February 13, 2020

Via Hand Delivery and Email
Town of Wilton Zoning Board of Adjustment
42 Main Street
PO Box 83
Wilton, NH 03086
wiltonzba@wiltonzba.org

Re: Rehearing of Quinn Properties, LLC Application for Variance; Case # 7/9/19-1 Letter of Opposition

Dear Chairman Faiman and Members of the Zoning Board of Adjustment,

I write on behalf of Christopher Balch and others to respectfully request the Town of Wilton Zoning Board of Adjustment again deny the application for a variance submitted by Quinn Properties, LLC ("Applicant") for Lot B-10 (known as 50 Quinn Drive) ("Application"). I respectfully request that the Board incorporate this letter into its record of this matter.

As an initial matter, we wanted to make two notes about this letter. First, we recognize that many of the arguments presented in this letter are the same or similar to the arguments presented in opposition to the application at the original hearing in November 2019. We have done that because we understand the law requires rehearing to be a complete do over. Second, we have found some of the Applicant's arguments difficult to follow. We have endeavored to respond to them as best as we can, but our responses may also be difficult to follow.

Under RSA 677:3, "[a] motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Therefore, other than the five statutory variance criteria, only the grounds raised in the Motion for Rehearing dated December 10, 2019 are addressed in this letter and only those grounds should be considered by the ZBA. The new grounds for rehearing are addressed first, followed by the original analysis of the variance criteria and the additional discussion of the unnecessary hardship criterion.

A. The ZBA Lawfully Conducted Itself and the Proceeding

Apart from the variance standards, the Applicant's argument boils down to an allegation that the ZBA's conduct and their proceedings were improper. No aspect of the Applicant's arguments has any merit. The ZBA reasonably and lawfully denied the variance and should do so again.

1. The caveat in the Notice of Decision was not improper.

The Notice of Decision memorializing the 11/12/19 verbal decision ("Notice") included a section titled "Caveats" that addressed the scope of the variance applied for, applicable provisions of the Zoning Ordinance, hardship, special conditions, and fair and substantial relationship, over about three pages. The ZBA made no error with respect to this section of the Notice.

The Applicant requested a variance only from the height restriction, not relief from the use restrictions that apply in the district in which the property is located. Therefore, the only request that the ZBA had jurisdiction to act on is the request for a variance from the height restriction. It did not have to and indeed lacked jurisdiction to advise the Applicant whether or not other variances would be required for the development to occur. The ZBA is a board of limited jurisdiction. RSA 674:33. It has power only to grant variances as limited under state statute.

While the Applicant now argues that the ZBA had some duty to guide it through the process of development, it is illogical that the ZBA would also have to decide requests not made. The ZBA met the requirements of Savage v. Town of Rye, 120 N.H. 409 (1980) as cited by the Applicant, including advising the Applicant that their application for this variance was complete and in order. The Applicant argues the ZBA had some duty over and above the requirement to advise an applicant on the specific application filed, including to advise applicants about all approvals that may or may not have needed. The Applicant did not apply for any other variance nor did the ZBA have any representations by the Applicant to determine if the Applicant met the five variance criteria for any other variance.

Further, the Applicant argues that representations made by an unidentified person or persons at "the Town" advised the Applicant that the only relief needed would be the variance from the height restriction. The Applicant is apparently making a municipal estoppel argument. Municipal estoppel has the following elements.

> first, a false representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

Thomas v. Town of Hooksett, 153 N.H. 717, 721 (2006). The Applicant fails to provide sufficient, credible evidence that the required elements of municipal estoppel have been met. The Applicant does not identify who or what entity within the Town made any such representations. Among other deficiencies, the Applicant does not state: (1) the ZBA

made any representation to that end; or (2) what whoever did make such representation had the proper authority to make any such statement. Therefore, the Applicant fails to even allege the basic requirements of a municipal estoppel claim.

All in all, the Applicant's argument that the caveat in the notice of decision was improper lacks merit and the ZBA should not give it any weight.

2. ***The use of research outside the public hearing process was not improper.***

The Applicant next argues that the reference to a 1981 newspaper article by Chairman Faiman during the November 12, 2019 meeting was improper. The Chairman's discussion of the article was as a source of legislative history around the enactment of the height restriction. The article appears to have been specifically referenced as a source to counter the Applicant's belief that the height restriction was enacted only because of the limitations of the fire department at the time. Use of legislative history is proper when an ordinance is ambiguous. Cf. Spengler v. Porter, 144 N.H. 163, 166 (1999) ("[L]egislative history will not be consulted when the language of the ordinance is plain.")

The Applicant also objects to the 1981 article claiming insufficient time to review and comment on it. First, the claim is factually inaccurate. By letter dated October 15, 2019 and submitted on or about October 16, 2019, members of the public discussed and described the contents of the letter. Thus, the Applicant had ample time to consider the letter's substance. In addition, assuming for the sake of argument that the Applicant somehow did not have sufficient time, granting the rehearing in itself corrects this issue. The Applicant inarguably has now had ample notice (over four months by the time of the rehearing) of the article, the ZBA's intention to refer to the article, the specific quotes in the article, and the impact on the ZBA's rationale. It has the opportunity to comment on the article during the rehearing and therefore any purported procedural injury has been corrected.

3. ***The decision was not inconsistent with the ZBA's duty of impartiality.***

The Applicant argues the ZBA was not impartial claiming it prejudged the application and such alleged prejudgment is evidenced by the facts that the ZBA requested document relative to the view to be submitted by 4 p.m. on the day the ZBA rendered its decision; the ZBA relied on the 1981 article even though it was not provided during a ZBA meeting; that the ZBA had prewritten a motion to deny; and that the ZBA did in fact deny the application.

This argument is entirely unfounded and unconvincing. Members of boards commonly prewrite motions to approve or to deny. Further, the minutes of the meeting state that "the approval draft was fairly well formed" but "the other one didn't have as much meat and didn't list the reasons for denial of the variance." (ZBA Meeting Minutes,

Nov. 19, 2019, p. 7.) This makes two important points. First, both approve and deny motions were pre-written, not just deny. Second, the ZBA did not have a prewritten, complete motion to deny that included the 1981 legislative history. Instead, the minutes show that the motion to deny was short and orally made, stating only what the request was and that it was denied because "the applicant has not demonstrated an unnecessary hardship as required." (Id. at p. 8.) As such, there is no evidence that the ZBA failed to consider the entire record or that it otherwise prejudged the application.

4. Bad faith

The Applicant argues that various actions by the Town of Wilton, the Wilton Planning Board, and apparently the ZBA have been made in bad faith. Importantly, in the context of an application for a variance from the ZBA, the actions of the Planning Board regarding proposed Zoning Ordinance changes are irrelevant. The ZBA has jurisdiction to interpret the current Zoning Ordinance and grant a variance if five statutory requirements are met. RSA 674:33. It does not have any power over the Wilton Planning Board. The Wilton Planning Board has the authority to handle all procedural steps to amend the Zoning Ordinance under RSA 675:3. While we have no reason to believe the Planning Board has acted or would act improperly, any actions by the Planning Board are completely separate from this application. Therefore, actions by the Planning Board are not evidence of bad faith by the ZBA.

With respect to the ZBA, the Applicant argues that the ZBA acted in bad faith because the ZBA offered no reason why a long-ago granted and now expired variance would not bind the ZBA in this case. The Applicant misapprehends several legal points in making this argument. First, if the Applicant wanted to make a legal argument that a long-ago granted and now expired variance would forever bind the ZBA, it should have done so before and instead of applying for the variance. Applying for the variance can be construed as an admission against the Applicant's argument. Moreover, the Applicant's legal arguments that res judicata and collateral estoppel apply are too underdeveloped for the Board's consideration. Suffice it to say that no legal doctrine would categorically bind all future ZBAs to a long-ago granted and now expired variance. The ZBA was free to approve or deny the sole applied-for variance and it correctly did so in good faith.

B. The Applicant Failed to Provide Sufficient, Credible Evidence for the ZBA to Approve the Variance

1. Granting the Variance Is Contrary to The Public Interest and The Spirit of The Ordinance Is Not Observed by Granting the Variance.

The first two variance standards are related and can be considered together. See Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011). "The first step in analyzing whether granting a variance would be contrary to the public interest or

injurious to the public rights of others is to examine the applicable zoning ordinance." Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 581 (2005).

The language of the applicable zoning ordinance is a declaration of public interest, making all variance requests at least somewhat in conflict with the public interest. For a variance request to be sufficiently contrary to public interest such that it must be denied, it "must *unduly and in a marked degree* conflict with the ordinance such that it violates the ordinance's basic zoning objectives." Nine A LLC v. Town of Chesterfield, 157 N.H. 361, 366 (2008) (emphasis added). While judging whether "granting a variance violates an ordinance's basic zoning objectives, [the court considers], among other things, whether it would alter the essential character of the locality or threaten public health, safety, or welfare" but "such examples are not exclusive."

Here, the "essential character" of the locality is a zone with structures at or beneath the tree line, not above it as the proposed structures would be. The record contains evidence that the legislative intent of the height restriction was to maintain that essential character. The height restriction was intended to maintain the visual and aesthetic quality that comes with containing structures, especially industrial structures, beneath the tree line. Varying the legal limits to the height of structures required by the ordinance would "unduly and in a marked degree" conflict with these purposes.

2. ***Granting the Variance Is Not Required to Do Substantial Justice.***

"Perhaps the only guiding rule [on this standard] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007) (citing 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 24.11, at 308 (2000)). In analyzing this standard, courts have also considered whether the proposed development was consistent with the area's present use. See Labrecque v. Town of Salem, 128 N.H. 455, 459 (1986).

The Applicant has not provided any analysis of the potential environmental and ecological impact that may be caused by using the on-site pond for fire suppression purposes. Without that analysis, the Board lacks sufficient, credible information to perform this balancing test of loss to the Applicant versus gain to the public. The Applicant has also not explained how changing operations from those beneath the tree line is consistent with new operations above the tree line.

3. ***The Values of Surrounding Properties Are Diminished.***

It is axiomatic that when a view or aesthetic quality changes from containing no structures above the tree line, or at least no industrial structures above the tree line, to

containing industrial structures above the tree line that property values will decrease, especially those that are in closest proximity to those industrial structures. Another hit to property values is likely to result from noise from the structures because they are located above the tree line. Structures, even industrial structures, located beneath the tree line have any noises associated with them buffered by the trees. However, when a structure rises above the tree line, that buffering capacity goes away, allowing the noise to travel farther than it would if the structure were beneath the tree line.

With what the Applicant has produced on this point, the Applicant has not met its burden in proving with sufficient, credible evidence that the proposed structures would not diminish property values.

4. Denying the Variance Will Not Result in Unnecessary Hardship.

Under RSA 674:33, the ZBA has the power to grant a variance if "[l]iteral enforcement of the provisions of the ordinance would result in an unnecessary hardship." RSA 674:33, I(a)(2)(E). An applicant can establish "unnecessary hardship" in two ways. First, the applicant can show that "owing to special conditions of the property that distinguish it from other properties in the area: (A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (B) The proposed use is a reasonable one." RSA 674:33, I(b)(1). Second, "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." RSA 674:33, I(b)(2). Both paths to establish unnecessary hardship start with finding "special conditions of the property that distinguish it from other properties in the area." RSA 674:33, I(b)(1) and (2).

In its motion for rehearing, the Applicant glosses over the "special condition" of the property that distinguishes it from other properties in the area. The only special conditions noted in the variance application relates to the presence of neighboring quarries and the elevation and topography of the lot, which the Applicant argues makes the height restriction less necessary. The ZBA correctly notes in its Notice of Decision that other properties have these same conditions. Either the "reasonable use" or the "fair and substantial relationship" paths to "unnecessary hardship" require first a special condition. The Applicant has presented no argument that the lot is unusually small, strangely shaped, or otherwise limiting on the horizontal development of the lot. Instead, it appears to ignore the special condition requirement and argues only that the ZBA mischaracterized the original purpose of the height restriction by relying on the 1981 newspaper article.

Leaving aside the shortcoming on the requirement to prove "special conditions" by sufficient, credible evidence, the Applicant appears to argue that the only way it can make reasonable use of the property is to construct an asphalt plant that requires a variance from the height restriction. The Applicant claims not being able to make a reasonable return on investment otherwise, citing Harrington v. Town of Warner, 152 N.H. 74, 80 (2005). However, the same case also states, "reasonable return is not maximum return." Id. at 80. Here, the Applicant appears to argue that unless it is allowed to do whatever is economically necessary to turn a greater profit on the existing quarry, any denial of a variance is illegal. Taken to its logical conclusion, this argument seems to state that if you need a variance to make a higher economic use of your property, the ZBA must approve that variance. This cannot be the case. Nothing in the statute or the case law says that getting a greater economic return on investment shall trump the requirements of a special condition, reasonable use of the property, and/or the purpose of the Zoning Ordinance.

Further, the Applicant argues that there is no fair and substantial relationship between the purpose of a height restriction and the property, assuming that use as a quarry is a "special condition," which we do not agree. Even if the use of a height restriction to prevent "undesirable industries" is unacceptable, which we do not concede, there are many purposes for enacting a height restriction allowed by statute. See RSA 674:17. The Applicant seems to argue that height restrictions can be imposed only due to the range of fire ladders or visual impact. Under RSA 674:17, many other purposes can justify a zoning ordinance, including "promote health and general welfare," "provide adequate light and air," and "assure proper use of natural resources and other public requirements," any of which would justify a height restriction. The Applicant says that the visual impact will be only in Goss Park, as if that minimizes or negates the impact. Instead, visibility from a park property actually may make the visual impact greater on the public than if the visibility was from a private property only.

5. ***Two Additional Legal Points.***

We respectfully request the Board to additionally consider the following.

First, the prior variance is entirely irrelevant. The Town of Wilton Zoning Ordinance Section 17.4 provides that any expired variance, such as this prior variance, is "void." Further, the legal requirements for obtaining a variance have changed substantially and materially since 1988 when the prior variance was obtained. If the granting of a variance, which then expired, guaranteed the granting of the same or similar variance in the future, then the expiration of the variance would have no meaning.

Second, the Town has supplemental variance criteria about which the Applicant has not provided any information. Town of Wilton Zoning Ordinance Section 10.6(a) requires that "The variance will not result in increased flood heights, additional threats to

public safety or extraordinary public expense". Because the Applicant has not provided any information about this requirement, the Board has nothing upon which to base any determination as to whether the Application does or does not satisfy this requirement.

Conclusion

The Applicant has not provided sufficient, credible information upon which the Board can determine that the Applicant has satisfied all of the required standards to approve the requested variance. The Board has a strong and defensible record that supports denial. For all of the above reasons, I respectfully request that the Zoning Board of Adjustment deny the Application.

Very truly yours,

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Cc: Client