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March 31, 2021

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

RE: Ben's Pure Maple Products, LLC

Dear Members of the Board:

The question was raised at last night's hearing concerning authority for the proposition that the applicant has the burden of proof. I mentioned several cases in which the burden of proof was discussed. The full citations of those cases are:

Husnander v. Barnstead, 139 NH 476 (1995)

Gray v. Seidel, 143 NH 327 (1999)

Rancourt v. City of Manchester, 149 NH 51 (2009)

Bartlett v. City of Manchester, 164 NH 634 (2013)

The Office of Strategic Initiatives for the State of New Hampshire publishes a document called "Zoning Board Handbook." The latest version is March 2021. The title of the document is "The Board of Adjustment in New Hampshire-A Handbook for Local Officials-March 2021." This handbook is available on line. In that handbook at page III-7, the handbook notes that the burden of proof is on the person making the appeal.

A moment's reflection on the nature of land use regulation and the interplay between police power and private property interest establishes that a property owner seeking to use his property in a manner which is not expressly permitted by the zoning ordinance must bear the burden of proof to show that the property owner is entitled to relief, whether the relief is that of a special exception or that of a variance. Otherwise, the entire fabric of land use regulation is turned on its head. The statement in the handbook for zoning officials published by the State of New Hampshire confirms that analysis. If the Temple Zoning Board of Adjustment is not familiar with this handbook, it is available free and can be printed from the web. It does periodically get revised. In this respect, the handbook published in 1985 by the predecessor of the Office of Strategic Initiatives, the New Hampshire Office of State Planning noted, "There must be sufficient evidence before the board to establish a favorable finding on each of the statutory requirements for a special exception." Barrington East Owners Assoc. v. Barrington, 129 NH 627 (1981) at page 7.

Temple ZBA
March 31, 2021
Page 2

A scan through the March 2021 zoning handbook establishes that the burden is on the applicant to present sufficient evidence to the Board to satisfy the requirements for the special exception. This also applies to variances.

To further buttress the burden of proof, the instructions that the Office of Strategic Initiatives recommends the zoning boards give to applicants, found at Appendix B, makes clear that the burden is on the applicant to establish that the applicant meets each of their criteria depending upon the particular appeal the applicant is making to the Zoning Board of Adjustment. Pages B-1 through B-3. The handbook specifically states at B-2 with respect to special exception as follows: "The necessary conditions for each special exception are given in the ordinance. Your appeal for a special exception will be granted **if you can show** that the conditions stated in the ordinance are met." Emphasis supplied.

I trust the authorities and references contained in this letter satisfy the Board's inquiry as to where the burden of proof of the matters before the Zoning Board of Adjustment rest.

To repeat my earlier comments, if the Board is not familiar with the handbook that the Office of Strategic Initiatives has prepared for Zoning Board members, I recommend to the Board members they review it.

Very truly yours,

Fernald, Taft, Falby & Little
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By: 

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sl/djh

cc: Thomas Hanna, Esq.