Town of Wilton, NH

Zoning Board of Adjustment

Notice of Decision

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 allowed the construction of an 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 variance has been denied because the Zoning Board finds that the applicant has not demonstrated unnecessary hardship, as discussed below.

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 Thursday, December 12, 2019, and must fully specify all grounds on which the rehearing is requested. (N.H. RSA 677:2)

Sincerely,

Neil Faiman, Chairperson
Wilton ZBA

Case #7/9/19–1, decided Tuesday, November 12, 2019

Caveats

The sole subject of this decision is the requested variance. This decision should not be taken to imply that an asphalt plant, in the abstract, either is or is not an allowed use on the subject property, which is not a question that was before the Zoning Board. For the purposes of this decision, we have asumed without deciding that an asphalt plant would be an allowed use.

Given the assumption that the underlying proposed use is an allowed one, the analysis below addresses only the height variance. The Board received considerable input in opposition to allowing any asphalt plant. We found such input to be irrelevant except to the extent that it bears directly on issues inherent in allowing the increase in height, and consequently disregarded it.

The Ordinance Provision

The ordinance provision which is the subject of the variance application is Section 8.2.6 of the Wilton Zoning Ordinance:

> **8.2 Lot Requirements** All new construction or development within the industrial district shall meet the following requirements.

…

8.2.6 Structure Height. Maximum structure height is forty-five (45) feet or two (2) stories.

Hardship

A variance may be granted only if

> Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. *RSA 674:33, I(a)(2)(E)*

where

> "[U]nnecessary hardship" means 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)*

There is very little case law pertaining to RSA 674:33, I(b)(1), but

> This definition of unnecessary hardship is similar, but not identical, to the test that we adopted in Simplex Technologies v. Town of Newington, 145 N.H. 727, 731–32 (2001). See Laws 2009, 307:5 (statement of legislative intent that first definition mirror Simplex test). *Harborside Associates, L.P. v. Parade Residence Hotel, LLC* (2011)

We will therefore refer to the hardship case law developed under the Simplex standard.

Special Conditions

"Special conditions of the property that distinguish it from other properties in the area" in RSA 674:33 corresponds to "the unique setting of the property in its environment" in the Simplex hardship standard in *Simplex v. Newington*. This standard was discussed at length in *Harrington v. Warner* (subsequently referenced in a number of other decisions):

> Next, Simplex requires a determination of whether the hardship is a result of the unique setting of the property. This factor requires that the property 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. In addition, the burden must arise from the property and not from the individual plight of the landowner. Thus, the landowner must show that the hardship is a result of specific conditions of the property and not the area in general. *John R. Harrington & a. v. Town of Warner* (2005) (internal quotations and citations omitted)

In the application, the applicant proposes these special conditions of the property:

> (a) "The property is not flat and rises more than 200 feet above the base elevation of the proposed plant which would be near the railroad tracks at the bottom of the lot in terms of elevation. The top of the 72' structure will be considerably lower than industrial operations higher up on B–10."

In the immediate vicinity, this would describe either the Quinn lot or the adjacent Granite State lot. In the Industrial District generally, there are also a number of lots with this characteristic. There are also Industrial lots which don't have the elevation characteristic, but are still large and remote enough that they would probably buffer a large structure as well as the subject lot. Whether this constitutes a special condition is a close call. We will assume, without deciding, that it does for the sake of the "fair and substantial relationship" analysis below.

> (b) "The property is already a stone quarry and use as a stone quarry diminishes the ability to use it for other industrial purposes."

Since the adoption of Chapter 9B of the Wilton Zoning Ordinance, "Gravel Excavcation District," in 2006, the quarry on Lot B–10 has been a non-conforming use. "A nonconforming use … may not form the basis for a finding of uniqueness to satisfy the hardship test." *Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239* (1992). Furthermore, to the extent that an existing use of the property reduces its value for other purposes, any resulting hardship would be self-created, and cannot justify a variance.

> (c) "The next door neighbor, Granite State, is an operating quarry and would not be a good neighbor for many traditional operations."

That a neighboring lot has essentially the same current use and physical characteristics as the lot under consideration is not a "special condition of [this] property that distinguishes it from other properties in the area."

> (d) "Because the industry has chaged so that quarries and asphalt and concrete plants have linked ownership, a quarry needs an asphalt or concrete plant to survive."

"A nonconforming use … may not form the basis for a finding of uniqueness to satisfy the hardship test." *Grey Rocks*. "[T]he burden must arise from the property and not from the individual plight of the landowner." *Harrington*.

We are left with topography as a (possible) special condition of the property.

Fair and Substantial Relationship

Assuming that the topography can be regarded as a special condition of the property, we must determine whether, owing to the topography, "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." This requires us to determine the public purpose of the ordinance provision.

In the application, the applicant states :

> "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 could reach when the Zoning Ordinance was enacted. The Wilton

> Fire Department did not have a ladder truck in those days but it does now (and, in fact, recently replaced its ladder truck.) The average ladder truck ladder can reach about 100'."

Other points in the application, including the paragraph proposing topography as a special condition of the property, suggest that the applicant may believe that limiting visual impact is another purpose of the ordinance provision.

We do not find either of these suggestions credible. There is no such height restriction in either the General Residence and Agricultural District or the Commercial District. The Ordinance surely would not allow 90 foot agricultural silos or eight-story office buildings if it found structures over 45 feet in general to be fire risks or eyesores.

In 1974, the Wilton Zoning Ordinance had only a rudimentary Industrial District chapter, with no meaningful restrictions on Industrial Uses. A substantial 1981 revision of the Zoning Ordinance included a complete rewrite of the Industrial District chapter. This was described by the Chairman of the "Sounding Board" (apparently 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 introduced a "Permitted Uses" section specifying restrictions on "smoke, noise, odors, vibrations, and discharges," and a "Building Height" section limiting the height of buildings to 45 feet or two stories.

From this historical context, we conclude that the height restriction was imposed as a simple way of limiting industrial facilities in the Town to a modest scale. Height is a marker for large / undesirable industry.

Thus, a 70-foot asphalt plant is simply an instance of the "undesirable [i.e., large] industry" which the Zoning Ordinance excludes in order to "retain Wilton character." The topography may reduce its visual impact, but it does not make it any less the type of development which the height restriction was intended to exclude.

Therefore, notwithstanding the topography, there is a fair and substantial relationship between the height restriction's public purpose of excluding certain kinds of industry in order to retain Wilton character and the specific application of that restriction to prohibit a 68-foot asphalt batch plant and 72-foot storage silo on the applicant's property.

By the same reasoning, notwithstanding the topography, the proposed use is not a reasonable one.