TOWN OF TEMPLE
ZONING BOARD OF ADJUSTMENT
October 19, 2023 Meeting

ZONING BOARD Attendees: Debra Harling, Emily Sliviak, Lucas Tabolt, James Stein, Allan Pickman, Richard Redding
Also in attendance: Joe Driscoll, attorney to Temple's Board of Selectmen from Mitchell Municipal Group, Tom Hanna, attorney to the Marshes, Christopher Boldt, attorney to the ZBA
Others Present: Cara Nicholl (Minutes), John Kieley, Ivy Bibler, members of the Marsh party, members of the town.

Harling called the meeting to order at 6:00 PM.

Harling gave a brief recap.

This meeting is a rehearing for the Marsh case 2023-06/29. The purpose of this meeting is to determine jurisdiction and whether there are any material changes in circumstances affecting the merits of the application, or if there's anything that's materially different from the original, denied 2018 application by the ZONING BOARD.

Harling gave the Marsh's and the town of Temple's attorneys the chance to speak.

Tom Hanna from BCM Environmental & Land Law, PLLC spoke on behalf of the Marsh group.

Hanna argued that the Marsh case is broader than the *Fisher vs. Dover*. He urged the Zoning Board to look at a more recent case, *TransFarmations, Inc. v. Town of Amherst*, decided in 2022. Hanna went through rules that were established by the case that would have an impact on the Zoning Board's review, quoting the following passages:

> "When a denial identifies a lack of information as the deficiency in the initial application, we have held that a reapplication proposing a project substantially identical to the prior proposed project is materially different under Fisher if the new application provides the information missing from the prior application."
>
> Moreover, an express invitation is not required. As we said in CBDA Development, LLC, "Fisher does not preclude consideration of a subsequent application — explicitly or 7 implicitly invited by a . . . board — which has been modified to address the board's concerns about the initial application."
>
> "We concluded that the applicant's 'new application supplemented its prior one in response to comments made by DES in denying the prior application. It was therefore not substantially the same application.'"

Hanna argued that Marsh's 2023 application fills in the shortcomings cited as the reason for denial in the 2018 application. Hanna stated that these changes in the 2023 application qualify it as materially different and therefore, the 2023 application should be able to proceed. Specifically, the Marshes have established that the proposed use should not adversely affect the value of the adjacent property. Hanna stated that the applicant produced letter from a

hydrogeologist. The hydrogeologist was even present at the Zoning Board's August 3rd meeting.

In addition to the issues raised by the 2018 Zoning Board, the Superior Court Judge Temple ordered that the applicant should apply for a special exception. Hanna argues that it would be disingenuous of the town of Temple to think that they could deny the court order based on jurisdiction when the town of Temple and the court knew that the 2018 application had failed and it was being brought up again.

Hanna argues that because the project is different, the 2023 application is qualified as a new application and does not require a court order.

The representative for the Town of Temple's Board of Selectmen, Joe Driscoll, from Mitchell Municipal Group, spoke next.

Driscoll stated that the applicants submitted a new application on June 29, 2023, despite clear rules that the applicants are operating an illegal junkyard and not a commercial enterprise. Driscoll recognized that the one major difference in the new application is that the applicant is now asking for a 4-acre junkyard instead of a 1.4-acre junkyard in 2018. Driscoll argued that there was not enough of a difference between the 2023 application and the 2018 application.

Driscoll also cited the *TransFarmations, Inc. v. Town of Amherst* case.

> "When a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition."

Driscoll argued about key differences in the *TransFarmations, Inc. v. Town of Amherst* case, including that there was no invitation by the Temple Zoning Board for a reapplication once there was more information. He cited *Buxton v. Town of Exeter*, stating that the Board of Adjustments and not the Board of Selectmen, has the power to grant approval:

> "The town attorney with the approval of the Board of Selectmen of Exeter approved the stipulation entered into; however, the board of adjustment and not the selectmen has the power to grant special exceptions. RSA 31:72 (II); Fernald v. Bassett, 107 N.H. 282, 220 A.2d 739 (1966). "`It is a long established principle under our law that towns are but subdivisions of the State and have only the powers the State grants to them.' . . . It follows that towns have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." Piper v. Meredith, 110 N.H. 291, 295, 266 A.2d 103, 106 (1970)... The selectmen may not do indirectly that which they cannot do directly.""

Driscoll argued that the court order did not extend the invitation for a reapplication, using the statutes 676:15 for injunctive relief and 676:17 for planning and zoning fines and penalties, second offense. Driscoll argues that the court's decision was an enforcement action to say that an illegal use is being made of the property.

Driscoll stated that within the 17-page argument from the court, nobody said the 2018 application can come back. There was no special exception or permission given in this case; instead, this case was a prosecution of illegal activities. And while the court ordered compliance, that is not necessarily happening right now.

Driscoll also stated that the applicants have not met the conditions that were laid out in the Board's 2018 decision. The Zoning Board gave 15 conditions to be met and the applicant hasn't adopted the 2018 decisions in their present application.

Driscoll urges the Zoning Board not to overlook the invitation issue and said it would be disingenuous to ensure that the Zoning Board has no jurisdiction.

Harling opened the meeting for abutters to speak for 3 minutes.

John Kiely spoke, stating that the project on Marsh's land has evolved from a hobby to a collection. Kiely states that the Superior Court said definitively that this is a junkyard and it is in violation of state law and Temple zoning laws. Kiely says that there is no evidence that the applicant will follow state rules on junkyards and the application doesn't reference compliance with any rules. Additionally, the application is incomplete. The junkyard is also bigger in 2023 than it was in 2018. He also argued to dismiss the appraisal and hydrologist's report.

Ivy Bibler came up to argue about her property value less than 525 feet from the acreage on the hill. Bibler stated that she has a well and a pond close to the property.

Harling interjected to clarify if Bibler was discussing jurisdiction or regional impact. Bibler said she was talking about regional impact. Harling informed Bibler that we are only discussing if the Zoning Board has jurisdiction, and tonight's meeting is not to discuss regional impact. Harling stated that if the Zoning Board determines they have jurisdiction, then they will go on to regional impact.

Harling asked if anyone else wanted to speak about jurisdiction.

Hanna gave a rebuttal that the question of applying for a junkyard license or site plan review is not in front of this board right now. The question that is currently being debated is whether or not the Board determines jurisdiction. Hanna cites the *TransFarmations, Inc. v. Town of Amherst* case and the Supreme Court decision that an express invitation is not required by the board explicitly or implicitly.

Kiely then spoke, stating that the question before the Zoning Board was a special exception, a site plan review, and a license, all for a junkyard. Kiely states that a hobby or collection application is different. This situation is in violation of the state junkyard statutes and the town zoning laws.

Harling asked for a motion to close any more public comments. Alan moves, Redding seconds. All in favor of closing public comments, unanimous aye.

Harling calls a recess at 6:46 for the Zoning Board to consult with counsel.

Bibler asked if it is possible to speak with the Zoning Board counsel over what he has heard today? Harling advised that the Zoning Board counsel is here for the board and does not respond to the public. Counsel will give the Zoning Board a chance to make an informed decision.

Harling resumed the meeting at 7:04 and stated they will begin deliberations.

Tabolt stated that he does not believe this application is different from the previous application. He does have some concerns about the *TransFarmations, Inc. v. Town of Amherst* case. There is no expressly obvious reason to resubmit this from the previous decision. He is concerned that testimony submitted from an appraisal or realtor could qualify it as an invitation.

Redding does not see it that way. He agrees that the 2023 application in most respects is not materially different than the 2018 application. The *TransFarmations, Inc. v. Town of Amherst* case differs in its requirements from this specific case. Redding also clarifies that because one example of a requirement being fulfilled does not satisfy the definition of materiality. This is a far different set of circumstances than *TransFarmations, Inc. v. Town of Amherst.*

Tabolt stated that that application was denied in great part because of environmental concerns.

Redding stated that he does not see why the Zoning Board has jurisdiction.

Tabolt states that the application itself is not materially different and the fact that they submitted a letter of opinion from a realtor or assessor is almost irrelevant because what the application is asking for is not material.

Stein agrees with some of what was said. The 2018 decision was denied for a lack of information and land impact for the abutters was a huge concern. That this project is larger than the 2018 application, he does not see how we can go forward with this. The other cases that Hanna cited all have reduced or fewer impacts than the case at hand here. Additionally, the 2023 application has a greater impact than the 2018 application.

Pickman is concerned that the applicant had an opportunity to address both the issues raised by court's decision and the conditions that the 2018 ZONING BOARD had laid out when they denied the application. He does not see enough in the new application that differentiates it from the 2018 application.

Harling agrees with what has been said and does not think there is enough information from the 2018 application that was denied.

Harling moved to motion.

Tabolt asked for clarity that with the individual conditions that were voted on, the failed vote was the impact on the property values (0-5). It was clarified that the Zoning Board set 15 conditions in place. If these conditions were met, including the impervious area to store all the stuff, that it would be approved.

Redding clarified that it was a stipulation, not a condition.

Tabolt says that to say that the application was rejected for the impacts on the soil and groundwater was not correct. The only thing that failed was the effect on property value.

Harling stated that she felt if they had voted to approve the application, they would have put these stipulations on it.

Redding states that we are not revisiting the 2018 decision. The question is if whether the 2023 application is materially different than the application in 2018. Redding's position on it is that no it is not materially different and we do not have jurisdiction.

Harling states that we are not looking at whatever reason it was rejected. We are determining if the circumstances have changed enough for us to have jurisdiction.

Tabolt stated that he does not believe the application itself is materially different.

Harling states that she doesn't believe the Board of Selectmen nor the Superior Court have the jurisdiction to give an application to the Zoning Board unless there is an appeal made and the Superior Court remands it.

Tabolt states that as Driscoll stated, it was more of an action to meet one or two of the two conditions set forth. It is not necessarily an invitation to resubmit an application. In his opinion, there is no express invitation to resubmit by the 2018 Zoning Board denial. And he does not believe the court has provided an invitation to resubmit. Additionally, the application is not materially difference, notably with a larger area. Tabolt does not think we have jurisdiction.

Harling made a motion that:

1. The Zoning Board does not have jurisdiction on this application under the *Fisher vs. Dover* or so stipulated in the minutes by the members of the Zoning Board. There is no material difference between the current application and 2018 application that was denied.
2. An enforcement action by the Board of Selectmen and court decision is not an invitation to reapply to the Zoning Board as a prior denial of the application. It does not create a material change in the circumstances.

Pickman seconded.

Redding Aye, Pickman Aye, Stein Aye, Tabolt Aye, Harling Aye.

Harling stated the next order of business is to approve the last meeting's minutes. Multiple corrections were made.

Harling made a motion to approve the September 14 minutes as amended. Pickman and Stein seconded.

Sliviak made a motion to adjourn. Pickman seconded the motion.

The meeting was ended at 7:41.