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VIA HAND-DELIVERY

December 10, 2019

Neil Faiman, Chairman
Town of Wilton Zoning Board of Adjustment
Main Street
P.O. Box 83
Wilton, New Hampshire 03086

Re: **Motion for Rehearing - Case No. 7/9/19-1**
Lot B-10, 50 Quinn Drive, Wilton, New Hampshire

Dear Chairman Faiman:

Our office represents Quinn Properties, LLC ("Quinn"), the owner of the above-referenced property (the "Property"). Quinn sought to construct a 68 foot high asphalt plant with a 72 foot high silo and was only advised that it needed to obtain a variance from the 45 foot height restriction in the Industrial zoning district for its proposed development. The Board voted to deny the variance on November 12, 2019 on the sole grounds that Quinn did not satisfy the hardship standard. Quinn asserts that the denial of the height variance for the proposed use was unlawful and unreasonable for the reasons set below.

1. The caveat in the Notice of Decision was improper.

The Notice of Decision includes a caveat that the decision should not be taken to imply that the asphalt plant is an allowed use of the Property. While, as the Notice of Decision correctly notes, the caveat leaves open the question as to whether the proposed development would require additional relief from the Board. Such a caveat is inconsistent with the Town's constitutional duty and the Town's own conduct to the detriment of Quinn.

The Town has a constitutional duty to assist owners in their efforts to develop and use their property. Carbonneau v. Town of Rye, 120 N.H. 96 (1980); Savage v. Town of Rye, 120 N.H. 409 (1980). The duty to assist "certainly includes informing applicants not only whether their applications are substantively acceptable but also whether they are technically in order." Savage, 120 N.H. at 411. A caveat which leaves open whether the Quinn's variance application was substantively complete is inconsistent with this duty. Under the caveat, the Town apparently could advise Quinn after the fact that it needs to spend more time and money pursuing additional

relief before the same Board even though the proposal had not changed from the time of the initial application and thus create a pattern of delay.

Similarly, the Town advised Quinn that only relief from the height restriction was required for its proposed development based upon a plan of development. Quinn had previously applied for and been granted a variance under the same plan of development to allow the same development under the same applicable provisions earlier. Quinn has spent time and resources in reliance upon the Town's repeated position that the proposed development only required a height variance. As such, the Town is estopped from adopting a contrary position now, particularly, where the only apparent change has been opposition from those who may or may not have standing. Aranosian Oil Co., Inc. v. City of Portsmouth, 136 N.H. 57 (1992).

2. The use of "research" outside of the public hearing process was improper.

Procedural due process requires notice and a meaningful opportunity to be heard. Furthermore, the statutory scheme contemplates that the Board will act upon the information in the record. While board members may use their personal knowledge of local conditions in assessing an application, "research" does not constitute personal knowledge. Continental Paving, Inc. v. Town of Litchfield, 158 N.H. 507 (2009).

In its decision, the Board relied, at least, in part, upon a 1981 newspaper article. The article was not included on the Board's website among the material submitted, but was provided at least to the Chairman. Quinn was not made aware of the Board's intended reliance upon the article until the public hearing had closed and, therefore, was denied an opportunity to comment on the same. As will be discussed later, the Board's reliance upon that article to suggest that the height restriction served to prevent certain undefined "undesirable industries" was misplaced and, therefore, the Board's use of the same was prejudicial. In sum, the use of "research" deprived Quinn of a fair opportunity to be heard contrary to both constitutional guarantees and the intent of the statutory scheme.

3. The decision was predicated upon process inconsistent with the Board's duty of impartiality.

Zoning boards considering variances act in a quasi-judicial capacity and, therefore, members must be an impartial as the lot of humanity will admit when considering such applications. Winslow v. Holderness Planning Board, 125 N.H. 262 (1984). This prohibits, among other things, prejudgment of a matter. RSA 673:14 [Applying juror standard to Board members], RSA 500-A:12, I(d) [Prejudgment as evidence of not being impartial.]. It also prohibits *ex parte* communication. The failure to act in an impartial manner may render any decision by the board void. Winslow, *supra*.

The Board requested that documents relative to the view be submitted by 4 p.m. on November 12, 2019, the date of deliberations. As such, the Board, as a body, should have still been considering evidence as of the November 12, 2019 hearing at least as it concerned the view. The Board's website did not include any submittal with an actual copy of the 1981 newspaper article and the same did not concern the view. Nevertheless, when it came time to deliberate, the Board referenced the actual 1981 newspaper article suggesting that said article had been supplied outside of the public hearing process by, based upon the note accompanying the article, a person who was undoubtedly opposed to the proposed use and seeking any grounds to deny the same. Moreover, that article served as a basis for a prewritten motion to deny which at least gave the appearance that the Board decided the matter prior to the consideration of all relevant evidence or without a complete record. In short, the decision was not the product of an impartial process, but rather a tainted process whereby opponents were given access to the decision-making outside of the public hearing process.

4. The Board's decision that there was no hardship was unlawful and unreasonable.

A hardship exists, in part, if, owing to special conditions of the property that distinguish it from other properties in the area, there is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application to the property at issue and the proposed use is reasonable. RSA 674:33, (b)(1). This definition of hardship is intended to be more considerate of property rights. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011) [First hardship definition is intended to be similar to definition set forth in Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001), which was more considerate of property rights.]. The focus under this definition is upon whether the special conditions of the property render the proposed use reasonable, rather than whether the special conditions of the property prevent any reasonable use of the property. Rancourt v. City of Manchester, 149 N.H. 51 (2003). Special conditions of the property generally focus upon property features which distinguish it from others in the district, including the development thereon, Harborside, *supra.* [Consideration of building size for sign variance as special condition.], although those features need not be unique to the property at issue. Harrington v. Town of Warner, 152 N.H. 74 (2005). Furthermore, consistent with the intent to be more considerate of property rights, the ability of an owner to obtain a reasonable return on investment may bear upon whether a hardship exists. Harrington, *supra.* [Whether there was a reasonable return on investment bore on hardship.]. The Board's hardship analysis is legally and factually flawed in every respect.

While the Board addresses special conditions first, consideration of the same without context (i.e. the general purpose of the zoning ordinance at issue) is not helpful. The Board

opines that the general purpose of the height restriction was to prevent undesirable industrial uses in the Industrial zoning district and relies upon a 1981 newspaper article for this conclusion.

First, the newspaper article does not expressly discuss the height restriction. This is problematic in that the person who provided the article even recognizes that the 1981 amendments also served to tidy up the zoning ordinance by, among other things, reducing the use of cross references. The article does not state whether the height restriction for the industrial zoning district was the part of some tidying up effort or not, even though the Zoning Ordinance which included height restrictions in other zoning districts would have suggested that indeed it was a part of the effort to tidy up the Zoning Ordinance. As such, the Board' determination that the height restriction served to prohibit certain undefined undesirable uses in the Industrial zoning district finds no actual support in the 1981 article and is rather an unwarranted presumption.

Second, if the height restriction was intended to prohibit certain undefined undesirable industries in Town, the height restriction would be void for vagueness as no person of reasonable intelligence would understand what uses were allowed or prohibited by the provision making the provision unenforceable. Similarly, a height restriction bears no rational relationship to prohibiting certain undefined undesirable uses. Using this case as an example, while it might be different in terms of scale, strict compliance with the forty-five foot height restriction would not necessarily prohibit the construction of asphalt plants in the Town. A smaller two ton plant could potentially meet the height restriction. The height restriction would merely foster shorter more expansive industrial facilities in many cases rather than necessarily prohibit any use and, therefore, the Board's conclusion as to its purpose defies even common sense.

Third, while zoning, in part, serves to segregate incompatible uses by district, height restrictions are commonly understood to serve other recognized zoning purposes. More specifically, securing safety from fire and, at times, providing adequate air and light are express statutory purposes which are cited in support of a height restriction. RSA 674:17, I(b),(d). Indeed, consistent with the enabling legislation, the Board's chairman at the July 9, 2019 hearing stated "I can see two reasons to have a height requirement, visual and safety." Furthermore, zoning ordinances are construed as a whole and other provisions of the Zoning Ordinance bolster this conclusion that the 45 foot height restriction served the typical statutory purposes.

Additionally, contrary to the findings in the prewritten motion, the 45 foot height restriction is expressly applicable in other zoning districts, including the residential district, and with respect to other uses, such as elderly housing. *See, e.g.*, Zoning Ordinance, §§5.2.5, 9A.5.7, 13.3(g). If the height restriction is intended to prevent undesirable uses, as the Board suggests, then the uses subject to these same height restriction may also be deemed undesirable on an ad hoc basis as well, including residential uses. Other occupied structures have even more

restrictive height restrictions, such as those in office parks, which, per the Board's rationale, would mean that the Town must find uses allowed in the office parks even more potentially undesirable given the greater restriction. Furthermore, the Zoning Ordinance permits certain unoccupied structures, such as cell towers, to be much higher suggesting that the height restriction is principally focused upon safeguarding persons against fire by assuring emergency responders may reach them consistent with the enabling legislation. In short, read as a whole, the Zoning Ordinance simply does not support the purpose suggested by the Board, but rather suggests that the height restriction serves the typical statutory purposes for such restrictions and the 1981 amendment merely served to eliminate an oversight in terms of a height restriction in the Industrial zoning district. As such, the Board misconstrued the general purpose of the height restriction in the first instance and, in the process, set forth an interpretation that would render the provision unenforceable.

As the height restriction served the usual statutory purposes, there is no fair and substantial relationship between fire safety and visual purposes of the height restriction and its specific application to the Property given the special conditions of the Property. The Property is currently has been used for a quarry operation. Quinn's entire quarry facility, which encompasses active lots in both Wilton and Lydenborough, mined approximately 80,000 tons of stone last year with every ton brining back approximately $1.25/ton in revenue. Even with portions of the Property in current use, Quinn has a tax bill of $45,000 annually for all of its properties used in connection with the quarry operation and that is but one expense associated with the Property and the operation thereon. In short, the quarry operation leaves little margin for error if Quinn is to obtain any return on its investment in the Property, let alone a reasonable one.

An asphalt plant, which uses material from the same site, would allow Quinn the opportunity to obtain a reasonable return on its investment by providing an additional revenue stream without the need to take portions of the Property out of current use. While a smaller 2 ton plant could potentially be constructed in strict compliance with the height restriction, such plants are not economically feasible in today's market, which is dominated by larger providers, and Quinn certainly would not get any reasonable return on what would be at least a million dollar investment in the basic equipment needed for even a smaller plant where there is no market for smaller plants in the area. In order to construct an economically feasible plant to allow a reasonable return on its investment, Quinn requires a height variance as all but the smallest plants exceed the height restriction meaning Quinn has a cognizable hardship. Harrington, *supra.*

The Board suggests that the current use is irrelevant because it is a nonconforming use and a nonconforming use cannot form the basis of a hardship. However, the case cited for that proposition was decided under the more restrictive hardship definition focused upon whether the

zoning ordinance denied the owner any reasonable use of his property, Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239 (1992), and the Supreme Court has suggested that such case law may not apply in the context of the more relaxed hardship standard. Rancourt, *supra*. [Rejecting the use of case law under more restrictive definition in context of more recent Simplex definition.]. Moreover, regardless of whether the use is nonconforming or not, the height restriction interferes with Quinn's right to a reasonable return which the less restrictive definition considers a hardship.

Quinn's hardship is unnecessary as the conditions of the Property make it such that Quinn can operate a plant and silo which exceed the height limitation without impacting the public interests promoted by the height restriction. The Property is used for a quarry operation which includes the use of heavy trucks along its access ways and indeed the Planning Board at one point reviewed the improvements on the Property under its site plan regulations and implicitly found the same to be safe for use by heavy trucks. Summa Humma Enterprises v. Town of Tilton, 151 N.H. 75 (2004) [Site plan review concerns whether property can be used safely for the proposed use.]. As such, the proposed plant and silo will be accessed from the existing ways on the Property and those ways on the Property will support heavier vehicles, like fire trucks. The Town's Fire Department has represented that its current equipment would allow it to reach the entirety of the proposed plant and silo.

Furthermore, the Property is a large lot, which is principally surrounded by a number of other lots owned by Quinn or a related entity (i.e. the applicant controls the use of the many surrounding lots), and the proposed plant and silo would be located away from adjacent properties, let alone structures on those adjacent properties. Portion of the Property are in current use limiting their development so as to impact any existing visual buffer. As such, in the event of a fire, the plant and silo would not present an immediate threat to neighboring properties, in particular, neighboring residential properties, notwithstanding their height.

The Board had before it evidence from the Town's Fire Department that its current equipment would allow it to reach the plant and silo even if they were 68 and 72 feet high respectively. Additionally, the size and location of the Property and the improvements thereon, together with a topography that would have the plant site lower than many surrounding areas, make it such that the plant and the silo, even at 68 and 72 feet high respectively, will not be visible from any occupied property as evinced by the view test conducted by Quinn at the Board's request. Indeed, the only property from which the plant or silo may be visible is the Goss Park property. However, in that case, the structures might only be visible from the edge of the property and only when the foliage is gone (i.e. when Goss Park and likely the plant will be closed.).

While as the Board suggests some other properties share some of characteristics, the Board does not suggest that all of the other properties or even the majority of the other properties in the Industrial zoning district share these characteristics cumulatively and the law makes clear that it is the cumulative characteristics of the Property which count. Harrington, *supra.* [Observing while one consideration may not be sufficient itself, other evidence taken with it can support hardship.]. In short, there was no fair and substantial relationship between the general fire safety and visual purposes of the height restriction and that restriction's specific application to the Property given the special conditions of the Property and the Board erred in holding otherwise.

The proposed use is also reasonable. Notwithstanding the improper caveat, the proposed asphalt plant is a permitted use of the Property. The Town, as noted above, did not suggest that a use variance was needed for the proposal and indeed recognized that it was permitted in the past under the same ordinance language. The current effort to amend the Zoning Ordinance in response to this proposal merely confirms the same. Permitted uses are deemed reasonable uses of a property. Harrington, *supra.* That the proposed asphalt plant would use material from the Property thus reducing traffic in and out of the Property and allow for a reasonable return on the Quinn's investment further bolsters this conclusion. Rancourt, *supra.*

Two final points need to be made. First, the Board's rationale under its reading of the height restriction mirrors a rationale for denial that the Supreme Court has found to be illegal. More specifically, the Board reads the height restriction to prohibit undesirable uses, finds the asphalt plant to be an undesirable use, and denies the variance essentially on those grounds. In short, the Board under its rationale denies the variance for the very reason it was sought in the first instance which is illegal. Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007). Second, it should be observed that the Board previously found a hardship under the more restrictive hardship definition when it previously granted a height variance for the same use in the late 1980's. The height restriction and the relevant use restrictions applicable to the Property at the time of the original variance and at the current time remain essentially the same.

Although the original variance ultimately expired, it nevertheless represented a final decision of the Board, which no one appealed, including the Town. The Board cites no authority for its apparent proposition that it may disclaim a prior final decision that it made, particularly one made under a more restrictive hardship definition. The doctrines of res judicata and collateral estoppel which serve to prevent the relitigation of issues which were or could have been litigated in an earlier proceeding resulting in a final decision may apply to administrative proceedings where a quasi-judicial decision is made, Cook v. Sullivan, 149 N.H. 774 (2003), and proceedings on variance are such quasi-judicial proceedings. The Board offers no reason why it should not be bound by its prior determination and the mere fact that there was opposition during

this hearing is not grounds to do so. This limitation would also apply to the Board's attempt to redefine the purposes of the Zoning Ordinance.

For all of these reasons, the Board's finding of no hardship was unlawful and/or unreasonable.

5. The Board's denial in conjunction with other conduct of the Town demonstrates bad faith.

Quinn initiated this process with the understanding that if it met the applicable standards it could proceed with its proposed development. The Board, as noted above, has already disclaimed not only its prior decision, but, with its caveat and hardship analysis, the Town's prior position, undisturbed for decades that the asphalt plant was a permissible use. In addition, the Planning Board in a public document has suggested that it is proposing changes to the Zoning Ordinance to ban uses which would not be approved later in the land use process.

In short, the Planning Board suggests that it has determined whether a use is appropriate on an ad hoc basis and implicitly denied the same on that basis, which is patently illegal under site plan review, Summa Humma, *supra.*, and it is now looking ratify its past practice.

In sum, Quinn has been made to spend time and money when the Town had no intention of granting approvals for use which it now seeks to ban in one manner or another, albeit illegally, even though Quinn commenced this process without notice of the actual amendment. Such conduct may render the Town liable for damages, attorney's fees, and, if no fair process can be had, a builder's remedy.

For the reasons set forth above, the Board's denial of the variance for the Property was both unlawful and unreasonable and the Board must rehear the variance.

Sincerely yours,
CRONIN BISSON & ZALINSKY, P.C.

By: Daniel D. Muller Jr.
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DDM:sms
cc: Quinn Properties, LLC
William Keefe, Esquire