

TOWN OF TEMPLE, NH

ZONING BOARD OF ADJUSTMENT

January 19, 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), 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 started by saying there has been a lot of activity on social media sites about the ZBA process lately and he felt this was a good opportunity to provide a cliff notes version to the public of the Zoning board's responsibilities as required by the state of NH. Therefore, John asked Mary Beth Ayvazian to summarize the zoning board's procedures. **Please refer to Attachment #1 at the bottom of these minutes for Mary Beth's summary.***

Kieley then 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 stated that this is a combination hearing for both applications however the board will hear the variance application tonight, and said we will be hearing from both sides. Kieley also noted he will read some letters into the record and mentioned that the ZBA will be meeting with legal counsel next week regarding some of the legal issues. Kieley stated he hopes to go into deliberations on both issues and come to conclusions shortly thereafter. Kieley also mentioned they were working on getting all the documents on this case on the town website soon.

Kieley named the voting members 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. Mr. Hanna renewed his objection of Cromwell participating in any form in these hearings due to her strong objection of Bens building permit request in 2016 which she voted no on. Mr. Hanna also stated that Cromwell assisted Connolly farm's appeal and produced 30+ pages of documents and spoke at length raising all manner of issues regarding Ben's operation which are similar to the activities being proposed now. Mr. Hanna said her vote would be no in this case and no on any other

location, and therefore she should not sit in on this case. Kieley commented that he noted the objection in earlier hearings and will note it today. Mr. Little added that her participation as a ZBA member does not bar her from speaking as a Temple resident. Cromwell also commented that in 2016 she recommended instead of the operation being on Bens fathers land, the obvious location might be to place the building on the exact location that is being proposed now and that should suggest she would be a supporter.

Kieley then stated that Mr. Hanna would be starting tonight, followed by anyone who is in support of the variance application, then anyone who is against the application, then they will accept final comments. He reminded we should only be discussing the variance application tonight not the special exception, and if anyone wants to make a statement, they can send them in writing to the board. Mr. Hanna said he is hopeful the board will consider closing both matters tonight and move into deliberations. Mr. Hanna also mentioned that although the technical criteria for the two applications are somewhat different, he would like to request that all of the materials submitted on the applicant's behalf be part of the record for this variance hearing and be considered by the board. Mr. Hanna then asked Jim Phippard to give a quick overview of the project to make sure all prior evidence is included in the public record.

Jim Phippard then shared a blown up sketch of the proposed site onto the screen. He spoke about the building, the lot size, location, and the use of the building as they are proposing, which is permitted by special exception. Regarding the variance application, he stated in order to allow this building to be less than the 500 feet separation regulation from the abutter in question (it is about 450 feet away), and although they have made many attempts to contact the owners (Federal Government, Freddie Mac), they have been unable to get the written permission needed and without the written permission, they are seeking the variance. He reminded the board that they also had traffic experts look at traffic impact and contacted the NH DOT who stated that no improvements to route 101/Webster Highway needed to be made. He noted they also did studies on the drainage and the professional results showed no increased run off from the property. He discussed the lighting locations which are going to be 30 feet high which is over the requirement, and he noted they are dark sky compliant. Phippard also mentioned that the utilities and the sewer system will be underground. He added they also addressed fire protection, the storm water pond, and wetland impact. He also discussed the architecture of the building which they believe fits in with the rural character of Temple. Mr. Phippard also showed an aerial photo which showed Ben's proposed site and everything around it including the location of the property owned by Freddie Mac. He also pointed out the forested area along 101 which adds a buffer screening effect for the residential property in question. He also addressed the tractor trailer turning impact and showed a radius tablet which showed the footprint of the tires and stated that all maneuvered safely.

Kieley reminded everyone to stick to the subject of the variance tonight and he commented that some of the things said tonight have been contested by the abutters and he suggests anyone with an interest to study all the files and review the issues raised by those against the application in order to keep things fair.

Mr. Hanna continued and stated that the variance is essentially a waiver of the strict letter of the zoning ordinance as long as the waiver does not sacrifice the spirit or purpose of the ordinance. Essentially the variance is established by state law as a safety valve. The 500 foot setback provision is to protect the residents from the impact of commercial projects. Mr. Hanna went on to state that the distance between the property in question and Ben's building is 450 feet, so the setback is pretty substantial and the ZBA can approve back to 200 feet. Mr. Hanna said the commercial retail market space is an additional 40 feet so they are close to 500 feet distance plus there is a substantial tree buffer along the south side of route 101

which will protect residents from the sights and sounds of Ben's establishment. Mr. Hanna went on to say that the sounds of the traffic on route 101 is quite substantial and supersedes any potential noise from Ben's business, therefore, they feel this project would not be a light or noise concern to any of the abutters. He noted that these special conditions, 101 being the largest, demonstrates the spirit of protecting the residents. Regarding the diminution of property value, since Bens site is 450 feet away and on the opposite side of route 101, and is accessed from route 45, and the tree buffer between 101 and the Freddie Mac property, because of all these reasons, there is no detrimental effect on the value of the Freddie Mac property.

Mr. Hanna went on to address the last two criteria items for the variance. Mr. Hanna stated that substantial justice is a balancing test and is not always easy to explain or understand. It is an evaluation where any loss to the individual (Ben) is not outweighed by a gain to the general public is an injustice. Mr. Hanna said a denial would be a loss to Bens and the board needs to consider that the public gain of the denial outweighs the loss to Bens. The last criteria item which Mr. Hanna read out loud and commented that their position is it is essentially not necessary to enforce the 500 foot requirement in the context of this property because the general purposes of the ordinance will be fulfilled no matter if it is 450 or even 300 feet because of the special conditions of the property. Distance, tree buffer and intervening state highway. Mr. Hanna said they believe the site that Ben is proposing for his project is a perfect site. It is on a state highway but the entrance to the site by trucks and other traffic is off route 101, suggests an ideal location for a low level commercial project.

Kieley asked if there was anyone else who would like to speak in favor of the variance. Steve Andersen spoke in support and said Ben is following all the rules which is one reason he is supporting the project. Steve also stated that the building that was pointed out by the screen shot was built as a business not a residential home, and the 500 foot measurement should be from the residential home not the business so they probably do meet the 500 foot requirement. He also commented that the sound of the truck brakes and motorcycles on route 101 is quite loud. Mr. Hanna then compared Mr. Andersen's commercial project from a long time ago, and stated that the measurement was from the commercial building to the residential dwelling which is how the 500 feet was measured. Mr. Phippard screen shared the plan which showed Mr. Andersen's property at a measurement of a 500 feet. Mr. Hanna stated not only did the ZBA this set a precedent on that project, and that prior position that the board took, confirms how the buildings should be measured.

Mike Dube also spoke stating he lives in close proximity to the planned site and said he did not care what kind of business moves in and stated we need new business in town especially now in this economy. He felt Ben's proposal fits in with this community. He confirmed the noise on route 101 is extensive.

Mr. Little spoke and said that Mr. Hanna's critical point to not approving this variance is the loss to Ben not the nature or usability of the land. In this case if Mr. Fisk cannot get consent from the abutting property owner as required by the ordinance, therefore he is asking the board to consider why it is substantial justice for Ben when he requests that the board ignore the provision made in the ordinance for the abutting property owner. Mr. Littles stated that Mr. Hanna has made a case that it is not a proper variance, it's a loss for Ben and has nothing to do with the land. He feels the purpose of the ordinance is that it does not substantiate justice to the abutting property owner.

Bill Ezell asked Mr. Hanna why they cannot shift the building 50 feet further north in order to meet the 500 foot variance. Mr. Hanna first made a comment that since they received new information tonight in which

Mr. Andersen stated that the residence of the Freddie Mac property may actually be further than the 450 feet that they knew about, since they were measuring building to building, and maybe this variance is not even needed. Mr. Hanna then deferred Ezell's question to Jim Phippard who stated that as the designer, and after a lot of thought, he felt the current plan was the best plan because it places the loading dock area away from route 101 view. If the building were to shift 50 feet, the loading docks would be in view to the public.

Greg Robidoux asked if the building moved 50 feet to the north, would it still be the same size. Jim said yes but would require changing the traffic circulation, parking and loading dock access.

Mary Beth Ayvazian added that looking at condition #1 for the variance, no diminution of value of the surrounding property will be suffered, she asked if there would be any additional evidence submitted. Mr. Hanna stated he submitted Brian Underwood's opinion letter which addressed all the abutter properties but the Freddie Mac property is the property in the context this variance is being sought. Mr. Hanna reminded the board of the distance of the tree buffer and heavy traffic on 101 which intervenes. Mary Beth asked if any back up to the opinion letter was going to be provided. Kieley said the real estate consultant did provide sales data as back up to the report. Mr. Hanna confirmed there is no other data to be submitted.

Kieley then closed public comments on the special exception application but left the opportunity for any comments on the variance application open. Kieley then asked Mr. Hanna if there was going to be any additional materials submitted on the variance application. Kieley stated he has gone through the Underwood materials and stated there are concerns relative to the report and the backup data, and wanted to give Mr. Hanna time to submit any additional data on real estate values or anything else, before they go into deliberations. Mr. Hanna will consult with the expert and will submit anything else if needed. Kieley asked if he could do so by Monday afternoon.

Kieley then moved on to the review of the last 2 ZBA minutes. After discussion and comments, Kieley moved to accept the Dec 1, 2020 minutes as amended. Ayvazian seconded, roll call vote was unanimous in favor. After discussion and comments, Kieley made a motion to accept the Jan 5, 2021 minutes as amended. Ayvazian seconded. Roll call vote was unanimous in favor.

Kieley continued on and read a summary of letters received from George Willard, Amy & Matt Cabana, Don McElreavy & Tamara Andrews, and Simon Le Comte. Kieley reminded everyone that the full versions are available from the office and will be online soon. **Please see attachment #2 for these summaries.**

*Kieley then asked if February 2<sup>nd</sup> would be a date that everyone could make for the next hearing. Everyone was available and the date and time was set for 5:30 on February 2, 2021.*

At 7:00pm Kieley motioned to adjourn the hearing until February 2nd at 5:30 via zoom. Ayvazian seconded, roll call vote was unanimous in favor.

Minutes respectfully submitted by Carole Singelais



## TEMPLE ZBA MEMBER ROLE

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The primary role of a zoning board is to review and decide cases where a special exception or a variance to the ordinance is sought and these are specifically proscribed by law, not whimsy. It is important to note that there is not a commercial ordinance in the town of Temple.

Because we do not have a business zone, any proposed commercial business must comply with the requirements of article 4 section 13 A and B of Temple's zoning ordinance. This is to protect residents according to the ordinances put in place over the years by you, the Temple citizens. It is the responsibility of the applicant to clearly demonstrate to the board their compliance with these requirements. And the Board must be fair and uniform in its decision.

Without stating anything about the merits of this particular case, we must be sure that we are fair across the board, no matter who the applicant is. If there is ever a conflict of interest, a member must recuse her or himself and this is all done in the open, with transparency. The board's work needs to be careful and thorough given the importance of the decision to people on both sides. It is essential that Zoning Board decisions be consistent, reliable, and enforceable in case they end up in Court, and any protracted litigation is expensive for the Town.

While I for one appreciate the incredible success story of young Ben Fiske and applaud those many successes, his popularity must have no bearing on our decision or local zoning becomes meaningless and subject to the whims and personal desires of the loudest and most vocal. This invites a system based on personal bias, influence, favoritism, and enables generally arbitrary practices. Please rest assured that your Zoning Board will not be swayed by the flavor of the month but will instead listen to all stakeholders; we will listen to all of our residents who wish to be heard; and we will apply the facts to render our decision. Your written comments or verbal comments during hearings are always most welcome and will always be listened to.

If you want to stay informed with facts and not just opinion, then please sign up for the [templeh.org](http://templeh.org) alerts from the official town website. Ordinances can always be changed and new ones be implemented, but there is a process for it and that does not happen through the ZBA; it is not our role.

Thanks for listening and being involved. It's extremely important and why Temple is such a wonderful place to live. Thank you again and thank you, Mr. Chair.

Mary Beth Ayvazian  
Temple ZBA Member

## **Attachment #2**

### ***Temple ZBA***

### ***Ben's Case***

### ***Summary of Letters Received***

**Name: George Willard**

Address: 94 Mansfield road

Date: 10/20/20

**Key Points:**

History of his service to the town

Opinion that when Site Plan Review was added in the 90's, commercial development was "best suited" along Rt 101.

Proposal is an "ideal use" of this lot

Fire dept has only reported one accident at this intersection

**Name: Amy and Matt Cabana**

Address:

Date: 8/28/20

**Key Points:**

No place to stop between Brookside in Wilton and Big apple in PB

Uses ben's products in restaurant

Could send inn guests to deli for lunch

Ben is a success story for Temple

Project would help toward a more viable future for Temple

**Name: Sally and Simon Le Comte**

Address: 565 Webster Hwy

Date: 9/28/20

**Key Points:**

Support Ben's sugar shack

Create employment

Support local business and growth of Temple

Would remove traffic from Webster Hwy

Ben supports the Town

**Name: Don Mcelreavy/Tamora Andrews**

Address:

Date:

**Key Points:**

Support Sugar Shack and Market

Believe it would benefit the town