

**TOWN OF LEBANON
ZONING BOARD OF APPEALS**

Thursday, November 16, 2023 ~ 7:00 p.m.

**REGULAR MEETING / PUBLIC HEARING
Lebanon Town Hall**

MINUTES

PRESENT: David Geligoff, Chairman
Donna Skaats, Vice Chairman
Scott McCall
Keith Sczurek
Michael Nintean, Alt.

ABSENT: Eilleen Weinsteiniger
John Noblet, Alt.
Philip Ziel, Alt.

1) Call to Order:

Chairman Geligoff called the November 16, 2023, Special Meeting of the Town of Lebanon Zoning Board of Appeals (ZBA) to order at 7:00 p.m. He introduced the members of the board and Mr. Nintean was seated as voting member for Ms. Weinsteiniger.

2) Public hearing for the following:

a) **#ZBA-23-1:** Distinctive Farms LLC, 92 Church Road, Assessors Map 266, Lot 32. Appeal of Cease and Desist Order made by Zoning Enforcement Office per Zoning Section 9.2e.

Chairman Geligoff opened the public hearing and read the legal notice into the hearing record. He then entered the following exhibits into the hearing record:

A) Legal Notice; B) Two-page application and two-page attachment; C) Notice of Violation & Cease & Desist Order dated June 13, 2023; D) Property description; E) Letter dated August 25, 2023, from Meghan Hope (Alter & Pearson LLC), to ZBA Chairman David Geligoff, written consent to extend commencement of hearing; F) Letter dated September 5, 2023, from Attorney Heller (Heller, Heller & McCoy) to Attorney Marrion (Waller, Smith & Palmer) request extension to commence hearing; G) Affidavit of Publication for Legal Notice; H) Lebanon Property Map 266 (Lot 32); I) Survey map, dated February 2, 2023 of 92 Church Road, prepared by Design Professionals, South Windsor, CT; J) Notification of abutters and abutters list; K) Meeting notification letters to abutters, certified mail slips and return receipt cards (collectively); L) Assessors Street Card, Map 266, Lot 32, current; M) Attorney Memo dated December 7, 2021 from Meghan Hope (Alter & Pearson LLC) to Planning & Zoning Commission; N) Attorney Memo dated February 13, 2023 from Alter & Pearson LLC to Philip Chester, Town Planner; O) Attorney Memo dated March 20, 2023 from Alter & Pearson LLC to Philip Chester, Town Planner; P) Attorney Letter dated June 15, 2023 from Meghan Hope (Alter & Pearson LLC) to Attorney Marrion (Waller, Smith & Palmer); Q) Kawa v. Hartland 2013 CT Superior Court decision.

Mr. Geligoff entered the following new items into the hearing record and labeled as exhibits:

R) Letter (email) dated November 16, 2023 from Ralph Johnson III to ZBA; S) Letter dated November 14, 2023 from Kathy & Michael Ladd) to ZBA; T) Letter dated November 16, 2023

from Judy & Larry Tellier to ZBA; U) Letter dated November 14, 2023 from Frank & Carri Lineberry to Mr. Chester.

Attorney William E. McCoy of Heller, Heller & McCoy, 736 Norwich New London Turnpike, Uncasville, Connecticut, representing the applicant Distinctive Farms LLC, (was sworn in later during the meeting).

He submitted the following document, which Chairman Geligoff entered into the hearing record and labeled as exhibit:

V) Copy of property deed and conveyance

Attorney McCoy stated as follows:

That the applicant Distinctive Farms LLC, acquired the property at 92 Church Road in October 1, 2020 and is the record title holder of the property. Jason Yerke is the managing member of Distinctive Farms LLC.

This property is in an agricultural zone and agricultural use is a permitted use in this zone. This property is in excess of 120 acres, a little more than 36 acres are dedicated to growing and harvesting of hay and leased to a third party.

There is also a special permitted home occupation use on this property unrelated to this application.

The activity being questioned is Distinctive Farms LLC's current use of a portion of the property to import, strip, cut and split wood for firewood which is then sold. No question that this is agricultural use if all the material is being harvested from the property itself. The question is, does it cease to be an agricultural use if additional product is brought onto the farm and cut and split. In addition to creating firewood, the owner is also using byproducts of the trees to create mulch, then mixed with other product to create topsoil and other material to expand the field use of the property, an ongoing process. The fields that are not currently being used need that product to bring them back to a state where they can grow agricultural products.

Referred to case law: Kawa v. Hartland Zoning Board of Appeals 2013 Superior Court and the Reed v. Suffield ZBA, 1999 Superior Court.

Distinctive Farms LLC provides wood product and logs to an energy organization that distributes to indigent people who cannot afford the wood products during the winter months, meeting a need within the community.

Mr. Yerke has identified the following seven other locations within the Town of Lebanon where wood processing is being done as an ancillary use for agricultural purposes:

- 1) Route 87 and Waterman Road, Abel Acres Farm
- 2) 1068 Route 87, Square A Farm
- 3) Route 87 at Tobacco Street
- 4) 1976 Route 207
- 5) 1912 Route 207
- 6) Mack & Barker Roads, Northrup Farm

7) 487 Cook Hill Road, The Sawmill

To their knowledge, no action has been taken against any of those locations alleging that the use is a nonagricultural use as it has been in the case of Distinctive Farms LLC.

Is consistency of enforcement relative to this decision being done in a uniform way?

Mr. Yerke was advised that if he applied for a permit for the current hoop house as agricultural use, there would be no enforcement taken. The hoop house is currently being used to store machinery.

He believes the importation of wood from offsite should be considered an ancillary use to create firewood an agricultural use and for creating soil which is a component for creating fields for agricultural use.

Jason Yerke, 92 Church Road, Lebanon, was sworn in. He stated that he purchased this property two years ago to fulfill his dream of enjoying the land and agriculture, and that he feels he is transparent and an asset to the town. His son occupies the dwelling and operates his own home occupation business there.

Attorney McCoy noted that Mr. Yerke has been attempting to conduct his business so as not to create adverse effects to neighboring properties, such as using special fuel in the machinery that reduces noise while operating, creating a berm at the front of the property to help mitigate sound being produced on the property being respectful of the neighborhood.

Attorney McCoy and Mr. Yerke answered questions from the board members.

Mr. Philip Chester, Zoning Enforcement Officer and Town Planner, was sworn in. He reported the following:

1) At the end of 2022, the planning office received reports from area residents and others about noise, trucks entering the site with logs, and that a hoop house had been constructed. He observed the hoop house from the road and saw firewood stacked inside and outside the structure, and piles of wood chips and cut trees.

2) On January 17, 2023, Mr. Chester conducted an inspection of the three (3) open zoning permits on the site and was accompanied by the First Selectman, Building Official, Mr. Yerke and his Attorney Meghan Hope. He observed the hoop house containing firewood, an outside concrete pad with retaining walls housing firewood, stacks of wood chips and tree logs, and tree cutting equipment.

Mr. Yerke said that the wood processing was part of a program to offer wood to low-income residents. Mr. Yerke was told by Mr. Chester that processing offsite wood and exporting the wood product was not an agricultural use. Mr. Yerke told Mr. Chester that the town needed to expand its definition of agriculture to come into modern thinking because farmers needed to diversify their income.

3) On January 24, 2023, Mr. Chester and PZC Attorney Catherine Marrion met on the site with Mr. Yerke and Attorney Hope. They observed large quantities of firewood, and stacks of wood chips and logs.

4) On January 27, 2023, Mr. Yerke submitted a zoning permit application for the hoop house. Mr. Chester consulted with Attorney Marrion, reviewed the Kawa v. Hartland case and the applicable Zoning Regulations, consulted with the Executive Director of the CT Farm Bureau who is also a forester, and spoke with Mr. Yerke's attorney and reviewed her February 13th and March 20th attorney letters regarding the use of the hoop house and site for wood processing.

5) On April 18, 2023, Mr. Chester denied Mr. Yerke's application for the hoop house based on and stating that the importation of logs for wood processing does not meet the definition of Agriculture under Zoning Sec. 4.3.a.2) and was not permitted in the Rural Agricultural Residence (RA) Zone.

6) In May 2023, Mr. Chester received inquiries from Mr. Yerke's engineer and realtor who asked if wood processing was a permitted use in Lebanon's Light Industrial zone. Mr. Chester said that processing was a permitted use in the Industrial Zone under Zoning Sec. 4.9.a.2) and noted that Scott's Hyponex company imported logs to process and export mulch on Industrial Park Road.

7) On June 13, 2023, Mr. Chester issued the notice of violation and cease and desist order.

8) Mr. Chester noted that as of today, the applicant continues to import, export and process wood at 92 Church Road.

Mr. Chester presented a portion of video of the December 13, 2019 PZC hearing on Distinctive Farms LLC's special permit application for a home occupation (minutes 27.3-30 and 40.15 to 44.54).

Attorney Catherine Marrion, of Waller, Smith & Palmer, PC, was sworn in and spoke on behalf of the Town of Lebanon, stating:

The first (home occupation) application submitted by Distinctive Farms LLC included a saw mill area that was not included in any subsequent applications submitted by Distinctive Farms LLC and Mr. Yerke, although the importation, processing and sale of lumber continues on the property. Since the December 2021 public hearing Mr. Chester and I communicated several times with the applicant's counsel, Meghan Hope of Alter Pearson on a variety of issues related to the applications. Many of the communications were related to the ongoing importation, processing and exporting of lumber. In her February 13, 2023 memo to Mr. Chester, Attorney Hope outlined the continuing importation, characterized as a customary accessory use of the farm, and splitting wood to be used as firewood. The wood is delivered to the site in 38 log trucks, split and dried in the hoop house, then removed from the property in a dump truck that holds two cords of wood for a total of 150 loads leaving the site on an annual basis.

The next month in the March 20, 2023, memo to Mr. Chester, Attorney Hope noted that Distinctive Farms LLC is contemplating transitioning to a tractor trailer that can hold twelve cords of wood. On June 15, two days after the Cease and Desist was issued, I received a letter from Attorney Hope stating that Mr. Yerke was working with multiple commercial real estate brokers to identify a property outside of Lebanon to relocate his firewood processing use. The letter also stated that there would be no more importation of wood for firewood for

processing on the property, and that the remainder of the wood would be processed and removed by December 31, 2023. Attempts to resolve the matter were not successful.

Turning to the definition of agricultural in the zoning regs which also includes forestry operations. When Connecticut courts have decided cases based on the definition of agriculture and forestry provided in municipal zoning regulations, the state's definition or Webster's dictionary, they consistently exclude cases that involve the importation and exportation of goods from other products. The 2013 case of Kawa v. Hartland ZBA was provided to Mr. Chester some time ago due to its similar fact pattern. In that case the plaintiff appealed the Cease & Desist Order relating to importing logs offsite for processing and sale. He attempted to equate his situation with one where the property owner was importing tree stumps that stayed on the property to be used to enrich the soil for growing. The court distinguished this situation from Kawa where the imported wood was not used on site but was processed and resold. The court noted that the words agriculture and forestry have plain meanings. Webster's dictionary defines agriculture as the science or art of cultivating the soil, harvesting crops, and raising livestock, the science or art of the production of plants or animals useful to man in varying degrees, the preparation of these products for man's use and their disposal. Forestry is defined as the science and developing, caring for or cultivating forests, the management of growing timber. Merriam Webster defines the term similarly. Under these common dictionary definitions, the property owner is engaged in agriculture and forestry when the owner cultivates, harvests, and sells his own timber. Importing for cutting, splitting and resale is neither agriculture nor forestry as it relates to the use of a property. It is instead a processing use. In holding for the ZBA, the Kawa court stated that the plaintiff is required to argue that it is still farming if the trees are not grown on the farm, are not used to improve the soil and are not incorporated into a product grown on the farm. The only connection which the logs have to the farm is that they are cut and split there.

Connecticut courts have also refused to consider an accessory use of an activity that is not allowed anywhere in a municipality as of right.

Chairman Geligoff entered the following document into the record and labeled exhibit:
W) Memorandum of Decision, 128 Moody Road LLC v. Enfield Zoning Board of Appeals.

Attorney Marrion reviewed additional case law wherein courts refused to allow a use as accessory to agriculture when that use is prohibited or allowed only in an industrial zone. She stated that Mr. Yerke, in effect, is arguing that he should be able to run a commercial sawmill as an accessory use to his agricultural use although he couldn't otherwise run a commercial sawmill except in the industrial zone with a special permit. The use in question is processing, which is only allowed by special permit in the light industry zone. For the reasons set forth, Mr. Chester was advised that the operation of a commercial sawmill is not an accessory use to agriculture.

Attorney McCoy spoke again in response to Attorney Marion's presentation. Attorney McCoy was sworn in as requested by the Chairman and made the following comments:

He is concerned in terms of the presentation, in that the discussion of a settlement should not come prior to the decision of the board because it implicates, can be used against someone, and feels it is unfair to both sides to discuss. Also, the video that was presented by the town and Mr. Chester's presentation focus on what happened before the Planning & Zoning Commission on a special permit application. This appeal and that special permit are

completely separate applications and the special permit is not relevant to what is decided tonight and it is very important not to confuse the two issues. The applicant and presenter for that special permit was not Distinctive Farms LLC (Mr. Yerke), it was his son, who has a separate and distinct business operation that the Planning & Zoning Commission permitted and should not be implicated in the decision tonight. He requests the board to read the Kawa case, not just the decision, but other cases that are referred to, and you will find Distinctive Farms LLC situation is much more in line than the cases in the Kawa case. Distinctive Farms LLC is operating a wood processing operation to create firewood, which is an agricultural use in an agricultural zone. This is not a sawmill, never was represented as or exists as a sawmill. The sole use of the equipment is to take a log, cut it into pieces, and splitting it for firewood, an ancillary use to an agricultural use. He is also concerned that Attorney Hope's discussion will be used against his client, even though it may not have been her intent. He also believes that it was not her intent that her correspondence would come before this board in this proceeding.

Public Comment:

- 1) Wayne Budney, in support.
- 2) Frank Lineberry, 291 East Hebron Turnpike, opposed.
- 3) Liz Shaloski, 260 Church Road, opposed.
- 4) John Shea, Church Road, opposed.
- 5) Kuzma, 245 Church Road, opposed.
- 6) Kathy Ladd, Church Road, opposed.
- 7) Ben, 75 Kingsley Road, in support.
- 8) Donna Shea, East Hebron Turnpike, opposed.
- 9) Jim Smith, 234 East Hebron Turnpike, in support.
- 10) John Hayman, Hoxie Road, in support.
- 11) Steve Sabo, 636 Trumbull Hwy, in support.

There was no further discussion and no one else present to speak either in favor or in opposition to the application.

Mr. Nintean made a motion to close the public hearing for ZBA-23-1, seconded by Mr. McCall. Motion approved unanimously. In favor (5) Geligoff, Skaats, Sczurek, Nintean, McCall. The public hearing was adjourned at 8:47 p.m.

Chairman Geligoff read the notice regarding the appeal of decision according to the Connecticut General Statutes Sec. 8-8. He stated that he anticipated the board will discuss the application at the regular meeting following the public hearings, but that no further comments can be made.

3) Discuss / Act on Public Hearing item:

#ZBA-23-1: Distinctive Farms LLC, 92 Church Road, Assessors
Map 266, Lot 32. Appeal of Cease and Desist Order made by Zoning Enforcement
Office per Zoning Section 9.2.e.

It was the consensus of the board that the zoning regulations are not being adhered to in this case, that the Cease and Desist Order was issued properly and should be upheld.

A motion to uphold the decision of the Zoning Enforcement Officer and the Cease and Desist Order was made by Mr. Ninteau, seconded by Mr. Sczurek. Vote: In favor (5) Geligoff, Skaats, Sczurek, Ninteau, McCall, unanimous. Opposed: (0) Application denied, Cease and Desist Order upheld.

- 4) Approval of Minutes of Previous Meetings:

Mr. Sczurek, made a motion, seconded by Ms. Skaats, to approve the September 14, 2023 ZBA Special Meeting Minutes as presented. Abstained: (1)Ninteau. Vote: In favor: (4) Geligoff, Skaats, Sczurek, McCall. Opposed: (0) Motion approved.

- 5) Old Business:

Mr. Sczurek will resign his position, as he has been elected as a new member of the Planning and Zoning Commission. Mr. Ninteau also has plans to resign his position.

- 6) New Business:

Ms. Skaats made a motion, seconded by Mr. McCall, to approve the ZBA 2024/2025 budget request in the amount of \$5,185.00. The motion was unanimously approved by the Board. Vote: In favor (5) Geligoff, Skaats, Sczurek, Ninteau, McCall, unanimous. Opposed: (0)

- 7) Bills: None.

- 8) Correspondence: CFPZA Fall Newsletter

- 9) Adjournment:

With no further business, Ms. Skaats made a motion to adjourn, Mr. Sczurek seconded. Motion unanimously approved and meeting adjourned at 9:10 p.m. Vote: In favor (5) Geligoff, Skaats, Sczurek, McCall, unanimous. Opposed: (0)

Respectfully Submitted,
Holli E. Smith, Recording Secretary
November 27, 2023

Please see minutes of subsequent meetings for approval of these minutes and any corrections hereto.