ITEM 1 - ROLL CALL

Present: Bill Hamilton - Chairman, Charles Rankie – Vice Chair, Ellen Lemire - Secretary, John Marshall, Cabot Trott.

Also Present: Jay Meyer – Alternate, Jeff Brubaker – Planner, Maggie Catanese – Recording Secretary, Shelly Bishop – CEO, Thomas McCarron, Terrie Harman

Absent: Rosanne Adams – Alternate (excused)

ITEM 2 –PUBLIC COMMENT PERIOD

There was no public input.

ITEM 3 – PUBLIC HEARINGS

Mr. Hamilton took a moment to review the rules and etiquette of holding this public meeting through the online Zoom platform.

Mr. Hamilton stated the request was from Terrie Harman, Trustee, Terrie Harman Revocable Trust, 6 Oak St., Exeter, NH for an Administrative Appeal of a decision of the Eliot Planning Board regarding a permit issued to Charles and Cheryl Tewell for property located at 21 Foxbrush Drive, Tax Map 50, Lot 19, Shoreland Zone.

Mr. Hamilton provided a brief summary of how this meeting will be conducted.

Mr. Rankie stated that Attorney Harmon had worked for me in the past and I feel I have no conflict.

Voting members did not feel there was a conflict.

Mr. Hamilton stated that at the last public hearing there was an issue with one board member being the recording secretary for the Planning Board, which is Ellen Lemire. It was brought to our attention previous to that by the town attorney that because of the nature of seeing and hearing testimony that the rest of the board is not privy to, it is strongly suggested that that person recuse themselves from the meeting tonight.

Mr. Rankie said it was discussed in the past and they asked that Ms. Lemire step down. It was voted upon and she was recused in the past.

Ms. Lemire had nothing new to say. She doesn't feel she has any reason to be recused from this hearing.

Mr. Hamilton would like to take a vote.

Mr. Rankie moves that Ms. Lemire is recused as a voting member for discussion on the motion. This had been maintained in the past and he would like to stay the same.

Mr. Trott seconded. He stated that this is something that the attorney recommended and this is nothing against Ms. Lemire.

Mr. Hamilton asked all in favor of recusing Ms. Lemire from the appeal to raise their hand. **Motion was carried with a vote of 3-1. Mr. Marshall voted in the negative.**

The voting members have been determined. Jay Meyer (alternate) will be a voting member.

The voting members tonight will be the regular members of the board, with the exception of Mr. Meyer filling in for Ms. Lemire.

The voting members have been determined, parties to the action are the Planning Board. Our jurisdiction is under Section 45-49, 45-50 Administrative Appeals. Standing will be determined, as well as timeliness. Then the Board will proceed into the hearing itself. The type of review that is being done is an Appellate Review. It is not a de novo review. Under section 44-47 of the Eliot Code, the Board of Appeals will conduct an appellate review of an Administrative Appeal of the Planning Board action in the Shoreland Zone. Under Section 45-49 the powers of the Eliot Code state: "The board of appeals shall hear and decide where an aggrieved person or party alleges error in any permit, order, requirement, determination, or other action by the planning board or code enforcement officer. The board of appeals may modify or reverse action of the planning board or code enforcement officer by a concurring vote of at least three members, only upon a finding that the decision is clearly contrary to specific provisions of this chapter." Under Title 30A in the State of Maine subsection 2691 regarding the Board of Appeals, Chapter 123, 3C under Municipal Officials states "If a charter or ordinance establishes an appellate review process for the board, the board shall limit its review on appeal to the record established by the board or official whose decision is the subject of the appeal and to the arguments of the parties. The board may not accept new evidence as part of an appellate review. The board may receive any oral or documentary evidence but shall provide as a matter of policy for the exclusion of irrelevant, immaterial or unduly repetitious evidence. Every party has the right to present the party's case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct any cross-examination that is required for a full and true disclosure of the facts." Therefore tonight, the Board of Appeals will review only the decision of the Planning Board of the February 16, 2021 meeting, Case # Planning Board 20-27 to approve a Shoreland Zoning permit application submitted by Charles and Cheryl Tewell. The Board will not revisit or consider any previous Planning Board action, nor any civil action of the appellant in Superior Court regarding previous decisions, nor any previous Board of Appeals decisions regarding this matter or any other matter not relevant to the February 16, 2021 Planning Board decision. Standing has been proven by the fact that the appellant is an abutter to the property. Timeliness, the Planning Board decision that is being appealed was made on February 16,

2021 and the appeal was submitted to the town on March 15, 2021. It is within 30-day requirement.

Mr. Hamilton briefly went over the way the hearing will run.

7:15 PM Public Hearing opened.

Ms. Harmon stated that the original proceeding started in July 2020. She requested that the Board note her exception to not discussing testimony or finding that occurred prior to February 2021. Paragraph 18 of the February 16, 2021 Finding of Fact, #18. It stated "proposed structural distance will be 29' from the highest annual tideline and entirely within setback making it more conforming to the greatest extent practical." That is contrary to the ordinance as follows, the highest annual tide is not defined it is irrelevant and it is not the standard. Maine's river setback law prohibits building anything within 25' of the river. The river setback is measured from the normal highwater line of the river. Title 38 section 439, A4, B, which governs the Eliot ordinance. 44-32(c)(1)a, expansion within the 25-foot setback is prohibited. It is supposed to be 75' back setback from building, but in this lot it is not possible. You will hear talk about the greatest extent possible. The sacred principle is that there can be no building at all within 25' of the river. That is the normal highwater line. Eliot's ordinance defines that as that adjacent to tidal waters, setbacks are measured from the upland edge of the coastal wetlands. According to that same ordinance, this upland edge of the wetland means the boundary between the upland and the wetland. "For purposes of a coastal wetland this boundary is the line formed by the land limits of the salt tolerant vegetation and/or the highest annual tide-level including all areas effected by tidal action." That is the coastal bluff, that is Note 4 on the amended application. It refers to 44-35(b)1. In essence is the case why 18 is contrary to the ordinance. It is an incorrect conclusion of law. The 25' must be measured from the top of the coastal bluff. Page 227 in the materials submitted, it shows a photograph February 2, 2021. That February 2, 2021 is a photograph taken by Tom McCarron and it shows the water basically at normal level, and you can see that it is right at the bluff. In summary, the 25' setback from the river is sacred ground. Nothing is allowed to be built there. There will be some talk about an 800' allowance, or 1000' allowance, but that is not what we are here to talk about. Nothing can be from that 25' setback. She requested that a letter dated April 15 from David Peterson be acknowledged or admitted.

Mr. Hamilton stated he received that letter about an hour ago. He said it can be submitted.

Ms. Harman said it is the applicant's burden to prove compliance with provisions and the applicant can't do that because the proposed building is not within 25' of the coastal bluff, and it must be. The previous approved application had a 20' front setback that was now changed to be a 30' front setback. The problem with that for the building is that it moved the building that much closer to the river in violation of the 25' required mandatory setback from the river. The test for a reviewing board is whether there was an abuse of discretion or error of law or findings are not supported by substantial evidence

in the record. There was a law case called Mills vs. Town of Eliot. This is a situation where Ms. Mills was not happy with the CEO's decision on something and what she was saying is that the CEO was required to make factual findings from which the CEO could determine the legality of this project. This case went up on appeal and up and up. It went to the law court and that law court said "meaningful judicial review of an agency decision is not possible without findings of fact sufficient to a apprise the court of the basis of decision. In the absence of such findings a reviewing court cannot effectively determine if an agency's decision is supported by the evidence. There is a danger of judicial use of administrative functions. Adequate findings also assure more careful administrative considerations help parties plan cases for review and keep agencies within their jurisdiction." It is really important to have accurate findings of fact in order to make decisions by a reviewing body. In this case of Mills vs. The Town of Eliot, the law court sent it back down all the way to the CEO with instructions to have the CEO make accurate factual findings. The reason she is talking about this Mills case is that we have that type of situation here for the Planning Board's failure to make correct findings. Failure to make correct findings precludes meaningful judicial review or precludes meaningful review by this board. The notice that Ms. Harman received was 8 days and not 10 days. She is not talking about the notice she didn't get in the original July 2020 preceding. Going to the Findings of Fact from the February 16 hearing, #11 is not correct. #11 says "one abutter discussed concern regarding what appeared to be different criteria used for structural location distances from the Piscataqua River. Concern was satisfactory addressed." She feels that is not correct. She is still concerned about that and that the Planning Board incorrectly made an error of law by allowing building into the 25' river setback. The river basically needs to be respected with that mandatory 25' setback. #11 is not correct. It needs to be changed. #18 she already talked about. Highest annual tide is not the test. #18 shouldn't be 29' from the annual tide-line. That is the wrong test. It is an error of law. #19 existing from deck which has no recorded town permit, that is incorrect because the permit # 95-91, a copy of it is located on pg. 210-211 in the materials provided. #21 says the applicant requested review for previously approved Maine DEP NRPA permit # (no number given), Maine DEP found that the modification would not require a new PDR. #21 the findings are not supported by substantial evidence in the record. Pages 48-49 in the materials, page 49 is an email from Ryan McCarthy to Alexis Sivovlos. In relevant part it says that the applicant is proposing some minor modifications to the site plan that reduce the footprint by 59 sq ft and shifts the location to the setback 30' from the frontline as opposed to 20'. The point to make about that is they have been told in fact the shifting of the building is into the 25' protected sacred area. Those findings are not supported by substantial evidence in the record. Her view is that the State needs to weigh in on this or the Board needs to conduct some kind of further proceeding to confirm that it can't be built into the 25' setback. It is impermissible. #25 says the existing property has access through a right-of-way agreement established in 1931 and is 400' from a public road (River Road). She feels this is not accurate. There is no agreement and there will be further discussion about that. It is about 600' in that right-of-way agreement. There is no such thing as a right-of-way agreement. In the conclusions #1 says that all sections have been met. She doesn't believe that is accurate. #2H is in conformance with revisions with sections 44-35 Land Use Standards, that is not accurate. It is building into the prohibited 25' setback

protecting the river. The setback is ignored and this is error of law. These Findings of Fact need to be changed. They are not trustworthy because they are wrong. The Findings of Fact need to be accurate Findings of Fact for a Board or a court to make a determination that this whole thing is in compliance with the code. The Board of Appeals can't do their job with Findings of Fact that aren't correct. She suggests that this be remanded to the Planning Board to make correct Findings of Fact. If not remanding to the Planning Board, that this be treated as a matter de novo here and have the Board of Appeals get some correct facts at this time. She states her concern about the notification about the previous proceeding which this proceeding amends. She states there is a case called Brackett vs. Rangeley. That is a situation where the Brackett's did not get notice and they were horrified to see that their neighbor, Mr. Sears had built a house in violation of the Rangeley ordinance and Maine law. The Brackett's brought suit up and up and it went to the law court and the law court said yes, you need to get notice and also the building was built is beyond the code and ordinance. The point that she urges the Board of Appeals to take is that this Brackett case stands for the proposition that there has to be appropriate notice but also where a building has been built in violation of ordinance, Mr. Sears ended up in the end taking down after he built his house, he took down a big chunk of his house after he built it to be in compliance with the ordinance and Maine law. It strikes her that we should probably deal with that right now. She has no objection to the building of an appropriate-sized setback from the river 25'. It is possible to do. She suggests that it would be a shame, like the Brackett in Rangeley situation, Mr. Sears the appending builder, took down a portion of his house after years of litigation.

Mr. Hamilton asked if there are questions from the Board to the appellant?

Mr. Trott asked where the original appeal is, he only sees the amended appeal.

Mr. Hamilton said the amended appeal was based on a previously approved appeal that came before the Board of Appeals as an appeal from the same appellant. It was adjudicated by the Board of Appeals as the appellant was denied that. That meant that the original permit was allowed and the applicant went ahead and decided to make some modifications to that. The current appeal Ms. Harman is appealing tonight is the decision of the Planning Board on February 16, 2021 approving the modifications to that initial approved plan, which also went in front of the Board of Appeals and was denied as an appeal. Essentially that is what is being contested tonight.

Mr. Trott asked if it is an amended appeal because the Board can't be listening to anything that has to do with the first case.

Mr. Hamilton said correct. If that were the case, the issue of timeliness would not be correct because we would be reviewing something that was done 90 days ago. We are not allowed to do that. He stated this is a brand-new appeal. The appellant submitted their appeal on March 15, 2021 which was within the 30-day allowance of February 16, 2021.

Mr. Trott wanted to clarify that they can't go back to the previous or other things that directly relate to this appeal.

Mr. Hamilton said correct. The Board's function is to determine when the Planning Board made its decision because this is an appellate review, the Board of Appeals can't go out on a limb and start to look at the entire case and decide as it would be in a de novo review what should have been changed, what was different, what new evidence there is. The BOA cannot do that. The BOA's focus is so very narrow that that's why I made that statement at the beginning of the meeting. The BOA is not here to review the entire case, we are here to review the decision of the Planning Board on February 16, 2021. That is it.

Mr. Trott asks that Ms. Harman would not continuously refer to the previous case.

Mr. Hamilton said the BOA allows an appellant uninterrupted testimony at the beginning. That is the only time that the BOA allows uninterrupted testimony. If he feels, or anyone on the BOA feels, that this conversation is going in a direction that is not relevant or material to the decision of the Planning Board on February 16, please speak up.

Mr. Meyer would like to see if Ms. Harman could talk a little bit about the public notice problems that she experienced.

Ms. Harman said the notice required a certified notification by certification by mail, 10 days, while hers was 8 days.

Mr. Meyer asked if she had knowledge regarding the other abutters and when they may have received their notices.

Ms. Harman said she doesn't.

Mr. Meyer asked if there was a trail of public notice certificate that the town provided her. Most of the time there is a receipt available to what day they gave the notice. The mail has been a little bit sketchy as of late. He believes it is getting better, but still there has been some problems with the post office delivering in a timely fashion. He asked if there is any sort of receipt from the town or is the town able to provide a receipt on public notices.

Ms. Harman said she doesn't know.

Mr. Brubaker (Town Planner) said they have record of the certified mail being mailed to abutters. They have records specifically of the certified mail being sent to Ms. Harman being post marked February 1, 2021. The post mark of that certified mail was February 1 and he does have a record of that in front of him.

Mr. Hamilton said that was part of the testimony in the Planning Board. That was definitely part of their response that it had been mailed February 1, 2021 and the meeting

was February 16, 2021 so it was well within the period. They had received a notification that it was received and they got a return receipt requested that was received.

Mr. Rankie said based on the instructions to the Board of Appeals prior to the Chairman opening the meeting, from what the appellant has said so far he believes that the Finding of Fact #18 which she challenges not to be 29' is essentially the only thing before the Board to be determined. He would like to ask the Town Planner what he has to say. Ms. Harman said it is less than 25' and the Finding of Fact that the Board has says it is 29'. He sees that is the only thing the Board has at stake to determine.

Mr. Hamilton said that is an appropriate response at this point since that was one of the keys to the appellant's initial testimony. Since the Town Planner is very familiar with the codes as the Board is as well, he would like him to reply at this point about that.

Mr. Brubaker wants to respond to this point. The focus is Section 44-32(c)(1)a for this specific point of contention. He refers to that as subparagraph A for the purposes of this specific point he is making. 44-32(c)(1) allows for expansion of a non-conforming structure within the limitations that that section enumerates. He wants to stress that it is incorrect to state that nothing can be built within 25' of a water body. It is incorrect for the appellant to state that and it is incorrect for attorney Pearson to have stated with regard to the referenced state statute Title 38, section 439-A,4B. It is incorrect for him to state that state statue "prohibits building anything within 25' of the river." Subparagraph A references the 25' criterion that has been cited as part of this appeal and part of Ms. Harman's testimony. It states in relevant part "expansion of any portion of a structure within 25' of the normal highwater line of water body tributary stream or upland edge of wetland is prohibited, even if the expansion will not increase non-conformity with the water by the tributary steam or wetland." Critically, subparagraph A does not prohibit any building within 25' of the normal highwater line. It rather prescribes an equal or smaller footprint within 25' when a non-conforming structure is expanded or replaced. There is ample documentation in the record before the Planning Board of this distinction and for just example he mentions the February 16, 2021 minutes. The clear threshold to use in 44-32 is from the normal highwater line. Tidewater, the applicant's representative, used the highest annual tide line also called the HAT line. But made the case to the Planning Board in February that the normal highwater is the HAT line. The applicant demonstrated that even if the top of the coastal bluff was the reference line, subparagraph A would still have been met. In this particular case, to meet subparagraph A, the applicant did not need to demonstrate that the replacement structure will be fully 25' from the normal highwater line. The applicant only needed to demonstrate that the portion of the replacement structure's footprint within 25' will be smaller than the portion of the non-conforming structure's footprint within 25'. This case, the applicant demonstrated that such portion was going from 304 sq ft in the old house to 0 sq ft if measured from the normal highwater line. He argues this is the correct standard. Even if the top of the coastal bluff is used, 44-35 refers that to new principle in accessory structures, so even if the top of the coastal bluff is used the applicant would still demonstrate compliance by a wide margin going from 388 sq ft for the old house within 25' to 11 sq ft for the replacement structure within 25'. The correspondence received

today from attorney Pearson, it is clearly inaccurate and that the testimony from Ms. Harman that nothing can be built within 25' is inaccurate as well. The statute prohibits expansion of any portion of any structure within 25' of the highwater line of the water body. He wanted to respond to the appellants points about notice.

Mr. Hamilton asked him to wait until his turn, which is after the Board's questions to the appellant.

Mr. Rankie said that took care of #18 quite well. He feels that is the only thing they need to decide. Regarding item #19, she stated that she found the building permit and it says there wasn't a permit that was found, but it also says that this wasn't used for any calculations. He asked if this was correct.

Mr. Hamilton said to wait on that one.

Mr. McCarron began by saying that the present state of affairs on the property is that there is no building there. The building has been fully torn down and removed. Essentially it is a lot right now. We are referring to the former structure. He wanted to talk about the right-of-way.

Mr. Hamilton said the right-of-way is not relevant.

Mr. Rankie said as a point of order, he stated that the Chairman stated that only things that are relevant to the February 16, 2021 decision of the Planning Board, then we shouldn't hear anything that is not relevant to the February decision of the Planning Board.

Mr. Hamilton made that determination. He does not feel the right-of-way has anything to do with the approval of the building permit of February 16 by the Planning Board.

Mr. McCarron mentions the #25 in the Findings of Fact.

Mr. Hamilton recognizes discrepancies in the FOF, but they are not totally incorrect. Mr. McCarron has the right to talk to make the Planning Board aware of that. He does not see where the relevance of this particular proceeding has anything to do with the right-of-way. He said Mr. McCarron should address right-of-way concerns with the Planning Board.

Mr. McCarron said the Board of Appeals job is to correct the Planning Board. He asks if he should correct the Planning Board's Findings of Fact, and not use the Appeals Board for that.

Mr. Hamilton said the Appeals Board determines whether the Planning Board acted according to the code. They may have gotten some facts confused. That is a human factor.

Mr. McCarron is suggesting that the statements of Findings of Fact that are part of the decision of the February 16, 2021 meeting are part of the record. If the facts as part of the record are incorrect and the Appeal Board won't allow the appellant to discuss, he feels he shouldn't address this with the Planning Board.

Mr. Hamilton said this issue has already been brought up by Ms. Harman. She already cited that discrepancy. This is repetitive testimony and he is not allowing it. He asked if there were any questions from the Board to the appellant.

There were none.

Mr. Brubaker referred back to his answer to the question about section 44-32, C1A. He referred the BOA to the full record before the Planning Board. He wants to emphasize that the Planning Board reviewed and approved a written argument which was submitted to the BOA. He believes that serves more as a supplementary argument rather than something that would displace or supersede the full record for the Planning Board.

Mr. Hamilton said he has the referenced document in front of the group. He asked Mr. Brubaker to hit the highlights.

Mr. Brubaker said regarding the question of notice, he referred to the top of page 2. "Abutter received certified mail of PB21621 amended hearing on 2/8/21 less than 10 days prior to the hearing." Section 33-180A states "Within 30 days following a finding that the application for the site plan is complete, the planning board shall hold a public hearing. At least ten days before such hearing, notices shall be posted in at least three prominent places, advertised in a newspaper with local circulation, and forwarded to the clerk of an adjacent municipality in the case where a plan is located within 500 feet of a municipal boundary. Abutters shall be notified by certified mail, return receipt requested." The public hearing notice was posted on February 1, 2021 and published in the Seacoast Online/Portsmouth Herald on February 6, 2021. The February 16, 2021 Planning Board packet includes copies of the public hearing notice and newspaper excerpt published with the published notice. Nothing in Section 33-130(a) requires a certified mail public hearing notice to be received by abutters 10 days prior to the public hearing. Even so, it is noted that certified mail notice for the public hearing was mailed with a post mark of February 1, 2021. The town has a record of Mr. McCarron signing to confirm receipt of the mail. Although Section 33-130(a) does not specify an advance receipt of 10 days or more by abutters of certified mail, even so, certified mail by the abutter was post marked February 1, 2021 it is further noted that Section 33-130(c) of the town code states "the abutters of owners shall be considered to be those against whom taxes are assessed. Failure of any property owner to receive a notice of public hearing, shall not necessitate another hearing or invalidate any action by the Planning Board." He made the point about footprint too, but paused to see if the BOA wants to discuss.

There were no questions or comments from the BOA.

Mr. Brubaker said regarding footprint, he wants to refer to the written argument. The relevant section is 44-32(c)(1)c.1. This allows for non-conforming structures expansion of up to 30% of the existing combined total footprint that existed on January 1, 1989 or 1,000 sq ft, whichever is greater. In the case before the Board, the applicant applied for a replacement structure of 999 sq. ft. Regardless of the combined total footprint that existed on 1/1/1989, that 44-32(c)(1)c.1. clearly allows at least a combined total footprint of 1,000 sq ft and the applicant is under that by 1 sq ft.

Mr. Hamilton asked if there were questions for the Planner.

Mr. Trott wanted to clarify the reduction of 999 sq ft would bring it more into compliance.

Mr. Brubaker stated that there is a clear documentation of compliance with 999 sq ft. That is compliant of Section 44-32-(c)(1)c.1.

Mr. Hamilton asked when the ordinance was changed that superseded all the other ordinances that have been referenced by the appellant, as far as 44-32.

Mr. Brubaker referenced MuniCode and it does appear that that was the November 6, 2018 town meeting. That is what is in Muni code.

Mr. Hamilton said November 2018 was when the ordinance was changed and the issue of a lifetime expansion was replaced by the issue of a minimum of 1,000 sq ft., within the 75' setback.

Mr. Brubaker can't fully speak to that history since that was before he was employed as Town Planner. He wants to make a point about this notion of lifetime footprint expansion. He doesn't think that specific phrase is relevant or pertinent. 1,000 sq ft is allowed regardless of the 1/1/1989 combined total footprint.

Mr. Rankie asked if the Planner could address #19 of the Findings of Fact of the February meeting.

Mr. Brubaker said that #19 in the Findings of Fact "the existing front deck which has no recorded town permit is not used in the expansion calculations. The existing timber steps and brick patio waterside were also removed from the footprint calculations."

Mr. Rankie mentioned #11 on the Findings of Fact. His interpretation of Ms. Harman saying that concern was not satisfactorily addressed. Maybe everybody wasn't happy, but the FOF here, his understanding of what the Planning Board was presented is that the PB was satisfied that it was addressed. He would like to bring this to Mr. Brubaker.

Mr. Brubaker said in response to #11 he would refer Mr. Rankie to February 16, 2021 minutes which include the Planning Board vote on the overall application. He would submit that if enough Planning Board members were not satisfied with that topic, they

certainly could have raised that concern or voted no on the applications. In fact, the application was approved. He believes that it is appropriate to look at Finding of Fact #11 in the context of what the Planning Board subsequently did, and that was the approval of the application.

Mr. Hamilton questioned whether the measurement should be from the top of the bluff or the normal highwater line. In our code, it refers to the normal highwater line in this particular instance.

Mr. Brubaker said this is correct.

Mr. Hamilton asked if there were any other questions to the Planner. (none)

There were no comments from abutters or interested parties.

Ms. Harman began with closing testimony. She stated that 38 MRSA Section 439-A.4 includes "Notwithstanding any provision in a local ordinance to the contrary…" She then quoted Section B, "Expansion of any portion of a structure within 25 feet of the normal high-water line of a water body or upland edge of a wetland is prohibited, even if the expansion will not increase nonconformity with the water body or wetland setback requirement."

Mr. Hamilton asked where in the plan there is less than 25' to either the plateau or to the highwater line. Where is this encroachment? Considering the plan, it is talking about 29'.

Ms. Harman said the test is the normal highwater line. That gets us to the bluff. We have to be talking from the bluff.

Mr. Hamilton does not agree. Normal highwater line vs. a high spring tide is a big difference. He knows it for a fact that the normal highwater line is nowhere near the most high spring tide, which is what she is talking about. That may as well reach the bluff, he is guessing because he doesn't know her property.

Ms. Harman said the normal highwater line has a definition in the Eliot ordinance and it refers to the "setbacks are measured from the upland edge of the coastal wetland." It goes on to say "wetland means the boundary between upland and wetland. For purposes of a coastal wetland, this boundary is the line formed by the land board limits of the salt tolerant vegetation and/or the highest annual tide level including all areas effected by tidal action." To her, that is the bluff because the water does [include] all areas effected by tidal action. We are dealing with the bluff. That is for Note 4 on Ryan McCarthy's submission. The letter from Warren Gerow from 2/2021 attaches a drawing showing that the building used to be a 20' front setback and is now a 30' front setback. That is good because that is in compliance with the code. In so doing the building has been pushed back by that amount of distance from 20 to 30 into the prohibited 25' river setback. That is the problem.

Mr. Hamilton asked if she is saying it was testified tonight by the Town Planner and not testified but part of the Planning Board's Findings of Fact and the minutes of the Planning Board meeting of February 16 that, regardless of whether the top of the bluff or the normal highwater line were used as a measurement standard, there still would be no encroachment within the 25'.

Ms. Harman disagrees because it is prohibited to build within 25' of the river setback. It defines the setbacks are measured from the upland edge of the coastal wetland. The upland edge of the wetland means that tucks up this boundary between upland and wetland. It is a line formed by the landward limits of the salt toleration vegetation and/or the highest annual tide level including all areas effected by tidal action. To her, that is the bluff. That is what was originally in the original application. In Warren's letter, you will see on the attachment how the pushing back of the 30' setback finally being allowed appropriately that pushes the whole building back into the prohibited 25' setback because the lot is so small. The lot doesn't have any leeway so the problem is there can be a building built, but the envelope must be 25' from the bluff, 20' on the sides, and 30' from the front. The building can be built within that. This building is too big and it is pushed back inappropriately into the 25' setback.

Mr. Brubaker referred to the site plan that the applicant presented. The applicant presented a response to Mr. Gerow's letter and that was sent to the Planning Board, so that is part of the record. The standard is not no building of any kind within 25'. The standard is reducing the footprint from the non-conforming structure to the replacement structure. If the normal highwater line is the measurement standard, he believes that is appropriate given the language in the town code, the footprint is going from 304 sq ft to 0 sq ft, fully outside of that 25' line. Even if the incorrect top of coastal bluff is used, the footprint goes from 388 sq ft to 11 sq ft. The fact there is 11 sq ft still within 25' of the top of the coastal bluff does not render that application out of compliance with any portion of section 44-32. Even if that incorrect top of coastal bluff standard is used, the applicant has still met the relevant sections of 44-32. The normal highwater line is going from 304 sq ft to 0 sq ft. This was presented to the Planning Board.

Mr. Trott asked for the page number for where he is getting the State law on the highwater mark?

Ms. Harman said it is in the letter from Eaton Peabody. She also found the letter from Warren Gerow. Page 201-204. April 15, 2021.

Mr. Hamilton asked if the Board received this letter?

Mr. Trott said yes. Very recently.

Mr. Hamilton said it prohibits building anything within 25' of the river. He believes the Town Planner and the code does not support that. It does also refer to the highest annual tide level which is not the standard that the town uses. The town uses the average high

tide level. There was a response from Ryan McCarthy (other Board members did not receive it) that Mr. Hamilton read aloud. From Mr. McCarthy to Jeff Brubaker, "Thank you for forwarding the letter you received today from Attorney Pierson. This letter re-affirms our use of the highest annual tide (HAT) level as representing the upland edge of the coastal wetland, which in turn represents the normal high-water line of the river. The HAT line and the 25-foot setback from the HAT line is clearly depicted and labeled on the plan. The proposed building is more than 25 feet from the HAT line as depicted on the plan as well; therefore, the applicant has demonstrated compliance.

Furthermore, State statute 38 §439-A.4.B. that Attorney Pierson refers to is the same language found in the Eliot Municipal Code of Ordinances Chapter 44-32(c)(1)a. Attorney Pierson states in his letter that 38 §439-A.4.B "prohibits building anything within 25 feet of the river." This is incorrect. The intent of 38 §439-A.4.B. is to prohibit "expansions" of legally existing nonconforming structures from occurring within 25 feet of the river, unless the structure meets the criteria of the 38 §439-A.4.B.(1), in which case it can expand per 38 §439-A.4.B.(1)(a). Here is the full statute language:

B. Expansion of any portion of a structure within 25 feet of the normal high-water line of a water body or upland edge of a wetland is prohibited, even if the expansion will not increase nonconformity with the water body or wetland setback requirement. Expansion of an accessory structure that is located closer to the normal high-water line of a water body or upland edge of a wetland than the principal structure is prohibited, even if the expansion will not increase nonconformity with the water body or wetland setback requirement.
(1) Notwithstanding this paragraph, if a legally existing nonconforming principal structure is entirely located less than 25 feet from the normal high-water line of a water body or upland edge of a wetland, that structure may be expanded as follows, as long as all other applicable standards of land use adopted by the municipality are met and the expansion is not prohibited by paragraph A.
(a) The maximum total footprint for the principal structure may not be expanded to a size greater than 800 square feet or 30% larger than the footprint that existed on January 1, 1989, whichever is greater. The maximum height of the principal structure may not be made greater than 15 feet or the height of the existing structure, whichever is greater.

The existing structure located at 21 Foxbrush was partially located within 25 feet of the river. The approved plan shifts the location of the replacement structure to more than 25 feet from the river, consequently the square footage of structure located within 25 feet of the river is not expanded, but is actually reduced to zero, thereby making the replacement structure more conforming."

Mr. Hamilton asked if there were any other question prior to closing the public hearing.

No questions.

The public hearing closed at 8:31 PM.

Mr. Hamilton would like to begin deliberation. He first outlines his **Findings of Fact**:

- The appellant is Terrie Harman, Revocable Trust Terrie Harman Trustee.
- Meeting date is 4/15/2021.
- The property in question is 21 Foxbrush Drive, Tax Map 50, Lot 19 in the Suburban Shoreland Overlay Zone.
- Standing and timeliness on the appeal.
- This is an administrative appeal under section 45-49 of the Eliot Code.
- This is an appellate review.
- The Board of Appeals will review the application as an appellate review only considering material received by the Planning Board prior to the decision to approve a revised site plan of Charles and Cheryl Tewell on February 16, 2021, case #PB20-27.
- The Planning Board public hearing on PB20-27 was held on February 16, 2021.
- An Abutting Land Notice was sent certified notices postmarked February 1, 2021.
- The meeting notice was published on February 6, 2021 in Seacoast Online Portsmouth Herald.
- The town has a record of Mr. Thomas McCarron, the husband of the appellant signing to confirm receipt of the certified letter.
- Section 33-130A of the Code states that "failure of any property owner to receive a notice of public hearing shall not necessitate another hearing or invalidate any action by the planning board."
- Section 44-32(c)(1)c allows a combined total footprint of 1,000 square feet.
- Planning Board approval of PB20-27 approves a replacement footprint of 999 square feet.
- The proposed structure location will be 29 feet from highest annual tide line in conformance to the Eliot Code of Ordinances making it more conforming than the previous removed structure.
- The Code revision of Section 44-32 was testified consistent with State guidelines. It was approved at the town meeting in November 2018.
- Nothing in this revised Section refers to any previous expansion restrictions.
- Section 44-32(c)(1)a references the normal high water line as does Section 44-32-(c)(1)c.1.

Mr. Rankie moved, second by Mr. Trott, that the Board of Appeals deny the appeal.

Mr. Hamilton stated that a motion has been made and seconded to deny the appeal. He would now like to begin discussion.

DISCUSSION:

Mr. Trott thinks that [regarding]any errors of finding, it looks like the Planning Board followed the ordinance as written in the town's ordinances. He sees the opinions and views, but can't go with the bluffs being the highwater mark because there are bluffs in

this town that are high enough to sink that house. He can't use that as anything but what is written in the town ordinance.

Mr. Hamilton stated that the Planning Board met the terms of the code. They were very careful in their deliberations. They were careful in their Findings of Fact. Findings of Fact are difficult to be complete or occasionally there may be some small fact of error. He thinks in totality they are accurate. He feels that the town in making an ordinance change in 2018 must have realized that the lifetime expansion issue that the appellant brought up was difficult and the other issue was that the town was following State mandate at that point, Section 1000 in the State statute that had changed. The town is in conformity with that as of 11/2018. He feels that the argument that the appellant has brought is based on material and ordinances that don't exist anymore. We have to apply the ordinances as they currently are and he feels the issue of notification was met through the ordinance. The certified letters were sent out on the 2/1 for a 2/16 meeting. These were return requested. The appellant was notified. Perhaps not 10 days in advance. He sees nothing in the code that requires that the appellant be notified 10 days in advance, only that the notices be sent out 10 days in advance. Given the mail delivery services, a certified letter, would certainly take priority. We know the fact that it was signed for and returned return receipt requested. Those two items in addition to the issue of the 25' setback and the issue of a highwater mark vs. the bluff, he feels the Planning Board acted in conformance with the code.

DISCUSSION ENDED

Mr. Hamilton asked all those in favor of denying the appeal; a roll call will take place.

Roll Call Vote:

Mr. Hamilton - Yes

Mr. Rankie - Yes

Mr. Meyer - Yes

Mr. Marshall - Yes

Mr. Trott - Yes

VOTE
5-0
Motion passes to deny

Mr. Hamilton said that **the vote was 5-0 in favor of denying the appeal.** Within seven days, a notice of decision will be issued. The applicant has 45 days to appeal to Superior Court within 45 days.

The Board recessed from 8:42 PM until 8:47 PM.

ITEM 4 – REVIEW AND APPROVE PREVIOUS MINUTES

Mr. Meyer moved, second by Ms. Lemire, to approve the minutes of December 17, 2020, as amended.

VOTE
5-0
Motion passes

ITEM 5 – OTHER BUSINESS

There was no other business.

ITEM 6 – ADJOURN

There was a motion and a second to adjourn the meeting at 9:17 PM.

Bill Hamilton, Chair
Date approved: 9/22/21

Respectfully submitted,

Maggie Catanese, Recording Secretary