed the public hearing at 9:12 PM.

FINDINGS OF FACT:

- The appellant is George Beland.
- The owner of the property is Pamela Newland, who was present.
- The property is located at 186 Pleasant Street, Eliot, Maine, Map 1, Lot 65.
- The property is 0.43 acres.
- The property is located in the Village District.
- The property is under a Purchase and Sales Agreement.
- The appellant was requesting a waiver to the terms of Section 45-456.1(d) for the purpose of meeting minimum setback requirements for a home business.
- The authority of the Board of Appeals rests in Section 45-194(c)(2), which enables the BOA to grant up to a 50% reduction in setback.

- The setback currently is 16 feet.
- The request was to waive 14 feet of a 30-foot setback requirement.

Mr. Cutting asked if the findings should also state that it is the responsibility of the owner of the property to file the waiver. Ms. Lemire noted that there is a Purchase and Sales Agreement. Chairman Hamilton stated that the BOA would be waiving the land's ability to support a business.

MOTION

Mr. Cutting moved, seconded by Ms. Lemire, to grant a 14-foot waiver, where a 30-foot setback is required in the Village District, for the purpose of meeting minimum setback requirements for a home business.

DISCUSSION

Mr. Cielezsko stated that he thought that the appellant had explained the need for a waiver.

VOTE

The Board voted 3:1 to approve the waiver. Voting in favor were Ed Cielezsko, Ellen Lemire and Jeff Cutting. Voting against was Charles Rankie.

Chairman Hamilton noted that Mr. Beland needed to make sure that the waiver was recorded in the Registry of Deeds in York County and that a copy of it be given to the CEO within 90 days. He stated that the BOA would issue a Notice of Decision within seven days. He added that if anyone wanted to appeal the decision in court, they would have 45 days in which to do that.

APPROVAL OF MINUTES

Mr. Cielezsko moved, seconded by Ms. Lemire, to accept the minutes of August 20, 2015, as amended. All were in favor.

OTHER BUSINESS

Chairman Hamilton stated that he sent a letter to the Town Manager asking that the Selectmen and Planning Board review the corner lot issue. Mr. Cielezsko and Ms. Lemire

stated that they liked the letter. Mr. Rankie stated that he had an easier way in which to state something that was in the letter, but the letter had already been sent.

Mr. Rankie asked if Chairman Hamilton had copied the letter to the Planning Board. Chairman Hamilton stated that he only sent the letter to the Town Manager. Mr. Rankie stated that he might have copied them, even though letters are supposed to go through the Town Manager. He stated that he thought communication could be direct from Chairman to Chairman. Chairman Hamilton stated that the chain of command currently was that all communication goes through the Town Manager. Ms. Lemire agreed.

Mr. Rankie stated that the Town Manger had made that up. He added that he believed the Town ordinance states that communication can be Chairman to Chairman, and that the Town Manager's position paper had stated that.

Chairman Hamilton stated that he did send the letter, and that the Town Manager had replied immediately, saying that the item would be on the agenda for the next meeting of the Selectmen. He also stated that he had a note back from Kate Pelletier. Ms. Lemire stated that the Planning Board had already had a quick discussion of the issue.

Mr. Rankie stated that he was confused as to what it means when the public hearing is closed, because he always understood that, once a hearing is closed, there was no comment allowed from the audience, though the BOA has the ability to specifically ask a question. He stated that once the public hearing for Cumberland Farms was closed, there were unsolicited comments from the audience. He stated that that did not meet his definition of a closed meeting.

Chairman Hamilton stated that it probably did not, but that he was trying to keep the hearing as open as possible, based on the longevity of the issue, and still maintain the ability of the BOA to function. Mr. Rankie stated that he had wanted to say some things, but that he remembers the previous Chair just about jumping over the dais if someone in the audience spoke.

Chairman Hamilton stated that a closed public hearing maintains the ability of the BOA to acknowledge comments or ask questions if so desired. He added that he did hear Mr. Rankie.

Mr. Rankie stated that Mr. Marshall had stated, on more than one occasion, that MMA is a lobby group, and that the BOA should disregard the guidance that was given to Mr. Rankie during his training with the handbook provided by MMA. He stated that he did not see them as a lobby group but that, if they are a lobby group, he thought that they needed other guidance. He asked for clarification as far as the guidance the BOA already had from MMA and whether they are, in fact, a lobby group.

Chairman Hamilton stated that he did not see the MMA as a lobby group. He stated that they are a group of professionals. Mr. Marshall stated that they are not a government agency. Chairman Hamilton agreed, but stated that the Town pays a lot of money to them for their guidance.

Mr. Marshall stated that he did not mean that the BOA should disregard the MMA. He stated that he thought the BOA needed to consider that the MMA is not a government agency. Chairman Hamilton stated that it was fortunate that they were not a government agency, because they have the ability to review government agencies, which is a benefit to the BOA.

Mr. Marshall stated that the MMA is a group of attorneys with their own opinions. Chairman Hamilton stated that they are more than that, and that they cite case law which gives the BOA a reference point in order to make a reasonable decision, not an emotional decision.

Mr. Rankie stated that he considered the MMA to be a hired consultant. He stated that he thought that Mr. Marshall totally disregarded the guidance that the MMA was providing, and that he thought that the MMA was not worthy of the BOA's consideration. Mr. Marshall stated that he was entitled to his opinion.

Chairman Hamilton stated that what he thought Mr. Rankie was saying was that the hearing was not the appropriate time for Mr. Marshall to discuss his opinion about the MMA. Mr. Marshall stated that he brought it up because the MMA was cited as if the BOA was reading out of the State statutes. Chairman Hamilton stated that the MMA was citing State law, not opinion.

Chairman Hamilton stated that the back of the MMA handbook contains everything that the BOA needs to know about the various cases that were decided in different parts of the State of Maine. He stated that the MMA is the only professional organization that is able to do that objectively. He stated that they were not proposing or promoting anything, as a lobbying group would. He stated that they were not the National Rifle Association or the oil industry.

Mr. Hamilton stated that the MMA is simply a review agency that the Town of Eliot hires to give information about what other towns in the State are doing. He stated that he agreed with Mr. Rankie that the MMA is a valuable resource, as opposed to lobbyists. Mr. Marshall stated that he thought that lobbyists were a valuable resource. Chairman Hamilton disagreed that they were a lobbyist group.

ADJOURNMENT

Mr. Rankie moved, seconded by Ms. Lemire, to adjourn the meeting. The meeting was adjourned at 9:30 PM.

Respectfully Submitted,
Linda Keefe
Recording Secretary

Approved by: _____
Bill Hamilton, Chairman

Date Approved: _____