Town of Wilton, New Hampshire
Zoning Board of Adjustment
Approved Minutes

DATE: November 12, 2019
TIME: 7:30 PM
LOCATION Wilton-Lyndeborough Coop HS Cafeteria, 57 School Road, Wilton
PRESENT: Neil Faiman, Chair; Joanna Eckstrom, Vice-chair; Jeff Stone; Paul Levesque; Peter Howd (Alternate); Bob Spear (Alternate); Judith Klinghoffer (Alternate)
Absent: Andy Hoar
Staff: Land Use Administrator Michele Decoteau

Attendees
Bill Abrahams-Dematte, Sharon Akers, Nikki Andrews, Chris Balch, Jennifer Beck, Heidi Bliss, Doug Bratten, Ronald Brown, Susan Brown, Ralph Buschman, Peter Chadzynski, Joe Coffey, Shannen Coffey, Steve Collins, Deana Darby, Tim Dresser, Andrew Finlayson, Dodie Finlayson, William Finlayson, Patricia Folz, Ronald Folz, Lincoln Geiger, Joan Giese, Anthony Graham, Glynn Graham, Mary Graham, Richard Hamilton, Kerry Hildebrand, Bart Hunter, Paula Iasella, Henriette Isene, Sherry Jennings, Marilyn Jonas, Stephen Jones, Jamie Jones, eQuanimiti Joy, Richard Kahn, Bill Keefe, Andrew Kennedy, Peter Leishman, Diane LeVert, Al Lindquist, Mike McGonagall, Kim McLaughlin, Benjamin Meiel, Doreece Miller, Bridget Mooney, Kathleen Patinsky, Lynne Pentler, Patricia Quaglia, Tobin Renwick, Hugh Renwick, Carol Renwick, Steven Rezsutek, Heidi Robichaud, Lynne Rocca, Joseph Rogers, Bill Ryan, Ashley Saari, Elad Sadeh, Jessie Salisbury, Kristin Schwab, Sussy Rose Shields, Katja Sienkiewicz, Robert Silva, Shannon Silva, Amy Snedaker, Lou Sorrento, Ruth Thibodeau, Daniel TwoEagles, Aiyana Vergo, Nancy Wallace, Lisa Wowianko, Mitchell Young, Lorey Zahn, John Zavgren

CALL TO ORDER:
Chairman N. Faiman called the meeting to order at 7:40 PM. N. Faiman introduced the Board members. B. Spear will be sitting in for Andy Hoar. N. Faiman stated that M. Decoteau was audio recording the meeting.

The Board discussed if they would continue past 11 PM.

P. Levesque MOVED to allow the meeting to continue to 11:30 PM but not start a new case after 10:30PM. J. Stone SECONDED. Three (3) opposed (J. Eckstrom, J. Klinghoffer, B. Spear), P. Howd abstained, and three (3) in favor (N. Faiman, J. Stone, P. Levesque). MOTION did not pass.

MINUTES OF PREVIOUS MEETINGS

July 11, 2019

Line 37 … JK change to J. Knight
Line 98 … delete comma after Foley
Line 100 … change "in" to "it"

J. Eckstrom MOVED to approve as amended. B. Spear SECONDED. AIF. J. Klinghoffer abstained.

Aug 13, 2019 Site Walk

J. Eckstrom MOVED to approve the minutes as written. P. Levesque SECONDED. All in Favor, J. Klinghoffer and B. Spear abstained.

Aug 13, 2019

Line 14 … Branon - correct spelling
Line 58 … change "turnoff" to "turnout"
Line 102 … add a "."

Line 104 … change “long” to “only”
Line 109 … delete “of”

J. Eckstrom MOVED to approved as corrected, J. Stone SECONDED. All in Favor, B. Spear and J. Klinghoffer abstained.

Sept 10, 2019

Line 40 … change IF to if
Line163 … change “would” to “could”

B. Spear MOVED to accept the minutes as amended. P. Howd SECONDED. All in Favor. J. Eckstrom abstained.

All other businesses were tabled until the next meeting.

PUBLIC HEARINGS CONTINUED FROM PREVIOUS MEETINGS

Chairman Faiman announced that the ZBA has two Zoning Board of Adjustment applications to review tonight and read the Public Hearing Notice into the record.

Case #: 07/09/19-1

Quinn Properties, LLC has applied for a variance to section 8.2.6 of the Wilton Zoning Ordinance to allow the construction of an asphalt batch plant and silo on Lot B–10, 50 Quinn Drive, which would be 68 and 72 feet in height respectively, where the ordinance limits structures to a maximum height of 45 feet. (Case #7/9/19–1, continued from October 23, 2019).

At 7:56 PM, J. Klinghoffer and P. Howd left the Board and joined the audience. B. Spear will continue to serve in place of A. Hoar for this case.

N. Faiman reminded everyone about the limits of the public testimony. He said this is part of the meeting is merely to find out what people saw during the sight line test. The Board discussed this limitation and decided to adhere to that.

M. Decoteau shared that a number of testimonies with photographs were already given to her prior to the meeting. She provided copies to all the Board members on the case and the applicant.

R. Brown (Isaac Frye, Wilton) said he made his observation at the end of his driveway and he could see the bucket and the top portion of the crane. It was the color of the autumn leaves. He did it without the aid of binoculars. He said that he did request night time lighting in a letter to the ZBA. That did not happen and he was disappointed. Given the size and color of the bucket, and the absence of lighting, and thought this was not a fair test of visual impact.

J. Coffey (Stagecoach Road, Wilton) said he walked along a snowmobile trail near Goss Park and took photos of his GPS app and the bucket at various points. He provided a copy of these for the record. He agreed this may not have been a fair test given the size and location of the bucket. He said we have a lot of other senses and given the height of the plant, the plume will be propagated farther away.

M. Decoteau confirmed that the test had been conducted as described. She met T. Quinn and B. Keefe Friday 11.07.19 at 8:30AM. She confirmed the bucket was at 73 feet as it was very windy and that the bucket and crane were orange. She confirmed it was in the location described on the site plan from 1990.

S. Rezsitek (855 Isaac Frye, Wilton) did not have time to do a daytime observation. Because it doesn't have lights, it was incomplete and not sufficient data.

G. Graham (Wilton) said she did not submit a picture of her observation, but she did walk Goss Park. She said that lighting was included on the previous site plan and it was a concern. She also showed a photo of the asphalt plant in Amherst at night.

S. Brown said her concern is about the height. She lives very close to the proposed plant and was concerned about the toxins. She felt the test was inconclusive since there was no light.

P. Chadzynski said without lights it is impossible to tell the impact; without knowing what this is going to look like at night. N. Faiman reminded everyone that they have heard that some people would like lights. The Board wanted to learn what people saw.

C. Balch (Center Road, Wilton) said he hiked up Temple Mountain, and using binoculars, could see the bucket but it was not spectacular. He could see the bucket from the Goss Park trail that starts at the ball field. He showed photos in which he superimposed a picture of the proposed asphalt plant over the crane. People who are sight impaired and this test will not be adequate for them. The sound and smell of the plant are important; these issues are impacted by the height of the towers.

B. Silva (Barret Hill Road, Wilton) said he observed the crane from about 80% of the Goss Park beach. He said that within 10 feet of Route 31 he could see it and he estimates that with a full sized plant he felt that it would be extremely visible from Route 31 as well.

A. Finlayson (Heald Road, Wilton) said he went driving and walking around but didn't see much of the crane but at the railroad tracks he could see it clearly. What struck him was how easily seen this was seen from the ball field. He felt that the sounds and the smell from the proposed plant were going to reek. He thinks that the proximity is too close to residences and it is too tall.

M. Jonas (Wilton) did her observations on the snowmobile trail behind her house. The trail is used by snowmobilers all winter long. It is an international snowmobile trail. The bucket was clearly visible from that trail. She stopped at the spot where snowmobilers park and when visitors stop, they will be parking right in view of the proposed plant.

A. Finlayson (Wilton) said he drove around and couldn't see it but thought he could have seen this from backyards. He said that he appreciated the effort of the applicants but suggested a better test would have been to take photos from the basket. He was offended that this test was not lit up, there should be more testing and this was not sufficient. There is a horrible blighting scar where the quarry is not. He felt this process didn't make sense and it was not fair.

S. Rezsitek wanted to add that the glow from lights is important and can, especially on a cloudy night, affect other properties. He lived near Pat's Peak ski area and with night skiing, the glow was very bright on cloudy nights.

L. Rocca (Country Way) said she is at 2800 feet. She tried to see it, but couldn't see it. If they are lighting it up, this will that affect my living, possibly. The lights really should be there also.

An audience member said he has not seen the tower and is married to a woman from Wilton. We are one community. We want the most healthy living situation in the community. It doesn't matter how tall the tower is, we are swimming in the same boat. When you are in a healthy family. N. Faiman said this part of the meeting is for testimony about the sight test. The audience member said thank you.

N. Andrews (Curtis Farm Road) said she bushwhacked behind her property and drove around but she didn't see the tower. She saw a lot of trees. What happens to the trees? If the trees disappear the tower will be visible from many more locations.

A. Finlayson said he is not sure about going on about the lighting and smell. He is not happy with the tests. N. Faiman said the purpose of the testimony tonight is about what you saw and did not see. A. Finlayson said he saw it above the trees. He would like to imagine what would see there. N. Faiman said we wanted to hear what the community saw during the test and your input helped the Board understand.

N. Wallace (Hearthstone, Wilton) she has a lovely view. She did not see the bucket because her neighbor has a tree with orange leaves. She felt that lighting would have more of a visual impact to her on her property.

S. Akres (New Road, Lyndeborough) said she observed the bucket lift from Goss Park, a facility that both towns share. This was visible from the parking lot. She submitted a picture and her location.

J. Eckstrom asked if anyone from the Board observed and would like to comment. P. Levesque said he drove along Dale Street and couldn't see it from the roads but couldn't go into people's backyards. N. Faiman said he drove the loop around the area and didn't see it but though this was not particularly informative since he doesn't live in the area. J. Eckstrom said from Isaac Frye or Route 31 she did not see it. She knows that the plant in Amherst is far more visible than the proposed plant. The only place she could see that plant, was from Frederick's Pastries, looking down Caldwell Drive.

R. Kahn (Wilton) said he could see this from his property in Lyndeborough. He asked what was the point of the test.

C. Balch (Center Road, Wilton), following up on what J. Eckstrom said, let her know that was still a quarter of a mile. J. Eckstrom said she visited the asphalt plant a number of times over the summer and she said that she smelled the two mile long asphalt paving project not the 0.3 mile away plant.

P. Folz (Styles Farm, Road) asked if there be a different Board reviewing some of the other things. N. Faiman said the ZBA is reviewing the Variance and the industrial use will go through the Planning Board. P. Folz said from her house, she cannot see the bucket lift, but when she goes out at night, she expects to see a dark night and if it is at all over cast, she said that she would certainly be able to see light pollution. She can see light pollution from Milford.

M. Brown (Hearthstone, Wilton) said that the Amherst plant is not a good comparison since it is flat all around it and this plant would be in different topography.

R. Brown (Isaac Frye, Wilton) asked if after the deliberations, there are five separate conditions for approval of a variance. He requests the Board vote on each of the five questions separately. N. Faiman there are disputes about what the correct way is to vote on a case. Each ZBA decides how they want to do it and it is in the bylaws. This Board votes up or down on the variance. If the variance is denied, it is legally required to share the findings of why the board as a whole was not satisfied. There is generally not a vote on the individual conditions.

D. Finlayson said her understanding is that if only one of the five criteria is not satisfied, then it shouldn't be granted. N. Faiman explained with a hypothetical story. She followed up with: we must be only focus on height and be logical. But height has to be attached to something. Everyone in the room knows what the height is attached to. She said it cannot be a test if it doesn't have lighting at night.

J. Eckstrom asked if the applicant had any comments. They declined.

J. Eckstrom MOVED to close the public hearing and enter deliberations. P. Levesque SECONDED. No discussion. All in Favor.

N. Faiman reminded everyone about the differences between a public hearing and a public meeting. The Board is not taking any further input. The Board will be deliberating among themselves.

N. Faiman said the Board has heard a lot of testimony. He asked for their thoughts.

P. Levesque said he isn't sure if everyone understands that this about height. This is in the Industrial District and if it is to go anywhere, it should be here.

N. Faiman said at 4pm he received a letter from a lawyer representing some of the people in audience. He viewed it enough to understand that it was testimony. If the Board wishes to read it, they would have to re-open the hearing and they would potentially have to reopen the process and allow the applicant to response. He feels that the letter is late and doesn't want to take new testimony. J. Eckstrom asked if we needed to reopen the hearing. N. Faiman said it was the kind of information that could have been offered at the previous meetings. M. Decoteau said she read the letter as staff and it was not about personal observations about the Sight Line test. The Board decided not to re-open the hearing.

R. Kahn said that the height doesn't mean anything. We can't talk about the asphalt plant. It is a complete thing, When are we going to talk about the asphalt plant? J. Eckstrom the ZBA can only address the application.

R. Folz (Stiles Farm Road) asked a point of order. This is a continuation of the meeting on Oct 23. N. Faiman said yes that was correct. R. Folz asked that if we are taking testimony, why not the letter. N. Faiman said if we re-open the hearing we can take testimony. It is too late. This was open for observations about the height. You can't open the hearing for a small amount.

C. Balch (Wilton) said the Oct 23 hearing was quite a hearing and many people spoke. None of us are experts and we didn't know we needed a lawyer. This has been a tremendous experience and we are trying to do this carefully and trying to do well. In the fairness of the hearing, I would want all the information.

The Board decided they were ready to proceed with deliberations.

J. Eckstrom said she appreciates everyone's concern about the Use; however, the application is for a variance about height and has absolutely nothing to do with the Use. This was specified in October. When the meeting was announced this was explained; there is another board that will deal with the Use. We don't have authority for the Use.

N. Faiman said having considered this, he doesn't believe there is a hardship. He referred to the case on D-99. There was nothing unique about the lot. This case is more complex and more nuanced. And more interesting. But when push comes to shove, there is not a hardship in this case and we should deny the variance.

P. Levesque this is the Industrial District and if he wants to put an asphalt plant this is where he should do it. What is holding them up is the variance on height.

B. Spear said he thought granting would not be in the public interest. There is a clear 45 foot height limit there is not a height limit in the commercial district. The Board and Staff clarified the districts that do have height restrictions.

B. Spear said there is a height restriction in the Industrial District. And if it wants to be on the town docket to take away the height restriction, that should be done. Otherwise I am going to let it stand.

J. Stone said the basis of the request is that this is an expansion of a non-conforming use. But it is a new and different non-conforming use. He read from the application. This says it is an expansion of a non-conforming use. It is not at all clear that asphalt batch plants have to be over 45 feet. Quarrying and asphalt are not the same. But if it is not an expansion, if it is new non-conforming use, then the use doesn't meet the requirements for a variance to be approved, it must meet all 5 criteria. Should a plan be approved anyway, another test is if this is contrary to the spirit of the ordinance, it is clear that the spirit of the Ordinance is to maintain the rural character of the town. Looking at the ways the application can be an expansion or a new use, don't see a legal way we can prove it. The law rules it out.

N. Faiman said that non-conforming use may be a red herring. The applicant is not proposing to expand a non-conforming use. They are proposing a new Industrial use in the Industrial District. The Board discussed if this plant would be an expansion of a non-conforming use or a new non-conforming use. The spirit of the ordinance is not met. He was suggesting on whatever ground the applicant asks for a variance, they cannot all five be met.

The Board asked for clarification and reviewed the minutes from the last meeting. The Board discussed the hardship test and that this met the spirit of the ordinance question.

B. Spear said do we understand what the public interest is in limiting the height in the Industrial District? We have taken testimony on the sight test that is part of the public interest. Public Interests and the Spirit of the Ordinance are the same. The Spirit of the Ordinance is about what it means deep down. Is lighting and visibility inherently part the height restriction?

J. Eckstrom said if we take out the asphalt plant, and look at the height. Can it be seen? Is it offensive? Does it fit in the neighborhood? There were many people who didn't see it from a mile away or two miles away. N. Faiman said he was surprised by how few people saw it from a middle distance. He was surprised by how many people could see it from Goss Park contrary what the applicant said.

N. Faiman said if you want to look at hardship, you have to look at the uniqueness of the property. Is it different from the properties in the area in a way that is specific to similarly situated properties in the area in a way this is specific to the hardship – does the Ordinance have a different effect on that property. J. Eckstrom does the fact that B-10, there were two owners of properties in the area: Granite State and Quinn. Does that make it unique? It is accessed by a private right of way. J. Eckstrom said she is trying to close her mind to issues outside of the height variance.

N. Faiman said he sees that there were four ways the property is unique:

1. It is not flat. His observation is that this could be either their lot or Granite State – the Extreme topography. What you do there is tucked away at the bottom of the hill. There are any number of other large industrial properties. If you stay just within the neighborhood. These are the only two with that extreme topography.
2. The property is already a stone quarry. J. Stone alluded to this with his comment that this is a non-conforming use. This may not be used to form the basis for hardship. You cannot use a non-conforming use for a hardship.
3. The next door neighbor is also a quarry. How can having a neighbor with similar characteristics, make their lot unique? This is self-created. J. Stone said the uniqueness characteristics is in part the existing use. N. Faiman there are two forks to this question: 1. I cannot do anything else with the lot, 2. Post Simplex, that the only question.

4. The industry has changed, and the quarry needs to have a concrete or asphalt plant to survive. This is a characteristic of the owner not the property. One of the bases of the uniqueness law is that the uniqueness if part of the property not how it is used.

N. Faiman continued. What is the public purpose of the Ordinance? The applicant believed that the it was the height of the fire department, But now the FD has trucks that can reach 100 feet. This seems implausible since there were no height restrictions imposed in other districts.

N. Faiman continued. In other areas, they visual impact might be why we have the 45 foot ceiling. That cannot be the reason they imposed the restriction in the Industrial District. In 1974 there was no height restriction in the Industrial District with almost no conditions. In 1981 there was at the time, a Sounding Board, whose chairman described the Industrial District as "establish[ing] standards designed to *retain Wilton character*, insure safe traffic flow, *prevent undesirable industry*, protect Wilton water sources and encourage desirable industry. [emphasis added]" (From a contemporaneous newspaper article.) The rewritten chapter introduced a "Permitted Uses" section specifying restrictions on "smoke, noise, odors, vibrations, and discharges," and a "Building Height" section limiting the height of buildings to 45 feet or two stories. From this historical context, we conclude that the height restriction was imposed as a simple way of limiting industrial facilities in the Town to a modest scale. Height is a marker for large / undesirable industry. Thus, a 70-foot asphalt plant is simply an instance of the "undesirable [i.e., large] industry." B. Spear asked if this was a motion for denial. N. Faiman said no, just his reasons.

N. Faiman asked what the other Board members were thinking.

J. Eckstrom said let's look at the previous approval. That was a 3 to 2 vote to approve. There is nothing that has changed. N. Faiman said the gravel pit was a permitted use in 1988. Now it is a non-conforming gravel operation. J. Eckstrom so you just throw out the grandfathered use? N. Faiman said you cannot use a non-conforming use for the basis of the Use. There is a reason that variances expire. This was a weak decision. I don't think we owe that board deference. J. Eckstrom said the two dissenters thought that the ordinance should be rewritten to change the ordinance. And also there was Planning Board approval. And there has been no move to prohibit the industry. I am having a hard time separating the use and the height. N. Faiman said he is not inclined to give deference decisions from 30 years ago.

J. Stone said in March 1981 the ordinance was changed, 30 years ago, an application was filed, approved and left to expire. The day it expired it has no relevance. We have reset. It is gone. Ordinances survive and unused variances do not. B. Spear said it is important to note what the Chairman just said; it became a non-conforming use in 2006. N. Faiman said that if he looked back on some of the variances he has voted for, he might now be surprised. But looking at minutes, we can look at the minutes to see their reasoning, we don't have to be bound by them.

J. Stone MOVED we deny the application for a variance for the reason of hardship.

N. Faiman said he has a draft of a motion to approve and another for denial. The approval draft was fairly well formed. He said the other one didn't have as much meat and didn't list the reasons for denial of the variance. It is worth being thorough. The Board read through his materials. B. Spear said given that the materials are substantial, can we use some of this for a motion? N. Faiman said that the Board usually votes a decision up or down then drafts a more precise set of reasons for denial.

J. Eckstrom assuming that an asphalt plant is an allowed use in the Industrial District, and we have received information that asphalt plants that are shorter than 45 feet, could Mr. Quinn, subject to Planning Board site plan approval, build an asphalt plant 45 feet tall? N. Faiman agreed. J. Eckstrom said that Mr. Quinn said that there were

reasons for the height such as truck access and dispersion. Would we have the same concerns for a 45 foot plant? J. Stone Withdrew his motion.

B. Spear MOVED to deny the application by Quinn properties for a variance to section 8.26 of the Wilton Zoning Ordinance. The Variance would have allowed the construction of an asphalt batch plant and silo that would have been 68 and 72 feet in height their respectively where the ordinance limits structures to a max height of 45 feet. The ZBA finds that the applicant has not demonstrated an unnecessary hardship as required. J. Stone SECONDED.

Discussion
None

A vote yes is to deny.
Vote
J. Stone - yes
P. Levesque - no
J. Eckstrom - no
N. Faiman - yes
B. Spear - yes

B. Spear MOVED to adopt the language in the draft as the reasons for denying the variance. J. Stone SECONDED.

Discussion
None

Vote
J. Eckstrom - no (she feels that this decision implies that the ZBA has made a comment that an asphalt plant is undesirable).
N. Faiman - yes
P. Levesque - yes
B. Spear yes
J. Stone - yes

N. Faiman reviewed the reconsideration process. Party to the proceedings means that a party who can show direct impact. Decision is non-appealable after 30 days.

At 10:18 PM. Howd and J. Klinghoffer returned to the Board.

J. Klinghoffer moved to adjourn. No Second.

J. Stone moved to go ahead with the second case. N. Faiman reminded everyone that this is wetlands crossing and that this is short first hearing. J. Eckstrom SECONDED.
All in favor.

J. Klinghoffer left at 10:22 PM

Case #11/12/19 -1
N. Faiman opened the Public Hearing by reading the public notice.

Al Lindquist has applied for a special exception under section 11.4(a) of the Wilton Zoning Ordinance to allow the construction of a driveway which would cross a wetland area, as part of a proposed lot line adjustment between Lots B–26–3 and B–26–1, 38 Wilton Center Road.

B. Spear will continue as A. Hoar's re replacement.

J. Eckstrom reminded the Board that they need to do a determination of regional impact.
N. Faiman read the RSA about Regional Impact. J. Stone asked about direction of flow of water. J. Wichert, the applicant's representative, showed the wetlands profile and contour lines showing the water is coming off the road and movement. There will be 770 acres wetlands impact for a single driveway.

The Board asked if the Lyndeborough portion involved in any way? J. Wichert said no, there is no impact in Lyndeborough. He described the original plan and how that has been impacted by the death of an abutter. P. Howd asked if the wetland extends in to Lyndeborough. J. Wichert said it might.

N. Faiman said let's hear it tonight and notify Lyndeborough and give them the opportunity for a site walk and give testimony at the meeting. J. Eckstrom proposed a quick introduction of the case and set up a site walk.

J. Wichert said they are here for a Special Exception for a wetlands crossing for a single family home. He has had a site walk with the conservation commission. Total wetland impact is 770 acres with 537 acres of permanent impact. An 18 inch culvert will be needed for the driveway.

J. Eckstrom MOVED to have a site walk on November 23, 2019, at 9 am at the end of Pead Hill Road with notification to Lyndeborough of both the case and the site walk. J. Stone SECONDED. All in favor.

J. Eckstrom MOVED to continue the case until to Dec 10, 2019, at 7:30 PM in the Wilton Town Hall. B. Spear SECONDED. All in Favor.

NEW BUSINESS
Tabled.

ADJOURN
P. Howd MOTION to adjourn at 10:42PM. B. Spear SECONDED. All in Favor.

Respectfully submitted by Michele Decoteau, Land Use Administrator
Approved 12.10.19

Exhibits on File
N. Faiman, Draft Denial Decision
N. Faiman, Draft Approval Decision
A. Manzelli letter, 3 pages

N. Faiman Draft
THIS IS NOT A DECISION
This is language suggested as a possible starting point for one possible decision of the Zoning Board, to facilitate drafting a final decision notice. It should not be interpreted as an expectation, prediction, or indication of a desired outcome.

The application by Quinn Properties, LLC for a variance to section 8.2.6 of the Wilton Zoning Ordinance has been denied. If granted, the variance would have allowed the construction of an asphalt batch plant and silo on Lot B–10, 50 Quinn Drive, which would be 68 and 72 feet in height respectively, where the ordinance limits structures to a maximum height of 45 feet. The variance has been denied because the Zoning Board finds that the applicant has not demonstrated unnecessary hardship, as discussed below.

Caveats
The sole subject of this decision is the requested variance. This decision should not be taken to imply that an asphalt plant, in the abstract, either is or is not an allowed use on the subject property, which is not a question that was before the Zoning Board. For the purposes of this decision, we have assumed without deciding that an asphalt plant would be an allowed use.

Given the assumption that the underlying proposed use is an allowed one, the analysis below addresses only the height variance. The Board received considerable input in opposition to allowing *any* asphalt plant. We found such input to be irrelevant except to the extent that it bears directly on issues inherent in allowing the increase in height, and consequently disregarded it.

The Ordinance Provision
The ordinance provision which is the subject of the variance application is Section 8.2.6 of the Wilton Zoning Ordinance:
8.2 **Lot Requirements** All new construction or development within the industrial district shall meet the following requirements.
…
8.2.6 **Structure Height.** Maximum structure height is forty-five (45) feet or two (2) stories.

Hardship
A variance may be granted only if
Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. *RSA 674:33, I(a)(2)(E)*
where
"[U]nnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area: (A) 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; and (B) The proposed use is a reasonable one. *RSA 674:33, I(b)(1)*

There is very little case law pertaining to RSA 674:33, I(b)(1), but This definition of unnecessary hardship is similar, but not identical, to the test that we adopted in Simplex Technologies v. Town of Newington, 145 N.H. 727, 731–32 (2001). See Laws 2009, 307:5 (statement of legislative intent that first definition mirror Simplex test). *Harborside Associates, L.P. v. Parade Residence Hotel, LLC* (2011)

We will therefore refer to the hardship case law developed under the Simplex standard.

Special Conditions
"Special conditions of the property that distinguish it from other properties in the area" in RSA 674:33 corresponds to "the unique setting of the property in its environment" in the Simplex hardship standard, *Simplex v. Newington*. This standard was discussed at length in *Harrington v. Warner* (subsequently referenced in a number of other decisions):
Next, Simplex requires a determination of whether the hardship is a result of the unique setting of the property. This factor requires that the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property. It does not, however, require that the property be the only such burdened property.

Rather, the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district. In addition, the burden must arise from the property and not from the individual plight of the landowner.

Thus, the landowner must show that the hardship is a result of specific conditions of the property and not the area in general. *John R. Harrington & a. v. Town of Warner* (2005) (internal quotations and citations omitted)

In the application, the applicant proposes these special conditions of the property:
"The property is not flat and rises more than 200 feet above the base elevation of the proposed plant which would be near the railroad tracks at the bottom of the lot in terms of elevation. The top of the 72' structure will be considerably lower than industrial operations higher up on B–10."

In the immediate vicinity, this would describe either the Quinn lot or the adjacent Granite State lot. In the Industrial District generally, there are also a number of lots with this characteristic. There are also Industrial lots which don't have the elevation characteristic, but are still large and remote enough that they would probably buffer a large structure as well as the subject lot. Whether this constitutes a special condition is a close call. We will assume, without deciding, that it does for the sake of the "fair and substantial relationship" analysis below.

"The property is already a stone quarry and use as a stone quarry diminishes the ability to use it for other industrial purposes."

Since the adoption of Chapter 9B of the Wilton Zoning Ordinance, "Gravel Excavation District," in 2006, the quarry on Lot B–10 has been a non-conforming use. "A nonconforming use … may not form the basis for a finding of uniqueness to satisfy the hardship test." *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992). Furthermore, to the extent that an existing use of the property reduces its value for other purposes, any resulting hardship would be self-created, and cannot justify a variance.

"The next door neighbor, Granite State, is an operating quarry and would not be a good neighbor for many traditional operations."

That a neighboring lot has essentially the same current use and physical characteristics as the lot under consideration is not a "special condition of [this] property that distinguishes it from other properties in the area."

"Because the industry has changed so that quarries and asphalt and concrete plants have linked ownership, a quarry needs an asphalt or concrete plant to survive."

"A nonconforming use … may not form the basis for a finding of uniqueness to satisfy the hardship test." *Grey Rocks*. "[T]he burden must arise from the property and not from the individual plight of the landowner." *Harrington*.

We are left with topography as a (possible) special condition of the property.

Fair and Substantial Relationship
Assuming that the topography can be regarded as a special condition of the property, we must determine whether, owing to the topography, "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." This requires us to determine the public purpose of the ordinance provision.

In the application, the applicant states:
"It is unclear what the public interest is in limiting industrial structures to 45 feet in height. The applicant believes that the 45 foot limitation was the height the fire department's ladder could reach when the Zoning Ordinance was enacted. The Wilton Fire Department did not have a ladder truck in those days but it does now (and, in fact, recently replaced its ladder truck.) The average ladder truck ladder can reach about 100'."

Other points in the application, including the paragraph proposing topography as a special condition of the property, suggest that the applicant may believe that limiting visual impact is another purpose of the ordinance provision.

We do not find either of these suggestions credible. There is no such height restriction in either the General Residence and Agricultural District or the Commercial District. The Ordinance surely would not allow 90 foot agricultural silos or eight-story office buildings if it found structures over 45 feet in general to be fire risks or eyesores.

In 1974, the Wilton Zoning Ordinance had only a rudimentary Industrial District chapter, with no meaningful restrictions on Industrial Uses. A substantial 1981 revision of the Zoning Ordinance included a complete rewrite of the Industrial District chapter. This was described by the Chairman of the "Sounding Board" (apparently a committee involved in the creation of the Ordinance revisions) as "establish[ing] standards designed to *retain Wilton character*, insure safe traffic flow, *prevent undesirable industry*, protect Wilton water sources and encourage desirable industry. [emphasis added]" (From a contemporaneous newspaper article.) The rewritten chapter introduced a "Permitted Uses" section specifying restrictions on "smoke, noise, odors, vibrations, and discharges," and a "Building Height" section limiting the height of buildings to 45 feet or two stories. From this historical context, we conclude that the height restriction was imposed as a simple way of limiting industrial facilities in the Town to a modest scale. Height is a marker for large / undesirable industry. Thus, a 70-foot asphalt plant is simply an instance of the "undesirable [i.e., large] industry" which the Zoning Ordinance excludes in order to "retain Wilton character." The topography may reduce its visual impact, but it does not make it any less the type of development which the height restriction was intended to exclude. Therefore, notwithstanding the topography, there is a fair and substantial relationship between the height restriction's public purpose of excluding certain kinds of industry in order to retain Wilton character and the specific application of that restriction to prohibit a 68-foot asphalt batch plant and 72-foot storage silo on the applicant's property.

By the same reasoning, notwithstanding the topography, the proposed use is not a reasonable one.

N. Faiman, Draft Approval

THIS IS NOT A DECISION
This is language suggested as a possible starting point for one possible decision of the Zoning Board, to facilitate drafting a final decision notice. It should not be interpreted as an expectation, prediction, or indication of a desired outcome.

THIS IS NOT A DECISION
The application by Quinn Properties, LLC for a variance to section 8.2.6 of the Wilton Zoning Ordinance has been granted. The variance will allow the construction of an asphalt batch plant and silo on Lot B–10, 50 Quinn Drive, which will be 68 and 72 feet in height respectively, where the ordinance limits structures to a maximum height of 45 feet.

Caveats
It should be noted that the sole subject of this decision is the requested variance. This decision should not be taken to imply a finding that the proposed asphalt plant is an allowed use on the subject property, which is not a question that was before the Zoning Board. For the purposes of this decision, we have assumed without deciding that the proposed plant is an allowed use.

Given the assumption that the underlying proposed use is an allowed one, the analysis below addresses only the height variance. The Board received considerable input in opposition to allowing *any* asphalt plant. We found such input to be irrelevant except to the extent that it bears directly on issues inherent in allowing the increase in height.

Note that the proposed asphalt plant is still subject to non-residential site plan review by the Planning Board and the issuance of building permits by the Building Inspector. The Planning Board will presumably not approve, and the Building Inspector will presumably not issue building permits for, a non-permitted use, and the site plan review process involves, among other things, identifying and mitigating potential adverse effects of a proposed project

BCM Environmental

& Land Law, PLLC
Solutions for Northern New England

November 12, 2019

Via Hand Delivery and Email
Town of Wilton Zoning Board of Adjustment 42
Main Street
PO Box 83
Wilton, NH 03086
wiltonzba@wiltonzba.org

Re: Quinn Properties, LLC Application for Variance; Case # 7/9/19-1
Letter of Opposition

Dear Chair Faiman and Members of the Zoning Board of Adjustment,

I write on behalf of Christopher Balch and others to respectfully request the Town of Wilton Zoning Board of Adjustment deny the application for a variance submitted by Quinn Properties, LLC ("Applicant") for Lot B-10 (known as 50 Quinn Drive) ("Application"). I respectfully request that the Board incorporate this letter into its record of this matter.

I. Granting the Variance Is Contrary to The Public Interest And The Spirit Of The Ordinance Is Not Observed By Granting The Variance.

The first two variance standards are related and can be considered together. See Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011). "The first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is to examine the applicable zoning ordinance." Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 581 (2005).

The language of the applicable zoning ordinance is a declaration of public interest, making all variance requests at least somewhat in conflict with the public interest. For a variance request to be sufficiently contrary to public interest such that it must be denied, it "must *unduly and in a marked degree* conflict with the ordinance such that it violates the ordinance's basic zoning objectives." Nine A LLC v. Town of Chesterfield, 157 N.H. 361, 366 (2008) (emphasis added). While judging whether "granting a variance violates an ordinance's basic zoning objectives, [the court considers], among other things, whether it would alter the essential character of the locality or threaten public health, safety, or welfare" but "such examples are not exclusive."

Here, the "essential character" of the locality is a zone with structures at or beneath the tree line, not above it as the proposed structures would be. The record contains evidence that the legislative intent of the height restriction was to maintain that essential character. The height restriction was intended to maintain the visual and aesthetic quality that comes with containing structures, especially industrial structures, beneath the tree line. Varying the legal limits to the height of structures required by the ordinance would "unduly and in a marked degree" conflict with these purposes.

2. Granting the Variance Is Not Required to Do Substantial Justice.

"Perhaps the only guiding rule [on this standard] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007) (citing 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 24.11, at 308 (2000)). In analyzing this standard, courts have also considered whether the proposed development was consistent with the area's present use. See Labrecque v. Town of Salem, 128

H. 455, 459 (1986).

The Applicant has not provided any analysis of the potential environmental and ecological impact that may be caused by using the on-site pond for fire suppression purposes. Without that analysis, the Board lacks sufficient, credible information to perform this balancing test of loss to the Applicant versus gain to the public. The Applicant has also not explained how changing operations from those beneath the tree line is consistent with new operations above the tree line.

3. The Values of Surrounding Properties Are Diminished.

It is axiomatic that when a view or aesthetic quality changes form containing no structures above the tree line , or at least no industrial structures above the tree line , to containing industrial structures above the tree line that property values will decrease , especially those that are in closest proximity to those industrial structures. Another hit to property values is likely to result from noise from the structures because they are located above the tree line. Structures, even industrial structures, located beneath the tree line have any noises associated with them buffered by the trees. However, when a structure rises above the tree line, that buffering capacity goes away, allowing the noise to travel farther than it would if the structure were beneath the tree line.

With what the Applicant has produced on this point, the Applicant has not met its burden in proving with sufficient, credible evidence that the proposed structures would not diminish property values.

4. Two Additional Legal Points.

We respectfully request the Board to additionally consider the following. First, the

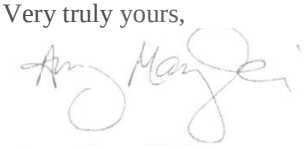
prior variance is entirely irrelevant. The Town of Wilton Zoning Ordinance Section 17.4 provides that any expired variance, such as this prior variance, is "void." Further, the legal requirements for obtaining a variance have changed substantially and materially since 1988 when the prior variance was obtained.

Second, the Town has supplemental variance criteria about which the Applicant has not provided any information. Town of Wilton Zoning Ordinance Section 10.6(a) requires that "The variance will not result in increased flood heights, additional threats to public safety or extraordinary public expense". Because the Applicant has not provided any information about this requirement, the Board has nothing upon which to base any determination as to whether the Application does or does not satisfy this requirement.

Conclusion

The Applicant has not provided sufficient, credible information upon which the Board can determine that the Applicant has satisfied all of the required standards to approve the requested variance. The Board has a strong record that supports denial. For all of the above reasons, I respectfully request that the Zoning Board of Adjustment deny the Application.

Very truly yours,



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Cc: Client