



Town of Wilton, NH Zoning Board of Adjustment

Notice of Decision

The request by Isaac Frye Holdings, LLC for variances to parts of section 9B.6 of the Wilton Zoning Ordinance has been granted in part, to allow a gravel excavation on Lot F-3-2, Isaac Frye Highway. The excavation has received conditional Excavation Site Plan approval by the Wilton Planning Board, and is shown on a set of plans labeled “Site Plan for an Excavation and Reclamation Grading Project known as Tax Lot F-3-2 – Isaac Frye Highway, Wilton, New Hampshire,” prepared by Rokeh Consulting, LLC and dated December 2, 2022, which was submitted to the Zoning Board and is included in the ZBA case file.

The request for a variance to section 9B.6.1, to allow the excavation to be closer to the lot lines than allowed by the Ordinance, has been granted.

The request for a variance to section 9B.6.2, to allow the access for the removal of the excavated material to be via Isaac Frye Highway rather than via Greenville Road, has been granted.

The request for a variance to section 9B.6.4, to allow the excavation to be reclaimed with steeper slopes than allowed by the Ordinance, has been denied, because the variance is not necessary to allow reclamation with the proposed slopes.

This decision shall expire if the construction or use permitted by it has not begun by Thursday, October 8, 2026. (Wilton Zoning Ordinance section 17.4)

The selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing of this decision. A request for a rehearing must be filed in writing with the Zoning Board of Adjustment on or before Thursday, November 7, 2024, and must fully specify all grounds on which the rehearing is requested. (N.H. RSA 677:2)

Findings of Fact

- Lot F-3-2 is an 8.84 acre lot in the General Residential and Agricultural District and the Aquifer Protection overlay district.
- The lot was created, along with Lot F-3-1, by the subdivision of Lot F-3 in 2016.
- In accordance with the Alternative Lot Requirements of section 6.3 of the Wilton Zoning Ordinance, the lot has 50 feet of frontage on Isaac Frye Highway, and a “flagpole,” 50 feet wide and 410 feet long, running east from Isaac Frye Highway to the body of the lot.
- Although the lot has several acres of level land, they are located at the top of a very steep hill, approximately 45 feet above the lot entrance, making them effectively inaccessible without an extravagant amount of earth work.
- A steep hillside coming down from the north originally protruded into the western end of the “flagpole.” The 2016 subdivision created an access easement running over the northeast corner of Lot F-3-1 to allow access to the body of Lot F-3-2, bypassing the hill, but a driveway using the access easement would have passed within a few feet of the existing house on Lot F-3-1.

Relevant History

Some time in late 2020, the Applicants began excavating and removing earth materials from Lot F-3-2. Following notification in early 2021 that the Town believed that the activity was in violation of various Town regulations, including the Zoning Ordinance, the Applicants suspended excavation and applied to the ZBA for variances to sections 4.1 and 12.4 of the Wilton Zoning Ordinance, to allow excavation outside the Gravel Excavation District (ZBA Case #5/11/21-1).

The Applicants subsequently altered their application, to permit only the excavation that had already occurred. The ZBA granted the amended variance request (“The 2021 Variance”) on November 9, 2021, with the condition that no more material would be removed from the property, and the understanding that the excavation was subject to Excavation Site Plan Review by the Wilton Planning Board.

The Applicants applied to the Planning Board for Excavation Site Plan Review on November 17, 2021. At the second hearing on the application, on February 16, 2022, the Planning Board stated that the excavation would need additional variances. The Applicant appealed that determination to the ZBA on March 17, 2022 (ZBA Case #4/12/22-1).

The Applicants subsequently withdrew the appeal without prejudice after reaching a settlement agreement with the Town which would allow the Excavation Site Plan Review to proceed, and which required the Applicants to apply for variances to section 9B.6.1, 9B.6.2, and 9B.6.4 of the Zoning Ordinance.

The Planning Board conditionally approved the Excavation Site Plan on June 19, 2024, and issued the notice of decision on July 9, 2024, and the Applicants submitted this application to the ZBA on July 23, 2024.

The 2021 variance decision notice contained the sentence “This decision shall expire if the construction or use permitted by it has not begun by Thursday, November 9, 2023.” However, that deadline was tolled by the February 16, 2022 submission of the Excavation Site Plan Review application. (RSA 674:33, IV(c))

Discussion

- The excavation which was performed in late 2020 and early 2021 reduced the hillside in the “flagpole” to allow access to the body of the lot without utilizing the easement over Lot F-3-1, and leveled an area at the northwest corner of the body of the lot.
- In granting the 2021 variance, the ZBA determined that the excavation that had taken place up to that time was both necessary and sufficient to obtain any practical use of the lot, since a small home could be placed on the leveled area at the northwest corner of the body.
- The practical issues remaining are about reclaiming the excavation, which basically means installing retaining walls where the driveway was cut into the northern hillside, grading and stabilizing the slopes south of the leveled area, and installing stormwater control measures. These matters are covered by the Excavation Site Plan and an associated Stormwater Application to the Planning Board.
- The 2021 variance having been granted and the Excavation and Stormwater Plans having been approved, the remaining legal issues that are the subject of this variance application are:
 - The requirement of section 9B.6.1 that excavation areas be set back 300 feet from all lot lines.
 - The requirement of section 9B.6.2 that all removed earth materials be transported by private way from the excavation area to Greenville Road or King Brook Road.

- The requirement of section 9B.6.4(a) that all slopes be reclaimed to no steeper than 3:1.

Reasons for Granting the Variance to Section 9B.6.1 (Setbacks)

- **Hardship:** As determined in granting the 2021 Variance, owing to the lot's topography and configuration, it could not reasonably be used without the proposed excavation, in the proposed location. The 2021 Variance would be ineffectual if the allowed excavation were required to adhere to the setback requirements of Section 9B.6.1.
- **Spirit of the Ordinance, Public Interest, Property Values:** At the conclusion of the development activity enabled by the variance, the lot will be left with a driveway and a single-family home that are entirely consistent with the public interest the spirit of the ordinance, and the character of the neighborhood. The only directly affected neighbor is Lot F-3-1, where the effects directly stem from the lot configuration arising from the 2016 subdivision. The long term effect on Lot F-3-1 of a driveway using the easement would have been worse than the short term effects of the excavation to develop a separate driveway.
- **Substantial justice:** Enforcing the letter of the ordinance would make the lot effectively useless, without any benefit to the public.

Reasons for Granting the Variance to Section 9B.6.2 (Access)

- **Hardship:** As determined in granting the 2021 Variance, owing to the lot's topography and configuration, it could not reasonably be used without the proposed excavation, in the proposed location. The 2021 Variance would be ineffectual if access to the allowed excavation on the lot was not from Isaac Frye Highway.
- **Spirit of the Ordinance, Public Interest, Property Values:** Gravel truck traffic associated with the excavation for a few months of 2020 and 2021 unquestionably had some effect on the neighborhood, but that effect is past. No more earth materials are to be removed from the lot at all.
- **Substantial justice:** Enforcing the letter of the ordinance would make the lot effectively useless, without any benefit to the public.

Reasons for Denying the Variance to Section 9B.6.4 (Slopes)

When a proposed use is permitted without a variance, there is no hardship and the ZBA cannot grant a variance. "... [W]e conclude that contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance because ... the ZBA will invariably consider this issue in deciding whether unnecessary hardship exists." *Bartlett v. City of Manchester*, 164 N.H. 634, 641 (N.H. 2013)

Section 9B.6.4(a) states:

No slope in soil material shall be left steeper than 3 to 1 (three (3) horizontal feet for each one (1) foot of vertical drop). The Planning Board may approve a reclamation plan incorporating 2 to 1 slopes (two (2) horizontal feet for each one (1) foot of vertical drop) provided all of the following conditions are met ...

That is, while establishing a 3:1 slope requirement, the language of the Ordinance explicitly grants *to the Planning Board* the discretion to relax it to 2:1. Interpreting this provision to mean that the 3:1 restriction was still in effect, even after the Planning Board had exercised its discretion to relax it, would make no sense.

In this case, the Planning Board has approved an excavation site plan with a reclamation plan incorporating 2:1 slopes. The Planning Board has therefore exercised its discretion to relax the

slope requirement of Section 9B.6.4(a). Thus, Applicants' proposed reclamation with 2:1 slopes is permitted without a variance, and the Zoning Board therefore cannot grant a variance.

Sincerely,

A handwritten signature in black ink, appearing to read "Neil Faiman". The signature is fluid and cursive, with a long horizontal flourish at the end.

Neil Faiman, Chairperson
Wilton ZBA
October 10, 2024

Case #8/13/2024-5, decided Tuesday, October 8, 2024