

**TOWN OF CORNISH, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT
SEPTEMBER 8, 2022**

The Cornish Zoning Board of Adjustment met on Monday, September 8, 2022, at 6:30 PM in the Cornish Town Offices. Members present were Michael Fuerst, Chair, Bill Balch, Jason Bourne, Caroline Storrs, Clerk; and Karim Chichakly and Troy Simino, Alternates.

Also in attendance were applicant Don Andrews, Seth Westbrook, architect for the applicants, Audra Klumb of A & D Klumb Environmental; Tim Schad; and Heidi Jaarsma, recording secretary.

Michael Fuerst called the meeting to order at 6:31 PM. Mr. Fuerst designate voting members with Karim Chichakly standing in for Kate Freeland. Caroline Storrs collected the fees and 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 have requested 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 also requested a Special Exception to repair a waterline within the 100-foot wetland buffer and for well repair within the wetland.

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

The application for a special exception was approved at the 8/29/2022 meeting. The variance applications were tabled pending a site visit to the subject property at 5:30 PM. The Board reconvened at the Town Offices after the site visit, and Michael Fuerst called the meeting back to order at 6:35 PM.

DELIBERATION

Mr. Fuerst gave Mr. Andrews an opportunity to address the hardship. Mr. Andrews stated that the existing structure creates a significant drainage issue for the house. The drainage has been replaced a second time, and part of the structure has been replaced due to water damage. Mr. Andrews stated that the existing gardens and orchard make it difficult to move the barn and that he hoped to improve the wetland through the construction of the barn. The slope and the grade are difficult to navigate, especially in icy conditions. He added that his wife had broken her ankle in that area this past winter. The Andrews hope to age in place, and alternative

configurations are not conducive to accessing area. Mr. Andrews said that denying the variance would present a significant hardship denying the use of the property. Audra Klumb added that putting the garage in the location proposed would improve the landscape by allowing the slope to the drainage to be directed into the vegetated area so that drainage would infiltrate into the wetlands.

Mr. Fuerst asked if there was any further discussion. Jason Bourne asked if in a scenario where the building was shifted to the east, would contouring still occur. Both Audra Klumb and Don Andrews confirmed that grading would still be necessary. Jason Bourne said that he understood that the siting of the garage doors and location of the building are important for proximity to the building and the main house and asked if there been consideration of reversing the design. Don Andrews stated that putting the garage on the east side of the building allows the garage to be subterranean and minimizes the impact of the building. JB asked if moving the garage bays westward or to the center would address the concern. Don Andrews replied that the space to the west of the garage bay is intended to be a summer kitchen with access to the patio.

Karim Chichakly read aloud several extracts from Section II of the ZBA handbook about variance regarding hardship.

Michael Fuerst said that one of the questions that needed to be addressed is whether fruit trees, existing gardens, and existing stone walls be taken into account as special conditions of the property. Karim Chichakly said that historically the Board has looked at topography. Michael Fuerst said that the inability to place the proposed structure anywhere else must be taken into account. If the building can be constructed in a different location, it is harder to establish hardship.

Mr. Fuerst circulated draft motions as a starting point for the Board, Mr. Fuerst submitted into the record a submission from Don Andrews and a set of full-size plans submitted by Mr. Westbrook. Michael Fuerst made a motion, attached, to deny the request for a variance to construct a new barn/garage. Caroline Storrs seconded the motion. The Board reviewed the five criteria outlined in the motion and voted on each by roll call.

1. *The variance will not be contrary to the public interest.* All members were in agreement that the variance would not be contrary to the public interest.
2. *The spirit of the ordinance is observed.* All members were in agreement that the spirit of the ordinance would be observed.
3. *Substantial justice is done.* All members were in agreement that substantial justice would be done.
4. *The values of the surrounding properties are not diminished.* All members were in agreement that the values of the surrounding properties would not be diminished.
5. *Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.*

The Board discussed subsection (a) of the hardship criteria. A. Jason Bourne asked if moving the proposed structure 15-30 feet had been determined as the distance required to avoid the wetlands conservation overlay district. Karim Chichakly stated that the number had been given in testimony. Michael Fuerst asked if 15-30 feet was an accurate

representation of what was needed to get the building out of the buffer. Seth Westbrook said that the structure would be removed from the buffer, but grading would still be required within the wetlands buffer. Michael Fuerst made it clear that he intended that the building would need to be removed from the buffer. Caroline Storrs said that she was considering whether there were unique topographical features. Ms. Storrs added that plantings have not been part of the Board's decision making. She stated that perhaps significant historical plantings could be considered but that many building projects need to move plantings. Ms. Storrs said that she had not found a situation unique to the property. The Board found, by a vote of 5-0, that the proposal did not meet subsection (a) of the definition of hardship.

Mr. Fuerst asked the Board to turn to subsection (b). Jason Bourne said that he had considered reasonable use of the property; entry to the garage remained important to the plan. Mr. Bourne wondered if the overhang were eliminated, was there still a reasonable use. Mr. Bourne felt there could be a reasonable use outside of the buffer area if the building was smaller or moved. Don Andrews said that the building size that could not be reduced and that one of the intentions of putting the structure under grade was a root cellar was the construction of a root cellar. The Board found, by a vote of 5-0, that the proposal did not meet subsection (b) of the definition of hardship.

Mr. Fuerst stated that the variance to locate the structure had been denied. He informed the applicants that they were prevented from working to move the structure out of the wetlands overlay district and reapply for a building permit. Mr. Fuerst suggested the Board could consider grading within the wetlands buffer since the variance request for laying the electric line included grading in the buffer. Seth Westbrook stated that a wall would be required if grading were not allowed within the wetlands overlay district.

Mr. Fuerst proposed that the Board take up the second variance request to lay an electric line through the wetlands overlay district. He would likely look afterward at work within the wetlands overlay district required to move/relocate the proposed structure. Karim Chichakly stated that a variance for grading within the wetlands conservation overlay district would need to be warned. Michael Fuerst felt that grading in the wetlands overlay district was part of the application submitted.

Michael Fuerst moved to deny the request for a variance to install an underground electrical line in the wetlands conservation overlay district. The full text of the motion is attached.

1. *The variance will not be contrary to the public interest.* All members were in agreement that the variance would not be contrary to the public interest.
2. *The spirit of the ordinance is observed.* All members were in agreement that the spirit of the ordinance would be observed.
3. *Substantial justice is done.* All members were in agreement that substantial justice would be done.
4. *The values of the surrounding properties are not diminished.* All members were in agreement that the values of the surrounding properties would not be diminished.

5. *Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.*

Michael Fuerst asked the Board to consider subsection (a) of the hardship criteria. Mr. Fuerst suggested asking the applicants to address the solar panels and how they relate to the electric connection. The members of the Board felt comfortable with prior testimony. The Board found 5-0 that subsection (a) of the hardship criteria had not been met.

Michael Fuerst asked the Board to consider subsection (b) of the hardship criteria. There was no comment from the Board which found 5-0 that subsection (b) of the hardship criteria had not been met.

Mr. Fuerst stated that the variance request to bury the electric line had been denied. Mr. Fuerst said that it did not mean that the applicants could not petition the Board for a special exception. Mr. Westbrook discussed the process to amend the zoning ordinance with the Board. Caroline Storrs stated that if the applicants avoided the buffer there would be no reason to appeal to the Board. Karim Chichakly suggested contacting the Planning Board about amending the Zoning Ordinance.

Mr. Fuerst made a motion to grant a variance for a temporary intrusion into the wetlands conservation overlay district for purposes of sitework for the new structure that will be built outside of the wetlands conservation overlay district and for the purposes of remediating the water issues on the property. Jason Bourne seconded the motion.

Troy Simino, alternate, noted that the Board had voted on the application and asked if the grading work was a separate application. Mr. Fuerst said that in his opinion, grading had been included in the application for the utility line and the building and that grading work was implied in both applications and contemplated in at least one. Mr. Bourne said that 3,500 square feet of grading was shown in the drawings submitted with the applications. Mr. Simino questioned whether it was standard practice to subdivide applications in this way and. Troy Simino advised that the application be resubmitted with a new plan so that the Board would know what the new grading plan would be. Mr. Fuerst said that he was trying to accommodate the applicants' moving forward with the project. Jason Bourne said that the information could be gathered at the meeting. Jason Bourne suggested that there would be less grading if the building were moved further out of the overlay district, and that he would consider less impact than was included in the application.

Michael Fuerst asked the Board if they would consider approving the grading plan. Karim Chichakly clarified that there was one grading plan for both variance applications. Mr. Westbrook said that grading plan represented worst case scenario and that actual grading would be less. He illustrated that the area in question was shown in pink on the plan, constituting 3,393 square feet. Mr. Westbrook stated that the plan represented the maximum amount of grading required. Jason Bourne asked if the assumption was that there would be grading in that area if the building was moved 15' back. Mr. Westbrook said that the grading impact would be reduced. The height of the knoll in the buffer area would be reduced.

Mr. Fuerst said that Mr. Simino had raised a good point, but that there was sufficient information to go ahead. Caroline Storrs said that because there was a maximum of where the incursion could go, the Board could go ahead. Troy Simino said that one of the concerns is that there is an obvious violation where spoils were dumped into the wetlands. Mr. Simino also noted that the edge of the 100' conservation overlay district was not marked. Mr. Simino expressed concern that Mr. Westbrook was not able to put a number on how far into the wetlands there would be an incursion. Mr. Westbrook said that he could provide dimensions. Mr. Simino did not think it was warned and the application has already been denied. Jason Bourne agreed that the Board had denied the variance, and the basis of the denial was the location of the building. Karim Chichakly said that he felt the Board had denied the variance, and he was worried about the legality of considering the motion before the board. Michael Fuerst felt that the issue was one of temporary use and included the mediation of the water issues. Mr. Fuerst withdrew his motion, and Jason Bourne withdrew his second.

Karim Chichakly said that the only other option was to table subject to a revised application. Mr. Chichakly said that the matter needed to be rewarned.

Mr. Fuerst said that the applicants could file a petition for the work in the conservation overlay district. Mr. Andrews noted that the existing incursion into wetlands conservation overlay district was done before the buffer was identified. Mr. Westbrook discussed how the grading could be done.

Mr. Andrews asked the Board to return to the grandfathering concept and to define what is substantially the same size. Michael Fuerst responded that the character issue was not a concern, but the size issue was and that the Board would need to interpret the meaning of general. Don Andrews said that the garage could not be moved to the east. Mr. Chichakly said that the other option would be to change the ordinance. Mr. Westbrook asked the Board about the appeal process.

OTHER BUSINESS

The Board discussed proposing amendments to the ordinance to the Planning Board. Karim Chichakly looked at Article VII.C.2 and found that the wording did not make sense and was overly restrictive.

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 adjourned at 8:10 PM.

Respectfully submitted,
Heidi M. Jaarsma

Motion to Deny Variance: Structure

Motion to deny the request for a variance for the construction of a new garage barn structure in the wetland's conservation overlay district.

The footprint of the portion of the proposed structure in the wetlands overlay district is smaller (161 sq feet) than the existing structure (347 sq ft). However the overall size of the structure (2 stories, 3,552 sq feet 40 X 60 sq feet) is not of the same general size as the existing structure 26 x 37'- 962 sq ft) and therefore its replacement is not permitted for a nonconforming structure pursuant to Article 7 Section C 2 of the Ordinance.

The applicant's parcel of land is greater than 80 acres. The applicant proposes to regrade the site so that water flow diverts down through the buffer zone rather than down the driveway and toward the foundation of the house. The applicants propose to reduce the height of a knoll upon which the structure will sit. There are thermal wells drilled close to the northerly side of the buffer zone. The proposed structure could be re-positioned to move it out of the wetlands overlay district and still accomplish the re-direction of the water flow and reduce the height of the land. The proposed structure would only need to be re-located between 15-30 feet in a general northeasterly direction to take it out of the overlay district entirely.

The applicant's site could be relatively easily accommodated to accomplish this change.

Applicant proposes placing solar panels on the roof and claims that optimal positioning requires the structure to be placed where proposed. However, the relocation of the building would still permit the solar panels to work although perhaps a bit less efficiently. The applicants have provided no evidence that the proposed siting of the structure is the only reasonable location for the structure.

In reaching its decision the Board has done a site visit and has reviewed, the "Andrews Residence Garage" Plan (4 pages) and the "Wetland Buffer Impact Overall Plan" (3 pages) the "Existing Garage Dimension Plan (1 page), all provided by the Applicants.

A review of the 5 criteria for granting of the variance is as follows:

1. The variance will not be contrary to the public interest. The overall plan for the construction of the new structure does not negatively impact the public, and the footprint of the structure into the overlay district is less than that of the existing structure.
2. The spirit of the ordinance is observed, as the building extension into the overlay district would be less and there may be a benefit to ameliorating surface and ground water issues which send water down the driveway and into the stream/wetland, and underneath the house.
3. Substantial justice would be done as the regrading for the new structure would ameliorate the runoff problems both to the home and down the driveway toward the stream.
4. There would be no diminution of surrounding property values as the proposed improvements are of a high quality and consistent with improvements in this rural area.
- 5 a. However, there is no hardship, as there are not special conditions of the property that distinguish it from other properties in the area and there is a fair and substantial relationship between the public purposes of the ordinance provision and the specific application to the property. There is sufficient other area on the applicant's property for the siting of the structure

without intruding into the wetlands conservation overlay district. The structure might only be required to be relocated a distance of 15-30 feet to avoid the overlay district entirely. The town has established a 100-foot buffer (greater than the state's buffer), In order to protect wetlands in the Town. The applicants have failed to show why the only possible location for this structure is partially in the overlay district. The fact that it might impact existing gardens, plantings and a stone wall, or that their proposed new circular drive might need to be reconfigured, do not constitute the type of hardship envisioned for a variance. The fact that the solar array will be most efficient if the structure is located as proposed is not a sufficient hardship. There has been no testimony that the solar array will not work if the structure is relocated out of the overlay district or that ground mounted solar arrays cannot be used on this large parcel. Although the applicant's proposed structure and redevelopment plan are reasonable, there is no evidence that they can only be accomplished in the exact location they have proposed.

5 b. There is no unnecessary hardship, as there is no evidence that the property cannot be used in strict conformity with the ordinance, as there are no special conditions of the property that distinguish itself from other properties in the area and the reasonable use of the property can occur without a variance. The structure can be relocated slightly to avoid the need for a variance.

Motion to Deny Variance: Electric

Motion to deny the request for a variance for the excavation and installation of underground electrical line in the wetland's conservation overlay district.

Currently the electrical service to the applicants' garage/barn located southerly of the house and driveway runs from the house to the structure. Applicants propose running the power line from the existing electric pole on East Road, underground across the overlay district to the new proposed structure and to the proposed solar array on its roof. . As currently proposed the line would be approximately 100 feet in length.

The ordinance permits a landowner to run an overhead electric line through the overlay district as a special exception pursuant to Article IV D. 1 b) iii. The ordinance does not permit the installation of underground electric lines in the overlay district.

The applicants have not provided any evidence that the only way to run power to the proposed structure and solar array is through the overlay district and that it is not possible to run it from the house to the proposed structure. The applicant has provided some testimony that that it is less effective and is possibly less safe from a fire avoidance perspective to run the solar array back through the house and to connect to the electric power lines as they are currently configured at the road.

In reaching its decision the Board has done a site visit and has reviewed, the "Andrews Residence Garage" Plan (4 pages) and the "Wetland Buffer Impact Overall Plan" (3 pages) the "Existing Garage Dimension Plan (1 page), all provided by the Applicants.

A review of the 5 criteria for granting of the variance is as follows:

1. The variance will not be contrary to the public interest. The burying of the power line in the overlay district is certainly not contrary to the public interest and might have some benefit. Water lines are permitted by special exception in the district already.
2. The spirit of the ordinance is observed, as the excavation to bury a power line would seem to be no more intrusive than the burying of a water line and might have the benefit of less interference overtime in the district as compared to maintaining an overhead power line, which is permitted by special exception
3. Substantial justice would be done as burying of the power line might be more beneficial to the integrity and protection of the overlay district than an overhead power line.
4. There would be no diminution of surrounding property values as the proposed installation of a buried power line might enhance property values and certainly would not diminish them.
- 5a. There is however no hardship, as there are not special conditions of the property that distinguish it from other properties in the area as it pertains to running an electric line and there is a fair and substantial relationship between the public purposes of the ordinance provision and the specific application to the property. As the ordinance permits by special exception the installation of overhead electric lines, the mere fact that the burying of the lines might be aesthetically desirable and over time less of an intrusion in the district, is not a hardship. In addition, it has not been shown that the only reasonable way to run the solar array requires running the line from East Road across the overlay district. Electric service already runs from the road to the house to the existing structure the applicant's propose to replace. Although the applicants' proposed structure and redevelopment plan are reasonable, there is no evidence that they can only be accomplished in the exact location and manner they have proposed.
- 5b. There is no unnecessary hardship, as there is no evidence that the property cannot be used in strict conformity with the ordinance, as there are no special conditions of the property that distinguish it from other properties in the area and the reasonable use of the property can occur without a variance. The power lines may be able to be installed overhead or continued to be run from the road to the house and then to the structure, thereby avoiding intrusion into the overlay district.