TOWN OF WILTON ZONING BOARD OF ADJUSTMENT
Approved Minutes

DATE: May 11, 2021
TIME: 7:30 PM
PLACE: Remote!
BOARD: Neil Faiman (Chair), Joanna Eckstrom (Vice-chair), Jeff Stone, Andy Hoar, Paul Levesque, Judith Klinghoffer (Alternate), Peter Howd (Alternate)
Staff: Michele Decoteau, Land Use Administrator
Attendees: Matt Bangert, Laurie Bourgoine, Andy Burnes, Dan Dillon, Dawson Gay (Building Inspector), Gail Hoar, Kenny Lehtonen (Applicant), Shannon Linn, Debra Munoz, Nikko O'Neill (Applicant's Representative), Lynn Pentler, Jon Rokeh (Applicant's Representative), Daniel Ross, Joan Ross, Ashely Saari, Mary Ann Shea (Cemetery Trustee), Lynne Stone, Karon Walker, Mike Wright, Tim Wylie

1) Call to order by the Chairperson

N. Faiman opened the meeting at 7:36 PM. He read the emergency declaration and the rules of procedure.

Roll call attendance
N. Faiman – here, with Lynn Pentler
J. Eckstrom – here, alone
J. Klinghoffer – here, alone
P. Howd – here, alone
A. Hoar – here, alone
P. Levesque – here, alone
J. Stone – here, with Lynne Stone

Elections

J. Eckstrom MOVED to nominate N. Faiman for Chair. A. Hoar SECONDED.
Discussion: Hearing none the chair asked for a roll call vote.

Roll call vote:
P. Howd – aye
J. Eckstrom – aye
P. Levesque – aye
J. Stone – aye
A. Hoar – aye
N. Faiman – abstain
J. Klinghoffer - aye. Motion carried.

P. Levesque MOVED to nominate J. Eckstrom as Vice-Chair. J. Stone SECONDED.
Discussion: Hearing none the chair asked for a roll call vote.

Roll call vote:

P. Howd – aye
J. Eckstrom – abstain
P. Levesque – aye
J. Stone – aye
A. Hoar – aye
N. Faiman – aye
J. Klinghoffer - aye. Motion carried.

Building Inspector
Dawson Gay, the new Building Inspector introduced himself.

2) Public hearings continued from previous meetings
Case #05/11/21- 1 — Isaac Frye Holdings

N. Faiman opened the public hearing by reading the public notice and reviewing the rules of procedure.

A. Hoar recused himself from the case. Voting members for the case will be: J. Eckstrom, N. Faiman, P. Levesque, J. Stone, and alternate P. Howd.

J. Rokeh, the applicant's representative, said that this is gravel removal that is incidental to construction of a single family house. He said the time frame for this would a complete house in six months with three months of that being excavation.

The question was asked how many feet of material was expected to be removed. J. Rokeh said quite a bit of material would be removed.

The question was asked where the excavated material would end up- was it going to be used on site. J. Rokeh said that the material would have to be removed from the site.

The question was asked about how much material would be removed. J. Rokeh said that that the current slope would be moved back about 30 feet. He said it would take about 3 months to get this done. The Board asked for the amount to be quantified. J. Rokeh said about 25,000 yards.

The Board asked about reclamation. J. Rokeh said that in order to get a Certificate of Occupancy, you need to have the lot loamed and seeded so that would be the reclamation.

The Board asked about the site plan provided. The applicant provided a septic plan and this not only doesn't show the entire lot, it doesn't show the before and after conditions. J. Rokeh said that there was a previous application to the town on this lot and that would show the before conditions.

K. Lehtonen said that the timeframe for the excavation would be 6-9 months followed by 3-4 months of house construction.

The question was asked about blasting. K. Lehtonen said no blasting, just large machines.

The question was asked about how much more gravel needs to be removed from this site. K. Lehtonen said that 25-35,000 cubic yards of material will be removed.

The Board requested a site walk. K. Lehtonen agreed.

The Board discussed the question if a variance is granted, would this pre-empt the Planning Board's authority? The applicant had applied for a variance as if they were excavating exclusively incidentally to construction of a single family house.

The Board discussed what was needed for a site plan that could be used for making a decision. At a minimum, the entire site needs to be shown, the contours before and after excavations, and information on number of trucks/timing of trucks.

The Chair opened the discussion for public comment.
K. Lehtonen said 25 to 35,000 cubic yards is in addition to what has already been removed. He said he removed between 1500 to 2200 cubic yards but he said the material was used on another job site so he didn't track it. If the Board wanted to track the material from here on out, K. Lehtonen said he could set up a system. She asked how many truck loads that would be. K. Lehtonen said that 17 to 18 yards fit in a truck.

M. Bangert said he calculated that the amount of material removed and it is closer to 5,000 yards of material already removed. This application has no right to be heard again – it has already been adjudicated. Nothing has changed in the law or the application. This is the third time that this has been done. M. Bangert said that the owner was well aware of the history and the limitations on the site. He said that as an experienced builder, the applicant should have realized he needed to go before the planning board before he removed gravel. This has eroded the confidence the neighborhood had in the Town. The entrance to the property is dangerous with steep slopes and large boulders.

M. Wright asked if there were maximum amounts of material that could be removed from a residential site. This proposal is to remove 70 times more material than is allowed. He also expressed concern about the number of trucks that will be coming and going from a residential site. This will impact both this summer and next summer with constant traffic. M. Wright was concerned about the impact of the heavy trucks on the road.

A. Burnes read his letter (attached).

T. Wiley asked about the commercial value of the material removed and the estimated value of the house. K. Lehtonen said the material wasn't sold, it was used on another job in town so no money changed hands. He expected to sell the house on this lot for about $500,000.

A. Hoar expressed concern about the removal of material without a building permit.

S. Linn Boggs had a number of concerns. First she said that even if no money was exchanged, there was still a value to the material removed. She estimated that the fill would cost $15 - $30/yard and that this should be researched and referenced. This is commercial excavation. Second, she said that this excavation is in violation of the noise standards. Finally, she said that the deed, that the applicant signed, said that there could be no excavation on the lot.

K. Lehtonen said it was common to get a driveway permit before a house permit so that the lot can be logged. He said that his company ceased all work when they received the Cease and Desist which is why the slopes have not been addressed. He said he added caution tape but cannot do more. T. Wylie said there was a Cease and Desist order.

M. Bangert said that if the applicant were to follow the state RSAs for excavations, some of the slopes he would have to maintain would be in excess of 60 feet long and over the property line. He said that there is commercial value to the material excavated.

G. Hoar noted that there was a timbering permit and wetlands permit visible on a nearby lot that is preparing for a single family house to be built. There were no permits visible at this site.

There were a number of abutters who had comments regarding why the excavation happened and the Board said that was not part of the application before the ZBA.

S. Linn Boggs had two comments. She asked about severability and she asked how this excavation is not already contrary to public interest.

D. Dillon said he was the primary abutter in this case and his patience was wearing thin. He thought this should be broken into two projects: the driveway and the rest of the lot. This is affecting the property values of his lot and all the others. The driveway has gone awry. He expressed that he felt shut out of the process because doesn't have a computer.

A. Hoar said he took exception to the fact previous history doesn't matter in this case. When a variance is given, there are restrictions quite often and there is an element of trust. The Town has to trust people to follow the restrictions. From the actions he has seen recently, he does not believe the applicant and his team are trustworthy people.

M. Bangert expressed concern about the ZBA usurping the Planning Board authority to regulate excavations. He said that the ZBA was beyond their authority.

D. Ross said he was concerned about the aquifer and an excavation taking place on a sensitive area. K. Lehtonen said that the aquifer protection district is only over a portion of the driveway

and wetlands are only on the back corner of the property. They were not going to be working over the aquifer and had marked off the wetlands already.

J. Ross said that this is not the first house that Mr. Lehtonen has built in Wilton, he should know the Ordinance.

M. Bangert said that ignorance is no excuse for breaking the law. The applicant should have read or understood the deed and plan. This is more than a driveway and the work shows blatant disregard for the rules. Goes to severability.

S. Linn Boggs asked if the test pits were dug to research the effect of the excavation on the aquifer. K. Lehtonen said the test pits were dug about 8 feet deep and not close to the seasonal high water levels.

The Board discussed what would be needed for a site plan to help them make a decision. The Board suggested reviewing the Excavation Site Plan Regulations as a place to start. The Board wanted a plan that showed the whole lot, the before and after excavation contours, and had more information.

There was concern raised about trucks and which direction they would be traveling and on which roads.

The Board discussed a Site Walk.

J. Eckstrom MOVED to have a site walk on June 5, 2021, at 9:00 AM with a rain date of June 6, 2021 at 2:00 PM. P. Howd SECONDED.
Discussion: Hearing none, the chair called for a roll call vote.

N. Faiman – aye
P. Levesque – aye
J. Eckstrom – aye
J. Klinghoffer – aye
P. Howd – aye
J. Stone – aye. Motion carried.

J. Eckstrom MOVED to continue the case to June 8, 2021 at 7:30 PM. J. Stone SECONDED.
Discussion: Hearing none the chair asked for a roll call vote.

N. Faiman – aye
P. Levesque – aye
J. Eckstrom – aye
J. Klinghoffer – aye
P. Howd – aye
J. Stone – aye. Motion carried.

P. Levesque MOVED to close the public hearing. P. Howd SECONDED.
Discussion: Hearing none the chair asked for a roll call vote.

N. Faiman – aye
P. Levesque – aye
J. Eckstrom – aye
J. Klinghoffer – aye
P. Howd – aye
J. Stone – aye. Motion carried.

3) Other Business

A. Hoar MOVED to postpone the minutes and discussion of fees. P. Levesque SECONDED.

Discussion: Hearing none the chair asked for a roll call vote.

N. Faiman – aye
P. Levesque – aye
J. Eckstrom – aye
J. Klinghoffer – aye
P. Howd – aye
J. Stone – aye. Motion carried.

4) Adjournment

J. Eckstrom MOVED to adjourn at 10:17 PM. P. Levesque SECONDED.

Discussion: Hearing none the chair asked for a roll call vote.

N. Faiman – aye
P. Levesque – aye
J. Eckstrom – aye
J. Klinghoffer – aye
P. Howd – aye
J. Stone – aye. Motion carried.

Respectfully submitted by Michele Decoteau, Land Use Administrator & Board Secretary

Approved on 07.13.21

05.11.21.LetterfromAndyBurnes

My name is Andy Burnes and I live at 202 Wilson Rd. My property abuts the IFH property along my southern border.

As I understand it there are five conditions that must be satisfied in order for this board to consider granting this variance.

Because these five conditions must be satisfied, and it is the applicant who seeks relief through the agency of this variance, the applicant should be compelled to prove, or provide sufficiently persuasive evidence, in support of the claims made to establish satisfaction of each condition. The applicant assumes this burden in applying for this variance.

Looking at the applicants answers to these five conditions, I see some issues that simply don't make sense. Or, at the very least, do not provide sufficient evidence to support the claims made.

1) "Granting the variance would not be contrary to the public interest."

IFH has already dug down, in places, 40 to 50 feet below the surface in the Aquifer Protection Zone. And more excavation is planned.

These aquifer protection zones exist because of their importance as a fundamental human need. Aquifers are complex and delicate, and they require strict regulation because of their importance and fragility. As such, any potential harm to the aquifer should be considered as contrary to the public interest.

The applicant's answer completely fails to treat the issue of Aquifer disturbance, and the resultant possible damage the proposed, and current, excavation could, or has already, caused. Not a single word.

New Hampshire 155-E provides for regulators to establish and include reasonable provisions for the protection of water resources.

And in Wilton zoning ordinance "Aquifer Protection District" section 12.4 "prohibitive uses" paragraph "I" indicates that excavation is prohibited if:

1) minimum depth to groundwater is 10 feet

There are most likely other ordinances that govern the interaction between excavations and Aquifers that more directly address the preservation of the functioning and water quality of the Aquifer, but I unable to find them.

Nonetheless it seems that certain questions need to be answered before a claim to uphold the integrity and functioning of the aquifer, and thus the public interest, can properly be made.

As far as I know no Hydro-geological survey indicating the depth to ground water at the new elevation, no documentation establishing that no harmful disturbance to the aquifer function and water quality

have taken place, have been submitted. Absolutely no evidence is provided to satisfy the burden of establishing the current, and future, excavation is not harmful to the aquifer and therefore not contrary to the public interest.
Condition 2) the spirit of the ordinance is observed.

The spirit of the ordinance is to protect the community from builders coming into Wilton and commencing operations, absent of any regulatory constraint, and to prevent the substantial harm these unregulated activities are likely to cause. That is the spirit and intent of the ordinance.

And that is exactly what has happened in this case. The very situation that the spirit and intent of this ordinance serves to protect against is exactly what IFH has done.

IFH's decision to begin excavation operations without proper permitting, without filing a site plan, or any attempts towards regulatory compliance, constitutes the most direct and egregious violation of the spirit and intent of the ordinance that is possible. It is a slap in the face to all assembled here who have invested their time, their resources, and their deliberate thoughtfulness to help ensure the safety and prosperity of this community. It's a hard slap. It makes inseparable the previous violations and this application for a variance.

As such no rightful claim to observance of the spirit and Intent of the ordinance, as is required to grant this variance, can possibly be made.

Condition 3) Substantial Justice is done.

Here the applicant writes "substantial justice is done when the loss of denying the variance is greater than the gain of the public by strictly enforcing the ordinance."

Oddly enough, the applicant has created the very condition that makes possible the significant gain to the public denying this variance would provide. IFH's decision to commence operations, willfully and with reasonable foreknowledge of violating, and without any regulatory compliance, will be observed by others contemplating doing business in Wilton. IFH's ability to operate unlawfully with impunity, such as the granting of this variance will partially infer, will set a dangerous precedent. That being: That it is in your best interest, when building in Wilton, to ask for forgiveness, rather than permission. The denying of this variance sends a clear message indicating the ZBA's commitment to enforcement, and will actively deter future builders, who may demonstrate the same disregard for Wilton and the ordinances designed to protect the community. This resulting enforcement/deterrent paradigm will create a significant public gain that is certainly greater than the loss of denying the variance. In accordance with the applicant's own calculus for substantial justice to be done, If the demonstrated gain to the public is greater than the loss of denying the variance this application must be denied.

5) denying the variance will result in unnecessary hardship.

Chapter 674:33 Powers of the ZBA
1:B:2 provides:
"An unnecessary hardship will be deemed to exist if, and only if, or when to specific conditions of the property they distinguish it from other properties in the area, the property cannot be reasonably use in strict conformance to the ordinance."

Other than a loose description of the lot topography, the applicant has offered no proof, no topographical maps, no engineering surveys, or any other form of persuasive evidence that establishes:

1) That there were no alternative suitable building sites on this 8+ acre lot that could have facilitated building a single-family house while maintaining strict accordance to the ordinance.
2) That there was no possibility that on-site materials could have been re-distributed in such a way as to create a serviceable building site.
3) That there was no alternative to the removal of excavated materials that would have been suitable

IFH has offered no evidence whatsoever that establishes that the site cannot be reasonably used in strict conformance to the ordinance, and therefore has not met the burden of claiming unnecessary hardship. For this reason they failed to satisfy the unnecessary hardship condition contained in the application, therefore it must be rejected.

And while we can speculate as to why IFH chose to behave in the way it did, we do know some facts:

IFH knew excavation was prohibited - it's in the deed!

IFH knew there was valuable gravel on site that could not be lawfully mined.

IFH commenced mining the gravel without any regulatory oversight or accountability.

IFH removed approx. 3000yd3 that was used at another commercial site.

IFH benefitted from the materials already removed, and stands to benefit from the planned continuation of removed materials in the future.

These are facts. And taken together with what has transpired on Lot F/3-2 it begins to look like there are more nefarious motivations for how things unfolded.

I believe that it IFH's intentional strategy to commence unlawful and unregulated removal of these valuable materials, and to remove as much as possible before the appropriate regulatory agency could respond. They wanted to find out what they could get away with and how much they could remove in the process. It feels to me like we are being scammed, like we are being hoodwinked, if that is a nicer way to put it.

I know that this forgiveness-rather-than-permission approach can not be acceptable to anyone present. I know that this approach should not be sanctioned by our beloved ZBA. This cannot be an approach that is encouraged by granting this variance. Because if you do, this board, and this community, will become far more vulnerable to the reoccurrence of unlawful excavations moving forward. Let's all work together to ensure that this cannot happen…again.