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 31, 2020

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

Re: Variance Application of Ben's Pure Maple Products, LLC
Tax Map 2, Lot 27

Dear Members of the Board:

I am writing on behalf of Robert Treadwell, Debbie Diffley, Seth Poirier, Deb Balise, Keith Charlton, Kristin Charlton and Tom Hawkins to express opposition to the requested variance filed with the Board on or about December 22, 2020.

The application for the variance completely misconstrues the variance requirement that particular zoning provision in some manner uniquely impacts the subject property. First, the application for a variance ignores land planning purpose of the ordinance's requirement that an affirmative consent be given by the abutting landowner. There are a myriad of reasons one could offer as to why a consent is not given. In this respect, the proposal of Ben's Pure Maple Products, LLC differs in no fashion from any other possible proposal seeking this type of a special exception under the Temple Zoning Ordinance. The fact that a landowner chooses not to respond with respect to a consent solicited does not mean that the Board should ignore the clear mandate of the ordinance. Otherwise, the Board has eviscerated the ordinance's requirement. There is no demonstration by the applicant that this particular provision of the ordinance is so unique in its application to this property

that the Board should grant the relief requested. The individual plight of the property owner is the problem for Ben's Pure Maple Products, LLC and not the property itself. Instructive on this point is the Supreme Court decision of Garrison v. Town of Henniker, 154 NH 26 (2006). The Supreme Court, in its decision, noted that while the property may have been ideal for the applicant's desired use, (storage and blending of explosive material), the burden of the particular provision in the zoning ordinance **must arise** from the property and not from the **individual plight** of the landowner. Here, the individual plight of the landowner is the landowner's failure to obtain a written consent from an abutting property owner. The plight of the landowner has nothing to do with the land and, in fact, other properties for which a special exception might be sought face the same obstacle of obtaining the consent of abutting landowners. In this respect, the property at issue here is no different from any other property in the Town of Temple.

The application asserts that the variance is not contrary to the public interest and that the spirit of the ordinance is observed. The public interest expressed in the ordinance is to segregate certain commercial uses meeting the requirements of the special exception from abutting landowners. This application does not serve that stated public interest. The application also does not observe the spirit of the ordinance. The spirit of the ordinance is to require a segregation. The applicant's request for a variance does not conform to the spirit of the ordinance.

The requirement of substantial justice being done requires the Board to overlook the abutting property owner which has failed to grant Mr. Fisk consent. How can the Board determine substantial justice is done when the Board is substituting its decision for the required consent under the ordinance? The Board is then determining that, although that property owner has a defined interest

under the zoning ordinance, the Board should ignore that defined interest. How can the Board determine in any reasonable fashion that Mr. Fisk's application achieves substantial justice without the Board abridging the provisions of the ordinance designed to protect the abutting property owners?

With respect to the issue of value of surrounding properties, deficiencies in the applicant's expert report have been identified. To those deficiencies should be added the observation that nowhere in the consideration of the expert has the magnitude of the proposed operation been contrasted to the rather minimal footprint of the existing operation. Any corollary developed from the existing operation I respectfully submit is false.

Without diminishing the prior discussion, but emphasizing the importance of the language of the ordinance, I respectfully note to the Board that the provision in issue is "the use of the property" and not "the building." The discussion in the application for a variance relates to the distances to the building. The use of the property includes the parking areas and other disturbances to the natural terrain which are considered ancillary uses to the principal use, the building. Accordingly, any measurements must be made to the edge of those supporting ancillary uses of the property. Clearly the parking lots are part of the **use** of this property. To ignore the distances to the parking lots and other disturbances and only focus on the distance to the building does not appropriately apply the terms of the ordinance under Section 13A.

I respectfully remind the Board that, although the applicant stresses that the proposed use is by Mr. Fisk, there is nothing in the ordinance or in the application as submitted that limits this 16,000 sq. ft. building with more than 3,000 sq. ft. of retail space to a maple syrup operation. I propose to the Board if one strips the personalities from this application and considers the

application as solely a 16,000 sq. ft. commercial operation with 3,000 sq. ft. of retail space included and then considers that structure and square footage to be devoted to warehouse, and retail distribution by Belletete's, VIP Auto, or Marvin Windows, would the Board be receptive? And looking further down the road, if the structure is then devoted to such a use, would the Board be satisfied it had observed the spirit of the ordinance, the articulated public interest, the service of substantial justice, the finding of a hardship unique to this property and not to the property owner?

I attach for the Board's consideration an explanation of Garrison v. Henniker prepared for the New Hampshire Municipal Association in the fall of 2006.

Very truly yours,

Fernald, Taft, Falby & Little
Professional Association

By: Silas Little

Direct Line: 603-924-3364 Ext. 14

sl/djh
cc: Thomas Hanna, Esq.
William Drescher, Esq.

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Just What is "Unique": The NH Supreme Court's Most Recent Variance Decision

Distributed at the NHMA Law Lecture #1, *Procedural Basics for Planning and Zoning Boards*, Fall 2006

By Christopher L. Boldt, Esq.
Donahue, Tucker, & Ciandella, PLLC
104 Congress Street, Suite 304, Portsmouth, NH 03801
(603) 766-1686
cbold@dtclawyers.com

In the case of Garrison v. Town of Henniker, 154 NH 26 (Docket No. 2005-471, Issued August 2, 2006), the Supreme Court upheld the reversal of variances granted for an explosives plant which was to be located in the middle of 18 lots totaling 1,617 acres - all zoned "rural residential". The applicant had sought use variances to allow the commercial use in the residential zone and to allow the storage and blending of explosive materials where injurious or obnoxious uses are prohibited. After an extensive presentation of the nature of the applicant's business and the site, the ZBA voted 3-2 to grant the variances with two conditions: (1) the 18 lots had to be merged into one; and (2) the variances would terminate if the applicant discontinued the use.

Upon appeal by abutters, the Trial Court reversed finding that the evidence before the ZBA failed to demonstrate unnecessary hardship. In upholding that decision, the Supreme Court agreed with the Trial Court that, while the property was ideal for the applicant's desired use, "the burden must arise from the property and not from the individual plight of the landowner." (Quoting, Harrington v. Warner). In discussing the three-prong Simplex standard for unnecessary hardship, the Supreme Court focused on the first prong: that a zoning restriction "interferes with their 'reasonable' use of the property, considering the unique setting of the property in its environment." (emphasis original with citation to Rancourt v. Manchester). In doing so, the Court agreed with the Trial Court that the evidence failed to show that the property at issue was different from any other property within the zone.

As a minor "bone" to the applicant, the Supreme Court did agree that Harrington's requirement of "dollars and cents" evidence of lack of reasonable return may be met though either lay or expert testimony; but such evidence as presented was not enough to convince the Court that the hardship resulted from the unique setting of the property.

Thus, the Court charged applicants to presenting sufficient evidence to allow the ZBA to determine that the use is reasonable and that the property is unique.