

**Zoning Board of Appeals Meeting Minutes**  
**Tanner Demers, Robert O'Reilly - appellants**  
**Town of Lyman**  
**October 12, 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, Bert Sobanik, and Russ Outhuse (1<sup>st</sup> alternate)

**Others Present:** Planning Board Chairman Roderick Tetu, Vice Chair Donald Herson, and CEO Patti McKenna; David Alves, Edward Titcomb attorney for Mr. Alves); Sigmund Schutz, attorney for the appellants and Brad Morin, town attorney.

**The Chairman called the meeting to order at 6:30 pm.**

Welcome to the October 12, 2021 hearing of the Town of Lyman Zoning Board of Appeals. My name is Tom Larned, Chair. Members of the Board, to my right is Bert Sobanik, secretary and to my left is Russ Outhuse.

Donna Richard is our clerk and Rod Tetu and Don Herndon are present from the Planning Board 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 Tanner Demers and Robert O'Reilly to overturn a Planning Board decision to approve a medical marijuana growing facility on Revere Way/ Raegan Lynn Road proposed by David Alves/Green Acres.

The burden of proof is upon the applicant to demonstrate compliance, or, in this case, non-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:**

Quorum: We normally have a 5-member board. A quorum of the ZBA shall consist of three members. We have 3 members present; you may elect to postpone or delay until a further date when we have a full board.

*Attorney agreed to continue with the 3-member quorum.*

Timeliness of appeal. The planning board decision was on May 19, 2021, with a written decision filed on May 28, 2021. Argument is for "Good Cause" exception to appeal deadlines, also noting that a Superior Court filing was made on August 18, 2021 for the same project.

Attorney for the appellants, Sig Schutz addressed the board. He advised that the crowd present is the type of turnout that should have been present with the first filing. He advised that there were process problems.

First issue was Robert O'Reilly bought property in August of 2020 but did not get notice addressed to him. He is opposed to the project and should have been contacted.

Second issue is the list of abutters did not include a significant amount of abutters within 500 feet of the project were not notified.

The tax maps did not include a significant amount of people who did not get notice of the proceedings.

Third issue is under the ordinance, public hearings are supposed to be posted. Notice not displayed.

Final issue is that notice is to be given 10 days in advance of the hearing. The notices came in much closer to the hearing date.

Due to the "Good Cause" exception, they are asking for a new public hearing. All other processes would go away with a new public hearing.

Chair asked what would happen with the superior court filing. Attorney advised it would go away. Attorney Brad Morin said Jeffrey Demers still has his appeal, but if it did go to

another public hearing it would cut some costs down in regard to the other filing. Jeff would have the opportunity to attend the public hearing as well.

Chair asked for any input from CEO regarding timeliness of the appeal.

Patti McKenna cited portion of the ordinance, 8.3.5 – the owners of property shall be considered to be those against whom property taxes are assessed.

Failure of any property owner to receive a notice of public hearing shall not necessitate another hearing or invalidate any action taken by the Planning Board.

She printed a copy of the assessing card for Robert O'Reilly. It was printed on 8/31/2021, it was mailed to Carl and Karen Andrews at 5 Roberts Pond Rd. They were the property owner of record at that time.

Confirmation of certified mail on May 8, 2021. There are signed cards for 5 Roberts Pond Rd., no date. The card for Tanner Demers was signed on 5/17/2021.

The ad was in the newspaper was posted on May 8, 2021 in the Portland Press paper.

Chair advised he could not yet take questions His initial inclination was that we had a great group present and would make for a great public hearing but also have someone investing a lot of money in a big project.

A lot of consideration on timing on whether to accept the “Good Cause” argument. It appears the Town did all they were supposed to do but perhaps the mail did not get delivered in a timely manner.

Attorney for David Alves, Edward Titcomb addressed the board. Whether or not the ZBA can entertain in effect the “Good Cause” exception for filing a late appeal presented, the zoning ordinance does not provide for that. The powers if you will of your zoning board of appeals, most municipal ordinances are drafted in that way. There are a handful statewide that do provide the authority for this board to hear and determine whether there is merit to allow a late filing, but this ordinance does not provide for that. The appellant’s attorney has defined four areas of notice and process problems. Those positions are precisely the issues that the superior court reviews which is now in a pending appeal. In fairness to the appellants in this case, there are some independent claims for relief which cite many of the positions articulated. This is not something that presently is within the jurisdictional authority of the zoning board of appeals and so the next step in the process is for this to go forward to superior court and there is more than just an appeal that there are things that superior court which will need to be addressed in terms of how the parties are going forward. But this is a process that my client needs to have continue so he can have some finality. He has been in this room and with this project a number of times.

Brad Morin addressed the board and advised that he is in the process now of defending the town’s decision from the zoning board of appeals. The “Good Cause” exception is actually, part of their complaint that is currently in front of the court. There is a gray area that he and attorney Schutz have been talking about. Whether a zoning board can hear the

“Good Cause” exception themselves. Others suggesting it is a judicial determination. Some of the cases they have talked about where they actually had the zoning board of appeals were lower court decisions. It is not clear whether or not the Zoning Board of Appeals has that right.

The MMA manual for local and land use appeals boards, say that in the absence of language in an ordinance to the contrary, the board of appeals has no authority to change an appeal period when an appeal is filed late. The board must take a vote as a board at a public meeting of the board finding that the appellant missed the deadline and denying the application on that basis. The person who filed the appeal may then appeal to the superior court. If the court finds that a flagrant miscarriage of justice would occur if the appeal were not heard, the court may remand the case to the board of appeals when it cites a bunch of cases. As a general rule, the court will discuss an appeal which is not filed within the applicable time limits. What they are saying is there is a carve out where the courts have said that if this is going to result in a miscarriage of justice, we can for ourselves waive that 30-day period. It is unclear whether the zoning board of appeals can make that determination themselves. I would have to recommend that we don't make that leap. I think he would have a stronger argument to appeal to that. The board could certainly hear evidence today about what took place and that would help develop a record for the court to review. If they do decide this issue right now, they are probably just relying on what the lawyers will, so I think that is why this is in front of you because they are stuck in a catch-22 of this “Good Cause” exception.

Chair asked for any discussion from board. Bert cited section 8.3.5 regarding failure of any property owner to receive a public hearing notice shall not necessitate another hearing or invalidate any action taken by the planning board. Seems to cover just about all of it.

Russ's initial impression is that all the protected land owners were not notified but it did not seem to matter.

Tom agrees that a lot of this is beyond their pay grade as they are not lawyers. He believes it might be in everyone's best interest to let the superior court decide if this warrants a “Good Cause” exception or not. Even if we were to get another public hearing we would end up back in superior court.

Bert agreed this was beyond anything he thought he would be involved in when he signed up.

The board continued to go back and forth on the best motion to make.

A motion was made to vote on the appeal that the appellants did not file their appeal in a timely manner. The Board voted 3-0, denying the appeal was filed in a timely manner.

The public hearing was closed without hearing any further arguments in the case.

**Adjourned : 7:05**