



TOWN OF WILTON ZONING BOARD OF ADJUSTMENT
Approved Minutes

DATE: September 14, 2021
TIME: 7:30 PM
PLACE: Florence Rideout Elementary School, 18 Tremont Street
PRESENT: Neil Faiman (Chair), Joanna Eckstrom (Vice-Chair), Jeff Stone, Andy Hoar, Judith Klinghoffer (Alternate), Peter Howd (Alternate)
Absent: Paul Levesque
Staff: Michele Decoteau, Board Secretary

Attendees: Dawn Ryan; Heidi Robichaud; William Ryan; Chris Owen; Felice Fullam; Dawson Gay (Building Inspector); Michael Bronson; Roy Tilsley, Esq.; Jessica Salisbury; Andy Burnes; Michael Boggs; Tim Wylie; James Gove; Silas Little, Esquire; Cori Ryan; Ashley Saari; Dan Ross; Joan Ross; David Pinsonneault, Esquire; Robin Maloney; Audrey Role; Bart Hunter; Joe Coffey; Kenny Lehtonen; Sandra Lehtonen; Jon Rokeh; Ken Cadrain; Casey Cadrain; K. Sweeney

I) Call to order by the Chairperson

N. Faiman opened the meeting at 7:33 PM. He reviewed the rules of procedures and introduced the Board members.

D. Pinsonneault, representing D. Ryan, requested the agenda be changed so the second case be heard first. R. Tilsley, representing Isaac Frye Holdings, LLC., agreed.

J. Stone MOVED to change the order of the agenda to hear the second case first. A. Hoar SECONDED.

Discussion: None

Roll call vote:

J. Klinghoffer – aye

A. Hoar – aye

J. Stone – aye

J. Eckstrom – no

N. Faiman – aye

P. Howd – aye.

Motion carried (5-aye, 1-nay, 0-abstain).

2) Public hearings

Case #9/14/21-1

R. Maloney has appealed the decision of the Wilton Building Inspector to issue a Building Permit to allow the replacement of a bridge on Lot A-47-2, 54 Stagecoach Road, asserting that the proposed bridge replacement violates sections 11.1, 11.2, 11.3, 12.1, 12.2, 12.3, 12.4(i), 12.5, and/or 12.7 of the Wilton Zoning Ordinance.

N. Faiman opened the public hearing by reading the public notice. He reviewed the process for an administrative appeal. P. Howd recused himself. Voting on this case are: J. Klinghoffer, A. Hoar, J. Eckstrom, J. Stone, N. Faiman

R. Maloney represented herself. Her first argument was land ownership. She stated D. Ryan doesn't own the bridge or the land under the bridge. She cited International Building Code (IBC) and NH building code as requiring the owners' signature on a permit application. She further quoted Steven Buckley, from NHMA, who stated that the IBC code required the owner to sign a permit application.

The ZBA Members stated that there were some things that the ZBA had jurisdiction over and some things the ZBA did not. J. Ross (21 Wilson Road) asked who is responsible for this if it is not the ZBA? N. Faiman said this could be trespass and that is civil matter.

R. Maloney said her second issue was that this was an expansion of a non-conforming use as noted on the permit application.

J. Klinghoffer questioned R. Maloney's standing. R. Maloney said that she is an abutter to the property with the bridge.

R. Maloney asked everyone to consider what are D. Ryan's future plans? R. Maloney is concerned about traffic and impacts to the environment.

R. Maloney said this was her last set of issues and they are all environmental issues. She said there was no wetland's permit. D. Ryan owns land on both sides of Mill Brook but DES and EPA say no to a new bridge. There is provision for repair of existing structures but this is an expansion. Wilton Zoning Ordinance section 17.1 says it can continue or be replaced but not enlarged or extended.

R. Maloney said this lot is in the Watershed District. Mill Brook is the only water in the Souhegan River watershed that is Class A water which means that this can be used as a drinking water source. What is going to happen with the dump trucks crossing this bridge?

R. Maloney said there was a timber harvest by the previous owner 3 years ago and this means that in 17 years timber can be harvested again and then only 50% can be harvested. The Board and applicant discussed how this is measured. R. Maloney summarized her concerns: 1) Ownership, 2) Non-confirming use expansion and 3) Environmental concerns.

Board Questions. J. Klinghoffer asked that before any further testimony, she wanted to clarify the Board's authority. N. Faiman said the question if this construction is allowed by our ordinance and if this is a nonconforming structure, is it a permissible expansion. If the Board finds that this is a nonconforming structure or use expansion, then it is remanded to Building Inspector, to take appropriate action.

J. Klinghoffer asked that the Board identify issues before the Board, and the issues that are not subject of consideration. N. Faiman said any issues with ownership, and right of Dawn Ryan is a civil matter and not subject to consideration. The reasons why she wants to build a larger bridge is none of our business.

R. Maloney asked why the Board didn't consider motivation when that is the consideration of other ZBAs in other towns. The Board said that the motivation or purpose isn't this Board's consideration and they are not responsible for other towns.

J. Klinghoffer MOVED to limit testimony on this case to matters within the Wilton ZBA's Jurisdiction. J. Stone SECONDED.

Discussion. N. Faiman clarified what is excluded. J. Eckstrom said we are considering if the Building Inspector has made an inappropriate decision and she wanted to hear from the Building Inspector and D. Ryan.

Roll call vote:

J. Klinghoffer – aye

A. Hoar – aye

J. Stone – aye

J. Eckstrom – no

N. Faiman – aye. Motion carried (4-ayes, 1-nay, 0-abstain).

R. Maloney wanted clarification on the environmental concerns. N. Faiman addressed matters in which the Zoning Ordinance played into the decision. The Board heard from the Building Inspector, Dawson Gay.

D. Gay said when the permit application arrived, there were a number of factors he reviewed with the bridge plan. He said he looked at Town Ordinance, Zoning Ordinance, conferred with Town Counsel and NH Municipal Association, and reviewed the memo accompanying the permit application.

J. Klinghoffer asked how you defend this if it is not an expansion of a Nonconforming Use. There was a discussion about notation on the permit application. Then the discussion returned to nonconforming structures. D. Gay said that he determined this was not an expansion of a nonconforming use by reviewing the building permit documents. J. Klinghoffer asked if the size was the same. D. Gay said the material was the prime difference between the old bridge and the proposed bridge. J. Eckstrom asked about wetlands. D. Gay said he reached to DES and he got input from the applicant and her contact at DES. D. Gay said he heard from his contact at DES and she reviewed the applicant's information then said there was no impact and this was not a jurisdictional impact. J. Eckstrom asked if that information was used to affect your decision. D. Gay said yes, I wanted to get DES's input before I approve any bridge.

The Board asked if D. Gay thought the bridge was similar enough in nature, even if it is longer and heavier. D. Gay said yes, the only real difference was the materials.

D. Pinsonneault said the existing granite abutments are staying, nothing is taken apart. The new precast concrete abutments will be inserted behind the existing abutments, and the steel beams will be laid across the current bridge.

In response to questions from the Board about the nature of the precast concrete abutments, K. Sweeney (Sweeney Construction) said it will be similar to the current bridge. Curbing will be added and two 8 foot blocks will be added after excavating into the upland and these would be outside the jurisdictional wetland.

D. Pinsonneault said there were two issues in the application and the additional issue of expansion of a non-conforming use. The last issues should not be included as it was not noticed. He discussed the lack of jurisdictional wetlands along the bridge and he said the bridge project is merely to continue the existing use. He said that the use in the past was for farm vehicles and that is the proposed use.

In response to a question from the Board, D. Pinsonneault said that according to Gove Environmental there is no jurisdictional wetlands, and DES said there was no interest in requiring a permit;

The Board discussed whether this bridge is a non-conforming use, if the new bridge is an expansion, and the interpretation of the Zoning Ordinance chapter 17.

The Board asked C. and W. Ryan (owners of the land under the bridge), why R. Maloney was the applicant and not them. They said they were not aware of the permit.

The Board discussed the size of the bridge and if being able to carry more weight, would it not be an expansion.

In response to a question from The Board, C. and W. Ryan said if the bridge were being repaired in kind, we would not all be here tonight.

In response to a question from the Board, C. and W. Ryan said that currently only vehicles that are 1-2, 000 lbs. go over the bridge. The new bridge could take 40,000 lbs. vehicles. W. Ryan added that the road that approaches the bridge is cobbled, if you drive trucks over it that are loaded, it will tear it up.

J. Coffey said that D. Ryan is doing the community a service by replacing the bridge. He said that he didn't understand how using modern materials is an expansion but he uses it as a pedestrian bridge. He said that D. Ryan is going to be using a pickup truck or a tractor, not a large truck.

The Board briefly discussed if they want to do a site walk but decided that was not needed.

A. Hoar MOVED to close the Public Hearing for deliberation. J. Eckstrom SECONDED.

Discussion: None.

Voice vote: All in favor. Motion carried.

A. Hoar said he wanted to hear why M. Decoteau said it was a non-conforming use. N. Faiman clarified that was in her role as Land Use Administrator. N. Faiman continued saying we were here about 9 months ago with a similar non-conformity at Ms. Ryan's and the Board decided at that time not to rule on the non-conformity issue.

The Board discussed if the bridge was an expansion of a non-conforming use and the encroachment of the wetland.

J. Klinghoffer MOVED to reopen the Public Hearing for the limited question if this is a non-conforming use. A. Hoar SECONDED. All in Favor.

Discussion: None.

Voice vote: All in favor. Motion carried.

D. Pinsonnault said, “He objected. This application was not based on it being a non-conforming use. The entry was after the fact by the Land Use Administrator. How does this board have jurisdiction over a matter that has not been preserved?” The Board asked M. Decoteau, in her role as Land Use Administrator, to explain her note on the permit. M. Decoteau said that the Wilton’s Zoning Ordinance Section 17 is particularly strict and does not allow for any expansion of a non-conforming structure. The bridge could not be built today without at least a special exception and wetland’s permits. The bridge plans show that the abutments are larger, the bridge deck is longer and wider than is currently in place.

The Board discussed the definition of wetland and if this would qualify. P. Howd, speaking from the audience, said wetland is the top of the bank on a river or stream. D. Pinsonnault raised the question that this section was not raised in the appeal and that it cannot be raised now after the appeal period is over.

The Board discussed if an applicant can raise a new issue for appeal after this notice, even if the Board discovered a reason to support the appeal.

R. Maloney said that this area is protected and this will ruin this area. She said that this a difficult process for lay people. The Board said there is limit on our authority, it is not a question of the Board punishing. R. Maloney said that hearing that this is being dismissed is heartbreaking, the appeals process is flawed.

A. Hoar MOVED to close the Public Hearing. J. Stone SECONDED.

Discussion: None.

Voice vote: All in favor. Motion carried.

The Board discussed the limits of what is noticed. The Board acknowledges that the paperwork can be difficult. The Board only sees one plausible reason for overturning this but it cannot be considered as it wasn’t noticed.

A. Hoar MOVED to deny the appeal on the grounds that no issue raised in the notice of appeal justifies receding the permit. J. Eckstrom SECONDED.

Discussion: None

Roll call vote:

J. Klinghoffer – aye

A. Hoar – aye

J. Stone – aye

J. Eckstrom – aye

N. Faiman – aye.

Motion carried (5-ayes, 0-nay, 0-abstain).

N. Faiman reviewed the rehearing process. P. Howd returned to the Board. A. Hoar left the Board and sat in the audience.

Isaac Frye Holdings, LLC (owner) and Kenneth Lehtonen (applicant) have requested variances to sections 4.1 and 12.4 of the Wilton Zoning Ordinance to allow gravel excavation incidental to the construction of a single family dwelling as described in RSA 155-E:2-a on Lot F-3-2, Isaac Frye Highway, which is outside the Gravel Excavation District. The Zoning Board will reconsider its July 13 determination that its consideration of the application was barred by the doctrine of *res judicata*, and may then hold a hearing on the merits of the application.

Voting on the application are: J. Klinghoffer, J. Stone, J. Eckstrom, N. Faiman, and P. Howd

J. Klinghoffer MOVED to close the public hearing. No Second.

A. Burnes asked why the Board made the decision to reconsider. N. Faiman said our Counsel suggested the Board reconsider. The Board asked comments be limited to the attorneys for both sides.

R. Tilsley and K. Lehtonen represented Isaac Frye Holdings. R. Tilsley reviewed the lot information and the applicant is seeking a variance to Sections 4.1 and 12.1. He wanted to be clear about amounts of material being removed. Total excavation will be 26,766 yards, with over 21,000K yards to go. R. Tilsley said they sent a request to Town Counsel, through his office, for driveway stabilization. One neighbor is concerned about the driveway. Asked the town for permission to stabilize the slopes. The Board asked that comments be restricted to *res judicata*.

R. Tilsley said the use: small scale excavation for a single family home, differs in nature and degree from the last application before the ZBA. There were other material changes since 2006 and that is why they are asking for a variance and understand that an excavation site plan is still needed for approval. He said the changes are:

- The 2006 application involved the removal of the entirety of the hill.
- The current application is on a different lot, subsequent to subdivision.
- This application is for the incidental removal of gravel for a single family house and not a multi-year gravel operation. This would be less than 10% than what was proposed in 2006.

He said *res judicata* does not apply and the board has the authority to hear the case. He provided the Board with exhibits A-C. The Board stopped the presentation of new material and merits.

R. Tilsley said *res judicata* doesn't apply because of changes in the law. He cited the Brant Case and RSA 674:33. In 2009 there was a change in the test of hardship. The test for substantial justice changed in 2007. Even if the decision is not based on these parts of the variance test, it can affect a decision.

S. Little, representing a number of abutters, said this particular piece of property is important. He reviewed the previous land use cases. In 2006, the proposed gravel operation was for a single family house and the Planning Board said it wasn't incidental. In 2006 the Zoning Board found that the property was not unique and that requirement hasn't changed. The Zoning

Board found there was no substantial justice. In part, that was because the town had expressed that a gravel operation was not allowed outside the gravel district. The volume of traffic was not mentioned. For *res judicata* not to apply, the five decisions between 2006 don't apply here and now would have to be disregarded. There is no mention in any discussion of the volume of material. The argument that is materially a new lot and the Planning Board restricted gravel removal. The Planning Board had the gravel operation removed from the application when the lot was subdivided.

S. Little said nowhere in the ZBA decision did it rely on the amount of material to be removed. The applicant cannot argue now that this was in fact the basis of the 2006 decision.

R. Tilsley said the 2016 decision creating the subdivision didn't expressly say you cannot remove gravel, just that you need to go to the Planning Board first. In terms of the uniqueness standard, it was in part of the standards 2006 and is not part of the current standards for a variance.

J. Klinghoffer MOVED to close the Public Hearing and start deliberations. P. Howd SECONDED.

Discussion: None.

Voice vote: All in favor. Motion carried.

Deliberations

The Board discussed that this current application is a smaller excavation and with a much shorter duration.

J. Klinghoffer MOVED to find this application is not barred by *res judicata*. J. Eckstrom SECONDED.

Discussion: None

Roll call vote:

J. Klinghoffer – aye

P. Howd – aye

J. Stone – abstain

J. Eckstrom – aye

N. Faiman – aye. Motion carried (4-ayes, 0-nay, 1-abstain).

J. Eckstrom MOVED to reopen the Public Hearing. P. Howd SECONDED.

Discussion: None.

Voice vote: All in favor. Motion carried.

J. Eckstrom MOVED to continue the case to October 12, 2021, at 7:30PM. J. Klinghoffer SECONDED.

Discussion: None.

Voice vote: All in favor. Motion carried. A. Hoar returned to the Board.

Case #9/14/21-2

Michael Bronson has requested a special exception under section 5.3.1 of the Wilton Zoning Ordinance to allow a state inspection station as a home occupation on Lot L-6-1, 8 Seagroves Street.

N. Faiman opened the Public Hearing by reading the Public Notice. M. Bronson appeared and shared his plan for a state inspection station. P. Howd said the applicant may need two variances including one for noise since a horn would need to be tested on each inspection that would be required to be louder than is allowed by our ordinance. Second, inspections need to be done in a commercial building. The Board and the applicant discussed how to move forward. The applicant withdrew the application.

N. Faiman MOVED to allow withdrawal of application without prejudice. P. Howd SECONDED.

Discussion: None.

Voice vote: All in favor. Motion carried.

3) Adjourn

The Board discussed tabling the remainder of the agenda at the next meeting.

J. Klinghoffer MOVED to adjourn at 10:31 PM. J. Eckstrom SECONDED.

Discussion: None.

Voice vote: All in favor. Motion carried.

Respectfully submitted by Michele Decoteau, Board Secretary

Approved 10.12.21