

APPROVED

TOWN OF ELIOT
BOARD OF APPEALS REGULAR MEETING
MAY 18, 2017

1. 7:00 p.m.: Roll Call

Present: Chairman Bill Hamilton; Vice-Chair Peter Billipp; Secretary Ellen Lemire; Charles Rankie; Jeffrey Cutting; John Marshall, Alternate. Also present was Heather Ross, Code Enforcement Officer and Barbara Boggiano, Recording Secretary, as well as others.

Excused Absent: Kate Hanson, Alternate

Chairman Hamilton called the meeting to order at 7:00 p.m. and introduced the members of the Board. He said tonight the Board has a request for reconsideration of the vote taken at the last meeting. He said the request for reconsideration was filed within the 10-day timeframe as outlined in the ordinance.

Chairman Hamilton said he spoke with the Town Attorney and the Board needs to do a couple of things. First, the Board needs to decide if they are willing to reconsider its previous action and, in doing that, they will need to take a vote. He said after there is a motion and a vote taken to reconsider and it carries, the Board will have to return to the original issue that the Board voted on, which is the issue of whether or not the appellant has standing. He said the vote was 3-2 that the appellant did not have standing and the appellant has asked for a reconsideration.

Chairman Hamilton said the first item the Board needs to discuss is the request for reconsideration, which we will vote on, and if that is approved, the Board will go to the issue of standing and vote on that, and if that is approved, the Board would go to the matter at hand, which is the appeal. He said that, before he opens the public hearing, he would have to determine if timeliness and standing have been met. He said he never addressed the appeal at the public hearing because he did not open the public hearing. He said that, if the standing issue is allowed this time, they will revert back to the initial application. He wanted to know if everyone was clear on that.

Mr. Rankie said where he lacks clarity is in the original appeal they were presented with, on April 20th, was an appeal of the Code Enforcement Officer's decision to grant the business as a continuing business, so there was not any issue. He said tonight's paperwork for the May 18th appeal says the appeal is to the hours of operation and not to the fact that it is open. He wanted to know what the Board will be looking at, at this point.

Chairman Hamilton replied that Mr. Rankie was getting way ahead, and, depending on the voting, to hold his question until they get to that point.

Mr. Rankie wanted to know, relative to the Town ordinance, do they follow the guidelines given to us by the Town Ordinance?

Chairman Hamilton asked as far as reconsideration.

Mr. Rankie said the ordinance dictates that the only way the Board of Appeals can reconsider the request is that one of the three who voted against it could open it up.

Chairman Hamilton said, as far as reconsideration, this was not brought up by the Town Attorney. He said he was more concerned with timeliness and standing. He said they will have to vote to approve or deny the request, then the Board will address the issue of standing, and then the issue of the appeal. He said he sees three issues in contention occurring.

Chairman Hamilton said first, they do have a copy of the ordinance which governs municipal boards, commissions and committees, and Item 12 in that document signed April 24, 2014 by the Board of Selectmen, paragraph 12 reads: "If not otherwise dictated by law or ordinance, a motion to reconsider a prior action of the board must be made by a member who had voted in the majority on that action. The second to that motion may be by any member who participated in the original voting. A vote to reconsider must be timely and thus must be taken up no later than the end of the next regularly scheduled meeting and completed, if reconsidered, by the end of the following regular meeting. If a vote to reconsider is passed the board may, at its pleasure, take additional testimony during their deliberation. Motions to reconsider and reconsideration may take place at special meetings if such occur within the above time interval."

Chairman Hamilton said the Town Board of Appeals has a set of by-laws they approved, which were submitted to the Board of Selectmen, for their review, that were revised on 8-8-16 to conform with the new charter, which was adopted. He said they also have a copy of the prior Board of Appeals by-laws, effective 2-18-10, which never changed Article #9. Chairman Hamilton read: "the Board may reconsider under this section within 45 days of its prior decision, and the request must be filed within 10 days. The vote to reconsider and action taken must be completed within 45 days of the date of the vote of the original decision. The Board may conduct additional hearings or receive additional testimony as provided in this subsection, only if: (1) the record contains significant factual errors due to fraud or mistake regarding the facts upon which its decision was based; (2) the Board misinterpreted the ordinance, followed improper procedures or acted beyond its jurisdiction or (3) if a second application for a variance on property was previously denied is substantially different from the previous one."

Chairman Hamilton said the Board has additional criteria to enable us to make a decision whether or not to reconsider and the third is the MMA manual.

Chairman Hamilton said this manual also provides town boards with guidelines, under Standards of Review, Sec. 4, Appeals, Reconsideration by Board of Appeals. He said it is fairly lengthy, and cites a number of legal cases, but essentially the request for reconsideration received by the Board must be voted on at a public, advertised meeting whether it will entertain the request or deny it. He said this applies to all boards in the Town of Eliot, even though it does not directly state or mention the request to reconsider to the Board.

Chairman Hamilton said his understanding of the ordinance is that the Board should follow that procedure to allow the prevailing members who voted against the issue, and asked whether or not they will reconsider their vote and if they are willing to make a motion.

Mr. Marshall said regarding "A" General Provisions of our bylaws then we can discuss, but he believes as far as the prevailing side, on the reconsideration, would be governed by Robert's Rules of Order, the charter and then the ordinances. He said the standard operating procedure for all boards everywhere is to follow Robert's Rules of Order.

Mr. Rankie said the ordinance takes hierarchy over our by-laws.

Chairman Hamilton said he is not sure that is the case.

Mr. Rankie said what he is hearing is our by-laws are more specific as far as reconsideration. He said he is not hearing a conflict.

Chairman Hamilton said it is not in our by-laws, but specifically spelled out in the ordinance and in Robert's Rules of Order. He said before we do that, the Board needs to make a motion for general discussion.

Chairman Hamilton said this is coming from the appellant and it's not like we had second thoughts. He said the Board owed it to the appellant before we make a motion, so that it is not coming from us, like we changed our minds. He thought it would be useful to have a discussion before they make a motion. He said it seems that the applicant's request for reconsideration is reasonable.

Mr. Marshall asked if we need a motion before we have the discussion.

Chairman Hamilton replied it would be useful to have a discussion before there is a motion.

Mr. Rankie said that as he understands the guidelines, if there is a motion and it prevails to reconsider, that does not mean they reconsider.

Chairman Hamilton said that is correct.

Mr. Rankie then wanted to know that our questions of standing, if it's changed, is what we would be discussing.

Chairman Hamilton replied yes, if that prevails, then we go to the original issue of standing, and then if that is approved, we would address the appeal.

Mr. Rankie said with that understanding, he would make a motion.

Mr. Rankie moved that the Board of Appeals reconsider its decision at its April 20th meeting, as requested by Karen Norton, seconded by Ellen Lemire.

Chairman Hamilton said the appellant wrote the letter to them and asked that they look at the starting point. He read Ms. Norton's letter:

"Dear Board of Appeals:

I am respectfully requesting reconsideration of your previous decision that I did not qualify as an aggrieved party. I believe the Board may have focused on the too many different things which were in play that night. I apologize if my letter or presentation confused you. In fact, I believe that I am an aggrieved party and hope to have you hear the case again. This letter attempts to more clearly lay out the core issue.

I am claiming to be an aggrieved party due to unequal treatment and regulation of two comparable businesses in the same neighborhood that compete with each other. One of the businesses was previously made to limit their hours of operation (and several other conditions)

by the Eliot Planning Board. The other garage located at 294 Pleasant Street claims to have never been subject to limits of operational hours. The Town's position appears to be that he is therefore grandfathered without need for limited hours of operation. They consider this business to simply be a continuation of use.

We had leased the property for some two to three years, but did not use it for business use, it was limited to residential and personal use. Both my son, Daniel, and the prior garage owner-operator were contacted on several occasions by town officials for "working too late." I contend therefore that some limitation of hours must have been in place at this location (294 Pleasant) and should again be applied. If the defense of this situation is that they are grandfathered without limitations, then why the calls from town officials for "working too late"? If they are grandfathered then it is WITH a limitation of hours as were the past two owners.

We have no issue with the other garage's existence, but they should be subject to regulatory review, parking limitations, hours of operation, lighting, signage and all other considerations that were applied to our property when we were forced to go through the Planning Board review. If fitting into and not bothering a residential zone was important when we came to the Town, I contend it must still be important when a near replica garage opens in the same neighborhood.

*Sincerely,
Karen Richards"*

Chairman Hamilton said this letter was submitted by the appellant, with the request for reconsideration.

Chairman Hamilton asked the appellant if her name is "Richards" or "Norton"? She replied it is "Richards-Norton."

Mr. Marshall asked if they had made a motion.

Chairman Hamilton said he has not opened the public hearing yet and that the Board is just deliberating.

Chairman Hamilton said there are two comparable businesses that compete with each other, but the appellant claims the other garage has never been subjected to limited hours of operation, and they feel it's a continuous use. He said they say they have no issue with the other garage, but it should be subject to parking regulations, lighting, and all the other conditions they were subjected to.

Chairman Hamilton asked if there was any more discussion.

Mr. Billipp said he would like to echo Mr. Rankie's comment, since the applicant has come back a second time, he would be in favor of re-hearing her request, just because they can get to the bottom of this issue. He said he did not know where it's going, but he wanted to be fair and "put our cards on the table."

Mr. Cutting said he would say the same thing and that if she had her attorney here, he thought she could articulate the process, but she is trying to explain her position. He said we should hear the facts.

Mr. Rankie said if she has a significant difference whereas the applicant is approaching the Board as a competing business, and we talked about the standing issue the last time, and it wasn't abutting this property, this is a whole different view and procedure and he would agree with Mr. Billipp.

Vote was taken 5-0, five in the affirmative, none opposed, to reconsider the Board's vote from the last meeting. Motion carries.

Chairman Hamilton said now that the Board voted to reconsider, next, they will need to make a motion on standing, which is in front of the Board.

Mr. Billipp wanted to know should they be looking at all that was submitted, since this is an appellant review, or are they looking at her letter of April 27th, requesting the appeal.

Chairman Hamilton said not at this point. He said they have to vote to look at it from the issue of standing.

Mr. Cutting asked if the public hearing was open. Chairman Hamilton replied not at this point.

Mr. Marshall asked if the Board was reconsidering the standing issue.

Chairman Hamilton responded yes. He said if they grant the appellant standing, then he will open the public hearing on the application.

Chairman Hamilton read from the MMA manual, the test for standing: "When a person can demonstrate that he or she has suffered or will suffer a "particularized injury" as a result of a decision by the planning board or CEO, he/she has met one part of the general test for "standing" to file an appeal with the board of appeals, if the board has jurisdiction to hear the appeal by ordinance or state. To meet the "particularized injury" test, the person must show how his or her actual use or enjoyment of the property will be adversely affected by the proposed project or must be able to show some other personal interest which will be directly affected which is different from that suffered by the general public."

Chairman Hamilton said that the Maine Municipal Association has given us this for a guideline. He said the key point – as he sees it – is the fact that the direct and particularized injury test is that the person will be directly affected differently from that of the general public.

Chairman Hamilton gave an example: if you don't like a project, and you drive by it every day, if you can prove that you have suffered differently from that of the general public than you can meet the particularized injury test for standing, but that has to be determined. He said other people drive by, so you have to show how you are directly affected.

Mr. Billipp read Sec. 45-50, appeal procedure, that "standing is determined on whether the aggrieved person or party is: (1) the owner of the land directly or indirectly affected by the granting or denial of a permit, variance, waiver or administrative appeal or (2) a person whose land abuts land for which a permit, variance, waiver or appeal has been granted," and he did not think that is the case. He said there are two garages that are separated by roughly 2100 ft. "or (3) a group of five or more residents or taxpayers of the town who represent an interest adverse to the granting or denial of such permit, variance, waiver or appeal" and the Board does not have that.

Mr. Billipp thought the Board has to look at number 1, and asked if there was a permit granted. He said they have a letter from the Code Enforcement Officer, and wanted to know if that qualifies as a permit.

Chairman Hamilton responded there does not have to be a permit, it has to be a decision or an action taken by the CEO or Planning Board. He said this particular appellant's letter was written

to the current lessee saying the property is grandfathered, and that Karen Richards-Norton letter is regarding the Planning Board's action and she believes that the injury is fairness in applying the ordinances. He said it is not just a competing business.

Mr. Billipp said the Board has a Notice of Decision letter to Karen Norton from (Heather Ross) the Code Enforcement Officer.

Ms. Lemire said that Sec. 45-49 addresses that "the Board of Appeals shall hear and decide where an aggrieved person or party alleges error in any permit, order, requirement, or other action by the Planning Board or Code Enforcement Officer."

Mr. Billipp thought that this is under the jurisdiction of the Board of Appeals and they have to determine whether or not to grant the appellant standing.

Mr. Rankie said, with respect to the standing issue, he sees that as separate and wanted to know what can they possibly do with this. He said it's not clear, but he sees she has standing and because it is a competing business, it does affect her, now that they have been asked to look at this letter.

Chairman Hamilton said they are not at that point yet. He said they have to decide whether or not the applicant has standing, and if the particularized injury is different from anyone else's.

Mr. Cutting said what he sees, is when they ran the business, they operated out of one structure, and operated under those hours, but someone had changed that and they are indirectly affected because things changed.

Ms. Ross said the provisions in effect are the same ones that were in effect then.

Mr. Billipp said her particularized injury is that it is different because, when they operated the business, they had a disadvantage; she believes the hours of operation are different.

Chairman Hamilton said they have no knowledge of that case and they have no testimony. He said they have not granted standing, but her particularized injury is different from everyone else who operated a competitive business because they had set hours of operation.

Chairman Hamilton said the appellant, Karen Norton, followed a certain set of rules but they are not being followed by the current lessee, and that is how she sees it, fairness in applying the ordinances.

Mr. Rankie said the way that Chairman Hamilton sees it is part of the appeal.

Chairman Hamilton initially responded no, but then he said he saw Mr. Rankie's point.

Ms. Lemire said it is not something she would have thought of.

Chairman Hamilton said that is the particularized injury.

Ms. Lemire said but it is not the decision by the Code Enforcement Officer.

Chairman Hamilton said the appellant feels she has not been treated fairly and the code is not being applied equally and that is the particularized injury, not the competition.

Mr. Rankie said they are not saying they agree with it at this point.

Chairman Hamilton said that is correct.

Mr. Rankie said he feels she has standing because she is in a competing business.

Chairman Hamilton said they need to make a motion to grant standing.

Mr. Billipp moved that the Board of Appeals agrees that the appellant has standing, seconded by Mr. Cutting.

Ms. Lemire said she is still confused because it is not part of their ordinance – and the Board has to decide standing, based on the decision or action of the CEO.

Chairman Hamilton said no, it has nothing to do with the appeal because they did not listen to the appeal. He said the appellant comes before the Board and they have to determine standing to the present appeal. He said if she did not do it in a timely manner, then they would not listen to the appeal. He said these are procedural things, timeliness and standing, and he cannot open the public hearing unless they have been met.

Mr. Marshall asked if he could ask Ms. Ross a question.

Chairman Hamilton asked if it had to do with the issue of standing. Mr. Marshall replied it did not—as they are dealing with the issue of standing.

Chairman Hamilton stated then he wished he would not. He said by the way, the voting members for tonight's hearing are the five regular Board members.

Ms. Lemire read: "when a person can demonstrate that he or she will suffer as a result of the decision of the Planning Board or Code Enforcement Officer."

Mr. Rankie asked if Ms. Lemire was reading from the MMA manual.

Ms. Lemire replied yes.

Mr. Rankie read from the ordinance, "standing is determined on whether the aggrieved party is: (1) the owner of the land directly or indirectly affected by the granting or denial of a permit, waiver or administrative appeal, (2) a person who abuts the land or 3) a group of five or more residents or taxpayers who represent an interest in the approval or denial of the waiver, permit or appeal. He said that is our ordinance, not the MMA ruling, which is stronger.

Mr. Rankie said he will go back to what Mr. Billipp said, that the appellant explained it is a competing business which is directly affected that gives her standing.

Vote was taken and granted, 4-1, four in the affirmative, with one abstention (Ellen Lemire). Motion carries.

Chairman Hamilton opened the public hearing at 7:45 p.m. and said the appellant has met both issues.

2. PUBLIC HEARING:

A. Karen Norton, 455 Main Street, requesting a reconsideration of a decision by the Board of Appeals at its April 20, 2017 meeting regarding property located on Tax Map 3, Lot 26.

Chairman Hamilton read the public hearing notice. He said the voting members will be the five regular members. He outlined the procedure he would follow for the public hearing. He asked if any of the voting members had a conflict of interest.

Mr. Billipp replied, as he stated at the last meeting, that he is a real estate broker in Maine, and was the listing agent two years ago, when this property was listed at 294 Pleasant Street, but it did not sell, and he feels he does not have any conflict of interest.

Chairman Hamilton stated, that he, as well as the Board members, felt that Mr. Billipp did not have a conflict of interest.

Chairman Hamilton said he would determine the parties to the action, which are the appellant and the Code Enforcement Officer, and he would then ask the appellant to state her case, followed by questions by the Board to the appellant and the Board will ask the CEO for her testimony and the Board will ask questions of the Code Enforcement Officer.

Chairman Hamilton said at that time, he will open it up to any abutters for their testimony, and, once all the testimony has been received, he will ask the appellant if she would like to offer a rebuttal to the comments.

Chairman Hamilton said everyone will have an opportunity to ask questions relative to the appeal and there will not be any more testimony once he closes the public hearing. He said the Board will try to deliberate tonight and within seven days he will issue a Notice of Decision to the appellant, and the appellant will have 45 days in which to appeal the decision to Superior Court.

Chairman Hamilton said he would like to hear from the appellant, asked that she state her name and address.

Karen Richards-Norton, Cross Street, said she is coming before the Board because the problem she has with this property is it is not grandfathered and should have had some stipulations because it directly affects our business. She said it is less than a half mile away.

Ms. Richards-Norton said for one business to have restrictions and the other one coming in doesn't, leaves her dead-ended. She said there is a wide-open path on the other side that they can do whatever they want.

Ms. Richards-Norton said to look at the marina which is grandfathered, and that grew and now has boat storage. She said if that business grows that much, and there are no restrictions, or guidelines she can follow, how can she keep up.

Ms. Richards-Norton said this directly affects her ability to stay in this town and she cannot stay without employment at the garage we started. She said if this other business does everything, she has no choice but to leave. She thought she should not be pushed out by discrimination allowing a business to come in and do anything they want.

Ms. Richards-Norton said they had the property and paid the rent and only used it for storage. She said the Town told them they have to work on their own vehicles during business hours, which was another restriction and they could not use the garage for our own personal use.

Ms. Richards-Norton said to have that many restrictions makes it very hard and it's not fair. She said to allow one business with no restrictions and no regulations makes it hard. She said when there was a fire it was more than a year before it was open again and they did not run a business out of it.

Ms. Richards-Norton wanted to know how the property could be considered grandfathered when there was no business out of it.

Ms. Richards-Norton said she cannot go before the Board and request an increase of hours. She wanted to know, if it is a previous business, then it should have hours of operation and the last two years there has been no business out of it.

Ms. Richards-Norton said she had paperwork to purchase the property and that Joann was working with us on the finance end and they had the lease taken out from under us. She said she does not know what else she could tell the Board, other than it's been very difficult for them. She thanked the Board.

Mr. Cutting said the appellant mentioned the garage burned and wanted to know if Ms. Richards-Norton had any documentation and how long was it out of service?

Ms. Richards-Norton answered she did not. She said it did not have any business due to a lot of structural damage. She said for a period of time Ron Millett was in there. She said she could research, but it was not closed more than a year.

Mr. Cutting asked was it used afterward as a business.

Ms. Richards-Norton responded yes.

Mr. Cutting wanted to know after Joe, how long did the appellant rent it.

Ms. Richards-Norton replied three years.

Mr. Cutting wanted to confirm that it was over three years and there was no retail use, per se.

Ms. Richards-Norton replied right.

Chairman Hamilton asked if she could specify those dates where there was no retail activity.

Ms. Richards-Norton replied the second lease was signed October 6, 2015, the first one May 1st, 2014 and John Pierce went out on June 3rd, 2013.

Mr. Cutting asked the appellant if from June 2013 it stayed vacant until they leased it.

Mr. Billipp said the dates we are talking about are in the letter from the Code Enforcement Officer in our packet, who has given us a timeline.

Ms. Richards-Norton said in her original letter to them, the CEO did not discuss the fire.

Chairman Hamilton said that John (Pierce) died on June 3, 2013.

Ms. Richards-Norton said she did not know that for sure if that was the date of the lease or when he left.

Chairman Hamilton asked the appellant if they went into that property on May 1st, 2014. Ms. Richards-Norton replied right, May 1st.

Chairman Hamilton asked from June 3rd, 2013, when John Pierce died, until May 1st, when you went into the property, it was not being run as a garage.

Ms. Richards-Norton replied from whenever he died, and she was not sure of the date.

Chairman Hamilton wanted to know if there was any commercial activity from May 2014 until October 2016.

Ms. Richards-Norton answered it was not her business at that point.

Chairman Hamilton asked whose was it.

Ms. Richards-Norton responded Dan's.

Chairman Hamilton said, on July 12, 2016, according to the CEO, 294 Pleasant Street was a commercial business at this location.

Mr. Cutting said it was over two years.

Chairman Hamilton said as of May 1st, when the appellant claimed they signed the lease, they did not use it as a garage, even though the lease agreement said that they shall.

Ms. Richards-Norton said shall.

Chairman Hamilton asked from May 1st, 2014 until July 12, 2016, about two years, if he was correct that what she (the appellant) is saying it was not operated as a commercial enterprise.

Ms. Richards-Norton replied correct.

Chairman Hamilton said even though the lease agreement said it should be.

Mr. Billipp said the lease said that it shall be, even though they did not.

Chairman Hamilton asked if there were any questions to the appellant.

Mr. Rankie said, referencing the April 27 letter, says that the "town officials on several occasions notified Dana at this location, that he was working too late." He said his question to the appellant is: does she have any documentation.

Ms. Richards-Norton responded no, they made phone calls to Dana. She said Dan was working there.

Mr. Billipp asked are we considering anything in the April 27th letter.

Chairman Hamilton responded yes.

Mr. Billipp said it occurred after the date.

Chairman Hamilton said they are considering it testimony as it refers to the original application.

Mr. Rankie said the presentation of the letter clarified, for him, the interpretation of standing.
Ms. Lemire asked in July 2016, who was using the building.

Ms. Richards-Norton replied just Daniel.

Ms. Lemire asked when Karen Richards-Norton stopped using it.

Ms. Richards-Norton responded they never stopped using it, but Dan wanted to work on the corner. She said Dana never put that through to work on the corner, but that was at the time her mother was dying and she and Dan had an argument. She said she told Dan that if he wanted to have the garage, fine, she would make it happen and told him to just go. She said Dana was away and that she could not balance things at that time.

Chairman Hamilton asked what date was that.

Ms. Richards-Norton replied it was in July, and that her mother died in August, 2014.

Mr. Rankie said that she had stated they were involved in financing to purchase the property.

Ms. Richards-Norton replied yes, but Joann got a promotion and she was going on the road, so she assigned their paperwork to another fellow in the office, and then his position changed. She said she lost 6 weeks of paperwork, and that the personnel in the office changed their positions.

Ms. Richards-Norton said that Joann was originally going to oversee this but now she travels up and down the State and doesn't have an office in Kittery any more.

Mr. Rankie asked was it your intent as a commercial endeavor.

Ms. Richards-Norton replied yes.

Mr. Billipp asked if the applicant could tell us how many written leases have you had for the property.

Ms. Richards-Norton said she thought it was three, but this paper says two.

Mr. Billipp asked if the last one, the current one, is still in effect, or when did that terminate.

Ms. Richards-Norton answered that they were going month-to-month while the paperwork was being processed at the bank, so it lapsed by three months. She said they never got a notice.

Mr. Billipp asked if the appellant could give them a date.

Ms. Richards-Norton replied in October 2016.

Mr. Billipp said in October, 2016, the lease was signed by Dana.

Mr. Billipp said up until October you and Dana still had a lease and the lease terminated in October 2016.

Ms. Richards said right.

Mr. Billipp said in October 2016, when the lease terminated, when did Pleasant Street open and did Daniel have a lease. He asked if Daniel is the appellant's son.

Ms. Richards-Norton replied yes, he is her son.

Mr. Billipp wanted to know when Daniel signed the lease.

Ms. Richards-Norton said that Dan had signed the lease in January, 2017, but it was run on whatever lease he had.

Mr. Billipp said it was the same lease.

Ms. Richards-Norton said she guessed so.

Mr. Billipp said it would have been a new person, so a new lease and that she was not on the lease.

Ms. Richards-Norton said no, it was leased out from under us.

Mr. Billipp said in January 2017, there is a new lease with a different party and Sec. 6 of the lease agreement repeated the same language of the previous lease. He said the language is consistent, whether or not the same activities are going on, and that it was approved by the owner, anyway, for an automobile repair garage.

Mr. Cutting said it was leased as a repair garage.

Mr. Billipp said they were repairing their personal cars.

Mr. Cutting said then it is a hobby, not retail.

Ms. Lemire said it is commercial.

Ms. Lemire questioned the appellant why they took out a commercial lease when they had no intention of using the property as a commercial endeavor.

Ms. Richard- Norton replied to prevent someone else going in there and wiping us out.

Chairman Hamilton asked if anyone else had any questions.

Mr. Billipp asked if the appellant, or perhaps the CEO, has copies of the leases that they could look at.

Ms. Ross responded she has.

Mr. Billipp said perhaps in her testimony, she could let the Board see them.

Chairman Hamilton said no one is disputing that a commercial lease was issued with the same terms, at least the last two leases.

Mr. Cutting said there is a lease for a grandfathered business, and it was not used as a retail business in a year, then the 12 months resets itself and moves forward.

Mr. Cutting said if it does not continue as a retail use, and the business starts up, the grandfathered status falls off at the end of the year it started. He said that is his point and he did not know if the records indicated that. He felt it is still a grandfathered business.

Chairman Hamilton said it was a commercial lease.

Mr. Cutting said they chose not to run it as a commercial business.

Mr. Rankie said the commercial lease is on the business being run as a commercial operation. He said they were looking for a commercial mortgage.

Chairman Hamilton said before the Board has this discussion, the questions are for the appellant at this point.

Chairman Hamilton said hearing none, he asked the CEO for her input.

Ms. Ross said this is a non-conforming lot with a non-conforming use located in the Village Zoning District. This past February, Ms. Norton filed a complaint stating that the use of the property located at 294 Pleasant Street had not been continuous, and that the non-conforming use had lapsed for a period longer than one year. Upon review of the complaint regarding the property, I found the following:

"On June 3rd, 2013 John Pierce, who ran "Joe's Garage" an auto repair garage, died. On May 1, 2014 Dana signed a commercial lease agreement for use of the property. Section 6 of the lease agreement stated: "the lessee shall use the premises as an automobile repair garage. The premise is currently allowed to be utilized by the Town of Eliot as an automobile repair garage as a pre-existing non-conforming use, it is therefore mandatory that lessee continues to utilize the premises as an automobile repair garage."

Chairman Hamilton asked Ms. Ross to repeat the last sentence which she did. Ms. Ross said after that, Dana Norton approached Kate Pelletier, and five days later, Kate issued a letter to Mr. Norton, stating that the existing non-conforming use would be allowed to continue *"so long as the use isn't expanded in area or function and the volume of business and/or range of goods and services provided is not increased from that of the previous operation."*

Ms. Ross said the copy of that letter is in your packet. She said that on October 16, 2015, Dana Norton signed another commercial lease for the use of the property and Section 6 repeated the language from the previous lease agreement. She said from her research, she determined that Dana Norton's intent was to continue the non-conforming use of the property, based on his letter requesting that, and she had no evidence otherwise. She said that on or about July 12, 2016, the Pleasant Street Garage commenced business at that location. She said that the lease agreement was signed for a year and it would have still been in effect.

Ms. Ross said that on January 17, 2017, Daniel Richards signed a commercial lease agreement for use of this property and Section 6 of the lease agreement repeated the language of the previous lease agreements for the property.

Ms. Ross said that Sec. 45-193 of the Town of Eliot Code of Ordinances, states: “(a) A non-conforming use which is discontinued for a period of one year may not be resumed. The uses of the land, building or structure shall thereafter conform to the provisions of this chapter,” and (c) “Ownership of land and structures which remain lawful but become non-conforming by the adoption or amendment of this chapter may be transferred, and the new owner may continue the nonconforming characteristics or uses subject to the provisions of this chapter.”

Ms. Ross said, upon reviewing the property, she found that 294 Pleasant Street has been continuously leased and used as an auto repair garage because the leases had been signed stating that they will continue the use and because of Dana's previous inquiry.

Ms. Ross said historic evidence did not indicate that the use had been discontinued for a period of one year, therefore she did not find any violation on the property.

Ms. Ross said she also made a finding that an automobile garage is permitted to continue on that property so long as the use is not expanded in area or function and that the volume of business and/or range of goods and services provided is not increased from that of the previous operation. She said she repeated the same language in a letter to Dana Norton.

Ms. Ross said that on March 23rd, Ms. Norton filed an administrative appeal, which states that “there is an error made in the granting of a permit;” however, the Board may wish to discuss this with Ms. Norton because a permit was not granted or denied, just a decision that it was to continue the use on this property.

Ms. Ross said if you want to address it for further clarification between her business and this business, Ms. Richards-Norton's business property was reviewed as a home business. She said there are different restrictions placed on that, such as hours of operation that are not in the ordinance, and she would have to request that the hours be changed through the Planning Board.

Ms. Lemire asked Ms. Ross when was the original approval of the use given for the property.

Ms. Ross replied she has no record of the use as it likely precedes zoning.

Ms. Ross distributed copies of the leases for the Board to review.

Mr. Billipp asked if there were three separate leases. Ms. Ross replied two were signed by Dana Norton and one by Daniel Richards.

Mr. Cutting asked if Ms. Ross checked with the Town Attorney for his advice.

Ms. Ross responded no.

Mr. Marshall thought that he had a little inconsistency with the CEO's testimony, as it was discussed that the lessee must utilize, and asked whether or not Ms. Ross cared if it was a commercial operation or personal utilization?

Ms. Ross answered that it had to continue as a commercial operation and she had no evidence to prove otherwise.

Mr. Marshall asked if Ms. Ross cared what the lease says or what happened.

Ms. Ross replied when she receives a complaint, she has to review it based on the information she had, and other than the contents of the lease agreement, the only information she has is the letter from Dana Norton indicating his intent to continue as a non-conforming use.

Mr. Marshall said it sounds like the lease allowed the commercial, but nothing happened.

Ms. Ross said she is looking at the intent.

Mr. Marshall said the intent is nebulous at best. He thought they should be looking at what happened and that he is sympathetic with the board. He said it sounds like the lease may have stated it could be commercial, but it is not in our ordinance.

Ms. Ross said it is her understanding they had commercial insurance through Wm. Dennett Agency.

Mr. Marshall said that is not necessarily actual activity.

Ms. Ross said the only documentation she has is a letter from Dana Norton and the lease agreement.

Mr. Marshall said he lives in a rural area and he could get a permit to put up a garage and fix my car if he wanted to, but that does not necessarily mean he is running a business, that is a whole other ball of wax. He said it sounds like it was a hobby shop.

Ms. Ross replied again, she has no documentation to support or deny that, only a signed lease and a letter from Dana Norton.

Mr. Cutting said he would think she would want to see if there was any revenue generated at this site, especially with any grandfathered business.

Mr. Rankie wanted to know if it was time to ask questions. Chairman Hamilton said he may ask a question of the CEO.

Mr. Rankie said the question to the CEO goes more to a recent letter of April 27th. He wanted to know if there was any restriction on the hours of operation restricting the business that is opened like the Pleasant St. Garage. He said he is a little confused as to any restrictions on hours and asked if the Board would consider what to do, based on this current letter. He said Mrs. Norton is not disputing the commercial endeavor, she is disputing their hours of operation.

Chairman Hamilton said we are discussing with the Code Enforcement Officer the notion it is a commercial enterprise with the commercial lease and intent, which is part of the discussion but, rather, ask your question.

Mr. Rankie asked if there were any rules for the Pleasant Street Garage, as it operates, restricting hours of operation or if there is any ordinance.

Ms. Ross answered it would only be limited by the noise ordinance, and the intent of those activities that occur there between the hours of 9 p.m. and 7:00 a.m. when the noise ordinance is in effect.

Mr. Rankie asked if that is the one with the crazy decibels.

Ms. Ross answered yes, that is the one.

Mr. Cutting said he asked this question earlier, but maybe this could be solved, and asked again, if Ms. Ross had contacted the Town Attorney based on the facts she had, whether it was considered to be a grandfathered business.

Ms. Ross replied normally she does not do that, when the decision is pretty clear, but if the Board wishes to do that, they can go through the Chair. She said she felt it wasn't necessary.

Ms. Lemire asked if there is a standard of practice that applies to what they are doing when there is a grandfathered business, or do you assume they are doing what they say they are doing. She wanted to know if they come in and say "this is my intent" or "this is the lease I signed" and they are doing what they say they are doing?

Ms. Ross responded there is no requirement to have copies of a lease or a letter of intent because the ordinance says the use can be transferred from one owner to the next.

Ms. Lemire said because it goes with the land.

Ms. Ross said that is correct.

Ms. Lemire asked if anything came into Ms. Ross's office at all.

Ms. Ross answered it is not required, this is a continuation of a non-conforming use, and the lease states that it cannot be discontinued for more than a period of one year.

Mr. Cutting said the use can be transferred from one owner to another any time, but if it goes 13 months they lose the grandfathered status.

Ms. Ross replied yes, that is correct.

Chairman Hamilton asked if any abutters wished to speak.

Leo Bonsey, 624 Main Street, said he lives right across the street from the property. He said he had a few things to clarify, first he has lived on that property since 1996. He said the previous

renter was Ron and the fire took place before he was there, so he doesn't know why this is being talked about.

Mr. Bonsey said the fire took place before he was there and he did not remember any fire when Joe was there. He said supposedly the neighbor in the white house who worked there was doing welding in the garage, there was a fire and it burnt, but this was back in the 80's or 70's. Mr. Bonsey said he remembers Dan saying that Dana Norton came down and took all his stuff and Dan's equipment and he was upset.

Chairman Hamilton asked, to be clear, was Mr. Bonsey speaking for, or against, the applicant.

Mr. Bonsey replied the second.

Chairman Hamilton asked if Mr. Bonsey was in favor or not in favor of the appeal.

Mr. Bonsey replied he was not in favor. He said one day Dan said that Norton came down and took his stuff and he was upset.

He said there was something else he wanted to say, the third thing was, he thought when Joe died, it should not be put down that the business stopped because his wife, Joann, made the decision of what not to do.

Ms. Lemire asked who is Joann.

Mr. Bonsey replied his wife, and his name was actually John, but Jo actually named the business. He said they thought someone else would run the business, but then it changed.

Mr. Billipp asked if Mr. Bonsey noticed anything different at the current garage as it is being operated, such as hours, noise, etc. and if the noise was the same or different.

Mr. Bonsey said the only noise was when the Town dug up the road. He said he did not see any loud noise or disturbance.

Mr. Billipp asked if Mr. Bonsey lived across the street, nearby.

Mr. Bonsey replied yes, across the street.

Mr. Billipp asked if Mr. Bonsey had lived there since 1996.

Mr. Bonsey replied yes.

Luann Bonsey said she lives across the street and originally Dana's and Karen's, not Dan's, was considered commercial property even though technically, it was not being used as a business and she wanted to know how is it different from what it is now. She asked how can the grandfather clause not be in effect when it has not changed as far as the business goes.

Mrs. Bonsey said it has not changed, technically whether it's used for a profit or the home use, it is still a business. She said it is still considered to be a business from when John Pierce used it to the present.

Mrs. Bonsey said the other question she has is what are the hours it affects, when can it be open and when is the cut off hour, and asked are the specific hours?

Chairman Hamilton said that Ms. Ross had replied to that question and did respond that the noise ordinance takes place at a certain time. He said she did not say the hours of operation were required by the Town.

Mrs. Bonsey said as far as the noise level, there is no noise coming out of the garage and they never disturb the neighbors.

Chairman Hamilton asked if she was speaking for the new owner.

Mrs. Bonsey answered yes, they live across the street and from 9 – 11 there is no noise going on and she hasn't heard any complaints. She said sometimes there are lights on.

Chairman Hamilton asked what about the prior owner.

Mrs. Bonsey replied as far as Dana had late hours there and even though the sign said "Norton's Garage."

Chairman Hamilton asked if there was a sign.

Mrs. Bonsey replied yes, there is a sign, but as far as the business goes, she did not know if the business was going on. She said that Dan took over and sometimes he uses it for business, but she feels the bottom line is she thinks not much appears to be going on at night. She said they have never had any problems with Dana. She said as far as loss of revenue, she didn't think there was any competition between the two businesses.

Chairman Hamilton asked if there were any other abutters who wished to speak. Hearing none, he asked if there are any interested parties who wished to offer comments at this point.

Tina Lane of 21 Alden Lane, said that she, and her husband Bruce, are the owners and there was a fire in 1992. She said they signed a lease agreement with Ron Millett, who went in after the fire, and rented it until December 2002. She said that John Pierce rented the property from March 2003 and the last lease with him was until 2010, and he was going month-to-month. She said that date the lease was signed was the 21st, so it went to the 21st of the month he died and he died June 3rd, 2013.

Mrs. Lane said after his burial, his wife wanted to use the garage to complete the work, but she did not want to sign a lease and they were not willing to let her run the business without a lease. She said that is when they approached Peter Billipp to sell the property. She said John had been there almost nine years. She said they have had several tenants who have been there 8-10 years. She said it was very disturbing what happened with John.

Mrs. Lane said they bought the property in 1979 and it was run as a garage. She said Dana approached them to rent it and run it as an annex, and said he did not want competition on the corner. She said that they agreed to let him run the business under the stipulation from the Town. She said they did not sign a lease with Karen, only Dana. She said they had no issues with Dana.

Mrs. Lane said he was definitely running the business there as an annex and did not want competition. She said when they had gone by the garage, work was going on, but they did not have evidence that money was collected from there. She said the garage was open for 2 ½ years.

Mrs. Lane said they approached Dana several times and told him that he has to run this as a business there because they were under a stipulation from the Town. She said he had several vehicles stored there, but they were okay with that.

Mr. Cutting asked how long has it been a garage.

Mrs. Lane said they have been in Town 53 years and for 38 years that property has been run as a garage. She said it has been run from '93 until now and there has been no break. He said after John died it, was almost a year, not quite, several months before they rented it to Dana and he agreed to pay more rent.

Mrs. Lane said that they had no idea that it was not being run as a business, and the first time they heard about it was when they were notified by the Code Enforcement Officer that something was going on.

Mrs. Lane said to back up, the last month Dana paid them rent was December. She said Dan called us beforehand and came to buy the property before Dana rented it. She said he called them and wanted us to finance it and we were not going to do it. She said Dan called us before he rented it and said he would like the garage. She said she spoke with him and told him he would have to speak with Dana, that Dana was renting the garage, and that they were not going to get in the middle. She said that Dana told them he was trying to buy the property.

Mrs. Lane said it was December and Dana, he paid the rent and said that we should go ahead and rent it to Dan. She said we asked Dana if he was sure and he said he was all done. She said he had a month to get everything out. She said they had no clue that he was not done.

Mrs. Lane said Bruce and Dana have been friends for years and speaks very highly of him.

Mr. Lane said he still thinks very highly of him.

Mrs. Lane said that Dana asked if they could wait until Monday, as he was trying to buy the property but he never called us, so we proceeded to sign the lease agreement with Dan. She said Dan gave us evidence of insurance and it is dated the 13th, not the 16th or the 17th. She said she did not know how that happened. She said at that point Dana would not have had insurance, it was under Dan, and they would not have rented it without insurance.

Mr. Billipp asked to recap, if the lease they had with Dan expired in December.

Mrs. Lane said the lease had started on the 16th, so it would have gone to the 15th of January 2017. She said they waited for Dana, but never heard back from him, so they signed the lease with Dan and then Dana called the night they signed the lease with Dan and he was upset. She told him they waited for him and he never called. She said he told her that Dan was supposed to call us.

Chairman Hamilton asked if any Board member wished to address the testimony.

Mr. Billipp wanted to know that it was several days after the expiration of the lease with Dana, they signed the new lease with Dan and asked who is Dan.

Mrs. Lane replied that is correct, and that Dan is her (Karen's) son.

Chairman Hamilton asked if there was any other Board member who wished to comment on the testimony. He addressed Ms. Richards-Norton and said she could speak to the Board.

Ms. Richards-Norton said she did not cancel the insurance, it was cancelled either by Dan or them (Mr. and Mrs. Lane). She said she called Mrs. Lane to speak with her and was told the insurance was cancelled already.

Ms. Richards-Norton said that, when Dana said he was done, he was tired, and worn out. She said his comment was taken out of context.

She said originally, they were going to sign over the business to Dan, but he said it wasn't good enough. She said he did not want that building, it was old and junky, and he wanted the one on the corner. She said for 20 years they carried that business, thinking Dan was going to take it over and Dana could work for him part-time, but everything totally fell apart.

Dan Richards said he is the current lessee and worked for Dana the whole time, along with another employee, John Rogers, and that they performed work there as an automotive repair business.

Chairman Hamilton asked if there were any more questions.

Mr. Billipp asked Dan, if the way he is running the business is comparable to the way it was previously done in terms of hours of operation and so forth.

Mr. Richards replied yes.

Chairman Hamilton asked if there were any other comments. Hearing none, he asked the appellant if she would like to give her final, closing statements.

Ms. Richards-Norton asked that the hours of operation be addressed so they could come to the Town and address their hours. She said they have to have something to try to make a living with this business, and it is discriminating to us. She said they had to abide by multiple restrictions and they had the lease taken out from under them.

Ms. Richards-Norton said that she cannot say how unfortunate the whole situation is. She said in any other situation, it would have been handled properly and the people would have been notified. She said it was Dana and then Dan went around the circle and she was in the middle because her mother was dying.

Ms. Richards-Norton said she still believes the hours should be regulated and it is only fair for any business in Town and the taxpayers. She thanked the Board.

Mr. Cutting asked Tina Lane, that she testified meticulously and it was a grandfathered business, and that she and her husband watched it the whole time.

Mrs. Lane responded yes.

Mr. Cutting asked Dan Richards if, during that time, he worked there also, as a paid employee.

Mr. Richards answered yes.

Ms. Lemire asked the CEO if there are standards for the grandfathered business or if they have any ordinances relating to the hours of operation.

Ms. Ross replied no, other than the ordinance that speaks to the non-conforming use and they cannot exceed the noise ordinance.

Chairman Hamilton asked if there were any Town hours of operation, statute, or things like that.

Ms. Ross replied no, but gave an example that, if they had a bright light, before zoning, it could continue, but they could not make it brighter.

Mr. Rankie said it would be if they had a sign, and had changed it to make it bigger. He asked if it is the same idea as the rest, even if it is a non-conforming business.

Ms. Ross responded yes, that is correct.

Chairman Hamilton asked if there were any more comments. Hearing none, he closed the public hearing at 8:44 p.m. and he said the Board will now deliberate. He opened general discussion.

Mr. Rankie said he has a question and a comment. He said it is his understanding, and the primary question he is asking is, has the CEO correctly grandfathered the business and allowed this business to continue – essentially – as a grandfathered business, or did she err.

Chairman Hamilton replied that it is an administrative appeal against the decision of the Code Enforcement Officer.

Mr. Rankie said they just heard testimony from the property owners and the employee of the place, who is the tenant that it is a commercial lease and there has been activity on this property.

Mr. Rankie said they heard testimony and he has a copy in front of him (Article 6) that specifically states the owner informed us. He said he is looking at the lease signed by Dana. He said he does not know him personally, but he seems to be honorable, which he stated that he would continue to use the property commercially, and the man (Dan) said he worked there.

Mr. Rankie said the owners testified and clarified and he did not see the need for any further discussion because the CEO acted correctly.

Chairman Hamilton asked if there was any other discussion.

Mr. Billipp said the testimony cleared up the whole matter for me. He said he has heard from the neighbors, Dan and the owners and, in the lease he has, #6 states the business is allowed to be utilized as an auto repair garage. Mr. Billipp read "the lessee shall use the premises as an automobile repair garage. The premises is currently allowed to be utilized by the Town of Eliot as an automobile repair garage as a pre-existing non-conforming use, it is therefore mandatory that lessee continues to utilize the premises as an automobile repair garage."

Mr. Billipp said that could not be more clearer and that the owners are very cognizant of this.

Mr. Rankie asked who signed that lease.

Mr. Billipp replied Dana Norton, from 2014. He said the language is clear and the use has been consistent, with no gap.

Chairman Hamilton said he would state the findings of fact.

Mr. Rankie said that we did not give Mr. Marshall an opportunity to offer his comments.

Mr. Marshall replied that he was all set.

Chairman Hamilton closed the discussion.

Mr. Marshall thought that a motion had been made.

Chairman Hamilton said no motion had been made, that he had closed the public hearing and the discussion has now ended.

Chairman Hamilton stated the findings of fact:

- the garage has been operated as a commercial garage since 1979, according to the owners' testimony;
- the lease that the previous tenant, Dana Norton, had expired on 1-15-17
- the three leases that the Board received as testimony from the CEO, 2 of which have Mr. Norton's signature' indicating the property is a non-conforming use to be operated as a commercial property under the conditions as stated in the lease and agreed to by Dana Norton on two occasions;
- the new lease with Dan Richards was created on 1-17-17 indicating the same conditions that were contained in the previous leases indicating continuing use, nonconforming use of a commercial garage;

Mr. Cutting added that Dan Richards testified, as an employee of Norton's Garage, that there has been continuous employment at that facility;

Chairman Hamilton said the Board received testimony that commercial insurance has been used to cover the property as a commercial enterprise and auto repair;

Ms. Lemire added the lease was pre-existing before ordinances;

Chairman Hamilton also added “as testified, there is a sign on the property that states "Norton's Garage.”

Mr. Cutting added the owners of the property are cognizant of the fact that the use of the building and property is grandfathered and did everything in their power to continue;

Mr. Rankie wanted to mention including producing a lease with that clause.

Mr. Billipp wanted the last sentence of #6 of the lease to be added as another finding of fact: “should the premises lose its nonconforming use status due to the actions, fault or inaction of the lessee, lessee shall be responsible to Lessor for the lost value of the premises.”

Mr. Billipp stated that Dana Norton was imminently aware he should continue the business as a non-conforming use.

Mr. Cutting added another finding of fact: “It was testified by both neighbors who live across the street that the level of activity has been consistent over the course of years they have lived on that property since 1996.”

Chairman Hamilton said he would entertain a motion.

Mr. Rankie moved that the Board of Appeals grant the administrative appeal to Karen Norton, seconded by Mr. Billipp. Vote was taken and voted 0-5, none in the affirmative, five opposed. Motion fails.

Chairman Hamilton said that a Notice of Decision letter will be sent within seven days and the appellant had 45 days in which to appeal the Board’s decision to Superior Court.

3. REVIEW AND APPROVE MINUTES AS NEEDED:

Chairman Hamilton reviewed the minutes of April 20th, 2017, page by page, and several corrections were made.

Mr. Rankie moved that the minutes of April 20, 2017 be accepted as corrected and seconded by Mr. Billipp. Vote was taken with all in favor, 5-0. Motion carries.

4. OTHER BUSINESS AS NEEDED

Mr. Rankie wanted to thank Chairman Hamilton for doing a great job and for his preparation for tonight’s meeting, with the interesting twists and turns. He said that in every case, Chairman Hamilton has always done his homework. He added that Ms. Ross also helped out the Board tonight with the ordinance, and thanked her.

5. ADJOURN

Ms. Lemire moved to adjourn the meeting at 9:12 p.m., seconded by Mr. Cutting. All were in favor by a unanimous voice vote. Motion carries - meeting adjourned.

Respectfully submitted,

Barbara Boggiano
Recording Secretary

Approved by: S: /
William Hamilton, Chairman

Date Approved: August 17, 2017_____