

**MINUTES  
PEMBROKE ZONING BOARD OF ADJUSTMENT**

**June 12, 2017**

**Pending 6-14-2017**

**MEMBERS PRESENT:** Bruce Kudrick, Chair; Tom Hebert, Vice Chair; Dana Carlucci, Mark Simard

**ALTERNATES PRESENT:** Ann Bond, Paul Paradis

**EXCUSED:** William Faith

**STAFF PRESENT:** Everett Hodge, Code Enforcement Officer; Susan Gifford, Recording Secretary

Chairman Kudrick called the meeting to order at 7:00 p.m. The clerk took the roll call. Dana Carlucci recused himself from Case 17-02-Z. Paul Paradis was designated to vote for Dana Carlucci. Ann Bond is designated to vote for William Faith. There are five voting members on the board this evening.

Chairman Kudrick explained the rules of the hearing. The Board makes its decision based upon the facts presented by the applicant. If any of these facts are subsequently found to be different, the Board reserves the right to revisit its decision.

Chairman Kudrick reopened the hearing for Case #17-02-Z.

**Case #17-02-Z**

Applicant:	Dana and Jocelyn Carlucci 8A Prospect Street Pembroke, NH 03275
Property Owner(s):	Main Street 145 Realty LLC 443 Deerpath Lane Pembroke, NH 03275
Property Address:	147/149 Main Street Pembroke, NH 03275 Tax Map (VE) Lot (166) in the B-2 Central Business District and the AC Aquifer Conservation Zoning Districts.

**Case 17-02-Z** The applicant, Dana and Jocelyn Carlucci 8A Prospect Street, Pembroke, N. H. 03275 is appealing the Code Enforcement Officer's e mail of March 10, 2017 regarding the removal of the "Trevor's Toy Box" sign at 145 Main Street. **Clarification:** The sign is on property owned by Main Street 145 Realty LLC, 443 Deerpath Lane, Pembroke NH. The property owned by Dana and Jocelyn Carlucci, 8A Prospect Street, is 147-149 Main Street, LLC located at 147-149 Main Street, Map (VE) Lot (166) in the B-2 Central Business District and the AC Aquifer Conservation Zoning Districts.

Chairman Kudrick summarized Case #17-02-Z. Dana and Jocelyn Carlucci are appealing a March 2017 decision by the Code Enforcement Officer regarding a sign at 145 Main Street reading "Trevor's Toy Box." The sign itself does have a permit in the Downtown Suncook B2 District. After the sign permit was issued, the business was not allowed in that location. The shop has been vacant for the past four years. The Building Inspector did inform the concerned property owner that the sign could not be removed as it may involve constitutional First Amendment rights. A doll store could locate a business in the vacant shop. No other complaints about the sign have been received from any other business owners downtown.

The applicant made his presentation at the May 8, 2017 ZBA meeting. This case was continued to June 12, 2017 to allow time for the Board to meet with Town Counsel to review the Zoning Regulations relating to this case. Due to budget constraints, the Town Administrator decided not to have a special meeting of the ZBA members with the town attorney, but instead to send all the information to current Town Counsel and request a written opinion.

Larry Preston, owner of 145 Main Street, asked if Paul Paradis was present at the May 8, 2017 meeting. Paul Paradis was not present at the May 8, 2017 meeting but has read the minutes.

Please state the decision that you would like reviewed:

The March 6, 2017 decision by the Code Enforcement Officer that the “Trevor’s Toy Box” was that the sign cannot be removed. The grounds are per a March 10, 2017 email to Everett Hodge from Dana and Jocelyn Carlucci in response to an email dated March 6, 2017 that the Town could not have the sign removed. Everett Hodge clarified that there was an email from Walter Mitchell summarizing a face to face discussion about the sign.

Dana Carlucci stated that he had a clarification to the May 8, 2017 meeting. He did not see any written request from the Town Administrator to the Town attorney in 2014 or a written decision from the attorney stating that the sign could not be removed.

The clerk read an email dated May 15, 2017, from Megan Carrier, Esq. to Christopher Cole, and then to Everett Hodge from Christopher Cole, Sheehan, Phinney, Bass & Green, 1000 Elm St., 17<sup>th</sup> Floor, Manchester NH 03101. It read: I looked into whether Pembroke can lawfully require the removal of the Trevor’s Toybox sign. Per Section 143-59 of the Sign Ordinance, the Code Enforcement Officer is authorized to order the removal of a sign if it is 1) dangerous; 2) in disrepair; or 3) is erected or maintained contrary to the provisions of this article.

I do not have any information that the sign is dangerous or in disrepair, so I looked to see whether it is contrary to any provision of the Sign Ordinance. The sign would be arguably be contrary to Section 143-63(K) which provides that signs erected “for the purpose of identifying the location of, or advertising adult entertainment uses... shall only be permitted in the C1 District, in the limited district, per Section 143-44.1.C.1 where Adult Entertainment Use is otherwise lawfully permitted by right or where a special exception has been previously obtained for said use.” In the 2013 litigation, it was determined that Trevor’s Toybox constituted a passive adult entertainment use which was prohibited from the B2 district. Thus, there is certainly an argument that a sign advertising Trevor’s Toybox cannot exist in the B2 district per Section 143-73(K).

Unfortunately, Section 143-73(K) appears to be content-based (that is, its basis is the message being conveyed) and therefore likely invalid under *Reed v. Gilbert* such that a mandate from the Town directing removal of the sign will subject the Town to a First Amendment challenge. Unless the sign is contrary to another provision of the Sign Ordinance that is not content-based, I would not recommend that the Town mandate removal of the sign.

Everett Hodge noted that Section 143-59B addresses abandoned and business use discontinued signs. Off premises signs have to be directional or informational in nature.

Chairman Kudrick asked Everett Hodge if the property owners got a permit for the sign. Yes, Everett replied, a permit was issued March 7, 2013 for Trevor's Toy Box sign as replacement for the existing Mr. Appliance sign.

Chairman Kudrick stated that the timeline includes David Jodoin asking Town Counsel if the sign could be removed on March 25, 2014. In March 2014, Pembroke Estates, LLC made a request to open store at 145 Main Street, Map VE Lot 167 selling Wicca/Pagan worship supplies. At that time property owner was advised to change the name on the sign to reflect the nature of the new business and products.

The sign itself, language and content, is not offensive. An order to remove the sign may open the town to first amendment rights and freedom of speech arguments. In a face to face meeting, Everett Hodge confirmed that Town Counsel advised not to pursue removal of the sign in 2014.

Larry Preston, 145 Main Street, stated that Trevor's Toybox is no longer the name of a defunct business. It is the name of the building, like the George B. Osgood building.

Mark Simard asked if there were any town regulations regarding naming a building. Everett said no.

Ann Bond noted that at the May 8, 2017 meeting, there was a webpage referenced. Larry Preston stated that is no longer an active website.

Chairman Kudrick summarized the case. This is a continuance of Case #17-02-Z. We have read the email dated May 15, 2017 from Sheehan, Phinney, Bass & Green. The applicant brought up the point that per Section 143-59 (B), the Code Enforcement Officer can order the removal of abandoned or discontinued use signs. Chairman Kudrick noted that the sign could say "dolls" or "toys". It was determined that passive adult entertainment use cannot exist in the B2 district. Section 143-63 (K) is content based and a request to remove the sign may lead to a First Amendment challenge.

There being no further discussion, Chairman Kudrick closed the public hearing at 7:20 p.m.

Chairman Kudrick stated that Section 143-59-D does allow abandoned signs to be removed under specific circumstances. Ann Bond asked if the store never opened, why a sign was allowed in the proposed name of the business. Everett Hodge stated there are no regulations in the ordinance about a business that never opens, or a business that closes and a sign remains.

Ann Bond asked if an applicant were going for approval of a business and sign, and if the business is not approved or never populated, is a sign allowed. Everett Hodge stated that there is nothing in the Sign Ordinance that addresses if a business never occupies the intended space. Where is town approval of what the signs say? Ann is concerned that other signs may come up in the future with a controversial name. Review of signs happens in town or building department review of applications.

Mark Simard noted that the Trevor's Toybox sign has never been taken down. However, the wording is not offensive. Everett noted we base the decision on the sign now, not the business. When a permit was requested to replace the Mr. Appliance sign, the town became aware of the website. The window dressing at Trevor's Toybox did not help.

Ann Bond noted that the attorney presents two sides in her May 15, 2017 response. A sign advertising Trevor's Toybox cannot exist in the B2 district per Section 143-73(K) and unfortunately, Section 143-73(K) is content-based. The wording of the sign is not offensive.

Mark Simard would lean more to Section 143-59B regarding abandoned signs.

Tom Hebert agreed that the act of removing the window dressing was discontinuance of the previous business use. However, the new argument from the building owner is that Trevor's Toybox is the name of the building. How can one dispute that statement?

The ZBA members agreed that the Sign Ordinance needs to be clarified. Tom Hebert stated that at a minimum, if the business does not exist where the sign is located, it must be removed. The building owner could choose to be a good neighbor. Tom Hebert stated that the sign is not offensive as a content-based sign. One would have to know the history of the prior business to make the connection. Now, Trevor's Toybox is the name of a building.

Ann Bond asked if another applicant could come back to the ZBA on the same issue. The town attorney would have to determine this at the time of a possible new application. Chairman Kudrick noted that some downtown buildings still have Coca Cola signs on them. Mark Simard asked if we are working with legal opinion we have at this time. Yes, Chairman Kudrick confirmed that is correct.

**MOTION:** Tom Hebert moved to UPHOLD the Code Enforcement Officer's decision in **Case 17-02-Z**, an Appeal from Administrative Decision regarding the removal of the "Trevor's Toy Box" sign at 145 Main Street for the following reason:

After consulting with legal counsel and comparing the case before us with that of the relevant Supreme Court Case of Reed vs Gilbert, the Board found there was no legal grounds in which to force further action on behalf of the town in regards to removal of the "Trevor's Toy Box" sign.

Mark Simard seconded.

**VOTE:** PAUL - YES TOM - YES BRUCE - YES  
ANN - YES MARK - YES

MOTION TO UPHOLD CEO DECISION PASSED ON A 5-0 VOTE.

Dana Carlucci returned to the Zoning Board of Adjustment. Ann Bond was designated to vote for William Faith.

#### **MINUTES OF PREVIOUS MEETINGS**

**MOTION:** Tom Hebert moved to approve the minutes of May 22, 2017 as amended. Dana Carlucci seconded.

**VOTE:** ANN - YES TOM - YES BRUCE - YES  
DANA - YES BILL - YES

MINUTES OF MAY 22, 2017 APPROVED AS AMENDED ON A 5-0 VOTE.

#### **NEXT MEETING**

**Date of next ZBA meeting** – Everett Hodge noted the next ZBA meeting would be on **Monday, June 26, 2017 at 7:00 p.m.** Two cases are scheduled.

**ADJOURN** **Motion:** Tom Hebert moved to adjourn. Ann Bond seconded. Vote was unanimous in favor of motion. Meeting adjourned at 7:45 p.m.

Respectfully submitted,  
Susan P. Gifford  
Recording Secretary