TOWN OF ELIOT – BOARD OF APPEALS MEETING

January 21, 2016

ROLL CALL

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

Others Present: Code Enforcement Officer, Heather Ross; Planning Assistant, Kate Pelletier; appellants; abutters; and 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. He asked that all electronic devices be silenced.

Chairman Hamilton thanked those in attendance for coming out on the "balmy" winter evening.

Chairman Hamilton stated that there were two public hearings scheduled. He stated that he would first go through the procedure so that when the public hearings were opened, it would be clear how the process would work. He stated that both appeals were administrative appeals, and that both would be handled in the same manner. He stated that the procedure would be as follows:

- Each public hearing will be opened separately.
- A brief summary of the appeal will be given.
- Voting members of the Board of Appeals will be determined.
- Any conflicts of interests among the BOA on a particular hearing will be determined.
- Parties to the action will be determined, which will be either the Code Enforcement Officer or the Planning Board.
- The jurisdiction of the Board of Appeals to hear the appeals and the applicable Eliot Code ordinances will be given.
- Standing and timeliness will be determined for each application, standing meaning that the appellant has standing to allow the BOA to hear the appeal. For timeliness, there is a 30-day requirement from the time the decision is made to the time an appeal is filed with the Town Clerk.

Chairman Hamilton stated that the type of review for ~~the~~ both hearings was an appellate review. Chairman Hamilton stated that what that meant was that the BOA would review the record of the Planning Board or the Code Enforcement Officer at the time that they made the decision which was being appealed. He added that the BOA could not look at any information after the decision, and that they could only look at the record of the Planning Board or the Code Enforcement Officer prior to making their decision.

Chairman Hamilton stated that the other type of review is called a de novo review, and that that is the type of review done by the Superior or Supreme Court, in which they look at all the aspects of a case, from the time the Planning Board made the decision to the current time. He stated that the courts do that in order to determine if there were any constitutional issues or other issues. He stated that the BOA could not do that, except where a decision by the Code Enforcement Officer applied to the Shoreland Zone.

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 or she would like to present information, as long as it is pertinent to the case.
- The Board will question the appellant.
- Parties to the action will present testimony, the Planning Board being the primary party to the action for the current hearings.
- The Board will question the Planning Board.
- 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 parties will have a chance to testify.
- The Board will question the interested parties.
- There will be rebuttal of any previous witnesses by all parties.
- Those who have questions of a previous speaker may ask that question through the Chairman. He asked that comments be brief in order to give everybody who wanted to speak a chance to do so. He stated that if anyone had a lot to say, they could add to their statements after the others had spoken.
- Comments will not be allowed that are repetitive or irrelevant to the proceeding.
- 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.
- The public hearing will be closed, after which there will be no additional comments from the audience, unless the BOA members feel that they need

more information, in which case they will call on an individual to provide that information.

- 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.

PUBLIC HEARING

The first public hearing was opened at 7:09 PM.

Chairman Hamilton stated that the voting members would be Mr. Cutting, Mr. Billipp, Ms. Lemire and Mr. Cieleszko, with the Chair voting in the event of a tie.

SUMMARY OF HEARING

Robert Ducharme was requesting an Administrative Appeal to construct a shed on his property located at 9 Creek Crossing, Map 61, Lot 19.

Chairman Hamilton asked if there were any conflicts of interest among the BOA members. There were none.

TESTIMONY FROM APPELLANT

Mr. Ducharme stated that he is a lawyer and practices in the State of New Hampshire in the area of civil law and is familiar with condominium law, but not with land use law. He stated that he would keep his comments as brief as possible.

Mr. Ducharme stated that he has had problems for years because he has to get his car out of the garage in order to get his lawn mower or snow blower out, and that he has put a number of dings into his car from the snow blower. He stated that he went through the process of trying to add a simple shed next to the garage. He stated that the process went well, that he emailed the CEO (which, he stated, she apparently did not receive), ordered the lumber and put the gravel down, and then went to the Town Hall to see the CEO. At that time, Ms. Ross Google-earthed the site and then stated that he could not erect the shed because the lot is a corner lot on the corner of Route 103 and Creek Crossing.

Mr. Ducharme stated that he did not consider the Route 103 side of the property to be a front yard, and that his wife, his neighbors and the post office also do not consider it to be a front yard. He stated that that front is wetlands, so he could not walk through the front yard to get to his front door, even if he wanted to do so.

Mr. Ducharme stated that the CEO had told him that her hands were tied because the ordinance is clear, but that the Town is trying to go about changing the ordinance. He stated that he was aware that the Planning Board has worked on the issue, but that he did not know whether or not it had been submitted in order to become a warrant article at the next Town Meeting. He stated that he was aware that one of his options was to wait until June, but that he did not know whether the issue would become a warrant article and, if it did, whether it would pass.

Mr. Ducharme states that he drives back and forth on Route 103 to work and to take his daughter and wife to various places. He stated that he has noticed structures in the front yard everywhere. He stated that the house right next to the Grange, on State Road, has a two-story shed next to the house. He stated that there is a similar situation two houses away from that house. He stated that on the corner of Beech Road and State Road there is a house with a shed on the State Road side of the property. He added that on the corner lot of Fore Road and Route 103, there is a shed on what the owners consider to be their back yard, but that he now realizes is actually their front yard.

Mr. Ducharme stated that he had been a prosecutor for a long time and then became a teacher, which was the best job he had in terms of spending time with his family and for flexibility reasons. He stated that he then went back into practicing law. He stated that the course he used to teach was about civics and government. He stated that he thought that the laws are supposed to reflect the morals and values of what people want, and that the law should never put form above substance. He stated that everybody is trying to change the front yard ordinance, that he is having a problem getting in and out of his garage and working on his yard, and the ordinance makes so little sense that it apparently is not being enforced elsewhere.

Mr. Ducharme stated that when he was talking with his wife, she said, "Just put up the shed." He stated that his daughter, with her 11-year-old eyes, looked at him and said, "Daddy, don't do anything illegal." He stated that he had not been planning to do anything illegal, but the daughter's statement quieted his wife.

Mr. Ducharme stated that he was trying to do everything right and everything that he was supposed to do, that everybody was trying to change the ordinance, but in the meantime what he wanted to would be wrong and not allowed. He stated that the hardship in the situation was a moral one of trying to put form above substance, and he did not think that was appropriate.

QUESTIONS FOR APPELLANT FROM THE BOARD

Mr. Cutting asked if there was a reason why the shed could not align with the garage. Mr. Ducharme stated that if one looks at the front of the house, there is a driveway that turns into the double garage. He stated that if he put the shed parallel to the garage, he would have to pave the area in front of the shed in order to get the snow blower out. He stated that if he put the shed that far back, there would be a privacy issue because there are four houses in the back, and because he eventually wants to include a patio with a place to sit in privacy. He stated that if the shed was located in the back, there would only be about 10 feet of area and steps would be required to get down to it.

Mr. Billipp stated that he observed that the lot was a long, narrow lot and that the house was several hundred feet from State Road. Mr. Ducharme stated that there was more than an acre between the house and the road. Mr. Billipp noted that the house was located in the back corner, far away from State Road and Creek Crossing. Mr. Ducharme stated that the land between the house and State Road has sunk since he has owned it, that it is covered with cat-o-nine tails, and that he had been told it would probably be wetlands at this point.

Ms. Lemire asked if the shed could be attached to the house. Mr. Ducharme stated that he could if necessary, though he had not been planning on doing that. He asked if that would make a difference. Ms. Lemire stated that if he did attach the shed, he would not be appearing before the BOA. Mr. Ducharme stated that he could work with Ms. Ross about how to do the attachment. Mr. Ducharme stated that he had not thought of that option because the project was not supposed to be that involved. He added that it was just supposed to be a shed. Ms. Lemire stated that if the shed was attached, it would become part of the primary structure.

Mr. Cieleszko clarified that Mr. Ducharme recognized that the area in question is a front yard, according to the ordinance. Mr. Ducharme concurred, but stated that it put style before substance. Mr. Cieleszko stated that the ordinance calls for both the Creek Crossing and the State Road side be considered front yards. He asked if Mr. Ducharme was asking the BOA to disregard the ordinance. He stated that in the administrative appeal, Mr. Ducharme was trying to tell the BOA that the CEO was wrong in her interpretation. He added that if Mr. Ducharme had asked for a variance, he would be looking at hardship that caused the predicament. Mr. Cieleszko stated that Mr. Ducharme was asking the BOA to disregard the rule. Mr. Ducharme stated that the CEO had told him that a variance would not work in his case, and that the administrative appeal would be the best approach. Mr. Cieleszko stated that the CEO was probably correct, as she usually is. He stated that in order to grant the appeal, the BOA would have to say that the CEO was not following the ordinance. Mr. Ducharme stated that he was not asking that they not follow the ordinance, but that he thought there should be a way to appeal.

TESTIMONY FROM THE CODE ENFORCEMENT OFFICER

Ms. Ross stated that the lot is a conforming lot with conforming structures. She stated that Section 45-405, Dimensional Standards, requires a minimum 10-foot setback for accessory buildings and further states that, "Accessory buildings may meet this minimum requirement provided they are smaller in size than the principal use and are no less than 30 feet away from any principal buildings on adjacent property. An accessory building shall not be located within a front yard."

Mr. Ross provided the definitions of the ordinance as:

- Front lot line means on an interior lot, the line separating the lot from the street; on a corner lot or through lot, the line separating the lot from the other street.
- An accessory structure or use means a use or detached structure that is incidental and subordinate to the principal use or structure.
- A corner lot is a lot with at least two contiguous sides abutting upon a street.
- A front yard is the area of land between the front lot line and the nearest part of the principal building.

Ms. Ross stated that because the appellant's lot is a corner lot, it has essentially two front lot lines. She stated that an accessory building is not allowed between the principal building and the front lot line. She stated that Ms. Lemire was correct in stating that if the shed was attached to the existing structure, it would become part of the principal structure and would then be allowed in the proposed location.

Mr. Ducharme asked why that was not discussed in the many times he and the CEO had met. Ms. Ross stated that thought did not arise in terms of a shed, but that it would become part of the principal structure if attached.

Chairman Hamilton stated that the BOA's charge was to determine whether or not the CEO acted clearly contrary to the code in denying the building permit for the shed.

QUESTIONS FOR THE CODE ENFORCEMENT OFFICER

Mr. Marshall stated that he thought the idea of attaching the shed should have been brought up. He stated that, having been a builder, he recommended putting a foundation under the shed before attaching it to the house, so that the shed does not move when the frost comes, which would rip the shed away from the house.

STATEMENTS FROM ASSOCIATE MEMBERS

Mr. Rankie stated that it was not too late for Mr. Ducharme to withdraw the appeal. Mr. Ducharme stated that he would rather hear the thoughts of the BOA and added that his daughter would wonder what their thoughts were. Mr. Rankie stated that the daughter was correct. He stated that it is the job of the BOA to enforce the ordinances of the Town, whether they like them or not. He added that it has been recognized that this is a poor law, and the Planning Board has been asked to put forward a change, which is well on its way.

Mr. Marshall stated that he would concur, but that he also agreed that it put form over substance, and that it is not very neighborly.

FINAL TESTIMONY FROM APPELLANT

Mr. Ducharme stated that he thought people had heard enough.

PUBLIC HEARING CLOSED

Chairman Hamilton closed the public hearing at 7:25 PM.

FINDINGS OF FACT

- The appellant is Robert Ducharme of 9 Creek Crossing, Map 61, Lot 19.
- The property comprises 2.01 acres
- The property is in the Suburban Zone.
- The lot is a corner lot.
- The authority for the Board of Appeals to review the administrative appeal is under Sections 45-49(a), Administrative Appeals, and Section 45-405(c), Dimensional Standards. Section 45-405(c) states that an accessory building shall not be located within a front yard.
- The property is a corner lot, resulting in the proposed accessory structure being located in a front yard.

MOTION

Mr. Cieleszko moved, seconded by Ms. Lemire, to grant the appeal and that the Code Enforcement Officer acted clearly contrary to the Eliot Code.

DISCUSSION

There was no discussion.

VOTE

The vote to approve the motion was 0:4, all opposing with the Chair concurring.

Chairman Hamilton stated that he was sorry Mr. Ducharme did not get his appeal, but that he hoped it would be resolved in consultation with the CEO.

SECOND PUBLIC HEARING

Chairman Hamilton stated that the hearing was for an administrative appeal by Judith Hilt, the Hilt Family Trust, Orland McPherson, James W. McPherson and Lynn McPherson against the decision of the Planning Board to approve an Elderly Housing Subdivision for property owned by Barbara B. Libbey, located at 1372 State Road, Map 20, Lot 13.

Chairman Hamilton stated that the voting members would be the same four regular BOA members (Mr. Cutting, Mr. Billipp, Ms. Lemire and Mr. Cieleszko), with the Chair voting in the event of a tie.

Chairman Hamilton asked if there were any conflicts of interest regarding the hearing. Mr. Rankie stated that he did not think he had a conflict of interest, but that he wanted to make it clear that he is President of Baran Place, which is an elderly housing community. He stated that he thought it was fair to note that fact because there were citations about elderly housing in the appellant's packet.

Ms. Lemire stated that she did not think that she had a conflict, but, for disclosure, she noted that she is Recording Secretary for the Planning Board and the Board of Selectmen. She stated that it is a neutral position and that all she does is record what is said in their meetings. Chairman Hamilton asked if Ms. Lemire felt that she should recuse herself. She replied in the negative. He asked if any member of the BOA felt that Ms. Lemire should recuse herself. None did.

Chairman Hamilton opened the public hearing at 7:30 PM.

Chairman Hamilton stated that the appeal was an administrative appeal to determine whether or not the Planning Board acted contrary to the Eliot Code. He stated that the BOA's jurisdiction to hear the case was under Sections 45-49(a), 41-69 and 41-178, which refer to appeals under the subdivision rules.

Chairman Hamilton stated that all of the appellants are abutters, which meets the standing requirement of the code. He stated that the Planning Board made their decision to approve the final plan on December 15, 2015, and the appeal was received on December 30, 2015. He stated that, since they had 30 days to file an appeal, they were well within the time limit and had met the timeliness requirement.

TESTIMONY FROM APPELLANT

Mr. Matthew Manahan stated that he was an attorney with Pierce Atwood and was representing the appellants. He stated that the appellants had 12 bases on which to challenge the Planning Board's Decision. He stated that the appellants felt pretty strongly that there were clear errors that the PB made.

Mr. Manahan stated that his clients are all abutters to the property at issue, and they are concerned about the effect that the development would have on their properties, including traffic, environmental impact, wetlands, and noise. He stated that the property has been protected, and has been identified to be protected, by the important historical components. He stated that his clients asked him to become involved late in the Planning Board process. He stated that he had sent a letter expressing his clients' objections to the PB, and that the letter was rejected. He added that the PB did not hold an additional public hearing, which was requested in the letter.

Mr. Manahan stated that his clients were asking that the BOA consider that the PB ignored the requirements of the ordinance.

Mr. Manahan stated that there were 12 items which formed the basis for the appeal. They are each discussed below:

The development is not elderly housing dwelling units. Mr. Manahan stated that the reason that it is an issue is because the Town's Growth Management Ordinance limits the issuance of building permits, but that there is an exception for building permits for elderly housing dwelling units, as defined in Sections 1-2 of the Eliot Code. He stated that the definition of an elderly dwelling unit is, "a dwelling unit specifically designed for elderly persons." He stated that that was not an issue that was discussed before the PB. He stated that the developer did not show any evidence that the units were actually designed to be elderly dwelling units. He stated that the obvious purpose of making the development elderly housing was to avoid the building cap requirements of the ordinance.

Mr. Manahan stated that the units in the development were designed for anybody, except for the restriction that at least one resident be at least 55 or older. He stated that the way the units are designed is not helpful to the elderly, and that that undermines the purpose for elderly housing.

Mr. Manahan stated that the memorandum submitted to the PB from Woodard & Curran of December 14, 2015, talks about some of the ways in which the development is not elderly housing. He stated that the memo notes that the units do not include door levers, slip-resistant flooring, low-pile carpeting, step-in showers, or grab bars for the toilet and shower. He stated that the units are multi-story and that elderly housing is normally single storied. He added that the PB granted a waiver for the covered sidewalk provision for elderly housing, which is important for the elderly to get around on snow and ice. He stated that Woodard & Curran also noted other provisions that could ease access for the resident, including ramps on sidewalks, handicap parking spaces and wheel chair entrances to units, none of which were apparently offered by the developer, since he did not present evidence of such.

Mr. Manahan stated that his clients believe that the development is not composed of elderly housing dwelling units and is, therefore, not exempt from the Growth Management Ordinance. He stated that in Ms. Pelletier's response, she said that this was an enforcement issue beyond the jurisdiction of the PB. He stated that he believed it was not an enforcement issue for the CEO. He stated that the issue was that, under the Subdivision Ordinance, Section 41-223(a), the PB has to find that the subdivision is in conformity with, "all pertinent local, state, and federal laws." He stated that one of those laws is noted in Section 29-4, which states that, "Unless otherwise exempted under the provisions of Section 29-3, all new dwelling units....shall conform to the provisions of this chapter. No new dwelling unit which fails to meet the requirements of this chapter shall be constructed or placed within the town." Mr. Manahan stated that the development does not meet the requirements of the chapter, which is the Growth Management Ordinance, if the development is not elderly dwelling units.

Street entrances are too close together. Mr. Manahan stated that Section 37-69(g) states that entrances onto existing or proposed arterial streets shall not exceed a frequency of one per 1,000 feet of street frontage. He stated that his clients engaged Diane Morabito of the Maine Traffic Resources to look at this issue and other traffic issues, and that her letter is Exhibit B of the appeal. Mr. Manahan stated that Diane Morabito stated quite clearly that, in her professional opinion, State Road is an arterial street and that, because of that, the proposed entrance violates the entrance spacing requirement. He stated that the evidence shows that there are four entrances onto State Road within 1,000 feet of the proposed entrance, which are Old Libbey Lane, Libbey Lane, Wiltshire Road, and Dixon Road. He added that that violates Section 37-69(g).

Mr. Manahan reiterated that the subdivision ordinance provides that the PB cannot approve a subdivision application unless the application is in conformity with all pertinent local, state, or federal laws. He stated that Section 37-69(b), which is the 1,000-foot spacing requirement, is such a pertinent, local law. He stated that the PB should not have approved the application because the entrances are in close proximity.

Maine Site Law approval is needed. Mr. Manahan stated that Section 41-173 of the subdivision ordinance states that, "the subdivider shall secure, in writing, state or federal review and/or approval of any required improvements before submitting the final plan." He stated that Ms. Pelletier argued that the condition imposed by the PB, that the developer supply to the CEO copies of any required permits, adequately met this requirement. Mr. Manahan stated that it was quite clear that the language does not allow this condition. He stated that the ordinance requires that the subdivider shall secure, in writing, any required improvements before submitting the final plan. He added that that did not happen in this case.

Mr. Manahan stated that the Woodard & Curran letter discusses how the proposed project will have over three acres of impervious surface not to be revegetated, which is a trigger for Site Law approval, based on an engineering review of the drawings. He stated that it is quite clear that site law approval is required and was not obtained. He stated that that was an additional reason why the PB decision was in error.

Stormwater requirements were not met. Mr. Manahan stated that under Section 41-213(a), Water Quality, the applicant has to satisfy certain requirements related to stormwater runoff. He stated that the Woodard & Curran memo talked about how the applicant did not supply adequate information to demonstrate compliance with stormwater runoff. Importantly, he added, there is a discussion in BMP Best Management Practices about other stormwater issues and stormwater design. He stated that the key issue identified by Woodard & Curran that is in violation of the ordinance is the fact that the soil report indicated that the ground water level is high, and is, therefore, potentially within the stormwater system.

Mr. Manahan stated that, if the ground water level is high and there is stormwater runoff, the water is supposed to percolate into the stormwater retention system, which it would be unable to do if there was water in the system already. He added that the stormwater would not be able to be controlled by the retention system and would flow offsite, due to the presence of ground water already in the system. He stated that that is in violation of the requirement of the ordinance, Section 41-213(a), which states that surface water runoff will be minimized and retained onsite, if possible. He stated that the Woodard & Curran memo noted that the applicant did not provide evidence to show that the stormwater would be minimized and retained on site, as required.

The development will have an undue adverse effect on historic sites. Mr. Manahan stated that that issue is not something that is actually in the Subdivision ordinance. He stated that subdivision ordinances in Maine track state law, but the Eliot ordinance does not contain the exact provision from the State Subdivision Law. He stated that State law does have to be applied by towns when issuing subdivision approval.

Mr. Manahan stated that the State statute provides that, when approving any subdivision, the PB must determine that the proposed subdivision will not have an undue adverse effect on historic sites. He stated that, because that provision is not in the Eliot ordinance, there is no definition in the ordinance of historic sites, though there is a definition of historic structures. Mr. Manahan stated that there is a State subdivision rule, administered by the Department of Agriculture, Conservation and Forestry, which defines historic sites for the purposes of State Subdivision Law. He stated that an historic sites is defined as, "any site, structure, district or archaeological site ...which is established by qualified testimony."

Mr. Manahan stated that the PB had been presented a report by the Eliot Historical Society that was unrebutted by the applicant. He added that the Historical Society report, written by the president, made clear that the proposed subdivision will have an undue adverse effect on historic sites. The report states that, "Upon measuring the section of Old Libbey Lane that will be impacted, it appears from the drawings, that at least 1000 feet, of the 1400 feet, will be destroyed." Mr. Manahan stated that Old Libbey Lane is one of the historical treasures that should be preserved and enjoyed by generations to come. He stated that the president of the Historical Society is clearly qualified to offer the testimony, yet the PB rejected the report as being given by one person. He stated that the PB did not give the report any credence. He stated that Helen Goransson filed a subsequent letter on December 10, 2016, stating that the rest of the Historical Society had agreed with the findings of the report and that they had officially approved it.

Mr. Manahan stated that it was an error for the PB not to even consider the Historical Society report. Because of the definition of historic sites in the State Statute, he stated, the PB should at least have entertained the report and should have asked the applicant to respond to it. He stated that the PB did not entertain it, did not listen to it and did not even consider it. He stated that that was an error because of the requirement in the State Statute that the development will not have an undue adverse effect on historic sites.

The applicant failed to provide the required traffic analysis. Mr. Manahan stated that Diane Morabito of the Maine Traffic Resources noted that, although State Road currently has a Level of Service A, the Eliot Subdivision Ordinance, Section 41-221(a)(3) requires that the proposed subdivision will not reduce an off-site street intersection's level of service to C or below. He stated that, as noted by MTR, the applicant did not supply peak hour turning movement counts needed to calculate Level of Service. He stated that the applicant did supply some traffic information, but did not supply the information to calculate Level of Service. He stated that that was based on testimony submitted to the PB by Diane Morabito, an expert on traffic analysis. Mr. Manahan stated that the applicant did not meet the requirement for the Level of Service C or better, and that the PB was in error in granting the permit nevertheless.

The Planning Board should not have granted a waiver from the maximum floor area requirement. Mr. Manahan stated that Section 41-310(d), Construction Requirements, requires that "elderly housing dwelling units shall have a maximum gross floor area of 1,200 square feet." He stated that the PB decided to waive that requirement because the applicant had asked for up to 1,500 square feet. He stated that in waiving the requirement, the PB apparently applied Section 41-67, Waivers, which provides that where the planning board finds special documented circumstances, the PB may waive certain required improvements. Mr. Manahan stated that the maximum floor area requirement is not a "required improvement," but that it is a dimensional criterion that applies to elderly housing in Eliot. He stated Section 41-67 should not have been applied by the PB.

Mr. Manahan stated that, assuming that the PB did have the authority to grant a variance or waiver, they should have applied the variance provision, Section 41-66, which states that where the PB finds that the subdivider has documented that extraordinary and unnecessary hardship may result from compliance with the ordinance, a variance can be applied. He stated that the applicant did not even try to prove that there were extraordinary and unnecessary hardships because the PB never asked, since they were not applying that provision. He added that, if the PB had applied the provision, it is clear that there are no extraordinary or unnecessary hardships that may result.

Mr. Manahan stated that Section 45-49(b) under the Zoning Ordinance provides that it is the BOA that has to grant variances from dimensional requirements, including dimensional requirements that are in the Subdivision Ordinance. He stated that to say that the BOA can only grant variances within the Zoning Ordinance would circumvent state law because state law requires that the BOA has to be the board to grant variances under the state's variance criteria of undue hardship. Mr. Manahan stated that towns cannot avoid that by putting dimensional standards in other ordinances. He used the example of a town putting the front set-back into the Subdivision Ordinance in order to allow the PB to waive the requirement, avoiding the need to go to the BOA for a variance. He stated that that would be subverting state law. He added that the issue is what was happening in this case, and that the BOA has to be the board to grant a variance to dimensional requirements, including seeking the ability to exceed 1,200 square feet of maximum floor area.

The plan did not identify the security system. Mr. Manahan stated that Section 41-310(e), Construction Requirements, states, "Security system identified on site plan." He stated that the site plan did not identify a security system, and he thought that that was a fundamental error. He stated that elderly people need to have a security system in place because they may be frail or slow and may not have access to 911, and that they, therefore, need a security system in place. He noted that Ms. Pelletier had replied in her response to the appeal that a security system was not identified because it was not

proposed, nor is it required. He stated that that statement ignores the requirement in Section 41-310, which says it is required.

The Planning Board should not have granted a waiver from the public sewer requirement. Mr. Manahan stated that elderly housing must be provided public water and sewer under Section 41-310(f). He stated that there are many reasons for this, but the main reason is that, according to Woodard & Curran, the elderly have a greater use of pharmaceuticals and personal care products (PPPC). He stated that there is a need to protect the elderly and the ground water by connecting to public sewer. He stated that the PB decided to waive the requirement, again applying Section 41-67, but that they did not explain why they waived it. He stated that it was the position of the appellants that the written Notice of Decision adopted by the PB is deficient, and that it is basically a check-list of requirements with no explanation as to why they did what they did. He stated that under Maine law for Planning Boards, any decision maker is required to set forth Findings of Fact which include explanations. Mr. Manahan stated that there is no written explanation as to why the PB decided to grant the waiver. He stated that it was the appellant's position that the PB should not have granted the waiver because the waiver is not in the interest of public health, safety and general welfare.

Mr. Manahan stated that the Woodard & Curran report makes it clear that, for elderly housing of this type, it is important to connect to public sewer. He stated that the report discussed the Maine Subsurface Waste Water Disposal rules for non-engineered systems of less than 2,000 gallons per day, where the applicant is required to provide a mounding analysis to document whether the leach fields will function as designed, given their proximity to each other and to wetlands. He stated that the proposed development is on a very wet site, and that a subsurface disposal system needs to be designed to address the high water table.

Mr. Manahan stated that Woodard & Curran noted that the greater use of PPPCs in the elderly would result in greater concentration in the waste water, causing a significant threat to the ecosystem and health, particularly in a wetland area such as the current one.

Mr. Manahan stated that the applicant did not provide documentation to demonstrate that the effluent discharge from the system will not contain PPPCs or how they would design a system to address that issue.

Mr. Manahan stated that there were two provisions for waivers in Section 41-67, the first being that the required improvement is not requisite in the interest of public health, safety or general welfare, and the second being that the required improvement is inappropriate because of inadequacy or lack of connecting facilities adjacent in proximity to the proposed subdivision. He stated that he interpreted Ms. Pelletier's position as being that the PB could waive the requirement because of the lack of connecting facility due to the fact that there is no public sewer adjacent to property. He

added that the provision in Section 41-67 cannot be used to ignore the need to connect to public sewer for elderly housing. He stated that the provision is used for such things as sidewalks. He stated that, if there is no sidewalk nearby, the PB might waive the requirement that a subdivision have sidewalks because there is nothing for the sidewalk to connect to. He stated that, in terms of the public sewer, the elderly housing is supposed to connect to the public sewer if it exists, and that they should not be located away from the public sewer. He stated that to waive the requirement would totally defeat the purpose of the ordinance because anytime an applicant could state that since he was not near public sewer, he did not need to connect to it. He stated that the waiver undermines the requirements in Section 41-67 that the PB must consider public health, safety and general welfare.

The development does not meet the minimum lot size requirement. Mr. Manahan stated that Section 45-405(g) states that the minimum acreage for elderly housing in all districts shall be one acre for the first dwelling unit and ¼ acre for each additional unit. He stated that the applicant has taken advantage of that by having two lots, comprised of about 10 acres each. He stated that the problem is that the development does not meet the definition of elderly housing. He stated that it is a slightly different problem than that previously discussed under the Growth Management Ordinance regarding elderly dwelling units because elderly housing is defined differently than elderly dwelling units.

Mr. Manahan stated that elderly housing means units constructed or operated as part of a life care facility, which this development is not, or housing units constructed, operated or financed wholly or partially with state or federal funds. He stated that it is important that the applicant never showed any demonstration that he was going to receive state or federal funds. In fact, he stated, all of the financial information presented by the applicant, as noted in Exhibit D, stated that the development is going to be funded from sources to which the applicant has access himself.

Mr. Manahan stated that in the Preliminary Plan Application, the requirement for adequate financing was described as, "Mr. Falzone is a recognized successful developer with considerable experience in residential projects. Mr. Falzone has successfully developed projects throughout the Seacoast and New England. Additional financial information is attached to the application." Mr. Manahan stated that all of the attached information is about Mr. Falzone's own finances, not about obtaining state or federal funding. He stated that the applicant did not provide evidence that he meets the requirement for elderly housing, so he, therefore, does not meet the requirement for the exemption for elderly housing lot sizes. He added that that means that the Suburban District lot size requirements apply to the development, so that for the nine dwelling units on the first lot, the minimum lot size would be 11 acres and on the second lot, with 12 dwelling units, the minimum lot size would be 14 acres. He stated that both of those amounts are larger than the 10 acres on the two lots that are being proposed.

The development does not meet the requirements to allow multiple structures on one lot. Mr. Manahan stated that Section 45-405(h), Dimensional Requirements, provides that in the Suburban and Village districts, "more than one principal structure may be located on a single lot, provided each such structure is located in such a fashion that it could be separately conveyed on a separate lot in compliance with all dimensional requirements of the district." He stated that the proposed dwelling units could not be conveyed in compliance with the district if they were conveyed as separate lots because they are too close together. He stated that free-standing dwelling units are principal structures and need to be separated from the side lot line by at least 20 feet, which would mean that if a line was drawn between structures so that they could be conveyed separately, they would need to be separated by 40 feet. He added that it is clear from the site plans that the separation between all of the structures is less than 40 feet and is closer to 25 feet on average. Mr. Manahan stated that the PB ignored the requirement, and that there would be no way to convey the proposed dwelling unit lots separately.

The development does not meet the requirement that sewage disposal systems must be located in areas of suitable soil of at least 1,000 square feet. Mr. Manahan stated that Section 45-416, sanitary standards for sewage, requires that all subsurface disposal systems shall be located in areas of suitable soil of at least 1,000 square feet in size. He stated that that is important to protect wetlands and areas around it. He stated that the developer has proposed multiple disposal systems. He stated that the Town's own peer review consultant, Michael Cuomo, in a letter dated December 8, 2015, states that the plan does not designate a 1,000-square-foot suitable soil area around each wastewater disposal area. Mr. Manahan stated that, therefore, the development does not meet the requirement. He stated that the PB ignored the letter from its own consultant and nonetheless approved the plan.

Mr. Manahan stated that he had presented the 12 arguments of the appellants. He stated that the Maine State Subdivision Law provides that whenever a PB issues a subdivision approval, the burden of proof is on the person proposing the subdivision. He stated that the PB essentially ignored that provision because they chose not to entertain the 12 arguments and approved the subdivision anyway. He stated that the appellants believe quite strongly that the PB decision was clearly contrary to provisions of the ordinance and, therefore, they ask that the BOA reverse the PB decision.

QUESTIONS FOR APPELLANT FROM THE BOARD

Mr. Billipp stated that he had been provided with more recent letters from Mr. Noel and Mr. Cuomo. He stated that Ms. Pelletier had copied the BOA members and had included further documentation. He asked Mr. Manahan if he was aware of those letters. Mr. Manahan stated that he did not believe that the letters answered the questions. He stated that the appellants had requested an additional public hearing because there had been a lot of information submitted after the October 20, 2015 public hearing. He

stated that that was the point in time when the PB presented information and entertained arguments from the public. He stated that the PB then received additional information, including the letters from Mr. Noel and Mr. Cuomo, which the appellants did not see prior to the time that the PB made the decision of final approval on December 15, 2015. He stated that the appellants had asked for an additional public hearing in order to respond to those types of things. He stated that the PB rejected that request and did not entertain the idea of having another public hearing. Mr. Manahan stated that he did not believe that the BOA should consider those letters as ameliorating the PB's failure to listen to what Mr. Cuomo said in his letter of December 8, 2015 because the PB did not allow the appellants to respond to the later letter.

Mr. Manahan stated that he did not think that Mr. Cuomo had noted that 1,000 feet of suitable soil is provided for each of the septic areas. Mr. Billipp stated that he thought that he did indicate that there was. Mr. Manahan stated that he didn't see Mr. Cuomo actually say anything contrary to what he had previously stated, which was that he concluded that the plan does not designate a 1,000-square-foot, suitable soil area around each wastewater disposal area as required by the ordinance.

Mr. Cieleszko asked for clarification as to what letters were being referenced. Mr. Billipp stated that that afternoon, as he was conducting his review of the case, he listened to the two recordings of the PB meetings, which Ms. Pelletier had sent to the BOA members. He stated that the letters were mentioned in the recordings of the PB meetings, and that he asked Ms. Pelletier for copies of the letters, which she then forwarded to the BOA members. Mr. Cieleszko stated that the only information he had was that which was in his BOA file folder.

Mr. Cieleszko asked if there had been any waivers granted by the PB in regard to street requirements, which Mr. Manahan had pointed out as being not to code. Mr. Manahan stated that the PB did not issue a waiver, but that they ignored the 1,000-foot requirement.

Mr. Cieleszko asked when Mr. Manahan wrote his letter, which was accepted by the PB. Mr. Manahan stated that it was dated December 14, 2015. Mr. Cieleszko clarified that the PB made their final decision on December 15, 2015. Mr. Cieleszko noted that Mr. Manahan had inundated the PB with information the day before the final approval. Mr. Manahan stated that that was the reason for the request that the PB have another public hearing. Mr. Manahan stated that the appellants are abutters and, therefore, are entitled to submit information after the hearing. He added that the PB accepted a great deal of information after the hearing from the applicant. He stated that the applicant inundated the PB with a bunch of new information after the October 20, 2015, hearing. Mr. Manahan stated that the appellants had to respond to the new information.

Mr. Cieleszko asked if Mr. Manahan had attended the PB meeting of December 15, 2015. Mr. Manahan replied in the negative, but that his understanding was that the PB Chairman basically dismissed the additional filing as not being important.

Mr. Rankie asked if the subdivision was approved with the condition of receiving approval from the Maine Department of Environmental Protection. Mr. Manahan stated that the site plan approval was conditioned on receiving any permits that were required. He stated that there are two problems with that, the first being that the condition basically delegates the PB's obligation to decide whether a permit is required by telling the applicant to give whatever permits are required to the CEO. He stated that that is an abdication of the PB's responsibility under the ordinance, which states that the subdivider shall provide, in writing, any approvals prior to submitting the final plan. He stated that the PB cannot just decide that, if there are any permits required, the applicant should pass them off to the CEO. Mr. Manahan stated that the second problem is that the ordinance section clearly requires the subdivider to secure, in writing, state or federal approvals before submitting the final plan, not after submitting the final plan and not after final approval. He stated that the PB cannot attach a condition to the final approval that the applicant can submit the permits at a later date.

Mr. Cieleszko asked if the conclusions that the PB made in granting the final approval included a condition to get a statement from HUD indicating financial backing. Mr. Manahan stated that he was not sure, but that even if it was included, it would not matter. Mr. Hamilton stated that the condition was not part of the PB's conclusions.

Chairman Hamilton stated that, according to the Board of Appeals by-laws, for administrative appeals, the CEO is given the opportunity to present the position of the CEO or the PB, as applicable. He stated that it was his understanding that it was the Assistant Planner who had been responding for the PB. He stated that, even though it is not specified in the by-laws, he would like consensus from the BOA as to whether they should ask the CEO or the Assistant Planner to testify. Mr. Cieleszko stated that he thought that the CEO should allow the Planning Assistant to speak for the PB. Chairman Hamilton stated that there is no indication in the by-laws that the PB has the ability to respond.

Phil Saucier, the Town attorney, stated that the PB actually is a statutory party to the appeal under state law. He added that the ordinance gives any board the same right as any taxpayers, so that the PB and the Board of Selectmen are actually automatic parties to the appeal. He stated that the PB can testify because they are a party to the action.

Chairman Hamilton stated that the BOA also has the ability, under the by-laws, to waive any rules under cause shown. He asked if it was the consensus of the BOA that the Assistant Planner give testimony for the PB. Mr. Rankie asked if the BOA could determine what the Town representatives wanted. Chairman Hamilton stated that the procedure is fairly rigid and that the appellant's testimony is followed by testimony from

the parties to the action. Mr. Rankie asked if it would be proper to have the Town attorney make the presentation. Mr. Saucier clarified that he was present on behalf of the BOA and was not representing the PB, and that his role was to help the BOA with any legal issues. Chairman Hamilton asked if there was consensus among the BOA members that the Assistant Planner give testimony for the PB. There was consensus.

TESTIMONY FROM ASSISTANT PLANNER

Ms. Pelletier stated that she would respond to the concerns of Mr. Manahan, as outlined in her letter to the BOA dated January 15, 2016.

The development is not elderly housing dwelling units and is subject to the growth management ordinance. Ms. Pelletier stated that the PB has no authority to determine whether the development is subject to the growth ordinance. She stated the responsibility of interpreting its terms or enforcing its provisions fall entirely on the CEO. She stated that the applicability of the ordinance to this development was not discussed by the PB at all during their deliberations. She stated that she did not think it would be appropriate for the BOA to consider the issue because of that fact.

Street entrances are too close together. Ms. Pelletier stated that any appeals under Chapter 37 are to be taken directly to the District Court, and the BOA does not have the authority to hear appeals on any issue regarding Chapter 37. She asked that the BOA not discuss that claim, which the appellants may appeal at Superior Court.

Maine Site Law approval is needed. Ms. Pelletier stated that all were in agreement that Maine Stormwater Law approval is needed. She stated that the guidance from the MMA states that Planning Boards have the inherent right to attach conditions of approval to applications if the applicable requirement could be met. The PB is under a time limit established by the ordinance between the time of the public hearing until they make a final decision, and that they cannot just sit there, if all of the requirements have been met, waiting for state approval to come. She stated that Ms. Ross is an experienced CEO and that she would never permit anything without the required documents in her hand. She added that there is a well-oiled machine in place to ensure that things do not fall through the cracks. She stated that the developers understand that they can take no action until the approvals are submitted.

The stormwater requirements were not met. Ms. Pelletier stated that the level of detail under discussion is not anything that the PB is qualified to, or expected to, make any determination on. She stated that the PB is only required to be shown reasonable evidence that the development complies with the standard. She stated that the stormwater plans are all reviewed by the State of Maine through the Best Management Practices. She stated that professionals who are qualified to evaluate the applications make the determination, and that it is not the responsibility of the PB. She added that

the PB was shown reasonable evidence, in statements from an engineer, stating that there would be no increase to the abutting properties of stormwater flow. She stated that that is the only requirement that the applicant needs to ensure.

The development will have an undue effect on historic sites. Ms. Pelletier stated that the PB certainly appreciates the work that the Historical Society does and the work that Roseanne Adams put into her report, but that it went above and beyond the requirements of the ordinance. She stated that calling a road a historic feature is a stretch. She asked if Route 236 could be considered a historic feature. She stated that, while the report may have been blessed after the fact by the board of the Historical Society, she did not believe that it was discussed at a Historical Society meeting prior to its submittal to the PB. She stated that the report was submitted by one member and that the PB did not accept the report. She stated that in an appellate style of review, the BOA should not accept the report in their deliberations either.

The applicant failed to provide the required traffic analysis. Mr. Pelletier stated that Mr. Manahan had stated that the applicant needed to show peak traffic flows. She stated that that is not a requirement of the ordinance, and that the applicant did supply, as required, existing traffic flows of average annual daily traffic counts which were supplied by DOT, which performs traffic counts at various points along all State roads in Town every single year. She stated that State Road has a Level of Service A, which is the highest grade possible. She added that the addition of 78 trips per day would not decrease the level of service of State Road. She stated that she did not think that there was any confusion on that issue. She stated that the applicant submitted everything required under the ordinance. She stated that 3.71 trips per day per unit for 21 units is not a big increase in traffic.

The Planning Board should not have granted the waiver from the maximum gross floor area requirement. Ms. Pelletier stated that in granting a waiver, the PB has to determine that the requirement itself is not in the requisite interest of the public health and safety. She stated that her advice to the PB at the time was to determine if the maximum of 1,200 square feet per unit was a requirement to ensure public health and safety, such as the requirements for water or sewer connection. She stated that the PB determined that the floor area requirement was not requisite in the interest of public health and safety, so they waived the requirement, which they are allowed to do by ordinance.

The plan did not identify the security system. Ms. Pelletier stated that the ordinance does not require a security system, but does require that the security system be identified on the site plan. She stated that the ordinance does not specify that the development has to have a security system. She stated that there was no security system proposed, so there was no security system shown in the plan.

The Planning Board should not have granted a waiver from the public sewer requirement. Ms. Pelletier stated that, as attorney Manahan had noted, one of the reasons that the PB can grant a waiver is because of inadequacy or lack of connecting facilities. She stated that, while Mr. Manahan used the example of the lack of a sidewalk to connect to, she would think that the lack of a sewer line to connect to would meet the requirement even more. She stated that she was not sure what else they would be talking about with that language if not something like a public sewer line. She stated that the PB is allowed, by ordinance, to grant waivers. She stated that if the Town no longer wants to give them that ability, then they need to change the ordinances to limit the ability, but that, at the moment, the PB does have that ability.

The development does not meet the minimum lot size requirement or the requirement to allow multiple structures on one lot. Ms. Pelletier stated that applying Mr. Manahan's statements to the ordinance would make it impossible to comply with the greatly reduced lot sizes allowed with elderly housing if a developer also had to comply with the other standards. She stated that the developer would need to develop individual lots along the road, and that it would not work because each lot would need 150 feet of frontage on a road that is 1,000 feet long, not allowing for that many dwelling units. She stated that it would not make any sense to require that the ordinance about multiple structures needing to be divided separately would apply to the elderly housing units because they would never be able to meet those requirements.

The development does not meet the requirement that sewage disposal systems must be located in areas of suitable soil of at least 1,000 square feet. Ms. Pelletier stated that this requirement is found in Section 45-416 of the Zoning Chapter. She stated that it is not something that the PB is expected to apply to this situation because it is not in the Subdivision Chapter. She stated that the requirement is to be interpreted and enforced by Heather Ross, the CEO.

Ms. Ross stated that the Subsurface Wastewater Disposal Rules are a separate set of rules that are set up by the State in determining what soils are suitable for installing septic systems, what types of systems can be installed, and the sizing of the systems. She stated that the work of taking the information and putting it into a design is done by a soil scientist. She stated that there were several reports on this project, including those of Mr. Cuomo and Mr. Noel, who put together a designer plan that is in compliance with the Town rules. She added that when the applications come through her office, Ms. Ross will review them to make sure that a licensed soil scientist has designed the septic systems to be in compliance with the State and Town rules.

Ms. Ross stated that the Eliot Code rules in effect for sanitary standards for sewage under 45-416 state that, "All subsurface disposal facilities shall be installed in conformance with the state plumbing code and the following: (1) All subsurface sewage disposal systems shall be located in areas of suitable soil of at least 1,000 square feet in

size." She stated that the ordinance does not specify that each septic system or subsurface wastewater disposal system has to have its own 1,000 feet, nor does it specify that there must be a septic or wastewater disposal system for just one unit within that 1,000 square-foot area. She stated that often, when there is a multi-unit project, there are several homes with a septic system designed to handle multiple homes.

Ms. Pelletier stated that, regarding the need for elderly housing to be partially constructed with federal funds, Mr. Falzone's engineer presented to the PB that there would be a portion of the project constructed with state or federal funds. She stated that it was a statement made in the record, and that the PB attached the condition of approval which states, "The property may developed and used only in accordance with the plans, documents, materials submitted, and representations the applicant made to the Planning Board. All elements and features of the use as presented to the Planning Board are conditions of approval and no changes in any of those elements or features are permitted unless such changes are first submitted to and approved by the Eliot Planning Board." Ms. Pelletier added that the statement in the record commits the developer to the requirement. She stated that, in the Planning Board's eyes, the developer had met the requirement by demonstrating that the project was indeed elderly housing.

QUESTIONS FOR PLANNING ASSISTANT FROM THE BOARD

Mr. Marshall stated that the issue boiled down to the fact, based on elderly housing, that the lot size is limited or reduced. He asked how to determine that the subdivision is elderly housing. Ms. Pelletier stated that there had been condominium declarations and by-laws submitted that restrict an elderly residence to at least one person who is 55 or older. She stated that the subdivider had stated, during a meeting with the PB, that the lots would be deed-restricted. Mr. Marshall asked for the definition of the deed restriction. Ms. Pelletier stated that two of the residents have to be at least 55 years old. She added that the units have first-floor master bedrooms and are limited to two bedrooms maximum in a maximum floor area of 1,500 square feet.

Ms. Pelletier stated that while door levers and wheel chair entrances may be Mr. Manahan's vision of what elderly housing means, it is not stated anywhere in the ordinances that those features are necessarily what make up elderly housing. She stated that the developer presented enough evidence to the PB to demonstrate that the units were designed for elderly. She stated that the residents would be 55 and older and are not all in wheel chairs. She added that the residents may not want the additional features, and that the subdivision is not an assisted living facility. She stated that the PB determined that the requirements had been met.

Mr. Marshall asked if the same argument made in the decision to increase the amount of floor area from 1,200 to 1,500 square feet could be used to increase the size of an accessory dwelling unit. Ms. Pelletier stated that one of the waiver criteria is the determination as to whether the ordinance requirement is in the requisite interest of public health and safety. She stated that if the ordinance is not, then it can be waived. Mr. Marshall stated that if he wanted to increase the area in an accessory dwelling to 1,000 square feet, that increase would not affect public health and safety. Ms. Pelletier stated that she was in agreement, provided that the PB was allowed to waive those dimensions. She stated that it is not the same type of standard as the requirement to connect to a water supply because that requirement would definitely be in the interest of public health and safety.

Mr. Cutting stated that it was his understanding that the community would be a 55+ community, not an elderly community. Ms. Pelletier stated that, by ordinance, elderly housing has to be partially constructed with state or federal funds, or HUD funds. Mr. Cutting asked how to secure HUD funds for a 55-and-older community. Ms. Pelletier stated that that was a problem for the developer, not for the PB. She stated that the developer has to demonstrate the funding and that the project would not more forward without that demonstration.

Ms. Lemire clarified that the subdivider actually has to have proof of funding before going for the building permit. Ms. Ross stated that developer would need to supply the information to the Town so that it could be attached to the PB approval.

Ms. Lemire stated that she had done some research on the Eljen in-drain septic system. She stated that the system is bio-filtering, that there are two of them, and that the system is environmentally friendly, smaller and easier to install. She stated that one of the questions she wanted answered was whether the system actually addressed the PPPC filtering. Ms. Ross stated that typically, a septic system is designed according to the number of bedrooms in each unit, and that there might be other issues that come into play, such as the presence of prescription drugs, which would be included by the soil scientist who designs the system. Ms. Ross stated that the Eljen systems are significantly smaller than other systems.

Mr. Cieleszko clarified that Ms. Pelletier had stated that the PB did not read the report from the Eliot Historical Society. Ms. Pelletier stated that she did not know that they did not read it, but that they did not accept it into the record because it was not appropriate. Mr. Cieleszko asked if the decision to reject the report was made through a motion. She replied in the affirmative. Mr. Cieleszko asked who had decided not to accept the report. Ms. Pelletier stated that the report was being represented as being prepared by the Historical Society, not by one member who did all of the research and wrote the report without any knowledge of or approval by the rest of the committee. She stated that she did not know if it was an ordinance for boards and committees to prevent one member from representing the group.

Mr. Cieleszko asked if there was any information from other members of the Historical Society that the report was prepared by a lone wolf. Ms. Pelletier replied in the negative. Mr. Cieleszko asked how the PB arrived at the decision that the report only represented one member. Ms. Pelletier stated that it was decided that the report was authorized by one member of the Historical Society.

Mr. Cieleszko addressed the issue of the deeding of a unit from one person to another. He asked what would happen to the property if two 56-year-old owners of a unit died. Ms. Pelletier stated that the PB did not discuss that issue. Mr. Cieleszko stated that his vision was that 20 years down the road, there might not be any residents in the subdivision who were over 55. Ms. Pelletier stated that it would then be an immediate violation of the ordinance if there were not two people older than 55 living in a unit. She added that the requirement stays in place forever.

Mr. Cieleszko stated that he was still confused about the waiver for the requirement improvements. He asked why the PB decided to waive an ordinance on the basis that the issue was not a life-saving issue. Ms. Pelletier stated that she did not think the PB could be faulted for waiving an ordinance that allows them to waive it. She stated that if the ordinance is not liked, then it could be changed to limit the waiver ability or broaden its criteria. Mr. Cieleszko questioned whether the PB had the right to waive because he did not see the floor area as a required improvement. He asked how the PB decided that increasing the maximum floor area from 1,200 to 1,500 square feet would be a required improvement. Ms. Pelletier stated that that Chapter of the ordinance does not break out required improvements or design standards.

Ms. Pelletier stated that there is a definition of what a required improvement is. Mr. Cieleszko asked for the definition. Ms. Pelletier stated that she did not have her ordinance book in front of her. Ms. Ross cited the definition as, "Required improvements, as used in chapter 33, article III (Site Review) and in chapter 41 (Subdivisions), means the infrastructure improvements necessary for the construction of a development, including street grading, street surfacing, storm drainage, utilities (including conduits for cable where electric and telephone utilities are to be located underground), landscaping and any other site improvements required by the planning board in approving a site plan or subdivision plan." Mr. Cieleszko asked if the PB was including the floor area as fitting that definition. She stated that a required improvement would be the fact that the housing is elderly housing dwelling units, and that she thought it could be squeezed into the definition.

Mr. Cieleszko asked if the project met the requirements of Sections 37-69 and 37-70 (street layout requirements and street design standards). Ms. Pelletier stated that she believed it would, and that how the ordinance is interpreted is that entrances to the subdivision, if there are more than one, need to be separated by 1,000 feet. She stated that the ordinance is not referring to the frequency of entrances to driveways because

the ordinance states that entrances onto arterial streets shall not exceed a frequency of one per 1,000 feet of street frontage. She stated that she had always interpreted that ordinance to refer to entrances to the subdivision, not to proximity to another street.

Mr. Cieleszko stated that the PB had a different interpretation in regard to the Brooks project, where the project was denied because of streets being too close together between Leach Road and Bolt Hill. He stated that the issue had been street access, and that the PB had come to the conclusion to stop the project because the access to the project could not fit the 1,000 limit. Ms. Pelletier asked if the entrance was onto an arterial street. Mr. Cieleszko stated that the street was onto a collector street. Ms. Pelletier stated that the ordinance would not have applied because the ordinance is for arterial streets. She stated that she was not familiar with the project and was not present when it came up.

Mr. Rankie stated that he thought he heard Ms. Pelletier say that the PB is not responsible for the definition of elderly housing, not responsible for all permits to be secured, not responsible for stormwater review, and not responsible to follow state laws or the direction of the Historical Society. He stated that dimensional standards were compromised because the project could not meet the standards in place. Ms. Pelletier stated that she did not say those things. She asked Mr. Rankie to repeat the issues one at a time.

Mr. Rankie stated that he had heard Ms. Pelletier say that the PB did not feel responsible to check the dimensions for elderly housing. She stated that she did not say that the PB was not responsible for applying the definition to the proposed project, but that they are not responsible for applying the definition to the Growth Management permitting requirements, which is entirely the job of the CEO. She stated that the PB is not responsible for deciding who or what is exempt or what is applicable to growth permits. Mr. Rankie clarified that the PB did not feel responsible to check the definition to see if the project was, in fact, elderly housing.

Mr. Rankie stated that he had heard Ms. Pelletier say that the PB was not responsible to make sure permits were secured. She stated that she did not say that. She stated that the PB is responsible in applying the conditions of approval, which do not allow the project to go forward until those permits are produced. Mr. Rankie stated that he thought he had heard the attorney state that the permits had to be secured prior to approval.

Mr. Manahan stated that the ordinance states that permits must be obtained prior to submission of the final plan to the PB. Ms. Pelletier stated that the reason why conditions of approval exist is that, once all of the requirements have been met, the applicant is only waiting for a permit. She added that the PB is under its own time limits, under ordinance, that cannot be exceeded. Mr. Rankie noted that Ms. Pelletier had said that the rules have to be followed. She replied that the rule was being followed because

the conditions of approval ensure that the rules will be followed. She asked why the PB should hold up the applicant if there was nothing left for the PB to review. She stated that every planning board she was familiar with does the process in the same way. Mr. Rankie stated that that is not in accordance with the ordinance.

Mr. Rankie stated that he thought he had heard Ms. Pelletier state that the PB is not responsible for stormwater design. Ms. Pelletier stated that she did not say that, and that she had stated that the PB is responsible for one requirement, which is that post-development flow to adjacent properties is not increased. She stated that the applicant had submitted more than enough information to demonstrate that it would not increase. Ms. Pelletier stated that the PB board is not responsible for seeing that the applicant applies best management practices because those issues are determined at the state level for the state permit.

Mr. Rankie asked if Ms. Pelletier had stated that the reason for the waiver of the dimensional standards was that the applicant would not have met the requirements. Ms. Pelletier stated that she did not say that.

Mr. Rankie asked if there was not a reason for the requirement that elderly housing be connected to Town sewer, such as locating elderly housing in a specific place. Ms. Pelletier stated that the Zoning Ordinance controls where elderly housing is located, and that the Comprehensive Plan has noted places where it would like to see elderly housing in the future. She added that the area of the proposed subdivision is certainly one of those areas. Mr. Rankie asked if Ms. Pelletier saw that the requirement to connect to sewer was an attempt by the Town to drive elderly housing to an area where there is a connecting sewer. She stated that if that was the case, it would drive elderly housing into South Eliot where there are 600 existing sewer users. Mr. Rankie noted that there is sewer on Route 236. Ms. Pelletier stated that that was correct, but that housing is not allowed in that location.

Mr. Cieleszko clarified that the requirements for access onto arterial streets are more stringent than those onto connector streets. He asked if there was any access within 1,000 feet of the proposed subdivision. Ms. Pelletier stated that she did not believe that that was how the ordinance was interpreted. She added that she did not think the development would meet the requirement if it was applied that way. He asked if there was another street within 1,000 feet of the proposed entrance to the subdivision. Ms. Pelletier replied that there probably is.

Mr. Cieleszko noted that Ms. Pelletier had stated that the BOA should not be looking at entrance requirements. He stated that Section 41-221(a)(6) states that ,"The subdivider shall assure safe access from existing streets by providing an adequate number and location of access points, with respect to sign-distances, intersections, school, and other traffic generators, pursuant to sections 37-69, 37-70 and 45-406 of this Code." He stated that within those sections there is the 1,000-foot rule. Mr. Cieleszko stated that if the PB

did not waive that requirement and forgot that there would be another road within 1,000 feet of the subdivision, it appeared that the BOA had the right to hear the appeal based on Section 41-221. Ms. Pelletier replied that it absolutely did not have the authority and that the PB did not read the ordinance in the same way that Mr. Cieleszko was reading it.

Mr. Cieleszko asked for verification that the peer consultant who did the analysis on the soil work had determined that the septic system is adequate. Ms. Pelletier stated that what the PB had asked for was for somebody to look at the soils and determine whether they could accommodate the septic systems. She stated that whether the subsurface wastewater disposal system complies with every single state plumbing code was not something that is appropriate for the PB to address. She stated that the input provided reasonably demonstrated that the soils could support on-site subsurface systems. Mr. Cieleszko noted that the peer consultant, Mike Cuomo, had stated that, with reservations, the system should work. Ms. Pelletier stated that she did not think that Mr. Cieleszko had received the later letters, which resulted in the PB's decision that the applicant had provided reasonable evidence to show that the soils could support the systems. He asked if there had been new evidence provided. Ms. Pelletier stated that she did not think that Mr. Cieleszko had the complete picture and recommended that he read the later letter. He asked if they had been supplied to the BOA in the packet. She stated that she could supply the letters, but that they had not been requested.

Mr. Rankie asked whether the peer review had analyzed data provided by another engineer or had produced new data. Ms. Pelletier stated that the peer review analyzed data from another soil scientist.

Mr. Billipp stated that Mike Cuomo's letter of December 8, 2015, was followed by other letters, more reviews and more site visits, which provided additional information to the PB. He stated that those later letters were sent to the BOA members that afternoon. Chairman Hamilton noted that the new information was given to the PB after the last public hearing. Mr. Billipp concurred, but stated that the information was provided before the December 15, 2015, site plan approval.

Chairman Hamilton stated that he realized how complicated the process had been and that he wanted to back up somewhat and discuss the basics of the subdivision. He asked for the minimum lot size in the Suburban Zone. Ms. Pelletier stated that it was two acres. Chairman Hamilton asked for the number of lots allowed if the proposal was for a conventional subdivision and not elderly housing, on the lot of 21 acres in size, of which 6.4 acres is considered wetlands by the subdivider. Ms. Pelletier stated that she did not have that information. Chairman asked for the number of building permits available for the current year for a conventional subdivision rather than elderly housing. Ms. Pelletier replied that were none. Chairman Hamilton asked for the number of building permits that would be allowed the following year. Ms. Pelletier replied that there currently is a waiting list of 36 for a potential of 18 permits that would be available.

Chairman Hamilton asked what criteria were used by the PB to determine that the subdivision was an elderly housing subdivision under Section 29-3(d) and the definition Section 1-2, which very clearly spell out what elderly housing means. Ms. Pelletier stated that the PB did not review Section 29-3(d) because they have no authority in that area. Chairman Hamilton asked what the PB had used to determine that the subdivision was indeed elderly housing units. Ms. Pelletier stated that the applicant had stated that it was elderly housing and supplied floor plans with the master bedrooms on the first floor.

Chairman Hamilton noted that in Section 1-2, an elderly dwelling unit is defined as, "a dwelling unit specifically designed for elderly persons." He asked for the criteria that the PB used to determine that the units were specifically designed for elderly. Ms. Pelletier stated that there were no criteria to apply. Chairman Hamilton stated that all he was asking for was the rationale behind the PB decision. Ms. Pelletier stated that the subdivider had supplied floor plans. Chairman Hamilton asked if the floor plans were specifically designed for elderly. Ms. Pelletier asked for the definition of the term "specifically designed for elderly housing." Chairman Hamilton stated that the standards applied to determine whether the subdivision meet the requirements for elderly housing are important because there are no building permits for this year or next year for a conventional subdivision. He stated that having the elderly housing designation is incredibly important to the application.

Chairman Hamilton stated that the density requirement is also different for elderly housing. He added that if the subdivision qualifies as elderly housing, that needs to be demonstrated and confirmed somehow. Ms. Pelletier stated the age requirement is in the deeds, and that it is not possible to get more formal than that. She stated that the PB had verbal representations, actual covenants and actual declarations.

Chairman Hamilton asked how the PB determined that the subdivision did not have more than three acres of impervious surface, necessitating a Site Law Review. Ms. Pelletier stated that the PB does not make that determination. She stated that it is a state law and not the responsibility of the PB. Chairman Hamilton asked if there was anything required in writing to determine whether or not a State Site Law review was needed. Chairman Hamilton stated that, in looking at a subdivision, the impermeable surfaces are driveways, roadways and other aspects. He asked Ms. Pelletier to describe what the impermeable surfaces are. Ms. Pelletier stated that there is nothing in the Zoning Ordinance requiring that those areas be delineated or subtracted from any total because they are not regulated shore lands. Chairman Hamilton stated that there were still 6.4 acres of wetlands. Ms. Pelletier stated that they are not recognized by ordinance as being different.

Chairman Hamilton asked how the PB had determined that the subdivision would not have an adverse effect on a historic site. Ms. Pelletier stated that it was because there

are no historic sites on the property. Chairman Hamilton asked if that determination was made in spite of the 24-page report prepared by the Historical Society. Ms. Pelletier stated that there were no historic sites by definition because a road is not a historic site.

Chairman Hamilton stated that the elderly housing provision, Section 41-310(e), does specify that a security system be identified. He asked how the PB did not require a security system. Ms. Pelletier stated that the ordinance states that, "A security system shall be identified on the site plan." She states that it does not say that a security system is required. Chairman Hamilton asked if there were other things that were not required but that needed to be identified on the plan.

Chairman Hamilton asked for the rationale for the PB waiving the requirement of 41-310(b) for covered sidewalks. Ms. Pelletier stated that the PB felt that the project was not a residential care facility and that the units were individual, detached homes, which are purchased and not rented, and that there is no assisted living component, no centralized dining and no community center, so that the development is not the kind of development where covered sidewalks are required.

Chairman Hamilton asked where the ordinance notes that the PB is allowed to grant variances on dimensional standards, an authority only granted to the BOA. Ms. Pelletier stated that the court of law has affirmed the ability of the PB to grant variances in non-zoning situations, which include dimensional standards. Chairman Hamilton stated that he did not agree and that he did not think the Maine Municipal Association would agree either.

Ms. Ross stated that, by definition, dimensional requirements means numerical standards relating to spacial relationships, including, but not limited to, setback, lot area, shore frontage and height. She stated that Section 1-2 does not mention the size of the unit as a dimensional requirement. Chairman Hamilton stated that a variance for dimensional standards to allow the expansion of 1,200 square feet to 1,500 square feet does not seem to apply to the definition. He stated that he was just trying to get a rationale from the PB representative as to where the waivers came from.

Chairman Hamilton asked if the PB ever required proof to satisfy the elderly housing definition, which states that, "It must be operated or financed wholly or partially with state or federal funds and which must have the approval of the Department of Housing and Urban Development as one designed and operated to assist elderly persons." He noted that Ms. Pelletier has stated that the applicant had testified in that regard, but he asked if there had been any other statement from anyone in authority. Ms. Pelletier stated that it was included in the narrative from the engineer. Chairman Hamilton asked if it was part of the conditions of approval. Ms. Pelletier stated that any statements in the record are conditions of approval, so that if the applicant testified in a PB meeting, it is a condition of approval.

Ms. Lemire stated that in the dimensional standards for elderly housing, there is no mention of actual square footage. She stated that what it says is that dwelling unit minimum size and square feet per unit do not apply to federal or state elderly housing. Ms. Lemire asked if the 1,200 square feet was actually a dimensional standard. Ms. Pelletier stated that that was her point exactly, that the variance was not a zoning variance, which could only be granted by the BOA. Chairman Hamilton stated that the MMA Manual states that a zoning variance is a zoning ordinance provision, and that an attempt to give the Planning Board, the Code Enforcement Officer or a municipal officer the authority to grant variances, violates Section 30-A M.R.S.A., Paragraph 4353, "since the statute gives the board of appeals the sole authority to grant a zoning variance." Ms. Pelletier stated that the key was that it be a zoning variance, whereas the PB variance applied to the Subdivision chapter. Chairman Hamilton stated that he thought that the zoning ordinance trumped the Subdivision chapter.

Mr. Saucier stated that the law court had said that the PB has the authority to grant variances and waivers of non-zoning ordinances, such as subdivision ordinances or site plan ordinances, which are not in the zoning ordinance. He stated that subdivision ordinances around the state do use the terms variance and undue hardship, but that it refers to a different standard and is different altogether from the zoning variances.

Ms. Lemire stated that Section 37-80 also states that, "Whenever the requirements of this chapter conflict with any other ordinance, code or federal or state standard, the more restrictive requirements shall apply. Wherever provisions of this chapter differ from state or federal standards that are less restrictive, the planning board has the option of following the less restrictive or differing standards and may waive the specific standards of this chapter as specified in 37-57." Ms. Lemire retracted her statement when it was noted that it was not applicable.

TESTIMONY FROM INTERESTED PARTIES

Durwood Parkinson stated that he is an attorney and was representing the applicant, Joseph Falzone. He stated that the hearing is an appellate review, not a de novo review, which means ~~is~~ that the review is limited to the record before the PB, not new testimony. He stated that that fact is relevant to the hearing because there was a lot of information that was submitted by Attorney Manahan on December 14, 2015, the day before the PB's final site plan approval, and that submission was not part of the record considered by the PB. He stated that some of that information was alluded to during the hearing, including the report by the appellants' traffic engineer, Diane Morabito, which was not considered by the PB.

Chairman Hamilton clarified that the PB final decision was made on December 15, 2015. He asked if the material had come in before the PB meeting. Mr. Parkinson stated that Mr. Manahan had said in his own letter of December 14th that, "I understand that the

Board will not entertain additional public comment on the December 15th, so I will not plan to be at that meeting. I hereby request a second public hearing." Mr. Parkinson stated that Mr. Manahan did not get that second hearing, so the information was not before the Board. Chairman Hamilton asked if the information was before the Board. Mr. Parkinson stated that the information was not before the Board and was not discussed by the Board, and that it came in at the eleventh hour and was not considered by the Board. He stated that sliding something under the door of the PB at 7:30 in the morning does not mean that it is before the Board. He stated that information has to come in through the public hearing process. He stated that the process was a bit different from the process of the BOA. He added that the BOA does not accept new information the night before deliberations on a variance hearing.

Chairman Hamilton stated that what the BOA was deciding, in an appellate review, is everything in the record up to the moment the PB made their decision. Mr. Parkinson stated that he objected to that because the information was not submitted as part of the public hearing and came in too late, which is why the PB properly disregarded the traffic report and the Barry Sheff report. He stated that, for that reason, the PB did not decide on the preservation report from the Historical Society.

Mr. Billipp stated that the public hearing was held before the preliminary PB site plan approval. Mr. Parkinson concurred, stating that that was when the public was allowed to speak. He stated that after the public hearing, it is incredibly common in the PB process for the PB to solicit information from consultants, either those of the applicant or those of the Town. Mr. Billipp stated that the letter from Barry Sheff was dated December 14, 2015. Mr. Parkinson stated that that was different from public comment. He stated that the letter was peer review from the Town, which is much different. He stated that, after a public hearing closes, the PB often accepts testimony and continued comment from an applicant clarifying issues that were brought up during the public hearing. He stated that the Morabito traffic study and the Barry Sheff of Woodard & Curran report presented information from the public. Mr. Parkinson stated that the package the BOA received from Attorney Manahan hangs very much on pieces of evidence that were not before the PB.

Ms. Pelletier clarified that the PB never even saw the Woodard & Curran report. Mr. Manahan stated that Ms. Pelletier had told him that she would submit it to the PB. She stated that he had submitted the report one hour before the PB meeting. He stated that it was presented one day before the meeting. She stated that it was one hour before the meeting. She stated that the PB never saw the document and that it was not part of the record.

Mr. Parkinson stated that the hearing was an appellate review, based on the record that was before the PB. He stated that the appellants have the burden of proof, but that they also have the burden of producing the record on appeal. He stated that the problem was that everybody was probing in the dark to find the answer. He asked, "What is the

right answer to these questions?" He submitted that one cannot get the right answer without having all of the information, which had not been provided.

Chairman Hamilton stated that the BOA is not a court of law and that none of the participants had sworn, under oath, to tell the truth and nothing but the truth. He stated that Mr. Parkinson would have his opportunity in a court of law. He stated that what the BOA wanted was testimony about the issues that were being brought up, not a legal opinion. He stated that Mr. Parkinson could deal with the legal issues in Superior Court, but that he did not want to listen to legal issues during the hearing. Mr. Parkinson stated that, with all due respect to the Chairman, he felt that he was making a procedural point about the burden of proof and the production of evidence that was required for the BOA to make an informed decision. He stated that if the BOA was going to make a decision, they should make it on all of the information and all of the minutes. He stated that he thought he was entitled to say that. Mr. Parkinson stated that he had felt all through the hearing and during the prior appeal of December 17, 2015, that Chairman Hamilton had been trying to shut down his comments.

Ken Wood of Attar Engineering at 1284 State Road, Eliot, Maine, began to testify. A member of the audience asked for point of order and then asked how the meeting was to proceed regarding comments. Chairman Hamilton notified Mr. Wood that he had not been recognized by the Chair. Mr. Parkinson stated that he and Mr. Wood were working as a team, that Mr. Wood was the applicant's engineer, and Mr. Parkinson was the applicant's attorney. He stated that he thought it was within his right within the by-laws, which talk about testimony on cross examination. Chairman Hamilton stated that the hearing was not at the point for testimony on cross examination and that the BOA was at the point of hearing testimony from parties of interest. Mr. Parkinson stated that Mr. Wood was the engineer for the applicant and that nobody could be a more interested party than that. Chairman Hamilton stated that he had not called on Mr. Wood and that he could certainly speak at another point. Mr. Parkinson stated that he was hoping for a bit of common sense, and that he, Mr. Wood and Mr. Falzone could make a few points and be done with their testimony. He stated that they could present the hard way or the easy way, and he thought that Mr. Wood should be the next speaker. He stated that that would be the official way to move the process and that, again, he felt that Chairman Hamilton was thwarting Mr. Parkinson's ability to defend the appeal. Chairman Hamilton stated that there was plenty of time in the hearing for Mr. Parkinson's testimony and that he was not going to cut any part of the testimony off, but that the testimony needed to be in order. Mr. Parkinson stated that he was at a loss to understand the procedure because the applicant wanted to speak, the applicant being the attorney, the engineer and the applicant. Chairman Hamilton stated that the applicant had spoken through the PB. Mr. Parkinson stated that that would be an incorrect statement.

Chairman Hamilton stated that for administrative appeals, the Code Enforcement Officer is presented the opportunity to present the position of the CEO or the PB. He

stated that, following questions to the CEO from the Board, interested parties are given the opportunity to present their case and can show their interest by raising their hands. He stated that he did not understand why Mr. Parkinson thought he should step ahead of everybody else. Mr. Parkinson asked if Mr. Wood could make his presentation. Chairman Hamilton agreed.

Mr. Manahan stated that he needed to state for the record that he objected to Mr. Parkinson's putting on a witness. He stated that in an appellate review, the BOA can review the record alone, not testimony from a witness, such as statements from Mr. Wood. Chairman Hamilton stated that, from that point forward, testimony would be limited to five minutes. He added that if anyone needed more time, he could come back after everyone else had spoken. Mr. Parkinson stated that he thought that was unreasonable. Chairman Hamilton stated that, given the time and the amount of testimony that was still to be heard, he did not think it was unreasonable. Mr. Parkinson stated that maybe they should adjourn for the night.

Ms. Ross noted that the video streaming had stopped working and that she did not know how to resume that process. Mr. Parkinson stated that it was required that the BOA keep a record of the meeting. Chairman Hamilton noted that the meeting was being recorded.

Mr. Wood stated that Mr. Manahan had raised 12 points, and he did not think he could address all 12 points in five minutes. Mr. Wood stated that the definition of elderly housing is that it is constructed or operated as part of a life care facility, and that elderly persons or handicapped persons shall occupy the units. He stated that the terms elderly person means a person who is 55 years of age or older or a couple that constitute a household and at least one of whom is 55. He stated that Ms. Pelletier had mentioned that the covenants and restrictions that the developer submitted go over and above that requirement. He stated that the covenants and restrictions stated that two of the residents have to be 55 and that no resident 18 years old or younger can reside within the facility for more than three months. He added that, by definition, one or more residents has to be over 55. He stated that there are three other elderly housing projects in Eliot. He stated that they are: Baran Place; Eliot Commons' 42-unit elderly housing project of rentals that will start being constructed in April 2016, for which the PB waived the floor area requirements; and the Villages at Bolt Hill with 150 units of elderly and assisted living, consisting of 100 units of elderly, for which the PB waived the floor area requirement to 1,700 square feet, and 50 units of assisted living. He reiterated that to meet the requirement for elderly housing, one resident has to be 55 or older. He stated that the resident does not have to be handicapped, and the facility does not have to have non-slip surfaces or grab bars in the bathrooms.

Mr. Wood stated that Eliot's ordinance requires that there be no post-development increase of stormwater runoff. Mr. Wood stated that Attar Engineering compared existing conditions to developed conditions and that there are detention cells and

underdrain soil filters on the project plans, which decrease the post-development increase. He stated that, in every instance, there is less stormwater flowing off-site onto adjacent properties under the developed conditions.

Mr. Wood stated that an email from Chris Coppi and Christine Woodruff of the Maine Department of Environmental Protection reported on a visit to the site at the request of Orland and Joan McPherson. He stated the email stated that, "As we discussed on the site, the Department's Stormwater Management Rules for this project regulate stormwater quality and the Town of Eliot's Rules regulate stormwater quantity. Mr. McPherson's concerns appeared to be mostly about how an increased quantity would affect his pond. My understanding from you is that the peak flow rate of stormwater from the project will actually be lower after the project is developed because of the detention that will be provided by the underdrain filters. Because there is no expected increase in peak flow, the pond should not be expected to be affected either."

Mr. Wood stated that he thought that Mr. Manahan had referred to the Woodard & Curran report that said that Stormwater Law of the MeDEP, Chapter 500, had to be met. Mr. Wood stated that that is incorrect. He stated that Stormwater Law for the State of Maine states that when there is more than one acre of impervious area, a permit from the State is required. He stated that Stormwater Law is addressed through water quality. He stated that, in the State of Maine, there are four ways of addressing water quality: buffers; underdrain soil filters; bio retention cells; wet ponds or infiltration bases. Mr. Wood stated that 80% of the development and 95% of the impervious area has to be treated. He stated that the proposed subdivision meets and exceeds those requirements as far as stormwater is concerned. He stated that the MeDEP accepted the stormwater permit for processing on December 9, 2015. He stated that they had called with a few minor comments and stated that they will issue the Chapter 500, Stormwater Law Permit.

Mr. Wood stated that Mr. Manahan and Mr. Sheff indicated that the project has over three acres of impervious area, but that it does not. He stated that if the project did contain over three acres of impervious, or that the development was greater than 20 acres, then a Site Location and Development permit would be required. He added that MeDEP had been down to the site and are reviewing the plan and have determined that Site Law Application does not apply to the project because it has less than three acres of impervious.

Jennifer Fox of 34 Drake Lane, Eliot, Maine, stated that she thought it was important to understand that elderly housing receives a density bonus, meaning that the project proposes 21 units on very small acreage and should be served by sewer. She stated that the PB issued a waiver to the sewer requirement based on conditions. She stated that those conditions were not met or substantiated by the time the PB granted final approval. She stated that the PB should not have granted final approval because the waiver and the conditions were not substantiated. She stated that, in particular, she

hoped that the BOA would read the memos from Joel Noel very carefully. She stated that the memos discuss the issues, but that they do not present the data that was being requested by the PB. She referenced the memo of December 14, 2015, addressing the 1,000-foot requirement for leach fields, which did not present to the PB the information that had been requested as a condition of the waiver.

Ms. Fox stated that another requirement that was made by the PB was to substantiate the provision that there would be 20,000 square feet, or 25% of the project area, of suitable soil in order to support the septic systems. She stated that, again, there was a memo generated on December 1, 2015, by Mr. Noel to Attar Engineering in which he talked about a way that the system would be operated. She stated that Mr. Noel suggested a way with which to measure the square footage, and that Attar had claimed that they confirmed the reference. However, she stated that data was never presented to the PB. Ms. Fox stated that there had been a lot of information that was talked about as being part of the narrative. She stated that the project is a major subdivision and that there should be data, and questions should be substantiated, before the PB grants any waivers.

Michael Wells of 15 Birch Lane, Eliot, Maine, stated that throughout the whole process, he had been hearing about how elderly housing is defined. He stated that HUD, under the Fair Housing Act of the Civil Rights legislation, are the only ones who can allow discrimination by familial means, such as specifying that no children shall be residents. He stated that nobody could state that anyone could not live at a location unless the Federal Government says so. He stated that, in order to do that, the project has to fall under the Fair Housing Act HOPA, which is the Fair Housing for Older Peoples Act and has to have a 55-year-old exemption. He stated that the project has to meet the requirements and mandates of the Federal Government annually, and every two years, with specifics. He stated that someone has to do that, and if that is not the developer, it would have to be the Town of Eliot who ensure. He stated an owner cannot deed a property to be for people 55 or older unless they meet the exemption of HOPA.

Helen Goransson of 255 Depot Road, Eliot, Maine, stated that her concern was that she and her husband own a barn in Eliot and are committed to preserving local lands in the area. She stated that they are not against housing developments, but that they are against breaking and bending rules unnecessarily. She stated that in this case, the developers figured out that if they called a project elderly housing, then they could bypass the Town's Growth Ordinance in granting building permits, allowing them to jump to the start of the line. She stated that, in addition, they could build many more houses on the small piece of property. She stated that the problem with the property is that the developer signed the Purchase and Sales Agreement with the owner, with the condition that all permits and approvals be received before the sale is completed.

Ms. Goransson stated that, unfortunately, the property is not suitable for elderly housing. She stated that that had been pointed out in many ways. She stated that the

Eliot ordinances specifically specify a sewer connection. She stated that before all of the information was available, the PB deemed, in October 2015, that it was time for public comment. She stated that, at the public hearing, every abutter and everyone who knew the area had said that the project was crazy and that the area was wetlands. She stated that she had had problems with her basement and driveway flooding and her septic system backing up. She asked how anybody could possibly expect to have 21 houses with separate systems on 20 acres of land in an area that is questionable for having proper soils. She stated that the PB listened to the concerned public, but heeded what the developer said, ignoring what the public had said.

Ms. Goransson stated that what also happened was that, at one point, the PB figured out that they needed historical information about the property because part of the check list was to ensure that there was nothing of historical significance on the property. She stated that the PB contacted the Historical Society. She stated that the society's president, by by-law, is authorized (with another officer) to come up with a report and present it as the word of the Eliot Historical Society. She stated that they spent hundreds of hours researching the report, provided the report to the PB, and distributed many copies. She stated that when the report was mentioned at the PB meeting, the Chairman made the statement that the report was not from the Eliot Historical Society, but that it was from an individual, and that he basically dismissed the report. She stated that in the December 2015 meeting of the Historical Society, in order to ensure that the report was an authorized report, the members voted to approve the report, confirming that there was a site of historical significance on the property which would be destroyed by the project. She stated that a letter was sent to the PB in plenty of time for them to digest the contents, but that it was, once again, ignored.

Ms. Goransson stated that Mr. Manahan's documentation of the points of the appeal was made on December 14, 2015, and was mentioned at the PB meeting of December 15, 2015, with the comment that, "You have all seen the report and it was a feeble attempt." She stated that the PB members nodded their heads, so that she knew that the PB members did see the Historical Society report and chose to ignore it. She stated that in general, what had happened during the whole process was that when the citizens of Eliot had things to say, which were as valid as anybody's opinion, their concerns were dismissed, but that the developers' plans were deemed correct.

Mr. Cieleszko asked for the date of the Historical Society's approval of the report. Ms. Goransson replied that it was at the meeting on December 2, 2015, at which time the members authorized Ms. Goransson, as secretary of the Society, to write the letter to the PB informing them of the vote. She stated that the Historical Society also wanted to ensure that, in the future, the Historical Society be contacted early in the process. Chairman Hamilton stated that the letter was received on December 10, 2015.

Dennis Lentz of 40 Brook Creek Crossing, Eliot, Maine, stated that, as a member of both the PB and the Historical Society, he wanted to put the issue to rest. He stated that the

report prepared by the president of the Historical Society was presented to the PB the night of the PB meeting, at which time the PB asked if the report had been voted on by the Historical Society members and the answer was that they had not. Mr. Lentz stated that the report should have gone through the channels, and that the Chairman of the PB rejected it. He stated that the following week, the report was voted on by the Historical Society. Chairman Hamilton stated that the letter from Ms. Goransson was received on December 10 2015, before the PB's final decision. Mr. Lentz stated that he did not know the dates. Mr. Cutting asked if the letter was discussed and the report recognized at that point. Mr. Lentz stated that he did not remember that it had. He stated that the report had previously been dismissed and that new evidence was not considered.

Joseph Falzone, the owner of the property, stated that the Historical Society report labeled 1,000 feet of Libbey Lane as a historical feature. He stated that Mr. Libbey had testified at the hearing that he owns Libbey Lane, that it is not on any national register, and that he could do whatever he wanted with it. He stated Libbey Lane does not comply with being a registered historical feature.

Kimberly Richards of 17 Pine Avenue, Eliot, Maine, stated that she is the Chair of the Conservation Commission. She stated that when many houses are built in a small area, there is going to be more of an impact on the resources. She stated that elderly housing allows a bigger concentration of units, and that there is a stipulation that it has to be connected to the sewer. She stated that the maximum unit size of 1,200 square feet is supposed to offset the burden on the resources that would otherwise occur with such density. She stated that, in her opinion, the waivers were not correct.

Mary Fournier of 16 High Meadow Farm Road, Eliot, Maine, stated that Attorney Manahan had done an excellent job representing the appellant. Ms. Fournier stated that she does not pretend to be a lawyer, but that the Town had been subjected to an incompetent Planning Board Assistant who had misinterpreted.... Chairman Hamilton stated that if Ms. Fournier had something to say pertinent to this particular case, she may do so. Otherwise, he stated, he would ask her to be seated. Ms. Fournier stated that the BOA appeals had asked Ms. Pelletier quite a number of questions, which she had answered. She stated that at the PB meetings, each and every time, Ms. Pelletier was present. Ms. Fournier stated that the process begins with the applicant going to the PB Assistant, who advises the PB at each meeting, if they ask for her advice on particular issues as they pertain to the ordinances. She stated that the ordinances are local laws which need to be taken seriously by the PB. She added that the CEO is a different step and that Ms. Ross had not come into the case yet.

Ms. Fournier stated that Ms. Pelletier met with the subdivision applicant, Mr. Falzone, and Mr. Wood, the licensed engineer. She stated that she had done quite a bit of research on a number of the ordinances, which Mr. Manahan had researched much better than she did. She stated that she put a lot of time and effort into her research. Chairman Hamilton asked if there was anything about the current case that Ms. Fournier

wanted to address. She stated that she was addressing the case. She stated that the BOA is an appellate board for the Town, not the Maine Supreme Court. She stated that the job of the BOA to make sure that the PB made sure that every single local ordinance and every single state and federal law that were pertinent were applied to this particular application for an elderly housing unit subdivision. She stated that the PB acted contrary to the Code. She stated that every single member of the PB and Ms. Pelletier are all responsible to see that the ordinances are followed. Ms. Fournier stated that it is Ms. Pelletier's job to interpret the ordinances. Chairman Hamilton asked Ms. Fournier to be specific about the current case, and she stated that she was specific.

Chairman Hamilton informed Ms. Fournier that her 5-minute time limit was up, but that she would be allowed to come back again after others had spoken for their first time.

Lynn McPherson of 41 Birch Lane, Eliot, Maine, stated that her concern, as an abutter, was having 21 septic systems in her back yard, affecting her well and drinking water. She stated that, that as had been stated in other PB meetings, this project is just phase one. She stated that if a precedent is set for elderly housing not being hooked up to sewer, she wondered what would happen to the remaining 80 acres of the property, which will be developed in phases two and three.

Susan McPherson of 39 Birch Lane, Eliot, Maine, stated that it was really apparent that the proposed project of elderly housing would by-pass some of the provisions of the Eliot Code, particularly the requirement for growth permits. She stated that it is easy to get caught up in the romanticized, feel-good notion that the Town is going to supply housing for the elderly citizens in Eliot. She stated that the project may be a great development for someone who is 55 or 56, but that she did not think that was what the people who wrote the ordinances had in mind when they put the provision into the Code.

Ms. McPherson stated that, as a physical therapist who works with the geriatric population in a skilled nursing facility for long-term care, she did not think that two-story housing was conducive to aging-in-place housing for the elderly. She stated that stairs are always an issue when she does home evaluations, and that stairs are almost always a barrier to someone returning home. She stated that there would also be stairs outside the house. She stated that, at the PB meeting of October 12, 2015, Judith Hilt had raised the issue of the 8,000 to 9,000 yards of fill that the developer had talked about being trucked in. She stated that one of the developer's agents responded to that concern by stating that the houses would be raised up. She stated that when picturing a house that has been raised up on a mound of soil with an elderly person trying to access the house, the person would need to have a ramp installed.

Ms. McPherson addressed the waiver to add 300 square feet to the floor area, stating that it would not make the house more accessible. She stated that, although there is a master bedroom on the first floor, a lot of people do not sleep in the same bedroom, so

one of the two elderly people would have to choose to traverse up and down the stairs, which may not be safe.

Ms. McPherson stated that her last concern was the water supply. She stated that for those who live downstream, it was not clear that the soils could support the demands that the septic would place on them. She stated that Mike Cuomo's review did not support the argument and, in fact, had described a number of deficiencies. She noted again that 41-310(f), construction requirements, in the section of requirements unique to elder housing, states that the housing is served by public water and sewer. She stated that that was the intent of the people who wrote the ordinances, and for good reason, as noted in the report from Woodard & Curran, which discussed the increased presence of PPPCs.

Ms. McPherson stated that in one of the PB meetings, Mr. Whalen had stated that the Board was "entrusted with the responsibility of enforcing the land use ordinances in the Town. We didn't write them, we didn't create them, but it is our job to enforce them." Ms. McPherson stated that she could not agree more. She stated that the approval of the project was clearly contrary to several provisions of the Eliot Code and ordinances and, therefore, should be reversed.

Orland McPherson of 1328 State Road, Eliot, Maine, stated that he is one of the abutters and that he had a wise-guy question to start with. He stated that he is over 55, that he owns a nice lot right next to him, and that he wondered if he could by-pass the growth permit ordinance and get a building permit if he called his project elderly housing. Ms. Ross stated that if he met all of the requirements, he could do so. She said that those requirements include that elderly housing constructed be financed or operated wholly or partially with federal, state or local funds, that elderly persons or handicapped persons shall occupy the housing units, and that the state or federal funding program must have received the approval of the United States Department of Housing and Urban Development as one designed and operated to assist elderly persons. Mr. McPherson clarified that he could not finance his theoretical project with his own money. Ms. Ross stated that he could not.

Mr. McPherson questioned how a septic system could be installed on land that currently is under water. He stated that the land had looked great in August and September because it had been a dry year, but that currently the entire area is under water. He questioned how a disposal field could be located there. He stated that the engineers considered it possible, but he questioned whether they would guarantee that the disposal field would not flood over onto Mr. McPherson's land.

Judith Hilt of 1374 State Road, Eliot, Maine, stated that she agreed with Mr. McPherson, adding that that afternoon she walked the side of her property which abuts the proposed project because she had wanted to take some photographs to bring to the hearing. She stated that she could not figure out how to print the photos on her new

laptop and could not provide them. She stated that she stood on her own property and took photographs of the proposed project, which was under water.

Ms. Hilt stated that the Comprehensive Plan of 2000, which was updated in 2009, stated that, "The vision of the Eliot Comprehensive Plan of 2000 is to protect and preserve open space to retain the rural face of the Town. It is the specified goal of the Comprehensive Plan to maintain forest, water habitats and open land because its loss can be a threat to our environment, quality of life, and the desirable aspects of the Town of Eliot." Ms. Hilt stated that when the whole process first started, her biggest concern was the marsh because the marsh goes completely across her property and behind the Grange. She stated that it is not a small marsh. She stated that when she found out about all of the houses that have wells, she became even more concerned. She stated that, as she had been going to PB meetings over the last four months, she was deeply concerned about the way in which the Town is headed if the PB is making such decisions. She asked what had changed in the last 15 years that Eliot no longer wants to keep, as much as it could, the charm and other points which she just read in the Comprehensive Plan of 2000. She stated that Eliot is always going to be a small Town. She stated that she had journals from her grandmother of 1920, when she would take the cart to the ferry and go to Portsmouth for supplies. She stated that Eliot is a suburb of Portsmouth and always will be.

Ms. Hilt stated that the traffic plan for the proposed development included 78 trips a day on State Road at a location 800 feet from an elementary school. She stated that one of her biggest joys is to hear the children in the spring and fall walking from the elementary school to the library. She added that there is one-half mile of sidewalk between the library and Beech Road. She stated that if there was a new road coming out over the sidewalk, she wondered what would happen to the children when there are 21 houses in a marsh. She stated that the location where the road will enter the site is all ledge. She added that, as far as she knew, in order to remove ledge to create a road, blasting would be necessary. She stated that she would like to hear whether or not the developer has another way to remove the ledge because the blasting topic had not been discussed at a PB meeting, other than noting that that was what has to happen. She questioned what would happen to the houses close to the site. She wondered if she would then have cracks in her basement, which had always been dry.

Mr. Cieleszko asked if Ms. Hilt had presented her information or given any pictures to the PB. He stated that she had spoken to the BOA eloquently, but asked if she had presented to the PB. Ms. Hilt replied in the affirmative and that she had defended her property to the PB at the October 20, 2015 meeting, but that she did not ask about the blasting and that she did not have the traffic data.

Robert Pomerleau of Cedar Road, Eliot, Maine, stated that he could add some clarity to the definition of elderly housing. He stated that the federal web site has three tiers of criteria, one being over 55, one being assisted living, and the third requiring more

extensive care. He stated that each tier has requirements for the type of housing. He stated that, in the over-55 category, there are no special requirements for grab bars, handicapped access or anything like that, and that it is simply an age category that requires one person in the house to be over 55 in 80% of the units. He stated that, for federal funding purposes, the project could contain 20% of houses that were not limited in any way to people over 55. He added that the Eliot Code does not make any reference to percentage, which can be interpreted to mean that all of the units are required to have residents over 55. He stated that if the project was including the requirement as a deed restriction, the developer is far exceeding the federal criteria for federal financing.

Richard Peele of 39 Birch Lane, Eliot, Maine, stated that he is a downstream abutter and was concerned about the stormwater, the septic systems, and the traffic. He stated that at the PB public hearing, he had raised the issue of entrances onto an arterial road, which had not been addressed by the applicant or the PB other than saying that they were going to be applying for a state permit. He referenced a Superior Court case, Eliot Shores LLC vs the Town of Eliot, in which the application was denied by the PB and the denial upheld by the BOA.

Jean Pesaresi of 40 Debby Lane, Eliot, Maine, stated that she would be an abutter to the second phase, and that she was concerned about her septic system and well. She stated that just the prior week, Debbie Lane had flooded, making it impossible to drive across the road. She stated that she has had her culvert replaced twice and that it never seems to be big enough. She stated that it is impossible to walk in her back yard or in the woods without sinking because the area is wetlands. She stated that she has beautiful, green grass which never needs fertilizing because it holds its water all year long. She stated that her fear was that if everything is waived now, that the waiver would be applied to the second and third phases. She stated that she did not want the value of her property to decrease or her well to get contaminated. She stated that she had a video of the water on her property line. She stated that she felt that the word of the abutters did not carry any weight. She stated that she supports elderly housing, but she did not see how anyone could say that the soil for the proposed project could support all of the septic systems.

Mr. Falzone stated that, according to the way the Eliot by-laws are written, a project would only have to have a portion funded by HUD or state funds. Mr. Rankie stated that the definition of elderly housing states that the project must have received the approval of the United States Department of Housing and Urban Development, noting that the verb is in the past tense.

Ms. Hilt asked Chairman Hamilton if he could request that Mr. Falzone address the blasting issue. Mr. Cieleszko stated that, as a point of order, the issue was not relevant to the hearing.

Ken Wood of Attar Engineering stated that there had been a lot of discussion about wastewater. He stated that Eliot Code requires adequate test pits of 9 inches to the receiving layer and that 25%, or 20,000 square feet, have 15 inches. Mr. Wood stated that the proposed project exceeds the 25% of each lot size by more than two. He stated that the information was given to the PB at the November 11, 2015, meeting, which Joel Noel attended. He stated that the PB felt satisfied that the project met the 25% lot size requirement of 15 inches or greater.

Mr. Wood stated that Mr. Cuomo's letter of December 14, 2015, states that the septic systems do meet the 1,000-foot requirement, and that there are 1,000 feet of adequate soils around each septic system. He added that Mr. Cuomo had said that buildings or roads could affect the 1,000-foot area. Mr. Wood stated that at the December 15, 2015, meeting with the PB, they demonstrated that the septic systems shown on the plan as having adequate test pits are not near buildings or driveways because of setbacks. He stated that there was a 1,000-square-foot lot around each septic system that had adequate soils of at least nine inches above seasonal groundwater.

Mr. Wood stated that the testimony that the majority of the lots were under water probably referred to the wetland area. He stated that there are 10-12 feet of relief between the areas where the septic systems are located and the wetlands area. He stated that the soil site evaluator does test pits and determines the seasonal high water table. He stated that the areas that require systems have to have nine inches or greater to the high water table of natural soil. He added that the Eliot Code requires that at least 25% of each lot has 15 inches or greater.

Mr. Wood stated that the blasting for the entrance would be in the Lyman soils. He stated that the road is designed on the Nicholville and Dixfield soils, which are deep in the ledge. He stated that the large knoll of ledge is not located where the entrance is designed.

Mr. Wood stated that there was a lot of discussion at the November 2015 PB meeting about the need for a waiver to the requirement to connect to the sewer system. He stated that the PB determined, probably based on the soils information, that they had the ability to grant the waiver. He cited the Code as, "Where the planning board finds that due to special documented circumstances of a particular plan, the provision of certain required improvements is not requisite in the interest of public health, safety and general welfare, or is inappropriate because of inadequacy or lack of connecting facilities adjacent in proximity to the proposed subdivision, it may waive such requirements." He stated that their discussion was based on the fact that there is no sewer to which they can connect, and that sewer is not a connecting facility.

Mr. Wood stated that Eliot's ordinance, in some cases, requires a 400-foot separation distance and a 1,000-foot separation distance for new roads proposed by a subdivision. He stated that the provision does not apply to existing roads. He stated that the Code

also requires a separation of cross-connecting intersections by 200 feet. Mr. Wood stated that if a proposed subdivision is required to have two entrances, they have to be separated by 1,000 feet on the same side of an arterial road, and that they have to be separated by 400 feet if the road is not an arterial road. He stated that if the entrances are across from each other, the required distance is 200 feet. In addition, he stated, an entrance is defined as three or more units on an entrance, meaning that every driveway is not an entrance. He stated that because the road is a state road, the state has jurisdiction on the entrances, and that the 1,000-foot criterion does not apply. He stated that the applicant had established early in the process that the project has an entrance permit from the State of Maine Department of Transportation.

Mr. Cieleszko clarified that what Mr. Wood was saying was that the 1,000-foot ordinance for an arterial street is not valid because the location is on a state-maintained road. He asked if that had been clearly stated by the PB at the time. Mr. Wood stated that there had been quite a discussion, and that the PB had determined that Route 103 had state jurisdiction and that the state had the authority to issue the entrance permits. He stated that, in addition, the PB had asked what the definition meant if it was not a state road. He stated that the discussion concluded that the 1,000-foot and the 400-foot separation distance applied to new roads pertinent to a new development. He added that a new development cannot put a neighbor out of business for the next 1,000 feet.

Mr. Cieleszko stated that the definition included a long section regarding partial HUD funding and other criteria. He stated that an elderly housing dwelling unit is a unit within elderly housing and is a dwelling unit specifically designed for elderly persons. He asked Mr. Wood if there was anything in the units specifically designed for elderly people. Mr. Wood stated that an elderly person is a person 55 years of age or a couple that constitutes a household in which one of them is at least 55. Mr. Cieleszko asked what aspects of each unit was dedicated to older people. Mr. Wood stated that there was discussion about the design of the units at both the April 2015 and October 2015 meetings of the PB, at which time the floor plans were reviewed in detail. He stated that each unit has a master bedroom and a master bath on the first floor, and that some of the units are only one floor. He stated that the units are adaptable and allow for one-floor living. He stated that the project is for people over 55, not for people who are 85 or handicapped. Mr. Cieleszko questioned if there was anything else about the design that would suit a person of 55 who was buying the unit and wanted to live there after he was on crutches. Mr. Wood stated that the garage, the master bedroom and master bath are all fully adaptable and accessible. Mr. Cieleszko stated that the units are not currently adapted. Mr. Wood stated that they could easily be adapted. He stated that if a client wanted the unit adapted, it could be constructed that way, with the addition of fixtures and grab bars. He stated that not everybody who is 55 wants an accessible or adaptable unit, but they do want to know that, if they choose to stay, it could be made accessible.

Mr. Cutting noted that there had been a lot of discussion about the sewer system, septic systems being close together, the high number of septic systems and the water runoff situation. He asked for information about the water situation on the property in regard to the wells. Mr. Wood stated that there is public water and hydrants for the project.

Ms. Lemire stated that she had talked to the CEO about the Elgin systems and filtering systems and that she knew something about them, but that she did not know a lot about them. She asked if the design of the biomass filtering was capable of filtering out the PPPCs. Mr. Wood stated that, like any septic system, it would. He stated that each unit has a septic tank, and that the Elgin system has a better filtering capability than would a stone-in-pipe system. He stated that just because a person is elderly, he really did not expect him to be flushing more medications down the drain than someone who was not elderly.

Mr. Rankie asked if, prior to getting approval for a waiver for the sewer, Mr. Wood had designed a private sewer. Mr. Wood asked if he meant a private sewer that would connect to the existing public system. Mr. Rankie concurred. Mr. Wood stated that he had not. Mr. Wood stated that what he thought Mr. Rankie was asking was whether or not he designed a force main to pump into the municipal system from the location of the proposed project. Mr. Rankie asked if Mr. Wood had looked at that possibility before the request for the waiver. Mr. Wood stated that, of course, he had looked at the possibility because he knows where the sewer is located in Eliot. He stated that the sewer location is not in the vicinity of the proposed project. Mr. Rankie asked if connecting to the sewer had been a consideration. Mr. Wood stated that the connection would be too far away, and that the closest sewer was the private sewer on Route 236 at the Eliot Commons. Mr. Rankie asked if a private system similar to that at the Commons had been considered. Mr. Wood stated that the Commons system is a force main into the municipal system. He stated that he had considered that, but that he knows the distance to the municipal system, so he discounted that as a possibility right away. Mr. Rankie asked if that would have been a course of action if the request for the waiver had been denied. Mr. Rankie added that it was probably irrelevant at this time, and Mr. Wood stated that he couldn't answer the question.

Mr. Parkinson, addressing the issue of the waiver for the maximum floor area, stated that just because something has a number beside it does not make the number a dimensional requirement. He stated that in the subdivision regulations, there are road standards, which include road widths and road depths, which can be waived by the PB. He stated that the floor area is in the subdivision regulations and that the appellant was asking the BOA to declare that it is a zoning regulation. He stated that it is clearly written in the subdivision regulations. He stated that if a court determined that it was a zoning regulation, that would be one thing, but his point was that that had not happened yet. He stated that the job of the BOA was to interpret the ordinance, in which the PB clearly has the authority to grant the floor area waiver based upon the regulation being a subdivision regulation as opposed to a zoning regulation.

Mr. Cieleszko stated that if the waiver was for an improvement, the PB did not have the right to waive the floor area. He stated that he was not talking about a dimensional standard that would have to come before the BOA, but that, even if the PB had the right to waive subdivision requirements under their own rules, they did not have the right to change the floor area. Mr. Parkinson stated that the maximum size is a required infrastructure improvement which can be waived. Mr. Parkinson stated that the PB is entitled to interpret its ordinance provisions in the subdivision regulations.

Gerald McPherson of 21 Wiltshire Drive, Eliot, Maine, stated that there are wells in the area, though they are not on State Road. He stated that he and his father had asked the environmental representative to come to the site, not solely out of concern for their pond, but also out of concern for the entire area. He stated that a lot of the frustration about the proposed project resulted because the public hearing was held so early in the process, and that a lot of information had come in after that hearing. He stated that the public never had a chance, other than in writing, to respond to the new information, and that there was no assurance that the PB had received the written responses. He stated that the only chance to speak publically was in October 2015. He stated that, after that date, the developer continued his process with more information and made strategic changes, to which the public never had the opportunity to respond.

Michelle Meyer of 58 Odiorne Lane, Eliot, Maine, asked what aspects of the proposed development would make it suitable for elderly people. She stated that it had been asked, during the public hearing, whether or not there would be grab bars and other special, adaptive equipment built into the homes. She stated that Mr. Falzone's response was, quite simply, "I'm not Santa Claus." Ms. Meyer stated that the attendees at the hearing were the people of Eliot. She stated that throughout the process, the people had been dismissed, marginalized and mocked. She stated that the process has been frustrating and frightening. She stated that the people of Eliot needed to take a good, hard look at what they were allowing to happen and to consider public health and safety. She stated that the people who sit on the Eliot boards need to be concerned about the public health, and that actions are irreversible. She stated that she was glad to have been given the opportunity to make her statements.

Jennifer Fox stated that there had been a question as to whether Mike Cuomo's memo had been reconciled and all the questions answered. She stated that the memo from Joel Noel, dated December 14, 2015, the day before the PB approval, had noted that Mike Cuomo had said that there were outstanding issues with the wastewater disposal for units 19, 20 and 21. She stated that it was noted that the disposal fields were only six feet apart, where 11 feet are required by the state. Joel Noel clarified in the memo that those units needed to be checked, or a new test pit needed to be completed. Ms. Fox stated that it was another example of something that had not been demonstrated or completed for PB review.

Ms. Fox stated that it was her understanding that the engineer never substantiated that there would be 20,000 square feet, or 25% of the project area, of suitable soil in order to support the septic systems. She stated that she questions whether or not that was part of the PB record.

Michael Wells stated that he did not know of any septic systems that treat PPPCs, other than a biological treatment and technical filtration. He asked if the proposed system would, in fact, treat pharmaceuticals. He stated that his well is about 100 yards from Mr. McPherson's pond, and that he was also concerned about that. He stated that he would never share a septic system with another person or another family because it is important to know what is going into the system. He stated that people who are unfamiliar with the system have to be informed about what to avoid putting into the system. He stated that there are a number of ways to cause ineffective working of a septic system. He stated that there is no chemical or pharmaceutical treatment in the proposed system.

Susan McPherson stated that it is absolutely not true that elderly people are on more medications than people who are not elderly.

Mary Fournier stated that the proposed subdivision is a 21-unit subdivision. She stated that the reasons for local ordinances are clear, and that the ordinances are needed to ensure that applicants can qualify. She stated that it is the obligation of the PB to make sure that applicants are complying with the ordinances. She stated that the ordinances in many different chapters of the Code apply to the proposed project. She stated that the ordinance regulating elderly dwelling units contains many requirements. She stated that the BOA does not get to pick and choose which of those requirements are followed by the PB and the Planning Assistant. She stated that neither does the PB get to pick and choose whether or not the applicant has submitted all of the right information. She stated that it is the Planning Assistant's job to make sure the information comes in to her, it is the PB's job to make sure the information comes in to them, and it is the job of the BOA to make sure that the pertinent local zoning ordinances were met by the applicant, and to make sure that the state and federal laws are applied. She stated that there is a state law which forbids property owners to cause water from their property to go onto the property of another. She stated that there are federal requirements for elderly housing. She stated that Section 1-2 of the Eliot Code defines an elderly person as someone who is 55 years of age or older. Ms. Fournier stated that it is a local law that each elderly housing dwelling unit be specifically built for elderly persons. She stated that the definition is just as clear as a bell.

FINAL TESTIMONY FROM APPELLANT

Mr. Manahan stated that to qualify as an elderly housing dwelling unit, as defined in the ordinance, the dwelling has to be specifically designed for elderly housing. He stated that there is nothing in the PB record to indicate that the units are specifically designed for elderly housing. He stated that Mr. Wood had noted that the units are not specifically designed for elderly housing, and that they, therefore, do not meet the definition.

Mr. Manahan stated that Mr. Wood had noted that the street ordinances do not apply because entrance would be onto a State road. He stated that Ms. Morabito had stated that she disagreed with that suggestion because all arterial roads in Eliot are State roads, meaning that if all arterial roads were exempt from entrance spacing requirements, there would never be an arterial road subject to that requirement. He stated that Ms. Morabito had specified that the definition of an arterial street as, "a 'major thoroughfare which serves as major trafficways for travel between and through town' with no mention of road ownership," meaning that the 1,000-foot spacing standard applies. Mr. Manahan stated that there was nothing in that language that supported Ms. Pelletier's position that somehow the standard only applies to new roads. He stated that the standard states that all entrances have to be separated by 1,000 feet.

Mr. Manahan stated that Mr. Wood had noted that the stormwater requirements had been met and that Ms. Pelletier had noted that the State looks at that requirement. Mr. Manahan stated that what the ordinance specifies is that surface water runoff shall be minimized and retained on site, if possible or practical, as required by Section 41-213(a). He stated that the Woodard & Curran report makes clear that the applicant did not supply the evidence to show that the Elgin systems will retain stormwater on site because of the level of the ground water. He stated that the PB ignored that. He stated that all of the evidence demonstrates that the water will not be retained on site, which violates the ordinance.

Mr. Manahan stated that it was very clear that the PB ignored testimony that the property meets the requirement in the state subdivision law as an historic site.

Mr. Manahan stated that several comments had been made as to whether the dimensional specifications qualified as required improvements. He stated that the essential question was whether or not the waiver for maximum floor area applies. He stated that the definition of required improvements applies to infrastructure improvements necessary for the construction of a development's site, not the construction of the development itself. He stated that the provision does not apply to dimensional criteria. He stated that dimensional requirements refer to the numerical standards relating to spatial relationships. He added that the 1,200-foot floor area is clearly a numerical standard relating to spatial relationship. He stated that the

ordinance requires that the BOA has the authority to rule regarding dimensional standards.

FINAL TESTIMONY FROM PLANNING BOARD

Ms. Pelletier had no final statement.

OPINIONS OF ASSOCIATE MEMBERS

Mr. Marshall stated that there appeared to be a great deal of interpretation. He stated that there seemed to be confusion as to what constitutes elderly housing. He stated that he qualifies as elderly, but that he does not have a one-story house, grab bars or covered sidewalks. He stated that he thought that there was confusion about the difference between elderly housing and assisted living in a congregate situation, which would include dining halls and other things. He stated that there was some legitimate concern about the water situation on the property. He stated that when he was about 12 years old, his family did haying on that property and that it was dry at the time, but that that was in July and August. He stated that he did suspect that there were some high spots, and that he thought the BOA needed to rely on the soil scientist for being able to pick appropriate sites (for the septic systems).

Mr. Marshall stated that the biggest issue was the waiver of the 1,200-foot maximum floor area. He stated that, other than that issue, he thought that the items were addressable. He stated that the owner of the property wants to use it in a particular way, and he needs to have a right to use his property. He added that he cannot use it in such a way as to offend his neighbors, but that there is a need to be careful to defend the property-owner's rights, which include the ability to use it in most ways. He stated that he was leaning toward denying the appeal.

Mr. Rankie stated that the appellant had itemized 12 clearly written reasons for the appeal. He asked for clarification as to which of those items were within the jurisdiction of the BOA to decide. Chairman Hamilton stated that he would prefer that Mr. Rankie give his comments first. Mr. Rankie stated that land use rights and specific provisions of the elderly units were not relevant. He stated that the subdivision should have been granted only under the strict definition of elderly housing. He stated that, since the subdivision was allowed as elderly housing, a significantly greater density was allowed. He stated that if the subdivision was allowed to be classified as elderly housing, the rest of the rules had to be followed, including size constraints and the need for covered walkways. He stated that in order to be considered elderly housing, the rules have to be

followed because, otherwise, the project would be taking the density advantage without following the ordinance.

PUBLIC HEARING CLOSED

Chairman Hamilton closed the public hearing at 11:00 PM.

DELIBERATIONS

Chairman Hamilton stated that the first order of the deliberations is to list the Findings of Fact. He stated that there were a lot of bases to cover and that he hoped to cover most of them.

FINDINGS OF FACT:

- The appellants are Judith E. Hilt, the Hilt Family Real Estate Trust, Orland G. McPherson, James W. McPherson, and Lynn McPherson.
- The appellants have proven timeliness and standing.
- The owner of the property in the appeal is Barbara Libbey.
- The property is Map 20, Lot 13.
- The property is in the Village and Suburban Zone.
- The majority of the parcel, according to the developer's plot plan, is located in the Suburban Zone.
- The proposed subdivision is called Libbey Common Subdivision.
- The proposed subdivision comprises 21 units situated on 20.4 acres, of which total wetland area located within the subdivision is 6.35 acres, according to the plot plan.
- The authority to review the application by the Board of Appeals is under Sections 45-49(a), Administrative Appeals, Section 41-178, Subdivision Appeals, and 41-69, Division 2 Appeals. The Sections are in the Eliot Code of Ordinances, which were ratified on June 15, 2013.
- The Planning Board case number is PB15-03.
- The subdivision was approved by the Planning Board on December 15, 2015.
- Requirements unique to elderly housing, assisted-living and life-care facilities are under Division 3 in the Eliot Code of Ordinances. The Sections which apply are: Sections 41-310(b), which requires covered sidewalks; Section 41-310(d), which requires a maximum gross floor area of 1200 square feet or less; Section 41-310(e), which requires that the security system be identified on the site plan; and 41-310(f), which requires that the property be served by public water and sewer.

- Section 1 -2 of the ordinances defines an elderly housing unit as a "dwelling unit specifically designed for elderly persons."
- Section 29-3 in the Growth Management Ordinance states that, "Dwelling units in elderly housing, as defined in Section 45-1 of this Code, shall be exempt from the provisions of this chapter."
- Section 41-173 requires that the subdivider "shall secure in writing state or federal review and/or approval of any required improvements before submitting the final plan. The subdivider is solely responsible for identifying and meeting local, state and federal requirements as provided in Section 41-223."
- In Section 41-221, items 1, 2 and 3 require a traffic impact analysis.
- Section 31-223(a) requires that any proposed subdivision, "shall be in conformity with all pertinent local, state, and federal laws."
- Section 41-148 requires that, "Prior to approval of the final subdivision plan, the planning board may require that additional information be submitted or that changes be made to the application, as a result of further study of the subdivision in final form or as a result of new information obtained at a public hearing for the purpose of insuring that all requirements of this chapter shall be met."
- Section 37-69(g) states that, "Entrances onto existing or proposed arterial streets shall not exceed a frequency of one per 1,000 feet of street frontage."
- The Eliot Historical Society report was not considered to disprove the contention that the development would not have an adverse effect on historic sites.
- Under state law, the Board of Appeals is the only board allowed to waive dimensional standards. The Planning Board is not allowed to do so.
- Security systems, under Section 41-310(e) are mentioned for elderly housing units and were not required by the Planning Board of the developer.
- No written explanations by the Planning Board for any waivers granted were listed in their Findings of Fact.
- The appellant never demonstrated the requirement that the elderly housing subdivision was, "operated or financed wholly or partially with state or federal funds," as required in Section 1-2, Definitions.
- If determined that the proposed units are not elderly housing units, the current plan would exceed the requirements of the ordinance in the Suburban Zone.
- A second public hearing was not held by the Planning Board to review new information received after the preliminary plan was approved.
- Required improvements are not dimensional standards.
- It was testified that the Fair Housing Act required by federal law needs to be met.
- Section 45-5 in the Zoning chapter, Conflict with Other Provisions, states that, "Whenever the requirements of this chapter and any other ordinances, code or statute conflict, the more restrictive requirements shall apply."

- Section 45-7, Compliance, states that, where this chapter imposes greater restriction upon the use of land, buildings, or structures, the provisions of this chapter shall control.
- Definitions from Section 1-2 applicable to the appeal are:

    1. *Elderly housing* means housing units constructed or operated as part of a life care facility or housing units constructed, operated or financed wholly or partially with state or federal funds. Elderly persons or handicapped persons shall occupy the housing units. The state or federal funding program must have received the approval of the United States Department of Housing and Urban Development as one designed and operated to assist elderly persons.

    2. *Elderly housing dwelling unit* means a dwelling unit specifically designed for elderly persons.

    3. *Elderly person* means a person 55 years of age or older or a couple that constitutes a household and at least one of whom is 55 years or older at the time of entry into the facility.

    4. *Required improvements* means the infrastructure improvements necessary for the construction of a development, including street grading, street surfacing, storm drainage, utilities, landscaping and any other site improvements required by the planning board in approving a site plan or subdivision plan.

MOTION

Mr. Cieleszko moved, seconded by Mr. Billipp, to grant the appeal and listed areas of concern to be included. Mr. Cieleszko itemized a number of areas in which he thought that the PB had erred in a few aspects of the proposal, including the spacing between roads, the waiving of floor area, and the units not meeting the definition of elderly housing.

Mr. Billipp stated that there were two more areas in which he felt that the PB had not followed the ordinances to the letter. He stated that his first concern was that the PB had not required the necessary proof of state or federal review before granting the final approval. He stated that, even though it had been testified that applications can linger in a government office and so site plan approval is granted with the condition that the permits be secured, that is not the way it should be done. He stated that he thought the PB erred in that area. He stated that the second concern was that he also thought that the PB overlooked information which was provided to them regarding a historic site and erred in their judgment not to consider that information. He stated that he agreed that

the PB misinterpreted the Code by granting a waiver for floor area from 1,200 to 1,500 feet.

Chairman Hamilton stated that he concurred that the PB did not consider the Historical Society report, even though the Society's letter of December 14, 2015, testified that the report was unanimously approved by the members.

Mr. Cieleszko stated that the BOA could nit-pick the issues, but that the important aspect of an administrative appeal is to find that an action has been clearly contrary to the ordinance.

Ms. Ross stated that, given that the appeal may continue on to court, it would be best to have a motion for the entire appeal as it was made. She stated that the BOA could then look at each item individually during deliberations.

Mr. Cieleszko moved, seconded by Mr. Billipp, to withdraw the motion. All voted in favor.

Mr. Cieleszko moved, seconded by Mr. Billipp, to grant the appeal because the decisions of the Planning Board were clearly contrary to the Code.

DISCUSSION

Mr. Cieleszko stated that some of the issues are differing opinions. He stated that the definition of elderly housing units clearly requires the design to be specifically for elderly. He stated that the PB did not look at it that way. He stated that there had been no testimony before the PB or the BOA indicating that anybody looked at whether or not there was anything in the design that was specific to the elderly.

Mr. Cieleszko stated that the PB had made many prior decisions in which they agreed that the entrances cannot be crowded by being less than 1,000 feet apart. He stated that now it appeared that the PB had changed their interpretation to mean that no two entrances to the same project can be closer together than 1,000 feet. Mr. Billipp stated that that seemed to be one area on which reasonable people could disagree, and that the engineer had made a good case to interpret it the second way. Mr. Cieleszko stated that allowing that interpretation would be setting a bad precedent, and that the issue has been a pet peeve of his forever.

Mr. Cieleszko stated that the third error by the PB was to grant a waiver to the maximum of 1,200 square feet of floor area. He stated that allowing 1,500 square feet of floor area would indicate that the units are not designed as elderly housing units.

Ms. Lemire stated that the only issue that she was struggling with was the maximum of 1,200 square feet of floor area. She noted that it had been stated that required improvements would apply to that waiver, and that that did not make sense to her. She stated that the reason why it bothered her was that the language states, "...any other site improvements required by the Planning Board." She stated that the increase in floor area had not been required by the PB, but had instead been requested by the applicant.

Mr. Billipp stated that the three areas of concern to him were whether the units qualified as elderly housing, the lack of consideration regarding historic sites, and the distance between street entrances.

Mr. Cutting stated that the units did not meet the definition of elderly housing in the Town of Eliot Municipal Code of Ordinances, and that the square footage should not have been increased.

Chairman Hamilton stated that the PB did not give the definition of elderly housing much consideration. He stated that he could see the argument on both sides of the issue regarding the proximity of street entrances. He stated that the requirement in Section 41-173 for the subdivider to, "secure in writing state or federal review and/or approval of any required improvements before submitting the final plan," could not be any clearer. He stated that he felt that the Eliot Historical Society was basically disregarded, in spite of the number of hours spent on the report. He stated that the PB deemed the report as representing one individual, in spite of supporting letters from the developer's engineer noting that the report was approved by the entire Historical Society. He stated that he agreed with the MMA that the BOA is the only board in the State of Maine with the authority to grant a waiver to the maximum floor area requirement.

Chairman Hamilton stated that, of the five requirements for elderly housing, the PB had discounted four, including covered sidewalks, a 1,200 maximum square footage, identification of a security system, and connection to public sewer. Mr. Billipp stated that there are different levels of elderly housing. Chairman Hamilton disagreed. Mr. Billipp stated that, once the PB understood that the development was for people age 55 and older only, some of the requirements do not apply. He stated that he thought that the PB had determined that they could reasonably waive some of the requirements. He stated that the development is not one, large building with nursing units.

Mr. Cutting stated that if the subdivision was not for elderly housing, there would be no available building permits. Chairman Hamilton stated that the application for the elderly exemption gives huge benefits. He stated that his biggest concern was that there was no written justification for the granting of the waivers.

Mr. Billipp asked if there was a need for a unanimous vote on each of the areas in which the BOA members found fault. Chairman Hamilton stated that he thought the appeal

could be either approved or denied, with the comments on the record. He stated that he did not think the BOA had to specifically eliminate specific areas.

Mr. Parkinson stated that he objected, and that he thought each item should be voted on.

Mr. Cieleszko suggested getting an opinion from the Town attorney as to how to proceed with the decision.

Mr. Saucier stated that he thought that the BOA should have articulated reasons regarding whether the appeal was granted or denied. He suggested reviewing each item of the appeal to determine which ones had the majority votes in favor. He stated that the ordinance states that in order for the appeal to be granted, the appealed action would have to be clearly contrary to the provisions of the ordinance. He stated that those provisions needed to be clear.

Chairman Hamilton asked for a vote on each item of the appeal. The votes on the validity of each appeal section were as follows:

1. The development is not elderly housing dwelling units. Mr. Cieleszko and Mr. Cutting voted in favor. Chairman Hamilton concurred.
2. Street entrances are too close together. Mr. Cieleszko voted in favor.
3. Main Site Law approval is needed. Mr. Billipp voted in favor.
4. Storm water requirements were not met. There were no votes in favor.
5. The development will have an undue adverse effect on historic sites. Mr. Cieleszko and Mr. Billipp voted in favor. Chairman Hamilton concurred.
6. The applicant failed to provide the required traffic analysis. There were no votes in favor.
7. The Planning Board should not have granted a waiver from the maximum floor area requirement. Mr. Cieleszko, Mr. Billipp and Mr. Cutting voted in favor.
8. The plan did not identify the security system. Mr. Cutting voted in favor.
9. The Planning Board should not have granted a waiver from the public sewer requirement. There were no votes in favor.
10. The development does not meet the minimum lot size requirement. There were no votes in favor.
11. The development does not meet the requirements to allow multiple structures on one lot. There was no vote in favor.
12. The development does not meet the requirement that sewage disposal systems must be located in areas of suitable soil of at least 1,000 square feet. There were no votes in favor.

The sections of the appeal determined to be valid were: the subdivision did not meet the definition of elderly housing; the Planning Board did not consider evidence of an undue adverse effect on a historical site; and the Planning Board did not have

jurisdiction to waive the maximum floor area requirement for elderly housing. The second consideration was that the floor area requirement could not be waived because it was not an infrastructure improvement, and that it would require a variance.

MOTION

The motion to grant the administrative appeal against the Planning Board's decision to approve the subdivision passed by a vote of 3:1. Mr. Cieleszko, Mr. Billipp and Mr. Cutting were in favor of granting the motion. Ms. Lemire was opposed.

Chairman Hamilton stated that a Notice of Decision would be sent to the appellant within seven days and that there were 45 days to appeal the decision.

APPROVAL OF MINUTES

Ms. Lemire, seconded by Mr. Billipp, moved to accept the minutes of December 17, 2015, as amended. All voted in favor.

AJOURNMENT

The meeting was adjourned at 11:41 PM.

Respectfully Submitted,
Linda Keeffe
Recording Secretary

Approved by: S/ Bill Hamilton, Chairman

Date Approved: February 18, 2016