

TOWN OF TEMPLE, NH

ZONING BOARD OF ADJUSTMENT

February 2, 2021 Public Hearing (Con't)

***Applicant - Ben's Pure Maple Products, LLC***

**ZBA Members present:** John Kieley, Deb Deleso, Greg Robidoux, Bill Ezell, Mary Beth Ayvazian, Gail Cromwell (Alternate)

**Others present:** Tom Hanna (BCM Environmental Land Law), Silas Little (Attorney for Abutters), Chris Drescher (Town Attorney), Brian Underwood (Property Value expert), Jim Phippard (Brickstone Land Use Consultants) 20+ interested people.

*Chair John Kieley called the hearing to order at 5:30 and notified the participants that this hearing was being held electronically pursuant to Executive Order 2020-04, Section 8, Emergency Order #12, Section 3.*

*Kieley asked each voting board member to state their name and indicate whether they were alone. All members stated their name and indicated they were alone.*

*Kieley mentioned that all of the required public hearing notifications were successfully implemented.*

*Kieley summarized the case which is an application for special exception under Temple's zoning ordinance, to construct a 16080 square foot building for production purposes which includes 3000 square feet of retail space. Kieley commented that since the applicant has not been able to secure a release from the abutting property owned by the federal government, the applicant has therefore also filed an application for a variance under Temple's zoning ordinance.*

*Kieley named the voting members of the board and asked if any of them had any reason to recuse themselves. All answered they had no reason. Kieley mentioned that Gail Cromwell is an alternate and may participate in the dialog tonight but will not vote.*

Kieley indicated that at the last hearing there were missing pieces of information to follow up with. He noted that In addition to the 50+ documents already received, attorney Hanna has sent more information from Brian Underwood on property value, new information from the DOT, and a new drawing with revised information on the distance between the abutters property to the proposed site. Kieley noted that all of the documents are now on the Temple website for anyone to view. Kieley noted the board will not go into deliberations and close out information without the applicant knowing if there was a gap with what they had and what they needed. Kieley also noted the board met with legal counsel and received advice that they should talk openly about any shortcomings or concerns they had and wanted the applicant to know about.

Kieley suggested the board have a conversation not a debate, to educate the applicant on what their current thinking is, and to make sure the applicant knows of any concerns so they can provide any additional information. Ayvazian commented that she is concerned with Brian Underwood's letter that states that the ZBA had not received any credible evidence or expert opinion that supports that there

would be a negative effect on the adjacent properties. She feels it is the applicant's burden to provide support that there will not be an impact. Kieley noted that in the first letter regarding the highest and best use of the properties in the area, that they will not change with this proposed business regardless of whatever the type of business is, and suggests more information to educate the board needs to be provided. Cromwell added that on one of the new pieces of information regarding traffic, she is concerned of the absence of a cover letter and is curious on what was told or not told and did that influence the answer.

Kieley asked Mr. Underwood for more back up data on the sales he used in the letter. Kieley stated he went through the data looking for the support. He noted the sample size was small and that they had to go back 20 years. No adjustments were made for that 20 year gap. When he ran the numbers on the 13 sales, he could not replicate Mr. Underwood's numbers on his report and suggested someone take a look at that and clean it up. Deleso agreed she is uncomfortable with the amount of evidence around the diminution of property value. Kieley continued reading the November letter and suggested that the 2 letters and the data given are not convincing. On the second letter from Underwood, the argument should not be looking at the neighborhood, only the adjacent properties and he felt not too much credit was given to that point. Kieley noted that the proof is on the applicant in all of these matters including no diminishment of property values and noted we have a gap that the applicant needs to be aware of. Ayvazian agreed and Ezell added that of all the evidence presented, this is the weakest and he has reservations.

Kieley commented on the state provided traffic study and noted the traffic count reflected a maple syrup based business not an expanded retail business which is a gap, and he noted he wanted to make sure the state has all the information regarding the type of business and the likely traffic counts. Cromwell added the assumption that is underlined, most of the traffic studies stated 200 customers per day and she is not sure where that number came from. It could easily be more and could require a traffic study she commented. Deleso added she thinks the information about the truck traffic going through is not sufficient enough. It is not the traffic going by, it is the traffic turning in and at what point do you need a traffic light. She would like to see more analysis on that.

Kieley then asked to close the variance application input and move into deliberations. Roll call vote was unanimous in favor. Hanna commented that according to the flow chart, there should be an opportunity for the applicant to be heard. Kieley said he could go ahead and speak. Hanna said on the 20<sup>th</sup> of January, Kieley asked for several items that he thought were important so therefore, they hired a surveyor to go out and take measurements and felt they should have the opportunity to show the board those aerial measurements and explain why they reached the conclusion of the measurement of 512 feet. Kieley asked the board if they all had a chance to review the new material or wanted to comment on it. All board members stated they were clear on the data and had no additional questions.

Attorney Little stated the zoning ordinance speaks to the use not the building and all the measurements should go from building to building. There is nothing with respect to that building that says it cannot be used for residential use.

The board went into deliberation at 6:03 on the variance application. Kieley started by stating the first issue on the table is the distance from the dwelling to the building use, and does the word dwelling include the shop or just where people reside? Also does the use include parking and other uses of the property. Kieley said this was discussed with legal and the opinion is that we should differentiate between parking and the proposed building. That led to a discussion to consider use as the measurement from the dwelling to the

proposed structure as differentiated from parking. What defines a dwelling? Do you consider today's dwelling or what could be considered in the future? He noted again the word is dwelling and is this where people live or could it be some accessory shop it was being used for? Ezell commented if any structure was considered a dwelling, anyone could put an 8X10 shed up and say nobody can build near it. He thinks it should be residents that occupy space. Robidoux added is the kind of structure in question currently being used as a residence and was it zoned as commercial? Is there an attached garage to the building and how is it being utilized? Ultimately the pictures showed it was a breezeway that connected the garage.

Kieley allowed Matt Cabana to comment on the federal government owned property and the use of the property. Cabana stated that he is a licensed real estate broker in the area and has firsthand knowledge of the property and said it is in great disrepair and is dangerous. The archery shop has never been used as a home. Just storage. Cabana noted he has tried to get information on the property however once a property goes into foreclosure, it is a long process to go through and you cannot do anything with it during that time. Cabana added you are not going to get anything from them and in his opinion, the bank does not care, it is simply a property they want to get rid of. He added it is in need of complete repair and stated if the board wanted more information on the property, he can provide it to them. Hanna asked if Cabana can speak again later in the hearings. Kieley said Hanna can get information from anyone he chooses.

Ezell commented we need to decide if the property is not habitable, is it therefore not a dwelling, or do we need to go by the fact that it is attached by the breezeway. Kieley stated it was time to vote with the first vote on interpreting is dwelling the habitable part of the structure or any structure on a property. Ayvazian asked if there was a legal definition of dwelling. Deleso asked is the breezeway considered part of the dwelling.

Mr. Little objected to accepting Cabanas information noting the board was already in deliberation. Little stated the entire building should be considered a dwelling. Kieley asked Hanna and Little to mute there systems and he noted he made a mistake letting Cabana speak.

Kieley stated we need to get to the question whether the dwelling is just the habitable part of the connected structure or whether it includes the portion of the structure that perhaps was never inhabited. Kieley asked if the board would be more comfortable to continue discussions with legal counsel. Deleso asked if they could go into a private session with legal. Robidoux said to look at the tax card and see how the property was used. Kieley said in the early 2000's there was a building application submitted as commercial that was signed by the select board even though it should not have because it was a residential zone. This was back when the archery place was started and he has not seen any history suggesting it was ever used as residential space. The board went into a private break room session with legal at 6:30.

The board came back to the main meeting at 6:46 and Kieley proposed a motion that for the purposes of the measurement of the 500 feet to the dwelling, they use the habitable portion of the structure. Kieley read from the Temple zoning ordinance that stated the definitions. Ayvazian seconded, roll call vote unanimous in favor. Kieley then made a motion to provide that the in determining the use of the proposed commercial operation, the measurement be made to the proposed building and not to the proposed parking lot or areas, referring to section 13A items 1 and 2 of the ordinance. Ayvazian seconded, roll call vote was unanimous in favor. Kieley stated that based on these two votes, they declare the application for a variance is mute. A motion to leave the deliberative session on the variance application and go back into the main hearing was made by Kieley. Ayvazian seconded, roll call vote was unanimous in favor.

Kieley noted attorney Hanna had an earlier question as to whether he would be allowed to respond to issues specifically regarding traffic and real estate and confirmed with Hanna that he did not want the board to go into deliberations on the special exception application now. Hanna agreed and said he wanted to be heard and will confer with his experts and get the additional information requested.

*Kieley then asked if March 2<sup>nd</sup> or 16<sup>th</sup> would be open for everyone to continue the hearing. Hanna asked that an earlier date be considered. Discussion at the Jan 19 meeting said maybe Feb 16 would be available and he asked for a date before March. Kieley noted there was another case in February that is scheduled. It was agreed that March 2nd would be a date that everyone could make for the next hearing.*

Kieley then moved on to the review of the January 19th ZBA minutes. After discussion and comments, Kieley moved to accept the January 19<sup>th</sup> 2021 minutes as amended. Ayvazian seconded, roll call vote was unanimous in favor.

Kieley continued on and read a summary of letters received from Mike Flynn, David Bond, Beth Fox and Emily Sliviak. Kieley reminded everyone that the full versions are available on the Temple website. **Please see attachment #1 for these summaries.**

At 7:09pm Kieley motioned to adjourn the hearing until March 2<sup>nd</sup> at 5:30 via zoom. Ayvazian seconded, roll call vote was unanimous in favor. He will contact Attorney Hanna if an earlier date becomes available.

## Attachment #1

### Temple ZBA

#### Ben's Case

#### Summary of Letters Received

*Name: Mike Flynn*

*Address: 112 General Miller*

*Date: 12/7/20*

Key Points: Ben's is an important part of Temple's character

Proposal would have positive effect on town

We need to support local businesses

*Name: David Bond*

*Address: 164 Moran Rd*

*Date: 1-3-21*

Key Points:

In the 80's Rt 101 was discussed as a corridor for commercial development

Economic development section of master plan references rt 101 development providing facilities/services for the traveling public

...further adds references to balanced tax base, employment and tourist based businesses

Proposal would not impact rural character of Temple

*Name: Beth Fox #3*

*Address: 62 Old Rev*

*Date: 1-5-21*

Key Points:

Not a relo but an expansion extending over three properties

Large scale industrial/retail

Photos of trucks and fork lifts being loaded/unloaded on town roads

Concern that truck area to north of proposed building is insufficient for the use and loading/unloading in the street will continue

Property at 56 Webster Highway calls into question the RE experts report

Comments on SE standards:

- 500' setback should include parking etc
- Outside storage etc to west of building should be prohibited
- Existing buffering to north and west should be protected
- Evergreen screening should be installed along old rev
- 2 driveway limit should be assured
- No parking in 55' setback. Overnight unscreened parking limited to one vehicle
- No on street parking or loading/unloading
- Septic properly sized
- Retail limited to 3000 sq ft
- Retail hours limited to 11-7
- No sale of alcohol etc
- Commercial hours 7 to 5; 6 to 6 during maple season
- Any use changes should be required to go back to ZBA

*Name: Emily Sliviak*

*Address: 5 Old Rev*

*Date: 1-12-21*

Key Points:

Disappointed in Board's "excessive time" and "lack of progression"

Concern with convenience store reference

Opposition letters have contained false statements

Provided description of deli

Requested conditions should not include her house

Traffic flow and safety have been an issue for decades and not brought about by applicant

Board has a lack of respect for experts

Should non-abutting neighbors have standing

No opponent has proven that their property will be diminished in value

New building "can better accommodate ....storage, cars , equipment etc"

New building to serve same ag purpose as current buildings...but be more efficient

*Name: Emily Sliviak*

*Address: 5 Old Rev*

*Date: 1-20-21*

Key Points:

Attempted to be recognized at the 1-19-21 hearing when minutes of the prior meeting were being discussed

Wants paragraph dealing with convenience store reference added to the minutes

Referenced Steve Pernaw's traffic studies and Tom Hanna's comment re mostly maple based products

Minutes respectfully submitted by Carole Singelais