

**TOWN OF CORNISH, NEW HAMPSHIRE  
ZONING BOARD OF ADJUSTMENT  
AUGUST 29, 2022**

The Cornish Zoning Board of Adjustment met on Monday, August 29, 2022, at 6:30 PM in the Cornish Town Offices. Members present were Michael Fuerst, Chair, Bill Balch, Jason Bourne, and Caroline Storrs, Clerk; and Karim Chichakly and Troy Simino, Alternates.

Also in attendance were applicants Don Andrews and Maggie Andrews, Seth Westbrook, architect for the applicants, Audra Klumb of A & D Klumb Environmental, Betty Caterino, Bill Caterino; and Heidi Jaarsma, recording secretary.

Michael Fuerst called the meeting to order at 6:31 PM. Mr. Fuerst designated voting members with alternate Karim Chichakly standing in for Kate Freeland. Caroline Storrs collected the fees, read the notice and reviewed the posting and abutters' notices.

**Case 22-03**

***Voting Members: Michael Fuerst, Chair, Bill Balch, Jason Bourne, Karim Chichakly for Kate Freeland, and Caroline Storrs.***

Don and Maggie Andrews have submitted an application for two variances concerning Article IV, Section D.1 of the Zoning Ordinance and for a Special Exception concerning Article IV, Section D.1(b)iv of the Cornish Zoning Ordinance.

Applicants requesting a variance that would allow for the installation of underground utilities and grading, and a variance for the replacement of a non-conforming garage partially located within the 100-foot wetland buffer. The applicants are also requesting a Special Exception to repair a water line within the 100-foot wetland buffer and to repair a well within the wetland.

The applicants' property is located at 465 East Road, Cornish, NH, Tax Map 11, Lot 88, in the Rural Zone.

**Background**

Mr. Fuerst asked the applicants to begin with the two variance requests. Mr. Fuerst pointed out that the Zoning Board has some affirmative duty to only grant a variance if absolutely necessary. If there is another way to get the applicant to the point to do what they want, the Board should assist them with the process. Mr. Fuerst said that the Board should discuss whether or not the proposal by the applicants was covered by Section VII.C.(1-3), *Non-Conforming Structures*, in the *Cornish Zoning Ordinance*. Mr. Fuerst suggested that a variance may not be required if the Board agreed. He read the three criteria provided in VII.C(1-3):

- 1. Any lawful nonconforming structure in existence when this Ordinance was passed may continue unchanged but may not be altered or substantially expanded in any way which will result in a new or increased violation, except as provided herein.*

2. *A nonconforming structure may be replaced by a nonconforming structure provided the replacement is of the same general size and character as the original structure.*
3. *An alteration or replacement of a nonconforming structure shall not increase the nonconformity.*

Mr. Fuerst asked the applicants to consider these criteria as they made their presentation. Audra Klumb of A&D Klumb environmental, wetlands scientist for the applicants, had marked the wetland boundaries of a perennial stream and associated wetlands on the property in April. Ms. Klumb had marked the locations where area covered in the application was within a conservation overlay district: the wetland buffer in one location and the shoreland buffer in another location. The 100-foot wetlands buffer extends into the current garage area. Stormwater is currently running down the dirt driveway into dirt road and into the wetland and stream. An existing utility pole is also in the buffer. The proposed garage will be located slightly less in the buffer than the existing garage in order to get the underground utilities to the garage. The proposed underground utilities will have to pass through the buffer, but once installed further maintenance in the buffer is not necessary. Ms. Klumb stated that the installation represents a one-time disturbance. Overhead lines would require routine maintenance within the buffer. Proposed grading will allow the runoff to be collected and infiltrated through a vegetated area on the property rather than into the wetland. Ms. Klumb concluded by saying that garage alignment will be adjusted so that there is less square footage within the buffer.

Seth Westbrook, architect, said that the existing nonconforming garage has 320 square feet within the buffer. The proposed garage will have 137 square feet within the buffer. Audra Klumb stated that the impact to the buffer is in the same location, but here will be less overall square footage within the buffer and that overall, less of the garage would be in the buffer. Michael Fuerst asked if the footprint of the building within the buffer area will fall within that of the current structures. Ms. Klumb replied in the affirmative. Mr. Westbrook shared the proposed construction design, which showed the existing and the proposed garage. The proposal included an open porch with an overhang within the buffer. Michael Fuerst asked Mr. Westbrook to confirm that none of the existing building would be outside of the area currently within the buffer area. Mr. Westbrook confirmed. Ms. Storrs asked the size of the new garage. Mr. Westbrook stated that the new garage would measure 60 x34 feet. Mr. Westbrook spoke to hardship. The current garage sits on a knoll above a house. As the house design has progressed, the applicants' desire was to keep the scale of the new addition low to retain the historic character of the house as viewed from the road. Mr. Westbrook explained how he had worked through various schemes working with the onsite grade to install a driveway. Water shedding toward the house also presented a problem. The applicants had been planning to reuse an existing addition, but due to standing water frame was rotted. Site drainage creates water problems coming off knoll to house. Mr. Westbrook stated that the new design will tuck the garage in and keep the building low in such a way that water is not directed toward the house. . Michael Fuerst asked if the purpose of the excavation work and keeping the garage lower was to have the water offload down the wetland into the stream. Mr. Westbrook stated that the intention

was to return to the natural grading as close as possible. He added that nestling the building in and providing swales would prevent water from flowing towards the house.

Michael Fuerst asked why the whole building could not be moved northeast, so that it was not in buffer zone at all. Assuming grandfathered structure provision does not apply, Mr. Fuerst asked what would be the problem with moving in that direction. Seth Westbrook responded that other plantings and gardens would be impacted as would access to existing orchard and greenhouse. Mr. Westbrook added that moving the proposed building north tightens up driveway quite a bit. Mr. Fuerst asked if moving the proposed building would have a negative impact on the water flow. Mr. Westbrook did not think so, but he felt that the turnaround and parking and use of the area to the north would be constricted and that it would be more difficult to save existing apple trees. Karim Chichakly asked how far the building would have to be moved to be out of the wetlands buffer. Mr. Westbrook thought that the building would need to be moved 20-30 feet, but noted that grading within the buffer would still be required.

Caroline Storrs said that 20-30 feet seemed large for the map presented and asked for a more accurate prediction. Michael Fuerst asked the applicant to provide a larger-sized plan. Ms. Storrs said that she had figured twelve feet would be required to move the building out of the wetlands buffer and was curious how Mr. Westbrook had gotten to 20-30 feet. Mr. Westbrook said that while fifteen feet may be possible, the proposal would still require grading within the wetland buffer. Mr. Westbrook discussed features of the landscape which affected the water flow. Mr. Westbrook said that the area presents a lot of surface and groundwater issues, but the real acute issue is how the water sheds onto the south yard. Mr. Westbrook clarified that the utilities would come in through the garage to serve the house. He said the goal was to have the roof of the garage be used for solar collection thus keeping the visual impact as minimal as possible. Batteries for the system would be stored in the garage. Bill Balch asked if the power from the barn to the house would be underground. Mr. Westbrook stated that all the controls would be in the barn and would go underground to the house. Ms. Storrs asked why the power had to come into the house. Mr. Westbrook said that the aerial line serving the house would be eliminated. Visually, Mr. Westbrook said, in order to have the utility underground, the best route is through the garage. Mr. Westbrook noted that the roof of house was not situated well or suited for solar. Karim Chichakly asked about the power connection. Mr. Westbrook stated that the connectivity needs to happen relatively close to the solar panels. He added that there is a particular way that the solar has to connect, and that the connection would be better in the barn where the batteries are located. Feeding the house would mean a more complex system of lines. Mr. Westbrook illustrated an alternative to connecting solar by going through the yard and around geothermal wells and into the barn that way. Michael Fuerst asked about the distance of line from the road to the barn. Audra Klumb stated that it was 100' from the existing pole to the existing garage. Michael Fuerst said that the Board would need a copy of the plan, with perhaps a blowup of the barn. Caroline Storrs asked for the square footage of existing garage/barn. Mr. Westbrook was asked what would go in the new garage. Mr. Westbrook said that the two bay garage would include firewood storage, a root cellar, a battery and electrical room, a craft studio space, and an outdoor kitchen. The upstairs area, which would be accessed from the back, would be used for equipment storage and a farm workshop. Caroline Storrs asked about water service

to the garage. Mr. Westbrook said that there would be an outdoor hose near the outdoor kitchen. The applicants have discussed using a hose with a harvest sink, but there is no intent to have a year-round kitchen.

Don Andrews explained that they were trying to minimize visual impact of the garage to make it look like a classic bank barn modelled on Blow Me Down Mill with a stone base and cedar shakes so that the structure would fit within character of structures of the area. Mr. Andrews felt that lowering grade was very important so that the garage did not overpower the house. The proposed work was an effort to shrink the visual footprint of the building.

Jason Bourne asked if the grade of the proposed building would be lowered within the wetland buffer. Mr. Westbrook said that some grading would happen within the wetland buffer. The proposal would tie a large portion into the existing topography. Mr. Bourne asked how deep the grading would go. Mr. Westbrook said that from floor to floor measured 10 feet and that there would be a 9 foot difference from the grade at the garage level to the upper dooryard. Retaining walls and plantings outside the buffer will be installed. Mr. Westbrook said that they were not looking to flatten, but to bring the natural grade down. Caroline Storrs noted that the grade was flatter to the east. Mr. Westbrook responded that it was flatter and higher up. Karim Chichakly asked if the area of the proposed garage that overlaps the wetlands buffer would be further down than it is now. Mr. Westbrook replied that the area of the proposed garage that sits within the buffer will be 4.5 to 5 feet lower than the current structure.

Mr. Fuerst explained that when the Board is making a decision about a variance, the applicant must meet five criteria. The Zoning Board is a quasi-judicial board, not a policy making one, and the variance may only be granted if the following five criteria are met:

1. *The variance will not be contrary to the public interest;*
2. *The spirit of the ordinance is observed;*
3. *Substantial justice is done;*
4. *The values of the surrounding properties are not diminished; and*
5. *Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.*
  - a) *For the purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:*
    - i. *No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of the provision to the property; and*
    - ii. *The proposed use is a reasonable one.*
  - b) *If the criteria in this subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

Mr. Fuerst stated that if the Board was dealing with a grandfathered use, one of the questions would be the age of the building. Mr. Andrews stated that the existing garage was constructed around 1930. Mr. Chichakly suggested the applicants present why they think the proposal meets the five variance criteria.

Seth Westbrook stated that the variance would not be contrary to the spirit of the ordinance because the proposal minimizes impact from building on the neighborhood and character of the road. Granting variance would allow the applicants to do the work required to provide as nice as possible a scale, character-wise.

Mr. Westbrook defined the spirit of the ordinance as protecting character and environment of a town. He stated that the proposal tries to do so by tucking the structure into property and running underground utilities. He added that while an overhead line would not require a variance, there would be a regular impact to the buffer vegetation due to maintenance. If the variance were not granted, running an overhead line would require a clear corridor through existing vegetation.

Mr. Westbrook asked for a clarification of substantial justice. Mr. Fuerst stated that it can be described as any loss to the individual that is not outweighed by gain to the general public. Don Andrews explained that what they are trying to do is in character to the neighborhood and the town by maintaining original cape and farm. Mr. Andrews said that they are trying in every way to do justice to the community through the history of the property. They had looked at many ways to utilize or repurpose the garage, but it was not functional for a modern usage. If not allowed to proceed with variance, the property may lose an existing garden and permaculture installations, trees, blueberries, grape vines, and other areas where the Andrews have put a lot of work on the farm. Mr. Andrews added that changing the position or location of the building would have an impact on other things already put in place in the past ten years of working on the project. The proposal includes a loop driveway around existing gardens to a porch on east end. If the building must be shifted, existing gardens, stone wall, and a sunken garden will have to be ripped out. There would be an impact on how they want to use space and retain existing and improved plantings.

Mr. Westbrook stated that he felt the project would improve surrounding property values through the construction of a beautiful building with historical character. He added that the underground utility will improve the neighborhood

Without the variance, Mr. Westbrook continued, the topography particular to that spot, such as the knoll and steep grades to existing building, would become a difficulty, especially with regard to controlling water flow. Mr. Andrews used his mobile phone to show the board several pictures illustrating the steepness of the grade. Mr. Andrews said that the house will continue to have water issues without the proposed grading work. Mr. Fuerst asked if the height of the knoll would have to be reduced if the proposed barn/garage location was moved. Both Mr. Westbrook and Ms. Klumb answered in the affirmative.

Karim Chichakly asked why the applicants were asking for a variance for underground utilities. Ms. Klumb stated that underground utilities are not an allowed use in the wetlands overlay

district. The water line through the buffer is allowed by special exception. Ms. Klumb reviewed the variance criteria with regard to the request to install underground utilities within the wetlands buffer.

Ms. Klumb stated that the underground utilities from the pole would be a benefit. The purpose of the ordinance is to protect the wetlands by maintaining a buffer. Underground utilities would require only one disturbance of the protected area to install, with no further disturbance needed. Ms. Klumb stated that the proposal does not go contrary to spirit, and in the end will be the area will continue to be maintained as a buffer. Michael Fuerst asked if NH DES was required to be involved. Audra Klumb said that the State did not regulate wetland buffers unless they were prime, a lake, or a septic was involved. Ms. Klumb stated that there was no State review for this wetland or work within the buffer.

Don Andrews said that the plan to have battery storage in secondary building reduces fire hazard and that a solar connection directly to a battery had electrical efficiency benefits. Mr. Andrews stated that the additional line required by other configurations would be more expensive. Mr. Andrews felt the underground lines had a benefit to the community as well. Michael Fuerst asked if the general public gained by the installation of overhead wires. Mr. Andrews replied that he did not believe so. He added that he had approached several neighbors about the project, and all had been supportive.

Ms. Klumb stated that underground power was always better for property values and that the installation of underground lines would not diminish property values.

Mr. Westbrook stated that the power would have to go farther up the road to avoid the buffer. Karim Chichakly stated that was not what hardship meant. Mr. Fuerst read from the definition of hardship. Mr. Fuerst stated that hardship was not just wanting to be able what you want to do or to do it in the most efficient way. He said that the applicant needed to show that, due to the nature of the property, the proposal is the only way to do it. Caroline Storrs stated that the applicant had to show that part of property is so unique that the proposal is the only way the goal can be accomplished. Karim Chichakly added that hardship is not financial; hardship means that the applicant cannot make reasonable use of the property. Caroline Storrs asked if there was another way to use solar panels and get electricity to house. Maggie Andrews stated that according to the solar engineers, the connection cannot run through house for safety reasons. To make that system work, Ms. Andrews continued, the closest access is the best way. Ms. Andrews said that they are trying to be as kind to the environment with the project as they can, and rerouting would reduce efficiency of the process. Don Andrews said that in the area of the old driveway is, there was an old well and power cannot come up through the driveway: going all the way around might not work and would lose a lot of efficiency in the system. Seth Westbrook asked where unduly oppressive kicked in. Karim Chichakly said that the power could run above the ground. Michael Fuerst asked if the applicants or their representatives had anything else to say and added that there would be an opportunity for the Board to ask questions. Mr. Fuerst requested a copy of the plan for the Board.

Mr. Fuerst asked if there was any comment from abutters. Bill Caterino said that the proposal sounded very reasonable. He felt that the Board did have discretion and that every situation is totally different. Mr. Caterino said that underground power was probably never considered when the ordinance was written. He felt that the proposal fit within the spirit of the ordinance. Betty Caterino felt that what was being asked was very reasonable.

Troy Simino asked if battery storage would be within the wetlands buffer. Audra Klumb said that batteries would not be stored within the wetlands buffer area. Mr. Simino stated that the reason that Cornish has a wetland overlay district is that we have gone above and beyond the state requirement to protect the wetlands.

### **Summary**

Michael Fuerst asked Mr. Andrews about the acreage of the property. Michael Fuerst noted that the stream is at the bottom of the wetland buffer zone.

Mr. Fuerst summarized the facts that had been presented: There is a structure, a garage, which pre-exists zoning, and a portion of that structure sits in a wetlands buffer zone. The garage sits at the top of the knoll, and drainage occurs back down towards the existing house and toward the driveway. The existing utility pole is in the buffer zone now, but the line runs along the road to the house. The proposal is to replace a garage with a larger structure with less impact to the buffer zone; however, there is a need to do excavation and drainage work in the buffer zone. The proposed structure's foundation will be 4.5 to 5 feet lower than the current garage. Currently the electricity runs from the house. The proposal is for solar panels on garage. Testimony, from an efficiency point of view, is that relocating the power connection would be substantially less efficient. Mr. Westbrook said that relocation of the power was borderline unfeasible. Ms. Andrews stated that connection through the house was unsafe. Mr. Fuerst continued that the existing garage is substantially smaller than the 34 by 60 foot proposed structure. Drainage off the existing garage is towards the house. Mr. Fuerst added that moving the garage to the north and the east would, from the point of view of the applicants, cause some problems with the proposed driveway and the existing driveway, would tighten turn arounds, and would create potential negative impacts to existing gardens, stonewalls, trees, and shrubbery. Mr. Fuerst said that it had been stated that moving the structure 15-30 feet would be required to take the building out of buffer. The proposed two-bay garage would contain space for firewood, root cellar, summer kitchen, craft studio, equipment storage, workshop. There will be no year-round water to the site. Mr. Fuerst said that the applicants have stated that they are trying to minimize visible impact by dropping the garage below grade. Don Andrews added that the height of house and the garage is significant. Another reason for dropping grade is because of steepness in the garage. Caroline Storrs asked about the location of the geothermal wells. Mr. Andrews stated that the wells were outside the wetlands buffer. Jason Bourne said that his understanding was that running the electrical lines along the road would still run through the wetland buffer.

Michael Fuerst marked as an exhibit the wetlands impact plan showing the area of the overlay district and the proposed and existing garages.

## Deliberation

Mr. Fuerst closed the hearing to additional fact finding at 8:01 PM. He suggested that the Board deliberate the two variances and decide whether a grandfathered use applies to the structure. Karim Chichakly read from page VII.C and said that VII.C.2, the requirement that the structure be of the “same general size and character” might be an issue. Michael Fuerst said that the entire structure is not in the buffer zone, and that he would argue that the portion of the structure within the buffer zone is being reduced. Jason Bourne said that he felt the violation was not increased. Caroline Storrs said that the new structure is two stories, so the total square footage of interior space is increased. The Board discussed the proposed patio and said that it would be helpful to have actual dimensions. Seth Westbrook calculated that the upper level was 1,440 square feet and the lower level was 2,112 square feet for a total of 3,552 square feet. Mr. Westbrook said that the colored portion of the building on the plan was in the buffer zone. Karim Chichakly asked about the amount of the current building in the wetlands buffer. Caroline Storrs asked why the building could not be moved. Mr. Westbrook replied that there would be a greater impact on the grade. He added that if the overhang were not a problem, it would be easier to get the building out of the buffer zone. The patio under the overhang would be constructed with pervious paving stones. Ms. Storrs said that the overhang did not count. Karim Chichakly noted that he had heard that the size of the existing structure was significantly less than that of the proposed structure. Michael Fuerst suggested that reducing the size of the offense in the buffer zone is the argument. Karim Chichakly disagreed and felt that condition VII.C.2 was not met. Jason Bourne said that he understood the argument for character, but the question was whether the building was of the same general size. Ms. Storrs agreed with Mr. Chichakly.

Michael Fuerst put forth a motion that Article VII.C can be interpreted to allow for replacement of the structure based on the fact that the area that is encumbered in the buffer zone is reduced. Bill Balch seconded the motion. Jason Bourne asked Mr. Fuerst if he was considering the second floor as part of that encroachment. Michael Fuerst said that he was considering the footprint. Karim Chichakly added that there had been no discussion of the impact of the increased depth of the proposed structure. Mr. Fuerst called for a vote. Karim Chichakly, Jason Bourne, Caroline Storrs, and Bill Balch voted in the negative. Michael Fuerst voted in the affirmative. The motion did not carry by a vote of 4-1.

Mr. Fuerst asked the Board to discuss the structure variance.

1. *The variance will not be contrary to the public interest;* Karim Chichakly, Jason Bourne, and Bill Balch agreed that the variance was not contrary to the public interest.
2. *The spirit of the ordinance is observed;* Caroline Storrs said that the spirit of the ordinance was to protect groundwater and that she could go either way. Jason Bourne said that it seemed like the spirit of the ordinance was observed since the proposal would affect a smaller area of the wetlands buffer. Michael Fuerst felt that the spirit of the ordinance was observed given that less water will run from the driveway to the stream.
3. *Substantial justice is done;* Ms. Storrs noted that the applicants are working to ameliorate the runoff problem.



4. *The values of the surrounding properties are not diminished;* Both Caroline Storrs and Michael Fuerst agreed that there would be no diminution of surrounding property values.
5. *Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.* Karim Chichakly did not feel that A1 of the hardship criteria had been met. He stated that the knoll was a pretty specific topographic issue on the property. Jason Bourne said a site visit would be helpful. Michael Fuerst suggested tabling the meeting and scheduling a site visit. Mr. Westbrook said that, in consideration of the way that the topography rises up to the garage, special conditions are a given.

Karim Chichakly moved to table the two variances until a site visit at 5:30 on Thursday, 9/8/22, followed by a meeting at the Town Offices directly afterwards. Jason Bourne seconded the motion, and the vote of the Board was in the affirmative, 5-0.

### **Special Exception**

Mr. Fuerst opened the hearing for a special exception at 8:40 PM. Audra Klumb presented the proposal to install a water line in the wetlands overly district. She stated that the well is in failure, and the water line needs to be replaced. Ms. Klumb pointed out the stream and the wetlands on the plan. The proposal repairs the well and lays a new line, continuing it through the wetlands buffer. The applicants have a permit from the state to go ahead and do the work; however, the work must be done before the end of low flow period in September. Michael Fuerst asked Ms. Klumb to address the criteria for a special exception.

1. *The capacity of existing or planned community facilities*  
Ms. Klumb stated that the existing system is on private property and will not affect the capacity of system for private property no affect.
2. *The character of the area affected.*  
Ms. Klumb stated that the use is existing and will not change
3. *Traffic on roads and highways in the immediate vicinity.*  
Ms. Klumb stated that traffic will not be affected.
4. *Town services and facilities.*  
Ms. Klumb stated that the proposal would not change the current use or impact other uses.
5. *Neighboring land uses present and prospective.*  
Ms. Klumb said the proposal will not affect neighboring land uses. And that there will be no change in overall land use in the area.
6. *Significant wildlife habitat, trails, natural, scenic or historic features.* Ms. Klumb stated that the proposal is located within a mapped wildlife corridor, but once the work is done, the use will not change. During work there will be some disturbance, but the area will be returned as is. An existing private trail will not change, and no native species have been identified.

Audra Klumb said that the well would remain a dug well, and the water line would cross the stream to a cistern. Ms. Klumb showed the Board the location of the proposed cistern on the plan.

### **Summary and Deliberation**

Mr. Fuerst closed the discussion at 8:47 PM and summarized the facts. An existing dug well needed to be rebuilt. A new line will be trenched where it will cross the stream towards the logging road, down the logging road and towards the house. The only addition to the existing system is a cistern, which will be located across the stream from the well.

Karim Chichakly moved to approve the application for a special exception as presented. Jason Bourne seconded the motion, and the vote of the Board was in the affirmative, 5-0.

### **Minutes**

Karim Chichakly made a motion to approve the August 15, 2022. Jason Bourne seconded the motion, and the vote of the Board was in the affirmative, 5-0.

### **Other Business**

Mr. Fuerst suggested that applicant contact information and a definition of abutter should be added to zoning application. Karim Chichakly made a motion to amend all forms to include contact phone, email, definition of abutters. Jason Bourne seconded the motion, and the vote of the Board was in the affirmative, 5-0.

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 8:56 PM.

Respectfully submitted,  
Heidi M. Jaarsma