



TOWN OF WILTON ZONING BOARD OF ADJUSTMENT
Draft Minutes

- 7 **DATE:** May 11, 2021
- 8 **TIME:** 7:30 PM
- 9 **PLACE:** Remote!
- 10 **BOARD:** Neil Faiman (Chair), Joanna Eckstrom (Vice-chair), Jeff Stone, Andy Hoar, Paul
- 11 Levesque, Judith Klinghoffer (Alternate), Peter Howd (Alternate)
- 12 **Staff:** Michele Decoteau, Land Use Administrator
- 13 **Attendees:** Matt Bangert, Laurie Bourgoine, Andy Burnes, Dan Dillon, Dawson Gay (Building
- 14 Inspector), Gail Hoar, Kenny Lehtonen (Applicant), Shannon Linn, Debra Munoz,
- 15 Nikko O'Neill (Applicant's Representative), Lynn Pentler, Jon Rokeh (Applicant's
- 16 Representative), Daniel Ross, Joan Ross, Ashely Saari, Mary Ann Shea (Cemetery
- 17 Trustee), Lynne Stone, Karon Walker, Mike Wright, Tim Wylie
- 18

19 **I) Call to order by the Chairperson**

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

22
23 Roll call attendance

24 N. Faiman – here, with Lynn Pentler

25 J. Eckstrom – here, alone

26 J. Klinghoffer – here, alone

27 P. Howd – here, alone

28 A. Hoar – here, alone

29 P. Levesque – here, alone

30 J. Stone – here, with Lynne Stone

31
32 Elections

33 **J. Eckstrom MOVED to nominate N. Faiman for Chair. A. Hoar SECONDED.**

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

35 Roll call vote:

36 P. Howd – aye

37 J. Eckstrom – aye

38 P. Levesque – aye

39 J. Stone – aye

40 A. Hoar – aye

41 N. Faiman – abstain

42 J. Klinghoffer - aye. Motion carried.

43
44 **P. Levesque MOVED to nominate J. Eckstrom as Vice-Chair. J. Stone SECONDED.**

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

46 Roll call vote:

47 P. Howd – aye
48 J. Eckstrom – abstain
49 P. Levesque – aye
50 J. Stone – aye
51 A. Hoar – aye
52 N. Faiman – aye
53 J. Klinghoffer - aye. Motion carried.
54

55 Building Inspector

56 Dawson Gay, the new Building Inspector introduced himself.
57

58 **2) Public hearings continued from previous meetings**

59 *Case #05/11/21- 1 — Isaac Frye Holdings*

60 N. Faiman opened the public hearing by reading the public notice and reviewing the rules of
61 procedure.
62

63 A. Hoar recused himself from the case. Voting members for the case will be: J. Eckstrom, N.
64 Faiman, P. Levesque, J. Stone, and alternate P. Howd.
65

66 J. Rokeh, the applicant’s representative, said that this is gravel removal that is incidental to
67 construction of a single family house. He said the time frame for this would a complete house in
68 six months with three months of that being excavation.
69

70 The question was asked how many feet of material was expected to be removed. J. Rokeh said
71 quite a bit of material would be removed.
72

73 The question was asked where the excavated material would end up- was it going to be used
74 on site. J. Rokeh said that the material would have to be removed from the site.
75

76 The question was asked about how much material would be removed. J. Rokeh said that that
77 the current slope would be moved back about 30 feet. He said it would take about 3 months
78 to get this done. The Board asked for the amount to be quantified. J. Rokeh said about 25,000
79 yards.
80

81 The Board asked about reclamation. J. Rokeh said that in order to get a Certificate of
82 Occupancy, you need to have the lot loamed and seeded so that would be the reclamation.
83

84 The Board asked about the site plan provided. The applicant provided a septic plan and this not
85 only doesn’t show the entire lot, it doesn’t show the before and after conditions. J. Rokeh said
86 that there was a previous application to the town on this lot and that would show the before
87 conditions.
88

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

91
92 The question was asked about blasting. K. Lehtonen said no blasting, just large machines.

93
94 The question was asked ~~about how much more gravel needs to be removed from this site~~
95 ~~about how much material had been removed so far from the site.~~ K. Lehtonen said that 25-35,000
96 cubic yards of material ~~had been~~will be removed.

97
98 The Board requested a site walk. K. Lehtonen agreed.

99
100 The Board discussed the question if a variance is granted, would this pre-empt the Planning
101 Board's authority? The applicant had applied for a variance as if they were excavating exclusively
102 incidentally to construction of a single family house.

103
104 The Board discussed what was needed for a site plan that could be used for making a decision.
105 At a minimum, the entire site needs to be shown, the contours before and after excavations,
106 and information on number of trucks/timing of trucks.

107
108 The Chair opened the discussion for public comment.
109 ~~G. Hoar asked how many cubic yards of material have been removed and how much more~~
110 ~~gravel needs to be removed?~~ K. Lehtonen said 25 to 35,000 cubic yards is in addition to what
111 has already been removed. He said he removed between 1500 to 2200 cubic yards but he said
112 the material was used on another job site so he didn't track it. If the Board wanted to track
113 the material from here on out, K. Lehtonen said he could set up a system. She asked how many
114 truck loads that would be. K. Lehtonen said that 17 to 18 yards fit in a truck.

115
116 M. Bangert said he calculated that the amount of material removed and it is closer to 5,000
117 yards of material already removed. This application has no right to be heard again – it has
118 already been adjudicated. Nothing has changed in the law or the application. This is the third
119 time that this has been done. M. Bangert said that the owner was well aware of the history and
120 the limitations on the site. He said that as an experienced builder, the applicant should have
121 realized he needed to go before the planning board before he removed gravel. This has eroded
122 the confidence the neighborhood had in the Town. The entrance to the property is dangerous
123 with steep slopes and large boulders.

124
125 M. Wright asked if there were maximum amounts of material that could be removed from a
126 residential site. This proposal is to remove 70 times more material than is allowed. He also
127 expressed concern about the number of trucks that will be coming and going from a residential
128 site. This will impact both this summer and next summer with constant traffic. M. Wright was
129 concerned about the impact of the heavy trucks on the road.

130
131 A. Burnes read his letter (attached).

132
133 T. Wiley asked about the commercial value of the material removed and the estimated value of
134 the house. K. Lehtonen said the material wasn't sold, it was used on another job in town so no
135 money changed hands. He expected to sell the house on this lot for about \$500,000.

136
137 A. Hoar expressed concern about the removal of material without a building permit.

138
139 S. Linn Boggs had a number of concerns. First she said that even if no money was exchanged,
140 there was still a value to the material removed. She estimated that the fill would cost \$15 -
141 \$30/yard and that this should be researched and referenced. This is commercial excavation.
142 Second, she said that this excavation is in violation of the noise standards. Finally, she said that
143 the deed, that the applicant signed, said that there could be no excavation on the lot.

144
145 K. Lehtonen said it was common to get a driveway permit before a house permit so that the lot
146 can be logged. He said that his company ceased all work when they received the Cease and
147 Desist which is why the slopes have not been addressed. He said he added caution tape but
148 cannot do more.

149 T. Wylie said there was a Cease and Desist order.

150
151 M. Bangert said that if the applicant were to follow the state RSAs for excavations, some of the
152 slopes he would have to maintain would be in excess of 60 feet long and over the property line.
153 He said that there is commercial value to the material excavated.

154
155 G. Hoar noted that there was a timbering permit and wetlands permit visible on a nearby lot
156 that is preparing for a single family house to be built. There were no permits visible at this site.

157
158 There were a number of abutters who had comments regarding why the excavation happened
159 and the Board said that was not part of the application before the ZBA.

160
161 S. Linn Boggs had two comments. She asked about severability and she asked how this
162 excavation is not already contrary to public interest.

163
164 D. Dillon said he was the primary abutter in this case and his patience was wearing thin. He
165 thought this should be broken into two projects: the driveway and the rest of the lot. This is
166 affecting the property values of his lot and all the others. The driveway has gone awry. He
167 expressed that he felt shut out of the process because doesn't have a computer.

168
169 A. Hoar said he took exception to the fact previous history doesn't matter in this case. When a
170 variance is given, there are restrictions quite often and there is an element of trust. The Town
171 has to trust people to follow the restrictions. From the actions he has seen recently, he does
172 not believe the applicant and his team are trustworthy people.

173
174 M. Bangert expressed concern about the ZBA usurping the Planning Board authority to regulate
175 excavations. He said that the ZBA was beyond their authority.

176

177 D. Ross said he was concerned about the aquifer and an excavation taking place on a sensitive
178 area. K. Lehtonen said that the aquifer protection district is only over a portion of the driveway
179 and wetlands are only on the back corner of the property. They were not going to be working
180 over the aquifer and had marked off the wetlands already.

181
182 J. Ross said that this is not the first house that Mr. Lehtonen has built in Wilton, he should
183 know the Ordinance.

184
185 M. Bangert said that ignorance is no excuse for breaking the law. The applicant should have
186 read or understood the deed and plan. This is more than a driveway and the work shows
187 blatant disregard for the rules. Goes to severability.

188
189 S. Linn Boggs asked ~~about where the test pits were dug~~ the test pits were dug to research the
190 effect of the excavation on the aquifer. K. Lehtonen said the test pits were dug about 8 feet
191 deep and not close to the seasonal high water levels.

192
193 The Board discussed what would be needed for a site plan to help them make a decision. The
194 Board suggested reviewing the Excavation Site Plan Regulations as a place to start. The Board
195 wanted a plan that showed the whole lot, the before and after excavation contours, and had
196 more information.

197
198 There was concern raised about trucks and which direction they would be traveling and on
199 which roads.

200
201 The Board discussed a Site Walk.

202
203 **J. Eckstrom MOVED to have a site walk on June 5, 2021, at 9:00 AM with a rain**
204 **date of June 6, 2021 at 2:00 PM. P. Howd SECONDED.**

205 Discussion: Hearing none, the chair called for a roll call vote.

206 N. Faiman – aye

207 P. Levesque – aye

208 J. Eckstrom – aye

209 J. Klinghoffer – aye

210 P. Howd – aye

211 J. Stone – aye. Motion carried.

212
213 **J. Eckstrom MOVED to continue the case to June 8, 2021 at 7:30 PM. J. Stone**
214 **SECONDED.**

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

216 N. Faiman – aye

217 P. Levesque – aye

218 J. Eckstrom – aye

219 J. Klinghoffer – aye

220 P. Howd – aye

221 J. Stone – aye. Motion carried.

222

223 **P. Levesque MOVED to close the public hearing. P. Howd SECONDED.**

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

225 N. Faiman – aye

226 P. Levesque – aye

227 J. Eckstrom – aye

228 J. Klinghoffer – aye

229 P. Howd – aye

230 J. Stone – aye. Motion carried.

231

232 **3) Other Business**

233 **A. Hoar MOVED to post-pone the minutes and discussion of fees. P. Levesque**
234 **SECONDED.**

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

236 N. Faiman – aye

237 P. Levesque – aye

238 J. Eckstrom – aye

239 J. Klinghoffer – aye

240 P. Howd – aye

241 J. Stone – aye. Motion carried.

242

243 **4) Adjournment**

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

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

246 N. Faiman – aye

247 P. Levesque – aye

248 J. Eckstrom – aye

249 J. Klinghoffer – aye

250 P. Howd – aye

251 J. Stone – aye. Motion carried.

252

253 Respectfully submitted by Michele Decoteau, Land Use Administrator [& Board Secretary](#)

254

255 Approved on XX.XX.XX

256 05.11.21.LetterfromAndyBurnes

257

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

260

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

263

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

268

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

271

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

273

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

276

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

281

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

285

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

288

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

291

292 I) minimum depth to groundwater is 10 feet

293

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

297

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

300

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

303 have taken place, have been submitted. Absolutely no evidence is provided to satisfy the burden of
304 establishing the current, and future, excavation is not harmful to the aquifer and therefore not contrary
305 to the public interest.

306 Condition 2) the spirit of the ordinance is observed.

307

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

311

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

314

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

321

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

324

325 Condition 3) Substantial Justice is done.

326

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

329

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

342

343 5) denying the variance will result in unnecessary hardship.

344

345 Chapter 674:33 Powers of the ZBA

346 I:B:2 provides:

347 "An unnecessary hardship will be deemed to exist if, and only if, or when to specific conditions of the
348 property they distinguish it from other properties in the area, the property cannot be reasonably use in
349 strict conformance to the ordinance."

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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.