

**July 13, 2016 Administrative Appeal by Steven Mclean of the Limerick Planning Boards decision to deny a conditional use permit for a Santa's Workshop/Gift Shop.**

Members present:

Michael Carroll-Chairman  
Kimberly Oliver-Co-Chairman  
Steven Mclean-Appellant  
Kathy Ward  
David Coleman

Public Present :

Andrew Ready  
Dottie Richard  
Joanne Andrews  
Steven Malmude  
Aaron Carroll  
Bill Jones  
Joseph Lenkowski  
Brian Saulnier  
Barbara Fifield  
Steven Colby  
Sean Carroll  
Denise Benton  
Laura May

Michael Carroll Chairman welcomed everyone to the Wednesday July 13<sup>th</sup> meeting of the Limerick Board of Appeals to review an application for an administrative appeal filed by Steven A. Mclean of the Limerick Planning Boards decision to deny a conditional use permit for a Santa's Workshop/Gift Shop at 65 Mountain Views Road in Limerick. He stated that all five members of the board were present. He noted that it was obvious that Steven Mclean being the applicant that this would be a conflict of interest. (Steve was sitting with the audience.) He also noted that he had a conflict of interest as well considering his families relationship with Steven Mclean and although he felt he could be fair he felt it best to recused himself and avoid any appearance of bias.

Kimberly Oliver Co-Chairman made a motion to accept Michael Carroll's recusal. Kathy Ward seconded it. No discussion was realized and all were in favor. Kimberly continued the meeting as Chairman of the Board. She discussed the timeliness of the appeal. She stated that Steven Mclean was appealing the June 1<sup>st</sup>, 2016 Planning Board decision to deny his application and that the appeal was filed within the time frame required so she felt he had met the timeliness and the Board was in agreement. She continued with the jurisdiction reading, the State of Maine Planning and Land Laws section 30 A 4353 zoning adjustment states that the Board of Appeals shall hear the appeals from any action or failures to act of the official or board responsible for enforcing the zoning ordinance unless only a direct appeal to Superior Courts have been provided by a municipal ordinance. She stated that Limerick does not have a municipal ordinance for a direct appeal to Superior Courts, therefore the Appeals Board does have

jurisdiction to hear this appeal. David Coleman moved the motion and Kathy Ward seconded it all were in favor. She continued with the standing and stated that the applicant did have standing. She explained that the applicant had to demonstrate that the applicant will suffer a direct and personal injury as a result of the decision of the Planning Board and that the citizen has standing to file an appeal with the Board of Appeals if the board has jurisdiction. Direct personal injury test, the person must show their actual use and enjoyment of the property will be adversely effected by the proposed project and that the citizen must be in attendance. She continues that he is in attendance and he owns the property and is unable to run a gift shop because the application was denied. He paid the required fees and the notification was made he has met all the requirements for standing. She proceeded to lay out the procedure. She, as Chairman, would recognize members of the board and the audience who wish to speak. She explained that the Chairperson had the right to vote with all the decisions, not just for ties. The Board of Appeals is hearing evidence only for the denial of the permit. She stated that she would be asking for clarification on the appeal once they get started. She continued that the sequence would be the presentation by the applicant without interruption. Questions to the chair to the applicant by the Appeals Board members and the Planning Board. Then presentation by the Planning Board without interruption and questions through the chair to the applicant by the board members and the applicant. Any rebuttal statements and then comments or questions by other interested parties in the audience. At this point she asked for clarification on the appeal. She read a letter written by Steven Mclean that on June 1<sup>st</sup> 2016 while the board was working on condition number 3, which is property values, a motion was made to deny the application and due process was not served. The letter also stated that the Planning Board has also demonstrated an inability or unwillingness to fairly consider the applicant's conditional use application. There was also a lot of information submitted with regards to bias. She questioned if Steven Mclean was appealing the Planning Boards decision to deny the permit because of bias or did he feel that they did not follow procedure when they made their decision.

Joseph Lenkowski, Steven Mclean's lawyer answered that it actually doesn't matter because statute in **Lockwords** decision require that the appeal that you conduct in this case is what is called a De Novo appeal, which means in effect you start over. You are starting from scratch. The record from the Planning Board is not even part of the appeal. The Appeals Board is reviewing this application for a conditional use permit as if you were the Planning Board.

Kimberly Oliver asked Mr. Lenkowski if that is the case is the Appeals Board looking at the same evidence that was presented to the Planning Board and Mr. Lenkowski answered no. She ask if the Appeals Board is circumventing the Planning Board and did not want the Board of Appeals to turn into a Planning Board where they would do site walks, etc. She stated that she did not believe that is what the Appeals Board is for. Mr. Lenkowski stated that it was a very good question and that she was touching on some good points. He stated that he did share some of her concerns and that he also shared concerns she probably has regarding the practical facts of this procedure. He continued that the Maine Supreme Court in their wisdom has interpreted the statute is that unless the zoning ordinance says otherwise, you are acting solely by the statute you must the appeal De Novo. What that means according to the Law Court is that the Board of Appeals starts from square one. The record before the Planning Board is not part of the record in front of the Zoning Board of Appeals unless it is offered into evidence in this hearing. He confirmed that Kimberly Oliver's concerns are real. **13:00** He felt that in certain cases that this would seem like you the Appeals Board would be stepping on someone's toes is very real. But the Supreme Court has said this is how you do it. He continued that this is why he

submitted the additional supplement that the board members received. He confirms that the Board of Appeals must start from scratch and that the Appeals Board should not give any deference to the Planning Board. The Appeals Board is making their own determinations. He also confirms that the concerns of the Appeals Board regarding site walks are valid concerns, but these issues were not addressed by the Supreme Court. It was his understanding that the Supreme Court gave the Appeals Board the authority to make the decision. He continued to say that the Supreme Court felt that if the Appeals Board heard the case and felt that the conditional use permit should be issued that it could send it to the Planning Board with the direction to issue the permit.

Kimberly Oliver asked again for clarification of the appeal whether it was for the denial of the permit or that the appellant felt there was bias. Joseph Lenkowski replied that the appellant felt there was bias. He was not sure that any board could look at this without doubt that there was bias. He felt that there was some animosity. He stated that whether it was bias or frustration it never progressed. He recalled that a comment was made, we are never going to get this done, let's just deny it. He could not conclusively say it was bias, it may have been just frustration.

Kimberly Oliver stated she felt they had a little more clarification as to what Steven Mclean was appealing and that they would need to start reviewing the 16 conditions.

Joseph Lenkowski asked how the board would like him to present the 16 conditions or just enter them into evidence. Kimberly Oliver felt that because it had been a while since she or David Coleman had been on the Planning Board that she would like to take each condition line item by line item.

Joseph Lenkowski began to read each condition.

1. Will meet the definitions and specific requirements set forth in this ordinance for the specific use.

Response: It is a use permitted in the district with a conditional use permit.

Kimberly Oliver asked him if he was getting this right from the zoning ordinance and his answered yes.

2. Will not have a significant detrimental effect on the use and peaceful enjoyment of adjacent or nearby adjoining property as a result of noise, vibration, fumes, odor, dust, light, glare, or other causes.

Response: All required site improvements for this use are already in place on the property. The use contemplated is a small to moderate scale seasonal retail use which will operate from October thru December and is expected to light to moderate family vehicle traffic. It will not generate any appreciable noise, vibrations, fumes, odor, dust, light or glare and will not affect the peaceful enjoyment of adjacent or nearby properties. Because of the location of the site on top of the mountain, it is not immediately adjacent to any dwellings and is not in the direct site line of any adjacent or nearby property.

At this point Kimberly Oliver asked if this same evidence was presented to the Planning Board. Joseph Lenkowski said that it would not have been the same because he had done this and he had not been involved when it was presented to the Planning Board. Kimberly Oliver was interested in knowing if the evidence was presented to the Planning Board the way that it should have been. He explained that it is not the Appeals Boards job to decide if the Planning Board did the right thing based on the evidence they received. The Appeals Boards job is to take the evidence given and make a determination based only on that evidence. Kimberly Oliver responded that she understands what Joseph Lenkowski is saying, but is still having an issue with what the Planning Board received for evidence is not anywhere as complete as what he is now presenting. She agrees that what is now being presented is complete, and she does not see a problem with this information, however, if it is not the same evidence that the applicant presented to the Planning Board could be the reason why the Planning Board denied the permit. Joseph Lenkowski realizes that this is very difficult to understand but because this is not addressed in the Limerick's Zoning Ordinance this is the procedure.

He continued with condition number 3.

3. Will not have a significant adverse effect on adjacent or nearby properties.

Response: Please see response to number 2.

4. Will not result in significant hazards to pedestrian or vehicular traffic or significant traffic congestion.

Response: The site is accessed by a private right of way. Currently only one other lot is accessed by that private way. There will be no pedestrian traffic other than visitors to the site. A DOT entrance permit for a subdivision development has been granted for said right of way.

Kimberly Oliver asked for the DOT permit as evidence. Steven Mclean gave a copy of the DOT permit to Kimberly Oliver and as she examined it she notice that the DOT permit was for Kathy and Steve Colby and Steven Mclean replied that that is the where the easement goes through. She asked him to give the board a copy of certain documents that may be presented.

Joseph Lenkowski continued with no. 5

5. Will not result in significant fire danger.

Response: The site of the proposed use is clear and has a gravel base.

6. Will not result in significant flood hazard or flood damage, drainage problems, ground or surface water contamination or soil erosion.

Response: the proposed use will be conducted in the existing building on the site which has been in place for over 10 years and will not be modified for this use. Likewise the ground improvements, parking lot and access ways have been in place for approximately 5 years and will not be further modified for this use. Drainage culverts are in place and connected with route 5 culverts. The site has never experienced drainage issues, flood damage or soil erosion. The proposed use has no attributes which would contribute to or cause ground or surface water contamination.

7. Will not cause a safety hazard because inadequate access to the site or to the buildings to the site for emergency vehicles.

Response: The site is accessible from route 5 and route 160.

Kimberly Oliver wanted clarification as to where the site was located and accessible. Steven Mclean answered that the access was through King Field Road, to Mountain View Road off of route 5 across from the Christmas Tree sign. On 160 it's Fire Tower Road, which is just before Mark Nichols, the big green gate that has been there for the last 18 years. After Joie Pierce the school bus driver.

Joseph Lenkowski continued with no. 8

8. Has proposed exterior lighting which will not create hazards to motorist traveling on adjacent public streets. Is adequate to the safety of the occupants and users of the site and will not damage the value and diminish the usability of the adjacent properties.

Response: The proposed hours of operation for the retail use 9:00 a.m. to 5:30 p.m. so the need for after dark lighting will be limited. Due to the location of the site explained in item two the lighting required for the site should have no impact to any adjacent properties.28:32

David Coleman asked if the shop would be open 7 days a week. Joseph Lenkoski answered that it would be weekends, Friday through Sunday.

9. Makes provisions for buffers and onsite landscaping which provides adequate protection to neighboring properties from detrimental features of the development.

Response: The only structure which will be involved in the proposed use has existed on the site for over 10 years. Due to the location of the site explained in item 2, the structure and other ground improvements are not visible from any adjacent property.

Kimberly Oliver wanted to know if it was an open building on the property. Steven Mclean answered that it was built to be a summer time house. It has a two bay garage underneath with a living space on top. He referred to a picture that was sent to the Appeals Board and Kimberly Oliver acknowledged that she was looking at the picture. She stated that she was just wondering that if Steven Mclean was going to have a gift shop would it be in the garage. Steven Mclean answered that it was.

Joseph Lenkowski continued with no. 10

10. Makes provisions for vehicular loading and unloading and parking and vehicular and for pedestrian circulation on site and on to adjacent public streets which neither create hazards to safety nor imposed significant burdens on public facilities.

Response: Please see attached aerial photograph with scaling which shows the provisions made for vehicular loading and unloading and parking for vehicular pedestrian circulation on the site. The proposed use is not adjacent to any public street and the entry to the private right of way which provides access to the site has received a DOT entrance.

Kimberly Oliver asked on the drawing the building and 12000 square feet for parking, so people are going to be able to come in park and then actually go around a circular driveway. How are people expected in and out? Steven Mclean answered they would come in right beside building or drive up a little further and turn and park there and then walk down to the building.31:21

Joseph Lenkowski continued with no. 11:

11. Makes adequate provision for waste water or solid waste and for the prevention of ground or service water contamination.

Response: The facility will make use of a portable toilet. He went on to say that they could have further stated that the proposed use is not going to generate solid waste or waste water. The waste that it generates will be trash, paper, boxes, etc.

Kimberly Oliver asked Steven Mclean if he would take the trash away once the shop closes so it does not sit. Steven Mclean answered yes.

12. Makes adequate provision to control erosion or sedimentation.

Response: Explained above the existing site improvements have been in place for a number of years. The site has not experienced any issues with erosion or sedimentation. The proposed use will not create any increased erosion or sedimentation at the site.

13. Makes adequate provision to handle storm water runoff and other drainage problems on the site.

Response: As explained above the existing site improvements have been in place for a number of years. The site has not experienced any issues with storm water runoff or other drainage problems. The proposed use will create any increased storm water runoff or other drainage problems at the site.

14. Provides for a water supply which will meet the demands of the proposed use.

Response: The water demands of the proposed use will be minimal. The applicant has a 200 gallon water tank on site

15. Makes adequate provision for the transportation, storage and disposal of hazardous substances and materials as defined by State law.

Response: Not applicable, there will not be anything like that on the site, unless they have hazardous Santa's.

16. Will not have an adverse impact on significant scenic vistas or on significant wildlife habitat, which could be avoided by reasonable modification of the plan.

Response: The only structure which will be involved with the purposed use has been in existence on the site for over ten years. Due to the location of the site explained in item 2 the structure and other ground improvements are not visible from any adjacent property.

Kimberly Oliver stated that the packet that the Appeals Board received from the applicant included an aerial view, the warranty deed, the easement deed for the road, the right of way for ingress and egress, the right of utilities above and below ground as well as the 16 conditions and responses. She asked Steven Mclean to show on the map 12D where the building is located. Steven Mclean points this out on the map. She then explains that where they are doing a De Novo, they will be looking at this as brand new as if it were the Planning Board. At this point all 16 conditions have been presented by the applicant. David Coleman responds that as far as conditional use permit is concerned he could recall from his years as a Planning Board member, what the procedure is. He continued that the Appeals Board would still need to hear the Planning Boards testimony and opened up to the public for commentary. He also states that it is as good as any pass he has seen on a conditional use for, but it is a

matter of reviewing it the way that it would normally be reviewed. He admitted that he was uncomfortable with the fact that he had not seen the site. Kimberly Oliver responded that they would not have to make a decision that evening, they could hold this meeting, schedule a site walk and reconvene at a later date and make a decision. She asked the Appeals Board members if either of them had any questions at this point for the applicant and neither of them had any. She then asked the Planning Board to give their testimony.

Aaron Carroll, Planning Board Chairman stated that he was not sure that it would have any bearing, but that he would like to review the application that the Planning Board received from the applicant one by one. He continued that if they had received this application they would have been in a much better place and that the application that the Planning Board received was fairly incomplete with vague answers and when they would try to get the information they needed the applicant would not provide it.

Kimberly Oliver asked if the Planning Board had only reach condition number 3. Aaron Carroll answered that they had only reach number 3 and they had requested that the applicant would meet with the Fire Chief and discuss the grade issue. He continued that one of the Planning Board members was interested in a specific NFPA standard. Kimberly Oliver further stated that from what she can tell that according to the appellant's application, the Planning Board only reach the third condition, so if the Appeals Board was going to hear the conditions that the Planning Board heard it would only be 1-3. Aaron Carroll agreed. Kimberly Oliver then asked Aaron Carroll, based on what the Appeals Board was number 1, anything different then what the Planning Board had received. He answered yes and stated for number 1 that it was allowed in the district was the answer they had received and for number 2 it was, will not have a detrimental effect, the building is already in place. He could not recall if they had reach number 3, but continued to say that the answer was, will not have a detrimental effect the building is located on an 85 acre parcel. Kimberly Oliver asked, of those 3, which one did the board feel that he did not comply with? Aaron Carroll answered that he did not recall. Kimberly Oliver continued that based on what was just stated, what was it that the Planning Board felt that the applicant did not provide. Aaron Carroll answered that it had more to do with the application that was submitted, looking forward and asking for addendums to the application. He stated that they were not reviewing specific conditions and they needed a road plan and a maintenance agreement for that condition. He continued, number 2 will not have significant detrimental on the use, peaceful enjoyment of adjacent or nearby properties as a result of noise, vibration, fumes, odor, dust, light, glare or other cause. He continued that they had asked for a road maintenance agreement so that the owners of the adjacent properties. They felt there would be some issues regarding noise, vibrations, and possibly dust so at this point they asked for a maintenance agreement. The following meeting they inquired if he had any new information regarding the agreement. The applicant replied that he had not and told the board to just go through the conditions and he would comply with whatever the board asked. He stated that it is up to the applicant to prove to the Planning Board that he satisfied his condition and he did not believe that the applicant had proved the condition. He added that if the Appeals Board was going to do this in this manner, that it makes him absolutely sick to his stomach to see it done this way. He continued that the Appeals Board needed to have a public hearing and hear the publics input and to have a site walk so that there is an understanding of the safety impacts that the Planning Board had asked Mr. Mclean to address and he refused to.

Kimberly Oliver asked the Appeals Board if they had any questions for Aaron Carroll and David Coleman asked when the public hearing took place so he could figure the time line. Joanne Andrews answered that it was May 18, 2016. Kimberly Oliver stated there was a meeting on May 18<sup>th</sup> and continued on to June 1<sup>st</sup>. 42:56 Kathy Ward asked if the reason the Planning Board decided to deny the permit was because the applicant did not comply or was it because the Planning Board members were bickering too much. Aaron Carroll replied that he could not answer that question. He continued that one of the members made a motion to deny the application. Following that there was some discussion that the applicant had not supplied the information. They had asked for addendum information such as a site plan, and a road maintenance agreement and nothing was provided. He stated that he guessed that the board was just frustrated, there was a motion made and another member seconded it. They discussed what the reason for denying it would be, and one reason discussed was that they did not have time for it. Other members said it was also because they could not get enough information to proceed.

Sean Carroll, Planning Board member, reiterated that the Planning Board was not given the information that they requested from the applicant. The applicant was reluctant and refused to clarify some of the 16 points. The Planning Board and applicant were at an impasse. The applicant felt he had given enough information, but the board did not feel the information was adequate. The meetings were continued a couple of times and the applicant was asked to provide a little more clarity with more depth and providing what was asked for and he never complied. At this point, everything came to a head and the permit was denied. It was due to the fact that we did not get the information that was requested.

Kimberly Oliver asked if the applicant was given a written decision and if so were the conditions that had not been met addressed in the letter.

Aaron Carroll answered that the Planning Board was still in the process of deciding what the motion was. He stated that Michael Carroll had asked the Planning Board to send a letter and at the last meeting they discussed what the motion was and that because they did not have the minutes they had to go back and review the tape and at this point he had not reviewed the tape. He continued that he recollected that Dottie Richard stated, "We just don't have time for this". He did not believe that was the motion, but he and Sean Carroll did not feel confident that was the motion. Because it is still unclear the Planning Board did not send the letter of denial.

Sean Carroll stated that they had discussed having a meeting at the same date and time as this Appeals Board meeting to clarify and discuss A. So we could have the minutes and discuss them and B. So that we could clarify the letter of denial. That did not take place because we did not have a 10 day public... we were hamstrung by the rules in play. It would have been easier just to have a meeting and discuss it.

Kimberly Oliver stated that to follow a conditional use permit, they would need to have a public hearing and a site walk.

Michael Carroll asked to speak and was recognized by the chairman. He stated that this meeting had been advertised as a public hearing and everyone that wanted to attend was already in attendance. He recommended going to the site at this time and conducting a site walk. He asked if Steve Mclean or the Board of Appeals members were in opposition to this.

Joseph Lenkowski clarified that this meeting would qualify as a public hearing. He did, however, state that he would feel more comfortable if notification for the site walk was given. He felt that there may be some people who would like to attend the site walk that was not in attendance at this meeting.

Kimberly Oliver stated that they needed to notify abutters. Michael Carroll replied that they were not the Planning Board and referred to the court case that did not even mention site walks. Kathy Ward stated that she did not feel comfortable not having a site walk. Michael Carroll asked if they would notify the public by stating it at this meeting or would he need to put an ad in the paper. He reiterated that everyone who wanted to attend this meeting is present and that everyone who would want to attend the site walk is also present.

Kimberly Oliver questioned that if an abutter was not at this meeting, but would have attended had they know there would be a site walk. She referred back to the Planning Board's procedure for a conditional use permit, they must notify abutters by written notice. Michael Carroll stated that the Appeals Board has no precedence set for a site walk. Joseph Lenkowski felt announcing the site walk at this meeting would be sufficient notice and would give everyone that would want to attend the opportunity.

Kimberly Oliver stated that she would like to table this meeting, have a site walk and reconvene to determine their decision. Michael Carroll agreed they had the jurisdiction to do that. 53:56 He continued that August 4<sup>th</sup> was the next day that they could meet in order for David Coleman to be able to attend. He asked Kimberly Oliver if she had an issue with August 4<sup>th</sup> and she said that she could work around it.

Michael Carroll stated that there is a variance that would probably take place in July. He felt that it should be a quorum for this, that no one had any conflict of interest that he was aware of. He did mention that David Coleman would not be able to attend. They discussed an appeal that was scheduled for August 4<sup>th</sup> and Michael Carroll stated that appeal has been postponed.

Joseph Lenkowski stated that he was not aware of any requirement, unless it was in the procedure for the Appeals Board that all members would need to attend the site walk at the same time. Each member could go when it was convenient for them. Michael Carroll commented that the whole point was so that the public could attend. Kimberly Oliver asked if they could meet the following morning July 14<sup>th</sup> at 8:30. Aaron Carroll stated that he knew of specific abutters who were unaware of tonight's meeting and were not here to speak. Kimberly Oliver replied that this meeting was publicly noticed. Aaron Carroll stated that these people should have the opportunity to address their concerns regarding the permit. He felt that the whole process was being circumvented and that it did not sit well with him. He continued that Barton Knight had attended most of the Planning Board meetings with regards to this conditional use permit and was not aware of this meeting. He felt that he would have the right to speak and express what his feelings are. He stated that if the Appeals Board was going to do this, it would need to be done the way the Planning Board does it.

Michael Carroll stated that he understands what Aaron Carroll is saying but they are not the Planning Board and do not operate under the same rules. He would like to see in writing somewhere that they would have to notify the abutters. Joseph Lenkowski stated that he understands the confusion and frustration, but this is what the Supreme Court has done to us. He confirms what Michael Carroll stated was the requirement for the Zoning Board of Appeals hearing that was publicly noticed. He reiterates what he had stated earlier that the Supreme Court has ruled that it would be heard De Novo. He admits that he should have chosen his words more carefully when he stated like the Planning Board, because it

is not handled the same. The Appeals Board is conducting the appeal by the way it is required by Maine law when sitting as the Zoning Board of Appeals. He states there is no other notice that you are required to give.

Sean Carroll stated with all due respect the applicant's attorney should not be directing this meeting. With all due respect to his professional acumen and his opinion, we should not, you should not be taking advice from the applicant's attorney. If there is an issue on whether or not you have the right or you have what what you're acting as right now, whether you are an Appeals Board, a Planning Board or a Hybrid of both that should be bounced off your attorney. Kimberly Oliver replied that the town's attorney had been consulted and Sean Carroll asked what was their conclusion and Kimberly Oliver answered that she concluded that the Appeals Board would have to take this appeal as a De Novo which means they would have to the process all over again. Sean Carroll continued that the question that was just asked was do you have to give notice as the Planning Board would have to give notice. That's the question and that's what the applicant's attorney is speaking to. And that's something that should be your attorney not the applicant's attorney.

Steven Malmude asked what he would like to know is if this is a De Novo procedure that does not necessarily mean that the Appeals Board has to do it the way the Planning Board does it. He stated that he is not quite sure members of this board want a site walk. He asked if all the members wanted a site walk. If you all want a site walk you should make a motion and take a vote on it and decide what your positions are as a board yourselves. He continued that if it is De Novo the board can do it the way they do all the Appeals Board hearings, which don't involve site walks. Kimberly Oliver commented that this one is a little different than the normal ones that are done. Steven Malmude stated that he had two questions and his first question is, do the board members require a site walk in order to reach a decision. Kathy Ward stated that she did. His second question was does it have to be done according to protocol to the Planning Board. He did not feel clear on that. He did suggest that if the Appeals Board that they as a board should decide if they need a site walk. **1:04.07**

David Coleman read: 30-A M.R.S.A. § 2691(3) (D) Accordingly, unless the municipal ordinance explicitly directs otherwise, a Board must conduct a hearing de novo. "And that is where we find ourselves tonight". When a Board holds a hearing de novo, it does not examine evidence presented to the decision maker or tribunal below," meaning the Planning Board, we have to do it ourselves", nor does it review the procedure below except to assure that the matter is properly before it. We need to determine jurisdiction, instead, it looks at the substantive issues afresh, undertakes its own credibility determinations, evaluates the evidence presented, and draws its own conclusions. Thus, in the absence of an explicit ordinance creating a purely appellate review by the Board, the function of the Board is to take evidence, make factual findings, and apply the laws and ordinances to the petition or application at issue, and to do so independently of the decision, if any. He continues, needless to say we have to make findings on all 16. He stated that typically when he did a finding he always started with the same comment, based on the information presented by the applicant, and a review of the site. He said he wanted to see the site. Kimberly Oliver agreed that they had heard the evidence for the 16 conditions, however, to make a decision they would need to see what they are making the decision on and come back and review the 16 conditions. Kathy Ward added that they may still have questions.

Kathy Ward stated that she personally would like someone to clarify for her something about the slope of the road.

Barbara Fifield asked if she could ask her question as it relates to the De Novo process. She stated that she is an abutter, she is on the Planning Board, but she had recused herself during that hearing. She asked the Appeals Board, if the public was notified that this was a De Novo Appeal. And was the public made aware of what a De Novo Appeal is. And was the public aware that an entirely new set of application data had been submitted in order to hear that De Novo Appeal. Kathy Ward stated that she believed the same ad that usually is published that there would be a meeting of the Appeals Board to hear an Appeal.

Michael Carroll stated that it was an appeal to the Board of Appeals and they did not have to get into the logistics of telling everyone what a De Novo and that it is a De Novo appeal. That is just the way it is. Kimberly Oliver added that they followed the same notification process for any other appeal as the Board of Appeals.

Sean Carroll stated that to answer Kathy's question the Limerick Fire Department has established that an egress can be no greater than a 5% grade. We have had projects within the last two years in this town that have been denied, were not given Fire Department approval based on the 5% grade. The Planning Board had an issue with the 5% grade. And we were waiting for the Fire Department to have clarification as to how they could approve a road that is roughly 2000 feet that does not meet the 5% grade that the Fire Department established was a base line for access, not for any other kind of issue other than ambulance access if something happened. That was one of the issues that the Planning Board had and the Fire Department never came forward and explained how they could do a 180 on that. And I haven't seen the new application apparently that was submitted. So I'd like to find out what the statement is regarding access and safety and public safety.

Joseph Lenkowski said just briefly I'm really not sure what that issue was all about, but that isn't the applicant's burden. Unless somebody from the Fire Department is going to come forward and say we have a problem with this. Then the applicant is going to respond to whatever problem the Fire Department has, or Police or anybody. Otherwise the applicant isn't required to anticipate every question that might come up and respond to it.

Brian Saulnier asked for clarification if they were still on presenting the Planning Board case on had they moved into the Public Hearing so the public could participate. Kimberly Oliver answered him by stating she was just going to open it up to the public. Brian Saulnier stated that the Planning Board according to Aaron Carroll, had only gotten to the second condition and Sean Carroll stated that he did not agree with that. Brian Saulnier stated that maybe we are seeing the conflict of the Planning Board because they are not even given consistent testimony or have the same perspective from their own meeting. He stated that he did not mean that to be a negative and that the Planning Board is doing the best they can. He stated that his question was going to be how Steve have not provided clarifications on the conditions when the Planning Board had only got to number 2 based on what was said. Kimberly Oliver added that it seemed the Planning Board had jumped ahead and looked at other things instead of taking each condition step by step by step.1:11:56

Sean Carroll stated that they could go back and forth all day, and asked Brian Saulnier if he did not remember the Planning Board discussing the 5% grade at those meetings that he had attended. Because they were heavily discussed and he went on to say that part of the issue was they could not get clarification from the Fire Department. It's out there and they, the Planning Board, had asked. There is a relationship between the applicant and the Fire Department. He said that he was not pointing fingers

and was not making a suggestion, all the Planning Board wants is an answer. How is it that one set of guidelines was the law, in the eyes of the Fire Department, they were steadfast on to it, would not budge from it, and on a much shorter road and now on an unimproved, quarter mile road the 5% grade disappeared. It was not an issue. The Planning Board asked a specific question and could not get an answer.

Brian Saulnier stated that he did recall the discussion. Regarding the Fire Department that this situation is not within the scope of his responsibility and that he was not equipped to answer that question. He continued that if he had the answer he would certainly give it to the Planning Board. Sean Carroll asked Brian Saulnier if he could get that answer from someone who is equipped to answer that question.

Kimberly Oliver interrupted and stated that the meeting was getting out of hand and brought it back on track Brian Saulnier asked if he could answer Sean Carroll's question and Kimberly Oliver allowed this. Brian Saulnier answered that certainly would do that. Kimberly Oliver stated that maybe they would have the answer for the next meeting.

Aaron Carroll wanted to clarify his earlier testimony regarding asking for more information, an addendum, to the application. The Planning Board could see that further on in the process there would be things that would need to be answered. He stated that the applicant asked what it was that he needed bring, so the 5% grade was discussed. He continued to say that Sean Carroll a member of the Planning Board had asked Aaron Carroll as Chairman of the board to pose this question to the Fire Department. Aaron Carroll went to Jason Johnson, the assistant Fire Chief, and asked him if he would mind coming to the meeting. He told him it was not a request of the Planning Board. He explained to Jason Johnson that he knew the subject of the 5% grade would come up and was wondering if he could be at the next meeting to answer a few questions. He asked him as a courtesy and not a request of the Planning Board.

Kimberly Oliver asked Aaron Carroll why it was stopped because of the 5% grade. Aaron Carroll answered that when they had the meeting with the Assistant Fire Chief, the Planning Board asked him what the ruling on this is. He said that he and several of the Planning Board members did not understand this and would like to know how to find out. The Assistant Fire Chief answered that he would contact the Fire Marshal and find out what that ruling is and clarify it to the board. Kimberly Oliver replied that the Planning Board was just waiting for more information before the Planning Board could make a decision. Aaron Carroll stated that the board was looking at it as a safety issue and admitted they may have gotten ahead of themselves. Kimberly Oliver replied that the best thing to do is to follow the 16 conditions right down through step by step.

Sean Carroll stated that the Planning Board did go step by step. They started with 1 and went to 2. He continued to say they were at an impasse. They could not get answers so they would table one and then go to the next one. The applicant refused to give any additional information and said what was there was fine. It wasn't a hostile environment, but it was somebody who was unwilling to bend and to give any more information. The 5% grade came up on number 4 and the Planning Board was getting clarification on Fire Department procedure. It was precedent and that was the Fire Departments rule. When the Planning Board could not get answers it would go onto the next one. The Planning Board was rushed to get this through and was having 3 hour meetings. That is how the Planning Board ended up jumping around.

Steven Malude stated that concerning the 5% grade. It has relevance to the transition between the road and the access road so that the back of the fire engine doesn't drag. He went on to say that it does not refer to the grade of the whole road. That was probably the reason why it was refused in the case that Sean Carroll referred to. Precisely because that road is so short. Kimberly Oliver stated that this does give some explanation.

Sean Carroll stated that the case that Mr. Malmude spoke of, which he did not reference, was not for a 30 foot long truck, it was for an ambulance to get access. It had nothing to do with a catastrophic event or a fire or anything like that. It was specifically asked and answered from the Fire Department, and had nothing to do with anything except, in case an ambulance had to get access. Kimberly Oliver then asked can an ambulance go up that road without it bottoming out. Sean Carroll replied, no, the policy is, a road cannot have more than a 5% grade. What was quoted to us was, the DOT manual for safety, emergency awareness. We were told that was what the Fire Department had to go by. Kimberly Oliver asked Sean Carroll if the Fire Department had given them evidence of that. Sean Carroll stated that it was referenced in a printed out page and shown to them by the Assistant Fire Chief, and another fire fighter on the Fire Department. The manual was DOT recommended emergency awareness. It did not say it was state or town or Federal Government code. It was not NFPA catalog, but we were told that was what they had to go by. That was the policy that the Planning Board was referring to. He had asked Jason Johnson why it was a law when it was coming from a manual that was a recommendation. Jason Johnson said that it was if an ambulance would have to go up there in case someone was hurt. Kathy Ward asked if that meant some of the other roads in town are grandfathered, because they have to have more than a 5% grade. Sean Carroll said these were the same statements that he made that time. I was given the Heisman. I was told that is it, that is our decision, that is all there is to it.

Brian Saulnier pointed out they had just clarified that the Planning Board had come to the point where the prevailing overseer of such a discussion was the Fire Marshal, feedback from him is pending. He is the one that is the authority to speak to this and the rest of the conversation of speculation is inappropriate other than Mr. Carroll's testimony, he did not question that stating that he was not there when he had his experience nor was he the person giving him the answers, however he felt it is the Fire Marshal that would be the one to answer these questions that is relevant to this application.

Steve Colby stated that he and his wife Kathy Colby owned the road that goes to the applicant's lot. They gave him access to that lot. As far as maintenance on the road he wanted to know who would be responsible to maintain the road. He referred to the stories regarding Provencher Lane over the years. They are going after the owner. Kimberly Oliver asked Steve Colby if it was a private road. Steven Colby answered that they did and that they did not want to go into any agreements with Steven Mclean they just want the town to put stipulations on maintaining the road. He stated that they could not get any answers at the Planning Board meetings from the applicant. They had discussed dust, washboard, we discussed it all. Kimberly Oliver asked if they had discussed liability, Steve Colby answered that they did not. 1:24:41 Kimberly Oliver was wondering if there were restrictions within the easement. She stated usually there would be egress and ingress but the easement does not allow maintenance. The easement does not allow the person to change the structure of the road. Steve Colby replied that he and his wife did not sign the DOT entrance permit. Kimberly Oliver read from the easement. She then stated that the Colby's had only given the applicant, Steven Mclean, access and the right to have utilities to go across it. She stated that this is what the easement agreement is. Steve Colby answered that it was. Kimberly Oliver stated that they had not gotten to the 16 conditions and this would be very

important question. Kimberly Oliver stated that the DOT permit, which is under Steven and Kathy Colby's name, in accordance with rules proclaimed under 23 M.R.S.A. chapter 13, the DOT approves a permit and grants permission to perform the necessary grading to construct in accordance with sketch or attached plan an entrance to the subdivision development at a point on 3118 feet north from Cannon Hill Road, subject to chapter 299 highway driveway and entrance dual standard conditions and specific conditions of listed below. So the permittee acknowledges and agrees to comply with the standard conditions in approval attached hereto. She continued to say, when you signed this; you didn't sign it. The DOT signed it. She asked Steve Colby if he knew about this. Steve Colby answered that they knew it after it had been done. Kimberly Oliver asked Steven Mclean if he filled the form out for Steve Colby. Steve Colby stated that they had one in their name prior and that this is a new one. Kimberly Oliver said, so you already had one. Steve Colby answered that they had one for a residential use. Kimberly Oliver noted that this was a driveway entrance permit. Steve Colby stated that he was not denying any of that, it is fine, he could put a Wal-Mart up there as far as he was concerned, but maintaining the road. Kimberly Oliver was explaining to Kathy Ward that this was a permit allowing to go off the main road onto a piece of property.

Kimberly Oliver wanted clarification for why Steven Colby was here. He stated that they did not live there nor did they do anything with the land and they were not going to do anything with the road. He continued that if Steven Mclean puts 50,000 cars up that road, they will not rebuild it or do anything to maintain it. He just wanted to clarify this. He wanted to make it clear that they would not go through the same thing that Provencher Lane has gone through with the homeowners coming out and wanting the road paved or whatever.

Michael Carroll stated that he had been thinking a lot about the De Novo. In the MMA regs, it says that the Board of Appeals decide that it meets all 16 conditions to send it back to the Planning Board to issue a permit. He continues; the conditional use has conditions to it so how can we just tell them to issue a permit.... Kimberly Oliver stated that she was agreeing with Michael Carroll. She continued that even though they had not gotten this far yet that they should remand it back. Michael Carroll said that they would need to clarify that one. Kimberly Oliver stated that at this point it is getting very complicated, she would like to get some legal counsel with the town attorney, Natalie Burns to pose some more questions. Michael Carroll stated that the Appeals Board is supposed to do this De Novo, so they would collect their own information and decide for themselves whether or not they feel that all of the conditions have been met. One of those conditions is safety and feels that a site walk is a good idea so they can walk up the road and decide for themselves, whether it is 5% or 10. He did not want to get into that argument, he felt that was a Planning Board issue.

David Coleman stated that along that same vein of thinking, the Appeals Board could make a decision that if they did decide there should be a permit or not. The Appeals Board is an appointed board, the Planning Board is an elected board, they have the power to issue the permit and the Appeals Board does not have that power. He continued that the Appeals Board did not have the power to make and elected board do anything. He did say he does feel that he has the ability to review this, he has done it dozens of times, however, there are a lot of unanswered questions.

Denise Benton stated that, Norman Hutchins the previous CEO, obviously felt that there were some issues with the roads, because he typed a letter and on the second page, he did date the note on the map of another parcel. He wrote this letter saying the road is not approved per standards of Limericks

ordinance for building permits Map 17 Lots 12 D and 66. On 12D he refers to Fire Tower Road, which off of 160 could not be an acceptable road. She thought it had something to do with the steepness and the road frontage. Mountain View Road is also listed. She continued that obviously he felt some concern. She did not know if it was for safety. She told him that someday that this would probably disappear so she asked for a copy, but it is in the folder at the CEO office.

Kimberly Oliver stated that from the note what she was seeing is the roads are not approved by the standards for the Limerick Zoning Ordinance for a building permit. Denise Benton acknowledged that, but stated that if it is not approved for housing then how it could be approved for a business.

Denise Benton stated that she would like to share another thing that she also holds a right of way that Mr. Mclean and his two sons cross. She recently had an experience where Mr. Mclean tried to press criminal trespassing charges on her because she went in to check her cousin's property. She is very perplexed that his roads are off limits to those who are family of people who own lots there, but yet he wants someone else's right of way to become public. 1:34:49 She feels it is a double standard.

Barbara Fifield stated that she would like to shed a little bit of light on the road issue relative to the document that was submitted by the road commissioner. When she went to build on her property that is adjacent to Kingfield Road, she was told by Mr. Hutchins, the CEO at that time that she had to get the Road Commissioner to approve that road for driveway access. That is what the document that (DOT not sure what document she was referring to )was referring to in that regard. She continued that she was about a month into the process of building and she went to see the CEO regarding another matter, and told him that she would be calling the Road Commissioner, and was told that she did not have to do that because Mr. Mclean has already obtained the approval. She felt that the document (from DOT not sure what document she was referring to) that was submitted was the result of that. It was in reference to her driveway. In terms of road access, there is another access, which she did not think had been revealed in the submission. Steven's Way which is owned by Mr. Mclean, is a private road that is also partially or entirely accessible to the top of Cannon Hill. It comes off in a different spot on Route 5. She continued one more thing about the land. She stated that when she decided to build there she had talked to the current owner regarding her lot and also with the owners of the road, which are the Colby's. She had been told that this was a private road and had a licensed assessor assess her property value on the basis that this was a private road.

Aaron Carroll wanted to talk about some things that the Planning Board struggled with. They asked Mr. Mclean, at the site walk, where was the parking going to be, where was this going to be and he refused to talk to the Planning Board. He refused to tell us if there would be any barriers on the steep bank. He also refused to show them the inside of the building, saying, they did not need to see it. It was not done on another gift shop so the Planning Board did not need to see it. The Planning Board just wanted an idea of what was going to be there.

Brian Saulnier stated that it had already been established that the Appeals Boards role was to review the permit from scratch with the information that has been given at this meeting. Further expressing what happened at the Planning Board meetings does nothing but serve to bias the Appeals Board at this point. In addition personal conflict has nothing to do with this permit and is not relevant and is completely inappropriate. The Appeals Board needs to stick with their process. Kimberly Oliver stated that this is their process.

Denise Benton stated that if the hours are going to be through December until 5:30 p.m. Starting in late October it is dark a 4:00p.m. She continued that there are no utilities up there so will people in earshot's distance be listening to a generator. She also wanted to know if the flashing light, although had not been on recently, would also be flashing.

Kimberly Oliver asked the board members if they had any questions from anyone regarding the testimony. David Coleman and Kathy Ward both answered no. She then confirmed the site walk scheduled for June 14<sup>th</sup> at 8:30. She stated that they would need to schedule a meeting to reconvene to continue this process.

Michael Carroll clarified that the Public Hearing has not been closed and will be reopened when the board reconvenes on August 4<sup>th</sup> because after the site walk there may be more questions or information required. Kimberly Oliver confirmed this. David Coleman made a motion to table this meeting and scheduled a meeting to reconvene on August 4<sup>th</sup>, Kathy Ward seconded it and all were in favor.

Kimberly Oliver stated that the Appeals Board would now continue with their agenda. Michael Carroll and Steven Mclean joined the board at this time.

Michael Carroll stated that they would do the new business and discuss the minutes of June 30, 2016. Kimberly Oliver made a motion to accept minutes as written. Kathy Ward seconded it. No discussion 3 in favor 2 abstained. He continued that they would need to look at the amendment to the Zoning Board of Appeals. There are some adjustments to make in light of this De Novo appeal.

Michael Carroll stated that he had attempted to address it but not sure it is 100% correct. They discussed re- wording, what should be omitted and to having Natalie review the revisions. They went on to scheduling July 28, 2016 for a meeting on a variance on a set-back. Everyone agreed on this date. With no old business he asked for a motion to adjourn. Kimberly Oliver made the motion to adjourn, David Coleman seconded it. No discussion was realized and all were in favor.

Respectfully Submitted;

Laura L. May