

## **Zoning Board of Appeals Meeting Minutes**

**Jonathan Tibbetts - appellant**

**Town of Lyman**

**October 26, 2021**

*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. Minutes are draft until approved by the Board of Selectmen.*

**Members Present:** Chairman Tom Larned, Bruce Fearon, Art Dumas and Russ Outhuse (1<sup>st</sup> alternate)

**Others Present** CEO Patti McKenna; Donna Richard, Clerk

**The Chairman called the meeting to order at 6:00 pm.**

Welcome to the October 26, 2021, hearing of the Town of Lyman Zoning Board of Appeals. My name is Tom Larned, Chair. Members of the Board, from my left, are Bruce Fearon, and Russ Outhuse, alternate board member replacing Kelly Stevens for this hearing. (Art Dumas joined the Board 15 minutes late or so). Donna Richard is our clerk, Patti McKenna, Code Enforcement Officer.

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 the Chairman if you are unable to hear or see. At this time, please silence all cellphones or any other noise-making devices.

The Board works from a prepared agenda and will be considering the administrative appeal of Johnathan Tibbetts to allow the construction of an accessory dwelling in the General Purpose district where it was prohibited by the Lyman Code Enforcement Officer.

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.

Preliminary business:

1. Quorum: A quorum of the ZBA shall consist of three members. As only four members are present for this meeting, I must advise you that you may request the meeting be postponed to a later date in the hope of a full board.  
Mr. Tibbetts elected to move forward.
2. Timeliness of appeal. The appeal was submitted 29 September, 2021. The accessory dwelling was denied by the CEO on August 30, 2021.
3. In summary, the appellant thinks the Code Enforcement Officer mis-interpreted Section 6.3.1B of the zoning ordinance which states: In the General Purpose District, there shall be no more than one (1) building for each principal use, and not more than two (2) buildings for an accessory use as limited by lot coverage requirements. He currently has a house, a garage, a lean-to barn, a cover-it building and a recently permitted post and beam barn, all of which serve different primary purposes. Therefore, he should be allowed to construct an accessory dwelling as his sole accessory building.
4. Jurisdiction: Type of review to be conducted. Section 8.3.9 of the Zoning ordinance states: The Zoning Board of Appeals shall be on an appellate basis and shall be limited to a review of the record developed before the Code Enforcement Officer's denial of the building permit.
5. Conflict of Interest or Bias. The Chair advised the Board members that if any of them has a direct or indirect pecuniary interest in the subject matters of the application to make it known.
6. The appellant has standing to appeal as the registered owner of the property.
7. A complete application has been filed.

***a. Presentation by the applicant and his/her attorney and witnesses, without interruption.***

Mr. Tibbetts addressed the board. He owns property at 53 Swetts Lane and is looking to add an accessory dwelling for a relative. The other buildings listed are to support his farm for income.

Calving barn and weaning barn, both for principal use. The garage is not attached to his house. He is allowed two accessory buildings. Since this is where he lives and works, he feels it is different than if he lived there and worked somewhere else. He also advised that if you follow precedence, he has other property with permits allowed to have multiple buildings. It is his opinion that the CEO misinterpreted the ordinance.

***b. Presentation by the Code Enforcement Officer***

Code Enforcement Officer Patti McKenna presented her findings.

Application for a detached accessory dwelling was denied on August 30, 2021., Based on the previous interpretation of the zoning board, and advice from MMA regarding that decision and how it relates to this application.

The lot size is 11.1 acres. There is currently a residence with a garage, and farm buildings on the lot. According to section 6.2.2 the maximum lot coverage for buildings is 20%.

20% of 11.1 acres is 96,703 square feet.

The permit was denied based on MMA's advice after the last decision from the ZBA.

In section 6.3.1.B of the ordinance states: In the GP district, that 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.

Section 10.6 states: One accessory dwelling unit shall be permitted on a lot on which an owner-occupied single-family dwelling is located which meets the following conditions: This lot meets all the conditions and for the sake of time, I will not read them.

Email from MMA regarding accessory dwellings as related to the interpretation of the zoning.

*"First, it is apparent that there is a conflict in your ordinance about whether more than one principal use can be established on a lot. The definition of "principal use" is, "the use to which the lot is primarily devoted" (emphasis added). This definition indicates to me that only one principal use is contemplated. However, section 6.3.1(B) states that "there shall be no more than one (1) building for each principal use" which indicates that more than one principal use is allowed on one lot. This interpretation is supported by the language in section 6.3.1(A) as well, which seems to limit principal uses and buildings to one per lot in the residential district ("In the Residential District, one (1) principal building or one principal use along with one (1) accessory building or use is allowed per lot").*

*Applying these conflicting interpretations to the permit in question, there are two ways to go about assessing the application:*

- 1) If you interpret the ordinance to mean that only one principal use is allowed, then you would have to determine which is the principal use – the farm or the residence. I am not sure how to assist in that determination, but I might suggest a fact-based assessment regarding the dominant use of lot (maybe using square footage?). If you consider the residence to be the accessory use, then according to 6.3.1(B) that use could have up to 2 structures – the house and the garage.*
- 2) If you interpret the ordinance to allow more than one principal use (which is my inclination) then both residential and farming could be considered principal uses, and the house and cow barn would be considered the allowed principal buildings. But this brings me to the second apparent conflict in this ordinance. Section 10.6 in the General Town Wide Regulations states that one accessory dwelling unit is allowed on a lot where an owner-occupied single-family dwelling is located. However, when read in conjunction with Section 6.3.1(B), such an accessory dwelling unit does not seem to be allowed if it will be in a separate building, since this section only allows one (1)*

*building per principal use, regardless of whether it is an accessory structure or a principal structure. This interpretation would also indicate that the separate garage is an illegal structure.*

I am not comfortable with either of these interpretations, but it does appear that your ordinance requires you to deny a permit for a new building to house an accessory dwelling unit on this lot. However, given the uncertainty in the language of your ordinance, again, I encourage you to contact your town attorney to advise you on next steps.

The town attorney advised that he would lean toward the possibility of allowing more than one principal use. However, he states that to permit this detached accessory building, it would result in too many buildings and this accessory use may have to be connected to another structure.”

So, I reluctantly denied the permit.

Here are some reasons why I think the interpretation of the ordinance might not be correct:

In the GP district there are uses listed that envision a residence, and a business, which the wording of section 6.3.1.B would come into play. Along with a residence, the GP zone allows Agriculture, Bed and breakfast, business contractor, Commercial facilities, Farming, Medical marijuana production facility, Outdoor recreation, personal service business, recreation facility, recycling, retail business, sawmill, special event facility, and a private school for examples. It is my opinion and has been my interpretation for 10 years, and I think by the examples I am about to show was the opinion and interpretation of previous code officers in the past, that there can be more than one principal use and therefore more than one principal structure per lot in the GP district.

The zoning ordinance dated 1976 – 2002 discussed more than 1 principal building by saying “if more than one principal building is constructed on a single lot, all dimensional requirements shall be met separately for each principal use.

In 2004 the only thing related to the number of buildings states “permitted uses and conditional uses shall conform to all dimensional requirements and other applicable requirements of this ordinance.

In 2005 the ordinance was totally rewritten, and it is then that the wording we see today was adopted. 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.

Traditionally the zoning envisioned multiple uses in the GP district, and I don’t think today’s wording should be interpreted to think otherwise, given that we are to encourage businesses in all zones per the comprehensive plan, and we allow farming which typically has multiple buildings in the GP zone, we allow detached accessory dwellings per section 10.6 of the ordinance.

Next, I would like to give examples of multiple buildings which include a house and other business-related building: Most permits were issued prior to 2012 when I started working here to illustrate this is not a new interpretation of the ordinance.

Swett's Lane, a residence, a well drilling company, an office building. Two principal uses.

Swett's Lane, a residence, and a farm, two principal uses with multiple buildings

So Waterboro Rd. A residence and a landscaping company – Two principal uses

Old No Berwick Rd – A residence and a farm – Two principal uses

Alfred Rd. residences and agriculture. Two principal uses.

Alfred Rd. – Residence and agriculture. A site where multiple greenhouses were permitted.

Kennebunk Pond Rd. – Residence and farm = Two principal uses

Clarks Woods Road. One picture with two examples

Residence with Farm – Two principal uses

Residence with greenhouse sales -- Two principal uses

Drown Lane – residences and a farm – Two principal uses

Howitt Rd – Residence and farm – Two principal uses.

Lastly, I want to use this example of more than one principal use and structure:

In 2017 I denied a permit for a detached accessory dwelling because the ordinance wording said, an accessory structure is allowed “within” a single-family residence. The zoning board overturned that denial for a detached accessory dwelling and allowed the detached accessory dwelling over a garage. Which resulted in a residence, an accessory dwelling over a garage and another garage. In the GP district.

If there can be two principle uses, which I believe there can, why can't there be three, or more, as limited by lot coverage? In this case, a Residence being the first principal use. Accessory dwelling being the second. Farm being the third. As long as EACH of these principal structures combined doesn't exceed the lot coverage limitation placed in section 6.3.1.B which in this case would be 96,703 square feet.

Art Dumas came in just after her presentation and quickly summarized and had him review her materials. The CEO favors a vote in favor of the applicant.

Art asked if it was her opinion that the permit needs a variance, which it does not. Art reviewed materials submitted as well as the photos of other properties.

He also asked if the CEO agreed that there was a misinterpretation of the ordinance. She advised that she does not agree with the legal advice she received to deny the permit. MMA and the attorney advised to deny based on the wording of the ordinance.

***c. Questions through the Chair to the applicant and CEO by Board members and people who will be directly affected by the project (e.g. abutters) and requests for more detailed information on the evidence presented by the applicant;***

Tom asked about principal uses mentioned regarding a residence and a farm. Generally, a farm has multiple buildings. A farm is allowed in the General Purpose district and applicant has over 11 acres.

Applicant also advised that the other issue is that insurance companies prefer those buildings split up so if there were a fire, for example, you don't lose everything. He had gone forward with other barns in this way and this was the next step and there was a misinterpretation. He said it was cluttered within the ordinance. It has been interpreted this way for a while. The idea in question is to have a mobile home on the property; therefore, it is not possible to attach it to his main residence.

Tom also mentioned the other way would be to split the parcel into two, which the applicant had said he had thought about but it would be higher tax and more expense. If he had to go that route, he might consider it. That is why he was trying for this appeal. Russ was ready to move ahead with a decision.

***d. Presentations by abutters or others who will be directly affected by the project and their attorneys and witnesses.***

No abutters

***e. Questions by the applicant and Board members through the Chair to the people directly affected and witnesses who made presentations.***

None

***f. Rebuttal statements by any people who testified previously.***

None

***g. Comments or questions by other interested people.***

Don Hernon spoke of another decision regarding principal use. His only suggestion is that this particular ordinance should be somehow rewritten as there are issues with interpretation. There appears to be more than one way to interpret the ordinance. Appellant's response was that his issue is that the General Purpose zone is one primary and 2 accessory dwelling ought to just be residential. Businesses can't grow with those guidelines. It does not make sense to buy commercial property and be limited to accessory dwellings or buildings.

Art questioned CEO's interpretation of the MMA response. CEO's response is that MMA is inclined to say that there can be more than one principal use.

MMA advises that allowing an accessory dwelling conflicts with one principal use and CEO reasons that an accessory dwelling can be considered its own principal use. The garage should be considered an accessory unit to the business and not his residence. The farm buildings are for his income and the accessory dwelling is not for profit.

The ordinance states there should 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. There was further discussion between the board, CEO and applicant about the gray area due to the types of barns and types of uses that the barns will be used for. They are all primary uses.

Maurice St. Clair then questioned why they are turning this into more than one use, it is all farming. He has 11 acres. Maurice also agrees the ordinance is poorly written to address the general purpose. If he needs several buildings for one principal use, that should be allowed.

Art replied saying that until the ordinance is changed you can't just ignore how it is written and ignore it.

Art finds it compelling that applicant would have three principal uses which would then allow the accessory building.

Roderick Tetu believes that this is a gross misinterpretation of the ordinance. He discussed a prior case that was denied. It was argued that there was one principal use and that there were too many accessory buildings.

Art replied that in regard to the marijuana facility, if they had had one building to grow and one to sell, that would be more than one principal use and that would allow up to two accessory buildings, but one of them could not have five and the other have none. Rod Tetu's interpretation is that they are bending it to suit them.

Art replied that it is poorly written ordinance, one part limits each property to one principal use and in another it clearly states that you can have more than one because it says each individual principal and it does not limit it to two. So, the key is determining the number of principal uses.

It seems to him that the applicant has the right to at least present to the code enforcement officer that he has a dwelling which is one principal use and the farm which is another or that he has two farms since they have separate purposes. The question then becomes, what is and what is not a principal use.

Applicant advises that right now his farm is set up between two properties. On paper they leave one location (Old North Berwick Rd) to other location. In his opinion they are two principal uses with different requirements.

If he had one barn that was a hobby, he could understand he would not have the argument for principal uses. He has principal uses (residence and farm) which would allow him accessory buildings for each.

Tom went over the ordinance again to clarify what the applicant defined.

There was more discussion between the board, CEO and applicant about what defines a principal use.

The permit that was denied was for an accessory dwelling unit as an in-law unit, it was denied on the recommendation of MMA.

Gut reaction by Art is that you can have three primary structures if you can show there are three primary uses.

Under the current ordinance he could add other businesses (such as child care, saw mill, etc.) as limited by lot coverage. Therefore, the argument is that he could have more than two or three primary uses.

Art advised that if the applicant can convince the code enforcement officer that he has more than 3 principal uses than he would be allowed the accessory buildings.

Applicant also advised that there is precedent to show that he has other permits that have been approved for greenhouses with no issues because they had principal use, so that interpretation plus the code enforcement officer that has interpreted it this way for a while, there is a valid argument.

CEO agreed that the wording needs to be changed.

Board agrees that since the ordinance can be interpreted in more than one way and that the board should not be analyzing the poorly written ordinance.

Chair asked if any other arguments from the public.

**Public Hearing closed at 7 p.m.**

***Motion by Art Dumas to find in favor of the appellant and allow the accessory unit, the motion was seconded by Bruce Fearon.***

***Discussion:***

Art did not feel it was the right way to go, but to instruct CEO that there can be more than one principal use and that if she feels he met the definition of three primary uses, then she should then give him the permit, or otherwise deny it.

It does not resolve the issue on the table.

Art advised it resolves basically saying she denied this because she was limiting it to one principal use. The applicant claims she misinterpreted the statute. Tom asked that if you send it back to code enforcement for another decision, why would the code enforcement officer change that decision?

Art does not feel he knows enough about the permit to stand on its own.

There was more discussion back and forth between Art, Tom and CEO regarding primary or principal use and allowed accessory units.

Maurice St. Clair also questioned why they are splitting up the uses when there is only one principal use which is farming.

After more discussion between the board and the applicant, the chair advised that there was a motion on the table that had been seconded to find in favor of the appellant.

***Vote: 3 in favor, with 1 abstention.***

***Meeting adjourned at 7:12 P.M.***



I, Donna Richard, Clerk to the Zoning Board of Appeals for the Town of Lyman, Maine, do hereby certify that the foregoing document consisting of three (8) pages are the original minutes of the Zoning Board of Appeals held October 12, 2021.

Donna Richard

Tom Larned, ZBA Chair

Tom Larned