Town of Wilton, NH
Zoning Board of Adjustment

Notice of Decision
February 18, 2020

The application by Quinn Properties, LLC for a variance to section 8.2.6 of the Wilton Zoning Ordinance has been denied. If granted, the variance would have relaxed the height limit for a proposed asphalt batch plant and silo on Lot B–10, 50 Quinn Drive, which would be 68 and 72 feet in height respectively, where the ordinance limits structures to a maximum height of 45 feet. The Zoning Board found that there would be no hardship arising from special conditions of the property, and that granting the variance would be contrary to the public interest and to the spirit of the ordinance.

Purpose

Determining whether to grant a variance requires a determination of the purpose of the ordinance requirement to be varied. The Zoning Board finds two purposes for the height restriction: fire protection, and preventing visual impact of industrial development on non-industrial properties.

Fire Protection

The applicants have proposed that fire protection might be a purpose of the restriction.

> "It is unclear what the public interest is in limiting industrial structures to 45 feet in height. The applicant believes that the 45 foot limitation was the height the fire department's ladder truck could reach when the Zoning Ordinance was enacted." (Application, Attachment, June 21, 2019, paragraph 1.b.)
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> "No one was sure why there is a 45 foot height requirement in the industrial district but this might be the maximum height of the fire truck ladder at the time the ordinance was developed. Now the average height of a fire ladder is 100 feet." (Applicant's attorney, minutes of the July 9, 2019 hearing, lines 330–333)
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> "... 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." (Request for rehearing, December 10, 2019, page 4)
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> "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." (Request for rehearing, December 10, 2019, page 5)

There is unnecessary hardship only if "owing to special conditions of the property that distinguish it from other properties in the area: 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". (RSA 674:33, I(b)(1)(A))

> "The property [must] be burdened by the zoning restriction in a manner that is distinct from other similarly situated property. It does not, however, require that the property be the only such burdened property. Rather, the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district." (John R. Harrington & a. v. Town of Warner, 2005)

The applicants have argued that "there is no fair and substantial relationship between fire safety ... purposes of the height restriction and its specific application to the Property", but they have not shown that the purported absence of a relationship between the height restriction and fire safety is owing to any special conditions of the property. Specifically, the applicants have argued that

- The Town's Fire Department has ladder trucks which would have no difficulty reaching the top of the proposed structures.
- Existing access ways on the property would provide access for fire trucks to the proposed structures.
- The Town's Fire Department has represented that its current equipment would allow it to reach the entirety of the proposed plant and silo.
- The size and remoteness of the property and the proposed location of the proposed structures on the property mean that any fire that did occur in the proposed structures would not present an imminent danger to neighboring properties.

However, these are not special conditions of the property. The same arguments could be made for a 72' structure on most lots in the Industrial District. The Town's ladder trucks could reach the top of a 72' structure on any other lot as well as on the applicant's property. Essentially the entire Industrial District is in close proximity to NH Highways 101 or 31, so access to structures would not be an issue. The minimum lot size in the District is two acres, and there is no reason to suppose that a 72' structure could not be constructed on most of those lots so as not to present an imminent threat to neighboring properties in the event of fire.

> **In summary, if the height restriction is unnecessary for fire protection purposes with respect to the property, it is equally unnecessary for fire protection purposes for most lots in the Industrial District; the purported absence of a relationship between the fire protection purpose of the ordinance provision and its application to the property is not owing to special conditions of the property; and there is therefore no unnecessary hardship.**

Visual Impact

The applicants have proposed that prevention of visual impacts might be a purpose of the restriction.

> "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.'" (Request for rehearing, December 10, 2019, page 4)
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> "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." (Request for rehearing, December 10, 2019, page 5)
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> "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." (Request for rehearing, December 10, 2019, page 6)

This is supported by the history and structure of the Ordinance. Prior to 1981, there was no height restriction in the Industrial District. The Industrial District chapter was completely rewritten in 1981. This was described by the Chairman of the "Sounding Board" (a committee involved in the creation of the Ordinance revisions) as "establish[ing] standards designed to retain Wilton character, insure safe traffic flow, prevent undesirable industry, protect Wilton water sources and encourage desirable industry. [emphasis added]" (From a contemporaneous newspaper article.) The rewritten chapter included two new adjacent sections: Section I, which established a visual buffer requirement between Industrial and abutting Residential properties and Section J, which established a 45' height limit. (In the current Ordinance these are sections 8.2.5 and 8.2.6.) Aesthetic values, such as preserving rural charm, and the preservation or enhancement of the visual environment, are legitimate zoning purposes. (Asselin v. Town of Conway, 1993)

Between Friday, November 8 and Sunday, November 10, 2019, at the request of the Zoning Board, the applicants conducted a "Sight-Line Test." This consisted of the placement of a telescopic work lift with work platform on top, extended to a height of 72' and placed at the location of the proposed asphalt plant and silo. At the November 12, 2019 hearing, the Board took testimony and photographic submissions concerning the result of the test.

From the minutes of the November 12 hearing:

> B. Silva (Barret Hill Road, Wilton) said he observed the crane from about 80% of the Goss Park beach. He said that within 10 feet of Route 31 he could see it and he estimates that with a full sized plant he felt that it would be extremely visible from Route 31 as well.

> S. Akers (New Road, Lyndeborough) said she observed the bucket lift from Goss Park, a facility that both towns share. This was visible from the parking lot. She submitted a picture and her location.
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> C. Balch (Center Road, Wilton) ... could see the bucket from the Goss Park trail that starts at the ball field.
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> R. Brown (Isaac Frye, Wilton) said he made his observation at the end of his driveway and he could see the bucket and the top portion of the crane. ... He did it without the aid of binoculars.
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> M. Jonas (Wilton) did her observations on the snowmobile trail behind her house. The trail is used by snowmobilers all winter long. It is an international snowmobile trail. The bucket was clearly visible from that trail. She stopped at the spot where snowmobilers park and when visitors stop, they will be parking right in view of the proposed plant.

Goss Park is one of Wilton's primary outdoor recreational facilities. It includes swimming and picnic areas and a baseball field.

The applicants have asserted that

> "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.)." (Request for rehearing, December 10, 2019, page 6)

The testimony from the sight-line test contradicts these assertions. In addition, a subsequent written submission from Robert Silva (February 13, 2020) and testimony at the February 18, 2020 hearing observe that the trees around Goss Park are actually coniferous — pines and hemlocks — so that the proposed structures would be no less visible in July than in November.

It is worth noting that many of the sightings from Goss Park were "in the tree tops," so that there is a direct relationship between the height of the proposed structures and their visibility.

Many of the commenters at the November 12 hearing complained that the sight-line test was inadequate because there was no lighting, and thus no measure of potential night-time visual impact. We understand that, because of the nature of the paving industry, much of the truck-loading activity at the proposed site would occur during the night-time hours, and that the facility would have to be lighted while that was occurring. The applicant has stated that lighting at the facility would adhere to "dark skies" standards, but at best, there seems to be no question that the structures themselves would have to be illuminated. This would potentially exacerbate any nuisance to residential properties where the structures will be visible.

In summary, there is a fair and substantial relationship between the height restriction's general public purpose of preventing visual impact from industrial development on non-industrial properties and the specific application of that provision to the property, and there is therefore no unnecessary hardship.

Furthermore, because a purpose of the height restriction is the protection of rural character and the preservation and enhancement of the visual environment, which is a fundamental purpose of the Zoning Ordinance, the granting of the requested variance would be contrary to the public interest and to the spirit of the ordinance.

Rehearing

The selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing of this decision. A request for a rehearing must be filed in writing with the Zoning Board of Adjustment on or before Friday, March 20, 2020, and must fully specify all grounds on which the rehearing is requested. (N.H. RSA 677:2) (The deadline is March 20 because, although the hearing was held on Tuesday, February 18, the decision was reached at 12:03 a.m. on Wednesday, February 19.)

Sincerely,

Neil Faiman, Chairperson
Wilton ZBA

Case #7/9/19–1, decided in rehearing Tuesday, February 18, 2020