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

DATE: February 18, 2020
TIME: 7:30 PM
PLACE: Wilton-Lyndeborough Coop HS Cafeteria, 57 School Road, Wilton
PRESENT: Neil Faiman, Chair; Joanna Eckstrom; Jeff Stone; Paul Levesque; Andy Hoar, Peter Howd (Alternate); Bob Spear (Alternate),
Absent: Judith Klinghoffer (alternate)
Staff: Land Use Administrator Michele Decoteau
Attendees: Deb Abrahams-Dematte, Bill Abrahams-Dematte, Gail Agans, Dave Agans, Sharon Akers, Chris Balch, Jennifer Beck, Jackie Benn, Joseph Benn, Sharon Blackburn, Heidi Bliss, Ronald Brown, Miguel Cardenas, Whitney Carpenter, Sarah Chazinski, Peter Chazinski, Shan Clark, Steve Clark, Donna Crane, Bruce Darby, Deana Darby, Brian Drayton, Tim Dresser, Denise Dumas, Phillip Dupont, Andrew Finlayson, Dodie Finlayson, William Finlayson, Debra Fogg, Anthony Graham, Glynn Graham, Sherry Jennings Marilyn Jonas, Gene Jonas, James Jones, Richard Kahn, Sara Kenney, Andrew Kenney, Thomas Lafleur, Sandra Lafleur, Paul Mahoney, Mike McGonegal, Doreece Miller, Bridget Mooney, Daniel Muller, Isaac Muszlinski, Margery Nelson, Amanda Nickerson, Joshua Paige, Rebecca Paige, Lynne Pentler, Nancy Plante, Patty Quaglia, Tom Quinn, Don Rankin, Lynne Rocca, Kathryn Rockwood, Joseph Rogen, Johnathan Roithan, Joan Ross, Dan Ross, Johnathan Rotman, Cori Ryan, Bill Ryan, Shira Sadeh, Lior Sadeh, Alayna Samsal, Kristin Schwab, Sussy Rose Shields, Robert Silva, Shannon Silva, Jack Slater, Nancy Wallace, Lorey Zahn, John Zavgren

PRELIMINARIES:

N. Faiman called the meeting to order at 7:34 PM and introduced the Board. N. Faiman opened the meeting and gave extra thanks to the Custodians for setting up the room for us. M. Decoteau recorded the meeting.

MINUTES:

The Board directed M. Decoteau to update the minutes of Jan 13, 2020 with the changes discussed.

J. Eckstrom MOVED to postpone the approval of the minutes until the next meeting. P. Levesque SECONDED. All in favor.

PUBLIC HEARINGS CONTINUED FROM PREVIOUS MEETINGS

P. Howd left the Board at 7:43 PM and moved to the audience.

N. Faiman opened the public hearing at 7:44 PM by reading the public notice. He reviewed the history of the case. This is a previous case, not a new case. All the testimony including all the written submissions, are all part of the case history and do not need to be repeated. The applicant has requested the rehearing and will have the opportunity to say why they think the decision was in error. There will be opportunity for public input.

N. Faiman continued, if the applicant wanted to build an asphalt plant that was 45 feet tall, there would be no need for a variance.
The applicant requested a height variance for what is presumed to be an allowed use.
N. Faiman reviewed the procedure for the meeting.

Voting members: N. Faiman, J. Eckstrom, J. Stone, B. Spear, P. Levesque. A. Hoar will be participating in the discussion but will not be voting.

T. Quinn provided a signed copy of an Authorization to Represent for Dan Muller. D. Muller, spoke on behalf of the applicant. Two exhibits were provided to the Board and the Applicant.

Exhibit A - from B. Spear, two pages regarding property values around an asphalt plant in Massachusetts
Exhibit B - from A. Finlayson

D. Muller asked for specifics on the authors of the exhibits and confirmed that Exhibit A was from B. Spear from the Board. D. Muller said he was concerned that a Board member was doing research outside the hearing process. The concern is that you are looking for a particular result. D. Muller quoted RSA 674:13. He said board members are held to the same standard as jurors and the work that B. Spear provided was research done to argue against the variance application.

B. Spear said he would appreciate if the applicant would read the data. This is to refute one part of the application.

D. Muller said there is statute that says you cannot do research, particularly before the start of the case and as the applicant's representative, he needs to raise the issue. If a Board member who should have been disqualified remains and votes, then the decision can be rendered invalid.

The Board discussed the standards and process of recusal. B. Spear asked the ZBA members to weigh in.

P. Levesque asked if the Board members could read the letters? D. Muller said that this a quasi-judicial proceeding. What everyone submits is evidence, the jurors should be listening to what the evidence is, but what you cannot do on the board, is factual research on a pertinent issue before a rehearing. This is supposed to be *de novo*.

A. Hoar asked if he was allowed to read the NH Land Use Law book? D. Muller said research of facts is one thing, but learning the law is different.

N. Faiman reviewed the relevant law about disqualification of a Board member. He said it is only the Board member themselves who decide to disqualify themselves, they can seek input from the Board. The participation of someone who should have been disqualified, can render the decisions invalidated.

P. Levesque asked if he would be allowed to drive around and see the site? D. Muller said that state statute says you are not allowed to do so outside a site visit. He said this would be actively

doing research for one particular position on the case. Going to visit the site is standard practice but not if you are seeking information to get to a particular side. D. Muller said this research was done with a particular viewpoint in mind.

B. Spear asked the Board to issue an advisory opinion that would not be binding on whether they thought he should disqualify himself.

N. Faiman asked the Board to answer the question: Should B. Spear disqualify himself?

VOTE

J. Stone - yes, reluctantly because Attorney Muller had said he would invalidate the decision if B. Spear stayed.
A. Hoar - yes, for the same reasons
P. Levesque - yes, but this brings us to a four person board, and A. Hoar could serve.
J. Eckstrom - yes
N. Faiman - yes

B. Spear chose to recuse himself. He submitted the document to the Board as a resident. A. Hoar was appointed to serve. A. Hoar confirmed he read the case materials.

D. Muller said that he had one more *pro forma* argument. He objected to the Regional Impact notices going to the towns of Milford, Temple, Greenfield and Mason as they are given the status as abutters. N. Faiman said that there was no objection from the applicant at the determination hearing in September.

D. Muller said that the Board has covered much of what he was going to cover, he is going to focus exclusively on the height and the other scope of the hearing type things. One, a variance, by nature, is an approval on a specific property. He simply wants to make that clear. One letter suggested that this would allow skyscrapers all over town. This is not the case. The basic point is that variances focus on a specific property. He continued, a variance by nature is specific to one single property. A variance focused on a particular property, not a general amendment to the ordinances.

D. Muller continued, now that the Board has this exhibit (Exhibit A) and a letter submitted on Feb 8 (Letter from the Coffeys), he wanted to make this clear that the Quinns are here for themselves. D. Muller continued saying the argument that the Quinns are a front for a Pike Industries is a strawman argument. Pike Industries was a tenant on this property at one time, however, they broke the lease before the term was up. The relationship between Pike Industries and Quinn brothers LLC is adversarial. The lease is done and they are off the property. This claim is wild conjecture.

D. Muller continued saying he was not going to repeat everything that Attorney Keefe said but he is going to emphasize a few elements. The first two are related, a variance shall not be contrary to public interest and conserve the spirit of the ordinance. The question is if the granting of the variance be in conflict with these and to be clear, do not have to show it is IN the public interest, there is a case called Gray v. Seidel that shows that is not the standard. Second, a number of the letters come with the notion that they can deny the variance and enforce the

Zoning Ordinance as written. He cited Malachy Glen Associates, Inc. v. Town of Chichester saying you cannot deny a variance for the reasons an applicant is seeking the variance. He continued saying that height restrictions by statute are for various purposes. One of those is fire safety. This is the one most often cited by towns. They don't want the building to be too high for emergency responders.

A. Hoar asked if D. Muller could point out where the Zoning Ordinance says that. D. Muller said safety that it is an interpretation and the Ordinance doesn't say that specifically; however, you can only adopt ordinances for specific reasons. So when you adopt an Ordinance, you are presumably doing it for one of the reasons set forth in the state statute. In addition to fire safety, another reason is access to air and light. The Fire Department has already addressed this.

D. Muller said, in terms of how this doesn't unduly conflict with the neighborhood is to examine if this alters the essential character of the neighborhood. Many letters mentioned that this would not maintain the rural character of the town, but this lot is accessed by a private road and would not be readily visible from properties that would have incompatible uses. The applicant had provided a visual analysis from VSS. There were a number of plans attached that showed Goss Park might be the only location that is visible. But in the months when there are no leaves, the plant will be closed as will Goss Park.

D. Muller said the other thing you might be talking about in terms of height, are threats to public welfare and safety. This is about access by first responders and the excess height won't be a problem. In the latest round of submissions, there are couple of new issues that were raised including noise.

N. Faiman said go back to the issue that this height problem for first responders. N. Faiman said in order for the Board to grant the variance and find there is a hardship, that hardship must be a consequence of special conditions of the property. He asked, how is that non-issue of emergency access a result of the special properties of this property as compared to other properties in the town?

D. Muller said his notion of the hardship test is slightly different notion. In the past, the standard for hardship was called the old Gray Rocks standard. The new standard is from Simplex. Under the Simplex test, elaborated under Bonnita Rancourt v. City of Manchester, do the conditions of the property make the request reasonable? That is what the focus is, not if there are alternatives, not whether you could comply with the zoning. D. Muller continued, in terms of special conditions, what you are looking for is: are there conditions that differentiate this property from others in the same zone. If there is nothing about your property that makes this reasonable there is no hardship. He said that when you looked at the Board's previous decision, the Board was concerned in part that this property was a lot like others in the industrially zoned district.

However there are some aspects of this lot that are different. Not only do you have several lots together. There is a very large lot, portions of the abutting properties are in current use creating a protective buffer, and what is distinctly different is that there was a site plan approval for this particular use and by May of 1990 they had met the conditions of that site plan - there isn't another lot that has that special condition - they have developed it specifically for the asphalt

plant. He said that he had not seen another lot with those exact same circumstances. He cited that development on the property can be a special condition and that is the Harborside case out of Portsmouth. All of those things cumulatively: large lot, buffers, improvements in place including drainage improvements – all make the use reasonable and add to that topography and the boundaries that make it difficult to view.

N. Faiman said to D. Muller, as you are aware, the new statutory definition of hardship is similar but not identical to the Simplex test. You are speaking eloquently to prong B – the proposed use is a reasonable one. But prong A- there is no fair and substantial relationship between general public purpose and the height restriction and what you are saying – the need for fire access – and the specific application of this provision to this property. What is it that makes this property different from other industrially zoned properties that would make it reasonable that the other properties should retain the height restriction and this one not – with regard to fire access?

D. Muller said he respectfully disagreed, the Harborside case, which was a Supreme Court Case, basically says that is Simplex.

N. Faiman said no, they said it was similar to, but not identical to Simplex. How did this meet the hardship definition?

D. Muller said he will address it in terms of a fair and substantial relationship to the general purposes of the ordinance and specific application to the property. He continued, again you are looking at a variance for a height restriction. One thing that comes into play is the adequacy of light and air. This is a large property with proposed development to the middle, has improvements made based on a site plan, and the many properties in current use that will serve as a buffer visually, and the infrastructure in place that was meant for heavy vehicles that could also be used for emergency vehicles. The Fire Department has no issue with reaching the greater height. For all of those reasons this will not interfere with light and air for other properties. It is not looming over other properties. It in fact is, won't generally be visible. And the one most likely it will be visible from, will be at time when both the plant and park are closed. Based on all these considerations, the height there is no fair and substantial justice between the height of the proposed use and the specifics of this property. There are specifics of this property that are shared with other properties in the zoning district, but that is ok under Harrington v. Town of Warner.

D. Muller said this meets both the first and second prong of the hardship question.
A. Hoar asked D. Muller to answer N. Faiman's question.

D. Muller said he would try again. The first prong - Owing to special conditions of the property, there is no fair and substantial relationship between the general purposes and the application to the specific property. He said that height restriction is primarily for fire protection but he will address the visual aspect as well even if he didn't agree with it. D. Muller continued, if you have a large property, with the infrastructure in place, if you have the topography, the size, and all the characteristics of this property there is no connection. It doesn't serve the fire protection, or the air and light purpose. It wouldn't serve the visual purpose either. The second prong was answered. All of these together make it such that there is no fair and substantial relationship

between the fire protection, light adequacy, and the visual buffer and the zoning ordinance and this case.

D. Muller said he wanted address one point made in Harrington versus the Town of Warner, there was a notion that a hardship can exist if you are not going to get a reasonable return on your investment. He wanted to address financial hardship. This is a quarry and last year they excavated 8 thousand tons and at $1.25/ton and with taxes, some of the letters suggested this was a generous profit. However, taxes are not the only expense. There are employees, insurance, environmental compliance, and more. For example, the Pike Industries lease was structured so that Pike could leave the lease if the quarry was not economically feasible, and they got out.

J. Stone said that Quinn Brothers, LLC contested Pike Industries claim they could not make a profit yet now Quinn Brothers, LLC claims *they* cannot make a profit. Which is it? D. Muller said that this is the reason Pike gave, it wasn't economically feasible. This proposal would allow them to put the size plant on the property to get a reasonable return on their investment.

D. Muller said with respect with diminution of surrounding property values, he addressed Mr. Spear's letter specifically. He doesn't know the specifics of the case. For real estate it is location, location, location. If you buy property next to an industrial zone or a commercial zone, those are taken in to account in the purchase price. The additional height will not interfere with air and light and not a single residence within two miles could see this - from a visual standpoint this will still look as rural as any other part of town. If you are not going to be generally able to see it, it is a hard to argue it will have any effect on property values.

D. Muller said finally with regard to substantial justice, the ZBA needs to consider the notion is if the loss to the owner if the variance is denied outweighs the public interest. The public interest here is that, given there are similar height restrictions in other zones, this is suggestive that this consistent with the state statute around fire protection and adequacy of air and light. On the other hand, if the owner, if the variance is denied, to make this feasible for them, and allow reasonable return, they need the larger plant. If there is no height variance, there is no plant and with that, the applicants don't get reasonable return on their plant. Substantial justice is done with granting of the variance.

D. Muller said that there were two recent filings – one on noise and one on lighting. If the Board wants to condition the approval on dark skies ordinance, the applicant would be fine with that. With respect to noise, without going into specifics, the height may or may not be implicated in more noise. There are also things like distance, buffers and topography that affect noise. But at this point, we don't think notice will be a factor. The applicant has offered to have someone look at the noise, but doesn't think this will be a factor. The applicant has some experience with asphalt plants, and they said they only had one complaint that was resolved. They expect the same thing here. Buffers and distance all play in to noise issues. The applicant feels that because there is a buffer and a large lot, there will be no noise issues. He notes in terms of existing conditions, there is already noise there, it is what it is right now. This is not going to change the existing conditions.

P. Levesque asked about night time operations. D. Muller said the general answer is that if there is night paving, they can come get the material at night, but the material would be made during the day. The town has a noise ordinance and this wouldn't violated. P. Levesque said the issue is not just the noise from the plant itself, but there would be trucks at night going through residential neighborhoods.

N. Faiman asked for clarification. Are there regulations that would legally require it be lit all the time? D. Muller said he wasn't aware of any. Even if there were, it would have to be pointed down. Generally a lot of site plan regulations have lighting regulations requiring down cast lighting to prevent light trespass. The board could require there be down cast lighting or meet Dark Sky standards.

P. Levesque said there is a silo at granite state on a neighboring lot. How high is it? D. Muller said he didn't know. J. Eckstrom said it was 62 feet. She believes that silo is considered equipment that was installed prior to the 45 foot height restriction.

D. Muller said he was done and able to answer questions. The Board opened the meeting up for public comments.

C. Balch (31 Center Road, Wilton) said he took a few notes. The applicant said they gross $55,000 but have lots of expenses. He asked if the ZBA should we grant the variance because the applicant's business is doing poorly? The buffer with Goss Park is white pine and hemlock, evergreens which will not gain more leaves. He shared some facts about what he was driving in 1989 and how many things have changed since then regarding safety. He said that to suggest that the plans submitted in 1989 could be built on now is a ludicrous idea. Finally, this plant would be operated at the same time that Goss Park would be in at its peak use and be most impacted by this plant. He shared that he felt that D. Muller was disrespectful and dismissive to the comments from the people of Wilton.

G. Graham (608 Abbott Hill Road, Wilton) said Mr. Muller referred to the spirit of the ordinance being one of three things: fire, air, and light. She continued, that we know that none of those things applied to OUR height ordinance. The spirit came from the town meetings where every single vote was counted in 1981 where the folks of Wilton wanted to retain the rural nature of Wilton. That part I believe is the real reason. She felt that the fact that we understand that the applicant doesn't have to prove this is IN the public interest - but there is much to say it is against the public interest. They also said they didn't *think* there would be noise, she didn't hear proof. But also even if there is down cast lighting, having lights makes it visible.

R. Brown (979 Isaac Frye Highway, Wilton) said he was one of the people who could see the bucket during the bucket test. He felt that D. Muller downplayed the visibility issue. He has neighbors who are at greater height than his house is. He said he would still be able to see it even in the fall and winter. The visibility is far more important than the applicant suggested.

M. Jonas (Fairfield Lane, Wilton) said that in RSA- 674:17, one of the other reasons for height restrictions, was health and welfare and to protect the citizens from other dangers. The noise from the quarry is from a non-conforming use. In terms of the new structure, the height really

does matter. When the sound source is in a location with wind speed gradient is greater at the top of a structure, the sound waves refract and all that sounds is going to bounce onto the hill side. If you have a shorter plant, the effect would be less and the trees would be able to block the sound. The reason is that this affects health and safety. She shared a long list possible health detriments from noise including the effects on children. The biggest effect is sleep disturbance and the operations in Amherst begin at 7am. We would be hearing a lot more from taller plant. The Board said she was speaking persuasively and authoritatively on acoustics and asked what her qualifications were. M. Jonas said is a speech and language pathologist, and has studied sound, hearing, and acoustics. She has a master's degree in speech in hearing.

P. Levesque asked how loud would the plant be? T. Quinn said no they don't have the numbers in hand. We did have plant in Amherst, right next to our office. He worked there every day while it was running. He was in a metal industrial building and could testify what the sound was and a well running plant isn't offensive. M. Jonas said she said she did measure the asphalt plant in Amherst and it was 85 db with steam pops at 90db. The background noise affects your perception, a sound seems louder with a quiet background. The db scale is exponential and 85 to 90 db is quite loud. P. Levesque asked how far away she was. M. Jonas said she was about 200 feet away. P. Levesque said most of the houses are ¼ mile away. M. Jonas said yes, but the effects of the wind speed gradients, and the fact we live in a bowl, will amplify the sound. If you wanted to make a sound amplifier, it would be similar to the quarry in shape. T. Quinn asked where the 200 feet measurement was. M. Jonas said the building next to the rail road tracks in front of the little metal building. She estimated the distance with google.

D. Agans (49 Hawthorn Drive) said we are arguing the stated purpose of the Zoning Ordinance which was rural character. If you put a restriction on the height of the industry you are limiting the size of an industry. And if they put in a shorter plant in, this would be a smaller industry and would have less of an effect on the rural character town. A height restriction limits the effect of the industry.

R. Folz (Styles Farm Road) asked if the Board member's research had found for Mr. Quinn, would he have objected? N. Faiman said it wasn't relevant. R. Folz said for future reference, how can the Board research an issue without finding a specific position? N. Faiman said you are doing our research for us. R. Folz said if we don't have all the information, how can we do this? N. Faiman said a board can hire an outside consultant. The Planning Board does that and the ZBA has done that in wetlands for example. R. Folz asked what part of the year, and how much of the year, would this be operation? T. Quinn said generally asphalt plants close down about the first frost or snow. Generally this is November to March. R. Folz asked why did the Quinns let the original variance lapse? The Board said this was stated in the past and that the economics have changed. R. Folz asked how was it determined that there was no impact on property values? N. Faiman said the applicant can do that if they choose. R. Folz asked what is the tax advantage for Wilton?

T. Dresser (Hearthstone, Wilton) wanted to read parts of his letter. There were some statements read by Dr. Green and some of the pieces that he wanted reviewed were the dimensions of the building and the topography. He requested that the Board ask the applicant to verify the models

used and the plans submitted be required to have a height of the structure be adequate for dispersal. The 30 year old plans maybe inadequate.

P. Levesque asked what specific chemicals come out of the stack? T. Quinn referred everyone back to the presentation by Dr. Green. There has been a lot made of the 2 mile hazardous zone. There is a lot of speculation about what people are looking at on the internet. There were a lot of false comments made in the letter by the Coffeys. With all this, there are a lot of things in the record that are not true. He urged the Board to pay attention to what has been presented by experts.

J. Slater (55 Cram Hill, Lyndeborough) asked whatever happed to the radius around the plant and it didn't include Lyndeborough. N. Faiman said that is not a question for the Board. J. Slater has been in the electrical business for 47 years, he returned to Lyndeborough, he is 600 feet from the plant. He is in jeopardy in regards to the environment. He has worked for AC Brox in Methuen, and spent 10 years in that plant, He knows what the lighting is like, the lighting on the extended height, and he will be affected. He asked where he got the information that the lighting will not affect the residences. N. Faiman asked the applicant what the basis of the assertion that the lighting will not affect the public. D. Muller said obviously in the past, some plants didn't comply with the Dark Sky ordinances. This became more fashionable in the last 20 years. That is why we offered that if there is lighting on the exterior, that there wouldn't be light trespass on the other properties. J. Slater said with regards to that answer, he assured the Board that with the height extension, this will affect him. There has never been a survey to determine which way the wind is blowing. T. Quinn said that on that particular property on Cram Hill Road is at least 200 feet higher than the proposed plan. N. Faiman asked J. Slater to confirm. J. Slater said it was 100 feet higher.

C. Balch (Center Road) said he has Dr. Green's testimony from October 23, 2019. He questioned her assertions that the proposed plant would not be heard or have odors that would reach Goss Park. In addition, the plant in Amherst is held up as a good comparison, but you can hear 80 db noise from 200 feet away. How does the proposed plant differ from the one in Amherst? T. Quinn said that our conversation in this room is 80 db. And you are hearing 80 db from the plant at 200 feet away, it shouldn't be a problem. But the nearest thing to the proposed plant is 800 or 900 feet away. This doesn't seem like an unreasonable noise level.

A. Finlayson (Heald Road, Wilton) said he wanted to address the map he provided. The applicant said this was outrageously wrong. A. Finlayson asked for clarification from the applicant about what was incorrect. T. Quinn said his point would be that everything in the Coffey letter is incorrect. Pike Industries has nothing to do with us anymore. Regarding the map, it does show the parcels we own and is generally correct but it also shows that Pike Industries can purchase our land and they don't have the right to purchase. A. Finlayson asked some follow up questions about the lease between Pike Industries and the Quinns. The Board asked what this has to do with the height. A. Finlayson said that they are trying to make the case they are a small operator but they have dealings with the bigger companies. The Board reiterated that Pike has no interest in the property and there has been no counter to that fact.

A. Finlayson said he did some research on height restrictions in other towns in the regions. Most in the region were 45 feet or less including Keene and Concord. Nashua and Amherst both allow building taller than 45 feet.

P. Howd (Conservation Commission, Wilton) said that at the Feb 4 meeting, absent two members who recused themselves, the Commission asked him to remind the ZBA about the letter they previously submitted. They should consider themselves reminded. P. Howd continued, his work focused on the development of bottom boundary layers on beds with multiple-scale and time-variable bed roughness. "My professional conclusion is that adequately representing the advection and turbulent diffusion of any effluent from the plant will require a sophisticated fully 3-D numerical model with realistic topography, roughness, and wind field. Dr. Green's (PhD in Toxicology) representation of advection/diffusion from a plant sitting on a flat and uniform surface is inappropriate in this specific location."

W. Carpenter (Hearthstone, Wilton) asked about the question of the claim of hardship. He sought clarification on the nature of the hardship, was it a technical or financial hardship? N. Faiman said the concept of hardship is well-nigh incomprehensible. In the very short definition – it is that the extent to which the Zoning Ordinance unreasonably burdens an applicant and prevents them from doing something that is reasonable to do due to the special circumstances of their property. He continued, but reminding everyone that this is not the legal definition: "A Zoning Ordinance is drafted for a purpose by its nature, it is drafted using a broad brush. You cannot zone individuals. A town decides to have an industrial district and this is what is allowed in the industrial district. These are drafted, presented and voted on by the town. The presumption is that they are good rules. However, the rules are supposed to work across dozens, even hundreds, of lots. There will be some lots that just don't fit. There are good reasons they don't fit, maybe it precludes something that should have been allowed, may be the reason is necessary. In general, the ordinance is good, but when you go and look at individual lots, the ordinance puts an unreasonable burden on someone and deprives them of some or all of the use or value of their lot. A variance is an escape valve." W. Carpenter and the Board discussed variance request and further clarified his question about hardship. The ZBA's function under state law and they implement the laws voted on by the towns people of Wilton.

J. Beck (Tighe Farm Road, Wilton) asked the ZBA respectfully to consider two claims made by counsel and look into them more carefully. She said they had to do with air and light. Her understanding is that under the Dark Sky lighting Ordinance, it would be impossible to do this given the industrial nature and given the security needs and night operations. This is not just about shinning light in to a neighboring area and will indeed affect wild life. She was amazed that they could contain and secure the air on the property and was interested to find out what data they are using to determine how they could contain the bad stuff and keep it on their lot.

C. Balch (Wilton) said he was not aware of any law that required a ZBA to grant a variance.

D. Ross (Wilson Road) asked what would be peak production and how does that translate to trucks on the road? He shared that he got up early and got on the road and most of the paving production he saw was at night, even after midnight. How would the need for night paving impact this plant. What good does this plant bring to Wilton? T. Quinn said it depends on

demand, but generally 60 -90 ton per season range. The number of trucks depends on the size. They were expecting about 30 trucks per day.

P. Levesque asked if the applicant was going to use propane. T. Quinn said yes. P. Levesque asked how are the applicant planned on getting the asphalt material. T. Quinn you have to heat it up.

L. Rocca (Country Way, Wilton) said her concern is that regardless of the height, is that the sound will travel down the rail road track. Her question is that the applicant says there won't be a lot of sounds but the 30 trucks per day will be the sound. You can't transport asphalt in a lot of ways since you have to keep it hot. Her husband has a business with trucks so she knows. She said that you will hear the trucks and smell the diesel. The amount of trucks is a concern. In the past, the Quinns have leased the land to other companies, if he can still make that profitable as a gravel pit, she thinks they could be profitable and not put an asphalt plant. She asked about prices - and profits. T. Quinn he said he does the books and knows the number, a heavy industrial property, there aren't a lot of other uses. You have a high fixed costs in a gravel operation.. One thing that is critical is that you need to have an outlet for your product. We need to create another outlet for a finished product. All the smaller companies we sold to have been purchased. The volumes are important. He asked about where she lived. L. Rocca said that she can tell which company is working from the sound. She has concerns about the noise in the evening and protecting her quiet time. If we lived on a flat surface, the trees would hide the sound. But we live on a hilly surface; and we can see each other and hear each other.

G. Graham said she has been a teacher for 40 years, more and more people are talking about nature deficit disorder even in Wilton. One of the places kids experience nature is Goss Park where we take our kids swimming. She would stop taking her grandkids if she could hear trucks. She would not want to take her grandchildren there if there was a tiny bit of particulates. How much is too much exposure for your grandchild?

S. Akers, (Lyndeborough) she understands that we are only addressing the height variance, but we were told tonight by the applicant, that without the height variance they cannot have an asphalt plant that is profitable. The two issues are interconnected and therefore we cannot divide the issue.

D. Ross (Wilson Road, Wilton) said the applicant asserts there will be no light pollution, no air pollution, no noise pollution. He urged the Board not take this at face value.

J. Ross (Wilson Road, Wilton) the applicant said it was 30 round trips, who is paying for the roads? What is going to happen to the roads? The Board responded that this is a state road and they will be paying taxes.

M. Jonas wanted to be clear about sound. The height has a really good possibility of increasing the sound but there was some confusion. But db is a logarithmic scale. She provided an example.

A. Finlayson said the applicants say there will be 30 round trips but how many trucks go in to the Route 31 route. T. Quinn said he would defer what they said before. There would be occasional deliveries of asphalt and propane and potentially sand. There would be some additional trips.

T. Dresser (Hearthstone, Wilton) shared that the OSHA recommendation of sound limit is 85 db over an 8 hour day. If you raise the db to 90, that cuts the exposure time in half.

L. Rocca (Country Way, Wilton) said when in 1988 when they reached out to build the plant, there were few if any houses. Since then, we have over 60 more houses in the area. Someone made a comment that there hasn't been a lot of change. P. Levesque said if you look along route 31 - there aren't that many houses. B. Silva (Barrett Hill Road, Wilton) said he pulled the data. There were 60 houses built within a 1 mile radius of B-10.

A. Nickerson (Country Way, Wilton) her house is on the other side of 31 and she can hear all the trucks along 31. She is used to hearing construction sounds. Not a problem during the day. But if the plant is operating at night, she had concerns about light and sound.

L. Rocca said that the due to her elevation and the railroad track, she can hear everything at the quarry.

R. Brown wanted to remind the Board that just as visibility and other factors, they spread out not just along 31. The traffic and costs we are not just talking about 31. Isaac Frye is used by trucks - any traffic heading west comes through Stoney Brook Way, and up Isaac Frye Highway and turns on Burton Highway to 101 West. Traffic spreads out in many directions. My barn has shifted because of that.

N. Wallace (Hearthstone, Wilton) said she has been uncomfortable that B. Spear recused himself. The applicant is represented by a lawyer and is concerned that the ZBA doesn't have legal representation. N. Faiman said that the Board has training, read books, expected to have some familiarity with the law. What D. Muller said was correct. N. Wallace said that she was uncomfortable with what seemed like a threat from the counsel.

D. Abrahams-Dematte (Barrett Hill Road, Wilton) said air quality is related to height. She wanted to express that we saw that emissions and VOCs are released from asphalt plants and that the higher the stacks the farther away the contaminants can spread. The proposal doesn't protect us from the pollutants.

D. Muller said he had a brief rebuttal. He continued, to clarify the adequacy of air and light. This doesn't deal with air quality. There was a question about emissions and doesn't want to debate. But for these types of plants you need to get a permit from DES - you have to get a permit for fugitive emissions and dust. D. Muller said that with respect to hardship, both economic and Simplex, he then quoted a case for a manufactured home park that needed to expand to stay profitable. In terms of the 1981 article, it doesn't provide a lot of specificity - doesn't specify which amendments for which ordinance. If it was an attempt to keep out undesirable industry, who thinks this could be the reason (audience raised their hands) but it would be ambiguous. The

fact that there are height restrictions on other districts, this doesn't seem that specific and it would be unenforceable.

N. Faiman said he would be interested in why the height restriction is in the Downtown Commercial District and the Industrial Zone, but not the General Residence or Residence and Ag districts? What would be the common themes? D. Muller said that was an interesting question. He said there were height restrictions in other areas. N. Faiman said that height restrictions are specific to the district for relevant concern. In the residential districts, it is a dense district and this may be to alleviate crowding. In the industrial district there may be more concern about visibility. D. Muller said from a general standpoint, why they went piece meal, is unclear. The extent that in 1981 this was to keep out certain industries, if it is a disguised use prohibition, that isn't enforceable.

D. Muller said OSHA is focused on worker safety and in terms of the noise argument of 85 db at 200 ft away is beside the point. The majority of the operations are down below on the ground. These are unoccupied structures above the height restriction. In terms of the presentation, the VSS materials were presented and he understands that Goss Park is mostly hemlock and pine, his understanding was that there were more deciduous trees at the park.

R. Kahn said wanted to respond to what D. Muller said. R. Kahn looked at height restrictions that are unique to Wilton. We don't really know why. He didn't see Fire Truck in any of them. He wanted to read about nuisance industries from Peterborough Ordinance about height. He owns property in Wilton and Lyndeborough and can see the quarry from both.

S. Brown (Putnam Hill, & Cram Hill Road, Lyndeborough) said she has the answer to D. Muller's question about who knows what a nuisance industry is. She has a letter from Sara Garcia about what is a nuisance industry. Sara Garcia is a Senior Economic Development Specialist in the International Economic Council in Washington DC. She said read from the letter about economic drivers for rural communities. Sweet smelling air and beautiful views are economic drivers in rural places.

A. Hoar MOVED to close the public hearing and enter deliberations. P. Levesque SECONDED.
Discussion – None.

Roll Call Vote
J. Stone – yes
A. Hoar - yes
P. Levesque - yes
J. Eckstrom - yes
N. Faiman – yes. All in favor

P. Levesque has a lot of trouble with the case. There are pros and cons on both sides. We are only voting on the height. There is also another silo on the neighboring property.

J. Eckstrom agreed that the Board was discussing the height. She does realize there are other potential implications – noise, light, and so on. There is another board whose job it is to deal with those issues and that is the Planning Board and site plan review.

A. Hoar said one of the things that we have to take in to account is the health and general welfare of residents as well as property values. The idea that this won't impact property values is horse hockey. The idea that sound doesn't travel is wrong. Sound does travel remarkably well in the town. The idea that houses are higher up allows for sound to carry farther - fewer obstructions. He believes the height restrictions were put in the industrial district with the goal of restricting what industries can be put in town.

N. Faiman said that like last time, he focused on hardship. He is assuming that D. Muller is essentially correct about the purposes of the height restrictions are some of reasons stated: - fire protection, visual impact, and that the town has the right to zone in a way to protect its rural character and aesthetic values. It seems clear that the amendments putting the height restriction were to preserve the rural character of the town. The Supreme Court has said that this is just as legitimate a reason for zoning and as valuable as fire protection and light and air. With regard to fire prevention, there is nothing unique about this property. N. Faiman cited the recent variance case on D-099. What is the characteristic of this lot that makes it special that any consideration that exceeding the 45 foot height restriction for fire protection is unique? N. Faiman said that D. Muller said that the roads provided good access to this property for the fire department - but this isn't unique to this property. All the Industrial Zoned properties have good road access. P. Levesque said he agreed. N. Faiman said that he has a problem with visual impact. It is reasonable to believe that there was a collection of amendments to protect the rural character. This was set up at the same time as the buffer restriction. The buffers are particularly large when an industrial property abuts a residential lot. The height restriction would help to keep the visual impact below the buffer. Looking at the testimony from the sight test, 80% of the beach at Goss Park would see the plant.

P. Levesque said there is a 62 foot tall silo right next to this property. It is just out of place. This is 300 acres of desolation. We are voting on the height restriction. Something is not adding up.

A. Hoar said he wanted to add that D. Muller wanted to diminish the impact by saying that the property surrounding the plan was in current use.

J. Stone proposed to take the variance criteria one at time. He MOVED that the Board discuss the variance criteria one at time. No SECOND but the board agreed by consensus.

Visual Impacts
N. Faiman said based on what he said previously, he would be comfortable finding that part of the purpose of the height restrictions in the Ordinance would be to protect non-Industrial Zoned property from visual impact therefor this would be inconsistent with the spirit of the ordinance and contrary to the public interest. J. Eckstrom said as far as Visual Impact, she agrees that this is a 58 acre property and the structures in excess of 45 feet would be on 2 of those acres. She doesn't believe it will have a visual impact. J. Stone said that he disagrees that the lighting is not an issue and even though a property nearby his home has dark sky lighting, it still affects his

night scape and has a visual impact. It doesn't matter if it is a large portion of the lot that is being used, if it is lit, it will be very obvious. P. Levesque said whether we approve a variance or not, there will still be a plant so the lighting doesn't mean anything. J. Stone disagreed saying that it would be more visible with a taller plant. It would have a negative effect. A. Hoar said part of the impact is the traffic late at night and early morning with the vibration. N. Faiman said he thought this was more an impact from the asphalt plant at night.

N. Faiman reviewed B. Silva's comment that he could see the site test man-lift from about 80% of the beach; M. Jonas looked at the sight test from the heavily-used, international snowmobile trail behind her house and it was clearly visible from the parking area, and S. Akers said she could see the lift from the parking lot at Goss Park and provided a picture. These were all visual impact directly related to the height. If you drop the height, then you wouldn't be able to see it. P. Levesque said it was hard to see. J. Stone said as was stated, this was a small man lift not at the scale of a plant. N. Faiman said if you drive by the Caldwell plant it is substantial. Imagine putting a people lifter next to it. J. Stone said applicant has a good point, even if they follow dark sky lighting, the plant will be lit at night. They may be able to avoid spot lights in someone's windows but the surface of the plant would be illuminated.

P. Levesque said we keep talking about the plant. There is a silo next door. A. Hoar said yes there is, but it isn't lit. N. Faiman said that is not what we are asked to approved. N. Faiman continued, the underlying motive for the height restriction is visual impact and if the proposed variance is approved, visual impacts would occur.

Property Values
N. Faiman said he doesn't see a difference in property values with the extra height. J. Eckstrom said she didn't see definitive proof on the diminution of property values. J. Stone said likewise, it is only speculation that there was no effect on property values. This one is a wash.

Hardship
N. Faiman said regardless of special conditions on the property, the plant will have a visual impact with the extra height which the ordinance was designed to avoid. There are no special conditions on the property that make it uniquely or unusually suitable with regard to fire protection. In other words, if a 75 foot asphalt plant was put on another property, would you say that there was something about that property that there would be a problem fighting a fire at 75 feet that isn't an issue if were on this lot. I don't think so. There is nothing that makes it more suitable for fire protection than any other similarly zoned property. P. Levesque agreed that it was not more not less than any other property.

J. Stone read from "The Five Variance Criteria in the 21st Century." The property must be burdened by the Zoning Ordinance and he didn't think that had been shown. In addition, the property must be burdened by the Zoning Ordinance in a manner that was distinct and he didn't think that was shown either. P. Levesque said there is nothing else that you can do with that property. Nothing can grow there. That is the hardship. J. Stone said it is currently being used. Nonetheless that the law says it must be burdened by the zoning in a manner that is distinct from other similarly zoned properties. N. Faiman, said he knows that D. Muller doesn't agree, but the statute is written to have two distinct prongs for hardship: reasonable use and no fair and

substantial relationship. N. Faiman said he was happy to agree that the reasonable use prong may be satisfied. Taken in isolation it is a reasonable use of the property that bears a logical relationship to the current use, but there must also be no fair and substantial relationship between the general purposes of the ordinance provision and the specific application of that provision to the property. The applicant has proposed one purpose of the ordinance is fire protection for the facility and there is no special condition of that property as a result of which, no fair and substantial relation exists between the restriction and the application of that provision to the property. One could argue that there is no specific relation between fire protection and a 45 foot protection. It isn't for us to say that isn't correct. P. Levesque said that the applicant said the purpose was fire protection. And we asked the fire chief and he said there was no problem. A. Hoar said that isn't the issue, the ordinance is in place and you have to satisfy both parts of the hardship test. P. Levesque said we are here to give relief. A. Hoar said, yes but only when justified.

Substantial Justice
N. Faiman said granting the variance will do substantial justice if the burden of the restriction on the owner is greater than the value to the public if the restriction were to remain in place. N. Faiman continued, got me. As with property values, I would not have a problem finding substantial justice. J. Stone quoted from the variance criteria statue. He continued, we have heard from more than one neighbor who would be adversely affected by a taller plant than a smaller one. Not definitive but cannot write it off.

The Board discussed if they wanted to continue the meeting, pause or deliberate at another meeting.

J. Stone MOVED that the ZBA deny the application for a variance based on not meeting the legal requirement on one or more points of the variance criteria.

Discussion
N. Faiman said that if we vote on this, then the Board needs another motion of the reasons for the motion.

A. Hoar SECONDED.

VOTE (yes is to deny)
Roll call vote
J. Stone - yes
A. Hoar - yes
P. Levesque - no
J. Eckstrom - no
N. Faiman – yes. Motion to deny has been granted.

A. Hoar suggested starting with Spirit of the Ordinance/Public interest
The Board found that as a consequence of the additional height of the proposed structure, this would be visible to the Goss Park and Highway 31. This would affect the rural character of the town in violation of the spirit of the ordinance. Further, as consequence of the added height, the

lighting of the plant at night there would be a visual impact, which would be inconsistent with the spirit of the ordinance. A shorter plant would be less visible and be behind the trees. J. Eckstrom said that there is no clear definition of rural character.

Property Values
N. Faiman said he was happy to leave out, but it should be mentioned. J. Eckstrom said she doesn't believe that it was proven that there was a diminution of property values. N. Faiman agreed especially when just looking at height. A. Hoar said the effect of a lit plant at night would diminish property values. N. Faiman said that would be speculative.

Hardship
P. Levesque said this is a hardship in that the applicant cannot make a living at it. It is a 300 acre gravel pit. J. Stone said there is no special condition to distinguish it from other properties in the area. J. Eckstrom said it is interesting that many of the surrounding properties are owned by the same person. J. Stone said it doesn't make this property unique. P. Levesque said if this property is isn't unique, I don't know what property is. N. Faiman said as D. Muller stated, we are accepting this as a reason: fire protection is the underlying spirit of the ordinance. J. Eckstrom said this has been dealt with. The fire department said they have no problem. N. Faiman said that if you find there is a hardship, you need to say why a 75 foot plant on this lot is different for fire protection that a lot on Route 31 that is 75 feet tall. Would it be ok to allow it elsewhere in town? J. Eckstrom said that infrastructure is in place on this lot. N. Faiman asked for clarification – were they concerned about fire protection at all?

J. Eckstrom asked where this is something that makes the property unique. N. Faiman said fire is not really a concern at all - and if the applicant brought it up it was a red herring. J. Eckstrom this was brought up by Bill Keefe and the Board asked him to seek information from the Wilton Fire Department. N. Faiman said so it would be just as suitable no matter where it was located. J. Stone said for this purpose it is the lot to which the Ordinance is to apply not what the owner has done to the property. P. Levesque said that the Board is good at twisting words. J. Eckstrom said I do believe that there is a hardship. P. Levesque said I agree.

N. Faiman said that fire was raised as an issue and there is no special conditions about the property that distinguish it from other properties such that no fair and substantial relationship exists between fire protection and the application of that to a greater than 45 foot structure on this lot. If the restriction applies across the district, that is not a hardship.

N. Faiman the other side of the hardship, preventing visual impact on non-industrial properties. This works with the buffers and it is a justified reason - the protraction of aesthetic value and rural character. This would be violated and there would be a visual impact on a public park and other residential properties.

J. Stone said there is no applicable uniqueness.

Substantial Justice

J. Stone said he leans toward fail but this is hard to pin down. Like nailing jello to the wall. N. Faiman said he was not inclined to incorporate this into a decision. A. Hoar and J. Stone said they could go along with that.

N. Faiman reviewed the grounds for denial:

Spirit of the Ordinance and Substantial Justice - the Board found part of the reason for the restriction is to protect the non-industrial property from the visual impact of industrial structures and that is accomplished by buffering and height restrictions. Relaxing the height restrictions results in losing that protection.

Hardship - the Board found that in regard to hardship there is nothing unique about the property that makes it especially appropriate to relax the height restriction for the interests of fire protection and regardless of the special conditions of the property, it violates the idea that there is a substantial relationship between the spirit of the ordinance to prevent visual impacts of industrial properties on non-industrial properties and the application of this to the particular property.

A. Hoar MOVED to adopt these as reasons for decision that will be provided to the applicant. J. Stone SECONDED.

Roll call vote
J. Stone – yes
A. Hoar - yes
P. Levesque - no
J. Eckstrom - no
N. Faiman – yes. All in favor

N. Faiman provided the standard review of the appeal steps. D. Muller agreed that the steps were reviewed properly but said there was a complication.

PUBLIC HEARINGS ON NEW CASES

Case #2/18/20–1 Kathryn Rockwood has applied for a special exception under section 5.3.1 of the Wilton Zoning Ordinance, to allow the hosting of small events (up to 30 people) as a home occupation on Lot J– 29, 34 Park Street.

J. Stone MOVED to continue this case to March 17, 2020 at 7:30 PM. J. Eckstrom SECONDED. All in Favor.

ADJOURN

J. Eckstrom MOVED to adjourn at 12:05 AM February 19, 2020. A. Hoar SECONDED. All in Favor.

Respectfully Submitted by Michele Decoteau, Land Use Administrator
Approved 06.16.20