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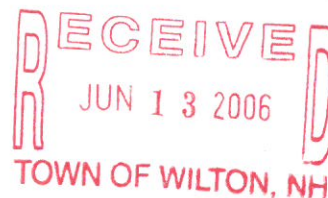
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**CONFIDENTIAL FAX TRANSMISSION**

DATE: June 13, 2006  
TO: Wilton Zoning Board of Adjustment  
FAX #: 654-6663  
FROM: Jed Z. Callen, Esq.  
RE: Objection to Variance Requests: Applicant: K. M. Zahn & sons, Lot F-3  
# OF PAGES INCLUDING THIS ONE: 10



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Documents being faxed: Faxed herewith is my letter to the ZBA of June 13, 2006..  
If you have any questions, please don't hesitate to get in touch with me.

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June 13, 2006

FAX TO 654-6663; ATTN: ZBA

Zoning Board of Adjustment  
Town of Wilton  
42 Main Street  
Wilton, NH 03086

Re: Objection to Variance Requests: Applicant: K.M. Zahn & Sons, Lot F-3

Dear Board Members:

I represent a large number<sup>1</sup> of neighbors (hereinafter "neighbors") of the proposed use at 536 Isaac Frye Highway. My clients include several who live on Isaac Frye Highway, and others also near enough to the proposed gravel operation to be directly affected by the truck traffic that would be generated thereby, and who therefore have standing in this matter. As the number of clients authorizing me to speak for them is increasing rapidly, I will bring a list of clients and present it at the Tuesday, June 13 ZBA public hearing.

Request that ZBA Member Jim Tuttle Disqualify Himself:

RSA 673:14 defines the conditions under which a ZBA member is disqualified to sit on a permit or variance hearing (a quasi-judicial decision). The grounds include, by explicit reference, the "juror standard" embodied in RSA 500-A:12, II. By this criterion, a Board member may not sit on a variance request hearing if "...it appears that [he] is not indifferent..." Dover v. Kimball, 136 NH 441, 445 (1992).

Numerous statements that Mr. Tuttle has made to the press, to various individuals, and before this Board, amply indicate that he is "not indifferent" to the outcome of this matter. Mr. Tuttle has publically indicated his opposition to the recent adoption of Zoning Ordinance Section 9B, the Gravel Extraction District, which is in issue in this application. At the May 9, 2006 hearing on this site, Mr. Tuttle spoke criticizing the overlay district. At the May 3, 2006 Planning Board work session, Mr. Tuttle was even more vociferous in his criticism of the District, and of its adoption. At that meeting, he read, and later submitted, an April 19, 2006 memorandum he and Mr. Hertihy had written to the Planning Board expressing strong opposition to passage of

<sup>1</sup> As of this writing, the number is approximately 70.

"Article 2" establishing this District as the sole location for gravel operations in Wilton.

Because of his vehement opposition to the enactment of this exclusive Gravel Extraction District", it is reasonable to conclude that Mr. Tuttle would not be "indifferent" to the first challenge to that District, seeking to allow gravel extraction outside of the designated District, at a location which applicant characterizes as "...close to the district where gravel removal is allowed." (App. Para 2). For the foregoing reasons, my clients respectfully request that Mr. Tuttle disqualify himself; failing which they request that the Board take a non-binding advisory vote on the question pursuant to the procedures of RSA 673:14, II. It is noted that this issue is being raised "...at the earliest possible time." See Fox v. Greenland, 151 NH 600 (2004).

The Application is Legally Deficient in that it Requests One Use Variance, where Two (and possibly Three) Separate Use Variances, and One Area Variance are Required; and MUST be Denied Because the Variances CAN NOT meet the applicable Variance Criteria.

A Variance is a relaxation or waiver by the ZBA of a **specific** requirement or provision of the Zoning Ordinance ("ZO"), available only if several specific conditions are proven by applicant, and after specific findings on each criterion are made by the ZBA. See RSA 674:33, I(b). As such, each separate and distinct provision of the Wilton ZO from which a variance is sought must be specifically identified, **and an individualized determination regarding each of the five criteria for a variance must be made, as to each of the Ordinance requirements from which a Variance is sought.**

Applicant has sought **FIVE variances**, or put another way, Variances from FIVE different requirements of the Wilton ZO. These are ZO Sections 4.1, 6.1, 9.B.2, 9.B.6.1, and 9.B.6.2. (Applic., p.1). However, despite the request for five Variances, Applicant has submitted only one application for one Use Variance, and no application for an Area Variance.

In order to make sense of the Application, and what this Board may do in response, the neighbors provide the following explanation of the various sections under which Variances have been requested, and indicate whether the criteria have been met:

A. Variance from ZO §9.B.6.1:

This section sets a **300 foot minimum "...undisturbed natural wooded buffer..."** between the active gravel operation and all public roads, and all lot lines. **Applicant fails to identify the width of the buffer it proposes in lieu of the legal requirement.** Judging from the scaled Preliminary Plan submitted, it appears that Applicant is proposing an approximately **60' buffer** (instead of 300') between Isaac Frye Highway, and the gravel berm; as little as a **25' buffer** from the Girl Scout Camp to the north; and as little as a **35' buffer** from the cemetery to the south.

The Variance needed for such a waiver of setbacks is undoubtedly an "Area Variance". See Harrington v. Warner, 152 NH 74 (2005): ("...an area variance....grants the landowner an exception from strict compliance with physical standards such as setbacks, frontage requirements, height limitations, and lot size restrictions.").

The Wilton Application for a Variance ("Application") properly identifies and describes Area Variances in paragraph 3.a, and lists at paragraphs 3(a). i., and ii. the appropriate legal criteria for proving the "hardship" component for Area Variances announced in Boccia v. Portsmouth, 151 NH 85, 91-2 (2004). **Applicant did not even fill out this section, and thus can not be deemed to have fully applied for this required Area Variance.** Indeed the only mentions of the Setback Issue by applicant, are on page 3 of 3 (General Information): "There is also a need for relief from the setback requirements because of the size of the lot." And on page 1 of 3 (Application): "The applicant....cannot meet the setback/buffer requirement."

These conclusory statements fall far short of the five part showing necessary for an Area Variance, with the two part showing to prove hardship, and the ZBA should therefor **refuse to even consider this Variance.** In the alternative, if the ZBA determines to process this incomplete and legally inadequate application for an area variance from the setback requirements, it must deny the Variance because it is clear that reducing the buffers between active graveling and the Girl Scout Camp from 300 feet to about 25 feet, *less than a tenth of the minimum proscribed* in the newly enacted Wilton ZO, §9.B.6.1, must necessarily reduce the value (serenity, dust, noise, safety, aesthetics) of that property. Similarly, the reduction to about 35 feet diminishes the protections from noise, dust, and aesthetic impacts on the peace and tranquillity of the cemetery, and the reduction along Isaac Frye Highway will have a similar negative impact on the NEFF property across the road<sup>2</sup>. As such, the **Variance must be denied.**

B. **Variance from ZO §9.B.6.2:**

This section prohibits the **transportation of earth materials removed in Wilton, on any road in Wilton except the roads designated** therein. Isaac Frye Highway is not listed among the roads on which gravel can be hauled from a pit; thus the Variance request. Because it involves a use not permitted in this district, and not the relaxation of dimensional requirements (See Application, para 3.a.), a **USE VARIANCE** is required. See also Harrington, Id.

Applicant for a Use Variance must demonstrate to the satisfaction of the ZBA,

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<sup>2</sup> State law, RSA 155-E, pre-empts, and sets minimum operational standards that Wilton may not waive. Applicant's Plan violates RSA 155-E:4-a, II., which requires a 50 foot MINIMUM setback from a property boundary. See also Wilton Excavation Site Plan Review Regulations, Section 7. a.

that the proposed use meets all FIVE criteria for a Variance, including the three (3) part "hardship" test laid out in Application, paragraph 3.(b). **Applicant must prevail on all five variance criteria to be legally entitled to the variance. Bacon v. Enfield, 150 NH 468 (2004). Applicant has failed to argue why this specific variance request satisfies ANY of the five required criteria!**

Specifically, under Criterion 1 (No diminution of surrounding property values), Applicant speaks **only** to the care to be taken in gravel removal on site, leaving the lot "level". There is NO mention of the impact of heavy gravel truck traffic on neighbors, abutters, motorists using the Isaac Frye Highway, or on the road itself. The ZBA has not been provided with an adequate application, or showing, by Applicant, to process or grant this Variance.

Criterion 2 is that granting the Variance "...would not be contrary to the public interest": Nothing in Applicant's argument speaks to the use of Isaac Frye Highway as a gravel haul road; applicant focuses instead on two irrelevant issues: that this site is "close to" the Gravel Excavation District, and gravel is a needed commodity. Applicant needs to demonstrate that use of Isaac Frye road for hauling gravel is "not contrary to the public interest". Applicant has clearly not even attempted to make this case. **Nor can it do so:** In March, 2006, the Town citizens voted to amend the Wilton ZO to include Section 9.B, including Section 9.B.6.2, specifically barring such proposed use of this (and other) roads. The will of the majority of the Town's residents is therefore known, in a way that the "public interest" can rarely be known. To throw out the clearly expressed interest of the majority of the Town residents just 3 months after they expressed that interest at the polls, **would be to betray the "public interest", and violate the public trust.** This Variance, therefore, can not be granted.

Criterion 3 is three part "Hardship" test for Use Variances (Applic, paragraphs 3(b), I, ii, and iii.) Subpart I requires proof that the specific restriction (here, no hauling on Isaac Frye Highway) interferes with the "**reasonable**" use of the property, considering its unique setting in its environment. The key word here is "reasonable" use. A reasonable use must be, at minimum, a legal use (Rancourt v. Manchester, 149 NH 51 (2003)) and the proposed use is not legal or permitted on this lot. Therefore, there can be no hardship argument for allowing haul trucks on this road unless and until applicant receives a Variance for the underlying use on this lot. The application regarding the road is therefore both deficient and pre-mature.

Subparts ii, and iii are likewise not proven. Applicant does not address either regarding the road issue. Even if Applicant had done so, it is clear that the specific restriction ("No gravel trucks accessing a gravel pit from Isaac Frye") bears a "fair and substantial relationship" to the general purpose of this Zoning Ordinance. The Preamble to the ZO, Section 1.0 states:

"The purpose of this ordinance is to promote and protect the health, safety, prosperity, convenience or general welfare of the inhabitants...."



The restriction against the heavy use of this road by gravel trucks surely bears a "fair and substantial relationship" with the promotion of health, safety, and convenience of Town residents.

Criterion 4 ("substantial justice"), and Criterion 5 ("spirit of the Ordinance"), are also not met. Applicant's Application does not address these criteria with respect to the Isaac Frye road variance. Given the very recent vote to bar gravel operations in this location, and to bar the use of Isaac Frye Highway as a gravel transport road, it is impossible to imagine how the ZBA could find that a Variance from such restriction would be consistent with either doing "substantial justice", or the "spirit of the Ordinance". To ignore, indeed reverse, the recently expressed will of the voters of Wilton would violate both.

**C. Variance from ZO §9.B.2:**

This section defines the **location** of the Gravel Excavation District, where gravel excavation is legal in Wilton. It is made illegal elsewhere, not by this section, but by ZO §4.1 (Alteration and Removal of Materials)

"Excavation of earth materials regulated under RSA 155-E are (sic) permitted **only** in the Gravel Excavation District..." (Emphasis added)

It is also made illegal on this particular lot in the "General Residence and Agricultural District" by ZO §6.1 (Permitted Uses), which lists all permitted uses, and does NOT include gravel excavation.

Neighbors submits that the Applicant does not really need a Variance from §9.B.2, as doing so would be less appropriate, or duplicative of the Variances needed to Sections 4.1 and 6.1. Should the ZBA disagree and prefer to waive the District Location, rather than the prohibition against gravel operations outside the Gravel Excavation District (§4.1), and the prohibition against this use in the RA District, neighbors incorporate herein by reference all the arguments, *infra*, against granting variances from Sections 4.1 and 6.1.

**D. Variance from ZO §4.1**

This provision makes gravel excavations OUTSIDE the Gravel Excavation District (Established and defined in Chapter 9.B), illegal. It is this section, along with Section 6.1 discussed *infra*, from which Applicant needs its Use Variance. It is presumed that Applicant's written arguments included in its Application, are meant to apply to this basic Variance. Despite making arguments, Applicant has not appropriately addressed the criteria as defined and refined in a long line of Supreme Court cases, and its application should be denied for failure to address, and carry its burden of proof, with respect to these criteria. Even if the Applicant had made its best

possible argument, the Variance must be denied because the proposed use **DOES NOT MEET THE VARIANCE CRITERIA.**

Criterion 1: (No diminution of surrounding property values):

It is axiomatic that active gravel pits do not make good neighbors. Gravel operations are noisy, dusty, aesthetically unappealing, and the heavy truck traffic of loaded gravel trucks, and returning empty gravel trucks, are a hazard, a nuisance, and a safety risk on our roads. In addition, the heavy trucks do damage to road surfaces, and car windshields, and the gravel pits themselves are ugly, dangerous, and environmentally damaging unless properly reclaimed. Offsetting these truths is the fact that we need gravel and sand to construct our roads and buildings. It is for these reasons that New Hampshire enacted RSA 155-E, and Wilton enacted ZO Chapter 9.B., and a full chapter of Excavation Site Plan Review Regulations, which attempt to address and ameliorate these adverse impacts.

Applicant seeks to excavate gravel from a small site, under 13 acres, sandwiched between three neighbors who each have a high degree of interest in peace and quiet. The **Girl Scout Camp** brings young women from NH, including more urban areas of the State, to rural Wilton for an introduction to, and taste of, our natural environment. The sound of loaders dropping gravel into trucks, back-up beeps, the grinding and crunching of heavily laden gravel trucks pulling out of the pit, the dust of the operations, and the inevitably negative impact on the prevalence of wildlife displaced by the loss of habitat, and further scared away by the graveling and loading operations, all will diminish the quality of the experience for these campers. This is exacerbated because Applicant seeks to reduce the 300 foot "undisturbed natural wooded buffer" (ZO §9.B.6.1) to as little as 25 feet, a TENTH of that required by the Wilton Zoning Ordinance, RSA 155-E:4-a, II and the Wilton Excavation Site Plan Review Regulations, Section 7. a. **This use would significantly diminish this abutter's property value.**

The value of a cemetery also lies largely in its natural physical beauty, and its quiet, contemplative serenity. Mourners, funeral participants, and visitors all seek peace and quiet. A gravel pit as an abutter, with either the minimal buffer proposed by Applicant, or even the 300 foot legal minimum, and gravel trucks coming and going from next door, **will diminish the quality and thus the value of this abutting property.**

What is Applicant's argument? "Because care will be taken in the removal of gravel and eventually will be a level lot..."

Criterion 2: granting the Variance "...would not be contrary to the public interest":

This criterion is impossible for Applicant to prove. This is because Zoning Board's are usually left to their own judgment to discern what is in "the public interest".

However, in a democracy, we accept as axiomatic the proposition that the voters vote for what they believe to be their own, and collectively, the public's interest. With Zoning Ordinance provisions enacted perhaps 15 or more years ago, it might be argued that the provisions of the Ordinance may no longer reflect the will of the voters, due to changed circumstances. No so here. In March 2006, barely three months ago, the Wilton voters were asked what they wanted to do, in the best interest of the Town as a whole, regarding the siting of future gravel excavation sites, and the roads that would be used as haul roads from those sites. They passed ZO Chapter 9.B, and Section 4.1. These enactments are clear statements to the Applicant, the ZBA, and any reviewing Court, that Wilton **does not want a gravel pit sited on this parcel of land, or anywhere outside the Gravel Extraction District; and does not want Isaac Frye Highway used for gravel transport.** Approving the Variance would be to betray the "public interest", and violate the public trust. This Variance, therefore, can not be granted.

Criterion 3 is three part "Hardship" test for Use Variances.

Subpart i: The zoning restriction does not interfere with the Applicant's "reasonable" use of its property because the proposed use is not a legal, and thus not a per se "reasonable" proposal. Furthermore, the hardship is NOT the result of something unique and special about this lot, as is required; but instead applies to ALL lots in Wilton not in the Gravel Excavation District.

"Thus, the landowner must show that the hardship is a result of specific conditions of the property and not the area in general. Simplex, 145 NH at 731." Harrington v. Warner, 152 NH 74, (2005)

Subpart ii: The specific restriction ("No gravel pits except in the designated overlay District") bears a "fair and substantial relationship" to the general purpose of this Zoning Ordinance. The Preamble to the ZO, Section 1.0 states:

"The purpose of this ordinance is to promote and protect the health, safety, prosperity, convenience or general welfare of the inhabitants...."

It is indisputable that the drafters of Chapter 9.B, and the voters who enacted it, saw this restriction as promoting and protecting the health, safety, and general welfare of the citizens of Wilton.

Subpart iii: Regarding the impact of granting the Variance on public and private rights, see Criterion 1, *supra*, re the impact on abutters' private rights, and Criterion 2 regarding the effect on the voters of Wilton if their recently expressed position regarding land uses in Wilton is so quickly and completely overturned.

Criterion 4 ("substantial justice"), and Criterion 5 ("spirit of the Ordinance"), are also not met. Applicant's arguments are unpersuasive. For the same reasons that this ZBA



can not find that reversing the Wilton voters recently expressed directive that gravel excavation NOT be permitted outside the designated District is "in the public interest", it can not reasonably or legally find that such a complete reversal of the voters' choice does "substantial justice", or is consistent with the "spirit of the Ordinance". Indeed to so find is to negate the democratic process by which Wilton, and all NH Towns, regulate and segregate incompatible land uses through zoning.

E. Variance from ZO §6.1

This provision makes all uses not listed as permitted (including gravel excavation) illegal in the RA District. The neighbors hereby object to the granting of this Variance for all the same reasons listed and argued in opposition to a Variance from Section 4.1 *supra.*, and therefore incorporate them by reference as if repeated here.

Miscellaneous Comments:

If Applicant intends to excavate more than 5 acres at a time without reclamation, as some suggest is intended, a Variance from ZO §9.B.6.3 must first be obtained. Such a plan would also violate Wilton Excavation Site Plan Review Regulations, Section 7. f, unless Planning Board approval is obtained.

Applicant has not requested a Variance from ZO Section 4.6 (Performance Standards), and so is applicable. The Noise limit at §4.6.2 can not be met by this project, and this provision alone should eliminate this use at this location.

Some of my clients believe that Applicant has already violated RSA 227-J:5 regarding failure to timely file a Notice of Intent to Cut prior to timbering the lot. There is also question regarding the Applicant's compliance with RSA 227-J:6, and 7, regarding the necessary wetlands and Terrain Alteration permits required for timber cutting that involves wetlands, or earth movement.

The Neighbors believe that Applicant has clearly violated **RSA 227-J:9**, by removing more than 50% of the basal area in one year within 150 feet of the Isaac Frye Highway, a public highway. Doing so is prohibited by RSA 227-J:9 even for timbering in preparation for graveling or residential development, unless the landowner already holds all local land use permits and approvals. Clearly Applicant herein does not yet have the Variances from this ZBA, or the Permit from the Planning Board (required under its regulations and RSA 155-E), and so it is still subject to the restriction on cutting more than 50% of the timber within 150 feet of the road. This is not a matter for ZBA enforcement, but is relevant in that the Applicant is making representations as to the adequacy of greatly reduced buffers and setbacks on this lot. Its treatment of the buffers is therefore relevant.

A portion of this parcel is within the designated Aquifer Recharge area.

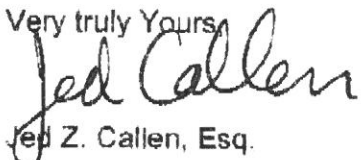
Applicant misstates distances in the Application. On the Application, under Proposed Use, it states the distance to be "...approximately 800 feet +/-..." to Route 101. According to the Town Tax map, it is over 1000 feet. In addition, Applicant indicates at paragraphs 2, and 5 that the site is "...close to the [Gravel Excavation] district...". In fact, the District is more than a mile away by road.

Comment from Abutter New England Forestry Foundation:

I am authorized by Attorney Ray Lyons, representing NEFF, to indicate that NEFF is "concerned about" this application and proposal, but is not at this time "opposed to" it, due to having too little information to fully analyze the implications.

Conclusion:

For the reasons above, the Variances requested by Applicant should all be denied, and each reason advanced above should be referenced.

Very truly Yours,  
  
Jed Z. Callen, Esq.

cc: file  
Encl: Client list

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*faxed to Joanna E.*