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VIA EMAIL AND U.S. MAIL

Robert N. Faiman, Jr. Chair
Wilton Zoning Board of Adjustment
42 Main Street
Wilton, New Hampshire 03086

June 8, 2022

**Re: Administrative Appeal of Isaac Frye Holdings, LLC (“IFH”)
Case No. 4/12/22-1**

Dear Mr. Faiman and Members of the Zoning Board of Adjustment (“the **ZBA**”):

I represent the Wilton Planning Board (“the **Planning Board**”) in the above-referenced matter. The purpose of this letter is to summarize the Planning Board’s position with regard to IFH’s Administrative Appeal which relates to IFH’s property located on Isaac Frye Highway and identified as Tax Map 4, Lot 3-2 (“the **Property**”). The Administrative Appeal asserts two primary claims of error: (1) that the Planning Board erred in stating that IFH was required to obtain a variance from Section 6.1 of the Wilton Land Use Laws and Regulations - Zoning Ordinance (“the Zoning Ordinance”) and (2) that IFH was required to obtain a variance from Section 9B.6.1 and 9B.6.4 of the Zoning Ordinance.

This memorandum is organized into three sections. The first provides a brief factual history. The second discusses the Planning Board’s concern that the ZBA lacks jurisdiction over this matter. The third addresses the merits of the Applicant’s Administrative Appeal.

I. Brief Factual History of this Matter.

This matter originally arises out of a code enforcement matter initiated by the Town through a Notice of Violation/Cease and Desist Letter dated January 4, 2021 (“**First NOV**”). A copy of the First NOV is attached hereto as **Exhibit A**. In the First NOV, the Town identified that the Property was in violation of the Article 4.1 of the Zoning Ordinance because IFH “remov[ed] gravel and earth materials from the Property” outside of the Gravel Excavation District and

DONAHUE, TUCKER & CIANDELLA, PLLC

16 Acadia Lane, P.O. Box 630, Exeter, NH 03833

111 Maplewood Avenue, Suite D, Portsmouth, NH 03801

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because “those activities are not exempted under RSA 155-E:2 or RSA 155-E:2-a.” First NOV at 3-4. The First NOV also identified that the Property was in violation of Section 12 of the Zoning Ordinance because the Property is within the Aquifer Protection District and IFH’s removal of earth materials was not a permitted use in the Aquifer Protection District. First NOV at *4. The First NOV identified that IFH was required to take the following action:

You are required to obtain any and all necessary permits and approvals to engage in excavation activities on the Property, ***including, but not limited to***, (a) applying for and obtaining Site Plan Review for any excavation activities; (b) applying for and obtaining a variance to allow for excavation activities in the General Residence and Agricultural Zone; and (c) applying for and obtaining an Alteration of Terrain permit from DES to engage in those excavation activities, and (d) applying for and obtaining a Building Permit for construction of a single family residence.

See First NOV at * 6. This corrective action was to be initiated on or before February 4, 2021. IFH did not file any appeal of any of the interpretations, applications, or constructions set forth in the First NOV.

When the above-referenced corrective action was not taken by February 4, 2021, the Town issued a second Notice of Violation/Cease and Desist Order on February 10, 2021 (“Second NOV”). A true and accurate copy of the Second NOV is attached hereto as **Exhibit B**. The Second NOV reiterated the corrective action required. See generally Second NOV. The Second NOV also addressed and disagreed with a historic assertion and contention of IFH, namely that the subject excavation was an exempt incidental exaction pursuant to RSA 155-E:2-a and thus exempt from the excavation prohibitions under the Zoning Ordinance and RSA 155-E. See Second NOV at *11-12. IFH failed to appeal any of the interpretations, applications, or constructions set forth in the Second NOV.

On April 7, 2021, IFH attended a pre-application “conceptual discussion” with the Planning Board. A copy of the meeting minutes associated with that conceptual discussion are part of the Record transmitted to the ZBA in this Appeal. It should be noted that “[a]ll discussions during the preapplication review phase are non-binding” pursuant to Section 3.1 of the Town’s Site Plan Review Regulations. During a “conceptual consultation,” “the applicant may bring in a site location or a base map of the site which provides minimal detail of the proposal,” and the Planning Board’s review of that site location or base map is limited. See Section 3.1.1 of the Town’s Site Plan Review Regulations. At that April 7, 2021 conceptual discussion, IFH was again informed that the excavation did not qualify as an incidental excavation and that a variance was required – the meeting minutes do not reflect the extent of the variance relief that would be required, nor any specific proposal, as IFH’s principal expressed in general terms that “his intent was to build a house, not conduct a gravel operation,” notwithstanding that IFH acknowledged publicly that the materials excavated were used as fill on another subdivision owned by IFH’s

affiliate, San-Ken Homes, Inc., on Goldsmith Road. See April 7, 2021 Planning Board Meeting Minutes at *2-3.

Thereafter, presumably in response to the Planning Board's guidance as to the need to obtain a variance, IFH's principal inquired with Town Administrator and Interim Code Enforcement Officer Paul Branscombe as to the variance relief required to bring the Property into compliance with the Zoning Ordinance. On April 15, 2021, Mr. Branscombe notified IFH's principal that IFH would need variances from the following Zoning Ordinance provisions in order to bring the Property into compliance:

- Section 4.1 of the Town of Wilton Zoning Ordinance, prohibiting excavation of earth materials in areas other than the Gravel Excavation District;
- Section 4.10.10 of the Town of Wilton Zoning Ordinance, requiring erosion and sediment control measures on any construction in Wilton;
- Section 12.4 (i) of the Town of Wilton Zoning Ordinance, prohibiting excavation uses in the Aquifer Protection Zone unless an Excavation Permit has been issued.

A true and accurate copy of the April 15, 2021 Letter is attached hereto as **Exhibit C**. Mr. Branscombe's April 15, 2021 letter also states that:

In addition, if the ZBA authorizes the proposed excavation use on the Property, under Section 9B.6. 1 of the Zoning Ordinance related to setbacks and buffers related to excavations, you would still need to either (1) restore the slopes on several portions of the Property, namely within the three hundred (300) foot buffer along the northerly lot line, or (2) obtain a variance to allow for excavation activities to take place within the required three hundred (300) foot buffer from a public road and the lot-line of a disapproving abutter. Based on the "Exhibit Plan" submitted by Fieldstone Land Consultants, PLLC dated February 1, 2021, excavation activities have taken place within the required three hundred (300) foot buffer, which are clearly in violation of the required Performance Standards for excavations.

See April 15, 2021 Letter at *1-2. Notwithstanding that Mr. Branscombe was an individual designated and duly authorized to enforce the Zoning Ordinance, see RSA 676:5, :15, :17, and :17-a, IFH did not appeal any interpretation, application, or construction of the Zoning Ordinance set forth in Mr. Branscombe's April 15, 2021 letter.

On April 16, 2021, IFH filed an application for a variance with the ZBA ("the Variance Application"). A true and accurate copy of the Variance Application is attached hereto as **Exhibit D**. The Variance Application only sought relief from Section 4.1 and Section 12 of the Zoning Ordinance to construct a single-family home on the Property. On April 27, 2021, Land Use

Administrator Michele Decoteau contacted IFH's engineer to "give [him] some feedback on the completeness of the application," stating that she had "a few additional parts of the ordinance that [he] may want to review to see if they pertain to [IFH's] property." See M. Decoteau's April 27, 2021, email to J. Rokeh a true and accurate copy of which is attached hereto as **Exhibit E**. Ms. Decoteau provided IFH's engineer with handwritten comments, stating "[p]lease also consider reviewing sections 9B.2, 9B.6.1, 9B.6.2 and 6.1." See M. Decoteau's April 27, 2021. Ms. Decoteau's comments and suggestions were not followed on the basis that IFH believed that the excavation "was only excavation incidental to building a [Single Family Home] and subject to RSA 155-E:2-a" (notwithstanding IFH's failure to administratively appeal the Second NOV or Mr. Branscombe's prior determination on that point).

During the ZBA's consideration of the Variance Application, IFH, for the first time, presented its current proposal for the Property. The ZBA granted the variance as to Section 4.1, but found that the grant of relief from Section 12.4 was moot as IFH still had to get relief and approval from the Planning Board as part of the Excavation Site Plan Review process.

II. **The ZBA does not have jurisdiction over this Appeal.**

At the outset, the ZBA does not have jurisdiction to consider whether IFH is required to obtain variance relief from Section 9B.6.1. As reflected above, on April 15, 2021, Mr. Branscombe, as the duly authorized Interim Code Enforcement Officer, informed IFH's principal in writing of the need for a variance from the setback and buffer requirements for excavations set forth in Section 9B.6.1 of the Zoning Ordinance. See April 15, 2021 Letter at *1-2. Mr. Branscombe was an administrative officer as that term is defined by RSA 676:5, II(a) because he was an official who "has responsibility for enforcing the ordinance." Mr. Branscombe's April 15, 2021 letter was a "decision of the administrative officer" under RSA 676:5, II(b) because that letter constitutes a "decision involving construction, interpretation, [and] application of the terms of the ordinance" that was implicated as part of the Town's code enforcement proceedings. Pursuant to Section 5 of the ZBA's Rules of Procedures, "appeals from administrative decisions taken under RSA 676:5 shall be filed within 30 days of the decision."

IFH's failure to appeal the initial administrative decision that a variance was required from Section 9.6B.1 of the Zoning Ordinance divests the ZBA of jurisdiction to consider that issue and, ultimately, IFH has waived and forfeited this argument. See Atwater v. Plainfield, 160 N.H. 503, 513 (2010); Appeal of Cheney, 130 N.H. 589, 594 (1988) (holding that failure to raise argument at the earliest possible time results in forfeiture of claim of error); Star Vector Corp. v. Town of Windham, 146 N.H. 490, 495 (2001); see also Cronin v. Town of Conway, 2016 N.H. LEXIS 99 (Non-Precedential Supreme Court Order) (decided April 1, 2016) (holding that property owner's failure to timely challenge board of selectmen's RSA 155-B order to raise, repair, and remove a hazardous building deprived owner's ability to raise claims of error with the Supreme Court).

Therefore, the ZBA should summarily deny IFH's Administrative Appeal related to Section 9B.6.1.

Further, the Planning Board questions whether the other aspects of IFH's Administrative Appeal are ripe for adjudication by the ZBA and, thus, whether the ZBA has jurisdiction to adjudicate this appeal at this time. The subject appeal appears to arise from the Planning Board's February 16, 2022 meeting. During that meeting, Board Chair Alec McMartin expressed his position that the Applicant "would need to obtain waivers of the requirements set out in RSA 155-E:4-a, II, RSA 155-E:4-a, VII, and RSA 155-E:5" in accordance with the process set forth in RSA 155-E:5-b and RSA 155-E:7 and that the Applicant "needed to obtain from the Zoning Board variances from Sections 6.1, 9B.6.1 and 9B.6.4." See Planning Board's February 16, 2022 Meeting Minutes at *4. Mr. McMartin also expressed that, should additional information submitted as part of the Excavation Site Plan Review process reflect that the seasonal high water table is less than the 10 foot minimum depth, additional relief would be required. Id. at *5. Board Vice Chair Karon Walker further stated that, absent the above-referenced waivers from the provisions set forth in RSA chapter 155-E and other required waivers, the Planning Board "was not allowed to issue a permit." Id. Ultimately, the Planning Board voted to continue the application to March 16, 2022; the Planning Board did not deny the Application nor find that the Application was incomplete. See id.

As this matter is an appeal of an administrative decision, thus implicating RSA 674:33 and RSA 676:5, III, it is critical to review those statutes to ascertain whether the ZBA does, in fact, have jurisdiction. RSA 676:5, III provides that "if, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section." (Emphasis added.) As reflected above, there has been no formal vote taken by the Planning Board regarding the need for variances or waivers. Rather, Members McMartin and Walker identified additional variance relief which they believed was necessary. The only matter voted upon by the Planning Board on February 16, 2022 was the motion to continue, which appeared predicated upon the fact that the Applicant had failed to seek or apply for various necessary waivers under State law and the Town's Excavation Site Plan Review Regulations in order to submit a complete application. See February 16, 2022 Planning Board Minutes at *5.

III. The ZBA should deny IFH's Appeal on the Merits

The ZBA should also deny IFH's Appeal because Sections 6.1, 9B.6.1 and 9B.6.4 of the Zoning Ordinance are applicable.

Turning first to IFH's arguments regarding Sections 9B.6.1 and 9B.6.4, IFH asserts that those performance standards are not applicable because those performance standards only apply to excavations within the Gravel Excavation District and the subject excavation is occurring within the General Residential and Agricultural District. IFH asserts that Sections 9B.6.1 and 9B.6.4 are "limited to properties within the Gravel Excavation District and deal directly with gravel pit operations." IFH also suggests that, because the ZBA did not require IFH to obtain a variance from Section 9B.6.1 or 9B.6.4, those provisions do not apply.

IFH's argument is based on an absurd interpretation of Sections 9B.6.1 and 9B.6.4 that is contrary to the plain language and the spirit and intent of those provisions. Section 9B.6 sets forth the "Requirements and Performance Standards" related to excavation activities. Section 9B.6.1, captioned "Setbacks and Buffers," provides:

All areas used for the excavation of earth materials shall be set back and separated by an undisturbed natural wooded buffer at least three-hundred (300) feet from all public roads except Webb Road and from all lot lines, except that:

- a. The setback may be reduced to twenty-five (25) feet from other lots in the Gravel Excavation District with the written permission of the lot owner.
- b. There is no setback requirement from lot lines between multiple lots containing land encompassed in a single excavation.
- c. Access roads may be constructed through the buffer area.

Section 9B.6.4 provides:

All topsoil removed during the excavation shall be stockpiled on site, and shall be spread over the site during the reclamation of the excavated area or any portion thereof. Additional topsoil shall be brought from off-site, as required, to provide a minimum depth of four (4) inches. The excavator may apply to the Planning Board for permission to remove a portion of the stockpiled topsoil from the site, subject to a determination that the remaining material will be sufficient to cover the reclaimed area to a minimum depth of six (6) inches.

(Emphasis added.)

By its plain and ordinary meaning, Section 9B.6.1 applies to all excavations when it states that "all areas used for the excavation of earth materials shall be set back." (Emphasis added.) Similarly, Section 9B.6.4 applies to "all topsoil removed during the excavation," without regard to

the exact location of the excavation. (Emphasis added.) Neither Section 9B.6.1 nor 9B.6.4 reference any limitation to excavations within the Gravel Excavation District. See Mountain Valley Mall Assocs. V. Municipality of Conway, 144 N.H. 642, 648 (2000) (stating that it is inappropriate to “add words that the Town did not see fit to include” when interpreting the Zoning Ordinance). Indeed, the only reference to the Gravel Excavation District in Section 9B.6’s Performance Standards is in subparagraph (a), which reduces the applicable setback for abutting properties when that abutting property is (a) also in the Gravel Excavation District and (b) provides written permission. Had the Town intended to limit the Performance Standards only to excavations within the Gravel Excavation District, Section 9B.6’s introductory clause would have identified such a limitation; it does not. Further, had the Town intended to limit Section 9B.6.1. to excavations within the Gravel Excavation District, that section would not have needed to make an exception to the setback requirement for other lots within the Gravel Excavation District; and yet it does. The wording of Sections 9B.6’s Performance Standards clearly evinces the intent to apply to all excavations, not just excavations within the Gravel Excavation District. Therefore, the ZBA should affirm the Planning Board’s interpretation (to the extent the ZBA finds that the Planning Board made an interpretation).

The Planning Board’s interpretation would also accord with sound policy and the spirit and intent of the Zoning Ordinance. Clearly, Section 9B.6.1 is intended to ensure that abutting properties have an adequate buffer and protections from neighboring excavation activities. These goals and objectives are not limited to the ramifications and effects of ongoing excavations, but also gives consideration to the long-term disturbances and alterations of topography resulting from completed excavations. For instance, as was communicated by an abutting property owner during the Planning Board’s April 7, 2021 conceptual discussion, the excavation activities on the Property were in such close proximity to abutting properties that those activities undermined and jeopardized retaining walls on abutting properties. See Planning Board’s April 7, 2021 Meeting Minutes at *2. Concerns about slope stability are not limited merely to properties in the Gravel Excavation District. Rather, those concerns are heightened when excavations are occurring outside of the Gravel Excavation District – where the topography and site conditions may not be as well suited for excavation activities.

Section 9B.6.4 is clearly intended to ensure that all excavation sites are appropriately reclaimed using native soils that are suited for the site and for its revegetation. Again, this interest is not limited to properties that may be located within the Gravel Excavation District. Such an interest is actually heightened where the need for site restoration and reclamation may be more pressing, as is the case here, where the excavation is in close proximity to residential uses that may not be compatible with the excavation activities.

It is also important to note that, contrary to IFH’s assertion, the scope of the Planning Board’s inquiry is to determine to what extent excavation should have been allowed based on its original, pre-excavation state. Stated differently, the purpose of both the variance and the

Excavation Site Plan review is to bring the property into compliance where proper approvals were not first obtained as is required. The Planning Board does not have to accept the Property as it presently exists in its non-permitted and non-compliant state. The Planning Board is permitted to consider the effect of the excavation on the Property and abutting properties prior to alteration.

This includes considering the excavation activities on the Property as commercial because, per IFH's own representations, the excavation that took place on the Property was commercial in nature. See Planning Board's April 7, 2021 Meeting Minutes at *3. Indeed, IFH's own principal stated that "the gravel removed from this lot was transferred without compensation to another job site in Wilton on Goldsmith Drive," a development that IFH's affiliate Sam-Ken Homes, Inc. developed, subdivided, and sold. Id. Pursuant to the Excavation Site Plan Regulations and the Town's Zoning Ordinance, these activities were not "incidental" excavations exempt from regulation where (a) IFH removed in excess of 500 cubic yards of material and (b) IFH failed to acquire all necessary permits and approvals necessary for the construction of a single-family home prior to engaging in excavation activities. See Section 3.4 of the Excavation Site Plan Review Regulations; Section 4.1 of the Zoning Ordinance; RSA 155-E:2-a Therefore, IFH's efforts to distinguish the excavation on the Property from a commercial gravel pit ignores IFH's prior activities on the Property, which were commercial in nature.

Assuming, for the sole sake of argument, that the language of Sections 9B.6.1 or 9B.6.2 was limited to the Gravel Excavation District, this fact is not determinative on whether the Performance Standards should apply to the excavation on the Property. Such an argument ignores a critical fact about the excavation on the Property – it was not permitted under the Zoning Ordinance and required after-the-fact variance relief. The excavation activities that occurred on the Property were not supposed to occur on the Property because it was not permitted in the applicable Zone. Even if the Zoning Ordinance limited the application of the Performance Standards to excavations within the Gravel Excavation District, that limitation would only exist because excavations are strictly limited to the Gravel Excavation District – it would not make sense to craft an ordinance to impose performance standards that applied to uses in districts where that use is prohibited. In this way, the ZBA's November 9, 2021 variance should be interpreted as modifying the boundaries of the Gravel Excavation District such that, the Gravel Excavation District (and its Performance Standards) are applied to the Property.

Turning to IFH's argument regarding Section 6.1, IFH asserts that variance relief is not necessary because the ZBA previously stated that the variance is "incidental to the construction of a single family dwelling on the Property" and that the ZBA "did not require [IFH] to obtain a variance under Section 6 of the Zoning Ordinance because the variance from Article 4.1. "was sufficient." This is a misreading of the ZBA's decision, as well as a misapplication of New Hampshire law.

The ZBA is a body of limited jurisdiction, and that jurisdiction is limited to the powers set forth in RSA 674:33. In exercising its authority to grant variances and in order to have jurisdiction to grant a variance, the ZBA must provide notice in accordance with RSA 676:7. See Hussey v. Barrington, 135 N.H. 227, 230 (1992) (stating that compliance with notice requirement is prerequisite to ZBA's jurisdiction). To serve as notice sufficient to confer jurisdiction, the notice must identify the specific provision of the Zoning Ordinance from which variance relief is sought. Therefore, as a body of limited jurisdiction, the ZBA issues or denies variances sought in an application. Abutters make decisions as to whether and to what extent to participate in proceedings based on the relief being sought as identified in the notice. The ZBA does not "require" applicants to seek a variance; by law it can only rule on applications that are submitted and properly noticed. IFH did not seek a variance from Section 6.1 of the Zoning Ordinance (nor from Section 9B.6.1 or 9B.6.4), and the notices issued related to the variance application make no reference to Sections 6.1, 9B.6.1 or 9B.6.4. Therefore, even if IFH were correct that the ZBA somehow absolved IFH of needing to seek variance relief from other provisions of the Zoning Ordinance (a position with which the Planning Board strongly disagrees) the ZBA did not have jurisdiction to do so.¹

IV. Conclusion

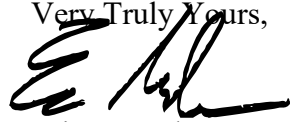
IFH's Administrative Appeal is clearly intended to avoid the application of protective provisions of the Zoning Ordinance, provisions intended to protect the Town, abutting properties, and the environment. The relief sought by the IFH, in addition to being contrary to the Zoning Ordinance and the law, is contrary to the public interest. For the reasons set forth above, IFH's Administrative Appeal should be denied.

¹ The same can be said with regard to IFH's assertion that the ZBA "*did not* require [IFH] to comply with the provisions of Section 9B.6.4," implying that the ZBA somehow commented on the applicability of that provision. (Emphasis in original.) The ZBA is a body of limited jurisdiction, and because no variance relief was sought from Section 9B.6.4, the ZBA did not absolve or issue a decision related to the need for variance relief from that section.

Regardless, IFH's assertion is factually incorrect. During the ZBA's hearing, when IFH's counsel commented that a reclamation plan would not be needed as part of the Planning Board Site Plan approval, Mr. Faiman commented that the reclamation plan "was part of the Site Plan approval process." See ZBA's November 9, 2021 Meeting Minutes at *4. In other words, the ZBA's own meeting minutes expressly refute IFH's assertions.

The Planning Board appreciates the ZBA's careful consideration of this matter.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'E. Maher', written over the closing 'Yours,'.

Eric A. Maher, Esq.

emahe@dtclawyers.com

Cc: Wilton Planning Board

EXHIBIT A



THE STATE OF NEW HAMPSHIRE

TOWN OF WILTON

January 4, 2021

Sandra J. Lehotonen, Manager
Isaac Frye Holdings, LLC
586 Turnpike Road
New Ipswich, NH 03071

1997 Investments, LLC
586 Turnpike Road
New Ipswich 03071

**Re: Location: Isaac Frye Highway (Tax Map F, Lot 003-02)
Notice of Violation
Cease and Desist Order**

Dear Ms. Lehotonen:

This Notice of Violation and Cease and Desist Order follows my inspection of the property identified as Tax Map F, Lot 003-02 in the Town of Wilton, New Hampshire ("the Property").

Pursuant to New Hampshire RSA 155-E:1, et. seq., RSA 676:15, et. seq, 676:17, RSA 676:17-a, and the Town of Wilton Zoning Ordinance, you are hereby notified that you are in violation of the above-referenced zoning ordinance and statutory provisions regarding the Property.

I. FACTUAL BACKGROUND

The Property is an 8.85 acre parcel located in the General Residence and Agricultural District. The Property was established as part of a subdivision approval granted by the Wilton Planning Board, as reflected in the Plan titled, "Subdivision Plan, Tax Lot F/3 for H. James Kennedy, 539 Isaac Frye Highway, Wilton, NH" dated December 2015 and recorded at the Hillsborough County Registry of Deeds at Plan No. 38802. That Subdivision Approval contains the following condition: "No gravel or earth materials shall be removed from the site without further Planning Board approval."

In 2019, Kristine and Nathan Chamberlin submitted an application to the Wilton Planning Board for authorization to excavate a substantial portion of the Property, sell those excavated materials, and build a house on the Property. The Planning Board expressed at that time that such activities constituted a commercial excavation. The Chamberlin's ultimately withdrew their request for an application and did not obtain authorization to remove gravel or earth materials from the Property."

In 2020, the Town's Code Enforcement Office received complaints that excavation activities were taking place on the Property and that gravel and earth materials were being removed in violation of the

Subdivision Approval, the Town's Zoning Ordinance, the Town's Excavation Regulations, the Town's Site Plan Review Regulations, the RSA 155-E, and RSA 485-A. Witness testimony and the Town's observations reflects that between 3,000 and 5,000 cubic yards of material have been excavated and hauled off site.

On December 28, 2020, Matt Fish and I visited the Property and spoke to Mr. T. Rocca from Rocca Excavation. During that inspection, we informed Mr. Rocca that the excavation was not allowed without any permits or approvals. Mr. Lehtonen was notified on forthcoming Cease & Desist order and that 155-E:2-a excavation was not incidental to construction in this case.

On December 29, 2020, I visited the Property accompanied by three neighbors, Matt Bangert, Shannon Linn and Andrew Burnes. We spoke with Mr. K. and Mr. T. Rocca from Rocca Excavation. During that visit, we informed them that the excavation was not allowed without any permits or approvals. They agreed to stop moving materials.

II. REGULATIONS, PROVISIONS, SPECIFICATIONS WHICH ARE BEING VIOLATED.

RSA 676:15, :17, and :17-a authorize the Town to enforce the provisions of the Town's Zoning Ordinance, Site Plan Review Regulations, Excavation Site Plan Review Regulations, and any condition set forth in any land use approval. RSA 155-E:10 allows for the regulator in any community to enforce the provisions of RSA 155-E in the same manner as set forth in RSA 676:16, :17, and :17-a.

a. You are in violation of RSA chapter 155-E and the Town's Excavation Site Plan Review Regulations

CHAPTER 155-E LOCAL REGULATION EXCAVATIONS

RSA 155-E:1 – Definitions. “In this chapter: . . .

II. “Excavation” means a land area which is used, or has been used, for the commercial taking of earth, including all slopes.”

RSA 155-E:2 – Permit Required: “No owner shall permit any excavation of earth on his premises without first obtaining a permit therefor” . . . except in limited circumstances, none of which are applicable to these circumstances.

RSA 155-E:3 – Application for Permit: “Any owner or owner's designee subject to this chapter shall, prior to excavation of his land, apply to the regulator in each city or town involved for a permit for excavation.”

RSA 155-E:10 Enforcement:

I. The regulator or its duly authorized agent may suspend or revoke the permit of any person who has violated any provision of his permit or this chapter or made a material misstatement in the application upon which his permit was granted. Such suspension or revocation shall be subject to a motion for rehearing thereon and appeal in accordance with RSA 155-E:9.

II. Fines, penalties, and remedies for violations of this chapter shall be the same as for violations of RSA title LXIV, as stated in RSA 676:15, 676:17, 676:17-a, and 676:17-b. In addition, the regulator or a person directly affected by such violation may seek an order from the superior court requiring the violator to cease and desist from violating any provision of a permit or this chapter and to take such action as may be necessary to comply with the permit and this chapter. If the

superior court issues such an order, the superior court in its discretion may award all costs and attorneys' fees incurred in seeking such an order to the regulator or person directly affected by such violation.

III. To ascertain if there is compliance with this chapter, a permit issued hereunder or an order issued hereunder, the regulator or its duly authorized agent may enter upon any land on which there is reason to believe an excavation is being conducted or has been conducted since August 24, 1979.

RSA 155-E:11 Regulations:

I. The regulator may adopt such regulations as may be reasonably necessary to carry out the provisions of this chapter, including adopting a permit fee schedule. Whenever such local regulations differ from the provisions of this chapter, the provision which imposes the greater restriction or higher standard shall be controlling, except that no local regulation shall supersede the sole applicability of express standards under RSA 155-E:2, I, III, and IV.

TOWN OF WILTON EXCAVATION SITE PLAN REVIEW REGULATION

Article 3.0 – Permit Required – “No owner shall permit any excavation of earth on his premises without first obtaining a permit” unless the excavation falls under an exception that does not apply.

Article 5.0 Application for Permit – “Any owner or owner's designee subject to this chapter shall, prior to excavation of or continuance or expansion of excavation of any land, apply to the Planning Board for an excavation permit and submit a reclamation plan. . .”

Violation: The Town has determined that the excavation activities taking place on the Property constitutes the commercial taking of earth because the Property is owned by an LLC the purpose of which is “other activities related to real estate” and is an affiliated entity to a variety of other entities owned by Sandra and Kenneth Lehtonen. Upon information and belief, the gravel and earth materials removed from the Property and used in furtherance of other commercial ventures. Neither you, nor any of your predecessors in title have obtained a permit under RSA chapter 155-E and such conduct constitutes a violation of RSA 155-E:2. As such, the Property is in violation of RSA chapter 155-E and the Town of Wilton’s Excavation Site Plan Review Regulations.

b. **You are in violation of Section 4.1 of the Town of Wilton Zoning Ordinance.**

TOWN OF WILTON ZONING ORDINANCE

Article 4 – General Provisions

Section 4.1: Alteration and Removal of Materials: “Excavation of earth materials regulated under RSA 155-E are permitted only in the Gravel Excavation District under the restrictions of Chapter 9B of [the Wilton Zoning Ordinance], except where exempted under the provisions of RSA 155-:2 and RSA 155-E:2-a.”

Violation: You are in violation of Section 4.1 of the Wilton Zoning Ordinance because the removal of gravel and earth materials from the Property constitutes the excavation of earth materials regulated under RSA 155-E and the Property is not located in the Gravel Excavation District. Further, the excavation activities are not exempted under RSA 155-E:2 or RSA 155-E:2-a. While your representative on the Property expressed his belief that the excavation activities was exempt as an incidental and, thus, exempt

under RSA 155-E:2-a, I(a), this is not correct because that exception requires that the excavation be “exclusively incidental to the construction or alteration of a building or structure or the construction or alteration of a parking lot or way . . . on a portion of the premises where the removal occurs” and only if all required permits for the construction of that structure have been obtained. The removal of the materials is not “exclusively incidental” to the construction or alteration of a building or structure, as reflected by the fact that no permits have been pulled for any structure or building on the site and the aggregate materials are being used off-site.

c. **You are in Violation of Section 12.4(i) of the Wilton Zoning Ordinance.**

Article 12 – Aquifer Protection District

Section 12.4(i): *Prohibited Uses:* “The following uses shall not be permitted in the Aquifer Protection District: . . . (i) Excavations of sand or gravel, except those conducted in accordance with an approved Excavation Permit issued pursuant to the Excavation Regulations of the Town.”

Violation: The Property is located in the Aquifer Protection District. The Property has been used to excavate sand and gravel. You do not have a permit to excavate sand and gravel. Therefore, you are in violation of Section 12.4 of the Wilton Zoning Ordinance.

d. **You are in Violation of the Town of Wilton Site Plan Regulations**

TOWN OF WILTON SITE PLAN REVIEW REGULATIONS

Article 2—Definitions

Section 2.0.11 – *Development:* “A planning or construction project involving substantial property improvement and, usually, a change of land use character within the site; the act of using land for building or extractive purposes.”

Article 5 – General Requirements for Site Plans

Section 5.1 – *Compliance with the Site Plan Review Regulations:* “No land development shall be started until a final plat, prepared in accordance with these regulations has been approved by the [Planning Board] and all other required permits have been issued.”

Violation: The Property is in violation of Section 5.1 of the Site Plan Review Regulations because you have used the Property for extractive purposes and changed the land use character of the Property without obtaining prior approval from the Wilton Planning Board and without obtaining an excavation permit.

e. **You are in Violation of the Conditions of Approval imposed on the Planning Board’s 2015 Subdivision Approval.**

Condition 9 of Approval in 2015 Subdivision of Approval: “No gravel or earth materials shall be removed from the site without further Planning Board approval.”

Violation: You have violated the Planning Board’s 2015 Approval regarding the Property because you have removed gravel and/or earth material from the site without Planning Board approval.

f. **You are in Violation of RSA 485-A and N.H. Code of Administrative Rules Env-Wq 1500.**

RSA CHAPTER 485-A: WATER POLLUTION AND WASTE DISPOSAL

RSA 485-A:17 – *Terrain Alteration*

“1. Any person proposing to dredge, excavate, fill, mine, transport forest products or undertake construction in or on the border of the surface waters of the state, and any person proposing to significantly alter the characteristics of the terrain, in such a manner to impede the natural runoff or create an unnatural runoff, shall be directly responsible to submit to the department detailed plans concerning such proposal and any additional relevant information request by the department, at least 30 days prior to undertaking any such activity.”

PART Env-Wq 1502 DEFINITIONS

Env-Wq 1502.58 – “Significantly alter the characteristics of the terrain’ means to undertake any activity anywhere in the state that changes or disturbs the terrain so as to impede the natural runoff or create an unnatural runoff that has the potential to adversely affect water quality in surface waters of the state. Examples of activities that significantly alter the characteristics of the terrain include, but are not limited to:

- (a) Timber harvesting operations as covered by RSA 485-A:17, IV; and
- (b) Earth moving activities that result in a temporary or permanent disturbance of:
 - (1) An area that:
 - a. Is more than 2,500 square feet in size;
 - b. Is within 50 feet of any surface water;
 - c. Is sloped such that runoff is in the direction of the surface water; and
 - d. Is subject to runoff over 50 feet or more of land having a grade of 25% or greater when measured at 2-foot intervals; or

PART Env-Wq 1503 PERMIT REQUIREMENTS

Env-Wq 1503.02 Permit Required.

“(a) Subject to (b), below, no person shall dredge, excavate, place fill, mine, transport forest products, or undertake construction in or on the borders of surface waters of the state and no person shall undertake any activity that will significantly alter the characteristics of the terrain without a general permit by rule, a timber harvesting permit by rule, or an alteration of terrain (AOT) permit obtained in accordance with this chapter.

...

(d) A disturbance shall be considered an unpermitted disturbance if it is not a normal agricultural operation as defined in Env-Wq 1502 and does not qualify for a general permit by rule or a timber harvesting permit by rule, and it:

- (1) Is not covered by an AOT permit or a site-specific permit that remains in effect; or
- (2) Is covered by an AOT permit or a site-specific permit that remains in effect but is not in accordance with the approved plans and specifications.

(e) Any disturbance for which an AOT permit is required that occurs, in whole or in part, prior to the permit being applied for or obtained shall be considered an unpermitted disturbance for which the person undertaking the work shall file an after-the-fact application as specified in Env-Wq 1503.31.”

Violation: The Property is in violation of RSA chapter 485-A and the regulations enacted under RSA chapter 485-A because you have engaged in excavation and dredging activities that significantly alter the character of the terrain without obtaining an alteration of terrain permit. Under RSA 485-A:22, III-a, the Town is authorized to enforce violations of RSA 485-A:17.

III. **CORRECTIVE ACTION REQUIRED/TIME FRAME TO COMPLETE CORRECTIVE ACTION**

You are ordered to take the following corrective action:

- (1) Immediately cease all excavation and earth moving activities on the Property;
- (2) You are required to obtain any and all necessary permits and approvals to engage in excavation activities on the Property, including, but not limited to, (a) applying for and obtaining Site Plan Review for any excavation activities; (b) applying for and obtaining a variance to allow for excavation activities in the General Residence and Agricultural Zone; (c) applying for and obtaining an Alteration of Terrain permit from DES to engage in those excavation activities, and (d) applying for and obtaining a Building Permit for construction of single family residence.

You are to cease engaging in excavation and earth moving activities immediately. You are to commence the remainder of the corrective action no later than February 4, 2021 through the submission of application for all necessary permits and approvals to undertake the corrective action outlined above. Thereafter, you are to diligently pursue said applications and take all action authorized and required under said applications and subject to such conditions as may be imposed by any land use board or regulatory bodies.

Failure to take the corrective action within the time frames set forth herein will lead to further legal action, including but not limited to, pursuing relief in District or Superior court under RSA 676:15, RSA 676:17, and/or RSA 676:17-a.

IV. **NOTICE OF VIOLATION AND CEASE AND DESIST ORDER/COMMENCEMENT OF FINES AND PENALTIES**

This written Notice of Violation and Cease and Desist Order is given to satisfy the fines and penalties requirement of RSA 676:17, I and II, which provide in part that:

- I. Any person who violates any of the provisions of this title, or any local ordinance, code, or regulation adopted under this title, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person; and shall be subject to a civil penalty of \$275 for the first offense, and \$550 for subsequent offenses, for each day that such violation is found to continue after the conviction date or

after the date on which the violator receives written notice from the municipality that the violator is in violation, whichever is earlier. Each day that a violation continues shall be a separate offense.

- II. In any legal action brought by a municipality to enforce, by way of injunctive relief as provided by RSA 676:15 or otherwise, any local ordinance, code or regulation adopted under this title, or to enforce any planning board, zoning board of adjustment or building code board of appeals decision made pursuant to this title, or to seek the payment of any fine levied under paragraph I, the municipality shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action. For the purposes of this paragraph, recoverable costs shall include all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses.

V. MOTION FOR SUMMARY ENFORCEMENT

A Motion for Summary Enforcement of this Order shall be made to the of the district in which the Property is situated unless the above-referenced corrective action is taken within the time provided, or unless an answer is filed within 20 days, as provided in RSA 676:17-a, V.

Failure to either take the corrective action, or to file an answer, may result in corrective action being taken by the Town, and if the Town takes that corrective action, the Town's costs shall constitute a lien against the real state, enforceable in the same manner as real estate taxes including possible loss of the Property if not paid.

VI. NOTICE OF FINES FOR ONGOING VIOLATIONS

You are hereby notified that failure to take the corrective action required in this Notice of Violation shall constitute a violation of RSA 677:17 and RSA 677:17-a, thus subjecting you to a fine of \$275 per day that such violations continue. As such, if you do not complete the corrective actions set forth above by the time frames set forth above, you will be subject to a \$275.00 fine for the first day of offences and \$550.00 for each day of thereafter that corrective action is not completed.

If you have any questions regarding this **NOTICE OF VIOLATION**, you should promptly contact Norma Ditri, Town of Wilton Inspector/Code Enforcement Officer at (603) 654-3960.

TOWN OF WILTON
BUILDING INSPECTOR/CODE ENFORCEMENT
OFFICER


Norma Ditri, Building Inspector

Cc: Eric A. Maher, Esq.
Wilton Select Board

EXHIBIT B



THE STATE OF NEW HAMPSHIRE
TOWN OF WILTON

February 10, 2021

Sandra J. Lehotonen, Manager
Isaac Frye Holdings, LLC
586 Turnpike Road
New Ipswich, NH 03071

1997 Investments, LLC
586 Turnpike Road
New Ipswich, NH 03071

Re: Location: Isaac Frye Highway (Tax Map F, Lot 003-02)
SECOND NOTICE OF VIOLATION
Cease and Desist Order

Dear Ms. Lehotonen:

This letter constitutes a Second Notice of Violation and Cease and Desist Order with regard to the property identified as Tax Map F, Lot 003-02 in the Town of Wilton, New Hampshire ("the Property").

The Town issued a Notice of Violation and Cease and Desist Order on January 4, 2021. To date, you have not taken sufficient corrective action to address the numerous violations of the provisions of the Town of Wilton Zoning Ordinance and New Hampshire statutes, including, but not limited to, RSA 155-E:1, et. seq., RSA 676:15, et. seq., 676:17, RSA 676:17-a, RSA 485-A and N.H. Code of Administrative Rules Env-Wq 1500, and the Property remains in violation of those ordinances, regulations, and statutes.

I. FACTUAL BACKGROUND

The Property is an 8.85-acre parcel located in the General Residence and Agricultural District. The Property was established as part of a subdivision approval granted by the Wilton Planning Board, as reflected in the Plan titled, "Subdivision Plan, Tax Lot F/3 for H. James Kennedy, 539 Isaac Frye Highway, Wilton, NH" dated December 2015 and recorded at the Hillsborough County Registry of Deeds at Plan No. 38802. That Subdivision Approval contains the following condition: "No gravel or earth materials shall be removed from the site without further Planning Board approval."

Prior to that subdivision, prior owners of the Property had sought authorization to excavate the Property, including in 2006 when a variance was sought to excavate the site prior to subdividing the house for multi-unit residential housing, which was denied. In 2007, H. James Kennedy sought approval for a subdivision that called for the removal of 90,000 cubic yards of material, that was denied for seeking to remove more material was not incidental to construction.

In 2019, Kristine and Nathan Chamberlin submitted an application to the Wilton Planning Board for authorization to excavate a substantial portion of the Property, sell those excavated materials, and build a house on the Property. The Planning Board expressed at that time that such activities constituted a commercial excavation. The Chamberlin's ultimately withdrew their request for an application and did not obtain authorization to remove gravel or earth materials from the Property.

In 2020, the Town's Code Enforcement Office received complaints that excavation activities were taking place on the Property and that gravel and earth materials were being removed in violation of the Subdivision Approval, the Town's Zoning Ordinance, the Town's Excavation Regulations, the Town's Site Plan Review Regulations, the RSA 155-E, and RSA 485-A. Witness testimony and the Town's observations reflects that between 3,000 and 5,000 cubic yards of material have been excavated and hauled off site (plans that you have submitted reflects 35,100 square feet of impacted area on the Property).

On December 28, 2020, Matt Fish and Building Inspector Norma Ditri visited the Property and spoke to Mr. T. Rocca from Rocca Excavation. During that inspection, Mr. Fish and Ms. Ditri informed Mr. Rocca that the excavation was not allowed without any permits or approvals. Mr. Lehtonen was notified on forthcoming Cease & Desist order and that 155-E:2-a excavation was not incidental to construction in this case.

On December 29, 2020, Ms. Ditri visited the Property accompanied by three neighbors, Matt Bangert, Shannon Linn and Andrew Burnes. Ms. Ditri spoke with Mr. K. and Mr. T. Rocca from Rocca Excavation. During that visit, Ms. Ditri informed them that the excavation was not allowed without any permits or approvals. Those individuals agreed to stop moving materials.

On January 4, 2021, Ms. Ditri issued a Notice of Violation and Cease and Desist Order ("First Notice of Violation") and caused that Notice of Violation to be posted on the Property. A copy of the First Notice of Violation is appended to this Second Notice of Violation and is incorporated herein by reference. That First Notice of Violation required you to cease engaging in excavation activities and to apply for all necessary permits and approvals sufficient to make the excavation activities that you undertook on the Property compliant, which included Site Plan Approval from the Town's Planning Board, a variance from the Town's Zoning Board of Adjustment, and a building permit. The date by which corrective action was to be taken was February 4, 2021.

On February 1, 2021, Kenney Lehtonen submitted a letter in which he confirmed that excavation operations had ceased prior to the Town's First Notice of Violation. That represented that an alteration of terrain permit was not required and that the excavation activities that took place on the site were exempt from RSA 155-A, because, under RSA 155-A:2-a, the excavation was incidental to the construction of a single-family home and driveway.

Mr. Lehtonen's February 1, 2021 letter included an application for a building permit. The building permit that was submitted is not complete as it is missing a driveway permit, a septic permit, and a permit for a water system. Further, the building permit application only provided a cursory site plan and the fees associated with the building permit have yet to be paid.

II. REGULATIONS, PROVISIONS, SPECIFICATIONS WHICH ARE BEING VIOLATED.

See Section II of the First Notice of Violation, which is hereby incorporated by reference. A copy of the First Notice of Violation is appended to this Second Notice of Violation.

As reflected in the First Notice of Violation the Property is in violation of the following Town ordinances, regulations, and statutes:

- RSA 155-E:2, requiring an excavation permit prior to engaging in excavation activities.
- Article 3.0 of the Town of Wilton Excavation Site Plan Review Regulations, requiring a permit for the excavation of earth on property.
- Article 5.0 of the Town of Wilton Excavation Site Plan Review Regulations, requiring for an excavation permit to engage in excavation of land.
- Article 4 of the Town of Wilton Zoning Ordinance, prohibiting excavation of earth materials in areas other than the Gravel Excavation District.
- Article 12 of the Town of Wilton Zoning Ordinance, prohibiting excavation uses in the Aquifer Protection Zone unless an Excavation Permit has been issued.
- Section 5.1 of the Town of Wilton Site Plan Review Regulations, prohibiting the development of land unless a final plat, prepared in accordance with the Town's Site Plan Review Regulations, had been issued and all permits obtained.
- Condition 9 of 2015 Subdivision Approval, stating that "No gravel or earth materials shall be removed from the site without further Planning Board approval."
- RSA 485-A and N.H. Code of Administrative Rules Env-Wq 1500, requiring an Alteration of Terrain Permit to engage in various enumerated excavation activities.

In addition to the above-referenced violations, the plan that you submitted reflects that you have violated RSA 155-E:4, II and RSA 155-E:4-a, II by engaging in excavation activities within fifty (50) feet of the boundary line of a disapproving abutter, namely the Burnes and Boggs properties located to the north of the Property.

III. CORRECTIVE ACTION REQUIRED/TIME FRAME TO COMPLETE CORRECTIVE ACTION

As reflected in the First Notice of Violation, you were ordered to take the following corrective action:

- (1) Immediately cease all excavation and earth moving activities on the Property; and
- (2) You are required to obtain any and all necessary permits and approvals to engage in excavation activities on the Property, including, but not limited to, (a) applying for and obtaining Site Plan Review for any excavation activities; (b) applying for and obtaining a variance to allow for excavation activities in the General Residence and Agricultural Zone; and (c) applying for and obtaining an Alteration of Terrain permit from DES to engage in those excavation activities, and (d) applying for and obtaining a Building Permit for construction of a single family residence.

You were ordered to commence action (2) on or before February 4, 2021. To date, you have not satisfied corrective action (2).

Based on February 1, 2021 letter, it appears that you contend that you are not required to take the full extent of the actions set forth in corrective action (2) because you contend that the excavation is exempt under RSA 155-E:2-a and because you submitted a building permit with that February 1, 2021 letter. This contention is incorrect for several reasons and your submission of an incomplete building permit is not sufficient for several reasons.

First, you are incorrect that the excavation taking place on the Property is an exempt excavation under RSA 155-E:2-a and, therefore, allowed under Section 4.1 of the Town's Zoning Ordinance, Articles 3.0 and 5.0 of the Excavation Site Plan Review Regulations, or the Town's Site Plan Review Regulations. RSA 155-E:2-a exempts excavations that are:

exclusively incidental to the construction or alteration of a building or structure or the construction or alteration of a parking lot or way including a driveway on a portion of the premises where the removal occurs; provided, however, that no such excavation shall be commenced without a permit under this chapter unless all state and local permits required for the construction or alteration of the building, structure, parking lot, or way have been issued.

(Emphases added.) RSA 155-E:2-a is not applicable because you engaged in the excavation activities prior to obtaining any permits for the construction of a building, structure, or way. This is further supported by Section 3.4 of the Town of Wilton's Excavation Site Plan Review Regulations, which states that an incidental excavation "cannot be started . . . until all required state and local permits necessary for the construction . . . have been issued." Additionally, RSA 155-E:2-a is not applicable because, based on the extent of the excavation activities, it is clear that the excavation on the Property is not "exclusively incidental" to the construction of a building, structure, parking lot, or a driveway. Indeed, under Section 3.4 of the Town of Wilton's Excavation Site Plan Review Regulations, incidental excavations cannot result in the removal of more than 500 cubic yards of earth that is transported off site and if more material is removed from the site, an excavation permit is required. As such, you cannot avail yourself now of the incidental exception under RSA 155-E:2-a and you are required to obtain an excavation permit.

Second, even if your interpretation of RSA 155-E:2-a was accurate, that interpretation fails to excuse your failure to take all actions reflected in corrective action (2) because Condition No. 9 in the 2015 Subdivision Approval, which applies to the Property, requires you to obtain Planning Board approval prior to removing any gravel or earth material, regardless of the reason for that earth or gravel removal activities.

Third, you have not filed a complete application for a building permit as you have not paid the required fees, a septic design or a permit for the installation of a water system, nor have you filed an application for an excavation permit or filed an application for Site Plan Review, as required in the First Notice of Violation.

In light of your failure to apply for the required permits to render the excavations that you have performed legal, the Town hereby identifies one addition form of corrective action that may taken in the alternative to corrective action (2). If you fail to take the actions identified in corrective action (2), you must take all actions necessary to restore the Property to its prior condition and contours, including, but not limited to, (a) obtaining a special exception to place fill in any and all disturbed wetlands; (b) obtain a wetlands permit from the New Hampshire Department of Environmental Services to replace any fill removed from any disturbed, jurisdictional wetlands; (c) using clean fill to restore said contours; and (d) revegetating disturbed areas using native species for any and all disturbed vegetation.

Given the prior opportunity to commence corrective action, you are required to commence all corrective actions immediately. Once commenced all corrective actions must be diligently pursued to completion.

IV. NOTICE OF VIOLATION AND CEASE AND DESIST ORDER/COMMENCEMENT OF FINES AND PENALTIES

This written Second Notice of Violation and Cease and Desist Order is given to satisfy the fines and penalties requirement of RSA 676:17, I and II, which provide in part that:

- I. Any person who violates any of the provisions of this title, or any local ordinance, code, or regulation adopted under this title, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person; and shall be subject to a civil penalty of \$275 for the first offense, and \$550 for subsequent offenses, for each day that such violation is found to continue after the conviction date or after the date on which the violator receives written notice from the municipality that the violator is in violation, whichever is earlier. Each day that a violation continues shall be a separate offense.
- II. In any legal action brought by a municipality to enforce, by way of injunctive relief as provided by RSA 676:15 or otherwise, any local ordinance, code or regulation adopted under this title, or to enforce any planning board, zoning board of adjustment or building code board of appeals decision made pursuant to this title, or to seek the payment of any fine levied under paragraph I, the municipality shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action. For the purposes of this paragraph, recoverable costs shall include all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses.

As you have failed to take the required corrective action identified in the First Notice of Violation within the times frames required in the First Notice of Violation, the Town hereby informs you that you have committed a subsequent violation of RSA 676:17 and RSA 676:17-a. Therefore, this Second Notice of Violation provides express notification that you are and will continue to be subject to a \$550 fine for every day that such violations continue.

V. MOTION FOR SUMMARY ENFORCEMENT

Notwithstanding your failure to take corrective action, the Town reserves the right to file a Motion for Summary Enforcement of this Order in the of the district in which the Property is situated unless the above-referenced corrective action is immediately commenced.


As stated in the First Notice of Violation, failure to either take the corrective action, may result in corrective action being taken by the Town, and if the Town takes that corrective action, the Town's costs shall constitute a lien against the real state, enforceable in the same manner as real estate taxes including possible loss of the Property if not paid.

VI. NOTICE OF FINES FOR ONGOING VIOLATIONS

As you have failed to take the required corrective action identified in the First Notice of Violation within the times frames required in the First Notice of Violation, you are and will continue to be subject to fines for violation of RSA 676:17 and RSA 676:17-a. Under those statutes, each day that corrective action is not taken constitutes a separate violation. Therefore, as you have committed subsequent violations, each day that corrective action is not taken will constitute a separate violation for which you will be subject to a \$550.00 per day violation.

If you have any questions regarding this **NOTICE OF VIOLATION**, you should promptly contact Paul Branscombe at (603) 654-3299.

TOWN OF WILTON
INTERIM CODE ENFORCEMENT OFFICER

 2/10/21
Paul Branscombe, Duly Authorized

Cc: Eric A. Maher, Esq.
Wilton Select Board
Wilton Police Department

EXHIBIT C



THE STATE OF NEW HAMPSHIRE

TOWN OF WILTON

April 15, 2021

Kenneth Lehotonen, Member
Isaac Frye Holdings, LLC
586 Turnpike Road
New Ipswich, NH 03071

1997 Investments, LLC
586 Turnpike Road
New Ipswich, NH 03071

Re: Isaac Frye Highway (Tax Map F, Lot 003-02) ("the Property")

Dear Mr. Lehotonen:

This letter responds to your inquiry as to relief that should be sought from the Zoning Board of Adjustment ("ZBA") related to the above-referenced Property.

The relief that should be sought is identified and explained in the Town's First and Second Notice of Violation, served on you on January 11, 2021 and February 10, 2021, respectively. However, to reiterate the information in the Notices of Violation, you must obtain variances from the following provisions of the Town of Wilton Zoning Ordinance:

- Section 4.1 of the Town of Wilton Zoning Ordinance, prohibiting excavation of earth materials in areas other than the Gravel Excavation District;
- Section 4.10.10 of the Town of Wilton Zoning Ordinance, requiring erosion and sediment control measures on any construction in Wilton;
- Section 12.4 (i) of the Town of Wilton Zoning Ordinance, prohibiting excavation uses in the Aquifer Protection Zone unless an Excavation Permit has been issued.

In addition, if the ZBA authorizes the proposed excavation use on the Property, under Section 9B.6.1 of the Zoning Ordinance related to setbacks and buffers related to excavations, you would still need to either (1) restore the slopes on several portions of the Property, namely within the three hundred (300) foot buffer along the northerly lot line, or (2) obtain a variance to allow for excavation activities to take place within the required three hundred (300) foot buffer from a public road and the lot-line of a disapproving abutter. Based on the "Exhibit Plan" submitted by Fieldstone Land Consultants, PLLC dated February 1, 2021, excavation activities have taken place within the required three hundred (300) foot buffer, which are clearly in violation of the required Performance Standards for excavations.

The relief identified herein is related to the relief that you need to obtain from the ZBA only. If you receive a variance to allow excavation on the Property, you still will need to seek Excavation Site Plan Review and an Excavation Permit from the Wilton Planning Board.

During our last phone call, you also inquired as to the amount of fines and penalties that have accrued thus far in this code enforcement matter. Based on the First Notice of Violation, you had until February 4, 2021 to commence corrective on the Property, which included commencing the Site Plan Review process, applying for a variance, applying for a building permit, and applying for any other permits necessary for the excavation activities. While you submitted a partial application for a building permit, you did not commence all of the required corrective action by that date because you did not seek a variance and did not seek to be put on the Planning Board's agenda by February 4, 2021. As such, starting on February 5, 2021, you started to accrue \$225.00 per day in fines and penalties, per RSA 676:17 and :17-a. Those fines accrued at the rate of \$225.00 per day until February 11, 2021, when the Wilton Police Department posted the Second Notice of Violation at the Property. Per RSA 676:17 and :17-a, the issuance of the Second Notice of Violation increased the daily fines and penalties to \$550.00 per day.

To date, despite being informed in detail as to what regulations and provisions were applicable and despite being duly informed as to what steps you needed to take to comply with the Notices of Violation, you did not commence the necessary corrective action at the Property, meaning that fines and penalties continue to accrue at the rate of \$550.00 per day. The calculation of the accrued fines and penalties through today's date is as follows:

Fines at \$225.00 per day (February 5 – February 11):	\$1,575.00
Fines at \$550.00 per day (February 12 – April 15):	\$34,650.00
Total Accrued:	\$36,225.00

The total above is not inclusive of the Town's costs and legal fees associated with this matter, which shall continue to accrue and shall be recoverable in a code enforcement action per RSA 676:17 and :17-a.

I note that, in your February 19, 2021, email to me, you asserted that you did not believe a fine should have been imposed because you believed that you "followed the guidance" of the first Notice of Violation by submitting an application for a building permit and indicated that you had sought other permits related to the construction of a single-family residence. As was detailed, however, in the First Notice of Violation, you were specifically directed to apply for and obtain Site Plan Review for the excavation activities and apply for, and obtain, a variance for excavation activities in the General Residence and Agriculture Zone.

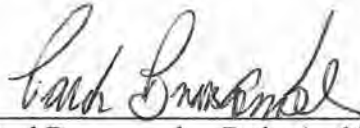
Your position appears to be based on your opinion that your activities constitute an "incidental excavation" that is exempt from excavation regulations and permissible in the General and Agricultural Zone. In the Second Notice of Violation, the Town explicitly informed you, in great detail the numerous reasons why your position was incorrect and why your excavation activities were not exempt under the "incidental excavation" exception. Despite being so informed, to date, the only additional steps that you have taken is meeting with the Planning Board for a conceptual discussion on April 7, 2021. You still have not sought variance relief or made any meaningful progress toward compliance. For these reasons, the Town disagrees that you have taken action sufficient to avoid the imposition of fines and penalties,

and the fines set forth above have accrued and will continue to accrue until you have brought the property into compliance.

Further delay in seeking the required relief will result in the Town initiating a code enforcement action.

Please let me know if you have any further questions or concerns.

TOWN OF WILTON
INTERIM CODE ENFORCEMENT OFFICER

A handwritten signature in black ink, appearing to read "Paul Branscombe", written over a horizontal line.

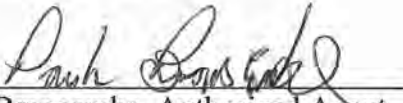
Paul Branscombe, Duly Authorized

Cc: Eric A. Maher, Esq.
Wilton Select Board
Wilton Police Department

INSTRUCTION FOR SERVICE

The Sheriff or local law enforcement officer is requested to serve a true and attested copy of the written order on each of the persons identified above in the notice section of this order by serving them in hand or by leaving such copy at the abode of the persons indicated and making a separate return of said service and attaching the return(s) to the copy of this order marked with the words "copy for return(s)" and returning said copy and returns to the undersigned so that said service is accomplished in the same manner provided for service of a summons in a civil action in district court.

Town of Wilton, NH

By 
Paul Brancombe, Authorized Agent
Interim Code Enforcement Officer

IN-HOUSE DISTRIBUTION: SB, PB, ZBA, LEGAL, LU/PL, BLDG, TAX, ASSESS, POLICE

EXHIBIT D



Town of Wilton, NH
Application to the Zoning Board of Adjustment
(Revised January 2011)

General Information, Page 1 of 3

Property Information

Describe the lot involved in the application (the lot that you want to build a building on, subdivide, conduct a business or other activity on, etc.). If more than one lot is involved, then describe them all in this space if it is convenient, or attach additional copies of this page.

Tax Map and Lot Number F-3-2 Lot Size 8.85 Acres

Street Address Lot F-3-2 Isaac Frye Highway, Wilton NH

Zoning District (check one):

- ☐ Residential ☒ General Residence and Agricultural
☐ Commercial ☐ Industrial ☐ Office Park

Relevant Overlay Districts (check any that apply):

- ☐ Research and Office Park ☐ Floodplain Conservation ☐ Watershed
☐ Wetlands Conservation ☒ Aquifer Protection ☐ Elderly Housing

Owner

If the application involves multiple lots with different owners, attach additional copies of this page.

Name Isaac Frye Holdings, LLC

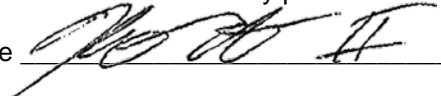
Mailing address 586 Turnpike Road, New Ipswich NH 03071

Mailing address 586 Turnpike Road, New Ipswich NH 03071

Town, State, ZIP New Ipswich, NH 03071

This application must be signed by the owners of all lots involved in the application.

I approve the submission of this application. If an applicant or representative is named on the next page, the person named there has my permission to represent me before the Wilton Zoning Board.

Signature  Date 04/16/2021

(continued on the next page)

clerk use only

Date and time received: _____

Received by: _____ Amount paid: _____

Case #: _____ ☐ Abutter list and labels included



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General Information, Page 2 of 3

Applicant

The applicant is the person who actually wants to build the building, conduct the business, etc. This is usually the same as the property owner, but might be a tenant, someone who plans to purchase the property, etc. If the applicant is the same as the owner, just check "Same as owner" and leave the rest of this section blank.

☒ Same as owner

Name Kenneth Lehtonen, Member - Isaac Frye Holdings, LLC

Mailing address 586 Turnpike Road

Mailing address _____

Town, State, ZIP New Ipswich, NH 03071

Signature of Applicant or Owner

I certify that to the best of my knowledge and belief, all information provided in this application is accurate.

Signature _____

Date 04/16/2021

Representative

Fill out this section if the application is being submitted by a realtor, surveyor, engineer, attorney, etc., on behalf of the actual owner or applicant.

Name Jon Rokeh, Rokeh Consulting, LLC

Mailing address PO Box 204

Mailing address _____

Town, State, ZIP Epsom, NH 03234

I authorize the above-named representative to submit this application and to speak before the Zoning Board on my behalf.

Signature of applicant or owner

Signature _____

Date 04/16/2021

(continued on the next page)



Town of Wilton, NH

Application to the Zoning Board of Adjustment

(Revised January 2011)

General Information, Page 3 of 3

Contact Information

How can we get in touch with the applicant or the applicant's representative, if there are questions about or problems with the application? Provide at least one of the following. If you provide more than one, please check your preferred form of contact.

This information is for: ☐ the applicant ☒ the representative.

☒ Daytime phone 603-387-8688 ☒ Evening phone 603-387-8688

☒ Work E-mail jon@rokehconsulting.com ☐ Personal e-mail n/a

Proposed Use

Explain what you want to do with the property. (Do you want to build a building, subdivide a lot, have a business, ...).

Explain why you need the Zoning Board to let you do it. (The building will be too close to the lot line; the Planning Board wouldn't approve your subdivision; your lot is in a zoning district where businesses aren't allowed; ...).

Be specific. Identify the section or sections of the Zoning Ordinance that apply. If lot sizes or configurations or building placements are relevant, provide a scale drawing or plan showing all relevant information, such as lot lines, setbacks, present and proposed structures on your lot and neighboring lots, etc.

Description of proposed use and need for ZBA approval (use this page; attach additional pages as necessary):

A single family home is proposed to be constructed on the site. The site has a great deal of elevation change and a long narrow area to get into the building area. Because of these constraints the site is proposed to be excavated down to a more reasonable grade that will create a more usable building site and area around the house that the homeowner will be able to enjoy for years to come. It would be unsafe to try to 'perch' the house on top of the hill that exists right now. The driveway would be very steep and require extra maintenance to make it safe to travel on during the winter.



Town of Wilton, NH
Application to the Zoning Board of Adjustment
(Revised January 2010)

Application for a Variance, Page 1 of 2

When, because of the specific characteristics of your property, the Zoning Ordinance unreasonably restricts your use of your property without a corresponding public benefit, the Zoning Board may grant a Variance, which modifies or sets aside particular requirements of the Ordinance.

The specific section of the Zoning Ordinance to be varied: Section 4.1 , Section 12.4

The requirement in that section that you want to change, and how you want it changed:

We are seeking a variance the excavate outside of the Gravel Excavation District
due to the excavation being incidental to the construction of a single family dwelling as
described in RSA 155-E:2-a.

To grant a variance, the Zoning Board must decide that it will satisfy each of the following five conditions. Please explain why you believe that each of the following statements is true. (Use additional sheets of paper if necessary.)

1. Granting the variance would not be contrary to the public interest: *See Attached

2. Granting the variance would be consistent with the spirit of the Ordinance: * See Attached

3. Granting the variance would do substantial justice: *See Attached

4. The proposed use will not diminish surrounding property values: *See Attached

(continued on the next page)



Town of Wilton, NH
Application to the Zoning Board of Adjustment
(Revised January 2010)

Application for a Variance, Page 2 of 2

5. Literal enforcement of the provision of the ordinance would result in unnecessary hardship.
Complete just one of sections 5(a), 5(b), or 5(c):

5(a) i. 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:

*See Attached

ii. The proposed use is a reasonable one:

*See Attached

iii. The hardship is a consequence of special conditions of the property that distinguish it from other properties in the area:

5(b) i. The property cannot be reasonably used in strict conformance with the ordinance:

ii. The hardship is a consequence of special conditions of the property that distinguish it from other properties in the area:

5(c) Hardship resulting from a physical disability.

i. The variance is necessary to make reasonable accommodations to allow a person with a recognized physical disability to reside in or regularly use the premises:

ii. The variance is in harmony with the general purpose and intent of the zoning ordinance:

TOWN OF WILTON ZONING BOARD OF ADJUSTMENT

APPLICATION FOR VARIANCE

Applicant/Owner: Isaac Frye Holdings, LLC

Property: Tax Map F, Lot 003-02

Relief Requested:

The above-referenced Applicant respectfully requests a variance from Article 4.1 (General Provisions and Performance Standards, Excavation, Drilling and Removal of Materials) and Article 12.4 (Aquifer Protection District, Prohibited Uses) of the Town of Wilton's Zoning Ordinance ("Ordinance") governing the excavation of earth materials and the excavation of earth materials in the Aquifer Protection District, to allow for the incidental excavation necessary for the construction of a driveway and single-family dwelling on the property known as Tax Map F, Lot 003-2 ("Property").

RSA 674:33, (I)(2's) Variance Criteria:

1. Granting the variance will not be contrary to the public interest. (RSA 674:33(I)(2)(A))

As the courts have said, to be contrary to the public interest, the variance must unduly and in a marked degree conflict with the ordinance such it violates the ordinance's basic zoning objectives. See Grey v. Seidel, 143 NH 327 (1999).

Here, the Applicant seeks a variance from Article 4.1 and Article 12.4 of the Ordinance to allow for the incidental excavation necessary for the construction of a driveway and single-family dwelling. The goal of these two particular provisions is to protect the Aquifer and commercial excavation operations from taking place in an area not zoned for excavation.

This is a unique situation, given that the site can not support a driveway or house lot without excavating material from the site. The intent of the zoning restriction is to protect more residential areas from noise and dust associated with long term gravel excavation operations. The proposal for the excavation incidental to the residential house is extremely limited and will only take a short amount of time to complete. Once completed and the single-family home is constructed there will be no other excavation required.

**2. The spirit of the ordinance is observed.
(RSA 674:33(I)(2)(B))**

This discussion mirrors the above analysis in that a variance request does not violate the spirit and intent of the Ordinance. Again, the rationale for the Town limiting the excavation of earth materials is to protect both the aquifer and neighboring residences.

As noted above, in this case, the denial of this particular variance would result in a non-buildable lot as this lot can not support a home without the excavation of some materials. This lot could not support driveway access without the excavation of materials.

Granting the variance would be consistent with the spirit of the Ordinance because the public would be protected from a long-term excavation project by limiting the allowed excavation to what is proposed for the house construction. A certain amount of land reforming is done with almost any single-family home construction. The topography of this lot requires extra reshaping to make it a more usable site for the long term.

Moreover, this request does not seek to change the character of the neighborhood, particularly as it will ultimately contain a single-family home.

As such, the spirit of the ordinance is observed in granting the requested variance.

**3. Granting the variance would do substantial justice.
(RSA 674:33(I)(2)(C))**

Substantial justice is done when the loss of denying a variance exceeds the gain to the public in strictly enforcing the Ordinance.

Here, granting the variance would achieve substantial justice by allowing the developer to excavate the materials needed to make a safer, more compliant driveway and house site. This would provide for more safety and useability now and in the future. Without the excavation the future homeowner would face difficult terrain and driveway maintenance in perpetuity.

In light of the above, the loss of denying the variance exceeds any public gain and warrants granting the application, and substantial justice weight in favor of this request.

**4. The values of the surrounding properties will not be diminished.
(RSA 674:33(I)(2)(D))**

If the variance were granted the values of the surrounding properties would not be diminished since the construction of a new, single family residence can only enhance the value of surrounding properties. This variance will not negatively change the character of the neighborhood. The incidental excavation is only temporary, and all single-family home construction has at least some time during construction that the land is actively being excavated and reshaped for the house, driveway and septic. Taken together, it is clear that this variance will not result in the diminution of value of the surrounding properties.

**5. Unnecessary Hardship
(RSA 674:33(I)(2)(E))**

A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

- (i) no fair or substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because:

The Property is special and distinct from other properties in the area given its large amount of gravel and steep slopes that need to be eliminated in order to make the land a more usable site location for a single-family home. This lot has a 30 foot area to enter the property and has a 8 foot rise within 50 feet off the road. Once into the main part of the property there is a hillside that rises 45 feet higher than Issac Frye Highway. The lot in its unaltered state is unbuildable compared to any lot that we have located in our research in the Town of Wilton. Moreover, the Property is special in that the incidental excavation is needed just to create the driveway, building site, lawn area and septic area for a house. All these things are standard items in new home construction.

Given these special features, the provision of the Ordinance at issue which aims to protect the Aquifer and residential neighborhood by limiting excavation within those zones, has no fair or substantial relationship between its policy and the Property. As such, requiring strict compliance with the Ordinance would result in unnecessary hardship because it would not advance the purpose of Article 4.1 or Article 12.4 of the Ordinance in any fair or substantial manner.

Rather, given that the spirit of the ordinance is to prevent gravel pits being permitted in residential areas as long term hauling sites. This is not the case for this lot. The developer need to excavate to create a safe and maintainable building site for a new construction home and denying the variance would result in an unnecessary hardship. In other words, this variance is warranted because the practical purpose of the Ordinance is not furthered as a result of the Property's unique conditions.

and

- (ii) The proposed use is reasonable because:

It seeks to allow the incidental excavation for a new construction home site, which is permitted under RSA 155-E:2-a. It is also reasonable given the alternative, which would result in site issues and extensive driveway maintenance for the future homeowner.

EXHIBIT E

Michele Decoteau

From: Michele Decoteau
Sent: Tuesday, April 27, 2021 8:21 AM
To: 'jon@rokehconsulting.com'
Subject: ZBA application for Isaac Frye Holdings

Hi Jon,

I received the application for the lot on Isaac Frye Highway.

Since you gave it to me early (thank you!), I have time to give you some feedback on the completeness of the application. I have a few additional parts of the ordinance that you may want to review to see if they pertain to your client's property. You have time and resubmit electronically if you want to add any changes.

Thank you!!
Michele

Michele Decoteau

Land Use Administrator and Stormwater Manager
Town Hall - 42 Main Street
PO Box 83, Wilton, NH 03086
(603) 654-9451 x309
~Preferred pronouns she/her/hers~

The Right-to-Know Law (RSA 91-A) provides that most email communications, to or from Town employees regarding the business of the Town of Wilton, are government records available to the public upon request. Therefore, this email communication may be subject to public disclosure.

Michele Decoteau

From: Michele Decoteau
Sent: Tuesday, April 27, 2021 8:41 AM
To: 'jon@rokehconsulting.com'
Subject: F-003-2
Attachments: SKM_C28721042707540.pdf

Hello Jon!

Here are my thoughts. I would suggest reviewing a few other parts of the Ordinance and regulations. If after review, you don't think they apply, just be ready for the meeting to explain why they don't apply.

I am here until 4pm. Call or email questions – I will do my best to get back to you promptly.

Michele

From: tow@wiltonnh.org [mailto:tow@wiltonnh.org]
Sent: Tuesday, April 27, 2021 8:55 AM
To: Michele Decoteau <mdecoteau@wiltonnh.gov>
Subject: Message from KM_C287

Hi - These are only
my suggestions.
I need this back
by 4pm today.
Cheers!!
Michele

City of Wilton, NH
Zoning Board of Adjustment
(Revised January 2010)

For a Variance, Page 1 of 2

of your property, the Zoning Board shall find that the proposed use is unreasonable without a corresponding public benefit, the Zoning Board shall deny the application. The Zoning Board may set aside particular provisions of the Ordinance.

Your letter cites
§ 12.4 also

varied: Section 4.1

The requirement in that section that you want to change, and how you want it changed:

We are seeking a variance to excavate outside of the Gravel Excavation District due to the excavation being incidental to the construction of a single family dwelling as described in RSA 155-E:2-a.

To grant a variance, the Zoning Board shall find that the proposed use meets the following conditions. Please explain on additional sheets of paper:

Satisfy each of the following five conditions. If any one of the following statements is true. (Use the space provided for each condition.)

1. Granting the variance would be in the public interest.

Please also consider
Reviewing Sections
9B.2 9B.6.2
9B.6.1 6.1

Attached

2. Granting the variance would be consistent with the zoning ordinance.

6.1 because the
gravel removed
was used for a
commercial operation -
what about remainder?

3. Granting the variance would do substantial justice: *See Attached

4. The proposed use will not diminish surrounding property values: *See Attached

(continued on the next page)



Town of Wilton, NH
Application to the Zoning Board of Adjustment
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Application for a Variance, Page 2 of 2

5. Literal enforcement of the provision of the ordinance would result in unnecessary hardship.
Complete just one of sections 5(a), 5(b), or 5(c):

5(a) i. 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:

*See Attached

ii. The proposed use is a reasonable one:

*See Attached

iii. The hardship is a consequence of special conditions of the property that distinguish it from other properties in the area:

5(b) i. The property cannot be reasonably used in strict conformance with the ordinance:

ii. The hardship is a consequence of special conditions of the property that distinguish it from other properties in the area:

5(c) Hardship resulting from a physical disability.

i. The variance is necessary to make reasonable accommodations to allow a person with a recognized physical disability to reside in or regularly use the premises:

ii. The variance is in harmony with the general purpose and intent of the zoning ordinance:

TOWN OF WILTON ZONING BOARD OF ADJUSTMENT

APPLICATION FOR VARIANCE

Applicant/Owner: Isaac Frye Holdings, LLC

Property: Tax Map F, Lot 003-02

Relief Requested:

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RSA 674:33.

1. Granting the variance (RSA 674:33(I)(2)(A))

As the courts have said, to be contrary to the public interest, the variance must be of a marked degree conflict with the ordinance such that it violates the ordinance's purposes and objectives. See Grey v. Seidel, 143 NH 327 (1999).

Here, the Applicant seeks a variance from Article 4.1 and Article 12.4 of the Ordinance for the incidental excavation necessary for the construction of a driveway and single-family dwelling. The goal of these two particular provisions is to protect the Aquifer Protection District from excavation operations from taking place in an area not zoned for excavation.

This is a unique situation, given that the site can not support a driveway or house lot without excavating material from the site. The intent of the zoning restriction is to protect more residential areas from noise and dust associated with long term gravel excavation operations. The proposal for the excavation incidental to the residential house is extremely limited and will only take a short amount of time to complete. Once completed and the single-family home is constructed there will be no other excavation required.

*Please consider
Section F of the
hand the laws
for definitions*

Sec F. 2.3

Section F.2.11

Section F.3.4

Section F.4.3

2. The spirit of the ordinance is observed.
(RSA 674:33(I)(2)(B))

This discussion mirrors the above analysis in that a variance request does not violate the spirit and intent of the Ordinance. Again, the rationale for the Town limiting the excavation of earth materials is to protect both the aquifer and neighboring residences.

As noted above, in this case, the denial of this particular variance would result in a non-buildable lot as this lot can not support a home without the excavation of some materials. This lot could not support driveway access without the excavation of materials.

Granting the variance would be consistent with the spirit of the Ordinance because the public would be protected from a long-term excavation project by limiting the allowed excavation to what is proposed for the house construction. A certain amount of land reforming is done with almost any single-family home construction. The topography of this lot requires extra reshaping to make it a more usable site for the long term.

Moreover, this request does not seek to change the character of the neighborhood, particularly as it will ultimately contain a single-family home.

As such, the spirit of the ordinance is observed in granting the requested variance.

3. Granting the variance would do substantial justice.
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Substantial justice is done when the loss of denying a variance exceeds the gain to the public in strictly enforcing the Ordinance.

Here, granting the variance would achieve substantial justice by allowing the developer to excavate the materials needed to make a safer, more compliant driveway and house site. This would provide for more safety and useability now and in the future. Without the excavation the future homeowner would face difficult terrain and driveway maintenance in perpetuity.

In light of the above, the loss of denying the variance exceeds any public gain and warrants granting the application, and substantial justice weight in favor of this request.

4. The values of the surrounding properties will not be diminished
(RSA 674:33(I)(2)(D))

If the variance were granted the values of the surrounding properties will not be diminished since the construction of a new, single family residence can only enhance the value of surrounding properties. This variance will not negatively change the character of the neighborhood. The incidental excavation is only temporary, and all single-family home construction has at least some time during construction that the land is actively being excavated and reshaped for the house, driveway and septic. Taken together, it is clear that this variance will not result in the diminution of value of the surrounding properties.

please review setbacks

5. Unnecessary Hardship
(RSA 674:33(I)(2)(E))

A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

- (i) no fair or substantial relationship exists between the general purpose of the ordinance provision and the specific application of the ordinance to the property because:

The Property is special and distinct from other properties in the area given its large lot of gravel and steep slopes that need to be eliminated in order to make the land a more suitable site location for a single-family home. Moreover, the Property is special in that the work required to create the building site, driveway, lawn and septic area for a house is all necessary for the new home construction.

Given these special features, the provision of the Ordinance at issue which aims to protect the Aquifer and residential neighborhood by limiting excavation within those zones, has no fair or substantial relationship between its policy and the Property. As such, requiring strict compliance with the Ordinance would result in unnecessary hardship because it would not advance the purpose of Article 4.1 or Article 12.4 of the Ordinance in any fair or substantial manner.

Rather, given that the spirit of the ordinance is to prevent gravel pits being permitted in residential areas as long term hauling sites. This is not the case for this lot. The developer need to excavate to create a safe and maintainable building site for a new construction home and denying the variance would result in an unnecessary hardship. In other words, this variance is warranted because the practical purpose of the Ordinance is not furthered as a result of the Property's unique conditions.

and

- (ii) The proposed use is reasonable because:

It seeks to allow the incidental excavation for a new construction home site, which is permitted under RSA 155-E:2-a. It is also reasonable given the alternative, which would result in site issues and extensive driveway maintenance for the future homeowner.