

STATE OF NEW HAMPSHIRE

TOWN OF TEMPLE
Case No.: 2023-06/29-SE

ZONING BOARD OF ADJUSTMENT

Motion For Rehearing Relating to August 3, 2023 Decision

This Motion for Rehearing is filed pursuant to RSA 677:2 on behalf of John H. Jackson-Marsh and Alan Marsh (hereinafter referred to as the “Petitioners” or “Applicants”), by their attorneys, BCM Environmental and Land Law, PLLC. The Petitioners request that the Zoning Board of Adjustment (hereinafter “Board” or “ZBA”) reconsider its August 3, 2023 determination that the ZBA lacked jurisdiction to hear the merits of the Petitioners’ application for a Special Exception (the “Decision”). The petitioners assign the following reasons to support their position that the ZBA Decision was unlawful and unreasonable:

1. The purported basis of the Decision, according to the Notice of Decision signed by Board Chair Debra Harling, was that “[It] was voted that under the Fisher v. Dover doctrine the current appeal (sic) was not significantly different in scope from the 2018 appeal denied by the Temple ZBA at that time.” See copy of Notice of Decision, dated August 3, 2023 attached.

2. Notwithstanding the express language of the Notice of Decision, the DRAFT minutes of the August 3, 2023 ZBA meeting state as follows:

“Stein makes a motion to dismiss the application based on not having jurisdiction and because of the appeal to the Supreme Court the application can be refiled at a later time.”

See copy of minutes of August 3, 2023 ZBA meeting attached.

3. The ZBA's reference to the Petitioners' Supreme Court appeal was immaterial to the issue of the ZBA's jurisdiction and served to confuse the Board on the question of the relevance of the so-called Fisher v. Dover doctrine.

4. The ZBA's vote to find lack of jurisdiction was 4 in favor 1 opposed.

5. The ZBA Decision conflicts with Judge Temple's June 2, 2023 Order in Case No. 2019-CV-00495, which stated at page 15:

- (1) The defendants shall bring the Property into compliance with state law and the Town's ZO by either removing all materials which constitute a junk yard pursuant to RSA 236:112 and their noncommercial enterprise use, or
- (2) Apply for the necessary land use approvals including the required special exception, site plan approval, and license, within 30 days of the date of this order. If the defendants do not obtain such approvals and license, then the defendants shall bring the Property into compliance as described in Paragraph (1) above.

See page 15 of Court Order, dated June 2, 2023 attached.

6. Judge Temple's Order followed the recommendation of the plaintiff Town's Proposed Order which included the following:

- a) The Defendants shall bring the property into compliance with state and local law by either removing all materials which constitute a junkyard pursuant to RSA 236:112, et seq. and their non-commercial enterprise use, or obtaining the land use approvals necessary including, but not necessarily limited to, the required special exception, site plan approval, and license, as required, within 30 days of the date of this Order.

See Town's Proposed Order attached.

7. The Decision by the ZBA conflicts with the Court's Order. First, the Town proposed this order and the Court adopted it; second, the Town's and Court's actions in doing so constitute "changed circumstances" as recognized by the Supreme Court, see *TransFarmations, Inc. v. Town of Amherst*, 175 N.H. 530, 535-36 (2022) (invitation to submit another application may constitute changed circumstances.)

8. Such “changed circumstances” constitute an exception to the so-called Fisher v. Dover rule against a subsequent application for ZBA relief.

9. Moreover, the Petitioners would not need Court permission to submit a different application for Special Exception, and, therefore, the inclusion of this recommended option by the Town and by the Court was obviously intended to apply to the application the Petitioners in fact filed.

10. The import of the Town’s recommendation in its Proposed Order that the Court’s Order should direct the Petitioners to reapply for a Special Exception was improperly called into question when the Kieleys’ counsel represented to the ZBA that the Town’s Proposed Order was for settlement purposes only. That was false. The Town’s Proposed Order was a formal, post-trial recommendation to Judge Temple, who then adopted the Town’s proposal.

11. In addition, the 2018 ZBA pointed out that the “applicant(s) did not offer any realtor or appraiser testimony or other evidence in support of their assertion that the proposed use will not adversely affect the value of adjacent property.” See Notice of Decision, p. 273 of Plaintiff Exhibit 12 of above referenced Superior Court case. In their 2023 application for a Special Exception, the Petitioners submitted a detailed written opinion by a well-qualified appraiser concerning the issue of impact on value of adjacent property.

12. Likewise, unlike the 2018 hearing, the Petitioners submitted a detailed report concerning the issue of contamination of ground water and water runoff, and had the professional hydrogeologist present on August 3, 2023 to respond to Board and neighbor questions.

For all of the foregoing reasons, the ZBA should grant a rehearing and, upon rehearing,

determine that it has jurisdiction to hear the Petitioners' application for Special Exception on its merits.


Respectfully submitted,

John H. Jackson-Marsh and Alan Marsh

By Their Attorneys,

BCM Environmental and Land Law, PLLC

Dated: August 30, 2023

By: 
Thomas R. Hanna (NHBA #1086)
41 School Street
Keene, NH 03431
603-352-1928
hanna@nhlandlaw.com

NOTICE OF DECISION
TOWN OF TEMPLE
ZONING BOARD OF ADJUSTMENT
423 NH RTE 45
PO BOX 191
TEMPLE, NH 03084

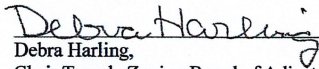
August 3, 2023

Allen Marsh
John Jackson-Marsh
32 West Road
Temple, NH 03084

Re: Case #2023-06/29-SE

You are hereby notified that by a vote of the Temple Zoning Board of Adjustment (ZBA) on August 3, 2023 it was determined that the ZBA did not have jurisdiction to hear your appeal. It was voted that under the Fisher v Dover doctrine the current appeal was not significantly different in scope from the 2018 appeal denied by the Temple ZBA at that time.

See the minutes of the Board's August 3, 2023 meeting.


Debra Harling,
Chair Temple Zoning Board of Adjustment

Note: Within thirty days of the ZBA's vote referenced above, the Select Board, any party to the action or any person directly affected by this action has a right to appeal this decision. See NH Revised Statutes Annotated Chapter 677. This notice will be placed on file and made available for public inspection in the records of the ZBA on August XX, 2023. Copies of this notice have been distributed to the applicant, Select Board and Town Clerk

Town of Temple, NH
ZONING BOARD OF ADJUSTMENT

August 3, 2023

Marsh Application

ZBA Members Present:

Emily Sliviak, Deb Harling, Allan Pickman, James Stein, Lucas Tabolt, Richard Redding

Attorney's Present

Attorney Tom Hanna representing the Marsh's.

Attorney Driscoll representing the Select Board.

Attorney Dan Luker representing John & Connie Kieley

At 6:00 p.m. Harling introduced the members and asked if any members had to recuse themselves.

Sliviak stated she will recuse herself for the Marsh hearing based on knowing Attorney Tom Hanna from a previous ZBA case.

Harling stated before an application is accepted the board will have to make the determination on if it has jurisdiction to do so.

Pickman believes the board does have jurisdiction to proceed with a hearing. Stein believes there is no significant difference between the 2018 application and the new application. Tabolt believes there is more information that has been presented from a geology study and an opinion regarding property values. Redding finds the application is substantially similar.

Harling wanted to hear Attorney Tom Hanna's opinion on why he believes the ZBA has jurisdiction to continue the application and start a hearing.

Hanna referenced the 1980 Fisher Vs Dover case, stated that this case does not allow similar cases to be heard but there are a line of other cases that do allow a board to have jurisdiction. Hanna states that Judge Temples order was for the Marsh's to reapply for a special exception. The town gave a proposed order based on the court's decision, *the defendant shall bring the property into compliance by either removing the material that constitutes a junk yard and their noncommercial enterprise use or they must obtain land use approvals necessary within 30 days of the order, including but not limited to applying for a special exception. Site plan approval isn't possible without a granted special exception. There are steps to completing the court order.*

Hanna continued to explain why the board does have jurisdiction to proceed. Hanna stated "the town invited the applicant in the proposed order to reapply as a means of compliance".

Attorney Driscoll stated there are a lot of leaps being made. Driscoll stated a special exception for a noncommercial enterprise use for keeping with these items meant that the board would have to override a previous decision. He believes the 2018 application is the same as the new application and the board does not have the jurisdiction to move forward.

Attorney Luker believes the applications are no different and that Judge Temple made a thorough determination that the property is a junkyard under state law. He believes by accepting the application and moving forward with a special exception then the board would be going against the recent court decision and against the previous board's decision in 2018. The same use that was applied for in 2018 is being reapplied for again. Luker stated that this board does not have jurisdiction under the Fisher doctrine and if you take into account Judge Temple's order he was directing the applicant to apply for a junk yard and going through necessary steps. The application is not complete and is missing attachment 3 which gave written permission for the board to view the property with a planned site visit.

Luker also wanted to make the board aware that the Town of Wilton has submitted a letter with their opinion on the property and regional impact.

Harling asked about the appeal that was filed with Judge Temple's decision, without prejudice.

Driscoll said the Supreme Court found that the decision is not final because attorney fees awarded to the town has not been affirmed yet.

Harling asked the opinion of the board, who would like to move forward or seek counsel first.

Pickman would like to move forward so the application can move forward to the PB.

Redding is curious to see what counsel has to say but sees no difference in the new application.

Stein believes a more complete application is necessary or the application should be dismissed under Fisher VS. Dover.

Tabolt agrees with the Superior courts decision on defining the property as a junkyard and the application should be different. Tabolt found it odd that written permission was not given to the board in order to visit the site. Tabolt stated that if this moved forward then regional impact may be a possibility and he would like to seek counsel's opinion first.

Pickman commented that there is nothing that is preventing this board to move forward and simply make a condition that requires the applicant to go to the PB next and obtain a junk yard permit from the town.

Bibler a town resident, stated she believes the property is subject RSA 438 because it is in the Souhegan Water district/water shed. Harling said jurisdiction must be determined first before discussing the possibility of regional impact.

John Kieleley wanted to discuss regional impact and Hanna asked the board to continue on the issue of jurisdiction only, no public comments should be allowed.

Stein made a motion to dismiss the application. Harling wanted to hear reasons why.

Stein stated the applications are the same.

Stein makes a motion to dismiss the application based on not having jurisdiction and because of the appeal to the Supreme Court the application can be refiled at a later time. Second by Redding

Pickman Nay, Tabolt Aye, Stein Aye, Harling Aye, Redding Aye

A vote was made in the affirmative that this board does not have jurisdiction.

Harling made a motion to approve the 7.14.23 minutes as amended, second by Tabolt.

OTHER BUSINESS:

Jim Medeiros is interested in becoming an alternate member for the ZBA. He spoke about his experience and interests in becoming a member. Harling made a motion to make Medeiros an alternate member for the ZBA for a 3 year term (recommendation to the SB), second by Sliviak.

Harling made a motion to adjourn, second by Pickman.

Minutes by Sliviak

DRAFT

parameters outlined by statute and the ZO. Consistent with these findings and due to the sheer scale of the defendants' violative use, as well as the likelihood that such use will only continue to expand, the Court finds that injunctive relief to abate the land use violations is an appropriate remedy under these circumstances. Thus, **the Court makes the following orders:**

- (1) The defendants shall bring the Property into compliance with state law and the Town's ZO by either removing all materials which constitute a junk yard pursuant to RSA 236:112 and their noncommercial enterprise use, or
- (2) **Apply for the necessary land use approvals including the required special exception, site plan approval, and license, within 30 days of the date of this order.** If the defendants do not obtain such approvals and license, then the defendants shall bring the Property into compliance as described in paragraph (1) above.

If the defendants fail to comply with these terms, the Town may, consistent with the authority granted by RSA 236:128, III, impose a civil penalty of up to \$50 per day for every day that the nuisance and/or violation continues, until such time as it is abated to the Town's satisfaction.

In addition to injunctive relief, the Town also seeks the imposition of civil fines and penalties pursuant to RSA 676:17, I. RSA 676:17, I, allows the Court to award a \$275 penalty for the violation of a zoning ordinance plus additional penalties of \$275 for each day that the violation continues after the landowner receives written notice of the violation. See City of Rochester v. Corpening, 153 N.H. 571, 575 (2006). The Town asserts that the \$275 per day penalties began to run on May 16, 2019, the date of

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH-SOUTH, S.S.

SUPERIOR COURT

Town of Temple

v.

John H. Jackson-Marsh, et al

Docket No. 226-2019-CV-00495

PROPOSED ORDER

Judgement is hereby entered against the Defendants for violations of the Town of Temple, NH Zoning Ordinance, and violations of RSA 236:112 et seq.

The Defendants are the owners of property located at 32 West Road, Temple NH, 03084. The Defendants John H. Jackson-Marsh and Alan Marsh are using the property as a junkyard in violation of RSA 236:122 *et seq.*, and the Town's relevant zoning ordinance and regulations. Specifically, the property constitutes a junkyard as it has stored and/or deposited on it, among other things:

...a quantity equal in bulk to 2 or more motor vehicles which are no longer intended or in condition for legal use according to their original purpose including motor vehicles purchased for the purpose of dismantling the vehicles for parts or for use of the metal for scrap; and/or used parts of motor vehicles or old iron, metal, glass, paper, cordage, or other waste or discarded or secondhand material which has been a part, or intended to be a part, of any motor vehicle.

See RSA 236:112

The Town of Temple's Zoning Ordinance incorporates this statutory scheme, and requires a special exception for such a use, and as the Defendants do not have said approval, nor the required site plan approval, the Defendants are in violation of the provisions of the zoning ordinance.

Furthermore, as none of the required approvals for this use of the property have

been received, the Defendants' use of their property constitutes a nuisance pursuant to RSA 236:119.

Prior to filing suit, the Town sent at least four separate notices of violation identifying the non-compliance to the Defendants. The Court notes that there is no dispute that said notices were received and, furthermore, the notice dated May 9, 2019 was served on the Defendants by the Hillsborough County Sheriff's Department. As the Defendants did not address the conditions stated in the notices, the Town filed suit on August 2, 2019, requesting injunctive relief pursuant to RSA 676:15 and RSA 236:128, all applicable civil penalties and attorney's fees and costs, pursuant to RSA 676:17, as well as all applicable fines afforded pursuant to RSA 236:128. To date, the the conditions on the property have not improved, and testimony was received indicating that the condition has actually worsened.

The Court therefore orders that:

a.) The Defendants shall bring the property into compliance with state and local law by either removing all materials which constitute a junkyard pursuant to RSA 236:112 , *et seq.* and their non-commercial enterprise use, or obtaining the land use approvals necessary¹ including, but not necessarily limited to, the required special exception, site plan approval, and license, as required, within 30 days of the date of this Order; and

b.) If the Defendants fail to comply with paragraph (a) above, the Town may enter the property and remove all violative materials. The determination of what

¹This statement is in no way an obligation on the part of the Town to grant any one or all of the required request approvals.

constitutes violative materials for purposes of statutory and ordinance compliance is at the sole discretion of the Town, however, to the extent that certain items may remain, the Town shall endeavor to prioritize the items the Defendants would like to remain.² Any costs incurred by the Town in such removal effort which are not offset by any proceeds from the sale of said materials shall entitle the Town to a post-judgment attachment on the property³; and

c.) The Town is awarded civil penalties in the amount of \$275 per day for each day since May 16, 2019, the date of service of the most recent Notice of Violation (see Exh. 5), that Defendants have been in violation of state and local law (\$389,950.00 through April 3, 2022), to be paid within 30 days of the date of this Order; and

d.) The Town is granted an award of attorneys' fees and costs incurred in bringing and pursuing this litigation. The amount shall be submitted by affidavit within 60 days of the date of this Order.

e.) The Town is entitled to a post-judgement attachment on the property for the civil penalties assessed as well as the approved attorney's fees and costs.

SO ORDERED.

Date: _____

By: _____
Presiding Justice

²Any failure by the Town to allow the Defendants' prioritized equipment and/or motor vehicles to remain in no way constitutes any liability on the part of the Town.

³Any arrangement for the removal of any of the violative items on the property is solely in the Town's discretion. The Town is under no obligation to realize the highest value for an item removed from the property.