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November 11, 2020

Town of Temple
Zoning Board of Adjustment 423 Route 45, PO Box 191
Temple, NH 03084

Re: Application of Ben's Pure Maple Products, LLC for Special
Exception to allow a 16,080 sq. ft. building, etc. on Tax Map 2,
Lot 17, NH Route 101 and Webster Highway

Dear Members of the Board:

I am addressing the Board on behalf of Robert Treadwell, Debbie Diffley, Seth Poirier, Deb Balise, Keith Charlton, Kristin Charlton and Tom Hawkins, all residents of Old Revolutionary Road, and the issue as to whether the application of Ben's Pure Maple Products, LLC meets the requirements of the Temple Zoning Ordinance for a Special Exception. My clients I assert have the requisite standing as a party especially affected by this application. Webster Highway provides the principle means of access to and from the residences, all located a short distance from the intersection of Webster Highway and Old Revolutionary Road.

Red-lined responses by Thomas R. Hanna, November 17, 2020. As the Board is aware, I represent Ben's Pure Maple Products, LLC and Ben Fisk. What follows are my responses to Silas Little's November 11, 2020 letter, within the body of his letter, following each enumerated paragraph. Initially, I reserve the right to challenge the legal standing of Mr. Little's clients.

I have identified the following deficiencies in the application for a Special Exception:

1. Temple Zoning Ordinance under Section 13A requires that the use be setback 500 feet from any existing dwelling. The use of the property includes the parking and loading dock areas. The Plans submitted to the Board do not establish that the parking and the loading dock areas are more than 500 feet from an existing dwelling. Further, for those property owners who have waived the 500 feet

requirement, the plans do not address and demonstrate that the parking and loading dock areas are more than 200 feet from existing dwellings.

With the exception of properties owned by Ben Fisk, there are only two residents whose dwellings are within 500 feet of the proposed new building. They are Ed and Lorraine Vickery of Old Revolutionary Road, Tax Map 2A-19, and FHLMC (Fannie Mae) of Tax Map 2A-51, formerly owned by people named Forte. We obtained consent letters from Vickery and Forte, but as indicated in our application, we have been unable to communicate directly with anyone at Fannie Mae and have asked the Zoning Board to grant a waiver for that property which is approximately 450 feet and across Route 101. We interpret the distance requirement to be from a dwelling to the proposed new building, which we understand to have been the interpretation by the Board when Wheeland's Auto and Truck Service, at 18 NH-45, obtained a Special Exception.

2. The application fails to contain waivers from abutting property owners allowing the use to occur within 200 feet. This requirement cannot be waived by the Zoning Board of Adjustment. The identity of the property owner makes no difference with respect to the requirements of the zoning ordinance. The 500-foot location requirement must be observed without regard to the property owner. It is axiomatic that the Board of Adjustment cannot waive a requirement of the zoning ordinance. The only route is an application for a variance and a demonstration by the applicant that each and every one of the conditions for granting the variance is met. *Town of Rye v. McMahon* 117 NH 857 (1977), Loughlin, Land Use Planning and Zoning pg. 304, Section 24.08. In addition to the bank owned property at the intersection of Route 45 and Route 101, there are no waivers from the owners of 409 NH Route 101 and 1 NH Route 45.

Ben has obtained the necessary waivers/consents, except for Fannie Mae referred to above. It is our position that the Zoning Board may, in its discretion, waive the 500-foot requirement as it relates to the former Forte property. It would not be allowed to waive the distance requirement below 200 feet, but that is not at issue. Given the circumstances, it should not be difficult to obtain a variance, but that should not be necessary for this property. Waivers/consents for 409 NH Route 101 and 1 NH Route 45 are not required.

3. The application states it is for a manufacturing facility with 26 employees and 3,532 sq. ft. of combination retail and deli. This exceeds the permissible square footage of retail space under the zoning ordinance. Further, the floor plans submitted show the use is different from those of the application. The floor plans should conform to the Special Exception application and conform to the requirements of the zoning ordinance. The Board should further observe the business plans of Ben's Pure Maple Products, LLC which discloses an entirely different range of uses from the application.

As for the retail dimensions, Mr. Little is counting areas where retail activities and customers will not be allowed. The deli, walk-in cooler, storage areas, the utility room and bathrooms were not and should not be considered retail.

4. There is no ample parking shown. If in fact there are 26 employees, then as there is no public transportation available to the proposed use, 26 employee parking spaces are required. The proposed use of 3,532 sq. ft. retail space requires at a minimum seventeen (17) parking spaces at the ratio of 200 sq. ft. per parking space. This is an accepted standard from the International Zoning Code. The site plan submitted shows only 23 parking spaces, including two (2) designated for handicap access which effectively means there is only 21 parking spaces for the employees and customers to the retail operation. The analysis of parking requirements shows that a minimum of 45 parking spaces are required. Further parking makes no provision for any vehicles operated by the business.

There is more than ample parking, as the Board saw at the October 14 site visit. The parking spaces on the south side of the building (the Route 101 side) are for customers. Parking for employees will be in the graveled area on the loading dock side of the building where there is room for more than 45 cars. Although Ben anticipates having up to 26 employees, they include workers in the woods and people making deliveries, etc. Not more than 15 employees are expected onsite at any given time. Screening for overnight sugaring vehicles, expected to be limited to 3 vans and/or pickup trucks, will be installed in the area of the screened-in dumpsters

5. The proposed use adversely effects the value of adjacent properties due to the traffic impact. The site plan submitted contains no discussion of the width of Webster Highway. The traveled width is 21.5 feet. The site plan does not disclose any template for access and egress by a tractor trailer meeting the American Association of State Highway and Transportation Officials Policy on Geometric Designs of Highways and Streets. The limitation of driveways to 32 feet combined with the width of the pavement of the traveled way of 21.5 feet establishes that there is not a safe access and egress for tractor trailer traffic to this proposed use. Templates attached to this letter are from the State of New Hampshire policy on driveways. Turning Template I for WB-50 Design Vehicle shows an outside radius of 46.2 feet and a minimum for the inside right wheel of 19.8 feet, both turn starting well inside the property line. Turning Template II shows a minimum turning radius of 42 feet for a single unit truck or bus. Both radii exceed the traveled portion of Webster Highway.

Traffic generated by Ben's Sugar Shack will not adversely impact properties adjacent to the maple production facility, contrary to Mr. Little's assertion made without attribution or support. The letter from Brian C. Underwood, dated

November 13, 2020, debunks the idea that traffic from the new facility will adversely affect area property values. Moreover, Stephen Pernaw's November 16, 2020 Evaluation of Traffic memorandum directly addresses Mr. Little's claim that Webster Highway is inadequate to accommodate turning movements by trucks entering and exiting the site. See Attachment 29 of the Pernaw report.

6. The traffic study submitted by the applicant does not consider traffic generation for alternate uses of the site. For instance, the traffic analysis merely discusses the "maple syrup" related operation. It does not discuss a retail use that is 12 months a year, 5 to 7 days a week. The assumption of 150 to 200 customers per day implies a lower traffic impact for a year round use. The State of Florida for a similar size operation says 64 trips per day per 1,000 sq. ft., which is 192 trips per day. This calculation ignores the statements in the business plan of Ben's Pure Maple Products, LLC to offer take out, such as coffee and pastries. The traffic study does not indicate that the myriad of uses discussed in the business plan of Ben's Pure Maple Products, LLC was considered in the analysis. Further, the Board should consider not only this application which is at best indefinite as to its intended use of the location, but also any future use to which this property could be placed if and when Ben's Pure Maple Products, LLC no longer occupies and uses the site.

Steve Pernaw did include trip generation for the "retail" portion of the business based on 3000 sf of market space. It is in the first Traffic Memo dated 9-08-2020. On page 4 he used two columns: one for manufacturing and one for retail. The total estimated trips on a weekday were 166 trips, and on a Saturday 222 trips. These numbers are close to what Mr. Little calls a Florida similar-sized operation at 192 trips per day. It is not feasible or reasonable to consider all possible future uses at the site. Besides, any change in use would normally have to come back to the Town for approval.

7. The appearance of the proposed use adversely impacts adjacent property and the rural character of Temple. The dimensions of the proposed use are approximately 45 feet elevation from existing ground and a visual mass length confronting Route 101 of approximately 180 feet, a vertical mass of 8,100 sq. ft. The building as proposed in no way conforms to the rural and agricultural character of Temple and the area immediately surrounding the intersection of Route 101, Webster Highway, and Route 45. Between the Milford/Wilton town line and the traffic light in Peterborough, there are only three (3) comparable structures. The first is Monadnock Water, which is set back more than this proposed use. The second is RE Granite, which is set back more than 500 feet from Route 101 and has retained existing vegetation screening so that its intrusion onto the visual landscape along Route 101 is de minimis. The third is the Shopping Plaza in Peterborough, which is obviously in a compact portion of Peterborough and differs wholly in character from the proposed use's location. The proposal of Ben's Pure Maple Products, LLC has all the elements of the structures occurring along Route 101A between the Milford/Amherst town line and the intersection of Amherst Street and the

Everett Turnpike. Footprint of the proposed structure greatly exceeds all abutting properties. Additionally, the Zoning Ordinance defines the height of a structure to be measured from the median ground elevation around the building to the ridge of the roof or the center line on a sloped roof. The elevation of the building exceeds the 40-foot limitation of the Zoning Ordinance as the building will be placed upon fill to a depth of approximately 6 to 7 feet.

Appearance. The appearance of the proposed use positively impacts property and the rural character of Temple, notwithstanding Mr. Little's statement to the contrary. The building will showcase a rural New England agricultural tradition in a facility that will have the characteristics of a large agricultural barn. We think the elevations and rendering demonstrate that the facility will be attractive. After the landscaping and maple trees are installed and when the evaporator room's steam is active, the facility will be a positive landmark in which Temple will be proud. Again, see letter of Brian C. Underwood. The exhibits appended to Mr. Little's letter represent an intentional distortion of the appearance of the building, especially when the depictions are compared with the architectural elevations and the rendering prepared by professionals. The height of the proposed building, including the cupolas, complies with the Town's 40-foot height limitation. The median ground elevation around the perimeter of the building is 103.3. The top of the cupola on the ell is 135 feet and the top of the cupola on the main building is 142.5. The maximum allowed height of the building is, therefore, 39.2 (142.5 minus 103.3). The elevations factor in the regrading for drainage purposes, something that is typical of construction projects. The ridge of the roof, of course, is lower than the cupolas, which have been added to enhance the agricultural character of the building.

8. With respect to hazardous waste, at different times a statement has been made that a delicatessen operation will occur on the property or otherwise the processing of animal products as opposed to maple syrup. No information is provided as to how waste from that operation would be taken care of. Further, the application does not contain a discharge permit for the water produced by the reverse osmosis process in the production of maple syrup. In that respect, meeting the conditions of adequate facilities for the use has not been satisfied

Hazardous waste. The characterization set forth in Mr. Little's Paragraph 8 demonstrates a form of advocacy that has no place in this discussion. There will be no processing of animal products as that terminology conjures. There will be a deli, a term which needs little further description. Moreover, the reverse osmosis process will confer a substantial benefit on the aquifer in this area and does not constitute a hazardous waste. Rather, the water created by the reverse osmosis will be clean enough to drink. NHDES has informed us that the reverse osmosis water discharge from Ben's Maple Syrup will require registration with the NHDES Groundwater Discharge Bureau. Once the facility is constructed, Ben will register with NHDES, and an inspector will come to the site and test the

discharge water to confirm that it meets the minimum State requirements for clean discharge water.

9. In the paragraphs above, traffic has been discussed with respect to the site requirements for tractor trailer units and the traveled width of Webster Highway. The Board should also focus on the fact that the intersection of Route 45 and the intersection of Webster Highway are skewed in that the center lines for Webster Highway and Route 45 are not aligned. Confirmation in writing should be received from the District Engineer for the State of New Hampshire that this proposed use with access so close to Route 101, indeed its principal access, does not raise issues as to the present configuration of the intersections of Webster Highway, Route 45, and Route 101. Beyond the statement of the applicant that no DOT driveway permit is required, the Board has no evidence that the District Engineer would not be concerned about the present configuration of the intersection of Route 45, Route 101 and Webster Highway and the traffic to be expected from this proposed use.

The intersection at Route 45/101 and Webster Highway is, of course, not ideally designed. However, as Stephen Pernaw states in his November 16 analysis, “(W)e find no compelling reason to modify the State highway as a result of the proposed development. I base this opinion on the results of our fieldwork, evaluation of the anticipated traffic volumes at the subject intersection, several publications in our technical library, my postgraduate education, and over 30 years of civil engineering experience.” See Executive Summary on Page 1 of Mr. Pernaw’s November 16 Memorandum. His conclusion is consistent with NHDOT’s decision that Ben’s proposed new facility does not require a Driveway Permit from the State.

10. Insufficient buffering is shown on the proposed site plan. With a building that is 45 feet above existing ground level and approximately 180 feet long facing Route 101, the spacing of sugar maple trees as shown on the plan does not constitute any type of buffering or screening.

Mr. Little suggests that the proposal to install maple trees along Route 101 is insufficient. We beg to differ. First, the building will be aesthetically pleasing: a large agricultural building with cupolas, barn coloring, and an evaporator room. The maples will mature to 30 feet wide and 40-60 feet tall. A post-rail fence between the maple trees will create a pedestrian scale and ties into the agricultural character of the building. The trees and fence will break up the direct view of the building.

11. An additional requirement for a Special Exception is that there can be no outdoor storage of materials or equipment. This applicant has demonstrated an inability to observe existing zoning and land use regulations. The Board should not accept the blandishments of the applicant, based upon his prior behaviors, that he will

comply with any part of the Special Exception which requires no outdoor storage of materials or equipment. The Board should note the application contains no storage areas by which the outside storage of Ben's Pure Maple Products, LLC will be consolidated to this site and then not stored outside. The applicant has recently constructed a large wood paneled gate where the applicant stores equipment and material out of doors, contrary to the provision of the Zoning Ordinance. This activity demonstrates the applicant continues to ignore the provision of the Zoning Ordinance.

There will be no outdoor storage of materials or equipment on the proposed site. Mr. Little's characterization of activities off site are irrelevant to Ben's application for Special Exception, and, his aspersions about Ben Fisk's 'behavior' are, frankly, out of line.

12. The Zoning Board is respectfully reminded that the reduction of the minimum setback to 200 feet is only at the Board's discretion. Given the magnitude of this proposed use on this site and its location, the Board is respectfully requested not to grant the Special Exception. This application does not constitute an appropriate exercise of the Board's discretion. In exercising the discretion, the Board should observe the requirements of Section 13A and 13B of the Temple Zoning Ordinance. First, the square footage of retail space is exceeded. Secondly, the mass of the structure and the traffic concerns are not a reasonable basis upon which the Board can exercise its discretion in granting a waiver of the 500-foot setback.

The applicant has satisfied the Special Exception criteria. Ben's Sugar Shack will be a major asset to the town of Temple. Mr. Little's clients, who are not abutters or even adjacent residents, will not be adversely affected and their property values will not be diminished. Ben's structure will have the appearance of an agricultural building. The retail market complies with the 3,000 square foot limitation. The project deserves the Board's support and approval.

13. The existing septic system is not adequate and the representations to the Board that the existing septic system meets requirements for the proposed use are false. Moreover, the floor plans show different uses than the septic system as originally approved. The applicant received approval from the State of New Hampshire based upon a plan submitted by Monadnock Septic Design, LLC, plan dated July 30, 2015. The operational approval granted to the applicant on December 16, 2015 states that the approval conditions were for a 2- bedroom apartment, a gift shop, and a packaging facility with 10 employees. The notes to Monadnock Septic Design plan state that it is for a dry good store of 900 sq. ft., a packing facility with 10 employees, and a 2-bedroom apartment. Table 1008-1 of the New Hampshire Code of Administrative Rules, Env-Wq 1000, requires a septic system for the applicant's proposal of 260 gallons per day for the employees, 300 gallons per day loading for a 2-bedroom apartment, and 150 gallons per day for the retail

store, plus 10 gallons per day for employees. From the application, it is not unreasonable to assume that there will be at least 2 employees in the retail store, which means the loading for the retail store is 170 gallons per day. The total loading for the proposed use based on the table is 730 gallons per day. The existing septic system is approved for 545 gallons per day. No provision in the plan is shown for disposal of the water from the reverse osmosis process and no permit from the State of New Hampshire for that disposal has been received.

Septic system. Mr. Little's comments concerning the septic system have merit. The designer of the septic system approved in 2015 was working on a design of a larger system, but when he did not respond to Ben's follow-up overtures, apparently because of illness, we retained SVE Associates to prepare a new design for the project, which will entail an expanded system specifically for the proposed facility. SVE's design will be by a professional engineer. The new system must, of course, be approved by NHDES. We expect the new system to receive State approval before completion of Planning Board site plan review, and such approval can be a condition of this Board's approval. Indeed, subsequent approvals by other governmental authorities, including site plan review, typically occur on projects such as Ben's Sugar Shack.

14. Attached to this filing are picture of the area to show its present condition and the stark change with a building approximately 45 feet higher than existing ground conditions and 180 feet width confronting Route 101.

Again, the building will comply with Temple's height limitation. See response to Paragraph 7. We ask the Board to note that the building will be have a green roof and brown façade, and will be articulated by several features, including the evaporator room, the expansive porch, dormers, the aforementioned cupolas and windows. In addition, there will be landscaping features. Much thought and design has gone into making the building and site aesthetically pleasing, with emphasis on showcasing the agricultural activities occurring inside the building. The articulation that defines the building was purposefully omitted from the exhibits attached to Mr. Little's letter.

15. I respectfully request the Board to have the design with respect to access and egress for vehicles reviewed by a consulting engineer for the Board and that the plan submitted by the applicant show where the 200-foot setback falls in relation to the parking and loading dock areas in relation to existing dwellings.

The access and egress from Webster Highway has been carefully planned and, contrary to Mr. Little's contention, will be safe. See Stephen Pernaw's memorandum, dated November 16, 2020.

I am adding to this letter the following information:

1. International Zoning Code Table 801.2.1 showing suggested off street parking based on types of use.
2. Title and notes for the Monadnock Septic Design submitted to the State of New Hampshire.
3. Printout from New Hampshire Department of Environmental Services showing approval issued in 2015 showing both the approval conditions and the flow.
4. New Hampshire Code of Administrative Rules, Table 1008-1 setting forth design criteria based upon use for loading in a septic system.
5. Selected materials from the Department of Transportation Office of the Commission Declaratory Ruling #2000-1 relative to turning templates and driveway design.
6. Photographs of the area in question from Route 45 and Route 101 and photo shop with building.
7. Screen shot from Google maps of intersection of Route 101, Route 45, and Webster Highway.
8. DES Registration for non-domestic waste water disposal at 83 Webster Highway, Temple, NH.
9. Ben's 2021 product List for Retail Space.
10. Site Plan showing 200' setback.
11. Site Plan showing 500' setback.
12. Ben's Pure Maple Products, LLC Project Overlaid on Google Earth September 9, 2020.
13. Schematics showing relative size to residential structures.

For the reasons stated above in this letter, the application as submitted to the Zoning Board of Adjustment should be denied.¹

Very truly yours,
Fernald, Taft, Falby & Little
Professional Association

By:


Silas Little

Encl.

cc: Thomas Hanna, Esq. (w/enc.)
Mr. Robert Treadwell (w/enc.)
Ms. Debbie Diffley (w/enc.)
Mr. Seth Poirier (w/enc.)
Ms. Deb Balise (w/enc.)
Mr. Keith Charlton (w/enc.)
Ms. Kristin Charlton (w/enc.)
Mr. Tom Hawkins (w/enc.)

¹ There is some reference in the applicant's presentation that the applicant's use constitutes an agricultural use. Were the applicant to process solely maple syrup from the applicant's adjacent property, the use might qualify as an agricultural use. However, the applicant is processing maple syrup he purchases and is processing sap from property that he does not own and is brought to this site. As such, the applicant's production facility in spirit the same as a hog slaughtering facility where the animal being processed is admittedly an agricultural animal, but the animal is not raised at the slaughterhouse. **The entire maple syrup production facility is, indeed, an agricultural use, as this Zoning Board ruled several years ago. Mr. Little's contention concerning the purchase of maple syrup, which Ben reboils, was raised and ruled on by this Board. Mr. Little was apparently not aware of this prior decision.**