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September 14, 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 for a Variance of Isaac Frye Holdings, LLC

Dear Chair Faiman and Members of the Board:

I write to you on behalf of abutters and other affected property owners in Wilton Center with respect to the application of Isaac Frye Holdings, LLC. I am writing to address the effect of prior denials by both the Planning Board and the Zoning Board of Adjustment with respect to gravel operations on the affected parcel.

Since 2006, this parcel and the parent parcel have been before the Zoning Board of Adjustment one time and the Planning Board three times. In 2006, the application was in pursuance of a contemplated subdivision of three lots. In 2007, a subdivision application was presented which was denied as part of the subdivision application that called for the removal of 90,000 cubic yards of material as "incidental to construction." In 2016, a second subdivision application was submitted which resulted in the present configuration of the master parcel into two lots. As part of that 2016 application, the subdivider proposed to remove 90,000 cubic yards of material before any construction. That condition of subdivision approval was removed from the application. The

Planning Board made clear in its decision on the application that no excavation or removal of material could occur on the lot until a proposal for such excavation came before the Planning Board.

The present circumstance involves an “after the fact” application for a variance. The applicant did not observe the condition of subdivision approval issued by the Planning Board on October 24, 2016 and noted on the plan. The plan recorded at the Hillsborough County Registry of Deeds at Note 9 says “No gravel or earth materials shall be removed from the site without further Planning Board approval.” Despite the notation on the plan, Isaac Frye Holdings, LLC removed 5,000 cubic yards prior to submitting an application for a variance. Isaac Frye Holdings, LLC only stopped gravel removal when a cease and desist order was issued by the Town of Wilton.

At the hearing on May 11, 2021, the applicant stated 35,000 cubic yards are to be removed in addition to what has already been removed. The applicant goes on to state that the excavation would be six to nine months and that material would be removed at the rate of 17 to 18 yards per truck load. The applicant did not discuss the effect of weather and town road changes over the six to nine months of the time period and the applicant did not disclose that yardage in the truck is not equal to yardage in the bank. There is approximately 20% fluff factor in material removed from the bank. In other words, the 17 to 18-cubic yard figure is 120% of what would be measured in the bank, or about 14 cubic yards. If the applicant’s assessment of 35,000 cubic yards to be removed is accurate, then approximately 2,500 one way loaded trips are required to remove that amount of material. Round trip traffic would be 5,000 trips. Projecting the 5,000 trips (one in, one out) over the six to nine month period means the weekly truck traffic is between 100 trips per week (20 trips per day) to a low of 68 trips per week (13 or 14 trips per day.) This discussion assumes 4.3 weeks in a month and five days of operation in each week.

The application argues the variance is necessary in order to develop a single family house lot on the 8.5 acres. Site inspection showed that in the areas undisturbed, a single family house site could fit where the septic system is proposed. The house would have one part of the foundation in the bank and a walk out basement on the north side. For comparison sake, the excavation required for a 24' x 30' house with a full basement in the ground is approximately 500 cubic yards. The actual volume occupied by the foundation of the house is 450 cubic yards and the additional 50 cubic yards is to allow for access to the excavation. In that respect, that additional 50 cubic yards could be kept on site and the actual material required for a foundation on the 24' x 30' structure with a 6' depth cellar hole is 450 cubic yards. That is the material that would be required to be removed from the site or spread around the house and "lost" in the development of the yard, septic system and the like.

The foregoing discussion establishes to the Board that this application has been decided on the merits by both the Planning Board and the Zoning Board at prior hearings. An excavation incidental to the construction of the house requires no more than 500 cubic yards of material to be removed from the cellar hole. The discussion concerning truck trips and extent of operation establish that the reasons stated on Monday, June 26, 2006 by the Zoning Board of Adjustment are still applicable. Those reasons are:

1. Granting the variance would be contrary to the public interest because of the overwhelming opposing to the proposal in the neighborhood and for traffic and safety concerns exiting Isaac Frye Highway onto Route 101.
2. The use contemplated is contrary to the spirit of the ordinance because the new ordinance proposing a gravel excavation district has overwhelming support of the public.

Parenthetically, no public interest is served where the applicant has acted in such flagrant disregard of prior Land Use Board decisions of the Town of Wilton. Any finding that the variance is not barred by *res judicata* makes a mockery of the prior Land Use Board decisions.

On July 18, 2006, the Zoning Board of Adjustment supplemented its findings denying the variance. The Board found that;

1. That the variance would detract from a safe, healthy and harmonious atmosphere for all in the Town of Wilton and would not minimize the detrimental effect of excavations on the visual character of the Town.
2. Nothing unique about the property or its environment to warrant a hardship and the present zoning restriction does not interfere with a reasonable use of the property.
3. Substantial Justice would not be done because any injustice the Zoning Ordinance creates must satisfy the other qualifications to obtaining a variance.

The Board is respectfully requested to recall conditions of the site when the site visit was conducted. The site is a gravel pit. There is nothing about the site as presently excavated which gives any indication that the excavation was incidental to construction of a single family residence. As noted above, compared to the quantities of material removed to date, only minimal excavation is required for a foundation and certainly nowhere near the 5,000 cubic yards that has been removed to date.

In considering the application of *res judicata*, the Zoning Board should not limit its consideration to the Zoning Board application made in 2006. The Zoning Board of Adjustment should also consider the decisions of the Planning Board on two subsequent subdivision applications which denied gravel excavation as incidental to the construction of housing. No appeals were taken from the Planning Board's decisions in 2007 and 2016. No challenge was made to the Planning

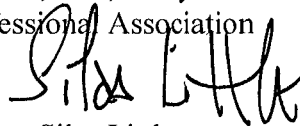
Board's determination that 500 cubic yards of earth material removal was all that was incidental to excavation for a single family residence. In the opinion of this writer, this application is barred not just by the decision of the Zoning Board of Adjustment in 2006, but also by subsequent decisions of the Planning Board in 2007 and 2016. Of further note, the board should consider the unsuccessful attempt before the Planning Board in 2019 by which a much larger gravel removal operation was proposed.

Prior Planning Board decisions and the decision of the Zoning Board of Adjustment in 2006 operate as a bar to this further consideration of this proposal.

Very truly yours,

Fernald, Taft, Falby & Little
Professional Association

By:



Silas Little

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sl/djh

cc: Roy Tilsley, Esq. (via email)
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