

**ELIOT BOARD OF APPEALS  
THURSDAY, OCTOBER 17, 2019 – 7:00 P.M.  
ELIOT TOWN HALL**

**MINUTES**

Members present: Bill Hamilton, Chairman; Charles Rankie, Vice-Chair; Ellen Lemire, Cabot Trott, John Marshall

Members absent: Jay Meyer and Rosanne Adams, Alternates (excused)

Others present: Shelly Bishop, Code Enforcement Officer; Barbara Boggiano, Recording Secretary

**1. 7:00 PM – Roll Call:** Chairman Hamilton called the meeting to order at 7:00 p.m. The five regular members introduced themselves.

**2. Public Comments:** None

**3. Review of previous meeting minutes:** Chairman Hamilton reviewed the minutes of August 15, 2019, page by page and several corrections were noted.

Mr. Marshall moved to approve the minutes of August 15, 2019 as amended, seconded by Ms. Lemire and approved 5-0 by a show of hands, all in favor. Motion carries.

Chairman Hamilton reviewed the minutes of September 19, 2019, page by page and several corrections were noted.

Mr. Rankie moved to approve the minutes of September 19, 2019 as amended, seconded by Mr. Trott and approved 5-0, by a show of hands, all in favor. Motion carries.

**4. Discussion of possible amendments to the Eliot Code:** Chairman Hamilton handed out a copy of the May 17, 2018 BOA Meeting minutes and said there was nothing in the ordinance that relates to waivers and a question came up. He said he was asked to contact the Maine Municipal Association Legal Services Dept. and the Town Attorney, which he did.

Chairman Hamilton said the dilemma the BOA has is there is nothing in the ordinance that addresses waivers other than the Code Enforcement Officer can grant up to 25% in a non-conforming lot of record to the dimensional setback standards. He said, according to the ordinance, the Board of Appeals is empowered to grant up to 50% and anything beyond becomes a variance. He said it is confusing and sets us up in a position to be indefensible.

Chairman Hamilton said the last time waivers were discussed was at their last regular meeting on May 17<sup>th</sup> 2018 with Town Atty. Saucier. He said he is probably in arrears for not discussing this material sooner, but this was not received by the Town Clerk until August 21<sup>st</sup>, 2018. He said both Atty. Saucier and MMA Attorney MacMahon asked the Board of Appeals to do something about the problem, to amend the zoning ordinance and ask the Planning Board to review this issue. He said they need to discuss how to go about doing this because it (waiver) is a stumbling block for us.

Chairman Hamilton said there is nothing in the State law that refers to waivers, and no definition about waivers, yet this is the function of the Board of Appeals and we have no definition or criteria.

Chairman Hamilton said, over the last 20 years, someone came up with these five questions (on the

current Town of Eliot waiver application), which came from State review and had to do with a different type of variance.

Chairman Hamilton said he would like to discuss the MMA attorney's comments and the Town Attorney's comments and come up with something to recommend to the Planning Board.

Mr. Rankie wanted to know what section refers to the Planning Board review.

Chairman Hamilton replied Sec. 45, but the Planning Board cannot determine a waiver either because there are no criteria.

Mr. Rankie said anything the Planning Board had would still be subjected to the Board of Appeals.

Mr. Trott said as the new guy, at the previous meeting, going over the application, he felt like it was more of a personal opinion than something they were trying to make a decision on. He said that the last public hearing was so confusing and misleading, and we had the questions but the applicant just answered "yes" or "no" - which made it difficult to get any information from him.

Mr. Rankie said that is why he made that statement. He said there was a lot to think about and they had a very productive discussion. He said he would like to get something more solid.

Chairman Hamilton said the BOA needs to have something to justify our process and variances are nearly impossible to get. He said most towns need some vehicle to allow some change to the ordinance other than the "undue hardship" that cannot be met.

Chairman Hamilton read from the May 17<sup>th</sup> minutes where our ordinance indicates "undue hardship" and a disability variance, but Atty. Saucier mentioned two other variances that are not in the town's ordinance: the practical difficulty variance, which is slightly easier to get and the "setback" variance for single family dwellings. He said the practical difficulty variance applies to non-conforming lots of record.

Chairman Hamilton said, according to what both the MMA attorney and the Town Attorney said, the Code Enforcement Officer does not have the authority to grant a waiver.

Chairman Hamilton said they should ask the Planning Board to include the definition for a practical difficulty variance in the Town Code of ordinances.

Mr. Rankie said, going back to the Charter, someone has already written a waiver ordinance.

Chairman Hamilton said that, typically, the State has provided five questions.

Mr. Rankie wanted to know if the practical difficulty variance would be hard (to meet).

Chairman Hamilton replied no, that would be easier.

Mr. Rankie asked if they would be used for reference only.

Chairman Hamilton responded they would be advisory, and would allow us to make our own decision.

Mr. Rankie wanted to know if it would be different.

Chairman Hamilton answered the practical difficulty variance would be defined in our ordinance.

Ms. Lemire said in the statement, granting a "setback variance" is based on a demonstrated need.

Chairman Hamilton said that under the "Findings of Fact," the final decision should state the reason(s) why the Board voted 3-2 and that should be included.

Ms. Lemire said they are already doing that.

Mr. Rankie said they should get the comments from the majority and the minority.

Ms. Lemire said if they have a discussion, then all the Board members should state their opinions.

Mr. Rankie thought that Chairman Hamilton said it should be a summary.

Chairman Hamilton said he writes the summary.

Ms. Lemire said that if they all have the discussion, then they need to state what their position is.

Chairman Hamilton said the difference between a hardship and a practical difficulty is the first question. He said that is the one that nails everybody. He said it should be in extreme cases and not the rule and includes the four questions in addition to the one just mentioned.

Ms. Lemire read the definition of practical difficulty and said it has to be for an allowed use.

Mr. Trott asked what book is Ms. Lemire reading from.

Ms. Lemire replied it is the Land Use book, Sec. 4353, under Zoning Statutes.

Chairman Hamilton said the first change is to the word "waiver" and remove it from the ordinance and the second change is the Code Enforcement Officer being able to grant 25% in waiver. He said the town decided the CEO should do that, but only the Board of Appeals can grant variances. He said they have to change that, the CEO has the ability to grant 25% for a waiver.

Ms. Lemire said they are only focused on non-conforming lots of record and the town has a lot of them.

Mr. Rankie said a lot of towns have them and wanted to know if the Board of Appeals wanted to incorporate the CEO's ability to grant waivers.

Chairman Hamilton replied that the ordinance puts a lot more pressure on the Board, and up to 50% it becomes a practical difficulty variance. He said if they only assign the disability, the town cannot change that.

Ms. Lemire said that waivers have been going on since the beginning.

Chairman Hamilton said that the town is making it easier for property owners of non-conforming lots and that the Code Enforcement Officer should be looking at it – up to 25%. He said variances are not allowed to be granted other than by the Board of Appeals, and there is nothing called a "waiver" anywhere. He said anything beyond 50% should be a practical difficulty or a setback variance.

Mr. Rankie said what he is hearing is that these variances are easier to get but no waivers are to be granted by the Code Enforcement Officer.

Chairman Hamilton said we could add new criteria to the practical difficulty variance and the BOA is not giving someone a variance because we like them or we think it is a good idea, but that the applicant has satisfied the particular requirements of the ordinance.

Chairman Hamilton read the five questions and the definition of the practical difficulty variance and said all were small properties which had setback issues. He said they need to be clear in the Notice of Decision letter and Findings of Fact that the Board had concerns about the parking and traffic in that location, but it is not the Board of Appeals' job.

Mr. Rankie said they have to trust the Planning Board will look at the application very carefully.

Chairman Hamilton said we have to give the Planning Board advice and consent that the Board of Appeals determines it meets the waiver.

Discussion continued about the previous case.

Chairman Hamilton said someone along the way wanted to change their property and the ordinance and that is why #1 was added.

Mr. Marshall said he agreed with him, that lot was created after zoning went into effect, but if it was created prior to then it should be connected to some kind of provision stating the use of their property was taken away.

Mr. Rankie said most properties in town are not like the Marshall Farm when the zoning was not in place. He said that 70-80% of the people on Pleasant Street bought their properties when the zoning ordinance of today was in place and they are trying to maximize the use of their properties.

Chairman Hamilton said it is hard to differentiate when they bought the property 50 years ago.

Another brief discussion ensued.

Chairman Hamilton said some had 50-acre parcels with no limitation then the town decided to limit the parcels to two acres.

Mr. Rankie said that is why he bought land in Eliot 40 years ago.

Chairman Hamilton said that his property is on two acres.

Ms. Lemire said the only reason why we are having this discussion is because the Town Attorney advised us to.

Mr. Trott said they are talking about the practical difficulty variance and have all the questions from the last hearing but it is unlike the other variance.

Chairman Hamilton said they can come up with their own set of standards.

Ms. Lemire said they cannot be more lenient than the State.

Mr. Trott said they are looking at the questions, but wanted to know who put this together.

Ms. Lemire replied Atty. Saucier.

Chairman Hamilton said they are very difficult questions to resolve.

Mr. Trott agreed and said he is trying to look at this to do their job correctly. He said he understood the ordinance but these are tough questions.

Chairman Hamilton said they have to ask the Planning Board to revise the zoning ordinance indicating that the CEO cannot grant those kinds of variances that are allowed in our ordinance but not in State statute.

Mr. Rankie said they have to do more work before we go to the Planning Board. He said the Chair should contact MMA to see what kind of work has been done in other towns.

Chairman Hamilton said he will e-mail many of the considerations that we discussed tonight and will talk with the MMA Legal Services and also with the Town Attorney.

Ms. Lemire noted that if a waiver should come before the Board, they should go to the Town Attorney first.

Chairman Hamilton said Atty. Saucier said we should use the hardship variance.

Ms. Lemire said that Chairman Hamilton should notify the Town Attorney first before the BOA grants a waiver.

Chairman Hamilton said he did not think that was hard and fast.

Ms. Lemire said no, this is from Atty. Rebecca MacMahon and read the sixth paragraph down on page 3.

Mr. Rankie said she is referencing getting information – which he did agree with.

Chairman Hamilton wanted to get the Code Enforcement Officer's comments.

Ms. Bishop said everyone gets it – the hardship variance versus the practical difficulty variance – the applicant always has to meet the first criterion.

Chairman Hamilton said that is not part of the practical difficulty variance.

Ms. Bishop said, regarding the five questions the Board is talking about, there is the public hearing, and people will speak against it if it makes their property less valuable. She said the waiver gives more flexibility with a non-conforming lot and it will always go before the Board of Appeals.

Chairman Hamilton wanted to know if Ms. Bishop was in favor of taking the waiver provision away from her if the applicant can't meet the standards.

Ms. Bishop responded she is okay either way, but it is taking away the ability for the owner of a non-conforming lot to have a little bit of flexibility where they can't meet the standards.

Chairman Hamilton said the justification is the only other thing and the reason why one individual cannot grant variances is because there is no public hearing and the CEO is giving away 25% waiver, but it is only known to you and the applicant. He said if someone applies for a 25% waiver or whatever, you do not have to have a public hearing, like with a building permit and no one knows about it; whereas, with the other type of variance, it opens it up to the community and everyone knows about it.

Mr. Rankie addressed Ms. Bishop and said she had referenced that in her first sentence that people do not get the opportunity to speak. He said people are going to accuse her of getting a kick-back.

Ms. Bishop responded right, and they are looking at the practical difficulty variance which would allow people some flexibility to do something and stay in line with the State statutes.

Chairman Hamilton said the Board of Appeals has no jurisdiction in making a decision on waiver requests.

Ms. Lemire said she agrees that people should know what is going on in town, and the public hearing is the only part that she agrees with.

Chairman Hamilton said he agreed with Ms. Lemire and hopes it is easier to get a practical difficulty variance up to 50% as it is no longer 25%.

Ms. Lemire said she would like to see some practical applications of that, in the form of other appeals made in other towns and the discussions other towns have had.

Chairman Hamilton said that is his challenge to the Board and let's find out what other towns are doing. He said they have homework to do and they all have access to every town's zoning ordinance. He asked Ms. Bishop what does Kittery have and is there a provision for the CEO.

Ms. Bishop answered no, they called it a Miscellaneous Variation request, which went through the Board of Appeals.

Ms. Lemire said she liked that.

Ms. Bishop said she did not know where that came from or where to find that as it is not in the State statutes.

Chairman Hamilton wanted to know what is in the State Statutes.

Ms. Lemire answered all the variances are listed.

Chairman Hamilton said they have only gotten into the non-conforming lots of records. He asked everyone to e-mail him with suggestions. He said that maybe they will find something that other towns have done already like waivers which have been granted in the last five years.

Ms. Lemire said that waivers have been around quite a while.

Chairman Hamilton said like Ethel's Tree of Life.

Ms. Lemire said she did not agree with it.

Chairman Hamilton said that was because the BOA based their decision on the four criteria and he was looking at that today. He said there has not been a case but this is the time to make a change.

Ms. Lemire said the Board of Appeals has been considerate.

Mr. Marshall thought that when they were talking about a lot of record and the issue was brought up about the change in lot size, they were talking about assisting someone who needs to put a garage up, but it is too close, or put a dormer on the house, and apparently it was decided, wrongfully, and it turns out it caused a great deal of expense for the applicant to do that. He said in that particular case, the neighbors came in and said "let him do it". He said his neighbors have not responded in the negative and no one objected.

Chairman Hamilton said the ordinance says if someone has a 2-acre lot and wants to build up 10 ft. and basically, we do not need your approval. He said if a variance were to be given, it is not for the current owner, but every owner in the future.

Chairman Hamilton said they should not satisfy the abutters of today because the variance goes with the property. He said 20 years from now, the neighbors may look at it and ask what went on.

Mr. Marshall said he did not think they can look that far out.

Another discussion ensued.

Chairman Hamilton said let's see what we can find, and, within a couple of weeks, he will contact Maine Municipal Association and say this is what the Board is thinking about and would like to make this proposal to the Planning Board, but let's get some samples.

Ms. Bishop said there is a waiver request coming up at the November meeting and wanted to know how will the Board of Appeals handle that.

Ms. Lemire said they cannot change anything until the ordinance is revised.

Chairman Hamilton said he will be in touch with the Town Attorney after he talks with the Select Board. He said it is very impressive, page 4, paragraph 8. He said that Atty. Saucier suggested using the four criteria from the undue hardship if they want a waiver and have not created standards for a practical difficulty. He said they should apply that in every waiver situation.

Mr. Rankie wanted to know how can they change in the middle of the stream. He said they have defining a waiver for "x" number of years and they realize they are doing something wrong, now they have to follow what they have been doing.

Chairman Hamilton said the Town Attorney suggested using the four criteria in the ordinance.

Ms. Bishop said they still have it in the ordinance and it allows a waiver. She said the one they have coming up is a request for a 50% waiver and asked if she should call Atty. Saucier.

Chairman Hamilton replied that Atty. Saucier stated very clearly the BOA should use the 4 criteria and will ask the applicant to use the five questions for a practical difficulty variance.

Mr. Rankie said we need to make it clear that we are looking at this.


Ms. Lemire added and that we are having this discussion.

**5. Other Business:** None

**6. Adjournment:** Mr. Marshall moved to adjourn the meeting at 8:48 p.m., seconded by Mr. Rankie and approved 5-0, motion carries. Meeting adjourned.

Respectfully submitted,

Barbara Boggiano  
Recording Secretary

Approved by:   
Bill Hamilton, Chair, BOA

Date Approved: 12-19-19