

**Town of Cornish, New Hampshire
Zoning Board of Adjustment
Case 21-03
November 15, 2021**

The Cornish Zoning Board of Adjustment met on Monday, November 15, 2021, at 6:30 PM in the Cornish Town Hall. Present were Caroline Storrs, Chair, Bill Balch, Jason Bourne, Michael Fuerst, and Stuart Hodgeman. Karim Chichakly and Kate Freeland attended remotely due to the Covid-19 situation and in accordance with the provisions RSA 91-A:2.III.

Also in attendance were Sandy Carpentier and Al Rossow, petitioners; Tom Hildreth (via Zoom), attorney for the petitioners; Gwyn Gallagher and Heather Gallagher; Laura Hartz and Jeremy Eggleton, attorneys for the Gallaghers; Heidi Jaarsma, recording secretary; Joan Bailargeon, Ginger Bulkeley, Chris Chilton, George Edson, Jill Edson, Bill Gallagher, Don LaClair, Lea LaClair, Colleen O'Neill, Kathi Patterson, Anita Porter, Tom Porter, Jan Ranney, and Zeb Watkins.

Caroline Storrs called the meeting to order at 6:33 PM.

Case 21-03

Case 21-03 concerns a request by Al Rossow and Sandy Carpentier for an Appeal from an Administrative Decision concerning Article IV, Section 4.1 of the Zoning Ordinance. The applicants have appealed the August 23, 2021, Selectboard decision to grant a certificate of zoning compliance to Many Summers Farm and Gallagher Tree Service for property located on Clark Camp Road, Map 10, Lots 55 & 55A (for the minutes "Jewell Lot" or "Jewell property"), in the Rural Zone. The hearing on appeal, which was opened on October 4, 2021, was adjourned on November 1, 2021, and continued to November 15, 2021.

Bill Balch, Jason Bourne, Karim Chichakly, and Stuart Hodgeman had been designated voting members by Chairperson Storrs at the October 4, 2021, hearing. Michael Fuerst and Kate Freeland had recused themselves at that same hearing. Caroline Storrs announced that tonight's meeting had been previously warned, and that no further warning had been necessary.

The first order of business was acceptance of the November 1, 2021, minutes. Karim Chichakly asked about the motion to adopt the rules of procedure and suggested that the amendments were made based on previous discussions. Stuart Hodgeman made a motion to approve the minutes as amended. Jason Bourne seconded the motion, and the vote of the Board was in the affirmative.

Ms. Storrs took up correspondence. A bill had been received from counsel to the Board. Ms. Storrs gave the bill to the recording secretary and asked that it be submitted to the Selectboard. Three items of correspondence were entered into the record.

Laura Hartz made a motion to reopen the hearing to address two procedural errors made at the November 1, 2021, hearing: first, the incorrect summary of the application and the discussion of the Board's deliberations; and second, the improper closure of the hearing. Ms. Hartz stated that

Mr. Gallagher had been told that he would have an opportunity to speak, which he was not offered.

Mr. Hildreth disagreed with the claim that procedural errors had been made which would require the Board to reopen the hearing. He stated that he had listened to the audio recording a number of times. As part of that audio, Mr. Hildreth stated that Karim Chichakly had provided a summary and Ms. Storrs had congratulated him on the accuracy. He added that Mr. Gallagher had numerous opportunities to plead his case. Mr. Hildreth said that he believed that the case had been closed appropriately. Ms. Storrs offered Mr. Rossow the opportunity to speak, but he declined to comment.

Caroline Storrs asked for a motion from the Board. Jason Bourne said that the motion relies on the minutes and the recording. Mr. Bourne recollected that both parties had opportunities for rebuttals. He did not recall that there had been no opportunity for rebuttal. He said that he did not think that those rebuttals were meant to go back and forth. Jason Bourne asked if the Board should consider the contention that the summary had been incorrect, and the Board was in agreement. Karim Chichakly pointed out that whichever way the second point went, the public discussion would not be allowed to be opened, but the correction to the summary could be allowed. The Board did not allow for factual differences. Caroline Storrs asked Mr. Chichakly if the Gallaghers should have the opportunity to speak to correct that error. Stu Hodgeman asked if the question should be posed whether there was additional factual information. Mr. Hodgeman felt that the Board should hear new information that was not allowed to be spoken. Mr. Chichakly responded that only a factual correction could be made.

Jason Bourne made a motion that the Board not reopen the public discussion, but that an opportunity be provided to correct the summary from the floor. Stuart Hodgeman seconded the motion, and the vote of the Board was in the affirmative 5-0.

Deliberations

Ms. Storrs asked Ms. Hartz to clarify the findings of fact. Ms. Hartz directed the Board to the summary from pages 11-12 of the November 1, 2021, minutes. She pointed out Mr. Chichakly's statement that the definition of agriculture very specifically excludes arboriculture. Ms. Hartz said that Mr. Chichakly's statement in the record was not true and that there was no exclusion for tree service in the statute. She added that there are several places where trees, forestry, lumbering, and lumbering operations are referenced in the statute, including several sections of RSA 21:34-a.

Caroline Storrs said that she would like some clarification from the Gallaghers. Ms. Storrs said that per her reading of RSA 21:34-a, the equipment stored on the site needs to be used for agriculture on the site. She asked how the two bucket trucks would be used on the Jewell Lot. Gwyn Gallagher responded that the equipment would be used for managing the sugarbush, roadside trees, maintaining the building. Ms. Storrs asked how many hours the equipment would be used on the lot. Mr. Gallagher replied that the business is very seasonal and the use of equipment would depend on the season. Ms. Storrs asked what the hours of activity would be, and Mr. Gallagher responded that hours of activity would depend on the time of year. He added that there will be periods of time when the equipment will be used full time maintaining the

sugarbush. Ms. Storrs asked how many trees were tapped in the sugarbush. Mr. Gallagher replied that there were 1600 taps. Ms. Storrs clarified her question and restated that she was not looking for the number of taps on the neighbor's sugarbush, but just on the Jewell lot that was in question. Mr. Gallagher replied that there were likely hundreds of taps on the Jewell Lot. Ms. Storrs asked if there was a sugarhouse on the property. Mr. Gallagher stated that the sugaring operation will be moved from Paget Road to the Jewell property and that boiling will take place on-site. Ms. Storrs asked if Gallagher Tree Service files a Schedule F. Mr. Gallagher replied that tax filing is made together. Heather Gallagher stated that the farm files a Schedule F. The aggregate income of Many Summers Farm and Gallagher Tree Service is filed on one return since an LLC allows filing as a sole proprietor. Ms. Hartz asked for clarification on the line of questioning. Ms. Storrs stated that she wanted to know if Gallagher Tree Service filed a Schedule F with the IRS. Mr. Gallagher replied that Gwyn and Heather Gallagher do file together with income that is partly the farm and partly the tree service. The two separate LLCs file jointly for Gwyn and Heather Gallagher. Mr. Gallagher stated that an LLC allows for filing as a sole proprietor. Ms. Hartz verified Mr. Gallagher's statement. Gwyn Gallagher asked how the answer to the question relates to the use of the land. Caroline Storrs said that she was trying to find out if farming was under Many Summers Farm, LLC, or Gallagher Tree Service, LLC. Mr. Gallagher said that the tree service was doing a lot of agricultural work, including maple syrup and the hemlock nursery.

Ms. Storrs asked how much time the chip truck would be used on the Jewell property. Mr. Gallagher said that it depended what the jobs of the day were. The vast majority of the work would be on the Jewell property. Ms. Storrs asked if the equipment would ever leave the property. Mr. Gallagher said that the equipment does go off-site, but that the majority of the time would be on-site. He added that Mr. Hildreth had done a lot of talk about landscaping, but Gallagher Tree Service had done no large landscaping jobs since the completion of a 2012 job at Dartmouth College: the focus of the business is on the farm and trees. Mr. Gallagher apologized that the website had not been updated, but the website is not an accurate depiction of what the business is. Gallagher Tree provides forestry and horticultural services in addition to farming. Ms. Storrs asked about the stump grinder. Gwyn Gallagher said that the equipment will be used on the farm for the vast majority of the time, but that the stump grinder is also used off-site for forestry jobs. Ms. Storrs asked about the backyard lift. Mr. Gallagher stated that it is a nimble, low compaction, useful tool that will be used quite a bit in the sugarbush. Ms. Storrs asked if there would be trucks going back and forth. Mr. Gallagher said that there would be trucks leaving the property, but that the trucks would be on-site for the vast majority of the day. He added that farming is a twenty-four hour a day job. Caroline Storrs asked if there would be much truck traffic going on and off the property with employees going back and forth. Gwyn Gallagher stated that it would be seasonal. If equipment is needed, and employee will go get it, but equipment is often left on large job sites for the duration of the job. When working on sugarbush or maintaining field edges, or working on the building, the equipment will be used at the Jewell property.

Jason Bourne asked if the Board was charged with figuring out whether or not the Selectmen made a mistake in issuing the certificate of zoning compliance, but he continued that the Board has the application as it has been completed and signed by two members of the Selectboard. He did not understand their thought process issuing the certificate of zoning compliance. He asked

whether there had been an underlying assumption that the building on that site had been continuously used for storing equipment. The Board of Selectmen minutes from August 16, 2021, discussed the current use of the Clark Camp property. The minutes mentioned the continued use for storage of equipment and maintenance and repairs. Mr. Bourne stated that when you look at the building, there is a huge barn designed to store and maintain equipment which is on a legal subdivision. He wondered whether the Selectboard had assumed that it was a grandfathered nonconforming use. He felt that he needed an answer before considering the question before the Board. Gwyn Gallagher stated that he had attended every one of those meetings. Karim Chichakly said that Mr. Gallagher cannot give evidence about what the Selectmen were thinking or not thinking and asked whether any of the Selectmen were at the meeting. Due to a conflicting meeting, no Selectboard representative was present. Caroline Storrs agreed and added that the minutes do not reflect any part of the Selectboard's thought process. Jason Bourne said that it was hard to not consider grandfathering when looking at the building, a large building for storing tractor trailers on a legal subdivision. Karim Chichakly stated that the use was taking place before the property had been subdivided. It was suggested that the Board call the Selectboard.

Laura Hartz raised a point of order and objected to calling the Selectmen since it was not relevant. She stated that the Board is charged with making a decision based on the record, the certificate of compliance and the materials submitted with that certificate. Jason Bourne said he did not necessarily need to know what they were thinking. He wanted to know if the building continuously been used for storing vehicles and farm equipment. Stuart Hodgeman asked if any of the Jewell family present could answer that question. Tom Hildreth raised a point of order. He added that this was new testimony and that the petitioners had been given no opportunity to research or prepare factual testimony in response. He added that the petitioners knew better than anyone what had been going on at that property because they have lived across from it for the past five years. Mr. Hildreth stated that it would be highly irregular to get those facts in tonight. Ms. Storrs said that Mr. Hildreth had a point. She felt that the petitioners needed time to come back with a response.

Jason Bourne stated that the Board had been to counsel for guidance and one area that came out of meeting was whether or not the building had been continuously use for storage of equipment. He added that the information is in the minutes of the Selectboard submitted to the Board. Mr. Bourne said that he was not totally clear on why that would be an inappropriate question to ask. Ms. Storrs said that she did not think it was inappropriate, but she would have expected the Gallaghers to have raised it at the primary reason for choosing to go ahead.

Troy Simino asked the Chair if he could pose a clarifying question. Ms. Storrs said that he could not. Ms. Storrs said that the meeting was closed to public discussion: the Board can ask questions of the public but the public could not ask questions of the Board. Troy Simino said that they could ask questions of the owner of the property. Ms. Storrs agreed that the Board could questions the owner of the property.

Al Rossow indicated that he would like to speak and was recognized by the Chair. He said that in many of the articles we read, we are urged to follow the money in disputes. The fact that there are two separate tax filings indicates that there are two separate businesses. He stated that trying

to amalgamate these two businesses into one agricultural business added new dimension to this case and was something that the Board should consider.

Caroline Storrs asked if Anita Jewell could give the Board input, but added that she felt that the Board should give the petitioners time to do some research on their own. Anita Porter stated that her father had a business on the property for fifty years. The building was constructed for the purpose of repairing, painting, big trucks, which continued to happen to a smaller degree after her father had passed. Trailers, compressors, etc., were stored there until the building was cleaned out in August of 2021. Max Jewell had used the building regularly to store equipment, box trailers, steerable trailers, and painting equipment. Caroline Storrs asked if Max Jewell had been a Cornish resident. Anita Porter stated that the building was used for overflow from Max Jewell's business in Claremont. Karim Chichakly said that could not hear Ms. Porter. Anita Porter restated her response. Stu Hodgeman asked if there had been a break in use of a year or longer. Anita Porter said no, that Max always had some pieces of equipment there. Caroline Storrs asked if he had permission from the Board of Selectmen as a non-resident. Anita Porter said that she did not know.

Ms. Storrs asked the Board what the next step would be. Jason Bourne asked if there were any other questions. Sandy Carpentier interjected and was recognized by Ms. Storrs. Ms. Carpentier said that she has been living across the street, and her opinion was quite different. From her observations, the building had been inactive for months at time: occasionally a truck would pull up and the Jewells would store trailers that they used sporadically in the summertime. From her perspective there was extremely little activity. She added that her residence was not seasonal. The house was continuously occupied.

Jason Bourne said that he was having a hard time considering the issue without knowing whether or not the building had been a non-conforming storage facility. Caroline Storrs considered what the grandfathered status was of the building and what proportion of the equipment is used for agricultural purpose. Ms. Storrs asked Board members whether the grandfathering question ticked off. Stuart Hodgeman felt that given Ms. Porter's description, no further information was necessary. Ms. Storrs said that the petitioners might like to take time to answer. Karim Chichakly stated that, grandfathered storage or not, there had been relatively little activity on the property. He continued that the Board had testimony that during the summer the equipment will be going in and out of the building every day as opposed to being stored. Caroline Storrs said that it was the activity of use, not the storage. Karim Chichakly stated that the proposal would involve considerably more activity than what has been going on, which could be described as overflow storage. Jason Bourne said that to Mr. Chichakly's point, the activity in and out of the storage is the question. The continued use of a building for large equipment seems to be consistent with what has been done there before. Karim Chichakly said that the original business was maintenance of the trucks and that the proposed use is not truck maintenance. Moreover, Mr. Chichakly said that the continuation of the use does not mean that the Jewells were in compliance. He added that storage was not the original use of the lot and that the current proposal was completely different. Stuart Hodgeman said that the Board should not try to connect what the Gallaghers want to do with what Milt Jewell did. He added that the Board needed consider whether or not what Gwyn and Heather Gallagher propose to do is agricultural. Mr. Hodgeman emphasized that the Board needed to decide if the activity taking place on the

property is agriculture. Mr. Hodgeman added that he would be hard pressed to say trees are not agriculture. Stuart Hodgeman called for a vote so that the proceeding would not be carried into the new year. Caroline Storrs asked that if the majority of the equipment is going off-site to do jobs, is the dog wagging the tail, or is the tail wagging the dog. Stuart Hodgeman said that the proposal deals with trees whether in a back yard or ten miles away. He added that contractor's yards are not germane in this situation. Caroline Storrs said that she was struggling with the percentage of time that the Gallagher Tree Service is going to practicing on the farm.

Jason Bourne posed a series of follow up questions to the Gallaghers:

What will you be doing on the site most days? Will the activity of Gallagher Tree Service on that site be primarily maintenance of the Clark Camp farm or primarily the storage and retrieval of equipment? Is storage and retrieval of the tree service equipment for GTS a primary use of the property?

Gwyn Gallagher responded that on the farm, the use will be primarily maple, compost, tree maintenance. Mr. Gallagher said that storage of tree service equipment was not a primary use of the property. Heather Gallagher said that the property would be used to store hay and hay equipment and to winter over cattle. She stated that the property is an extension of farm, not the tree service. Bill Balch asked where the equipment would be maintained. Gwyn Gallagher said that equipment would be maintained in the barn, but that S.G. Reed does most of the work on the large equipment, and only small maintenance is done at the barn. Heather Gallagher added that farm equipment, such as tedders, will be maintained at the site. Gwyn Gallagher said that the arborist equipment, which is also agriculture, is a small percentage. Karim Chichakly how much of the time the equipment will it be used on the property. Caroline Storrs asked for a breakout of the time that the equipment would be on the property or off-site. Gwyn Gallagher did not know exact breakdown. Heather Gallagher said that without the bucket truck, the farm cannot make compost, so she would say would be 100% in response to Mr. Chichakly's question. Ms. Gallagher reiterated that without the equipment, Many Summers Farm cannot operate; all equipment is coming back to the farm for compost, lumber, every day. Caroline Storrs said that she was trying to figure out how the equipment is ancillary to the Jewell Lot. Karim Chichakly said that would mean that the equipment will never leave the property. Caroline Storrs agreed. Gwyn Gallagher said that the equipment works on the farm and off the farm, but that the Board is missing how is the land used. He continued that part of the building will have some equipment in it, but that the main use of land is agriculture. Equipment will be used to prune trees and cut trees down. Caroline Storrs asked if Mr. Bourne wanted to explore grandfathering further. Karim Chichakly said that he was of the opinion that it would not be a grandfathered use. Stuart Hodgeman wanted to move past the grandfathering issue. Jason Bourne agreed that it would be cleaner to make a ruling on whether or not the proposed use of the property was an agricultural use.

Stuart Hodgeman stated that the Board is charged with verifying whether or not the Selectmen's decision that the proposed use was agriculture was in error. Mr. Hodgeman said that equipment is used in an agricultural mode and that the applicants have means to resolve their concerns through other Boards. Stuart Hodgeman stated that he would like to make a motion. Karim Chichakly interjected that he wanted to review some facts. Jason Bourne asked if Mr.

Hodgeman had withdrawn his motion. Stuart Hodgeman continued to make a motion that the Board of Selectmen did correctly in awarding the Certificate of Compliance; the issue deals with agriculture. The tree service and Many Summers Farm are dealing with agriculture on that property and the certificate of compliance should stand. Jason Bourne seconded the motion.

Karim Chichakly made the following review of the facts:

- (1) Many Summers Farm is agriculture which is an allowed use;
- (2) The work for the hemlock nursery and maple is agriculture and is allowed;
- (3) He did not think there was anything in the ordinance that says inactive seasonal equipment cannot be stored;
- (4) He did think that commercial equipment that is not being used on that lot predominately and is spending most of the time off the lot is not an allowed agricultural use on that lot. The Board had been told the equipment would be going out daily for six hours a day during the warmer months. A lot of equipment will be moving on and off regularly that will not be doing anything for the agricultural use of that lot or the agricultural use of Many Summers Farm.

Jason Bourne said that he had heard Mr. Chichakly say that some of the equipment would not be used at all on the property and that the Board had heard testimony to the contrary. Mr. Chichakly said he had not said that. He clarified that he had said there was equipment that would be used predominantly off farm. Stuart Hodgeman said that the equipment will bring truckloads of stuff that will be used on the farm. Bill Balch asked if the use was what the Gallaghers are doing now on their Paget Road property and want to move it over. Bill Balch also asked how much of the time people would be working at the building. Heather Gallagher said that she is planning on planting a hemlock nursery, there will be a small greenhouse in the future, making hay, tapping trees and that depending on the season, and at those times there will be people there. Those people could be in the building taking care of tedder, tractor or skid steer. Bill Balch said that he used to work for the phone company which had a big garage. People would gather at 8:00AM, and the place would sit empty the entire time. He asked if there was any similarity to that description. Heather Gallagher said that some days there will be not a ton of activity on the property during the day. She said the activity will be seasonal and will not necessarily be a place with trucks being parked and taken away. Caroline Storrs asked how many employees there would be. The Gallaghers responded that there are four employees shared between the two companies. Heather Gallagher said the number varies from year to year and season to season. Recently, employees have been involved more with Many Summers Farm, particularly with maple syrup.

Sandy Carpentier said that no one had mentioned anything about the snowplowing. Karim Chichakly said that the hearing is closed.

Caroline Storrs asked for any further comment on the motion. There being none, Ms. Storrs asked the recording secretary to reread the motion:

Stuart Hodgeman made a motion that the Board of Selectmen did correctly in awarding the Certificate of Compliance; the issue deals with agriculture. The

tree service and Many Summers Farm are dealing with agriculture on that property and the certificate of compliance should stand. Jason Bourne seconded the motion.

Ms. Storrs then called for a vote by roll call and asked each member to state the rationale behind their vote. Jason Bourne stated that he believed that the work Gallagher Tree Service and Many Summers Farm do on the property is agricultural work and voted in the affirmative. Stuart Hodgeman referenced his aforesaid motion and voted in the affirmative. Bill Balch agreed with Jason Bourne and voted in the affirmative. Karim Chichakly stated that while the work on the lot is agricultural, he had received no reliable testimony about the percentage work done by Gallagher Tree Service on the lot versus off the lot. Mr. Chichakly voted in the negative. Caroline Storrs agreed with Mr. Chichakly and added that the definition of agriculture states that equipment stored on the site needs to be used for agricultural purposes on the site. Ms. Storrs voted in the negative. Ms. Storrs announced that the motion carried by a vote of 3-2, and the appeal was denied. She informed the petitioners that should they decide to appeal, they have 30 days to submit a letter in writing to the Board.

Ms. Carpentier approached the Board. Laura Hartz asked that her rejection to the ex parte communication be submitted into the record.

Applications

Heidi Jaarsma said that she had included directions specific to each type of appeal on the applications. Caroline Storrs said that the notice of decision template available in the handbook would be useful for the Board to use and asked Ms. Jaarsma to type the approval and denial forms for Bill Balch. Jason Bourne made a motion to accept changes to the applications. Stuart Hodgeman seconded the motion. Kate Freeland was in accord. Karim Chichakly had no comment. Ms. Storrs called for a vote, which was in the affirmative, 7-0.

Stuart Hodgeman made a motion to adjourn. Jason Bourne seconded the motion, and the vote of the Board was in the affirmative. The meeting was adjourned at 8:20 PM.

Respectfully submitted,
Heidi M. Jaarsma