



TOWN OF WILTON ZONING BOARD OF ADJUSTMENT
Approved Minutes

DATE: October 12, 2021
TIME: 7:30 PM
PLACE: Florence Rideout Elementary School
PRESENT: Neil Faiman (Chair), Joanna Eckstrom (Vice-chair), Jeff Stone, Andy Hoar, Paul Levesque, Judith Klinghoffer (Alternate), Peter Howd (Alternate)
Attendees: Lynn Pentler; Silas Little, Esquire; Andrew Burnes; Shannen Linn; Roy Tilsley, Esquire; Nikki O'Neill; Gail Hoar; Jon Rokeh; Kenny Lehtonen; Sandy Lehtonen; Chris Owen; Joan Ross; Daniel Ross; Ashley Saari; Sara Spittel; Sandy Zielie; Ken Robinson; Peg Duggan

1. Call to order by the Chairperson

N. Faiman opened the meeting at 7:32 PM and introduced the Board. He reviewed the Board procedures.

2. Minutes of previous meetings

08.11.21

J. Eckstrom MOVED to accept the minutes of 08.11.21 with the corrections from tonight's meeting. P. Levesque SECONDED.

Discussion: None

All in Favor. Motion carries (6 – ayes, 0 – nay, 1 – abstention, A. Hoar).

09.14.21

C. Ryan provided meeting corrections for the Board. The Board discussed if it would accept corrections made by the public. Anyone may correct their own testimony and any other corrections will be reviewed.

J. Eckstrom MOVED to approve the minutes of 09.14.21 as corrected. A. Hoar SECONDED.

Discussion - J. Eckstrom asked Board Members prepare their comments on the minutes ahead of time.

Discussion: None

All in favor (7 – ayes, 0 – nay, 0 – abstentions. A. Hoar abstained on approving minutes on case #05/11/21-1).

3. Public hearings continued from previous meetings

Case #5/11/21-1—

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.

A. Hoar left the table and recused himself.

N. Faiman opened the Public Hearing by reading the public notice. He reviewed the ground rules on the hearing as well as the structure of the hearing. Voting on this case: J. Eckstrom, P. Levesque, J. Stone, N. Faiman, P. Howd (for A. Hoar)

R. Tilsley and J. Rokeh, presented the case. R. Tilsley reviewed the lot description and the variances sought. The applicant wants to remove approximately 26,000 cubic yards of gravel to build a home on this lot. He said the applicant had driveway permit and sought a building permit. R. Tilsley said the material the applicant would need to remove would be just enough to build a single family home: 5183 cubic yards have already been removed and the engineer said there is 21,583 cubic yards to go. R. Tilsley said the applicant understands this is more than incidental use in Wilton and understands that he would need a site plan approval from the Planning Board.

N. Faiman asked that since you're agreed that you need to get excavation site plan review from the Planning Board, why do you need a variance to Section 12.4? R. Tilsley said this was specified in the Notice of Violation from the town. In his opinion, once the Planning Board granted a permit, this variance would become moot.

R. Tilsley said there is a lot more than 26,000 cubic yards of gravel on site. He reviewed the details of the 2006 Variance application. R. Tilsley said that other building options will not work in part due to the narrow entrance to the lot, it is 58 feet wide, and the requirements of the Driveway regulations limiting the slope of driveway.

R. Tilsley said, in response to material submitted to the ZBA, there is no flatter place to put the material that would not need to be excavated. J. Rokeh said it was not feasible to balance the lot and make a buildable site. J. Klinghoffer asked about the flat area on the site walk. J. Rokeh said some of that area is in the lot setback and this house would take up all this open space.

J. Rokeh said if you built with no more excavation, the driveway would be 20% slope. A switch back wouldn't work as it would require the whole lot.

J. Klinghoffer asked what if you requested a variance to the setbacks and put the house closer to the lot line? R. Tilsley said there wouldn't be room for the septic and this current design would benefit the tax base, with a nice house, this would be the best possible location. J. Klinghoffer said at the site walk we discussed other options. R. Tilsley said it would require other variances. He said there is no location that wouldn't require a variance. If we get the relief we need from the current location, under the ordinance, this is the best option and the only legal standard.

P. Howd said that during the site walk, there was a discussion of easement over the neighbor's driveway. Why was that not used? K. Lehtonen said when you have a shared driveway, it drops the value of the property especially if it goes close to the neighbors. P. Howd said it was an economic decision. K. Lehtonen said it was the best use. P. Howd asked if a variance would be needed if you used the shared driveway? K. Lehtonen said the slope we are having a challenge with is behind the abutter's house. N. Faiman said the abutter's driveway goes around a "nose"

of land that reaches into the abutter's property and wouldn't have required as much excavation. R. Tilsley said ultimately it is not a good use of either property. Regardless of the use of the easement, it would require the variance.

J. Klinghoffer said that on the site walk, the owner said he placed the house in that particular location, not dependent on the characteristics of the land, but where he wanted it to be. She said she is not persuaded that the location shown on the plan is now the only location where this house can be placed. K. Lehtonen responded that no, there are other locations. The previous owner sited the house in a different location that required more material to be excavated. R. Tilsley said the driveway limits where the house can be sited. This will be a fully compliant lot when this project is done.

R. Tilsley said that the property values will not be negatively affected. He referred to the letter from Mr. Saari that he submitted to the Board.

The Board asked questions about how the amount of gravel to be removed was calculated. J. Rokeh explained how he arrived at the calculations.

A Board member asked why gravel was removed when the applicant knew it was illegal. R. Tilsley said that the applicant had a driveway permit and thought it was adequate.

J. Eckstrom asked about a building envelope on the subdivision plan. J. Rokeh said there was nothing beyond setbacks.

P. Howd asked why not get a variance to Section 6.1? R. Tilsley said a variance to Section 12.4 would address what is needed.

R. Tilsley said that "reasonable standard" was mentioned in a letter, however, it would violate the law to not analyze the five part variance criteria. If we do the driveway without the variance, it would violate the driveway regulations. Plan was to access 101 via Isaac Frye Highway, but the town may prefer using Wilton Center Road for the trucks.

R. Tilsley reviewed the five variance criteria.

1. This is not contrary to the public interest. This is an approved residential lot. The amount of excavation needed is not incidental according to the regulations but this is incidental to building a single family house and will result in a fully compliant single family house lot.
2. The Spirit of the ordinance is observed. This is similar to the public interest. This project needs a short term and necessary, excavation for an approved use. Gravel operations in the Ordinance, is focused on long term excavations.
3. Substantial Justice is done. The gain to the public is balanced with the rights of the owner. It is contrary to the law to look at the owner of the lot and be influenced. Just the land can be used when you do the property balancing test. R. Tilsley said K. Lehtonen has played this straight and is not asking for special relief because he jumped the gun. R. Tilsley said the gain to the public of strict enforcement and denial would result in an illegal taking.

4. The value of surrounding property will not diminish. He referred to the letter from the real estate agent. R. Tilsley said this will be a fully conforming lot after a six to nine month excavation.
5. Hardship
 - a. The special conditions of this lot that distinguish it from others, prevent it being used in strict conformance with the Ordinance. R. Tilsley said that strict enforcement would make this lot unusable. It has a small flag pole access, and the property rises eight feet in elevation in the first 20 feet.
 - b. The excavation is incidental to constructing a single family house and using the property for an approved use. There is a limited size and scope of excavation. Extraction provision of the ordinance is not a barrier and this will be a fully compliant lot in the end.
 - c. This is a reasonable use - limited in duration, quantity and scope. Alternative is poorly shaped driveways, and would be a taking. We can't use this property with less than 500 cubic yards - how the house is situated, a variance would be needed to use this lot. It will lead to a fully compliant lot.

The Board asked about a self-created hardship. This was a subdivision in 2016. Did the owner, Mr. Kennedy, create a lot that could not be used without a variance? R. Tilsley said no. He said the Planning Board approved the lot and cannot approve a non-conforming lot. The note requiring preapproval for excavation acknowledges that excavation is required. The Board asked about keeping material onsite. J. Rokeh said this wasn't possible.

Public Comment

S. Little, representing abutters and neighbors, said he wanted to correct something said earlier. He is not suggesting the Board NOT go thru the five variance criteria, but this application is the antithesis of a reasonable application. There are standard engineering techniques that do not require the removal of a lot of material. S. Little provided some examples.

In response to a question from the Board, S. Little said the driveway could be built in other ways including benching. The applicant is removing 200% to arrive at a 6% slope, you don't need to remove this amount. He said this is excessive, it is not moderate. He said he respectfully disagrees with R. Tilsley. The applicant should be taken into account. What this applicant did should cause the ZBA to deny the request as it doesn't meet the substantial justice criterion. S. Little said before the excavation commenced, one could use some creativity that didn't require removal of this quantity of material.

S. Little said that 113 vehicle trips per day is not in the public interest. They cannot use the approved gravel haul routes since they are outside the Gravel District. They are ignoring the setbacks in Section 9 of the Ordinance. The applicant cannot be in compliance with Section 9B. There is no attempt address the public interest.

S. Little said the Office of Strategic Initiates (OSI) states that a variance cannot be given for a prohibited use. The Board asked for case law supporting this. S. Little said that generally these cases are sent to Superior Court with dimensional variances as well and the courts are responding to the dimensional variance rather than the use variance.

S. Little said he doesn't understand how someone who ignores a note on a recorded plan then says it is substantial justice to be granted a variance to do that activity.

S. Little said the surrounding property values may change. There is no guarantee that this will be completed in the time frame they gave. There is no certain future in terms of closure and if there is a change in the market for gravel and housing this could delay the completion.

S. Little said there no demonstration of that minimal relief is needed. There is no discussion of creative techniques for building on slope. They have not tried to use the material on site. They have not sought relief for Section 6 or 9B - this is an incomplete application.

He commended his letters to the record.

J. Eckstrom asked about gabions. S. Little explained what they are and where to see them locally.

S. Linn (192 Wilson) and A. Burnes (202 Wilson) wanted to share expert testimony in the form of a letter. R. Tilsley objected to the testimony since it was not provided to anyone before the meeting. S. Little said this is not uncommon to get written testimony at the meeting. It is not a requirement to provide to the applicant ahead of time.

The Board discussed how to proceed.

P. Howd MOVED to continue to the Nov meeting. P. Levesque SECONDED.

Discussion:

J. Klinghoffer said it was 10:00 PM now. The Board is likely to be continuing regardless shortly. R. Tilsley strongly disagreed with the testimony in writing being presented at the last moment and not provided to everyone. K. Lehtonen said that he met the expectation to have material in on time. Requests that the Board hold everyone to the same standards. S. Linn said she was never was informed of the deadline. Her counsel said there were no rules. And why if the applicant can request a continuance at the last minute, why cannot the abutters?

P. Howd asked to change the motion to read "Next Meeting" and not November. P. Levesque agreed.

J. Stone-yes

J. Eckstrom-yes

P. Levesque-yes

N. Faiman - no

P. Howd - yes. Motion carries (4 – ayes, 1 – nay, 0 – abstentions).

The Board discussed whether they were to limit the receipt of materials. And as a practical matter, new material needs to be to the Land Use Office before 11 AM the Friday before a meeting.

A. Hoar returned to the Board.

4. Correspondence and Invoices

Done!

5. Other Business

Bylaws

The Board noted that they received copies of the Wilton and Hudson ZBA Bylaws. P. Duggan sent a report on plain language to the Board as a guide for writing ordinances.

Scanning Software

The Board discussed the need for OCR scanning software.

6. Adjourn

J. Klinghoffer MOVED to adjourn at 10:29 PM. P. Levesque SECONDED.

Discussion: none.

Voice vote: All in favor. Motion carries (7 – ayes, 0 – nays, 0 – abstentions).

Respectfully submitted by Michele Decoteau, Board Secretary

Approved on 11.09.21