

TOWN OF TEMPLE, NEW HAMPSHIRE
Zoning Board of Adjustment

APPROVED MINUTES OF PUBLIC HEARING
September 22, 2016

ZBA members present: Virginia (“Jenny”) Houston (Chair) Honey Hastings (Vice Chair), Mary Beth Ayvazian, John Kieley, David Martz, Sydney Thomas (alternate) and Bill Ezell (alternate). Attorney Biron Bedard represented the ZBA.

Parties Present: Martin Connolly, pro se, Tom Hanna representing Wendell and Amber Fisk, Ben’s Sugar Shack (BSS) and Ben’s Pure Maple Products, LLC d/b/a.

Meeting was called to order by Chair Houston at 7:10 p.m.

Members of the ZBA and parties were introduced and the Chair read the appeal from Martin T. Connolly.

Testimony to be heard on Martin T. Connolly’s Appeal of the Board of Selectmen’s July 26, 2016 decision to grant a Building Permit to Wendell Fisk for construction and expansion of an existing building at 83 Webster Highway.

The Chair informed the parties and the members of the public present that the Board would hear from the Applicant, Mr. Connolly and then from the Fisks.

Mr. Connolly read his letter of appeal into the record.

The Chair noted that the hearing was limited to a narrow issue and discussion should be limited and concise if possible.

Mr. Connolly then sought to have Allan Pickman testify on his behalf stating he had the right to bring people to back up his appeal.

The Chair informed Mr. Connolly that the ZBA would give time for people speak in support of his appeal and to those in opposition to also speak. However, Mr. Connolly must present his case.

Attorney Hanna stated that prior to the meeting he was told that Mr. Pickman would be giving a statement as a member of the Planning Board. The Chair noted that Mr. Pickman would be allowed to speak for himself.

Mr. Connolly continued his presentation stating that the Board of Selectmen was incorrect in determining that the building is for agricultural and not commercial purposes.

Mr. Connolly cites from RSA 21:34-a in making a distinction between an agricultural versus a commercial use.

Mr. Connolly handed out copies of RSA 21:34-a referring specifically to section III stating that a farm stand will remain agricultural and not commercial provided that at least 35% of the product sales are attributable to products “produced from the farm”. By example he stated that Fisk’s own product would include the sap collected from his own trees to make syrup. Simply boiling syrup purchased from others does not count as being “from the farm”.

Mr. Connolly then referred to a hand out regarding a loan from New Hampshire Community Loan Fund (exhibit 1) given to Ben Fisk for purchase of two tractor trailer loads of syrup. Mr. Fisk buys syrup from small producers in 55 gallon drums and packages it. Mr. Connolly contends that this creates commercial activities.

John Kieley asked Mr. Connolly what proof he has that this is an ongoing business model of Mr. Fisk’s.

Mr. Connolly stated that Ben’s Sugar Shack received a loan from the New Hampshire Community Loan Fund to finance the purchase of two tractor trailer loads of syrup and set the business up for future loans.

John Kieley again asked how this describes a business model.

Mr. Connolly distributed copies of a handout from the Maple News (exhibit 2) which he said shows Ben’s Sugar Shack as an equipment dealer for Dominion and Grimm.

John Kieley stated that they need more information that Ben’s Sugar Shack is a wholesale syrup business.

Mr. Connolly stated that this is hard to find other than Ben’s own admissions that he is buying syrup from New York and Vermont.

Mr. Connolly distributed a handout referring to Ben’s Sugar Shack website (exhibit 3) showing sales to grocery stores, TJ Maxx and Amazon.

In order to show proof of compliance that 35% of sales from farm stand are from products produced on the farm, Mr. Connolly suggested that Ben’s Sugar Shack books be looked at.

The Chair reminded Mr. Connolly he has the burden of proof.

Mr. Connolly handed out a document titled “The sale of maple sugaring equipment is commercial at 83 Webster Highway” (exhibit 4). Mr. Connolly stated that signage at 83

Webster Highway advertises maple equipment as being sold at the site. There is no indication that the buyers should go to Old Revolutionary Road. All sales are linked to 83 Webster Highway.

Mr. Connolly ended his presentation.

The Chair asked if any members need to disqualify themselves. All responded, no. The Chair declared that there was no need for the alternates.

The Chair recognized Attorney Tom Hanna, representing Wendell and Amber Fisk and Ben's Sugar Shack.

Mr. Hanna distributed a binder which contains the following:

- His letter with rebuttal to Mr. Connolly
- Building Permit
- Photos
- Brochure for Ben's Sugar Shack
- Letter opinion from Steve Taylor
- Statues
- Two DES letters

Mr. Hanna began his presentation with the photos.

Dave Martz asked him to identify the wrap around section of the facility.

Mr. Hanna confirmed that the building is still 35 feet from the road.

Mr. Hanna showed parking for between 16 and 18 cars.

Additional parking was created as a result of clean-up of the property.

Photos also show items that are for sale in the gift shop.

Attorney Hanna described the current problem as certain people using the appeal of the selectmen's issuance of a building permit as a way of putting Ben's Sugar Shack out of business.

Attorney Hanna referred to his rebuttal letter. The new space will not contain any material not already being stored on the site. The material in the past has been stored here and there on the property. The sugar house, bottling room, tractor trailers and sheds were used as storage areas. A building permit is the proper vehicle in the case for a building that does not reflect expansion of the business assuming it meets setback and environmental concerns.

Attorney Hanna discussed two letters from a DES inspection. Believes the undated letter, in response to a complaint concerning water use, was issued sometime before August 16, 2016. The DES letter absolved Ben's Sugar Shack from any DES violations. There are no setback or environmental issues. The building permit is not related to an expansion of Ben's Sugar Shack business.

Mr. Hanna read a letter dated 9/21/16 from Steve Taylor, former NH Commissioner of Agriculture into the record. Taylor does not believe that anything Ben's Sugar Shack does takes away from it being a maple sugaring operation.

Mr. Hanna stated that it is Ben's plan to continue to expand the number of trees tapped. His goal is to produce all syrup from sap he gathers from his own trees. Presently it is necessary to buy product in from outside sources. Mr. Hanna also stated that:

- A) Ben's Sugar Shack sells jams, honey, salsa, pancake mix, flavored coffee, etc. All these products are intended to enhance sales of syrup.
- B) Products made on site are picked up by trucks to be delivered to buyers, and trucks conversely will pick up items from elsewhere (not made at the site) and deliver it to customers.
- C) Maple sugaring equipment is not stored on the site. The sale of equipment is a minor part of the operation. Hanna further made the point that BSS does this to get a discount on the equipment for BSS's use.
- D) The 35% rule referenced by Mr. Connolly is irrelevant. This relates only to farm stands. The farm stand at Ben's Sugar Shack is a tiny fraction of the business.
- E) Letter from Mitchell Locker of the DES indicates he contacted the Dept. of Agriculture and they confirmed that the facility had been inspected and was in compliance.

Mr. Hanna stated that he believes Mr. Connolly misread the "on the farm" part of the statute. Ben leases a sugar bush and sugar house in Newbury, NH. Some of the syrup and sap delivered to Ben's Sugar Shack comes from this location. Buying syrup is an accessory use. A typical definition of accessory use is it has to be subordinate in scale to the primary endeavor. Ben's Sugar Shack meets this test.

The Chair raises the issue of parking brought up by Mr. Connolly. Attorney Hanna stated that there will be no more parking needed as a result of the new building. Special events may cause parking issues, but there is more parking because the site has been cleaned out resulting in more space.

Mr. Hanna also noted that no new employees will be hired.

In response to Dave Martz's question concerning bulk purchases by Ben's Sugar Shack from the outside, Mr. Hanna stated that the majority of revenue is from product produced at the Sugar Shack. The product being brought in from the outside is re-processed in Temple.

Mary Beth Ayvazian asked Mr. Hanna if he was saying that the new building will be holding what was stored in the tractor trailers, sugar house, bottling room and sheds.

The sheds measured 12' x12', the trailers 102" x 54'.

Dave Martz asked how many taps he has and was told 20,000. About 12,000 gallons of sap is produced by Ben's Sugar House. Hanna answered yes, and that is was a consolidation and allowed for more parking.

The Chair opened the floor to the public.

Maria Copertino, anabutter spoke. She said, "It is sad that this is going on in Temple. Everyone should get along as neighbors. Neighbors are trying to put Fisk out of business."

Chair would like to hear from the Board of Selectmen and then Connolly supporters first. The Board of Selectmen had no further information.

Allan Pickman: Stated that proposed expansion is laughable. The trailers were probably illegal. An agricultural exception is not an excuse for running food processing. Wants to know how much of Ben's Sugar Shack production is actually coming off the land and how much is imported. The gift shop farm stand is subject to the 35% requirement or it should be considered a commercial shop.

The Chair request that Mr. Pickman cite the commercial ordinance.

Mr. Pickman cites to RSA 21:34-a.

Mary Beth Ayvazian asked which part is not permitted by the ordinance, and Mr. Pickman refers to the 35% farm stand requirement. Mr. Pickman questions if it is a farm.

Honey Hastings stated that sugaring is approved under the ordinance. Mr. Pickman has no problem with tapping on the land, but importing is commercial.

Ted Sartell: Believed site plan review is necessary. Enough changes are happening that it is having an impact on the community.

Ken Sullivan: Stated Planning Board was frustrated with agricultural exception. Temple will suffer from the impact. ZBA needs to put limits on the building permit.

Bill Ellis: Feels this has to be considered an expansion. Is worried about parking.

Gail Cromwell: Hands out map and assessment card. She feels there was a lack of consideration of the definition of agriculture. Ben's Sugar Shack has progressed from local maple sugar producer to a source of product remotely connected to maple syrup processing. It has transitioned from agriculture classification to commercial.

Referred to additional property owned by Ben Fisk. Mr. Hanna objects to introduction of other property as being irrelevant.

The Chair stated to Ms. Cromwell that the discussion needed to be limited to the subject at hand.

In submitting tax map and assessing card, Ms. Cromwell stated that structures existing on property do not match prior building permits. Cromwell began discussing issues with the septic plan that was submitted and the lack of building permits.

(Mr. Hanna continued to object to her testimony as irrelevant.)

Ms. Cromwell continued that:

- A) Product is not produced on the farm and sales to grocery stores go beyond what Ben can produce himself.
- B) She suggested that Ben's Sugar Shack financials should be audited.
- C) If Ben's Sugar Shack had been regarded as commercial the ZBA would be considering a variance. If RSA 674:32-b is followed and the application is considered to be a significant expansion of an existing agricultural business, all town agencies should be involved in considering a variance, site plan review, traffic impact, etc.
- D) She is including a timeline of activity of the Board of Selectman and stated that the Board of Selectman did not confer with the town attorney. She also refers to a "conflict of interest" problem on the Board of Selectmen.

Attorney Biron Bedard representing the ZBA said that the question Ms. Cromwell raises can be addressed if the ZBA agrees with the appeal and sends the permit application back to square one.

E) In closing, Ms Cromwell stated that Ben Fisk should be proud, but the market he wants to reach has become much larger than definition under agriculture.

Tedd Petro: Asked what the Board of Selectman's attorney has to say.

Tom McEleny : Permit only should be voted on.

George Willard: Town counsel advised the Board of Selectmen not to speak at the meeting.

Paul Jordan: Described as a slippery slope. Mr. Connolly's farm produces ice cream. Products for ice cream do not come from his farm. Not different from what Ben does.

Steve Anderson: Is an abutter. Ben followed the rules as to the permit process and is now being told there are different rules.

Heidi Jordan: Pointed out that building permits have disappeared from Town offices along with other records.

Brandon Fisk: States he pulled building permit for construction in 2008.

Chair – Mr. Connolly to begin his closing remarks.

Connolly Closing Remarks:

Refers to handout dated 7/26/16 from Connolly to DES, (Exhibit 5) in which he expressed concerns with discharge coming from the facility. He has no problem with the expansion. He has a problem with the environmental issues.

Mr. Connolly passed out photos (exhibit 6). Mr. Connolly states he has rights to a pond on the property and is concerned about discharge from the current building towards the pond.

Mr. Hanna objects to this testimony stating it is irrelevant to the building permit. The information pre-dates the inspection by DES. Letter indicates that things have been taken care of.

Connolly believes granting the building permit shows Board of Selectmen are protecting Ben.

Has no problem with expansion. Has a problem with two selectman not following the rules. He would have no problem if Ben went to the ZBA to go through the process.

The Chair recognizes Mr. Hanna for his closing.

Hanna Closing:

The expansion of the building is not related to the expansion of use. The building is to be used for storage of material already at facility.

The bottling room is 1220 sq. ft. Sugar house 1300 sq. ft. The trailers were 432 sq. ft. 3 sheds were 144 sq. ft. Cargo trailer was 98 sq. ft.

3680 sq. ft. used for storage.

New space 20x90 = 1890 sq. ft.

20x20 = 400 sq. ft.

Total of 2200 sq. ft. of new space.

The issue of the gift shop is irrelevant. It accounts for ½ of 1% of revenue.

The chair announced a brief recess and will pick a date for continuing the hearing.

The meeting was reconvened and a date of 10/5/16 was set to continue the meeting starting at 7:00 p.m.

Meeting was adjourned at 10:20 p.m.

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