Wilton Conservation Commission

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October 3, 2019

Town of Wilton Zoning Board of Adjustment
P.O. Box 83
Wilton NH, 03086

The Wilton Conservation Commission, with Jeffrey Stone recused, unanimously recommends that the height variance requested for an asphalt batch plant proposed by Quinn Properties, LLC (the "applicant") on lot B-10 be denied. After careful consideration of its existing application and facts relating to asphalt batch plants, we believe the request fails to meet the standards established by the New Hampshire courts for granting a variance in support of the extension of a nonconforming, or grandfathered, use. A brief explanation of our thoughts on those two issues follows. Should you desire a more complete version, we would be happy to provide that, either in writing, or by testimony at your next public hearing on this case.

Our first concern is that the Quinn Properties, LLC application (the "application") is worded, and presented by counsel, so that approval of the proposed height variance, and the asphalt plant, would establish it as "an extension" of the nonconforming, or grandfathered, use of this land (see the first paragraph of its typed attachment.) As written, the proposed asphalt plant would benefit from all the protections afforded the pre-existing, nonconforming use. While the wording of the opening may not have been carefully considered, this does not absolve the Zoning Board of Adjustment from treating it as such. The New Hampshire Office of Strategic Initiatives (OSI) offers the following guidance to a Zoning Board of Adjustment in such cases (*The Board of Adjustment in New Hampshire: A Handbook for Local Officials, NH OSI, December 2018, p II-19*):

> A legal test for expansion of nonconforming uses has been established by the New Hampshire Supreme Court from cases such as *New London Land Use Association v. New London Zoning Board of Adjustment & a*, 130 N.H. 510 (1988). In reviewing whether a particular activity is protected as within the existing nonconforming use, the following factors, or tests, **must** [*emphasis ours*] be considered:

- To what extent does the challenged activity reflect the nature and purpose of the existing nonconforming use. (i.e., does the proposed change arise "naturally" through evolution, such as new and better technology, or changes in society.)
- Is the challenged activity merely a different manner of utilizing the same use or does it constitute a use different in character, nature and kind from the nonconforming use?
- Does the challenged activity have a substantially different impact on the neighborhood?
- Enlargement or expansion of a nonconforming use may not be substantial and may not render the property proportionally less adequate.

Only one 'negative' answer is required in order for the asphalt batch plant to be rejected as a use "protected as within the existing nonconforming use." We feel that the proposed extension fails all four of these tests and thus the asphalt plant must be considered a new and different use by the Wilton Zoning Board of Adjustment (WZBA). To give just one possible example – an asphalt plant is a very different industrial operation from a quarry, would require construction of several new buildings, and would have a different and expanded set of impacts on the neighborhood. A statement for the record should be made when the WZBA decides this issue.

We believe that this "New London Test" should be decided first. If the proposed use (the asphalt plant) is deemed invalid as an extension of the nonconforming use, then it would seem illogical at this time to discuss, and render a decision, about the requested variance. The WZBA should rather require the applicant to submit a new application reflecting the fact that the proposed asphalt plant would be a new use, the evaluation of which could involve different review standards further in the process. It seems clear to us that any application for an asphalt plant that might possibly be built on B-10, cannot include, implicitly or explicitly, construction as an "extension" of the grandfathered quarry. Consideration of the variance is moot until the status of the use is corrected.

With regard to the requested variance for the height of the proposed mix plant and storage silos, we feel the application fails to successfully meet the criteria established by a series of NH court cases needed for approval. Collectively, these are referred to as the Simplex standards. In the application these tests and their answers are numbered 1-5, with some sections having multiple questions. The WZBA must evaluate the answers to each of the Simplex tests.

While we take issue with many of the applicant's Simplex answers, for brevity we will focusing on its responses in section 5(a) of the application. We have reproduced the Simplex questions and the applicant's answers from its application (indented passages below) for context and clarity of our critique:

> 5(a) i: No fair and substantial relationship exists between the public purposes of the ordinance provision and the specific application of the provision to the property:

a. As discussed above, the rationale behind the 45-foot limit as applied to an industrial structure is unclear.
b. Without a variance the property can't be used for an asphalt batch plant because by design they are more than 45 feet high.
c. A variance for structures with a height of more than 45' does not violate the general public purposes of the ordinance because the silo and the plant attached to it would be located on a small piece of a much larger parcel (Lot B-10) that is itself bordered by other industrial users, a state owned rail corridor and other industrial zoned parcels owned by the applicant. It is highly unlikely that the silo and associated plant equipment will be seen, heard or otherwise noticeable by residents outside the boundaries of the existing Quinn Properties LLC existing quarry operation.

5(a) i. a: We find the response irrelevant. Regardless of the origin and history of Wilton Zoning Ordinance (WZO) 8.2.6, it is the existing ordinance, just as 60 years is the age cutoff for elderly housing. It may be arbitrary, but it is the standard as approved by the town, regardless of origin. Secondly, since the origin of the 45-foot limit is unknown but being debated (see "As discussed above" in a.), it could just as well be case that the ordinance was drafted with the purpose of prohibiting industrial development that would require stacks and the associated release of airborne emissions, whereas the emissions from tall agricultural silos (in the Res-Ag District) were deemed less offensive in a primarily rural community. The origin of WZO 8.2.6 could have nothing to do with firefighting capability and everything to do with preserving the rural character of our community.

5(a) i. b: Their statement is false. Asphalt batch plants are commercially available with silo heights under the 45-foot limit. We can supply vendor information on request. Denying the variance would not deny the use. We suspect the applicant is making an economics-based request as smaller, but compliant, plants likely produce and store less asphalt.

5(a) i. c: The applicant writes, "It is highly unlikely that the silo and associated plant equipment will be seen, heard ***or otherwise noticeable*** by residents outside of the boundaries of the Quinn Properties LLC existing quarry operation" [emphasis ours]. The potential for operational impacts to surrounding properties here, and in earlier answers, is denied by the applicant. In determining that regional impacts may exist on 9/10/2019, the WZBA explicitly found that the operation of an asphalt batch plant on this site may be reasonably expected to be "noticeable by residents outside the boundaries" of lot B-10 for a number of possible reasons. Accordingly, the WZBA has already found it likely that the applicant may fail this test.

5(a) ii: The proposed use is a reasonable one:
a. The proposed use is a reasonable one given the location and current use of Lot B-10 and the surrounding properties.

5(a) ii a. We feel the applicant is intentionally confusing the word “surrounding” with “abutting.” Both in this answer and in previous answers regarding impacts on surrounding properties (such as decrease in property values), the applicant has routinely chosen to substitute the meaning of the term “abutting” where the court’s guidance, based on its use of the word “surrounding”, is clearly intended to be geographically broader. We expect there will be impacts on Goss Park, other residents in a 2-mile radius (according to EPA studies), and to traffic using Forest Road (Rt 31), not to mention the road itself.

> 5(a) iii: The hardship is a consequence of special conditions of the property that distinguish it from other properties in the area:
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> a. The property is not flat and rises more than 200 feet above the base elevation of the proposed plant which would be near the railroad tracks at the bottom of the lot in terms of elevation. The top of the 72’ structure will be considerably lower than industrial operations higher up on B-10.
> b. The property is already a stone quarry and use as a stone quarry diminishes the ability to use it for other industrial purposes.
> c. The next door neighbor, Granite State, is an operating quarry and would not be a good neighbor for many traditional operations.
> d. Because the industry has changed so that quarries and asphalt and cement plants have linked ownership, a quarry needs and asphalt or cement plant to survive.

5(a) ii.a: The topography of Lot B-10 is not a unique or special characteristic compared to other lots in this district.

5(a) ii.b-c: “A nonconforming use may not be used to form the basis for a finding of uniqueness to satisfy the hardship test.” (Grey Rocks Land Trust v. Town of Hebron, 136 NH 239, 1992 as summarized in “Grandfathered - The Law of Nonconforming Uses and Vested Rights (2009 Ed).”, H. Bernard Waugh, Jr., p. 29). We think the applicability of Mr. Waugh’s statement regarding New Hampshire case law is clear when applied to this application. The existence of the applicant’s quarry may not be used to support a finding of hardship. Moreover, the special conditions finding applies to the applicant’s property, not that of the neighbor in (c). But, should it be considered here, the presence of the Granite State quarry next door makes Lot B-10 less unique (or special), not more unique.

5(a) ii.d: This is a purely economic argument for the plant itself and does not relate to the height of the silos. It does not bear on locating the plant on Lot B-10 – only that the plant and the quarry share ownership. Denying the variance would not deny the opportunity to own an asphalt plant in a different location.

To summarize, The Wilton Conservation Commission recommends:

1. That the Wilton Zoning Board of Adjustment reject the variance application from Quinn Properties, LLC for lot B-10. We believe the asphalt batch plant is NOT an allowable extension of the nonconforming quarry.
2. That the Wilton Zoning Board of Adjustment deny the variance as hardship was not shown to exist, among other failures in meeting the Simplex criteria.

Respectfully submitted,

W. Bart Hunter
Chair, Wilton Conservation Commission

CC: Town of Wilton Planning Board
Town of Wilton Select Board
Town of Lyndeborough Conservation Commission
Town of Temple Conservation Commission
Town of Milford Conservation Commission
Souhegan River Local Advisory Committee
Nashua Regional Planning Commission
New Hampshire Office of Strategic Initiatives, Planning Division
New Hampshire Department of Environmental Services