

**ELIOT BOARD OF APPEALS  
REGULAR MEETING  
NOVEMBER 21, 2019 – 7:00 P.M.  
ELIOT ELEMENTARY SCHOOL GYM**

Members present: Bill Hamilton, Chairman; Charles Rankie, Vice-Chair; Ellen Lemire; Cabot Trott; John Marshall; Jay Meyer and Rosanne Adams, Alternates

Others present: Shelly Bishop, CEO; Barbara Boggiano, Recording Secretary and others

**1. 7:00 PM: ROLL CALL** Chairman Hamilton called the meeting to order at 7:00 p.m. He welcomed everyone to the Board of Appeals regular meeting and announced that they have three appeals tonight. He asked anyone who had a question to please address them to him, as Chair.

Chairman Hamilton said the meeting is not being livestreamed tonight due to the location at the Elementary School; however, it is being video-taped and will be uploaded to the town's website tomorrow. He said there is no WiFi compatibility.

Chairman Hamilton thanked Kristina and Kevin Goodwin as well as Melissa Albert for have a recording device here, so he thought they were well covered.

Chairman Hamilton asked the members to introduce themselves, which they did.

Chairman Hamilton outlined the proceedings: he will open the public hearing, read the brief summary and determine the voting members. He said there are only five who will vote and we have two alternates, Mr. Meyer and Ms. Adams, so there is a full quorum. He said the five regular members will be voting tonight on all three appeals and asked them to raise their hands.

Chairman Hamilton said the Board will determine if there is any conflict of interest among the Board members and if there is, the Board will determine by vote and that member will recuse himself/herself and an alternate will be appointed in his/her place.

Chairman Hamilton said the Board will determine the parties to the action, and in this case, it is the Code Enforcement Officer. He said the Board of Appeals has a narrow focus in that they have to follow the ordinance and rule upon the applicability to each appeal. He said they cannot determine the outcome on whether or not we would like it to be but what the ordinance specifies. He knows that some of the appeals are emotional but the Board of Appeals is charged by the State as well as by the town.

Chairman Hamilton said each appeal has two primary components, standing and timeliness. He read from the Town Code on timeliness: any application of an appeal has to be submitted within 30 days of the decision by either the Code Enforcement Officer or Planning Board.

Chairman Hamilton said there are two types of review: the first, "appellate", is where the Board can only review the action of the CEO/Planning Board and cannot look at any new information to determine the basis of whether or not the CEO or Planning Board acted contrary to the code. Secondly, he said the other type is "de novo" where the Board can review the process from the beginning and take new evidence throughout the meeting.

Chairman Hamilton said the appellant will be the first one who will testify, uninterrupted.

Chairman Hamilton said once the appellant is done, the Board will ask questions, followed by parties to the action, in this case the Code Enforcement Officer, because they are requests for waivers. He said with a variance there are no parties to the action, other than the request and that hearing would be on a de novo basis.

Chairman Hamilton said the Board will have questions after the CEO or the Planning Board Chair has given their testimony, followed by testimony from interested parties, the abutters, and the perhaps the Board will have questions to ask. He said everyone will have an opportunity to explain and ask questions in this proceeding. He said the appellant will have be offered the last chance to summarize their case. He said he will ask the Associate members who are not voting to weigh in and give their sense of what they feel the issues may be, and then he will close the public hearing.

Chairman Hamilton said once the public hearing is closed, the Board will deliberate and decide the findings of fact. will determine Findings of Fact and any information that needs to go into the appeal will be part of the Notice of Decision letter to the appellant.

**2. Public Comment Period:** Chairman Hamilton asked if anyone has a question to the Board not related to the items on the agenda. Hearing none, he closed the public comment period.

### **3. PUBLIC HEARINGS:**

**a) Request from Donna D. Knox, Esq. and 10 other residents for an Administrative Appeal of the decision of the Code Enforcement Officer regarding property owned by Spinney Creek Shellfish Corporation, 27 Howell Drive, Tax Map #4, Lot 65 in the Village Zone, involving an expansion of use.**

Chairman Hamilton read the request and asked if any of the members had a conflict of interest with the appellant.

Mr. Trott said he worked for the Howell's in the 80's and served on a board with Mrs. Howell.

Chairman Hamilton wanted to know if Mr. Trott would be able to be impartial with the nature of this appeal, without any conflict of interest.

Mr. Trott replied yes, he would.

Mr. Rankie commented that what Mr. Trott has stated is what we have discussed – this is a small town with 6,000 people and we are bound to interact with others over the course of time. He did not feel there is a conflict of interest.

The other Board members agreed and did not feel Mr. Trott had a conflict of interest.

Ms. Adams said she needed to disclose that previously, before she was on the Board of Appeals she attended Planning Board meetings, where she spoke in favor of the application. She stated she did not believe that she had a conflict of interest with the appeal or the ordinance.

Mr. Rankie pointed out, for the sake of appearance, that the Board may want to ask Ms. Adams to join the audience. He said they talked about the Board of Appeals members abstaining from attending Planning Board meetings and having prior knowledge.

Ms. Adams stated that the Planning Board meeting was two years ago.

Mr. Rankie said that Ms. Adams was not a member of the Board of Appeals at that time.

Ms. Adams said she has not had any interaction {with the Planning Board} since she has been a member of the Board of Appeals.

Mr. Rankie said he brought that up because of the appearance of a conflict of interest.

Chairman Hamilton asked if anyone else has concerns about Mr. Trott and Ms. Adams with a potential conflict of interest.

Mr. Meyer responded he did not.

Ms. Lemire replied she did not.

Mr. Marshall answered no.

Chairman Hamilton opened the public hearing at 7:17 pm.

Sandra Guay, Attorney for the Howells, asked about jurisdiction.

Chairman Hamilton said, regarding jurisdiction, it is difficult, because the property is located in the Village District but also in the Limited Residential District which is part of the Shoreland Zone. He said his understanding is that the property in question is used by the Spinney Creek Shellfish Corporation, which is in the Shoreland Zone, and the Limited Residential District.

Chairman Hamilton said this administrative appeal in the Shoreland Zone by the Code Enforcement Officer will be decided by the Board of Appeals, according to the ordinance and this hearing will be on a de novo basis.

Chairman Hamilton read from Sec. 45-48 and 45-49, Duties and Powers of the Board of Appeals. He said the Board can consider new evidence and testimony, be it oral or written, and is a fresh undertaking in reaching a decision.

Chairman Hamilton read from Sec. 44-47 (c) (Shoreland Zone): "*Administrative appeals*. When the board of appeals reviews a decision of the code enforcement officer the board of appeals shall hold a "de novo" hearing. At this time the board may receive and consider new evidence and testimony, be it oral or written. When acting in a "de novo" capacity the board of appeals shall hear and decide the matter afresh, undertaking its own independent analysis of evidence and the law, and reaching its own decision."

Chairman Hamilton said it is his determination that this is how this hearing will proceed and asked that he hear testimony from the appellant.

Atty. Guay wanted to know about timeliness.

Chairman Hamilton said that timeliness has been met by the appellant since her appeal was submitted October 22<sup>nd</sup> and the CEO made her decision within the 30-day period.

Chairman Hamilton read from Sec. 45-50, Appeal Procedure: *(b) An aggrieved person or party is:*

*(1) An owner of land whose property is directly or indirectly affected by the granting or denial of a permit, variance, waiver or administrative appeal under this chapter;*

*(2) A person whose land abuts land for which a permit, variance, waiver, or appeal has been granted;*

*(3) A group of five or more residents or taxpayers of the town who represent an interest adverse to the granting or denial of such permit variance, waiver, or appeal.*

Chairman Hamilton felt there is no issue with standing and that is his determination.

Atty. Guay said she sent a letter to the Code Enforcement Officer.

Ms. Bishop said she Attorney Guay was requesting information, which she sent her.

Chairman Hamilton said when he made his determination of timeliness, he was talking about the Code Enforcement Officer's determination and appeal.

Atty. Guay said that before testimony starts, she believes this matter should be with the Planning Board.

Chairman Hamilton said he did not believe that this is with the Planning Board.

Atty. Guay said she attended the Planning Board meeting of August 6<sup>th</sup>, where the application from Donna Knox and the other residents was addressed. She said that under the attorney's advice, they would not make a determination so she felt the timing for the Planning Board had passed.

Chairman Hamilton agreed and said that there was a timeliness issue with the Planning Board. But, he said that the decision of the Code Enforcement Officer was appealed within the 30-day limited window.

Chairman Hamilton opened the floor to the appellant, Donna Knox, and said she may proceed.

Atty. Knox thanked the Chair and the Board of Appeals for the opportunity to be heard.

Atty. Knox said, in the interest of time, and to avoid redundancy, she will speak on behalf of the other 10 appellants who filed the application. She said there are two issues that she wants to address; first, the appropriateness of having the CEO handling the decision, as opposed to the Planning Board, according to Sec. 45-192. She said secondly, the appropriateness and the substantiation of the decision of the CEO's reliance on §1-2 Definitions and Rules found in Chapter 1, and making a decision to the exclusion of any statement found in Sec. 45-192 of the Zoning ordinance, Expansion of use, which she read and that particular provision, which the CEO relied on. She thought that was in error.

Atty. Knox wanted to know, in making her decision, if the CEO gave any consideration to Expansion of Use in addition to one or more of the particular provisions that the Code Enforcement Officer was relying on and the authority and responsibility of the Planning Board as well as the consideration of the criteria process that must be followed.

Atty. Knox said all this must be taken into account before there is an expansion or extension of a non-conforming use. She said the public hearing must be held by the Planning Board for handling these matters and according to Sec. 45-192, the CEO states there will be no increase in the size of the operation, especially conflicts with Sec. 45-192. She said the circumstances of the decision and the first decision made no mention of Sec. 45-192 or the criteria for the extension of operation.

Atty. Knox said Sec. 45-192 is very specific regarding expansion and function, and she wants to speak to function because Spinney Creek Shellfish will be enlarging their operation.

Atty. Knox read from Sec. 45-192,(a) Application for extension or expansion of area or function shall be filed with the planning board in the same manner as for a conditional use permit. A nonconforming use may be expanded in area or function by building horizontally or vertically, adding to the volume of

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business, or increasing the range of goods or services by not more than 25 percent over any ten-year period. The planning board shall grant or deny such application for extension or expansion of a nonconforming use, with or without conditions, only after holding a public hearing on the matter.

Atty. Knox said according to Sec. 45-192, it restricts the increase of function to no more than 25% in a 10-year period. She said according to Sec. 45-192, the Planning Board will hold a public hearing and the definition upon the CEO relied is contradictory to Sec. 45-192. She said the CEO's definition of Expansion of Use does not mention function. She said as Sec. 45-5 states, when there are conflicts with other provisions, quote "whenever the requirements of this Chapter and any other ordinance, code or statute conflict, the more restrictive requirements shall apply." She said that Sec. 45-192 is more restrictive and it must be followed when it is ascertained there is an expansion of this operation.

Atty. Knox said Sec. 45-288 in the code speaks to the Village District and the intent is preserving the quality of a small town or village. She said Spinney Creek Shellfish Corp. is a grandfathered enterprise, subject to scrutiny and inspection in this matter.

Atty. Knox said that the Spinney Creek Shellfish Corp. is increasing production, from 160,000 to 170,000 up to 1 million shellfish, which is an expansion of the function.

Atty. Knox said that Spinney Creek Shellfish Corp. is a multi-faceted business: processing the shellfish, testing, packaging and shipping – all from their facility in the Village.

Atty. Knox said they discharge pollutants into the creek. She said she does not know how much that function will look like; how many boats will be on the creek; how many tanks do they need and how much more detergent will be leeching into the creek. She asked how many more employees will they need and how large will be this operation.

Atty. Knox said there will be delivery of supplies and more trucks and the number of employees has gone from three to 24. She said all these questions and more should go into the decision of whether this company should be enlarged and what is the impact.

Atty. Knox said the last site plan review was done in 1992, and that was 27 years ago. She wanted to know what is the impact and why none of it was addressed. She said Sec. 45-192 requires the Planning Board to hold a public hearing. She said these questions can only be answered through an investigation and the town should not rely on the minimum definition in the code.

Atty. Knox said if a conflict, then Sec. 45-5 says the less restrictive definition must be subordinate to Sec. 45-192, which is more restrictive. She is asking the Board of Appeals for a proper investigation and before the final determination is made.

Chairman Hamilton asked if there were any questions from the Board.

Mr. Rankie wanted to know was Atty. Knox asking for two things.

Atty. Knox replied actually not, the Board decides that the CEO's decision was not correct and sends it back to the Planning Board. She said to let the CEO make the determination without a public hearing according to Sec. 45-192 isn't correct.

Mr. Rankie wanted to know if Atty. Knox was asking the Board of Appeals to reverse the CEO's decision and remand the Spinney Creek Shellfish license back to the Planning Board for review and public comment.

Atty. Knox replied yes, the Planning Board should hold a public hearing and they should conduct an inquiry.

Mr. Trott said that Atty. Knox was looking at 45-192 and this is based on the definition.

Atty. Knox said a letter was sent to the CEO dated Sept. 30<sup>th</sup> because the Howells were not adding two months to extend the season nor change the use. She said it is less restrictive than Sec. 45-192. She said that Sec. 45-5 is for when it conflicts and these two do. She said Sec. 45-192 is more restrictive and requires a hearing.

Mr. Trott said that Sec. 45-192 with expansion or extension will be a non-conforming use. He said she is looking at the definition of an expansion: one or more uses during the operating season not the use of more ground area.

Atty. Knox said she is not challenging that use, she is challenging the Code Enforcement Officer's interpretation of Sec. 45-192 and the expansion of the footprint vs. function. She said the function is being increased to be enlarged by increasing the volume of the business or production and services, which is what is happening here. She said that section goes on to require a public hearing, contrary to the definition of Sec. 45-192, Sec. 45-5 is more restrictive which applies.

Mr. Rankie said the conclusion is there are two things being asked for, as Mr. Trott outlined.

Chairman Hamilton said the request is to review the decision made by the CEO and to remand it back to the Planning Board for a public hearing.

Mr. Rankie said that Atty. Knox is asking the Board of Appeals to determine it was not appropriate to be sent to the CEO to begin with.

Chairman Hamilton said the way he understood it, the Board is only determining the decision of the CEO as a de novo review and whether she acted contrary to the code and it is nothing involving the Planning Board. He said that the Planning Board request may not be timely as it did not come within the 30-day limit. He said he believed the Board is here to do that tonight. He said he mentioned at the onset that if it comes on the 31<sup>st</sup> day it cannot be heard. He said there is no decision by the Planning Board being considered and the BOA is to judge only the CEO's decision.

Atty. Knox said she did not think it is consequential but stated that Chairman Hamilton is correct. Chairman Hamilton said let's focus on that and wanted to know if Atty. Knox was aware that the property owned by the Spinney Creek Shellfish Corp. is not only in the Village District, but the Limited Residential District of the Shoreland Zone.

Atty. Knox responded no - she had not considered that.

Chairman Hamilton said that aquaculture is a permitted use in the Shoreland zone and Spinney Creek Shellfish is a conforming use. He said he did not believe that it was superseded by the Shoreland Zone, Limited Residential District, which allows aquaculture. He said all that she had referred to is Sec. 45-192, which is not relevant to the case. He believed that, in 1992, the Planning Board determined the use as an approved use in the Limited Residential District, at that point., which the current code allows.

Chairman Hamilton said that being a non-conforming lot of record is not the issue.

Atty. Knox responded okay.

Chairman Hamilton said that she can ask the Code Enforcement Officer if his interpretation is correct. The CEO said it is not a non-conforming use and the Planning Board has no jurisdiction of the use's expansion.

Atty. Knox said if that is the case, she would want to take a look at that and what the restrictions are in the Code.

Chairman Hamilton asked if there were any other questions from the Board. Hearing none, he asked the CEO if she would please share her statements regarding the Administrative Appeal.

Ms. Bishop said she did not consider Sec. 45-192 relevant involving the expansion of use because aquaculture is a permitted use with Planning Board approval. She said they are not proposing to change anything on the building footprint, which would require Planning Board approval.

Ms. Bishop said Sec. 45-192 is not applicable because it is a conforming use in the Shoreland Zone.

Chairman Hamilton asked Ms. Bishop if that is the conclusion of her testimony.

Ms. Bishop responded yes.

Chairman Hamilton asked the Board if they had any questions of the Code Enforcement Officer.

Mr. Trott said he would like clarification of her jurisdiction in this matter.

Ms. Bishop said she received an inquiry, did research and gave a response.

Mr. Trott said that Ms. Bishop just made a decision.

Ms. Bishop replied she was denying the request, based on the application.

Mr. Rankie said on page 2 of the appellants' presentation, the third paragraph, there are statements about waste detergent allegedly being discharged into the creek. He wanted to know if the CEO could give him her take on that.

Ms. Bishop responded it is her understanding that this is regulated by the Dept. of Marine Resources. She said they come down to sample the water. She said she did not know if it is relevant to why they are here.

Mr. Rankie said he is asking the question because it is presented to us here. He felt he would be irresponsible if he did not ask.

Chairman Hamilton said the definition is part of the town's ordinance, in Chapter 1 § 1-2, Definitions, Expansion of Use, which means an addition of one or more months to a use's operating season or an increase in the footprint devoted to a particular use.

Chairman Hamilton wanted to know, from the application from Spinney Creek Shellfish, whether their intent was to increase the size of the footprint.

Ms. Bishop answered no.

Chairman Hamilton asked if it was based on the fact of one or more months being added to their operating season.

Ms. Bishop replied on both. She said there was no addition to the season or proposed extension of the footprint.

Chairman Hamilton said they are increasing the number of cages. He wanted to know if that was something the CEO considered as part of the expansion of use

Ms. Bishop answered the Dept. of Marine Resources has jurisdiction over that area, so it is possible that it could be an extension of the footprint.

Chairman Hamilton said the Town of Eliot and the Board of Appeals' jurisdiction does not apply to the cages and wanted to know if that is correct.

Ms. Bishop responded that is correct.

Chairman Hamilton wanted to know if that is part of her decision as well.

Ms. Bishop answered yes.

Mr. Trott said the appellant was talking about the volume and the increase from 170,000 to 1,000,000. He asked if Ms. Bishop could clarify the State's definition of volume (of production) in the language of Sec. 45-192.

Ms. Bishop replied volume as in how much.

Mr. Trott said volume in the language of Sec. 45-192.

Ms. Bishop read: "may be expanded horizontally in volume..."

Mr. Trott asked if that related only to a non-conforming use.

Ms. Bishop answered yes and she did not consider Sec. 45-192 relevant to the situation when they are talking about an expansion of a conforming use.

Ms. Lemire read, according to the Shoreland Zone, Sec. 44-48, Enforcement, *(1) in the Shoreland Zone, it shall be the duty of the Code Enforcement Officer to enforce the provisions of this chapter. If the Code Enforcement Officer shall find that any provision of this chapter is being violated, he or she shall notify in writing the person responsible for such violation, indicating the nature of the violation and ordering the action necessary to correct it, including discontinuance of illegal use of land, buildings or structures, or work being done, removal of illegal buildings or structures, and abatement of nuisance conditions. A copy of such notices shall be submitted to the municipal officers and be maintained as a permanent record.*

Ms. Lemire said, in this particular situation, given the complaint going to the CEO, she would address the violation and appropriately deal with it. She asked Ms. Bishop if the violation was not taken care of, then she would have needed to go to the Select Board, and not the Planning Board, isn't that correct.

Ms. Bishop replied yes.

Chairman Hamilton said the business is in the Shoreland Zone and the Dept. of Marine Resources has jurisdiction over that use. He said it does not have anything to do with the expansion of the footprint and the addition of time does not apply and asked Ms. Bishop if that was correct.

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Ms. Bishop replied yes.

Chairman Hamilton said he will take testimony from parties of the action and asked if anyone wished to speak.

Atty. Guay said she has a copy of the site plan, approved in 1992 that she would like to submit.

Chairman Hamilton said you are welcome to address the Board.

Atty. Guay distributed the plan to the Board members. She said she wanted to clarify the discussion and noted that the plan shows the area is located largely in the Village District, but the entire section that encompasses the business is in the Limited Residential District and aquaculture is a permitted use and a conforming use in that district.

Atty. Guay said she wanted to clarify briefly, for the record, with respect to the Planning Board, in the ordinance states that the Planning Board cannot initiate a review and the Town Attorney stated that in his letter to the CEO and the Town Manager, there is no way for the Planning Board to initiate an investigation without an application. She said only the CEO has jurisdiction to investigate and determine if there is a violation and to issue a Notice of Violation.

Atty. Guay said the Board of Appeals does not have jurisdiction to remand it to the Planning Board. She said this is a permitted use in the Limited Residential District and aquaculture has been in Spinney Creek commercially since the 60's. She said Spinney Creek Shellfish has been operating an aquaculture business in the same area since the 70's. She said the definition of expansion of use does not apply since they are not talking about nonconforming uses.

Atty. Guay said it does address that if someone is amending a previously-approved site plan.

Atty. Guay said, for the record, Spinney Creek Shellfish Co. is a working waterfront. She said she has worked up and down the Coast of Maine with aquaculture and it is fair to say that any port in the State of Maine is a working waterfront. She said when she read that, it struck a nerve with her.

Chairman Hamilton asked if there were any questions of the witness.

Mr. Rankie thanked Atty. Guay for bringing that up, the working waterfront, as it also struck him.

Ms. Adams said that since Atty. Guay brought up expansion, it is her understanding from the application that it covers less acreage than is presently there. She said then it will be 2.75 acres and what was proposed was a larger expansion. She wanted to know how much expansion is it from what is presently there.

Atty. Guay responded she believes it is less of an expansion, less of an area covered than the prior application.

Ms. Adams asked if it would be less of an area than presently.

Atty. Guay replied she did not think so. She said what she was speaking about is on the shore, is the previously-approved site plan with no expansion. She said the Dept. of Marine Resources has control over the number of cages.

Chairman Hamilton asked Atty. Guay if she could give him an estimate of the current configuration and is it increasing from 160 to 1 million cages.

Atty. Guay asked Lori Howell to come to the podium to address that question.

Ms. Howell replied with all due respect she objected to this line of questioning. She did not think it is relevant to the onshore use and all things discussed are not relevant. She said she can talk about this off record.

Chairman Hamilton asked if there are any other questions. Hearing none, he said he will hear from the abutters.

Kourosh Djafarian, 256 Main St., said he understands people want to expand their business and they want to make more money, but asked at what cost.

Mr. Djafarian said he sees everything they are talking about, living there and he has lived there 15-16 years. He said during that time, 70% of the birds have disappeared and he sees that every day. He said people use it for canoeing.

Mr. Djafarian said he is concerned about these things. He said accidents will happen there on the creek and kids use the creek. He said he has concerns of the bleach and detergent from the tanks which is harmful. He said he does not know the code.

Mr. Djafarian said he learned one thing, coming to this country, the law is the law. He said everything is in {the Board's} hands and he is sure it will change. He said he is sad to see that. He said there will be more traffic and more pollution. He said the Board should listen to the people who live there.

Mr. Trott said, for the record, the Board is listening to the public.

Chairman Hamilton asked if there were any other abutters who wished to speak.

Roberta Place, 4 Spring Lane, said she has lived on the creek for 15 years. She said she sees changes and with 600 more cages in the creek, and an increase in production, they will have to be cleaned, and none of those tanks have been cleaned. She wanted to know how often should they be cleaned and how much detergent is going into the creek.

Ms. Place wanted to know just because they can do it, should they be doing it. She said she has seen changes and the more product taken out of that creek, the more harmful it will be to the creek.

Ms. Place said it is a small creek and she has seen changes over the years and there is no eelgrass in front of her house. She said it's gone and the residents are sad.

Mr. Rankie asked Chairman Hamilton if he wouldn't mind explaining where the Board's jurisdiction is.

Chairman Hamilton replied it is his understanding that the Town of Eliot has no jurisdiction over marine waters. He said the Dept. of Marine Resources has that and they are very strict with issues of bleach and excessive pollution.

Chairman Hamilton said the Board of Appeals primarily has land use jurisdiction but Spinney Creek Shellfish's intent is not to expand their building or the tanks on the shoreline. He said the BOA's jurisdiction ends with the determination of the CEO and whether or not she made a correct or incorrect determination.

Chairman Hamilton said that he understands their concerns and how deeply this is affecting everyone, and he does not know what the DMR issues are in listening to the people. He said it is not up to the  
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Board of Appeals to say anything about this and if you are concerned that is one avenue you should consider, contacting the Dept. of Marine Resources.

Chairman Hamilton said he mentioned on the outset that the Board of Appeals, in any community, has a narrow focus. He said unfortunately, this issue came to us and perhaps it should have gone to someone else. He said he sympathized with everyone and hoped that the State will be more responsive.

Filomena Knowles, 2 Estuary, Kittery wanted to know where the actual operation is, is it in the Shoreland zone.

Chairman Hamilton responded it is in the Limited Residential District of the Shoreland Zone.

Ms. Knowles asked if the Howells wanted to move their building and would that be acceptable.

Ms. Bishop replied they would have to take the site plan to the Planning Board if they wanted to expand their building.

Ms. Knowles wanted to know even if it is a nonconforming use.

Chairman Hamilton answered it is an approved use and any expansion of that use has to go to the Planning Board. He said an increase in size needs to get reviewed.

Ms. Knowles asked if it would be talked about.

Chairman Hamilton replied that is correct.

Chairman Hamilton asked if there were any other interested parties who wished to speak.

Janet Saurman 22 Park Street., Eliot wanted to provide information. She said since 1956 the creek, in those years, was a horrible piece of water. She said people living on that part of the creek seemed not to know what condition that creek was. She said it was not desirable but used for winter recreational activities, like ice skating.

Ms. Saurman said the company running a business on the water knew that had to be cleaned up. She wanted to know why would a company which makes their living on the water add to polluting the water? She said that does not make sense.

Ms. Saurman said the eelgrass has been disappearing up and down the entire Piscataqua River. She said the problem is with chemicals going into Great Bay. She said the eelgrass is slowly coming back, but the Howells' business has not impacted the eelgrass.

Ms. Saurman said she wanted to add those two points: the creek is a clean body of water now and the eelgrass problem is on the entire river, not just in Spinney Creek.

Valentina Luong, 242 Main St., said that 5 years ago, the Howells brought a diver and they were taking oysters from the shore. She said her husband stopped him.

Ms. Luong said she sees black floats now – 200 of them – in front of her yard. She said with 68 or 86, with 800 cages, there will be more floats in the water. She said when they drive across the causeway, she sees bubbles going into the ocean and she doesn't know what they are. She said with the expansion, and a lot of floats, the impact will be felt. She was told to stay away from the float.

Ms. Luong said they cannot enjoy the natural beauty of the creek any more. She said every morning they see a man in a boat riding down there and it is very sad.

Ms. Luong wanted to know why is the expansion so big. She said the creek is special and it will impact the water and the land. She said she is concerned that the value of their houses will go down. She said no one wants a house on the water if they are seeing a lot of black, ugly floats on the water.

Mr. Trott asked the Chairman if they could limit the conversation to pertinent items on the application.

Chairman Hamilton addressed the audience and said that the Board of Appeals may not be the proper authority to come to with their concerns.

Ms. Knowles wanted clarification and said to tell the people that Spinney Creek has gotten better and no longer dumps sewerage since the Town of Kittery has a new plant.

Mr. Djafarian came back up to the podium again and said the more important issue is safety. He said when they have children swimming and the boats are going back and forth, it is dangerous.

Chairman Hamilton asked the appellant if she wanted another chance to present her case.

Donna Knox said, for the record, that she is an attorney, and got singled out, but she is here as a resident with concerns. She said the other residents have counsel and there was a misunderstanding. She said that she is not representing clients, if that makes a difference.

Mr. Rankie pointed out that Atty. Knox had signed the letter using "Esquire."

Atty. Knox apologized if she used the word "Esquire" when she signed the letter. She thanked Mr. Rankie for pointing that out.

Mr. Rankie said she could not take that back and should be proud you had to work hard to get that.

Chairman Hamilton said he would read into the record a letter received from Robert and Barbara Burns, dated November 12, 2019 (regarding Expansion of Spinney Creek Shellfish Company (SCSC):

*"Members of the Appeals Board:*

*Since the undersigned are unable to attend the Appeals Board hearing on November 21, 2019, regarding the increase in business volume of SCSC, we would like to provide input regarding the decision of the Eliot Code Enforcement Officer (CEO) regarding this matter.*

*The undersigned are riparian owners on Spinney Creek residing at 32 Meadow Lane in Eliot. It is our understanding the CEO rejected a request by riparian owners that the SCSC increase in oyster harvesting requires review and approval by the Eliot Planning Board. We have a difficulty comprehending this decision since it is quite clear that increase of harvesting the current level of 160,000 oysters to 1,000,000 with the addition hundreds of additional oyster cages does not require Eliot Planning Board review and a public hearing. The Eliot Ordinances are very clear for a "grandfathered business", in that a foot print expansion or increase in volume above 25% requires this review. I won't present the math but it is evident the increase in volume of business far exceeds 25%*

*This increase in volume will result in significant increases in boat traffic required to service the cages as well as truck/shipping traffic from the SCSC facility. In addition to these factors we won't go into the environmental effects on this small body of water since they are evident.*

*We have been residents of Eliot since 1975. In the years we have lived in Eliot, it has been shown in our opinion, that SCSC has not been a "good neighbor" and has little concern for their neighbors. This opinion is based on events at River Homeowners Association pier, location of a facility on River Road and activities on the York River. We understand that opinion has no standing regarding the Appeals Board decision regarding this matter.*

*We trust an open and ingenious review of the CEO's interpretation of the code will be conducted by the Appeals Board and this matter will be returned to the Planning Board for a site review and a public hearing.*

*/Signed/ Robert and Barbara Burns"*

Chairman Hamilton said the Planning Board received a letter from then Town Attorney Chris Vaniotis. He said he would skim through the letter from Mr. Vaniotis, dated February 22, 2000, that was addressed to the Eliot Planning Board and read:

*"Following the public discussion on the recent (now withdrawn) application of Spinney Creek Shellfish Company to establish an aquaculture operation in a Limited Residential District, the Planning Board has asked me to take another look at the question of whether commercial aquaculture is allowed in those shoreland zoning districts which otherwise do not permit commercial uses."*

Chairman Hamilton said he would skip down and read: *"For the following reasons, I continue to think that the intent of the Eliot Shoreland Zoning Ordinance is to permit aquaculture in those zoning districts where it is listed as a permitted use..."*

Chairman Hamilton read: *"Aquaculture is defined in the Shoreland Zoning Ordinance as (quote) the growing or propagation of harvestable freshwater, estuarine or marine plant or animal species. (unquote)"*

Chairman Hamilton said he believed the Planning Board's determination was based on the Spinney Creek Shellfish Company's expanding land use function as an approved use in the Shoreland Zone because it was in the Limited Residential District at the time.

Chairman Hamilton closed the public hearing at 8:41 p.m.

Chairman Hamilton stated the Findings of Fact:

- The appellants are Donna Knox and 10 other residents of the Town of Eliot;
- The applicants met the standing criteria under Sec. 45-50, (b)1-3, aggrieved parties;
- Other citations of the ordinance that apply are Sec. 45-49 and Sec. 45-50.
- The appeal was filed on October 22, 2019, less than one month after the written decision by the Code Enforcement Officer dated September 30, 2019, and the appellants have met the timeliness standard;
- As per Sec. 44-47 (a) and (c), the Board of Appeals will hear and decide the Administrative Appeal of the CEO's decision on a de novo basis, and may hear new evidence and testimony, undertaking the matter afresh and undertaking its own independent analysis of evidence and the law and reaching its own decision;
- The property in question is owned by the Spinney Creek Shellfish Corporation;
- The address is 27 Howell Drive and is located in the Village Zone and the Limited Residential District in the Shoreland Zone, as defined in Sec. 44-33 according to the tax map;
- Spinney Creek Shellfish Corporation is applying to the Maine Dept. of Marine Resources Limited Purpose Aquaculture License to increase the number of its cages from 180 to 600;

- On Feb. 22, 2000, Town Attorney Vaniotis submitted a letter, requested by the Planning Board, that aquaculture, as a business, is an allowed use in the Limited Residential District, but advised the Planning Board that their decision should be based on specific facts which come before it.
- On August 4, 1992, the Planning Board approved the site plan for SCSC as an approved use in the Limited Residential District of the Shoreland Zone;
- On Sept. 23, 2019 the CEO determined that Sec. 45-192 is not involved in any additional footprint of the building in expansion.
- On Sept. 30, 2019, the CEO determined that, referencing Sec. 1-2, "Expansion of Use," Spinney Creek Shellfish Corp. was not involved with any additional expansion of the building footprint and does not constitute an expansion of use;
- It was testified that as per Sec. 45-5, may present a conflict of interest in the ordinance;
- It was testified that the Planning Board cannot initiate action without a formal application;

Ms. Lemire asked if Chairman Hamilton could clarify his finding of fact on conflict.

Chairman Hamilton said that Sec. 45-5 of the ordinance mentions when two ordinances are in conflict, the most stringent would apply. He said they have not determined if there is a conflict.

Ms. Lemire said it is a conforming use and a conforming lot of record. She said that it is all about being non-conforming does not apply.

Mr. Rankie said another finding of fact would be it was determined that Sec. 45-192 is not relevant to this application.

Ms. Lemire said it is not applicable since this property is a conforming lot and a conforming use.

Ms. Adams asked what about per Sec. 45-290, Table of Land Uses?

Chairman Hamilton said it is not in there, it is in the Shoreland Zone and it was not brought up in testimony.

Chairman Hamilton said Sec. 44-34-15, an aquaculture business is a permitted use in the Shoreland Zone.

Mr. Trott asked about the fact-finding letter from the lawyer dated Feb. 22<sup>nd</sup> 2000.

Ms. Lemire said, as per Sec. 44-48 the Code Enforcement Officer is the responsible authority for enforcing all codes in the town and provisions of this chapter and to review any violations in the Shoreland Zone, as per Sec. 44-48 B, (1) and therefore acted correctly and within her authority.

Chairman Hamilton said that the Maine Dept. of Marine Resources is the responsible and controlling authority to address issues of expansion of the aquaculture component in the application, whether pending or approved, and not the Town of Eliot.

Chairman Hamilton asked if there were any other Findings of Fact and, if not, he would like to hear from the alternate members.

Ms. Adams said it is very clear that the Board of Appeals has no jurisdiction on this application and what is being proposed. She said the Code Enforcement Officer has determined it is in the Shoreland zone and whether or not something is permitted. She said the Planning Board did not make a decision so there was no appeal of that decision. She said it could be whether the CEO did her job, making that

finding, which she did and there is really no way to remand this to the Planning Board. She said she believed the CEO made the right determination in the letter she sent out.

Mr. Meyer said there are a lot of residents who have concerns about safety and potential water pollution, but that is not under the Board of Appeals' jurisdiction and should be addressed to the Dept. of Marine Resources. He said he appreciates what the folks are saying but they should speak with the State.

Chairman Hamilton said he would entertain a motion.

Mr. Rankie said point of order.

Chairman Hamilton said he closed the public hearing.

Mr. Rankie said he did not close to stop the discussion. He said his understanding is that Chairman Hamilton is looking for a motion.

Mr. Trott said he appreciates the passion people brought in this matter. He said he grew up on this river. He said every person up here is concerned about this town and that is why we are here. He said it is not just where you are living, but the whole town.

Mr. Rankie moved to deny the appeal by Donna Knox and 10 other residents of the decision of the Code Enforcement Officer regarding property owned by the Spinney Creek Shellfish Corporation, 27 Howell Drive, seconded by Mr. Trott.

Mr. Rankie said it is very clear that the Code Enforcement Officer acted correctly and within her authority.

Vote was taken by a show of hands, 5-0, all in favor, none opposed. Motion carries.

Chairman Hamilton said that the appellants had 45 days to appeal the Board's decision to Superior Court. He said that a Notice of Decision letter will be sent to the appellant within 7 days.

Chairman Hamilton called a five-minute break at 8:58 p.m.

**b) Request from Ted Long for a Waiver from front setback requirements on property located at 1274 State Road, Tax Map #15, Lot #13, in the Village Zone, involving a change of use from commercial to residential.**

Chairman Hamilton read the request and asked if the applicant was present.

Mr. Long confirmed that he was.

Chairman Hamilton said there is no issue of timeliness because it is not relevant in this case since there is no decision.

Chairman Hamilton said that Mr. Long met the standing requirement because he had shown the Board the deed and the Purchase and Sale Agreement that he is involved with.

Chairman Hamilton said that the five voting members will be the same as the previous case. He asked if there were any conflicts of interest.

Hearing none, Chairman Hamilton opened the public hearing at 9:09 p.m.

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Chairman Hamilton said Mr. Long should give the Board what he would like them to rule on. He said this building is owned by the Seacoast Church. He said in order for them to confirm the square footage of the home, Mr. Long needs a waiver from the required front setback of 30 ft. He said that Mr. Long has listed 19.7 ft.

Chairman Hamilton asked Mr. Long if he was familiar with the requirements of a waiver. He said he will go over the Board's role in granting waivers.

Chairman Hamilton said he is not sure if this is a non-conforming lot of record.

Ms. Bishop responded that it is.

Chairman Hamilton said that Mr. Long has a non-conforming lot and has to meet the setback requirements. He said that the CEO has referred this matter to the Board. He said they have been advised by the Town Attorney that Mr. Long will have to reply to five questions.

Chairman Hamilton asked if Mr. Long had a copy of his application in front of him.

Mr. Long replied yes.

Chairman Hamilton asked Mr. Long if he cared to elaborate on any of his responses to the five questions. He said the Board is charged to find out if he has a need rather than just a convenience. He said he would read each question and Mr. Long's response:

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

Response: The existing building has been used for commercial use. We request to change the use of the building to residential which puts the building in violation of the town's set back requirement regarding residential buildings – therefore a setback waiver is due to the unique circumstance of the property.

Chairman Hamilton wanted to know if Mr. Long had anything to add to that.

Mr. Long replied no.

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

Response: The renovations planned along with general cleaning up of property and landscaping will improve the essential character of the locality. The location will no longer be an empty building.

Chairman Hamilton asked Mr. Long if he had anything to add to that.

Mr. Long responded it will enhance the overall appearance of the building. He said that he will be repairing the driveway and will make it look nice.

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

Response: This hardship is a result of the applicant by requesting to change the use of the building from commercial to residential, thus changing the setback requirements.

Chairman Hamilton asked if Mr. Long had anything to add to that statement.



Mr. Long answered yes, the Town Code has caused the need for a waiver and change of use.

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

Response: Using this property for a single-family residence should in no way reduce or impair the use of abutting properties.

Chairman Hamilton wanted to know if Mr. Long had anything to add.

Mr. Long responded that it will not be a commercial property.

Chairman Hamilton added that there are other residential properties in the area as well.

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

Response: Granting of a waiver is based on demonstrated need. Without the waiver the property could not be utilized as a single-family residence. The building would have to be moved or demolished. Neither option is financially available to the buyer.

Chairman Hamilton asked if there was anything Mr. Long would like to add.

Mr. Long said he looked at other buildings and the Town Code.

Chairman Hamilton asked if any Board members had questions.

Mr. Rankie wanted to know if it was Mr. Long's intent is to take out the fencing and parking and make it look like a house.

Mr. Long replied he explained what he will be doing and he needs to discuss that. He said they may have an electric fence for the dog.

Ms. Adams asked if Mr. Long intends to live in the house and not sell it.

Mr. Long answered yes, he and his wife will be living there.

Chairman Hamilton wanted to know how did Mr. Long determine the measurements of the setbacks.

Mr. Long responded that their bank which they are involved with financing sent an inspector out.

Chairman Hamilton asked if the measurement is 19.7 feet.

Mr. Long replied yes.

Mr. Meyer asked when that house was originally built as a residence or had it been converted to a residential building.

Mr. Long replied it was a commercial building when it was originally built.

Chairman Hamilton said he would like the Code Enforcement Officer to speak to the setback. He wanted to know if Ms. Bishop used the online GIS measurement to the house or from the pavement to the property line. He heard that from the front entrance it is 19 ft. He asked the CEO if she did a physical measurement to the pavement.

Ms. Bishop said she did a physical measurement to see how close it was from the edge of the pavement and it was 25 ft from the structure. She said if that is the case, it seemed to be 25 rather than 19 ft.

Chairman Hamilton said the property is in the Village Zone and asked what is the setback requirement.

Ms. Bishop replied 30 ft.

Chairman Hamilton wanted to know who is right.

Ms. Bishop responded the online GIS came out with 19 ft.

Chairman Hamilton asked if they should use that.

Ms. Bishop answered no, they should use the physical measurement.

Chairman Hamilton asked if Ms. Bishop was confident that it is 25 ft.

Ms. Bishop answered from the closest point of the structure, but she did not know where the property line was, but she took it from the edge of the pavement and 25 ft. is what she measured.

Chairman Hamilton said, in either case, the waiver is still required, whether it is 19.7 or 25 ft.

Mr. Marshall asked is this the only thing Mr. Long needs to make it residential. He said the applicant is not asking to build anything and all the Board has to do is make it residential.

Ms. Bishop said it is a conforming lot with a nonconforming structure.

Mr. Marshall wanted to know if the Board is going to make the applicant tear it down.

Ms. Bishop replied that is why Mr. Long is here, the use is commercial and he wants it to be residential.

Ms. Lemire asked if he was granted the waiver, he would not need to change the setback.

Chairman Hamilton said the setback still requires 30 ft.

Mr. Marshall said he is not building anything.

Chairman Hamilton said it is still a non-conforming use.

Ms. Bishop corrected him by saying it is a conforming lot with a non-conforming structure and that is the reason for his request.

Mr. Marshall wanted to know if it didn't have to be changed from commercial = it is residential.

Ms. Bishop replied in order to do this, he would have to rebuild the structure and that is why Mr. Long is asking for a change of use.

Ms. Lemire wanted to know how long has this 30 ft. setback been skewed.

Ms. Bishop replied she did not know.

Chairman Hamilton said it does not matter if it is commercial or residential, the setback is 30 ft. He said changing the use on a nonconforming lot of record needs a waiver.

Ms. Bishop said yes, having the home needs a setback.

Ms. Lemire said if it has been that way for a long time, the Planning Board must have approved that and she wanted to know why are we here now.

Ms. Bishop responded this has gone to the Planning Board in the past, but they cannot grant a waiver to the setback.

Ms. Lemire wanted to know how did it get approved.

Mr. Rankie replied it looks like a 50's type of building.

Chairman Hamilton answered it was before zoning.

Ms. Lemire said that it has been approved over and over again.

Mr. Marshall said he recalled when the Board approved it as a school.

Chairman Hamilton said the applicant is just trying to be safe.

Mr. Rankie asked the Chairman if he could ask the CEO a question.

Chairman Hamilton replied sure.

Mr. Rankie wanted to know if the owner already decided to live in the building, and convert it, what do they have to do.

Ms. Bishop answered they would have to apply for a building permit, it would be a non-conforming use, and for Planning Board approval, they would have to look at the ordinance.

Chairman Hamilton asked if they would still have to go to the Planning Board for a change of use.

Ms. Bishop replied no, because of the setback.

Mr. Rankie said, as Mr. Marshall pointed out, the waiver is all that is needed.

Mr. Marshall said what they are really trying to do is to make the bank happy.

Mr. Rankie asked if Chairman Hamilton wanted a motion.

Chairman Hamilton answered he hasn't closed the public hearing yet and asked if there were any other interested parties who wished to speak.

Gary Berg, 3 Beech Road, says that this property abuts his property on three sides. He said he believes the structure was built in 1963, or the early 60's and has been three different banks and a church. He said he spoke with the owner and also Peter Dennett, who owns the adjacent property on State Road, and they are looking forward to it being a residence. He said he it has been an eye sore for many years and they are looking forward to it being a nice home in the center of town.

Linda Pratt said she is a Real Estate Agent who is representing Mr. and Mrs. Long, who have a Purchase & Sale Agreement for the property. She said they are here because the bank requests a letter from the town stating reasonable assurance that they will be given the required permits to turn the

building into their home. She said that Ms. Bishop said she did not have the authority to do that and that is why they are here. She said the bank is asking the Board of Appeals to do that for them.

Chairman Hamilton asked the applicant if he would like to speak again, or did he feel he had said enough.

Mr. Long declined to make any further comments.

Chairman Hamilton asked if the associate members wanted to weigh in on this request.

Neither Mr. Meyer or Ms. Adams had any comments to offer.

Chairman Hamilton closed the public hearing at 9:29 p.m.

Chairman Hamilton stated the Findings of Fact:

- The applicant is Ted Long, PO Box 478, Eliot, Maine;
- The property is located at 1274 State Road and is identified as Tax Map 15, Lot 13 and is in the Village Zone;
- The applicant has met the standing requirement by showing the Board the deed and the Purchase & Sale Agreement;
- There is no issue with timeliness because no decision was made by the CEO or the Planning Board;
- The request is for a waiver from the front yard setback requirements;
- The applicant intends to purchase and renovate the building into a single-family dwelling in the Village zone and the required setback is due to the change in use from commercial to residential;
- The current setbacks are either 19.7 ft. or 25 ft. to the pavement;
- The structure is non-conforming due to the setbacks, but the property is conforming in lot size and street frontage;
- The request for a waiver to the setback was initiated by the loan agency to ensure that proper permitting was in place prior to any loan transactions.

Chairman Hamilton asked if there were any other Findings of Facts. Hearing none, he said he would entertain a motion.

Mr. Marshall moved to accept the application from Ted Long and to grant him a waiver to the front yard setback requirements on the property located at 1274 State Road, identified as Tax Map 15, Lot 13 and further, to clarify and adjust the setback to whatever the existing structure is, seconded by Mr. Rankie. Vote taken by a show of hands, 5-0, all in favor, none opposed, motion carries.

Chairman Hamilton said that Mr. Long would receive a Notice of Decision letter within seven days, approving his request, and that he needs to file the waiver with the Code Enforcement Officer and the York County Registry of Deeds within 90 days. He said that Mr. Long had 45 days to appeal the Board's decision to Superior Court from tonight.

**c) Request from Christine Bennett for a Waiver from side setback requirements on property located at 140 Moses Gerrish Farmer Road, Tax Map #15, Lot #46 in the Village Zone, in order to construct an Accessory Dwelling Unit.**

Chairman Hamilton asked if the appellant was here.

Charles Hugo said he is here representing Christine Bennett

Chairman Hamilton asked him what his name is.

Mr. Hugo replied Charles Hugo.

Chairman Hamilton said the Board received a letter from Christine Bennett, designating Mr. Hugo as her representative and told Mr. Hugo he has standing and there is no timeliness involved.

Chairman Hamilton said it would be the same five voting members and asked if there was any conflict of interest amongst the members on this request. Hearing none, he opened the public hearing at 9:38 p.m.

Mr. Hugo said Ms. Bennett could not attend tonight's meeting because she is away, taking care of her elderly parents. He said that is part of her thinking in constructing this accessory dwelling, for her parents, or for herself when she is elderly.

Mr. Hugo asked if Chairman Hamilton would like him to go through the list.

Chairman Hamilton replied yes.

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

Mr. Hugo replied that Ms. Bennett is looking for a waiver of 10 ft. because of the existing conditions of the lot -- it is narrow and, if the Board looks at the site plan, both neighbors' garages are on her property line or within a few feet of it. He said the neighborhood has a lot of properties that are narrow.

Mr. Hugo said there is a large amount of ledge and cross-pitch there on the south side.

Chairman Hamilton said he saw that on the plan, where the cross-hatch is.

Mr. Hugo said the elevation is 10 ft. higher than on the north side. He said in order to get by at a level grade, they will need the space to adjust the pitch.

Mr. Rankie said he is not clear on what is being asked for and where.

Chairman Hamilton asked Mr. Hugo to explain.

Mr. Hugo said, looking at the drawing, shows a chicken coop which has been removed and the proposed garage with the accessory dwelling above it. He said Ms. Bennett is requesting a 50% waiver to the lot line.

Mr. Marshall asked if the chicken coop was being converted.

Mr. Hugo replied no, that is the 8 ft. x 16 ft. shed that was removed.

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

Mr. Hugo replied no, it will not alter the essential character of the neighborhood.

Chairman Hamilton read #3: is the hardship the result of action taken by the applicant or a prior owner?

Mr. Hugo responded no, not the prior owner.

Chairman Hamilton wanted to know, regarding #4, if granting the waiver would substantially reduce or impair the use of the abutting property.

Mr. Hugo responded he did not believe so as it is away from the existing residence. He said the existing fence will be maintained on the southern side for a buffer.

Chairman Hamilton wanted to know what is the last line that starts "I will have to ask my neighbor..."

Mr. Hugo replied "permission" in order to make the slope because of the cross pitch and without the waiver, the structure is over the 10 ft. required from the dimension of the northern side of the property line. He thought that is what Ms. Bennett is referring to.

Chairman Hamilton read #5. Is the granting of a waiver based upon a demonstrated need, not convenience.

Mr. Hugo replied no.

Chairman Hamilton continued with #5, ...and is there no feasible alternative available?

Mr. Hugo responded no.

Chairman Hamilton wanted to know that there was nowhere else on the property that Ms. Bennett could put the accessory dwelling unit without the Board granting her a waiver.

Mr. Hugo replied no.

Chairman Hamilton asked Mr. Hugo if that was the end of his testimony.

Mr. Hugo answered yes.

Ms. Lemire said she needed clarification on the plan and wanted to know if the blue dotted line represented the 10 ft. setback.

Mr. Hugo answered the drawing is when he originally planned it. He said he was not aware that the accessory dwelling unit had setbacks for the accessory dwelling structure though what he assumed were the required setbacks.

Ms. Lemire wanted to know why can't Ms. Bennett put an addition on the back of her house.

Mr. Hugo replied it is all ledge.

Ms. Lemire wanted to know, if she stood on the property, would it be like this? She held up the plan and pointed to it.

Mr. Hugo said the ledge goes probably 15 ft. above the back of the house. He said it is on a large hill.

Ms. Lemire said ok, directly behind the house, and looking at the plan, she asked is that a patio with trees around it.

Mr. Hugo replied that is a retaining wall. He said from the checked line it is all ledge essentially up to where the house is.

Mr. Marshall asked where is the accessory dwelling and the house.

Mr. Hugo replied where the ledge is drawn – it crests and then goes down again.

Mr. Trott asked if Ms. Bennett could not have gone up and made it a second story building.

Mr. Hugo said that Ms. Bennett would have to answer that question. He knows there are existing solar panels on the roof.

Mr. Trott replied okay.

Chairman Hamilton said the traffic is by the main house and the driveway and wanted to know how will the vehicles get back there.

Mr. Hugo asked him if he saw the tan line that goes up to the back – that is the driveway.

Chairman Hamilton said that is not the ledge.

Ms. Lemire pointed to the plan and asked Mr. Hugo to confirm what it is.

Mr. Hugo replied that is the driveway.

Mr. Rankie wanted to know what is the side setback required.

Mr. Hugo replied 20 ft.

Mr. Rankie said it was not clear to him why Ms. Bennett could not fit the building in.

Mr. Hugo replied because of the cross pitch.

Mr. Trott asked if the house was not a slab.

Mr. Hugo replied yes.

Ms. Lemire replied they did not have a copy of the proposed garage.

Ms. Bishop replied that the garage permit is in their packets.

Chairman Hamilton asked if there were any questions of the Code Enforcement Officer. He asked, as he understands it correctly, if there is no other place to put that.

Ms. Bishop replied she does not, without guessing. She is not physically sure of the site constraints, but she is familiar with the site.

Chairman Hamilton asked if there was any testimony from interested parties. He said he received a letter dated November 18<sup>th</sup> from the abutters, Daniel and Aimee Kardulas, which he would read into the record:

*Dear Board of Appeals,*

*Based upon our review of the applicant, Christine Bennett's, request of waiver, we oppose the waiver request for setback concerning our property boundary at 138 Moses Gerrish Farmer Road from 20 feet to 10 feet per Town application records.*

*We are concerned with the size and scope of this dwelling in regards to the size of the property for which the waiver is being requested as well as for vehicular traffic towards the back of our property and the potential for another short-term rental possibility. The size of this property is not conducive for two permanent dwelling situations in regards to the properties that abut it as well as we feel it would diminish the resale value of our property as well as the visual site lines being obscured.*

*In reviewing Christine's nature of waiver statement, question 5 asks whether the waiver is based upon need or convenience. In conversations with said applicant it was stated that the living space would be out of convenience so as not to have to continue traveling to Connecticut to stay with her parents or having to stay with friends locally in Kittery so as to continue her Airbnb rental in her primary dwelling.*

*Based on excavation work that has already taken place for the foundation of this dwelling, wire fencing attached to our wooden fence was taken down and not put back up and our wooden fence sustained damage of which we have pictures.*

*We would appreciate knowledge of a decision when it is made.*

*Thank you,  
/signed/ Daniel and Aimee Kardulas*

Chairman Hamilton asked if there were any questions regarding the letter.

Mr. Rankie wanted to know if they stated the applicant does not live there.

Mr. Hugo said that Ms. Bennett is in Connecticut taking care of her parents. He said she is renting the house to a couple, and she pays the mortgage, but that is her primary residence.

Mr. Trott asked if that is Ms. Bennett's plan – to move her parents in.

Mr. Hugo responded that is one of her plans.

Mr. Trott wanted to know how soon.

Mr. Hugo stated that Ms. Bennett has a condo.

Mr. Trott asked if there will be an Airbnb.

Mr. Hugo replied no.

Mr. Rankie said the criteria for an accessory dwelling unit, is that the property owner has to live in one or the other.

Ms. Bishop replied that is correct, one of the units is owner-occupied and has to be registered with the York County Registry of Deeds.

Ms. Lemire said Sec. 45-195 Nonconforming structures in this code says {a} a nonconforming building or structure may be repaired, maintained or improved, but the area in nonconformance may not be extended or expanded except in conformity with Sections 45-192, and sub-section of this section.

Ms. Lemire wanted to know if a non-conforming use with a garage is considered nonconforming.

Ms. Bishop replied an accessory dwelling is a permitted use.



Ms. Lemire said an accessory dwelling unit is a permitted use, but it does not meet requirements.

Ms. Bishop said according to Sec. 45-194 C, (2), that's where a waiver comes in and the applicant has to go before the Board of Appeals.

Ms. Lemire wanted to know if that one applies.

Ms. Bishop replied yes, an accessory dwelling unit within it will not but the garage does.

Ms. Lemire asked if this is a non-conforming lot of record.

Ms. Bishop responded yes.

Chairman Hamilton asked if there were any other questions.

Mr. Trott read Sec. 45-195 (c): *No structure or use which is at or less than the required setback shall expand towards property lines. However, a structure to be built upon an existing lot of record may meet the same front yard setbacks as adjoining lots provided that adjoining structures are within 200 feet, the board of appeals may clearly identify such setback, and the structure conforms with other performance standards found in this chapter.*

Mr. Trott said the applicant is expanding toward the property line and it is not supposed to go any more.

Ms. Bishop asked Mr. Trott to read it again.

Mr. Trott said as he understands, it can go as far as the existing building is now.

Mr. Trott asked if Ms. Bishop could clarify the first sentence.

Ms. Bishop explained that whatever the existing structure is, it cannot go closer to the property line as far as it is already nonconforming.

Chairman Hamilton asked if there were any other questions from the CEO.

Mr. Meyer spoke up and said, regarding the letter and mentioning the wooden fence – he did not have that letter and asked if Chairman Hamilton wouldn't mind showing him.

Mr. Meyer asked how far back is the ledge away from the accessory dwelling, maybe 20 ft.

Mr. Hugo replied just below the grade, it runs down to the front of the structure.

Chairman Hamilton closed the public hearing at 10:15 p.m.

Chairman Hamilton stated the Findings of Fact:

- The property is owned by Christine Bennett;
- The property is located at 140 Moses Gerrish Farmer Road, identified as Tax Map #15, Lot #46 and is in the Village District;
- The request is for a waiver for a 50% reduction of the side yard setback required in order to establish an Accessory Dwelling;
- The property is a non-conforming lot of record, less than one acre in size, according to Sec. 45-194;

- The applicant requested a 50% waiver to the side setback of 10 ft. where 20 ft. is required;
- The applicant proposes to build an accessory dwelling unit above a currently permitted garage at the rear of the property;
- The Accessory Dwelling Unit requires Planning Board approval under Sec. 45-192 because it is a non-conforming lot of record.
- A letter was received from Daniel and Aimee Kardulas, opposing the request;
- The garage permit was issued recently within one month;
- With the accessory dwelling unit, the required setback is 10 ft.;
- Sec. 45-194 (c) 2 allows for a 50% waiver from the Board of Appeals;
- There is an established easement on the property from P & G pipeline;
- The applicant has requested a waiver based on hardship due to excessive ledge and the existing grade and her desire to have an eye-pleasing design.

Mr. Rankie asked if they could discuss the letter from the abutters. He said he has read this and his feeling is they should deny the waiver because the applicant has enough land to shift the building and build it with the 20 ft. setback. He said if the Board grants the waiver or not, he does not see an opportunity or anything they can do what the letter is asking the Board to look at.

Chairman Hamilton said, regarding excessive hardship, the applicant does have a permit for a garage.

Mr. Rankie said he was bringing it up for the Board's consideration. He said the applicant did make time to write this and it is a hardship situation, just where it is going to be.

Chairman Hamilton asked if anyone else has any comments.

Mr. Trott said the placement of the structure was one month ago. He said if it was thought through, she would not need a waiver. He said the hardship was where were they going to put it, and the garage was there anyway. He said he finds it hard to say it is not for convenience.

Mr. Hugo tried to interrupt but Chairman Hamilton said the hearing is closed, but the Board can ask questions.

Mr. Trott said if they look at it, it is based more on cost than on the consideration of the neighbors and it should be more centered.

Chairman Hamilton asked if there was any further discussion.

Ms. Lemire asked if the foundation has not been poured.

Mr. Hugo replied yes.

Mr. Rankie moved that the Board of Appeals grant the waiver, as requested by Christine Bennett, to the side setback requirements on property located at 140 Moses Gerrish Farmer Road, Tax Map 15, Lot 46, to construct an accessory dwelling unit. Mr. Marshall seconded the motion.

Mr. Rankie said she would not be asking for the waiver and he is looking at a financial hardship, dealing with the ledge and the outcrop. He said they will not see the building once it is built. He said there is significant outcrop there and thought that her intention is to make it fit in the lot and make it look nice. He said with respect to the abutter, the Board can tell her place to it better on her property.

Chairman Hamilton said if they granted the waiver, it locks it in where it is.

Mr. Rankie said as long as the Planning Board approves it.

Mr. Trott said you understand that there is ledge there and you will be able to see it as you drive by. He said there is quite a lot of heavy stuff back there already and it does not give the neighbors an option. He said there is no other house behind it, if we approve this. He said by centering it, it would give the waiver and maybe help the neighbors.

Mr. Rankie said by crowding the property line, it would actually keep the traffic away from #138, rather than centering it. He said it puts the activities on the back and away from #138.

Mr. Trott said she could move the house back and put the driveway in the front. He said she could make it work without a waiver. He said it takes away the option for the neighbors and there seems to be an issue already.

Mr. Rankie said he does not support waivers very often.

Mr. Trott said they have to take into consideration the questions and he believes that granting the waiver will impact the neighbors.

Mr. Rankie said she has 16 ft., so anything done on the southern side could be done.

Mr. Trott said the garage was put in one month ago, but rather than that, she decided she needed an accessory dwelling unit. He thought the Board was supposed to take into consideration the abutters and they heard from one.

Chairman Hamilton asked Mr. Trott if he thought there is no other feasible alternative for the accessory dwelling.

Mr. Trott replied he does. He added that he believed that Ms. Bennett has other options that are there.

Chairman Hamilton wanted to know, if they move the 24 x 36 ft. garage so it does not require a waiver, and the lot line is 60 ft. He said there is 23 ft. on both sides so it does not require a waiver. He wanted to know if it would be less of an impact on the neighbor.

Mr. Trott said it meets the town ordinance so it is what it is at that point. He said we are here because we are concerned with the waiver being close to the property. He said he may be looking at it the wrong way.

Mr. Marshall said why don't they split the difference and give them 15 ft.

Chairman Hamilton said that would not work.

Mr. Trott said the applicant cannot build this building according to the code, that is his understanding.

Chairman Hamilton said that is correct.

Mr. Meyer said he should check his math – Chairman Hamilton had spoken about earlier 18 ft., so she would still need a waiver.

Chairman Hamilton said Mr. Meyer was right.

Mr. Rankie said he still maintained that 10 ft. from #138 is being kinder.

Ms. Lemire said she needed clarification on #4, the last 3 lines, where it says "I will have to ask my neighbor permission to move... She wanted to know if it said "the toe of the slope."

Mr. Rankie responded that is correct.

Ms. Lemire said thank you, that makes sense.

Vote was taken by a show of hands, 4-1, four in favor and one voting in opposition (Chairman Hamilton). Motion carries.

Chairman Hamilton said that Ms. Bennett will receive a Notice of Decision letter within seven days and that she will have to file a copy with the Code Enforcement Officer and the York County Registry of Deeds within 90 days.

Mr. Rankie asked Chairman Hamilton to speak with the Town Clerk because he could not read Ms. Bennett's notes.

**4. REVIEW AND APPROVE MINUTES AS NEEDED:**

Chairman Hamilton said, because the hour is late, he will defer the October 17<sup>th</sup> minutes to the next Board meeting and asked for a motion to adjourn.

**5. OTHER BUSINESS AS NEEDED:** Deferred until next meeting

**6. ADJOURN:**

Mr. Rankie moved to adjourn the Board of Appeals meeting at 10:35 p.m., seconded by Ms. Lemire. All were in favor by a show of hands, and voice, 7-0. Motion carries. Meeting adjourned.

Respectfully submitted,

Barbara Boggiano  
Recording Secretary

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

Bill Hamilton, Chairman, Board of Appeals

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

1/23/20