

FERNALD, TAFT, FALBY & LITTLE
PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
14 GROVE STREET
P. O. BOX 270
PETERBOROUGH, NEW HAMPSHIRE 03458-0270

Tel: 603-924-3361 Fax: 603-924-4277

SILAS LITTLE
MARK D. FERNALD

RETIRED:
RICHARD R. FERNALD
ROBERT TAFT
J. RODERICK FALBY, JR.

December 1, 2020

Town of Temple
Zoning Board of Adjustment
423 Route 45, P O 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:

Please accept this letter as a supplement to my earlier letter of November 11, 2020.

In listening to the last hearing and reviewing the submittals in support of the application, I wish to emphasize to the Board the issue here is not the personality of the applicant. The issue before the Board is the development of this parcel of land and how the Town of Temple envisions within its zoning ordinance a commercial development. Once this parcel is developed as proposed by the applicant, that land will be forever changed. The Board needs to divorce the personalities from consideration as to whether the proposal meets the requirements of the zoning ordinance.

I wish to emphasize that the ordinance does not permit the Zoning Board to waive the requirement of an abutting landowner agreeing where the use is within 500 feet. The fact the applicant has been unable to obtain that waiver is not relevant. What is relevant is that any decision to waive that requirement not only effects the present property owner, but future property owners. In the exercise of the Board's discretion, the Board should ask itself whether it is suitable for a use as massive and intensive as the proposed use to be less than 500 feet from any residential structure regardless of the current owner's opinion. Zoning is an attempt to take out of individual decisions and personalities land use. Zoning is an attempt for the Town to have an orderly development in accordance with how the Town envisions its future land uses.

The Board has before it an application which is fatally deficient in complying with the bare structure of the zoning ordinance. The plans do not conform. The application should be denied because the plans do not conform to the requirements of the ordinance.

In considering whether the application meets the requirements of the zoning ordinance, the Board should view the square footage of the building which is devoted to retail operations and not to the processing of sap and syrup. Most recent floor plans submitted by the applicant shows an area

that is 68' 10" x 80' comprised of the customer retail area, the grocery dock, the utility room, lavatories, the cooler, the deli food prep and packaging. The square footage taken solely from the plans and ignoring the vestibule and ignoring any porch or other improvement is over 5,507 sq. ft. The applicant seeks to avoid compliance by providing the square footage only for the customer retail area. However, the rooms adjacent thereto are obviously serving the customer retail area and are as much a part of the retail area as the area the consumers have access to. The dimensions set forth in this letter are based upon the plans which are incomplete as to all dimensions. Just taking the area designated market customer retail area, grocery dock, utility and the men's and women's lavatories result in a square footage of 4,116 sq. ft. That does not include the walk-in cooler and the deli food prep and packaging, which are clearly part of the retail use. The Temple Zoning Ordinance defines a retail establishment and makes no distinction between the areas open to the public and the areas for the conduct of business activities associated with the public areas. The calculation of floor area for retail space needs to consider in light of this definition the entire square footage of what is devoted for the retail establishment. With respect to parking, the representation was made that there was sufficient parking, but it was not delineated on the plan. Without delineation, there is not certainty to the Board that parking with adequate aisles and traffic patterns can be placed on the site. The applicant states that a significant portion of the parking is a gravel surface. A gravel surface parking area does not serve high intense traffic. A gravel surface parking area is subject to mud seasons. Given the high water table (see septic design) and discussion of fill on which to construct the building, this site particularly will suffer at times of seasonal high ground water unless extraordinary efforts are undertaken to insure the adequacy of the gravel parking area. No such efforts are shown on the plan.

The submittal of Mr. Pernaw reinforces the use of this property is not consistent with the objectives of the zoning ordinance for a commercial use. In addition, the sketch appended to the end of Mr. Pernaw's report establishes that exiting and entering vehicles from Webster Highway to the facility will exceed the traveled width of Webster Highway. Please note attachment 29 of Mr. Pernaw's report does not show the width of the pavement in that area, but a simple inspection of the sketches show that the vehicles go into the opposing lane of traffic and off the edge of pavement entering or exiting the area.

In considering the impact of this application, the Board should note that without computing the fill outside the footprint of the structure, the fill required for the structure is 3,260 square yards, approximately, which assumes a compression factor of about 10%. 3,260 square yards is approximately 204 10-wheeler loads of fill to the site. Stressed another way, the amount of fill required under the building alone, forgetting the change in grade outside the footprint of the building, is approximately 3/4 of a mile of 1 foot fill placed on Route 45, from the intersection of Route 45 with Route 101 to somewhere past the intersection of Old Peterborough Road. The calculations behind this statement are based upon the 16,000 sq. ft. footprint and 5 feet of fill. There are 27 cubic feet in a cubic yard. The compacted fill required is 2,963 cubic yards. The yards in the back of the truck to yards on the ground of clean fill is approximately 110%. A 10-wheeler carries 16 yards loaded. The traffic discussion of Mr. Pernaw does not consider the impact of the truck traffic necessary to bring in the amount of fill required to develop this site. The amount of fill required goes to the adequacy of the site and the appropriateness of the site for this use. The revised parking

shown by the applicant does not address the total parking requirements using any standard. The location of the additional parking further intrudes into the setback from Route 101 and intrudes into the 200 feet minimum required for this use. Also, the additional parking raises the issue as to whether in fact an AOT permit is required. Traffic calculations by Mr. Pernaw are thrown off because he did not use the actual square footage of the retail space being somewhere between 4,000 sq. ft. and 5,500 sq. ft. in his traffic projections. Where traffic flows are based upon square footage, the gross square footage of the use is calculated, not the customer space or human traffic space.

With respect to Mr. Pernaw's discussion, again, the Board needs to consider the approval of this application is not wedded or limited to Mr. Fisk. The Board needs to consider, stripped of personalities of the applicant and his supporting staff, whether a building 180 feet long, 16,000 sq. ft. with a visual facade of approximately 8,500 sq. ft. and the attendant parking areas to support the use meets the standard of an adverse effect not typical of permitted uses within the area and whether the proposed use, in its impact, is compatible with the surrounding land uses.

The applicant's counsel states that it is not feasible or reasonable to consider all possible future uses of the site. To the contrary, the site needs to be evaluated for the uses that would flow from any approval. What the applicant's counsel is stating is that the Board should only consider Mr. Fisk and the personal involvement of Mr. Fisk in this proposal. That is not consistent with good zoning practice and good land use planning.

The issue has been raised about the requirement of an Alteration of Terrain Permit. The Board is respectfully requested to obtain a certificate by a civil engineer on an engineered plan that the total area disturbed will not exceed 100,000 sq. ft. No such certification has been provided to the Board of which I am aware. Further, such certification should be made after demonstration of sufficient parking for the proposed use. With respect to the requirement of an AOT permit, Env-Wq 1503.12 includes septic systems in the calculation of contiguous area disturbed. The exclusion of a septic system necessary to support the use on this project from the AOT requirement is a misrepresentation to the Board of the regulations of Env-Wq 1503.12, "Measurement of contiguous area disturbed inclusion and plans." The revised floor plan brings into play the question of the capacity of the septic system. The Department of Environmental Services for retail use does not distinguish between customer retail area and gross retail area. Accordingly, any loading calculation has to be based upon the total retail area, which would include the areas not considered by the applicant to be retail area bringing the total retail area somewhere between 4,000 and 5,500 sq. ft.

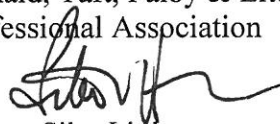
In considering the application of Ben's Pure Maple Products, LLC, the Board needs to be mindful under Section 13 of the Temple Zoning Ordinance, a special exception is for the "non-commercial use of land." The ordinance does not distinguish between the ancillary uses, such as parking, and does not limit what is non-commercial use of land to only the buildings. Further, in the provisions regarding the setback, the zoning ordinance is written as the "proposed use." Again, in that part of the zoning ordinance there is no mention made of the buildings. Accordingly, in considering the setback requirements under the ordinance for the special exception, the Board needs to look at the development of the entire site as that constitutes the non-commercial use of land. This discussion of use is further reaffirmed in a review of the definitions section of the Temple Zoning Ordinance. A review of the definitions section of the Temple Zoning Ordinance discloses that use is not limited to a building, but rather speaks to the activity occurring on the tract or parcel of land.

The discussion in this letter is not meant to diminish the comments made in my earlier letter. Those apply with equal force and in my opinion the responses of Mr. Hanna do not adequately address the issue before the Board. That issue is whether in this location, on this lot, and divorced from the identity of the application, this application should be approved. I respectfully note to the Board the application that is before the Board should not be approved for the clear reason the applicant did not comply in the application to the requirements of the zoning ordinance as to the square footage and having the use within 500 feet of abutting residences. In my opinion, those defects are fatal. Further, this application is one on which the Board is not justified in exercising its discretion in waiving the minimum setback to 200 feet. Even if those defects were cured, I wish to emphasize to the Board that this application appears driven by the personality of the applicant and devoid of any consideration of proper land use planning standards.

Very truly yours,

Fernald, Taft, Falby & Little
Professional Association

By:



Silas Little

Direct Line: 603-924-3364 Ext. 14

sl/djh

- enc. 1. Env-Wq 1503.12
2. Floor plan showing dimensions to retail area, excluding walk-in cooler, deli food prep and packaging
3. C-3 layout plan showing additional parking and disturbing.

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

ADDENDUM

As I have not had access to a complete set of plans, there are two (2) matters on which the Board should be satisfied with respect to this application:

1. Fire protection. There is no municipal water supply and how is fire protection provided for a 16,000 sq. ft. commercial building.
2. Reference was made at the site walk of a canal and the plans appear to show a canal. If in fact this canal runs water, then in likelihood there is wetland vegetation in the base of the canal. Have the wetlands been mapped in relation to the proposed development? The information I have does not show that a certified wetlands' scientist has reviewed the proposed development in relation to the wetlands and map the Temple Zoning Ordinance requirements as to a buffer from the wetlands.

Submitted:



Silas Little, NHB #1495

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

Env-Wq 1503.12 Measurement of Contiguous Area Disturbed; Inclusion in Plans.

(a) Subject to (b)-(d), below, for purposes of determining the need for an AOT permit or the amount of the fee required by RSA 485-A:17, the amount of contiguous area disturbed shall be the sum of the square footage of all areas proposed to be disturbed as part of the total project, including but not limited to areas associated with:

- (1) Roads and communal parking areas;
- (2) Permanent stormwater controls;
- (3) Temporary and permanent methods for protecting water quality;
- (4) Utility installation, including wells and septic systems if applicable;
- (5) Temporary stockpiles;
- (6) Staging areas;
- (7) Borrow areas; and
- (8) Foundations and lot grading.

(b) The areas that will be disturbed for individual lot development shall be excluded from the calculation required by (a), above, only if:

- (1) The project is a single family or duplex residential subdivision where no disturbance on any individual lot will occur until after the construction and stabilization of all other items of construction associated with the subdivision are complete; and
- (2) There will be no earth moving across lot lines at any time.

(c) For any excavation, grading, and reclamation project, any actual or proposed terrain disturbance since May 4, 1981 shall be:

- (1) Deemed part of the total project;
- (2) Included in the calculation of the amount of contiguous area disturbed; and
- (3) Shown on the plans submitted for the project.

(d) Subject to (b) and (c), above, the amount of contiguous area disturbed shall include any actual or proposed terrain disturbance that occurs on the same property as the proposed project or is part of a larger plan of development:

- (1) Within 10 years before the commencement of any terrain alteration activity for the proposed project; and
- (2) Within 10 years after the terrain alteration activity for the proposed project ends.

(e) All areas described in (d)(1), above, and any area(s) described in (d)(2), above, that are already identified at the time of the application shall be shown on the plans for the proposed project.

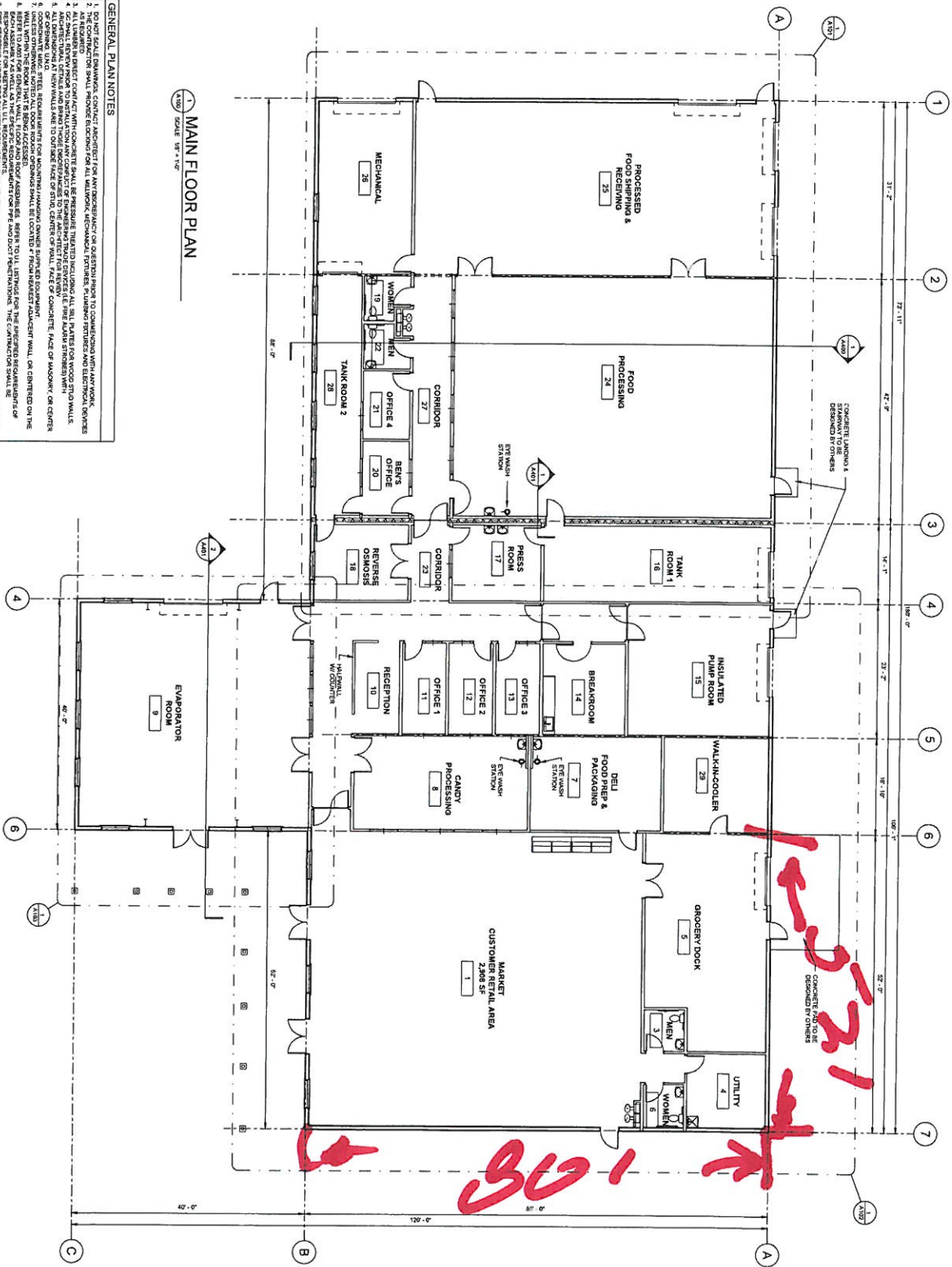
Source. (See RN1 at p. v) #9343, eff 1-1-09; (See RN2 at p. v) amd by #9817-A, eff 12-1-10; ss by #12342, eff 8-15-17 (See RN3 at p. v)

Env-Wq 1503.13 AOT Permit Applications: Filing and Processing.

(a) Within 14 days after the date an application is received, the department shall determine whether the applicant has submitted everything required by Env-Wq 1503.05(c).

- GENERAL PLAN NOTES**
1. DO NOT SCALE DIMENSIONS. CONTACT ARCHITECT FOR ANY DISCREPANCY OR QUESTION REGARDING THIS DOCUMENT WITH ANY WORK.
 2. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
 3. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
 4. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
 5. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
 6. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
 7. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
 8. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
 9. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.

MAIN FLOOR PLAN
SCALE: 1/8" = 1'-0"



BENS MAPLE HEADQUARTERS
PROPERTY: Webster Highway
Temple, NH 03604

FLOOR PLAN

A100

SHEET 5 OF 31

DATE: 1/18/2020

DWG: MK CXC DDM

For: Bens Maple
Prepared by: Thomas, LLC

NOT FOR CONSTRUCTION

STATUS: DRAFT APPROVAL PERMIT CONSTRUCTION

REVISION	DATE	DESCRIPTION
1	1/18/2020	ISSUE FOR PERMIT
2	1/20/2020	REVISED
3	1/20/2020	REVISED

TEAM ENGINEERING
100 South Main Street
Suite 503
Bedford, NH 03110-4446
Phone: 603.882.1111
www.teamengineering.com

ENGINEERING
Building Inspection & Design

