

TOWN OF CORNISH, NH
ZONING BOARD OF ADJUSTMENTS
CASE 11-03
OCTOBER 3, 2011

The Town of Cornish Zoning Board of Adjustment met on October 3, 2011, at 7 p.m. in the Cornish Town Office. Voting members present were Dale Rook, Scott Baker, Bruce Tracy, Bill Balch, Jason Bourne (Chair), and Jim Brown. Caroline Storrs recused.

The meeting was called to order at 7:04.

Case 11-03 concerns a request by Peter and Caroline Storrs for an Appeal of Administrative Decision concerning Article IV, Section B, of the Cornish Zoning Ordinance. The applicant proposed a Tea House on property located on St. Gaudens Road, Map 8, Lot 34, in Cornish, NH.

Jason Bourne stated that an appeal of administrative decision requires that a decision has been made. A certificate of zoning compliance, dated 7-15-2011, signed by the Selectboard, does state that the business requires a special exception. Larry Dingee stated that an error had been made by the Selectmen. He continued that further down, the request would have been denied, and it was not. The Selectmen's minutes state that the request was approved as an extension of the agricultural use.

Mr. Bourne asked who completed the form. Mr. Dingee said that the form had been a joint effort. Mr. Dingee said that he did not know the sequence of the application, but Ms. Ogilvy may have filled it out. Mr. Bourne asked what 'conditions as described' meant. He asked what the conditions were. Mr. Dingee said that they had been working from a letter submitted by Ms. Ogilvy describing the business use on the property. John Hammond said that the conditions were the present operating conditions of the Song Garden for the certificate signed on July 15, 2011. Merilynn Bourne said that conditions would be better stated as use. Ms. Ogilvy said that she had checked special exception because she thought that she might have to go before the Zoning Board, but she was told that she did not have to go by the Selectboard.

Background

Mr. Bourne stated that the Zoning Board does have the power to hear and decide appeals pursuant to RSA 674:16. He also read from RSA 674:33 and reviewed the appeal process.

Mr. Storrs stated his contention that the Selectboard's decision to include the Tea House and retail sales was incorrect: that those uses were not an extension of the agricultural use. Ms. Ogilvy could do so through a special exception, which is not a difficult procedure and does give the opportunity for public comment.

Mrs. Storrs told the Board that she had heard about the Tea House on Connect Cornish and read from the initial posting. Mrs. Storrs said that she felt it fell under the definition of a restaurant. Having tables goes into the realm of a restaurant. Mrs. Storrs read from RSA 143A: restaurant licensure. A tea room where food and beverage are provided to the public with or without charge does require a food service license under the RSA, she stated.

Jason Bourne asked Mrs. Storrs about the document printed from Connect Cornish. He asked when the date of the posting had been. Ms. Ogilvy said that she had posted it a week before she had been told that she needed a permit. She said that she did not know that she needed a permit. Mr. Bourne asked the Selectboard if there had been any public posting of the certificate of zoning compliance. Mr. Dingee said that the posting of the Selectmen's minutes was the only required notice. Mrs. Storrs said that she had called on August 1, 2011, when she got the minutes of the meeting. Mr. Hammond had said that the Board of Selectmen would take another look. The Selectboard had done a site visit. Mr. Bourne said that he was trying to gauge whether or not the appeal had been filed in a reasonable amount of time. Mrs. Storrs said that Peter Storrs had received an official letter regarding the site visit on September 1, 2011. The appeal had been filed within sixteen days. The Planning Board on September 15, 2011, did not file an appeal, but had told the Storrs that they could file as aggrieved parties.

Jason Bourne read the conditions set out in the August 8, 2011, letter. Jason Bourne asked if the conditions listed in the 8/8/11 letter applied retroactively to the 7/15/2011 certificate of zoning compliance. The Selectboard said that the conditions did apply retroactively. Mrs. Storrs said that there is in the ordinance an option for notice of abutters. Mr. Bourne asked if Ms. Ogilvy had met the conditions. Ms. Ogilvy had applied for request #2, driveway permit, and parking for elderly had been addressed. The BOS has a copy of an email stating that she has contacted the Stated Health Department. Jason Bourne said that if she is not currently compliant with all the conditions, then the certificate is not in effect. John Hammond said that that was correct. Jim Brown asked about the letter stating that Ms. Ogilvy had contacted the State Health Department. He was given a copy by the Selectboard.

Mr. Brown asked what 'evening activities' meant on the August 8, 2011, list of conditions. Mr. Dingee said that the issue of evening gatherings had come up. The Selectboard looked into the matter and decided that as long as activities were a personal or family nature, they were not under the authority of the Ordinance.

Open Discussion

Martha Zoerheide said that she sees the Tea House and Song Garden in front of her house. If she had any question of it getting too big, she would have asked Peggy and Dan about it. Ms. Ogilvy is a fifth generation family on Dingleton Hill. Ms. Zoerheide believes her when she says

that she does not want to change the Hill. They opened their cabin to offer people a place to relax. She said that it was not a restaurant and that there was no charge. Ms. Zoerheide understood that they had been told by the State that they did not need a permit. She has seen no more than four cars. She said that it was a pleasure to have Peggy and Dan as neighbors. She said that they have put a lot of money into the tea house and gardens. She appreciated that the three Selectmen had seen the Tea House as an extension of the Garden.

Everett Cass said that he did not know these people. What they are doing was not even a business. They should not even have been here. Mr. Cass said that we are in danger of becoming another Norwich, and he supports them 100%. Susan Cass asked if the Storrs had contacted the Ogilvy's.

Carol Santamaria lives in Windsor and enjoys the Song Garden immensely. She has friends who come down from Hanover. It seems to be a perfect fit, and she hopes that common sense prevails.

Sue Voulet said that she has visited the Song Garden four times, and it becomes more a magical place every time. She has learned about flowers and music and takes the opportunity to meditate. It is a creative use of the land.

Judith Kaufmann said that the Tea Garden is clearly an extension of an agricultural activity: it is ongoing only during the agricultural year. She felt that the laws regarding restaurants did not apply.

Lawrence Craig Green said that he was from Bar Harbor, ME. He heard from the at the hearing from the RSA that to be a restaurant food had to be prepared for you. At the Tea House, people prepare their own food. He discussed a memorial to his daughter on the Fitch land and worried that it could fall under zoning at some point. He described the Tea House as a refuge. He said that noise is not an issue.

Lucy McLellan read a letter from her sister Sarah Heath. Ms. McLellan was amazed that anyone would object to the Tea House in Cornish. The Song Garden and the Tea House were both a labor of love. The comments in the guest book in the Tea House clearly show the appreciation of the tranquility. The letter stated that most cars were family and friends. She said that the Tea House and Song Garden are in the spirit of the Cornish Art Colony.

Bernice Johnson said that Cornish is a small town, and everyone is a friend of everyone else. When someone has a problem, they usually go next door and discuss it and settle the problem.

Gwyn Gallagher said that we are fortunate to have a competent Selectboard that has handled the matter in a consistent fashion as they have with many small-town issues. They looked at the issue. As a member of the Planning Board, he said that the Board did take it up and decided not to appeal. He said that the Board did not recommend that they appeal. Jason Bourne asked why it was brought to the Planning Board. The Storrs thought that it was in violation of the ordinance; however, the Planning Board felt that it did not fall into their purview. Caroline Storrs read from the minutes stating that Mr. Dingee recommended the Storrs appeal.

Dan Hertzeler said that this hearing was unfortunate and sad. He thanked the Selectboard for seeing that the scale is so small that there is no impact. The decision to allow operation has been completely validated. His understanding speaking with Colleen Smith from the DHHS is that the use was permissible under agritourism. It is not a restaurant in the sense that coffee in a waiting room is not a restaurant. They have not changed the agricultural use of their land. An estimated 450 visits were made with an average of 6-10 people and 3-4 cars per day. They are artists on Cornish Art Colony land. Their dream is to seek to share beauty with others. They have worked hard to make their little piece of Cornish a jewel on the landscape. It has been hurtful to be publicly treated as wrongdoers and to forcibly be stopped from doing what they are doing. They hope for a public apology on ConnectCornish. Regarding the rumors: they did hope to show movies at private gatherings. He referenced a woman who brought her 85 year-old mother who was overwhelmed by the beauty. Anyone who saw that would say that the Song Garden was a good thing. He referenced several other visitors who were moved by the place. The Song Garden and Tea House are a net good to the community. They should be encouraged and not slapped down. They know no other way, as artists, than to continue working on their land and sharing.

Jason Bourne stated that, for the record, he had not heard one negative thing about the Song Garden. He said that the Town does have a zoning ordinance and a Zoning Board. The appeals process is a legal one, and residents of this town are entitled to use that legal process.

Ms. Ogilvy thanked all who supported the Song Garden and Tea House. She spoke to the fact that the Selectmen felt that the Tea House is an extension of the agricultural use of the land. She says that the Storrs believe that she is running a restaurant. The State of NH describes a restaurant as an eating establishment where food and beverage are served. The State of NH has said that all items served fall into the category of not needing a permit. Restaurant food is not served. They do not need a special exception for a restaurant because they do not have one. She said that agritourism was necessary to farmers in today's economy. Agritourism brings people to farms who would not otherwise come. The Tea House brings people to the Song Garden. The increase in revenue she has seen (45%) has been in cut flowers. The Tea House has not come near the amount of money she has put into it. Most people who go to the Tea House purchase flowers. When people come to a farm from far away, dollars come into the town at other

businesses. She read the definition of agritourism: she said that she honestly believed it was an extension of the agricultural use of the property. The selectmen were very intuitive about this. Her entire summer had been stressful. She wished that the Storrs had come to her. She had two events on the stage: a family engagement party and a cello and piano concert for fourteen people on the stage built by her husband. She said that rumors about prospective events that were not true. She was told that she would have to start the Site Plan Review in February. Jason Bourne said that she would have to follow that up with the Planning Board and Selectboard.

Merilynn Bourne said that there is a process in town and that was stressed with Peggy and Dan. Had that process been followed, the same level of support would have been there. The issue is not about Peggy and Dan for what they are doing: it is a use issue, not a personal attack. Ms. Bourne stated that we do have a zoning ordinance, but just because we are a small town does not mean that we should cast it aside. Following the process would have avoided this evening in Ms. Bourne's opinion.

Mr. Dingee pointed out that the appeal centers around the definition of the Cornish Zoning Ordinance about what constitutes a restaurant. He said that it is fair to say that this use does not meet the definition of a restaurant.

Jason Bourne said that the appeal centered about whether or not the ZBA felt that there had been an error in the Selectboard decision. The ZBA should decide whether the decision to see it as an agricultural use was in error. Mr. Dingee said that there would be opportunity for public comment in Site Plan Review. He said that Site Plan Review was requested to start now. There is still time to begin that process.

Closed Discussion

Mr. Bourne closed the public discussion. The Board returned to the original application and the error in marking the special exception. The Board found that it was an error. Mr. Bourne turned to the timeliness of the appeal. He referenced the August 8, 2011, addendum. The Board found that the appeal had been made in a timely manner.

Mr. Bourne said that the matter before the Board was whether or not the Selectboard made an error in signing the certificate of Zoning Compliance.

Jim Brown said that he felt the Selectboard did err. He was concerned about the food service applicability. He felt that a roadside stand did not sell food for consumption. He said that he was also concerned about it falling under cottage industry. Scott Baker asked if it was a residence. It was not. It does not fall under Cottage Industry if it is not a primary residence. Mr. Brown's overall concern was that it would have been nice to have this hearing on a motion for

special exception because the focus could have been on conditions. His worry was that the use could expand and seriously impact the residential nature of the neighborhood. He asked what was done with the Cornish Colony Museum. There was a Tea House in the building. Bill Balch said that the application regarding a Neighborhood Store on NH Route 12A had been given a special exception. Jason Bourne asked regarding the district. The Tea House was in the rural district and a Neighborhood Store would not be allowed in the Rural District.

Mr. Bourne asked that if the Tea House were not an extension of the agricultural use, what was it? Mr. Bourne asked if anyone agreed that the use was an extension of the agricultural use. Mr. Rook said that from what he heard tonight, it was an extension of the agricultural use, just like sleigh rides would be. Mr. Brown said that selling or donations, it was the same thing. Mr. Balch and Mr. Rook agreed. Mr. Brown said that it qualified as a food service establishment under the RSA. Although a license was not required, Mr. Brown felt that business still fell under a food service establishment.

Mr. Bourne said that he felt the use did not fall under a restaurant since the Tea House was not preparing food. The application listed tea, instant coffee, cookies, biscotti, and pot pourri as items sold. Ms. Ogilvy said that the word 'sell' was incorrect. Mr. Bourne asked if the sale of those products was a natural extension of an agricultural use. Scott Baker discussed that nature of the business and questioned whether it could be categorized as food service. Jim Brown asked how it could be categorized as agriculture. Bill Balch said that he could see both sides of the issue. He did not think that it would be wrong to go through the Special Exception procedure. Mr. Brown said that Ms. Ogilvy was correct in checking yes under special exception. Bruce Tracy asked if a mountain was being made of a molehill. He felt that it was absurd. Bill Balch said that the argument was about procedure and not the operation.

Jason Bourne said that he also could see both sides of the issue. Restaurant was the only other place the use would fit as allowed by Special Exception in the Rural Zone in the zoning ordinance. Mr. Baker asked Mr. Brown if he would want to change any of the conditions as set by the Selectboard. Mr. Brown was concerned about growth of the business.

Mr. Bourne asked Gwyn Gallagher if parking would be covered in Site Plan Review. Mr. Gallagher said that parking and lighting, etc., would be covered by Site Plan Review.

Mr. Brown asked if a bathroom was offered. Ms. Ogilvy said that although she had stated in the application that she would get a portable facility, she later found out from the State that she did not need one. She agreed that the problem could be in the name of the Tea House. The structure is 20x20 feet and does not fall under the definition of a restaurant according to the State. If the Tea House expanded to the point where parking would involve many cars, she would shut it down. Ms. Ogilvy said that she had written it when she was uneducated. Mr. Bourne said that if

anything on the certificate changed that she would have to come back. If a condition changes, Mr. Bourne said, the applicant would have to return to the Selectboard. Larry Dingee said that it was not a requirement. Mr. Bourne said that the Selectboard had signed off on the conditions. Mr. Brown asked if there was a septic on the site. Ms. Ogilvy said that there was a farm well and artesian well, but no septic. Water is brought from off-site and has been tested and approved.

Ms. Ogilvy showed the Zoning Board a slide show. She stated that it was very beautiful, but very small. Mr. Hertzler said that flowers were on display in the Tea House. There are also flower gardening books in the Tea House. Ms. Ogilvy says that she lives in a condo and does not own land, so she goes to Cornish to garden.

Peter Storrs asked if it was possible to have a service establishment, a restaurant, that does not fall under State regulations. Mr. Brown said that it was. Mr. Bourne read the definition of Restaurant in the Zoning Ordinance. Caroline Storrs referenced the tea house at the Cornish Colony Museum. The Selectmen had asked the owner of the Cornish Colony Museum to go to the Zoning Board for a Special Exception. The tea house at the Museum had been an extension of the use. Even though the scale of the Song Garden was smaller, she felt that it was similar enough to merit the same oversight.

Mr. Dingee said that the scale of operation at the Cornish Colony Museum was much greater than what happens at the Tea House. Mrs. Storrs read Article IX of the Zoning Ordinance.

Ms. Ogilvy continued the slide show of the property. Ms. Ogilvy said that she was related to Sue Lewin, Maxfield Parrish's model on the Tea Tray, and therefore named it the Tea House. Ms. Ogilvy said that according to the argument before the Zoning Board, she could have a hog farm but she could not have old women drink tea on her property.

Larry Dingee said that in fairness to the Selectmen that it would be helpful to get some insight from the ZBA as to what the use of the property should be defined as. Mr. Dingee said that it fit the definition in the State RSA of agriculture.

Mr. Bourne asked if the Board felt it had enough information for a vote on whether or not the Selectboard made an error in issuing the certificate of zoning compliance. Mr. Bourne discussed the scale of the use. He said that there was a built in potential for control and input from the public. Mr. Balch agreed that it be kept small. Mr. Bourne said that the conditions were fairly well defined on the certificate of zoning compliance. Mr. Brown said that he continued to be concerned about the potential for growth. Mr. Brown said that the number of visitors per day is those at the garden. Mr. Tracy said that this was too much for seasonal flowers. He added that it was not a restaurant. Mr. Bourne asked if the pot pourri was a product of the garden. Ms.

Ogilvy said that she plans to make her own and is currently packaging bought pot-pourri. She reviewed everything that she sells.

Bill Balch entertained a motion to state that the Selectmen acted properly and asked if it would be out of line to ask the Board to change some conditions. Dale Rook seconded. Jason Bourne added that as part of site plan review there may be other conditions. Larry Dingee added that the Site Plan Review process is a meeting open to anyone to make comment.

Jason Bourne asked for a vote to decide whether the Selectboard made an error. Jim Brown moved to take a vote as described. Yea vote means that the BOS erred. Nay would mean that they did not. Scott Baker seconded the motion. Yeah: Jim Brown. Nay: Bill Balch, Dale Rook, Jason Bourne, and Scott Baker.

Hearing was adjourned.

Respectfully submitted,
Heidi M. Jaarsma