

**TOWN OF LYMAN**  
**ZONING BOARD OF APPEALS PUBLIC HEARING**  
**TUESDAY, APRIL 13, 2021 – 6:00 P.M. – LYMAN TOWN HALL**  
**ADMINISTRATIVE APPEAL - JEFFREY DEMERS FOR MAP 10, LOT 5C REVERE WAY PROJECT**

***Note: These are summary minutes. A recording of the meeting is on file at the Lyman Town Hall. Minutes are not verbatim. Minutes may be paraphrased for clarity.***

**MEMBERS PRESENT:** Chairman Thomas Larned, Secretary Bertram Sobanik, Arthur Dumas, Bruce Fearon, and Kelly Stevens.

**ALSO PRESENT:** Appeals Applicant Jeffrey Demers with Attorney Keith R. Jacques, Attorney Joseph V. Lenkowski for Map 10, Lot 5C Revere Way Project Owner David Alves, Lyman Code Enforcement Officer Patti McKenna and Planning Board Chairman Roderick Tetu, and Town Attorney Bradley Morin.

Chairman Thomas Larned called the meeting to order at 6:00 p.m., introduced parties involved that were present, explained the hearing procedure, and noted the following as Preliminary Business: (1) Quorum - was present; (2) Timeliness of Appeal – filed within 30 day deadline; (3) Summary of Appeal – site plan was incomplete and inadequate, Wadleigh Pond Road will not support the increased traffic, and 7 principal use buildings are not allowed on one lot in the General Purpose District; (4) Jurisdiction – Section 8.3.9 of the Zoning Ordinance states that the Zoning Board of Appeals shall be on an appellate basis and shall be limited to review of the record developed before the Planning Board – Any appeal from a decision of the Zoning Board under this section shall be made to the Superior Court within 45 days after that date of decision; (5) Conflict of interest or bias – None stated; and (6) Standing – As an abutter the applicant has standing to appeal.

Presentation by the applicant was made by Attorney Jacques highlighting the following high points (noting points presented but not spoken are in no way waived or abandoned):

(1) The Zoning Board of Appeals is required to reverse the decision of the Planning Board if they determined a procedural error was made or it was contrary to the ordinance.

(2) The property is located in the General Purpose District which by ordinance limits development to no more than one building for each principal use and no more than two buildings for accessory use. The Planning Board permitted seven buildings on a single lot, six related to the principal use (greenhouses for medical marijuana cultivation).

(3) The Planning Board's justification that the phrase in the ordinance "as limited by lot coverage requirements" gave the Planning Board the authority or ability to expand the number of buildings allowed because the project is on a big lot, but that interpretation ignores the plain language of the ordinance for a General Purpose District. In essence the Board applied the Commercial/Residential District Zoning Ordinance to this project which states the number of

buildings (or what can be done in the buildings) is determined by the total lot coverage allowed for the site. But this project is not in the Commercial/Residential District, this project is in the General Purpose District.

(4) The project did not meet several site plan review standards (listed in the written submission) and all must be met otherwise it fails. Focus was given to three:

a. The project will not create a hazard to pedestrian or vehicular traffic or significant traffic congestion.

b. The project will not create a safety hazard because of inadequate access to the site or buildings for emergency vehicles.

This site is accessed by the narrow, dirt private way (Wadleigh Pond Road) and the Planning Board made inadequate provisions for improvements and maintenance of this way (built and maintained by the private owners) and it is now going to be required to serve construction and commercial traffic to access a project that far exceeds what is allowable under ordinance. The Planning Board also failed to make provisions for emergency vehicles to have continued access. It was noted an agreement was made that provided for a one time payment followed by annual contributions conditioned upon there being a road maintenance agreement in place, done with no input from or consultation with the people who built and maintain the private way. The Planning Board ignored the inherent limitations of the private way and of the site. Noted - The concerns of Fire Chief Mathiew Duross who indicated as always, during winter and spring seasons, travel will be difficult, in addition to the water supply being inadequate for the site. Subsequent thereto another communication was received from Chief Duross stating "water supply produces no abnormal concerns", which thereby makes the record unclear on the subject.

c. The project will not have a significant adverse effect to adjacent or nearby property values. There is no evidence the developer of this project met this standard. Also, the ordinance states the Assessor is supposed to sit on the Staff Review Committee to provide input and due to the current vacancy of a Town Assessor this did not happen nor was there effort to find a replacement or get that input. Instead, the Planning Board took the word of a Board Member who found there was not enough out there to determine one way or the other, so the Board made the finding that that was the end of that.

Attorney Jacques stated this project should never have been approved. It is clear under ordinance it should not be there. It is a huge burden at the end of a private road maintained by private residents with no consideration given to their needs and desires. He asked that the decision of the Planning Board approving the project be reversed.



Presentation by Code Enforcement Officer Patti McKenna and Planning Board Chairman Roderick Tetu was made as follows:

- (1) Ordinance Section 6.3.1(B) was read – In a General Purpose District there shall be no more than one building for each principal use and no more than two buildings for an accessory use as limited by lot coverage requirements. An e-mail dated December 10, 2020 from Maine Municipal Association legal department was read regarding principal use and the number of buildings allowed for each. The letter also addressed the ambiguity of the ordinance and indicated ... “Generally, an ambiguity would be construed in favor of a landowner, except in cases involving a nonconforming use, structure, or lot”.
- (2) In February 2020, the Planning Board reviewed and approved (based on the same premise as this project) a project in a General Purpose District for several self-storage buildings that met the lot coverage requirements (as this project does). That project was not appealed.
- (3) With regard to the reference made to Fire Chief Mathiew Duross changing his mind/letter after a conversation with the Code Enforcement Officer, it was noted that to discuss and converse with other departments about projects and applications is something in the CEO’s job description. Chief Duross indicated that there were already concerns and that this project does not increase those concerns. That was the conversation that occurred.
- (4) The Assessor does not sit in on the Planning Board and the Staff Review is a sub-committee of the Planning Board; a separate committee that reviews smaller applications (such as for a daycare). The Assessor is not required and is not asked to sit on the Planning Board.
- (5) The burden of proving a project would negatively affect a property value is on the property owner making the claim, not on the developer. There was no evidence presented by any nearby property owner for the Planning Board to review to that effect.
- (6) The CEO does sit on the Staff Review Committee and with regard to the application for that Day Care, when asked, that applicant stated they maintain the road already and will make sure it remained safe to travel. The Planning Board felt they acted similarly when they accepted the offer of the applicant of the Revere Way project for the payment and contributions for maintenance as referenced.
- (7) The letter from the Town Attorney Bradley Morin dated December 15, 2020 was referenced regarding the Planning Board’s right to issue a business permit on a private road which indicated: (a) he did not believe the Town could force a commercial developer to be responsible for a private road; (b) that the responsibility for maintaining a private road is probably an area outside the Town’s authority to control; (c) in many cases a private road is maintained by its users or an association formed for the purpose; (d) the ordinance definition

of roads includes both public and private roads – which leads to conclude that commercial projects can be approved in either setting; and (e) he did not believe that the application could be denied simply because the access to the property is over a private road – if private road access was a bar to commercial development it would be spelled out explicitly in the ordinance.

Presentation by Attorney Joseph V. Lenkowski for Revere Way Project Owner David Alves was made as follows:

(1) Attorney Jacques correctly stated this Board is to reverse the determinations and findings of the Planning Board only if it finds that the decision was based on a procedural error or was clearly contrary to the ordinance.

(2) Attorney Jacques arguments made regarding the various criteria was really asking this Board to substitute their judgement for the judgement of the Planning Board. The Planning Board heard what was presented to it and made substantive decisions based on those presentations. The Board would be going beyond its authority to act on those portions Attorney Jacques would like it to act on. Those were for the Planning Board and the Planning Board made those decisions and as long as they have some basis in the record for that decision it should be upheld.

(3) The Code Enforcement Officer's presentation and the letter from Maine Municipal Association Legal Department both made it clear that there is a patent ambiguity in Ordinance Section 6.3.1(B) – *"there shall be no more than one (1) building for each principal use and no more than two (2) buildings for an accessory use"*. As written, this suggests there is no limit on the number of principal uses that could exist on a lot in a General Purpose District. There can be 7,8,9 etc. principal uses each with one building plus two accessory buildings on a lot. How the Planning Board dealt when faced with that ambiguity was both reasonable and rational and was how they have done it in past cases, which was applying what was already contained in the Ordinance Section 6.3.1(B) *"as limited by lot coverage requirements"*. If the Board determines that was a reasonable interpretation than what the Planning Board did was clearly not contrary to the ordinance.

Chairman Tom Larned opened the floor for questions through the Chair to the Applicant, Planning Board, Code Enforcement Officer, Board Members, and people who will be directly affected by the project/abutters.

John Tibbetts, member of the Staff Review Committee, spoke to clarify the point made earlier (regarding the Day Care Project) indicating that the Committee was not going to approve that application without those road conditions.



Don Hernon, member of the Planning Board, submitted a Memorandum dated February 11, 2021 which states his support of the approval by the Planning Board of this project. He stated this project was a permitted use on a 50 acre lot in a General Purpose District. Seven meetings, a site walk, and a public hearing with over 70 people in attendance was held (the majority not in favor), and they tried to follow the standards within the ordinance. He added this was not a popular project. He noted this particular use was approved in June 2019 at the Annual Town Meeting by a close vote (approximately 100 in favor and 80 against) with less than 200 total votes cast. As far as he is concerned the Planning Board did due diligence in following the ordinance when considering the project. He does not have any financial interest in this project and is not speaking for the whole Planning Board.

John Houy, 292 Wadleigh Pond Road, stated his wife was in charge of the maintenance of the road for the last 8-10 years. He read from the letter submitted in the application (Exhibit G) to Jose & Denis Morais from Select Board Chair Leo Ruel dated December 20, 2011 asking all residents of Sullivan Lane (which is a private road) to contribute to the cost of a culvert repair that was needed. He noted that right now Wadleigh Pond Road has a culvert  $\frac{3}{4}$  collapsed because of the logging that went on on this property and the residents now have to open up their wallets to fix it.

CEO Patti McKenna noted the December 20, 2011 letter was not presented to the Planning Board during this project's application process, so it was not part of what was reviewed.

Also, with regard to the comment made earlier by a Staff Review Committee member, based on the Town Attorney's opinion (that an application for a business on a private road could not be denied simply because access to it was over a private road), they would have erred if they denied that Day Care application. She added her feelings were that she was specifically excluded from a particular Staff Review discussion because she would have brought up that a legal opinion was being sought and would have suggested to hold off on a decision until it was received.

Attorney Jacques noted they were not there to state under no circumstance can a commercial project be located on a private way; they were there to state this private way is not adequate for this extensive project. Perhaps one greenhouse yes, but not six.

Brian Dulong, 105 Chappell Shores Road, questioned a comment made earlier from a Planning Board Member regarding the town vote on this project. Clarification was made to Mr. Dulong that the comment was with regard to a town vote in favor of an ordinance allowing medical marijuana grow facilities, not a town vote on this particular project.

David Dulong, 107 Chappell Shores Road, stated he went through the Ordinance and thought only one principal use is allowed per lot. The Planning Board has allowed six buildings for one

principal use which is obviously not correct. He could have five different uses with a building for each, but we do not have five uses, we have one use with six buildings.

Bertram Sobanik brought up the possibility of subdividing the property after the project is completed and questioned if it were going to be written in that it could not be sub-divided. Patti McKenna stated it was not written it and noted per ordinance, the minimum requirement for a medical marijuana production facility is 5 acres. Bertram Sobanik stated this lot could then be subdivided and the project end up on a 5 acre lot. Attorney Lenkowski noted that could not happen because it would not be approved; it would exceed lot coverage allowed by ordinance. Arthur Dumas questioned why the Zoning Board of Appeals would even care about that scenario. Bertram Sobanik answered because it was brought up it was going to be on 50 acres so that was going to make it all right.

Kelly Demers, 10 Partridge Way, member of the Planning Board and also a licensed real estate appraiser commented on property values and explained in detail the process for establishing property values. He reported his findings on feedback received on a national level which indicated there is no supportable market based data from which to form creditable results showing any discernible market value change for properties located nearby or potentially affected by proximity to marijuana growth facilities. Kelly Stevens mentioned that there were other studies out there (NIH Research Studies) that show market value devaluation.

John Houy commented on the project report provided indicating that there will be odor therefore in his opinion that would negatively impact the sale of his home.

Attorney Jacques requested the Appeals Board to look closely at the MMA letter because it does not state because of ambiguity you can put as many buildings up as you want. He added that in essence the Planning Board rezoned this property to a Commercial District to be able to put more greenhouses on the property. The Board turned it into a pure lot coverage issue.

Jeff Demers, 303 Wadleigh Pond Road, commented on public safety (the dangers of people doing the "grab and go" and also getting public safety vehicles and apparatus down to the site) noting that he and his family's homes will be 600-700 feet away from this establishment.

Patti McKenna noted that the Planning Board does have a condition on their decision and read it as follows: "if an odor violation is confirmed by the Code Enforcement Officer the applicant shall resolve the issue within 5 days...the CEO may revoke the Certificate of Occupancy if the odor issues are not resolved within 5 days".

Kelly Stevens questioned the odor control plan and stated she would like to know more about the company referenced ("Odor Organica"). Patti McKenna stated the odor control plan submitted was peer reviewed by a third party (Southern Regional Planning) noting that the goal



of the odor control is to have no odor outside of the buildings and the condition imposed is standard and used by other towns.

Arthur Dumas confirmed this project was “grow only” therefore there would be no “dropping by” to pick up marijuana by individuals. It was then stated the reference of “grab and go” was to criminal activity (individuals stealing the product).

Arthur Dumas noted this project was stated as being the equivalent of three houses, the applicant agreed to pay the equivalent of 2 houses, and that the owners of the road have the right to hire a Road Commissioner. Also, the fact remains that there is nothing stopping the applicant to construct 3 bigger buildings instead of the original 6 buildings proposed.

Chairman Tom Larned open the floor for questions from the public through the Chair to the Applicant, Planning Board, Code Enforcement Officer, and Board Members.

Maurice St. Clair, So Waterboro Road, questioned the definition of principal use noting the project referenced earlier by the CEO was his project (4 buildings to be used as storage units in a General Commercial District).

*At this time, 7:02 p.m., it was determined all questions and comments from the public were heard therefore Chairman Thomas Larned closed the Public Hearing portion of the meeting and the Appeals Board entered into general discussion.*

Thomas Larned stated the Appeals Board would first have to determine if the Planning Board made a procedural error by not following Ordinance 6.3.1(B). He noted the following: (1) lot coverage for the project is not an issue; (2) the principal use is a marijuana growing facility; (3) there are six buildings proposed for the purpose of growing; and (4) there is one building proposed for storage. He stated the MMA letter read aloud did not sound as if one could override the “one building allowed for primary use per lot”.

Patti McKenna read the following from the MMA letter: ...“I agree that the limit contained in 6.3.1(B) on the number of buildings in a General Purpose District to not more than one for each principal use suggests that there could be more than one principal use in that district”... She stated the word “each” in the ordinance is what makes it ambiguous, which as MMA states, an ambiguity generally would be construed in favor of the landowner.

Bertram Sobanik stated he could not see where the proposal states it is for more than one principal use. Thomas Larned asked why the Planning Board upon review of this project overlooked this. Patti McKenna explained it was because of the words “each....as limited by lot coverage”.

Kelly Stevens asked if any of the other items that were incomplete as pointed out in the Appeals Application have been addressed by the landowner. Patti McKenna noted that the project has been approved so nothing further had been addressed.

Town Attorney Bradley Morin suggested having Attorney Lenkowski explain how this project fits into the ordinance. Attorney Lenkowski stated he was not there to interpret the ordinance for the Board he was there to make the point that the Planning Board reviewed an application for a project and based on the ambiguous ordinance in place (not entering into account anyone else's interpretations of the ordinance) and everything put in front of them, whether they made a reasonable effort or not. If it was reasonable, their decision should be upheld.

Attorney Jacques referenced the comments of ambiguity in the ordinance and read aloud the following: ....*"In the General Purpose District there shall be no more than one building for each principal use and no more than two buildings for an accessory use"*... He then read it again replacing the words "each principal use" with "marijuana growing facility" and stated there was no ambiguity there.

Town Attorney Bradley Morin highlighted some of the MMA letter and stated the answer contained therein was somewhat ambiguous itself. He added that when something is reviewed on an appellate basis you review how things were interpreted in the past. He noted the Appeals Board can recess and seek further professional advice.

Attorney Jacques noted that the fact the Planning Board got this wrong before in the past, does not mean that they get to get it wrong now. He added that this is the first time the Appeals Board is being faced with this issue and it really is the time to fix it before it gets out of hand and there is one commercial district in the entire town of Lyman.

Thomas Larned noted there is some ambiguity when you get into multiple purposes and asked if there was anyway to construe six greenhouses as multiple purposes. The consensus stated was no, not the way it was presented, it looks like one principal use.

Thomas Larned noted that the ordinance is written for a 5 acre housing lot however when you get to a bigger lot and more of a commercial operation it does not seem to fit very well.

Arthur Dumas noted that a logical and reasonable interpretation of the ordinance would also be that you can have up to one building and up to two accessory buildings - but it is all limited to the amount of land you have; so, if you only have a one acre lot you probably cannot have two accessory buildings as you would be limited by lot size and coverage (per ordinance).

Bertram Sobanik stated the ordinance reads no more than one building for each principal use – there is one principal use – there is more than one building – it fails.



Bruce Fearon stated he can understand what the Planning Board was working with and can also agree that the way the ordinance was written was more for when the town was growing. He noted the project has only one purpose and referenced the way the ordinance was written. With regard to the comments of ambiguity he indicated that the boards really need to work on consistency.

Thomas Larned added that the ordinance probably needs to be revised a little bit down the road however the question now is whether the Planning Board went against the ordinance. He reviewed again the specifics of the project out loud and then indicated he did not see how it fit into the General Purpose District. **Roll Call Votes followed.**

**(1) Did the Planning Board err in approving the project based on Ordinance 6.3.1(B)?**

	<u>Yes</u>	<u>No</u>
Bruce Fearon	X	
Arthur Dumas	X	
Kelly Stevens	X	
Bertram Sobanik	X	
Thomas Larned	X	
<b>TOTALS:</b>	<b>5</b>	<b>0</b>

**(2) Did the Planning Board consider the plans sufficient – were data requirements met?**

	<u>Yes</u>	<u>No</u>
Bruce Fearon	X	
Arthur Dumas	X	
Kelly Stevens		X
Bertram Sobanik		X
Thomas Larned		X
<b>TOTALS:</b>	<b>2</b>	<b>3</b>

**(3) Did the Planning Board properly consider and adequately address Section 8.3.6 (B) ? -**

**#4 – Will not create a hazard to pedestrian or vehicular traffic or significant traffic congestion**

**#7 – Will not create a safety hazard because of inadequate access to the site or buildings for emergency vehicles**

**#10 – Makes provisions for vehicular parking, loading, unloading, as well as vehicular and pedestrian circulation on the site and onto adjacent public streets which would neither create hazards to safety nor impose significant burdens on public facilities**

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	<u>Yes</u>	<u>No</u>
Bruce Fearon	X	
Arthur Dumas	X	
Kelly Stevens	X	
Bertram Sobanik	X	
Thomas Larned	X	
<b>TOTALS:</b>	<b>5</b>	<b>0</b>

**(4) Did the Planning Board adequately and properly consider the issues of property values ?**

	<u>Yes</u>	<u>No</u>
Bruce Fearon	X	
Arthur Dumas	X	
Kelly Stevens		X
Bertram Sobanik	X	
Thomas Larned	X	
<b>TOTALS:</b>	<b>4</b>	<b>1</b>

Thomas Larned stated overall, the Zoning Board of Appeals is going to return this to the Planning Board for their reconsideration because they erred with regard to 6.3.1(B) and site plan requirements were not met as specified. He added with regard to all other issues (safety and property values), the Zoning Board of Appeals ruled that the Planning Board did consider and approve appropriately.

A **MOTION** was made by Kelly Stevens, seconded by Bruce Fearon, to close the Public Hearing at 7:49 p.m. Motion passed by Roll Call Vote: 5-0-0.

	<u>Yes</u>	<u>No</u>
Bruce Fearon	X	
Arthur Dumas	X	
Kelly Stevens	X	
Bertram Sobanik	X	
Thomas Larned	X	
<b>TOTALS:</b>	<b>5</b>	<b>0</b>

Notes from the Board were submitted to the Clerk for the official record.

Respectfully Submitted,

Laurie Bosco, Zoning Board of Appeals Clerk



Adverse to abutters? 292 Wadleigh Pond Rd  
devastating to the residents of Sullivan Lane/Wadleigh Pond Rd  
Town Atty Town cannot deny application based on private Road  
Road design Road should be safe to travel (accommodate  
safety and emergency vehicles, though

292 Wadleigh Pond Rd - Devastating to the residents  
due to excess and heavy equipment traffic  
Culvert on road ready to collapse

105 Chapel Shores Rd

107 Chapel Shores one use w/ 6 buildings

10 partridge way - <sup>assessor</sup> appraiser went on a FARE book  
pages said there is no adverse market value  
on neighbors, However, other abutter and  
resident of area contradicted this. Also, N.E.H.  
shows adverse market value in areas/neighborhoods  
around

Jeff Demers - Wadleigh Pond Rd. h.s family's safety  
is an issue Public Safety 650 ft but not  
sure if its from property line or proposed  
greenhouses.

## MEMORANDUM

February 11, 2021

From: Lyman Planning Board Member Donald M Hernon  
To: Lyman Zoning Board of Appeals

Subject: Planning Board Review and Approval of Medical Marijuana Grow Facility at  
Reagan Lynn Road Lyman, Maine, Map 10 Lot 5-C

### References:

- (a) Town of Lyman Zoning Ordinance
- (b) Town of Lyman Annual Town Meeting, June 2019
- (c) Planning Board (PB) Site Plan Review Notice of Decision (NOD) dated 12/16/2020 on this project

### Background:

1. Lyman voters approved changes to the Lyman Zoning Ordinances in June 2019 to allow and regulate Medical Marijuana Grow Facilities.
2. Medical Marijuana Production Facility (MMPF) is shown in ref: (a) as requiring a Site Review (SR) in three Lyman Land Use districts (Residential, General Purpose, and Commercial/Residential).
3. Lyman Zoning Ordinance Section 10-22-B, Medical Marijuana Production Facility provides performance standards, in addition to the requirements of the State of Maine, noting that MMPF are allowed in every district on lots of 5 acres or more in the Residential and General Purpose districts, and any legal lot in the Commercial/Residential district.
4. As stated in the Planning Board (PB) Site Plan Review Notice of Decision (NOD) dated 12/16/2020 on this project, the PB held 7 meetings, conducted a site walk, and conducted a public hearing at GMFR Fire Station to accommodate the relatively large number of members of the public (about 60) in attendance.
5. The NOD provides details about the project, the public hearing, the 16 standards required by the Zoning Ordinance (section 8.3.6), and 18 Conditions of Approval.

### My Comments:

1. These comments reflect the opinion of one member of the PB, and have not been approved by the PB.
2. I do not have any financial interest in this project, nor (to my knowledge) do any other PB members. PB By-laws Article 7.3 require that a PB meeting requires a quorum (3 members) without any of the three members having a conflict of interest with a project before the PB.
3. The applicant on this project (David Alves) is presently a Lyman Select Board member. I did not consider this fact, nor did I observe any special consideration given to Mr. Alves, in deciding on the merits of this application in accordance with the Zoning Ordinance requirements.
4. The Lyman Town Meeting in June 2019 approved the changes to the Lyman Zoning Ordinances by a relatively small margin with less than 200 town residents voting.



5. The majority of the people at Public Hearing were NOT in favor of this project for reasons noted in the NOD. However, the project is an authorized use on a 50+ acre lot in an authorized Town district.
6. My opinion is that the PB did due diligence, and followed the approved Lyman Zoning Ordinance in considering this project. I believe that the PB approval is valid and should NOT be overturned by the Zoning Board of Appeals.

Sincerely,



Donald M. Hernon  
Lyman PB Member