

Zoning Board of Appeals Hearing Minutes
For Roland Nadeau, appellant
Town of Lyman
March 29, 2017

Members Present: Chairman Tom Larned, Secretary Bertram Sobanik, Arthur Dumas, Michael Archambault, Bruce Fearon, and Jay Cloutier (1st alternate)

Others Present: CEO Patti McKenna, Stephen Gray, Marie Nikel and Paul R. Lizotte

The Chairman called the meeting to order at 7:00 pm. He read the opening remarks and the procedures as follows: Welcome to the March 29, 2017 hearing of the Town of Lyman Zoning Board of Appeals. This hearing will come to order. This is a public proceeding and, unless the Board specifically votes to go into executive session, you have the right to hear everything that is being said and to look at all the exhibits that are offered. Please notify me if you are unable to hear or see. Please turn off cell phones or any other noise-making devices to avoid interruptions.

Tom Larned, Chairman introduced the Board; Bert Sobanik, Secretary; Art Dumas; Michael Archambault, Bruce Fearon, alternate Jay Cloutier, who will not be voting at the hearing, and Clerk Irene Single

The Board works from a prepared agenda and will be considering the administrative appeal of Roland Nadeau concerning a decision of the Code Enforcement Officer stating she misinterpreted the ordinance in her denial of his request to build an accessory dwelling unit.

The burden of proof is upon the applicant to demonstrate compliance with the provisions of the applicable ordinance or ordinances. After the Board votes on the merits of the application, it will prepare a written opinion.

Appeals from adverse decisions must be filed with Superior Court within 45 days of the Board's decision. Also, to be certain that you preserve your individual right to file any such appeal, you must be certain that this Board's record evidences your appearance this evening and the basis for your support or opposition. Please record your attendance on the sign in sheet by printing and signing your name.

Again, remember this is a public proceeding and you have the right to hear and see what is happening. All persons speaking will be asked to first state their name and address or affiliation.

Are there any questions?

Preliminary business:

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1. We have a full Board of 5 (five) members this evening. Alternate Jay Cloutier, will not be voting.
2. Timeliness of appeal: The Code Enforcement Officer's decision was issued on February 22, 2017, and the appeal was filed March 1, 2017.
3. Summarize the appeal. The Chair summarizes the nature of the appeal and any documents submitted in support of or opposition to the application.

Roland Nadeau is appealing the decision of the Code Enforcement Officer regarding construction of an accessory dwelling unit at 26 Zander Lane.

4. Jurisdiction: Section 9.2.9.A.1 of the zoning ordinance states that in an Administrative Appeal the Board will hear and decide where it is alleged that there is an error in any order, requirement, decision or determination by the Code Enforcement Officer in the enforcement of this Ordinance. The action of the Code Enforcement Officer may be modified or reversed by a majority vote of this Board.

Chairman allowed the Code Enforcement Officer to discuss jurisdiction first. CEO, Patti McKenna, said she brought this up only because this is the second decision on this appeal. The first one was in July 2016 and it was not appealed. They were similar in nature. The first one was for a detached accessory dwelling unit. The second one was denied on February 22, 2017 for a remodeling of an existing garage into an accessory dwelling unit. She wanted to disclose this early on.

5. Conflict of interest or bias: If any member of the Board has a direct or indirect pecuniary interest in this case, please make it known now. No conflicts stated.
6. Standing: Roland has sufficient standing in this case as the registered owner of the property.
7. Complete Application: He has a complete application.
8. Order of business
 - a. Presentation by the appellant and his attorney and witnesses, without interruption;
 - b. Questions through the Chair to the Appellant by Board members and requests for more detailed information on the evidence presented by the Appellant;

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- c. Presentations by abutters or others who will be directly affected by the project and their attorneys and witnesses;
- d. Questions by the applicant and Board members through the Chair to the people directly affected and witnesses who made presentations;
- e. Rebuttal statements by the CEO;
- f. Comments or questions by other interested people.

Appellant, Roland Nadeau, explained to the Board that the property in question is at his current residence at 26 Zander Lane. He wrote a check for his first appeal however tore it up. He applied for a permit to put up a structure (a garage). He has built a 2-car garage with an upstairs. He has a permit for a 100-amp service issued by the electrical inspector. It is installed and approved and the power is separate from his home. The next thing he did was get a septic design for a 2-bedroom house which was installed and approved. He has a plumbing permit for a full bath with washer and dryer hook ups. What he's missing from this project is a kitchen sink. He believes the CEO stopped reading the ordinance after reading Section 10.6 and he interprets that his project meets all the conditions and that it meets 10.6 and that his unit is within an accessory dwelling unit. He maintains he can place an accessory dwelling unit above the garage but he has no data to provide to prove it except the interpretation of the ordinance. He believes it is allowed according to section 10.6.3 where it states, "The accessory dwelling unit shall be located in the same building or accessory building to the principal structure...." Where does he go from here?

Chairman asked, "Any questions from Board Members?" Mr. Dumas's primary concern is the res judicata issue where this issue was raised once and not appealed. He asked, "Is the town pressing that or not?" CEO said she thinks it's the Board's decision and she would not appeal it if they feel they have the evidence. Mr. Dumas thinks that is the first thing they have to decide. CEO said she used the same information in making her decision in July to make the decision in February. Chairman said the two letters look "almost exactly the same." Mr. Cloutier suggested they handle the jurisdiction part first before moving on. Board agreed.

Chairman stated they have a request for a building permit for an accessory dwelling unit back in July which the CEO denied and was not appealed. Appellant said he turned in the appeal but didn't pursue it only because it (accessory dwelling unit) had to be in an existing structure, even though that's not spelled out in the ordinance at all. CEO responded that she thinks from her recollection is that "we" (the town) were going to bring that referendum question back in November to fix the conflict in the ordinance. "There is nothing in this that says something about an existing building. We hoped to bring it back and fix the conflicting words but it got defeated in November."

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The Board cannot go by the reasons why the voters rejected it in November after passing it in June. Mr. Cloutier's concern is that it was not appealed last year and that perhaps it should have gone forward with the stipulation that Mr. Nadeau ask for a hold on it until the results of the November referendum. Since Mr. Nadeau chose to pull it back, he thinks it's done. He should have delayed the process. Chairman and Mr. Dumas said "Res judicata." Mr. Dumas said there are two or three variables to consider including the issue that Patti (CEO) said she wouldn't appeal it. He said, "First it sounds that Roland relied on the hope and expectation that this would change and he'd be able to go forward. And it would be fair to listen to it based on the merits. The second thing is that even from a technical standpoint and if Patti is correct, I think you could argue that res judicata (already been decided) would not apply as he's seeking a building within an accessory unit. Now he's only seeking an accessory dwelling. He legally got the building."

Chairman said, "It seems like, with this issue coming up on the referendum last November like you said, in all fairness we should go ahead and consider this issue even though it got turned down. Now in fairness this was happening and he decided to wait and here we are." Mr. Dumas agrees to eliminate the res judicata and go on based on the merits. Chairman said it's reasonable to continue. He said, "Here the appellant has a garage which has the elements of an accessory dwelling unit and looking for a permit for that. Does it matter that it got turned down by referendum? If there was still a possibility that it comes up again and the results are changed that would affect his decision. Based on that we could overturn that decision." Mr. Dumas asked if this was the only decision in the referendum and CEO said it was voted on by itself.

Mr. Nadeau said, "the ordinance was approved by the Planning Board, the town council (Board of Selectmen) and the CEO so what's the problem here!" CEO said we had left a conflicting word in there and MMA said there's a conflict and that the language in our ordinance states the stricter part of the ordinance has to be followed and to deny all detached accessory dwelling units even though we intended to allow it.

Mr. Dumas said he doesn't actually see the wording as a conflict in reading the sections. He read Section 10.6 "One accessory dwelling unit **shall** be permitted within an owner-occupied single family dwelling in all districts." He said, "That does not by itself mean you cannot have an accessory unit within a dwelling. Then you have the second sentence which states 'the accessory dwelling unit **shall** be located in the same building **or** accessory building...". To me those are not in conflict. One says it can be within a dwelling. One says it can be within a building or accessory structure."

Mr. Sobanik asked the dimensions of the garage and Mr. Nadeau responded "24'x36', but you have to exclude closets, stairways, bathrooms. I have a drawing if you want to see it." He showed them the drawing explaining what areas do not count. He said "It's under 600 square feet. That's a pretty big area. I brought that before the Planning Board at a

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public hearing. Nobody disputed that fact. There are several ways to circumvent that. I can build a 40'x40' and have only 600 square feet of living space. There is nothing in there that considers size. Mine is 24x36 with a 2-car garage under it and it's on my property."

Mr. Cloutier, in looking at Section 10.6.3, brought up the issue of the word 'within' and said Mr. Nadeau's is a detached garage and "If it's an attached garage it would be one thing." Mr. Dumas said, "It only says one accessory dwelling unit shall be permitted within." Mr. Archambault said he could have one inside that structure. Mr. Cloutier reads it as 'an accessory' needs to be attached. Mr. Dumas doesn't read it that way. Mr. Archambault said that "logically this is saying it can be in the same dwelling and the next section says "or" can be allowed." Chairman said the condition could mean that it can be within or in an accessory dwelling. That is why there is this conflict.

Mr. Archambault asked how far away is the detached garage from the principal dwelling and Mr. Nadeau laughed and said he could "attach a wire from one to the other and still call it attached. There are a lot of ways to attach it." Mr. Dumas asked the CEO if in her opinion an accessory building has to be attached. CEO said "Currently it does. Before they changed the wording, it had to be attached." But then she said "No, an accessory building does not have to be attached." That's the part that MMA said conflicts. Again, Mr. Dumas said those are two separate sentences. If accessory doesn't mean attached, then he doesn't see the conflict. CEO said it says two different things. Mr. Dumas said he is homing in on the first sentence that says "that something shall be permitted; a single family dwelling within and it doesn't say it cannot be without, only that it can be within." Mr. Archambault said "It doesn't make sense that they talk about an accessory dwelling unit if the intent was not to be a detached garage. Why would someone rent out an accessory within their home? It makes more sense that an accessory unit be in a different building. An accessory to the main unit, not a part of the principal, that's how I see it." Chairman asked, "How about 10.6.4 which states 'The building containing the accessory dwelling unit shall have the exterior appearance of a single-family home?' Does it look like a single-family home or a 2-car garage?" Mr. Nadeau said "It's a 2-car garage with an upstairs and vinyl siding. There's a foundation underneath." Mr. Dumas asked, "Aren't there a lot of houses that are built on top of 2-car garages?" Mr. Nadeau said "That's where this whole project took charge. There are so many violations in Lyman on second floors. I should probably not tell you this but I will but I have violations. The intent of the article was to clarify this and MMA came back and said to her (CEO) that if it ever went to court, they would look at the intent. I think the intent was to be an accessory dwelling."

Mr. Sobanik asked, "Is there any way to subdivide this and have that stand alone? Would it meet the setbacks and the lot size if you were to cut that off?" Mr. Nadeau said, "You really can't cut them off because you are allowed two accessory structures in general

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purpose to be on your lot. There's no way to cut it off because I would be creating a non-conforming lot to start with. You can't sell it, you can only rent it and keep it only because if you cut it off you're creating a non-conforming lot under five acres. I only have five acres to be conforming." Mr. Sobanik said that's what he was asking.

Mr. Archambault thinks that 10.6 is a positive statement about what shall be permitted and not a negative as to what cannot be permitted and that 10.6.3 also says what shall be permitted underneath that so he just thinks that 10.6.3 specifically, to him, that it can happen and 10.6 doesn't say it can't happen. He doesn't see a No." Chairman asked, "So how do you define 'within' in an owner-occupied single-family dwelling? So, do you think the intent was to allow a detached dwelling?" Mr. Archambault said what he is thinking is that they (the ordinance) are saying one accessory dwelling unit is permitted within your house under the following conditions." Chairman said "So you think that the intent was there to put in accessory dwelling? It doesn't totally prohibit it." Mr. Archambault said, "That is correct. Why put 10.6.3 in there if you didn't want it to happen?" Chairman said, "It's kind of screwed up." The CEO said, "That's what MMA said." Mr. Dumas said the referendum was supposed to clarify this confusing ordinance. He thinks Mr. Nadeau still has the right to put in this accessory dwelling as long as it meets everything else and he didn't hear Patti (CEO) say anything contrary to that.

Chairman asked if there were any abutters or anyone else who has questions or would be affected by this project. Marie Nikel of 34B Zander Lane asked, "Do you know if this referendum question will come back in June for a vote?" CEO answered, "Yes it's coming back in June." Mr. Nadeau said he was not waiting for another referendum. He owns all the property in the area. Mr. Archambault asked if there was any way to know the vote of November. CEO didn't know. It had been posted on the board at one time. Mr. Nadeau said there were several hundred people who voted because of the Presidential election and many didn't understand what they were voting for. Chairman asked if there were any more questions.

Paul Lizotte of 478 Mast Road asked if this decision would pertain only to Mr. Nadeau or if it would be allowed for others to build a unit over a garage. Mr. Nadeau said that's what they are voting on tonight. Chairman said it is precedent setting. "It gives you a basis if the Board reverses the decision." CEO said it would change how she interprets the ordinance. Mr. Archambault asked Patti "What's the slippery slope that we are worried about on this? Is there a negative if a bunch of people pop up and want this?" CEO said, "We tried to make it so you could do this. Our ordinance says the stricter part of our ordinance applies when there's a conflict. We want to bring it back again so people can have detached accessory units. It isn't that we don't want them." Mr. Archambault said "So it's not really a negative, it's just one word that is conflicting. I think that there's definitely a good argument on both sides and I think there's not really a big concern that this is happening in the town of Lyman."

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Chairman asked if he can have a motion to take a vote. Mr. Sobanik and Mr. Dumas said they have heard enough. They proceeded to take a vote. Chairman said, "All of those in favor of overturning the Code Enforcement Officer's decision and permitting an accessory dwelling unit in the accessory building say Aye or raise your hand." He said, "That's a unanimous vote in favor. Jay is not voting. I kind of like your argument, Patti." CEO said, "We thought it was allowing but then...." Chairman said he can see where that would be so. Intent is obviously here. Mr. Sobanik said, "10.6.3 accessory dwelling unit" all comes unwound. Mr. Nadeau said, "You can bring the article back." CEO said, "I don't know if we need to." Chairman said this should provide her enough..." Mr. Dumas said, "It is confusing and it would be good to get it clarified." Another short discussion followed.

Mr. Archambault moved to close the hearing, seconded by Mr. Dumas, all in favor.
Adjourned at 7:43 pm.

No notes from the Board were given to the Clerk for the official record.

Respectfully submitted,

Irene Single, Zoning Board of Appeals Clerk

I certify this 7- page document to be a true and accurate copy of the proceedings of this public hearing.

Bertram Sobanik, Secretary