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June 8, 2021

Via email and First Class Mail

Town of Wilton  
Zoning Board of Adjustment  
42 Main Street, P O Box 83  
Wilton, NH 03086

RE: Application of Isaac Frye Holdings, LLC, Tax Map F, Lot 3-2  
Isaac Frye Highway, Wilton, NH

Dear Members of the Board:

I wish to supplement my previous written communication to the Board with respect to the above application.

I. Prior applications for this lot:

The application does not address the prior decisions of both the Planning Board of the Town of Wilton and the Zoning Board of the Town of Wilton with respect to a gravel operation on this site. At a minimum, the applicant should be instructed to withdraw the application for a variance until the applicant can supplement the presentation by addressing the issues raised by Fisher v. Dover, and Brandt Development v. Somersworth. It is only fair to the abutters and to the Board that the applicant be required to state in writing to the Board why this application is not barred by prior decisions and by making such a statement in writing affording to the abutters the opportunity to rebut the assertions made by the applicant.

II. Present Application does not present a request for a variance from all applicable provisions of the Wilton Zoning Ordinance:

The present application for a variance refers only to Section 4.1 and Section 12.4 of the Wilton Zoning Ordinance. The application does not address Section 6.1 and the definition of a commercial operation which is the removal of material to a place off site. Section 4.1 and Section 9B.3. The application also does not address the setback requirements imposed by Section 9B of the Town of Wilton Zoning Ordinance establishing buffers and boundaries of excavation. Given what is proposed in the application, that is the removal of material for sale off site, the application is incomplete and the proposed operation could not be conducted without a variance from Section 6.1 and the provisions of Section 9B as it relates to gravel operation in the Town of Wilton and use of Town roads.

III. Disproportionate excavation of earth materials when compared to required excavation for single family home.

The applicant urges consideration of its application by making statements that the proposed extraction of earth materials is incidental to the construction of a single family house. Nothing in the applicant's submission demonstrates that the site as it existed prior to the commencement of excavation could not have been used for a single family house with the rearrangement of the terrain on site. To contrast, for a two story residential structure of 2,500 sq. ft. gross living area with a full basement, the excavation required for the basement would be a bit more than 1,250 sq. ft. By benching the basement into the hill, the area of excavation would be less than the cubic volume of the basement, which would be on the order of 10,000 cubic feet (1,250 sq. ft. x 8' height) or less than

370 cubic yards. The site walk demonstrated that near where the proposed leachfield is is a fairly level area which would require no significant terrain alteration and based on the contour lines, the proposed leachfield could be moved either closer to Isaac Frye Highway or toward the temporary benchmark in the 5" hemlock. Moving the house toward the area where the leachfield was staked out and then moving the leachfield area either toward Isaac Frye Highway or away from Isaac Frye Highway would allow a building to be built with minimal terrain alteration. Certainly, the applicant has shown no evidence that the site as it existed prior to excavation could not have been utilized for a single family residence without the removal of material on the scale which has occurred and which the applicant is proposing to continue. In other words, there is no demonstration the variance is really required for the construction of a single family house on this lot.

IV. The application fails to satisfy the five criteria necessary for a variance.

A. Public Interest:

The Board's previous decision in 2006 addressed the situation of Isaac Frye Highway and that the public interest would not permit operation of gravel trucks to and from the site given the configuration of the intersection with Isaac Frye Highway and Route 101. That standard of public interest remains. In addition, there is a greater force given the scofflaw approach of the present applicant. The public interest is not served by rewarding this applicant for the disregard of the clear Note 9 on the Subdivision Plan from which the applicant's deed description was prepared. In fact, a review of the deed of Chamberlain to the applicant demonstrates that the applicant could have no clear idea of the lot that was being purchased without reviewing the plan. The deed recorded at Volume 1986, Page 2436 refers to the plan, "[r]eference is made to the Plan for a more particular description of the premises conveyed." The deed goes on to state that the conveyance was made

subject to all matters shown in the plan, including, but not limited to, the provision for payment of impact fees. (Emphasis added). In no way can the public interest be served when the applicant was clearly on actual notice that no earth removal activities could occur on the site by the deed itself, the very instrument by which the applicant took ownership.

B. Substantial Justice:

The same arguments as applied to public interest pertain to substantial justice. No substantial justice is achieved in the consideration of this application for a variance when the applicant has acted in such disregard not only to the Planning Board conditions of approval for the lot, but also the provisions of the Zoning Ordinance concerning gravel excavation operations. The added element in considering substantial justice is the failure of the applicant to show that some minor site alteration would not permit the construction of a single family residence on the lot without the removal of earth materials.

C. Spirit of the Ordinance:

The Town of Wilton in 2006 established the Overlay District to permit gravel and earth materials extraction in certain areas of the Town. The spirit of the Ordinance was to confine those activities to areas where there would not be the mix of residential properties and the utilization of Town roads. The spirit of the ordinance clearly segregates gravel and earth material extraction. This application is against the stated purpose of the ordinance as set forth in Section 1.0, Preamble. The Preamble expresses the spirit of the ordinance as to promote and protect the health, safety, prosperity, convenience or general welfare of the inhabitants as well as the efficiency and economy in the process of development of the incorporated Town of Wilton by the promotion of good civic design and arrangements, including the protection of farmlands and open space by wise and efficient

expenditures of public funds; by the adequate provision of public utilities and other public requirements and by other means. In no way can this application be stated to conform to the spirit and intent of the ordinance. The Office of Strategic Initiatives at Page II-12 reports the following comments concerning the spirit of the ordinance:

However, when the ordinance contains a restriction against a particular use of the land, the Board of Adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits industrial and commercial uses in a residential neighborhood; granting permission for such activities would be of doubtful legality.

D. Diminution in Value of Surrounding Property:

The site walk on Saturday, June 5, 2021 made plain to all attending that the activities occurring on this lot have substantially diminished the value of the abutting property owner, Mr. Dillon. The thoughtless disregard in pushing ahead with an access road and excavation leaves an eyesore and degrades the value of Mr. Dillon's property. The condition of the property also degrades the general area and shows a callous disregard to any reasonable use of property. Again, the Office of Strategic Initiatives in the zoning handbook, The Board of Adjustment in NH, at page II-14 quotes a presenter on the issue of diminution of surrounding properties as follows:

Keep in mind that the burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease value.

E. Unnecessary Hardship:

The applicant has admitted that there is no distinguishing characteristic to this lot which presents a particularly unique situation and one in which other properties are not similarly impacted concerning the restriction of gravel removal and earth excavation as provided under the Zoning Ordinance. To quote the Office of Strategic Initiatives in its zoning handbook:

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When the hardship so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular land in question makes it different from others can unnecessary hardship be claimed.

The Board of Adjustment in NH, II-14. In this respect, the Board is requested to take notice of the response made by Mr. Lehtonen to a question posed at the site walk. Mr. Lehtonen was asked a question as to what made this property particularly unique and distinguishable from other properties. Mr. Lehtonen was unable to provide an example and stated there were none.

Very truly yours,

Fernald, Taft, Falby & Little  
Professional Association

By:

  
Silas Little

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sl/djh