

**Town of Cornish, New Hampshire
Zoning Board of Adjustment
Case 21-03
December 14, 2021**

The Cornish Zoning Board of Adjustment met on Tuesday, December 14, 2021, at 5:30 pm in the Cornish Town Offices. Present were Caroline Storrs, Chair, Bill Balch, and Jason Bourne. Karim Chichakly, Kate Freeland, Michael Fuerst, and Stuart Hodgeman 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; Tom Hildreth (via zoom), attorney for Sandy Carpentier and Al Rossow; Gwyn and Heather Gallagher; Laura Hartz, attorney for the Gallaghers; Everett Cass, Laura Cousineau, Bill Gallagher, Dillon Gallagher, Buzz Lord, Jill Lord, Kevin Noble, Kathi Patterson, Colleen O'Neill, Anita Jewell Porter, David Russell, Anita Porter, Wallace Watkins; and Heidi Jaarsma, recording secretary.

Caroline Storrs called the meeting to order at 5:30 PM. Ms. Storrs announced that the meeting was a public one and that anyone had the right to attend; however, no public testimony would be taken while the Board acted on the motion for rehearing.

Ms. Storrs announced that the decision related to Case 21-03 had been sent by certified mail to Al Rossow and Sandy Carpentier, the Cornish Board of Selectmen, and Gwyn and Heather Gallagher. Ms. Storrs also announced that an objection of motion for rehearing had been sent to her but was not distributed to members since no further testimony or input can be considered on a motion for rehearing when any filing or input that is not part of the record. Ms. Storrs had sought advice on the matter from the NH Municipal Association, and the objection for rehearing had been submitted into the record.

Approval of Minutes

Karim Chichakly and Caroline Storrs made several corrections to the November 15, 2021, minutes. Bill Balch moved to accept the minutes as amended. Jason Bourne seconded the motion, and the vote of the Board was in the affirmative, 5-0.

Motion for Rehearing

A motion was submitted by Al Rossow and Sandy Carpentier for a rehearing of Case 21-03. Bill Balch, Jason Bourne, Karim Chichakly, and Stuart Hodgeman had been designated voting members by Chairperson Storrs at the October 4, 2021, hearing of Case 21-03. Michael Fuerst and Kate Freeland had recused themselves at that same hearing.

Caroline Storrs began by asking members to establish standing. She asked members if they agreed that Ms. Carpentier and Mr. Rossow had standing in that they are a direct abutter and have an interest in what is going on. All members agreed, 5-0. Members also agreed with the background on page 3 and the procedural background on page 4 of the motion for rehearing.

The Board turned to the argument beginning on page five of the motion (attached). Ms. Storrs stated that the argument reiterated the reasons that Karim Chichakly had given in support of the appeal. Ms. Storrs read from section 3.1 of the motion:

The Gallaghers' testimony was frustrating in many respects. They refused to provide specific answers to specific questions about the nature of the off-site operations of the Gallagher Tree Service, LLC, and the Gallagher Tree Service Equipment. The Gallaghers' refusals were especially frustrating because, presumably, the information is readily available to them. (Motion for Rehearing, Section 3.1)

Ms. Storrs asked if there was any subsection in particular that a Board member would like to speak to. She read from section 3.4 and noted that she had shared the frustration expressed in the motion. Counsel to the ZBA had advised that the Board to find out the specifics of what is going on with Gallagher Tree Service such as hours of operation, percentage of hours off-site and on-site. Ms. Storrs said it was very difficult because she felt that she did not get any answers to those questions.

Karim Chichakly agreed that the Board had not received answers to the questions about the operation of Gallagher Tree Service and added that it was the duty of the Board to get those answers. Mr. Chichakly stated that the Board had made an evidentiary mistake by making a decision without getting the answers to the questions posed. He added that the Board could have continued the hearing until the answers were provided. Ms. Storrs added that part of the problem was that the Gallaghers may not have known why the Board needed the information. The definition of agriculture, and ancillary use, meant that it was about what is happening on the property, on the farm. The Board needed to know how much of the Gallagher Tree Service operation was happening on the farm and how much was happening off site. Stuart Hodgeman asked if there was a set percentage for that. Caroline Storrs replied that counsel for the Board had used the phrase, you need to find out if the dog is wagging the tail or if the tail is wagging the dog. The hours off site and on site were necessary information, Ms. Storrs added. Although counsel had not given a set percentage, he had advised that the Board would know through questioning whether the business is taking place primarily on the Jewell property or if it was ancillary to the farming at the Jewell property.

Stuart Hodgeman said that there is an agricultural entity involved with the tree service. The chips were turned into mulch and other products from the trees were used on the farm. Mr. Hodgeman described a typical Upper Valley farm operation: farmers have silage fields all over the county and in different towns. They take their harvester or their balers and go off-site and do not always work on the farm. He said that trying to find a percentage was just a fairy tale.

Caroline Storrs said that she felt that you could locate the McNamara Farm, for example, on the River Road in Plainfield. They farm fields all over the Upper Valley, but their business is located in Plainfield. Gallagher Tree Services is now going to be located on the 4.8 acres of the Jewell lot. The question for the Board, Ms. Storrs said, is whether that is that ancillary. Karim Chichakly said that all the work that a farm like McNamara's is doing is in direct support of their farm. Mr. Chichakly gave an example of a logging operation on his lot, which would not be

forestry, but a contracting business. Jason Bourne asked for a clarification. Karim Chichakly said that if he was in the logging business, the use of forestry is on the lot where the forestry is taking place. The use on his lot where he keeps his logging operation is contracting services. A farm like McNamara's is not contracting their services out. Jason Bourne asked Mr. Chichakly about an operation where there is a mix of use. Mr. Bourne said that the tree service, for example, produces product for the compost operation on the farm. Karim Chichakly replied that the Mr. Bourne's question go back to percentages. All along, Mr. Chichakly continued, the Board has not been given any data, and that is why he had voted no. Caroline Storrs agreed. Mr. Chichakly added that the Board had been given conflicting data: at the first hearing, Mr. Chichakly stated that the Board had been told that workers would show up in the morning and take the bucket truck off-site. At the last meeting, the Board had been told that the bucket truck would be on the farm 100% of the time. Mr. Chichakly reiterated that the Board needed information and facts, not anecdotes. Caroline Storrs agreed that had been the frustration for some Board members. Jason Bourne said that in fairness, the Board had heard testimony that the equipment is shared by Gallagher Tree Services and Many Summers Farm, and the equipment is essential to the operation of the farm. Caroline Storrs answered that Barry Schuster, counsel for the Board, had advised that the Board needed those percentages. Ms. Storrs stated that without the facts of the percentages, it was hard to say that it is an ancillary use. Jason Bourne responded that the Board has testimony that Gallagher Tree Service will be contributing to the compost operation on a daily basis. Caroline Storrs responded that the Board did not know whether compost was made every day. All the Board had received was a general statement that the farm would be making compost. Karim Chichakly asked how many vehicles are involved. Caroline Storrs stated that there are 2000 hours per worker per year, 8 hours a day, and asked how many of those 2000 hours are going to be spent on the farm. Jason Bourne said that he had heard testimony that Gallagher Tree Service was a regular part of the operation on the farm. Ms. Storrs asked if composting would happen every day in the winter and in the spring. Jason Bourne answered that the testimony had been daily. Karim Chichakly interjected that that statement had been made in the second hearing, but that was not what the Gallaghers had said in the first hearing.

Karim Chichakly stated that there would be three trucks going in and out every day, and considered how much of that work is done on the farm with that equipment. Mr. Chichakly added that the Board did not have any of the facts about the operation of the business, facts that would have been asked of anyone else the Board was talking to about their business. Jason Bourne stated that it was not his assumption that the equipment is used on the farm 100% of the time. Some offsite work contributes directly and some does not. Without knowing the percentages, Mr. Bourne said that he did understand that some offsite work contributes to the farm operation as well as onsite work that contributes to the farm operation. Caroline Storrs said that the Board still did not know how much. The bucket loader, Ms. Storrs continued, was going to be used 100% at the farm. She added that it is an expensive piece of equipment to be sitting at the farm 100% of the time. Jason Bourne replied that it clearly was not going to be used on the farm 100% of the time and added that the 100% figure was likely spurious, did not necessarily give an accurate representation, and was not supported by the following testimony. Karim Chichakly stated that the Board was never given a number by the Gallaghers, who had danced around the information. Karim Chichakly suggested the Board just use the 100% since that was the only number given. Jason Bourne stated that the 100% was in response to the question

regarding activity on the farm. Caroline Storrs stated that the whole definition of agriculture was that it had to happen on the farm.

Jason Bourne discussed the composting, which included material brought in from off the farm and resulting from activity off the farm. He added that Gallagher Tree Service provides that service for Many Summers Farm and said that he felt that that activity aligned with the state definition of agriculture. Caroline Storrs responded that twelve machines are being stored on the property. Looking at the whole package of all the equipment, Ms. Storrs stated, is where the confusion comes in.

Caroline Storrs asked if there were any other questions about section 3.1.5 to 3.7.4. There were none.

The Board turned to section four, the definition of agriculture, beginning on page 7 of the motion for rehearing. Ms. Storrs stated that agriculture means all operations or activities on the farm and again made reference to Mr. Schuster's advice that all activity needs to happen on the farm. She restated that the decision the Board had to make was how much is happening on-site and how much is happening off-site. Jason Bourne asked Ms. Storrs to restate what comment she wanted from the Board. Ms. Storrs asked for comment on the interpretation of the definition of agriculture and the definition of ancillary, meaning that it takes place on the farm.

Karim Chichakly said that the Board had covered the definition of agriculture in its discussion of the previous section. Ms. Storrs agreed. Stuart Hodgeman asked what percent would the Board accept as ancillary. Caroline Storrs said that her interpretation from Barry Schuster was that with the percentages, the Board would know if most of Gallagher Tree Service happening off site or was it happening on the farm. Mr. Schuster, Ms. Storrs reported, had not given an exact percentage, but had stated that the percentage would give a clearer picture of how the Gallaghers were going to operate the tree service. Jason Bourne said that he was focusing on the phrase ancillary or in conjunction with. He has heard in testimony that Many Summers Farm and Gallagher Tree Service work in conjunction with each other, with the equipment shared between both entities. He referenced specific testimony regarding how the equipment would be used on the farm sites, including the Jewell site. In conjunction, Mr. Bourne continued, means something different from ancillary to, and the practice of storing the equipment could be a practice in conjunction with the farming operation on the Jewell site. Caroline Storrs stated that if storage of equipment is the primary use of the lot, then the use becomes a contractor's yard. She added that ancillary in conjunction with needs to be primarily on the farm, and a smaller part of the operation. She stated that Gallagher Tree Service cannot be a business that is operating out of that building. Jason Bourne asked if Many Summers Farm is reliant on this equipment for their farm operations, why they could not store that equipment on their own site. Mr. Bourne continued that the Board had heard testimony about how each piece of equipment would be used on the farm. Caroline Storrs replied that she did not see how three snow plows could be used on the farm. Ms. Storrs stated that if you are pruning trees offsite with a bucket truck, you may also prune some maple trees on the site, but that on-site pruning would take place during a very small portion of the year. Ms. Storrs added that if the use is offsite as a commercial use somewhere else, it has become its own business, and it is the dominant use of the property. Jason Bourne questioned whether that was a primary use, given testimony from Gallaghers and added that it

would not be the primary use of that lot. Caroline Storrs reiterated that the Board had not received the testimony. Jason Bourne said that he felt he had received the testimony. Karim Chichakly stated that there had been no substantiation behind the testimony received.

Caroline Storrs turned section five, non-conforming use. Jason Bourne said that the former use of the property came up in Board of Selectmen minutes in the original paperwork. Testimony from Anita Jewell and Jan Ranney at the 10/4/2021 hearing touched on the non-conforming use. Understanding the history of the building and how it has been used, Mr. Bourne said, was a factor in his consideration of whether or not that use had been continued. Ultimately, Mr. Bourne stated, the Board decided to move past it, per Mr. Hodgeman's comments at the hearing. Jason Bourne said that he had agreed that it would be cleaner to move past the non-conforming question since it would be too difficult to get an answer to whether the use had changed. Jason Bourne stated that in his opinion, the non-conforming use issue had been taken off the table during the discussion. Caroline Storrs read from section 5.2 on page 10 of the motion, which suggested comments made by two members were influenced by the potential that the Gallaghers were proposing continuation of an existing use. Stuart Hodgeman stated that had not been his conclusion: it would have been too hard to determine whether uninterrupted or not. Caroline Storrs said that the Board of Selectmen said that the use was for storage on their certificate of zoning compliance. Stuart Hodgeman replied that he did not think it was addressed in the certificate. Jason Bourne agreed the certificate of zoning compliance did not deal with existing non-conforming use and added that the certificate of zoning compliance mentions storage of farm and tree equipment, but he did not know if it was related to the Board of Selectmen minutes which do mention prior use of equipment storage. Mr. Bourne said that he had wanted to know if the non-conforming use was a factor, but had walked away from it because it was not as clean as addressing the specific agricultural use. Caroline suggested that the Board could chase the issue down now. Ms. Storrs said that she had asked Mr. Balch to bring the book of ZBA cases, which showed that neither Milt or Josephine Jewell ever applied to the Town to ask for a change of use from a trucking repair business. Mr. Bourne raised a point of order; he stated that it was not necessarily appropriate to chase the non-conforming issue down now. The question before the Board now was whether non-conforming use as discussed in the record influenced Board members. He questioned whether additional facts could be introduced at this point. Karim Chichakly also stated that it was out of order. Ms. Storrs agreed, but asked if the rehearing should be granted if new testimony was required to reach a decision. Jason Bourne stated that the Board had testimony about the issue from the prior hearings. The motion for rehearing, Mr. Bourne added, implied that raising the non-conforming use influenced the ruling of the Board. The Board, he concluded, needed to address whether or not the discussion of non-conforming use influenced the ruling of the Board. Stuart Hodgeman concurred and stated that it was not a factor in his vote. Mr. Bourne said it had not been a factor in his decision either. Karim Chichakly stated that the point of a rehearing is to decide if the Board had done things procedurally correctly. He felt the non-conforming discussion had been out of order because it had gone far afield in chasing an argument that had not been presented by either side. The Board had tried to bring in testimony from many other places, and that even Ms. Hartz, attorney for the Gallaghers, had said that the Board was out of order. Mr. Chichakly felt that the Board was chasing down evidence without allowing either side to present. Jason Bourne stated that the issue was raised at the public hearing, and there had been no response from the appellant on October 4, 2021. Board members, stated Mr. Bourne, are allowed to use their own knowledge of

properties in the Town in making decisions related to whether or not the Selectboard made a mistake. Mr. Bourne stated that he did not feel the discussion had been out of order. Karim Chichakly reiterated that the Board had spent a long time chasing testimony and had gone far afield.

Ms. Storrs turned to section six of the appeal, new evidence. Jason Bourne disagreed that there had been new factual testimony. Ms. Storrs made reference to page 12 of the motion which asserted that new information that the Gallagher Tree Service equipment would be involved in agricultural operations 100% of the time on the Jewell property. Karim Chichakly added that composting every day was new, as were logs being sawn into lumber, and the sugarhouse. Caroline Storrs added that bringing wood back to the farm to be chipped was new. Jason Bourne noted that the transcription in the motion was missing the words “and then” after “chipper” and before “back to the farm.” The omission, he continued, changes the meaning because it makes the difference between the chipping happening on the farm and bringing the chips back to the farm. Caroline Storrs mentioned that a sawmill would be brought onto the Jewell property. Mr. Bourne said that he had a different take on the statement. “Have sawn” does not mean that the Gallaghers are sawing the logs, but that they are having them sawn. Mr. Bourne did not take that to mean that they were setting up a sawmill operation on the farm. Karim Chichakly said that he had not heard it that way, but he was happy to hear Mr. Bourne’s explanation.

Caroline Storrs turned to section seven, different uses. Ms. Storrs read the uses which the motion asserted had not been mentioned previously in the case: sawmill, onsite chipping, preparing logs for market, sugar shack, and the addition of a greenhouse. Ms. Storrs noted that the sawmill and onsite chipping had been addressed. Jason Bourne stated that the sugar house and the greenhouse would require building permits, so the assertion that it should be turned back to the Board of Selectmen to re-rule did not make sense. Caroline Storrs retorted that when an applicant says what they are going to do, they have to lay it out. Jason Bourne recalled that testimony had stated that the sugarhouse would be moved to the Jewell property in the future. Ms. Storrs recollected testimony that a new sugar house would be constructed. Stuart Hodgeman said that the Gallaghers had said that they would be boiling sap on the site. Ms. Storrs read from the motion, section 7.4, that the objection was being made under the principles of *Sklar v. Town of Merrimack*, 125 N.H. 321 (1984), which states that the Zoning Board must return the case to Selectboard to determine whether the Board would affirm its original decision in light of changes proposed by the Gallaghers.

Ms. Storrs read from section 8 of the motion, which asserted that denial of appeal amounted to an unconstitutional taking. Ms. Storrs asked for any comments or questions. Karim Chichakly said that it was a fair motion to state going through other town boards was an inadequate remedy, but that did not necessarily mean that the Board agreed with the section.

Laura Hartz raised a point of order. Ms. Storrs did not recognize Ms. Hartz.

Caroline Storrs read the conclusion of the motion, and asked the Board to return to the beginning of the motion in order to decide to keep the vote of 3-2 or deny the rehearing. Karim Chichakly noted that the Board was not voting on the old motion. The Board, Mr. Chichakly stated, was voting on whether or not to grant a rehearing. Ms. Storrs agreed that the

Board was voting on whether to grant the rehearing or not. Mr. Chichakly said that the 3-2 statement was confusing because there had been no vote. Ms. Storrs agreed. Stuart Hodgeman agreed that the Board needed to vote on whether to allow a rehearing or not. Karim Chichakly asked Ms. Storrs if she had the part of the zoning board regulations that discusses the conditions by which the Board should vote in favor.

Ms. Chichakly read from chapter IV of the Zoning Board in NH Handbook: “we believe that municipal boards, like courts have the power to reverse themselves at any time prior to the final decision if the interests of justice so require.” He noted that interests of justice is mentioned several times. Mr. Chichakly also read “If in its review of the motion for rehearing the board feels compelled to add additional reasons for denial beyond those issues raised in the motion, they should grant the motion, hold a new hearing, and include their additional reasons...If the board feels there are sufficient grounds to reconsider their original decision, the motion should be granted.” Mr. Chichakly continued to read from chapter IV of the handbook, “The...rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the courts...the board is not required to grant the rehearing and should use its judgement in deciding whether justice will be served by doing so. In trying to be fair to a person asking for a rehearing, the board may be unfair to others who will be forced to defend their interests for a second time...No purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people or for other valid reasons. The board, and those in opposition to the appeal, should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them. The coming to light of new evidence is not a requirement for the granting of a rehearing. The reasons for granting a rehearing should be compelling ones; the board has no right to reopen a case based on the same set of facts unless it is convinced that an injustice would otherwise be created, but a rehearing should be seriously considered if the moving party is persuasive that the board has made a mistake. Don’t reject a motion for rehearing out of hand merely because there is no new evidence...”

Caroline Storrs asked if there was a motion. Jason Bourne said that before a motion was made, his understanding was that the Board would revisit points one through seven on page two of the motion. Ms. Storrs reread points one through seven. Karim Chichakly made a motion to grant the motion for rehearing. Caroline Storrs seconded the motion, and asked if there was any discussion. There being none, Ms. Storrs called for a vote. Caroline Storrs, Bill Balch, Karim Chichakly, and Stuart Hodgeman voted in favor of the motion. Jason Bourne voted against the motion. Stuart Hodgeman stated that he felt that we should solve own problems in Cornish before it goes to court. Ms. Storrs asked other members to give reasons for their vote. Karim Chichakly believed some errors were made, that evidence was introduced without fair rebuttal, the character of the area was not explored, and the Board had not received the information requested. Bill Balch felt that several mistakes were brought up that should be corrected.

Jason Bourne read the following into the record: The assertion that we must rehear in order to correct mistakes is effectively an assertion that we must rule in favor of the appellant, as the so-

called mistakes cited would overturn our own good-faith deliberation. The town ordinance and state statutes have not specified any threshold percentage of onsite vs. offsite use of agricultural and arborist equipment which would disqualify the practice of storing such equipment in conjunction with the activities on the farm as a permitted agricultural use. Many Summers Farm and Gallagher Tree Service have provided testimony describing how both business work in conjunction with each other, sharing equipment for the operations and improvements of the farm lands, the cultivation of a maple sugarbush, the cultivation of hemlock saplings, and the haying of fields while recycling the byproduct of the tree service in the production of compost, all of which occurs on the farm, and have described how ancillary equipment, such as plows, facilitate the maintenance of the farm and provide access to woodlots, which have been described as a daily part of their compost operation. The Certificate of Compliance issued by the selectboard encourages the *agricultural* expansion of both Many Summers Farm and Gallagher Tree Service.

Caroline Storrs stated that she voted in favor of the rehearing because the definition of agriculture was not taken into account in the first vote. The motion for rehearing was granted by a vote of 4-1. The Board set a rehearing date for January 10, 2022, at 6:30 PM, at the Town Hall.

Karim Chichakly made a motion to adjourn. Jason Bourne seconded the motion, and the vote of the Board was in the affirmative, 5-0. The meeting was adjourned at 6:52 PM. Everett Cass asked if there would be public input at the next hearing. Ms. Storrs said that testimony would be taken at the public hearing.

Respectfully submitted,
Heidi M. Jaarsma