KNA KEACH-NORDSTROM ASSOCIATES, INC.

October 12, 2021

Silas Little, Esq.
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14 Grove Street – Post Office Box 270
Peterborough, New Hampshire 03458

Subject: **Land of Isaac Frye Holdings, LLC**
Isaac Frye Highway (Map F – Lot 3-2); Wilton, New Hampshire
KNA Project No. 21-1008-1

Attorney Little:

At the request of your clients Shannon Linn and Andy Burnes we have reviewed and considered application materials and related public documents relevant to a variance application filed by the owner of the subject property and currently pending before the Wilton Zoning Board of Adjustment. Based upon our review of these materials we understand:

- The subject 8.85-acre parcel, identified as Lot 3-2 on Wilton Assessor's Map F, is situated in both the General Residence & Agricultural and Aquifer Protection (Overlay) Districts.

- At present the property owner (Isaac Frye Holdings, LLC) wishes to construct a single-family home and customary site improvements (driveway, septic system, etc.) on the subject parcel. Given the prevailing grade and contour of the parcel, the owner presently contemplates excavation and removal of an estimated 26,766 cubic yards of native soil material for the stated purpose of facilitating planned residential construction in the manner shown on drawings submitted to the Wilton Zoning Board of Adjustment under the cited application.

- Consistent with RSA 155-E:2-a, the Town of Wilton's Excavation Site Plan Review Regulations (Regulations) identify a series of uses/activities for which a local Excavation Permit is not required. One such use or activity for which an exception is provided under Section 3.4 (a) of the Regulations is: "Excavation that is *exclusively incidental* to the lawful construction or alteration of a building or structure, or the lawful construction or alteration of a parking lot or way including a driveway on a portion of the premises where the removal occurs … In the event that the incidental excavation results in the removal of more than 500 cubic yards of earth that is transported off site, an Excavation Permit will be required and shall be submitted per Section 5 (of the Regulations) below." Given the volume of *incidental* excavation contemplated by the

owner far exceeds the maximum for which exception is available under the Regulations we understand that it has been determined and acknowledged by the owner that a local Excavation Permit is in fact needed in the current instance.

- In addition to controls imposed under the Excavation Site Plan Review Regulations, excavation of earth materials is regulated by and through the Wilton Zoning Ordinance. Specifically, Section 4.1 of the Zoning Ordinance restricts excavation activities for which an Excavation Permit is needed to land situated in the Town's Gravel Excavation District. Further, as acknowledged above, the subject site is situated in the Aquifer Protection District. Section 12.4 of the Zoning Ordinance identifies "excavation(s) of sand or gravel, except those conducted in accordance with an approved Excavation Permit issued pursuant to the Excavation Regulations of the Town" as a *prohibited use* in the Aquifer Protection District. Since the subject premises is situated both outside of the Gravel Excavation District and within the Aquifer Protection District, it is subject to restrictions which, absent variance relief, preclude excavation and removal of a volume of earth greater than that defined as *incidental* under applicable land use ordinances and regulations (500 cubic yards).

Collectively, these understandings both form the genesis and purpose of the current variance application. Based upon our consideration and review of the pending variance application, identified as Case 5/11/21-1 by the Wilton Zoning Board of Adjustment (ZBA), we offer the following remarks:

1. As a procedural observation we are puzzled as to why the owner did not file; and based on the record does not appear to have been encouraged or directed to file, two separate variance applications. As acknowledged above, in order to realize the outcome desired by the owner, relief from both Section 4.1 (General Provisions) and Section 12.4 (Aquifer Protection District) of the Wilton Zoning Ordinance is necessary. Although Sections 4.1 and 12.4 each serve to control excavation activities, Section 4.1 is a general zoning provision, adopted pursuant to authority of RSA 674:16, which simply recognizes excavation as a permitted use and identifies specific locations within the municipality where this activity is a permitted use; Section 12.4 of the Aquifer Protection District Ordinance, an "overlay ordinance" adopted pursuant to authority of both RSA 674:16 and RSA 674:21, has been adopted for the purpose of establishing certain controls and performance standards of a scientific basis which are intended to correspond with special environmental characteristics of land of a certain quality. In our view objective consideration of the public interest, spirit, substantial justice and unnecessary hardship prongs of criteria established under RSA 674:33, I (2) can and often do vary greatly between a variance application which seeks relief from a "traditional" zoning control and another which seeks relief from a scientific based zoning provision applicable to land having certain environmental characteristics.

   Based upon our consideration and review of a narrative response to statutory variance criteria of RSA 674:33, I (2) appended to this application it appears the bulk of testimony so offered focuses on the owner/applicant's intended use of land and demonstration that relief is needed in order to realize the desired outcome. Section 12.1 of the Aquifer

Protection District Ordinance acknowledges the District was "established for the purposes of protecting, preserving and maintaining the existing and future municipal water supply sources of the Town of Wilton by regulating the uses of land over known aquifers and their recharge areas, so as to protect such supplies from contamination caused by adverse or incompatible land use practices or developments. The Aquifer Protection Ordinance is intended to limit the uses of land so designated to those which will not adversely affect water quality by contamination, or water quantity by preventing recharge of the aquifer." Given this very strong and direct statement of purpose, we find it remarkable the narrative submitted by the owner/applicant did not attempt to advance a single favorable argument as to why the owner/applicant asserts this proposal will not be contrary to the public interest; how the spirit of the ordinance would be preserved; and/or how substantial justice would be realized by the granting of relief from the terms and conditions of Section 12.4 of the Aquifer Protection Ordinance being sought. In this writer's view, the owner/applicant's failure to address basic statutory variance criteria in a context which recognizes and reflects the underlying purpose and intent of the Aquifer Protection District Ordinance renders this application, as presented, both non-responsive and non-persuasive.

2. Upon consideration and review of record documents we learned the subject parcel was created by subdivision in 2016. These documents, including Plan No. 38802 recorded at the Hillsborough County Registry of Deeds (HCRD), indicate the subject parcel was created by a subdivision application approved by the Wilton Planning Board on February 17, 2016. We view the date of this relatively recent subdivision approval as noteworthy since it appears applicable land use ordinances and regulations that were in affect at time of subdivision approval remain in effect today with only limited subsequent amendment. Those familiar with the Town of Wilton understand this municipality has promulgated, maintained and consistently administered a full array of complete and properly developed land use ordinances and regulations for several decades. Collectively, these ordinances and regulations include customary controls and performance standards which generally assure that lots or parcels created by subdivision are both reasonably configured and suitable for their intended purpose without need for extraordinary modification or zoning relief. In fact, Section 5.4 of the Subdivision Regulations, entitled "Land Characteristics", in affect both now and at the time subdivision approval for Lot F-3-2 was granted reads as follows: "Land of such character that it cannot, in the judgement of the Board, be safely used for building development purposes because of exceptional danger to health or peril from fire, flood, poor drainage or other hazardous conditions, shall not be platted for residential, commercial or industrial subdivision, nor for such other uses as may increase the danger to life or property, or aggravate the flood hazard." As shown on the subdivision plat approved by the Wilton Planning Board in 2016, it appears a relatively flat and accessible half-acre or so of land suitable for single-family residential construction was and remains available at the northwest corner of the subject parcel. Based upon examination of the plat, it appears this area may have been represented as such at time of subdivision approval since not only suitable provisions for access, but also accommodations for a 4,000 square foot receiving area (for on-site wastewater disposal) and water well are shown as being available in this vicinity. In addition, both the recorded subdivision plat (HCRD Plan No. 38802) and corresponding Declaration of

Common Driveway Easement (recorded at HCRD Book 8832; Page 2473) combine to establish durable easement rights over Lot F-3-1 for the benefit of Lot F-3-2. These easement rights afford opportunity to construct and maintain improvements necessary to create dependable vehicular and utility access to the subject parcel without need for performing excavation within the westerly "tail" of Lot F-3-2, which otherwise serves frontage for this back lot parcel on Isaac Frye Highway.

As an alternative to building at the northwesterly corner of the premises, we believe existing site topography shown on the approved subdivision plan demonstrates that it is possible for one seeking to optimally site a dwelling at the height of the land to construct a lengthy but reasonably graded private driveway to reach the large plateau area at the height of Lot F-3-2 by simply extending driveway construction to the east/southeast in order gradually climb the grade and contour of a natural north-facing slope which occupies the northerly portion the property. In our view either of these two approaches to the siting of single-family residential construction on the subject parcel described herein would be expected to yield outcomes that are both compliant with the performance standard described at Section 5.4 of the Subdivision Regulations as well as alleviate need for excessive excavation and corresponding need for zoning relief presently sought by the current owner/applicant. Accordingly, we do not accept the owner/applicant's stated position that the subject property is "unbuildable" without undertaking the excessive volume of preparatory excavation presently contemplated. Simply put, while we accept the owner/applicant's notion that the natural topography of the subject parcel may represent a "special" or "unique condition" we cannot accept the owner/applicant's stated representation that "the lot in its unaltered state in unbuildable …" In fact, in our view the siting of a home atop the large (2+ acre) plateau that exists at the height of land, accessible via a driveway constructed in the manner described above, likely represents the highest and best use of this property and has real potential to yield an "estate lot setting" that would be truly special or unique.

3. Lastly, it must be recognized that current NRCS Soil Survey Mapping of Hillsborough County, New Hampshire suggests this site consists of excessively well drained sand and gravel soil material. Test pit data appearing on a "Proposed Sewage Disposal System Plan", dated February 22, 2021 prepared for and submitted by the owner/applicant confirms validity of this mapping. Based on the quality of soil material present it must be recognized that need of excavation and removal of the large volume of earth contemplated under the current development proposal should not be viewed as a burden but rather a financial asset for the owner/applicant. That is to say, we anticipate the fair market value of sand and gravel material contemplated for removal under the owner/applicant's current building proposal far exceeds costs associated with excavation and hauling of the same to an alternate location.

We trust remarks provided in this short letter report properly serve as a concise summary of our consideration and review of the subject property and current land use application pending before the Wilton Zoning Board of Adjustment. In the event you should have questions or seek clarification in regard to remarks offered herein, we invite you to contact this writer at your convenience.

Sincerely:

Steven B. Keach, P.E.
President
Keach-Nordstrom Associates, Inc.