

THE STATE OF NEW HAMPSHIRE

Hillsborough Superior Court Southern District

Docket No.:

Deb Balise, Debbie Diffley, Thomas Hawkins, Seth Poirier, Robert Treadwell

v.

Town of Temple

AMENDED AND RESTATED COMPLAINT  
(Appeal from Zoning Board of Adjustment Decisions)

NOW COME your Plaintiffs and by Order of the Court entered July 2, 2021 respectfully submit this Amended and Restated Complaint as follows:

1. Your Plaintiffs are Deb Balise, 114 Old Revolutionary Road, Temple, NH 03084; Debbie Diffley, 85 Old Revolutionary Road, Temple, NH 03084; Thomas Hawkins, 203 Old Revolutionary Road, Temple, NH 03084; Seth Poirier, 114 Old Revolutionary Road, Temple, NH 03084, and Mr. Robert Treadwell, 85 Old Revolutionary Road, Temple, NH 03084.
2. Your Defendant is the Town of Temple, a municipal corporation with an address of 423 Route 45, Temple, NH 03084.
3. This matter is from the decision of the Zoning Board of Adjustment on March 16, 2021 to deny the request for rehearing of your Plaintiffs of the decision made on February 2, 2021 on the application of Ben's Pure Maple Products, LLC for a variance from the provisions of Section 13A(1) of the Temple Zoning Ordinance.
4. Jurisdiction and venue is appropriate under New Hampshire Revised Statutes Annotated Chapter 677, Section 4 and RSA Chapter 507, Section 9.
5. Ben's Pure Maple Products, LLC sought a variance from the requirements of the Temple

Zoning Ordinance that a commercial use under Section 13A shall be set back at least 500 feet from any existing dwelling of another owner.

6. At the hearing on February 2, 2021, the Board of Adjustment determined that the application for a variance by Ben's Pure Maple Products, LLC was not required. In making the determination, the Temple Zoning Board of Adjustment determined that the required distance of 500 feet from one dwelling to the proposed use meant that the distance was measured from building to building. Further, the Temple Zoning Board of Adjustment determined that the dwelling structure within 500 feet for the proposed use on Temple Tax Map 2-A, Lot 51 does not include a "shop" portion of the dwelling.
7. Your Plaintiffs are persons aggrieved by the decision of the Temple Zoning Board of Adjustment. Your Plaintiffs have participated in the hearings held by the Zoning Board of Adjustment on the application for a variance. Your Plaintiffs' properties are all within the neighborhood of the subject parcel. Each of your Plaintiffs' properties uses as access Webster Highway and Old Revolutionary Road to their properties. The use proposed by Ben's Pure Maple Products would change an existing field to a warehouse/processing facility/retail space employing 26 employees, two (2) driveway entrances from Webster Highway, a 16,000 sq. ft. building, a vertical mass of 8100 square feet, and attendant parking and delivery areas extending approximately 70 feet from the front of the building and 170 feet from the rear of the building. The total developed area for the use is just under 100,000 square feet, purposely kept so by the applicant to avoid an alteration of terrain permit. The proposal of Ben's Pure Maple Products is a substantial change from the existing use of the property and the existing uses in the immediate area. Each of your Plaintiffs has a residential

use of their property and the traffic generated by the proposed change immediately injures your Plaintiffs in their enjoyment of their residential uses.

8. Your Plaintiffs through counsel timely filed the request for rehearing of the Board's decision on February 2, 2021. The request for rehearing asserted that the decision of the Board in interpreting the provisions of Section 13A(1) is unlawful and unreasonable.
9. First, the request for rehearing challenged the Board's determination that the required separation of 500 feet was measured not from the proposed use, but rather from any structure proposed for the use to the nearest residential dwelling. The Board in making that determination ignored the plain language of the ordinance. The ordinance does not state "building." The common and ordinary meaning of use of the property includes the necessary ancillary development of the property, including the parking area. The clearest manifestations of a nonresidential use of the property are the substantial area of black top, the in and out traffic to that commercial use, the illumination of parking areas, the vehicle lights and engine noise, and the late hours of snow and ice control. Those activities are all part of the use of the property which fall within the common and ordinary meaning of the word "use."
10. The Board's substitution of the word "building" in Section 13A(1) of the Temple Zoning Ordinance is unreasonable and unlawful. The substitution is unreasonable as it ignores the stated principle of the Temple Zoning Ordinance to provide some separation from commercial development of property from abutting residential property. Section 13 Temple Zoning Ordinance. The decision is unlawful as the Board ignores the principles of statutory construction that requires the Board to determine the meaning of the Zoning Ordinance from

its construction as a whole and not by construing isolated words or phrases. The Board ignored the plain language of the ordinance and the Board added words which the Temple Zoning Ordinance does not include. Connolly v. Town of Madison, New Hampshire Supreme Court Slip Opinion February 22, 2021.

11. The Board's division of an existing residential structure on Tax Map 2-A, Lot 51, 5 NH Route 45, again, ignores the principle that the meaning of the Temple Zoning Ordinance must be derived from construing the ordinance as a whole. Section 11 of the Temple Zoning Ordinance makes clear that a home business must be part of the dwelling. The part of the dwelling the Temple Zoning Board of Adjustment focused on was originally built as a home business. No accessory building was devoted to the home business. At the time of the hearing, that the use of that part of the structure which originally had been built as part of a home business no longer existed and the sole use of the property at 5 NH Route 45 was for residential purposes. Further, there is nothing within the Temple Zoning Ordinance and the residential use of property that precludes a shop from being part of a dwelling and in fact many residential structures throughout New Hampshire contain shops or work spaces which are part of the residential use. The Board inserted a division to the dwelling structure not provided for in the ordinance.
12. The error of the Zoning Board of Adjustment is further demonstrated by the introductory language to Section 13 of the Temple Zoning Ordinance. Section 13 established standards and conditions for "trade, enterprises, facilities, whether commercial, non-commercial, and/or industrial **use of land** or buildings." Emphasis supplied. The introductory language to Section 13 demonstrates the focus of the ordinance is on the use of the land and not as the

Zoning Board would have it on only the building. That the introductory language focuses on the use of the land is only logical as there is almost no nonresidential use of property which does not involve activities outside of any building or structure, the most common activity being the parking for traffic to and from the proposed use.

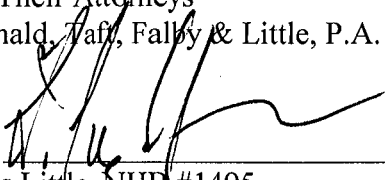
13. The Board's decision with respect to the division of the dwelling at 5 NH Route 45 is not supported by the evidence presented to the Board. Tax records and earlier applications to the Town of Temple show that the footprint for the dwelling is beyond what the Board considered and to restate, under Section 11 of the Zoning Ordinance, a home industry or professional service is housed in a dwelling. The Temple Zoning Ordinance makes no distinction between the home business portion of the dwelling and dwelling. The Zoning Board of Adjustment introduced a distinction not found in the ordinance.
14. The Temple Zoning Board of Adjustment granted the special exception sought by Ben's Pure Maple Products, LLC on April 29, 2021 and May 4, 2021.
15. Your Plaintiffs timely filed the Request for Rehearing under New Hampshire Revised Statutes Annotated Chapter 672, Section 2.
16. The Temple Zoning Board of Adjustment denied the Request for Rehearing on June 15, 2021.
17. The Temple Zoning Board of Adjustment did not issue its written decision on the special exception on April 29, 2021 and/or May 4, 2021. A written decision was given by letter dated June 16, 2021, but the actual date the Temple Zoning Board of Adjustment issued the written decision is not known.
18. Your Plaintiffs raised three (3) issues in the Request for Rearing, one of which concerned the

failure of the Zoning Board of Adjustment to set a time limit in which Ben's Pure Maple Products, LLC was to pay fees to the Town of Temple. That basis for a request for rehearing is now moot.

19. The Request for Rehearing raised the issue of the Board's interpretation of the Zoning Ordinance relative to the separation required under the ordinance as set forth in the original petition filed with this Court between the proposed commercial use and the nearest residential dwelling. In addition to that ground, the decision of the Board of Adjustment was unreasonable in that the truck traffic permitted as the background truck traffic in that area was not of the intensity and duration as the Board of Adjustment has permitted for Ben's Pure Maple Products, LLC.
20. For each of the reasons set forth above, the Plaintiffs assert that the decision of the Temple Zoning Board of Adjustment on February 2, 2021 is unlawful and unreasonable and respectfully request that this Court remand this matter to the Temple Zoning Board of Adjustment to consider on the merits the application for a variance, order that the proposal of Ben's Pure Maple Products, LLC is subject to the provisions of Section 13A relative to the separation of the proposed use from existing dwelling, and grant such other and further relief as shall be just and equitable. In addition, the Plaintiffs assert that the decision of the Temple Zoning Board of Adjustment announced on April 29, 2021 and May 4, 2021 is unlawful and unreasonable with respect to the physical separation required under the ordinance between the proposed commercial use and the nearest residential dwelling and that the truck traffic permitted for the proposed use is unreasonable as it far exceeds the background truck traffic in that area being more intense and of greater duration.

Respectfully submitted,  
Deb Balise, et al  
By Their Attorneys  
Fernald, Taff, Falby & Little, P.A.

Date: July 7, 2021

By:   
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