

**MINUTES**  
**PEMBROKE ZONING BOARD OF ADJUSTMENT**  
**October 26, 2015**

**Approved 11-23-15**

**MEMBERS PRESENT:** William Bonney, Chair; Bruce Kudrick, Vice Chair; Tom Hebert, Dana Carlucci, Paul Paradis

**ALTERNATES PRESENT:** Mark Simard

**EXCUSED:** Mark Johansen, William Faith

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

Chairman Bonney called the meeting to order at 7:01 p.m.

**PUBLIC HEARING**

Case #15-06-Z

Applicant: Hillside Baptist Church  
547 Pembroke Street  
Pembroke, NH 03275

Property Owner(s): Hillside Baptist Church  
547 Pembroke Street  
Pembroke, NH 03275

Property Address: 547 Pembroke Street  
Pembroke, NH 03275  
Tax Map 563, Lot 22-2 located in the LO Limited Office and AD Architectural Design Zoning Districts.

**Case 15-13-Z** The applicant, Hillside Baptist Church, 547 Pembroke Street, Pembroke, NH per Notice of Decision dated August 24, 2015 has been granted a rehearing of cases 15-06-Z and 15-07-Z. The property is located at 547 Pembroke Street, Map 563 Lot 22-2 in the LO Limited Office and AD Architectural Design Zoning Districts.

**Case 15-06-Z** The applicant, Hillside Baptist Church 547 Pembroke Street Pembroke, NH is appealing the Code Enforcement Officer's decision to deny an (EMC) electronic message center sign to replace an existing sign at 547 Pembroke Street. The property is located at 547 Pembroke Street, Map 563 Lot 22-2 in the LO Limited Office and AD Architectural Design Zoning Districts.

**Case 15-07-Z** A request has been made for a **Variance** under *Article VIII, Signs § 143-63, Special conditions for specific types of signs X Electronic Changing Signs*. The applicant, Hillside Baptist Church 547 Pembroke Street Pembroke, NH is requesting a Variance to install an (EMC) electronic message center at 547 Pembroke Street to replace an existing sign. A Variance is required because based on Table 143-62 Dimensional Table of Signs this type of sign is not allowed in the LO Zoning District. The property is owned by Hillside Baptist Church, 547 Pembroke Street, Pembroke, NH 03275. The property is located at 547 Pembroke Street Map 563 Lot 22-2, in the LO Limited Office and AD Architectural Design Zoning Districts.

Mr. Everett Hodge confirmed that all abutters were notified previously. Chairman Bonney opened the public hearing at 7:03.

Attorney Michael Tierney, Wadleigh, Starr & Peters PLLC, 95 Market Street, Manchester NH representing Hillside Baptist Church stated that he is incorporating by reference all of the minutes and testimony from July 27, 2015 on this matter.

Chairman Bonney opened the public hearing at 7:02 p.m. This public hearing is a rehearing of Cases 15-06-Z (Administrative Appeal) and 15-07-Z (Request for Variance).

There were 5 regular members and 1 alternate member present. Therefore, there was a full five-member board present for this hearing. Chairman Bonney 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.

Copies of rehearing request dated August 18, 2015 including a rendering of proposed new sign were provided in the agenda packet.

Attorney Tierney noted two typos in the August 18, 2015 letter. Second line of second paragraph should be "improperly." On page four, last paragraph, word should be "precedents." Attorney Tierney stated that Reed v Gilbert, Arizona addressed exemptions allowed for various speakers.

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Attorney Tierney stated that this particular application is for a sign of similar size to Mobil or Pembroke Academy. If approved, the applicant would abide by current zoning regulations for signs of this type. If imposed as conditions of approval, they would be reasonable.

Jay Smith, 386 Pembroke Street, asked whether exemptions are granted on the same kind of variance. This is non germane as the Pembroke residents do not desire to have the LO District cluttered by signs. If a mosque wanted to locate in the LO district and broadcast morning prayers over a loud speaker, this would violate the noise ordinance.

Chairman Bonney clarified that if approved, this would be the first variance for an electronic messaging sign in the LO District.

Sally Highland, Bachelder Road, asked what is different in this rehearing of the cases. Attorney Tierney stated that Hillside Baptist Church has presented somewhat different information after the concern raised about height and dimensions. In Exhibit 1, you will see the proposed sign is shorter, smaller and has nicer landscaping.

Janet Sanderson, Pembroke Street, stated she feels the ZBA has made the right decision. This is a residential area.

Dianne Schuett, Pembroke Street, stated as to the constitutionality issue, the nature of the sign is not allowed in that district. If the electronic message sign is approved, Diane Schuett asked that the applicant abide by the rules for signs in the LO District. Signs shut down when the business is closed, or 10 pm.

Sara Smith, 386 Pembroke Street, stated she has the same opposition. The church has an existing sign that gives them a voice. The aesthetic question is that lighting on a sign changes the nature of the neighborhood of rural landscapes and antique homes.

A Pembroke Street resident asked if the purpose of the sign to bring in more parishioners.

Rebuttal by applicant was allowed. Fad Cousin, signs4Jesus, is working with Hillside Baptist Church and they are well within their right to present a bible scripture on a sign on a daily basis. Mr. Cousin stated that he was reading the Pembroke Zoning Regulations and noted that the purpose of zoning is to promote the welfare, health and prosperity of people, not by buildings, sidewalks and streetlights but by presenting a message of hope to those passing through Pembroke. The word of God brings healing and comfort. In these times of terrible heroin addiction, a word of wisdom is needed. Mr. Cousin is living proof that the word of God is real and provides hope. The sign will be a respectful sign and the light will be shut off at 10 P.M. Mr. Cousin stated that Attorney Tierney argued the legal aspects eloquently.

Everett Hodge clarified that with regard to the Pembroke Academy message sign, the Pembroke Zoning Board of Adjustment did not approve the sign. The Building Inspector approved the electrical installation because he happened to be driving by when the installation was conducted.

Alfred Page, Associate Hillside Baptist, Upper City Road, Loudon NH, stated that he is retired Navy with 25 years. He has seen radical changes in New Hampshire. We have thrown God out of schools, government and court. Heroin epidemic, committees and drug czars are in New Hampshire. Scripture is the word of God. The current sign is on a timer. If we lose power, we have to manually reset the timer. The new sign would be programmed to shut off at the appropriate time.

Sally Highland, Bachelder Road, stated to clarify, the Pembroke Academy school sign is exempted by State statute that applies to every community in New Hampshire. Chairman Bonney stated that is correct.

Dianne Schuett, Pembroke Street, stated that an electronic message sign will disrupt the nature of Pembroke Street in the LO District. Twenty one other businesses and churches will want a lighted sign. This is distracting to drivers.

Attorney Tierney stated that he has listed 10 exemptions in local ordinance including 143-63 (p) public service notices. The proposed sign is no more distracting than the Mobil sign. The ZBA must consider the particular application in front of them. The electronic message sign in Chichester, NH was installed in 2011 and did not result in more requests for electronic messaging signs.

Sara Smith, 386 Pembroke Street, stated that she is a fast reader and she cannot read the entire Pembroke Academy sign message unless she is stopped at the light. At the speed people drive by Hillside Baptist Church they won't be able to read the complete message.

Fad Cousins agreed it is tough to read the Pembroke Academy sign because they don't stick to the minimum size lettering. The quality of the proposed church sign is sharp and crisp. The message will not blink, flash or scroll and will be changed once every 24 hours. The church staff is unable to change the message on the existing sign in the winter.

Bruce Kudrick asked what the distance was from the church to the sign. Attorney Tierney stated the distance is 300-400 feet. How far is the sign from the driveway? Attorney Tierney stated there is 270

feet of frontage at Hillside Baptist Church and the sign is centered between two large maple trees so it can be seen. He estimates the sign is 100 feet from the driveway.

Dana Carlucci asked if the existing sign could be moved closer to the driveway. It would depend on the location of the tree. Is the drive kept clear of snow in the winter? Yes the driveway is cleared of snow. Attorney Tierney confirmed that someone lives on site.

Chairman Bonney summarized the case. This is **Case 15-13-Z** The applicant, Hillside Baptist Church, 547 Pembroke Street, Pembroke, NH per Notice of Decision dated August 24, 2015 has been granted a rehearing of cases 15-06-Z and 15-07-Z. The property is located at 547 Pembroke Street, Map 563 Lot 22-2 in the LO Limited Office and AD Architectural Design Zoning Districts. It was stated that the Zoning Board of Adjustment may have erred in its previous decision. If approved, the applicant would abide by local zoning regulations for electronic message signs in the C1 District on Route 106. The proposed sign is of similar sign and composition as the Pembroke Academy sign. The Pembroke Zoning Board of Adjustment did not approve the Pembroke Academy sign. A rendering of the proposed sign was provided. It was stated that the sign if approved should be shut down after hours, not just made dimmer. The ability to spread a religious message exists now for Hillside Baptist Church. An electronic messaging sign would be a major change in character of the Route 3 residential village neighborhood. It was stated that the purpose of zoning is to promote the health and welfare of people. It was stated that a message from Scripture brings comfort and hope. The proposed sign is a respectful sign. Even though the ZBA and the Town of Pembroke did not approve the electronic message sign at Pembroke Academy, the Building Inspector inspected the electrical installation because he stopped and observed the contractor putting in the electrical. Heroin addiction is rampant in New Hampshire and people everywhere could use God's message in their lives. The church staff has to reset the timer manually on the current sign when a power outage occurs. It was stated an electronic message sign could be distracting to drivers. It was stated that twenty one other businesses and churches in the LO District could want an electronic message sign. It was stated that a number of other exemptions in Pembroke Zoning Ordinance make it unconstitutional to require a variance for a church sign. The ZBA should only consider the case before them and not possible future cases. It was stated that drivers cannot read the Pembroke Academy sign because it uses small lettering. It was noted that writing a message in red letters does not help legibility. It was stated that the proposed electronic message sign would have sharp, crisp lettering. It is difficult to change the message on the existing sign in winter. The gas station sign is just numbers and is very readable. The existing sign is 300 feet from the church. Various options to move the existing sign were discussed. Everett Hodge confirmed that the existing sign is located 68 feet from the driveway.

Attorney Tierney asked if the current rehearing was for both the Administrative Appeal Case #15-06-Z and the Variance request Case #15-17-Z. Chairman Bonney confirmed that the agenda notice encompassed the rehearing of both cases in Case #15-13-Z. It was stated that an electronic message sign would change the essential character of the neighborhood. Dana Carlucci stated that everyone in the room is aware the hearing is for both Cases 15-06-Z and 15-07-Z. Attorney Tierney asked if the Board had read and understood everything he set forth in writing in two letters dated August 18, 2015. Chairman Bonney confirmed yes, the Board understood. Everett Hodge stated he did not approve the electronic message sign at Pembroke Academy, and Sign Permit number S-2014-10 issued 6/19/14 clearly states in Project Notes "REPLACING EXISTING SIGN WITH AN ELECTRONIC MESSAGE BOARD OF THE SAME SIZE. THIS SIGN DOES NOT MEET THE CURRENT ZONING REGULATIONS FOR THE R-1 ZONE AND IS NOT ALLOWED". Everett Hodge had a conversation with school administration and the Town Manager followed up with an email. The school had an alumnus willing to provide the funding and decided to go ahead with the electronic message sign because of the State exemption to local ordinance. Everett Hodge performed an inspection to confirm that the

sign was installed properly because he happened to drive by at the time of installation. The sign permit fee was waived as a courtesy. The school was not required to pull permits or have inspections. Paul Paradis asked how many other things get installed in the school district without being looked at.

Mr. Cousin stated that as a building inspector, the school is required to get an inspection. Dana Carlucci stated that as a licensed plumber for 32 years, he has been involved with State inspectors for gas, electric and plumbing. The school would have to arrange for local or State inspections as appropriate.

Bruce Kudrick noted that the Town of Hooksett signed permits for the two new State rest areas on Route 93. Hooksett Building Inspector can inspect the buildings as a courtesy and mention any recommendations to the State. Overall, the State Fire Marshall has authority over the projects.

Attorney Tierney stated that legally, the Town of Pembroke has several sign exemptions in their local ordinance.

There being no further comment, Chairman Bonney closed the public hearing at 8:02 p.m.

**Deliberations:** Bruce Kudrick stated that per the Pembroke Master Plan, residents do not want the rural character of Pembroke Street to change. Dana Carlucci stated that per surveys completed by residents and businesses and input from 15-18 State agencies, the Planning Board transferred all of the mandates into the zoning ordinance to move forward in a positive manner. The Master Plan was voted on and accepted by town residents. The zoning ordinance was also voted on and accepted by town residents. The first sentence of the Pembroke Zoning Ordinance is actually “This chapter is made in accordance with the Master Plan...”

Dana Carlucci stated that he reviewed the exemptions listed by Attorney Tierney in his August 18, 2015 correspondence and none of them have electronic message signs in them. There are public service signs, life and safety signs, and temporary construction signs. As a Board, we have never approved a variance in the LO District for an electronic message sign. This community has a lot of affiliation with local churches. Dana Carlucci proposed that young people in the church community become involved by changing the message on the existing Hillside Baptist Church sign. The applicant is not substantially burdened because the existing sign is beautiful and functional. Mark Simard stated that the Zoning Board of Adjustment does not set precedent with anything. Our focus is on this particular sign request.

The ZBA reviewed the variance criteria.

1) The variance will not be contrary to the public interest.

Bruce Kudrick noted that an electronic message sign changes the character of the area and is not in the public interest according to the Pembroke Master Plan.

2) The spirit of the ordinance is observed.

It is against the spirit of the ordinance because electronic message signs are not allowed in that zoning district. The ordinance is well written and concise to promote safety and welfare of people.

3) Substantial justice is done.

Hillside Baptist Church has a nice sign now that is functional and is similar to others in the LO District on Route 3.

4) Property values are not diminished. No testimony that property values would be diminished was provided.

5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. The Hillside Baptist Church is well established with the existing 12 square foot sign.

Changing the message manually may not be convenient, but other churches and businesses in the LO District change the messages on their existing signs.

**MOTION:** Bruce Kudrick moved to **DENY** the rehearing appeals in Case #15-13-Z for both an Administrative Appeal and a Variance for applicant, Hillside Baptist Church 547 Pembroke Street Pembroke, NH. The property is owned by Hillside Baptist Church, and is located at 547 Pembroke Street, Pembroke, NH 03275, Map 563 Lot 22-2, in the LO Limited Office and AD Architectural Design Zoning Districts.

The Zoning Board of Adjustment denied the **Administrative Appeal and Variance** for the following reasons:

1. The applicant, Hillside Baptist Church of 547 Pembroke Street in Pembroke, NH (“Hillside”), moved for rehearing of our July 27, 2015 decision denying its appeal of the Code Enforcement Officer’s decision to deny Hillside’s request to replace its existing sign at 547 Pembroke Street with an electronic message center sign (“EMC”).
2. Hillside also submitted a request for rehearing on the Board’s decision denying its request for a variance under Article VIII, Signs, § 143-63(X) for purposes of installing the EMC.
3. Hillside’s property is located at 547 Pembroke Street, Map 563 Lot 22-2, in the LO Limited Office and AD Architectural Design Zoning districts. Under the Ordinance, EMCs are not permitted in the District where the Hillside Property is located; they are permitted only in the Commercial/Light Industrial (C1) District and on those lots directly abutting Pembroke Street from properties south of the Pembroke Street/Main Street intersection to the Allenstown town line. Zoning Ordinance, at Article VIII, Signs, § 143-63(X).
4. The purpose of the zoning restriction on EMCs in the zones in which the Property is located is to protect the historic integrity and character of Pembroke Street.
5. The school district, which is exempt from local land use regulations to the extent it is making a governmental use of its property, implemented and erected an EMC on the Pembroke Academy property—which is located in the same District as the Subject Property—against the wishes of the Town. Hillside has suggested that the Town must permit it to install an EMC based on either:
  - (A) the “substantial burden” provision of the federal statute called the Religious Land Use and Institutionalized Persons Act (“the Act”), which prohibits governments from imposing or implementing a land use regulation in a manner that imposes a “substantial burden” on religious exercise; or
  - (B) the “equal terms” provision of the Act, which prohibits governments from implementing a land use regulation in a manner that treats a religious institution on less than equal terms with a nonreligious institution.
6. The Board has considered each of these prohibitions
7. **Substantial Burden Provision:** The Act’s “substantial burden” provision provides as follows:

“No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a

religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling Government interest.”

The Act does not define the phrase or term “substantial burden.” We understand that the burden to demonstrate a “substantial burden” is on the applicant in this matter.

8. A review of applicable law reveals that in determining whether a particular burden is “substantial” within the meaning of the Act, certain factors are considered, including (A) whether the regulation at issue appears to target a religion; (B) whether local regulators have subjected a religious institution to a process that is designed to reach a predetermined outcome contrary to the group’s requests; and (C) whether the land use regulation is imposed on the religious institution arbitrarily, capriciously, or unlawfully. Ultimately, an ordinance provision can violate the Act’s substantial burden provision if it raises an inference of hostility towards a religious organization.

9. The Board has determined that the prohibition on EMCs in the LO and AD Districts does not rise to the level of a “substantial burden” as contemplated by the Act. The ban on EMCs is neutral, generally applies to all landowners in the zone, and does not target religion in any way. There is no evidence that the Town’s enforcement of the ordinance against Hillside is designed to reach a predetermined outcome, or that the Town has imposed the ban arbitrarily.

10. The burden Hillside complains of appears to be the fact that its agents are required to walk down to the existing sign and manually change the letters, as opposed to changing the message on an EMC more quickly and easily from inside the building. Hillside’s building is located approximately 270 feet from the road. The Board finds that this burden does not rise to the level of a “substantial burden” of the applicant’s exercise as contemplated by the Act.

11. Hillside argues in its Request for Rehearing that the fact that the church may express its message through a different medium or in a different location does not relieve the Town of its obligation not to impose a burden on the Church’s use of its own property.” Request for Rehearing, at 3-4. In support of this argument, Hillside cites two cases where courts held that a substantial burden violation could not be avoided based on the fact that the churches could relocate to a different property. The Board does not find the sale of a property and relocation to a different property to present a burden comparable to the burden associated with having to walk from Hillside’s building to the road to manually change its sign and message.

12. A “substantial burden” occurs when the ordinance renders religious exercise effectively impracticable. The ordinance prohibiting EMCs here does not render worship impracticable, does not impose significant pressure on Hillside to violate its faith, and does not effectively bar Hillside from using its property in the exercise of its religion.

13. **Equal Terms Provision:** The Act’s “equal terms” provision provides:

“No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”

14. The main issue in this administrative appeal and variance application is whether the ordinance prohibiting EMCs was or is imposed in a manner that treats Hillside on “less than equal terms with a non-religious assembly or institution.” Hillside compares itself to Pembroke Academy, and argues that because, as a government entity, Pembroke Academy was exempted from local regulation under a state law (and exempt, therefore, from the ordinance prohibition on installing an EMC in the zone), Hillside must be treated on “equal terms” and permitted to install an EMC. But Pembroke Academy is an actor or landowner on which the Town of Pembroke cannot impose, and has not imposed, its land use laws, including the EMC ordinance.
15. The Board finds that Pembroke Academy is not an appropriate point of comparison, or so-called “comparator,” because it is the beneficiary of a state law exemption from local land use regulation as a government entity. Our review of relevant law reveals support for the proposition that Hillside cannot be compared to an institution that obtained a different kind of relief, or obtained relief via a different means, than the relief sought by Hillside.
16. The Act is written in terms of equality of treatment. On that basis, Pembroke Academy is not an appropriate “comparator” because it is not similarly situated to Hillside. Pembroke Academy benefitted from the exemption from local land use regulation conferred by the Legislature in Concord. PA obtained its right to install its EMC from a different authority that was applying entirely different standards—namely, state standards. The applicant is entitled, under the Act, to equality of treatment with other similarly situated landowners, but is not entitled to be treated, as a consequence of an exemption available only to a few, state-law prescribed persons or entities, better than those other landowners. The Board does not feel that the applicant’s interpretation of the Act is appropriate.
17. The Board finds that the ordinance does not run afoul of the Act’s “equal terms” provision because Hillside is treated equally with all appropriately comparable non-religious entities and institutions in the District.
18. **Variance Standard:** The Board considers now, for purposes of analyzing Hillside’s request for rehearing of the Board’s decision to deny its variance request, the five elements that must be satisfied for purposes of granting a variance.
  - a. *The variance will not be contrary to the public interest.* The Board finds that the variance would be contrary to the public interest because allowing the EMC would change the essential character of the neighborhood and detract from the rural character of the Route 3 corridor from Route 106 to Main Street.
  - b. *The spirit of the ordinance is observed.* The Board finds that the variance would not observe the spirit of the ordinance because it would run afoul of the purposes of the signage provisions as expressed in Article VII., Section 143-57(A)-(D). The variance would be directly contrary to the stated purposes of (1) promoting the safety, comfort, and well-being of the users of the streets, roads, and highways of Pembroke; (2) reducing distractions and obstructions caused by signs; (3) discouraging excessive visual competition in signage; and (4) preserving and enhancing town character. Furthermore, the Board finds that Pembroke’s Master Plan is informative as to the spirit of the ordinance, and the variance would be contrary to Section XI-8 of the Master Plan, which states in part, zoning changes were encouraged in order to maintain and enhance the traditional village character of



Pembroke” (emphasis added). Allowing an EMC would not be in keeping with the village character of Pembroke.

- c. *Substantial justice is done.* The Board finds that substantial justice is done by denying the variance because any loss Hillside suffers as a result of being required to utilize its existing manual sign rather than an EMC is outweighed by the value the public gains from protecting the safety of persons traveling—whether by foot, car, or otherwise—along the Route 3 corridor from Route 106 to Main Street, reducing distractions caused by signs, discouraging excessive visual competition in signage, and preserving the rural village character of Pembroke.
- d. *The values of surrounding properties are not diminished.* No evidence that granting the variance would have an adverse impact on surrounding properties was presented.
- e. *Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.* The Board finds that no special conditions of the Subject Property distinguish it from other properties in the area such that there is no fair and substantial relationship between the public purposes of the ordinance and the specific application of the ordinance to the Subject Property. A number of other churches own or occupy property on the Route 3 corridor from Route 106 to Main Street. Nothing about the Subject Property renders it less important to enforce the purposes of the ordinance—promoting safety, reducing distractions, discouraging visual competition, and preserving Pembroke’s rural character—against the Subject Property. Although it may be less convenient for Hillside to manually change the lettering on its existing sign, the denial of this variance request certainly does not result in a situation where Hillside cannot reasonably make use of the Subject Property.

Dana Carlucci seconded.

**VOTE:**            DANA - YES            TOM – YES            BRUCE –YES  
                      PAUL – YES            BILL - YES

MOTION TO DENY REHEARING APPEALS FOR CASE #15-13-Z PASSED ON A 5-0 VOTE.

#### **REQUEST FOR REHEARING**

**MOTION:** Dana Carlucci moved to approve the rehearing request for Case #15-11-Z as requested by Attorney Michael Tierney, Wadleigh, Starr & Peters PLLC, 95 Market Street, Manchester NH representing applicant Next Level Church, P.O Box 476, Somersworth, NH and schedule the hearing for November 23, 2015. Tom Hebert seconded.

**VOTE:**            DANA - YES            TOM – YES            BRUCE –YES  
                      PAUL – YES            BILL - YES

REQUEST FOR REHEARING OF CASE 15-11-Z GRANTED ON A 5-0 VOTE.

**The rehearing of Case #15-11-Z is scheduled for Monday, November 23, 2015.**

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

**MOTION:** Dana Carlucci moved to approve the minutes of September 22, 2015 as amended. Tom Hebert seconded.

**VOTE:**            DANA - YES            TOM – YES            BRUCE –YES

PAUL – YES            BILL - YES  
MINUTES OF SEPTEMBER 22, 2015 APPROVED AS AMENDED ON A 5-0 VOTE.

**OTHER**

**OLD BUSINESS**

**NEXT MEETING**

**Date of next ZBA meeting** – Everett Hodge noted the next ZBA meeting would be on **Monday, November 23, 2015 at 7:00 p.m.**

**ADJOURN** **Motion:** Tom Hebert moved to adjourn. Bruce Kudrick seconded. Vote was unanimous in favor of motion. Meeting adjourned at 8:25 p.m.

Respectfully submitted,  
Susan P. Gifford

**MINUTES  
PEMBROKE ZONING BOARD OF ADJUSTMENT  
October 26, 2015**

**Pending 10-28-15**

**MEMBERS PRESENT:** William Bonney, Chair; Bruce Kudrick, Vice Chair; Tom Hebert, Dana Carlucci, Paul Paradis

**ALTERNATES PRESENT:** Mark Simard

**EXCUSED:** Mark Johansen, William Faith

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

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**PUBLIC HEARING**

Case #15-06-Z

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Sara Smith, 386 Pembroke Street, stated she has the same opposition. The church has an existing sign that gives them a voice. The aesthetic question is that lighting on a sign changes the nature of the neighborhood of rural landscapes and antique homes.

A Pembroke Street resident asked if the purpose of the sign to bring in more parishioners.

Rebuttal by applicant was allowed. Fad Cousin, signs4Jesus, is working with Hillside Baptist Church and they are well within their right to present a bible scripture on a sign on a daily basis. Mr. Cousin stated that he was reading the Pembroke Zoning Regulations and noted that the purpose of zoning is to promote the welfare, health and prosperity of people, not by buildings, sidewalks and streetlights but by presenting a message of hope to those passing through Pembroke. The word of God brings healing and comfort. In these times of terrible heroin addiction, a word of wisdom is needed. Mr. Cousin is living proof that the word of God is real and provides hope. The sign will be a respectful sign and the light will be shut off at 10 P.M. Mr. Cousin stated that Attorney Tierney argued the legal aspects eloquently.

Everett Hodge clarified that with regard to the Pembroke Academy message sign, the Pembroke Zoning Board of Adjustment did not approve the sign. The Building Inspector approved the electrical installation because he happened to be driving by when the installation was conducted.

Alfred Page, Associate Hillside Baptist, Upper City Road, Loudon NH, stated that he is retired Navy with 25 years. He has seen radical changes in New Hampshire. We have thrown God out of schools, government and court. Heroin epidemic, committees and drug czars are in New Hampshire. Scripture is the word of God. The current sign is on a timer. If we lose power, we have to manually reset the timer. The new sign would be programmed to shut off at the appropriate time.

Sally Highland, Bachelder Road, stated to clarify, the Pembroke Academy school sign is exempted by State statute that applies to every community in New Hampshire. Chairman Bonney stated that is correct.

Dianne Schuett, Pembroke Street, stated that an electronic message sign will disrupt the nature of Pembroke Street in the LO District. Twenty one other businesses and churches will want a lighted sign. This is distracting to drivers.

Attorney Tierney stated that he has listed 10 exemptions in local ordinance including 143-63 (p) public service notices. The proposed sign is no more distracting than the Mobil sign. The ZBA must consider

the particular application in front of them. The electronic message sign in Chichester, NH was installed in 2011 and did not result in more requests for electronic messaging signs.

Sara Smith, 386 Pembroke Street, stated that she is a fast reader and she cannot read the entire Pembroke Academy sign message unless she is stopped at the light. At the speed people drive by Hillside Baptist Church they won't be able to read the complete message.

Fad Cousins agreed it is tough to read the Pembroke Academy sign because they don't stick to the minimum size lettering. The quality of the proposed church sign is sharp and crisp. The message will not blink, flash or scroll and will be changed once every 24 hours. The church staff is unable to change the message on the existing sign in the winter.

Bruce Kudrick asked what the distance was from the church to the sign. Attorney Tierney stated the distance is 300-400 feet. How far is the sign from the driveway? Attorney Tierney stated there is 270 feet of frontage at Hillside Baptist Church and the sign is centered between two large maple trees so it can be seen. He estimates the sign is 100 feet from the driveway.

Dana Carlucci asked if the existing sign could be moved closer to the driveway. It would depend on the location of the tree. Is the drive kept clear of snow in the winter? Yes the driveway is cleared of snow. Attorney Tierney confirmed that someone lives on site.

Chairman Bonney summarized the case. This is **Case 15-13-Z** The applicant, Hillside Baptist Church, 547 Pembroke Street, Pembroke, NH per Notice of Decision dated August 24, 2015 has been granted a rehearing of cases 15-06-Z and 15-07-Z. The property is located at 547 Pembroke Street, Map 563 Lot 22-2 in the LO Limited Office and AD Architectural Design Zoning Districts. It was stated that the Zoning Board of Adjustment may have erred in its previous decision. If approved, the applicant would abide by local zoning regulations for electronic message signs in the C1 District on Route 106. The proposed sign is of similar sign and composition as the Pembroke Academy sign. The Pembroke Zoning Board of Adjustment did not approve the Pembroke Academy sign. A rendering of the proposed sign was provided. It was stated that the sign if approved should be shut down after hours, not just made dimmer. The ability to spread a religious message exists now for Hillside Baptist Church. An electronic messaging sign would be a major change in character of the Route 3 residential village neighborhood. It was stated that the purpose of zoning is to promote the health and welfare of people. It was stated that a message from Scripture brings comfort and hope. The proposed sign is a respectful sign. Even though the ZBA and the Town of Pembroke did not approve the electronic message sign at Pembroke Academy, the Building Inspector inspected the electrical installation because he stopped and observed the contractor putting in the electrical. Heroin addiction is rampant in New Hampshire and people everywhere could use God's message in their lives. The church staff has to reset the timer manually on the current sign when a power outage occurs. It was stated an electronic message sign could be distracting to drivers. It was stated that twenty one other businesses and churches in the LO District could want an electronic message sign. It was stated that a number of other exemptions in Pembroke Zoning Ordinance make it unconstitutional to require a variance for a church sign. The ZBA should only consider the case before them and not possible future cases. It was stated that drivers cannot read the Pembroke Academy sign because it uses small lettering. It was noted that writing a message in red letters does not help legibility. It was stated that the proposed electronic message sign would have sharp, crisp lettering. It is difficult to change the message on the existing sign in winter. The gas station sign is just numbers and is very readable. The existing sign is 300 feet from the church. Various options to move the existing sign were discussed. Everett Hodge confirmed that the existing sign is located 68 feet from the driveway.

Attorney Tierney asked if the current rehearing was for both the Administrative Appeal Case #15-06-Z and the Variance request Case #15-17-Z. Chairman Bonney confirmed that the agenda notice encompassed the rehearing of both cases in Case #15-13-Z. It was stated that an electronic message sign would change the essential character of the neighborhood. Dana Carlucci stated that everyone in the room is aware the hearing is for both Cases 15-06-Z and 15-07-Z. Attorney Tierney asked if the Board had read and understood everything he set forth in writing in two letters dated August 18, 2015. Chairman Bonney confirmed yes, the Board understood. Everett Hodge stated he did not approve the electronic message sign at Pembroke Academy, and Sign Permit number S-2014-10 issued 6/19/14 clearly states in Project Notes "REPLACING EXISTING SIGN WITH AN ELECTRONIC MESSAGE BOARD OF THE SAME SIZE. THIS SIGN DOES NOT MEET THE CURRENT ZONING REGULATIONS FOR THE R-1 ZONE AND IS NOT ALLOWED". Everett Hodge had a conversation with school administration and the Town Manager followed up with an email. The school had an alumnus willing to provide the funding and decided to go ahead with the electronic message sign because of the State exemption to local ordinance. Everett Hodge performed an inspection to confirm that the sign was installed properly because he happened to drive by at the time of installation. The sign permit fee was waived as a courtesy. The school was not required to pull permits or have inspections. Paul Paradis asked how many other things get installed in the school district without being looked at.

Mr. Cousin stated that as a building inspector, the school is required to get an inspection. Dana Carlucci stated that as a licensed plumber for 32 years, he has been involved with State inspectors for gas, electric and plumbing. The school would have to arrange for local or State inspections as appropriate.

Bruce Kudrick noted that the Town of Hooksett signed permits for the two new State rest areas on Route 93. Hooksett Building Inspector can inspect the buildings as a courtesy and mention any recommendations to the State. Overall, the State Fire Marshall has authority over the projects.

Attorney Tierney stated that legally, the Town of Pembroke has several sign exemptions in their local ordinance.

There being no further comment, Chairman Bonney closed the public hearing at 8:02 p.m.

**Deliberations:** Bruce Kudrick stated that per the Pembroke Master Plan, residents do not want the rural character of Pembroke Street to change. Dana Carlucci stated that per surveys completed by residents and businesses and input from 15-18 State agencies, the Planning Board transferred all of the mandates into the zoning ordinance to move forward in a positive manner. The Master Plan was voted on and accepted by town residents. The zoning ordinance was also voted on and accepted by town residents. The first sentence of the Pembroke Zoning Ordinance is actually "This chapter is made in accordance with the Master Plan..."

Dana Carlucci stated that he reviewed the exemptions listed by Attorney Tierney in his August 18, 2015 correspondence and none of them have electronic message signs in them. There are public service signs, life and safety signs, and temporary construction signs. As a Board, we have never approved a variance in the LO District for an electronic message sign. This community has a lot of affiliation with local churches. Dana Carlucci proposed that young people in the church community become involved by changing the message on the existing Hillside Baptist Church sign. The applicant is not substantially burdened because the existing sign is beautiful and functional. Mark Simard stated that the Zoning Board of Adjustment does not set precedent with anything. Our focus is on this particular sign request.

The ZBA reviewed the variance criteria.

6) The variance will not be contrary to the public interest.

Bruce Kudrick noted that an electronic message sign changes the character of the area and is not in the public interest according to the Pembroke Master Plan.

7) The spirit of the ordinance is observed.

It is against the spirit of the ordinance because electronic message signs are not allowed in that zoning district. The ordinance is well written and concise to promote safety and welfare of people.

8) Substantial justice is done.

Hillside Baptist Church has a nice sign now that is functional and is similar to others in the LO District on Route 3.

9) Property values are not diminished. No testimony that property values would be diminished was provided.

10) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. The Hillside Baptist Church is well established with the existing 12 square foot sign. Changing the message manually may not be convenient, but other churches and businesses in the LO District change the messages on their existing signs.

**MOTION:** Bruce Kudrick moved to **DENY** the rehearing appeals in Case #15-13-Z for both an Administrative Appeal and a Variance for applicant, Hillside Baptist Church 547 Pembroke Street Pembroke, NH. The property is owned by Hillside Baptist Church, and is located at 547 Pembroke Street, Pembroke, NH 03275, Map 563 Lot 22-2, in the LO Limited Office and AD Architectural Design Zoning Districts.

The Zoning Board of Adjustment denied the **Administrative Appeal and Variance** for the following reasons:

8. The applicant, Hillside Baptist Church of 547 Pembroke Street in Pembroke, NH (“Hillside”), moved for rehearing of our July 27, 2015 decision denying its appeal of the Code Enforcement Officer’s decision to deny Hillside’s request to replace its existing sign at 547 Pembroke Street with an electronic message center sign (“EMC”).
9. Hillside also submitted a request for rehearing on the Board’s decision denying its request for a variance under Article VIII, Signs, § 143-63(X) for purposes of installing the EMC.
10. Hillside’s property is located at 547 Pembroke Street, Map 563 Lot 22-2, in the LO Limited Office and AD Architectural Design Zoning districts. Under the Ordinance, EMCs are not permitted in the District where the Hillside Property is located; they are permitted only in the Commercial/Light Industrial (C1) District and on those lots directly abutting Pembroke Street from properties south of the Pembroke Street/Main Street intersection to the Allenstown town line. Zoning Ordinance, at Article VIII, Signs, § 143-63(X).
11. The purpose of the zoning restriction on EMCs in the zones in which the Property is located is to protect the historic integrity and character of Pembroke Street.
12. The school district, which is exempt from local land use regulations to the extent it is making a governmental use of its property, implemented and erected an EMC on the Pembroke Academy property—which is located in the same District as the Subject Property—against the wishes of the Town. Hillside has suggested that the Town must permit it to install an EMC based on either:

(A) the “substantial burden” provision of the federal statute called the Religious Land Use and Institutionalized Persons Act (“the Act”), which prohibits governments from imposing or implementing a land use regulation in a manner that imposes a “substantial burden” on religious exercise; or

(B) the “equal terms” provision of the Act, which prohibits governments from implementing a land use regulation in a manner that treats a religious institution on less than equal terms with a nonreligious institution.

13. The Board has considered each of these prohibitions

14. **Substantial Burden Provision:** The Act’s “substantial burden” provision provides as follows:

“No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling Government interest.”

The Act does not define the phrase or term “substantial burden.” We understand that the burden to demonstrate a “substantial burden” is on the applicant in this matter.

8. A review of applicable law reveals that in determining whether a particular burden is “substantial” within the meaning of the Act, certain factors are considered, including (A) whether the regulation at issue appears to target a religion; (B) whether local regulators have subjected a religious institution to a process that is designed to reach a predetermined outcome contrary to the group’s requests; and (C) whether the land use regulation is imposed on the religious institution arbitrarily, capriciously, or unlawfully. Ultimately, an ordinance provision can violate the Act’s substantial burden provision if it raises an inference of hostility towards a religious organization.

9. The Board has determined that the prohibition on EMCs in the LO and AD Districts does not rise to the level of a “substantial burden” as contemplated by the Act. The ban on EMCs is neutral, generally applies to all landowners in the zone, and does not target religion in any way. There is no evidence that the Town’s enforcement of the ordinance against Hillside is designed to reach a predetermined outcome, or that the Town has imposed the ban arbitrarily.

10. The burden Hillside complains of appears to be the fact that its agents are required to walk down to the existing sign and manually change the letters, as opposed to changing the message on an EMC more quickly and easily from inside the building. Hillside’s building is located approximately 270 feet from the road. The Board finds that this burden does not rise to the level of a “substantial burden” of the applicant’s exercise as contemplated by the Act.

11. Hillside argues in its Request for Rehearing that the fact that the church may express its message through a different medium or in a different location does not relieve the Town of its obligation not to impose a burden on the Church’s use of its own property.” Request for Rehearing, at 3-4. In support of this argument, Hillside cites two cases where courts held that a substantial burden violation could not be avoided based on the fact that the churches could relocate to a different



property. The Board does not find the sale of a property and relocation to a different property to present a burden comparable to the burden associated with having to walk from Hillside's building to the road to manually change its sign and message.

12. A "substantial burden" occurs when the ordinance renders religious exercise effectively impracticable. The ordinance prohibiting EMCs here does not render worship impracticable, does not impose significant pressure on Hillside to violate its faith, and does not effectively bar Hillside from using its property in the exercise of its religion.

19. **Equal Terms Provision:** The Act's "equal terms" provision provides:

"No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."

20. The main issue in this administrative appeal and variance application is whether the ordinance prohibiting EMCs was or is imposed in a manner that treats Hillside on "less than equal terms with a non-religious assembly or institution." Hillside compares itself to Pembroke Academy, and argues that because, as a government entity, Pembroke Academy was exempted from local regulation under a state law (and exempt, therefore, from the ordinance prohibition on installing an EMC in the zone), Hillside must be treated on "equal terms" and permitted to install an EMC. But Pembroke Academy is an actor or landowner on which the Town of Pembroke cannot impose, and has not imposed, its land use laws, including the EMC ordinance.
21. The Board finds that Pembroke Academy is not an appropriate point of comparison, or so-called "comparator," because it is the beneficiary of a state law exemption from local land use regulation as a government entity. Our review of relevant law reveals support for the proposition that Hillside cannot be compared to an institution that obtained a different kind of relief, or obtained relief via a different means, than the relief sought by Hillside.
22. The Act is written in terms of equality of treatment. On that basis, Pembroke Academy is not an appropriate "comparator" because it is not similarly situated to Hillside. Pembroke Academy benefitted from the exemption from local land use regulation conferred by the Legislature in Concord. PA obtained its right to install its EMC from a different authority that was applying entirely different standards—namely, state standards. The applicant is entitled, under the Act, to equality of treatment with other similarly situated landowners, but is not entitled to be treated, as a consequence of an exemption available only to a few, state-law prescribed persons or entities, better than those other landowners. The Board does not feel that the applicant's interpretation of the Act is appropriate.
23. The Board finds that the ordinance does not run afoul of the Act's "equal terms" provision because Hillside is treated equally with all appropriately comparable non-religious entities and institutions in the District.
24. **Variance Standard:** The Board considers now, for purposes of analyzing Hillside's request for rehearing of the Board's decision to deny its variance request, the five elements that must be satisfied for purposes of granting a variance.

- a. *The variance will not be contrary to the public interest.* The Board finds that the variance would be contrary to the public interest because allowing the EMC would change the

essential character of the neighborhood and detract from the rural character of the Route 3 corridor from Route 106 to Main Street.

- b. *The spirit of the ordinance is observed.* The Board finds that the variance would not observe the spirit of the ordinance because it would run afoul of the purposes of the signage provisions as expressed in Article VII., Section 143-57(A)-(D). The variance would be directly contrary to the stated purposes of (1) promoting the safety, comfort, and well-being of the users of the streets, roads, and highways of Pembroke; (2) reducing distractions and obstructions caused by signs; (3) discouraging excessive visual competition in signage; and (4) preserving and enhancing town character. Furthermore, the Board finds that Pembroke's Master Plan is informative as to the spirit of the ordinance, and the variance would be contrary to Section XI-8 of the Master Plan, which states in part, zoning changes were encouraged in order to maintain and enhance the traditional village character of Pembroke" (emphasis added). Allowing an EMC would not be in keeping with the village character of Pembroke.
- c. *Substantial justice is done.* The Board finds that substantial justice is done by denying the variance because any loss Hillside suffers as a result of being required to utilize its existing manual sign rather than an EMC is outweighed by the value the public gains from protecting the safety of persons traveling—whether by foot, car, or otherwise—along the Route 3 corridor from Route 106 to Main Street, reducing distractions caused by signs, discouraging excessive visual competition in signage, and preserving the rural village character of Pembroke.
- d. *The values of surrounding properties are not diminished.* No evidence that granting the variance would have an adverse impact on surrounding properties was presented.
- e. *Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.* The Board finds that no special conditions of the Subject Property distinguish it from other properties in the area such that there is no fair and substantial relationship between the public purposes of the ordinance and the specific application of the ordinance to the Subject Property. A number of other churches own or occupy property on the Route 3 corridor from Route 106 to Main Street. Nothing about the Subject Property renders it less important to enforce the purposes of the ordinance—promoting safety, reducing distractions, discouraging visual competition, and preserving Pembroke's rural character—against the Subject Property. Although it may be less convenient for Hillside to manually change the lettering on its existing sign, the denial of this variance request certainly does not result in a situation where Hillside cannot reasonably make use of the Subject Property.

Dana Carlucci seconded.

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

MOTION TO DENY REHEARING APPEALS FOR CASE #15-13-Z PASSED ON A 5-0 VOTE.

### **REQUEST FOR REHEARING**

**MOTION:** Dana Carlucci moved to approve the rehearing request for Case #15-11-Z as requested by Attorney Michael Tierney, Wadleigh, Starr & Peters PLLC, 95 Market Street, Manchester NH representing applicant Next Level Church, P.O Box 476, Somersworth, NH and schedule the hearing for November 23, 2015. Tom Hebert seconded.

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

REQUEST FOR REHEARING OF CASE 15-11-Z GRANTED ON A 5-0 VOTE.

**The rehearing of Case #15-11-Z is scheduled for Monday, November 23, 2015.**

### **MINUTES OF PREVIOUS MEETINGS**

**MOTION:** Dana Carlucci moved to approve the minutes of September 22, 2015 as amended. Tom Hebert seconded.

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

MINUTES OF SEPTEMBER 22, 2015 APPROVED AS AMENDED ON A 5-0 VOTE.

### **OTHER**

### **OLD BUSINESS**

### **NEXT MEETING**

**Date of next ZBA meeting** – Everett Hodge noted the next ZBA meeting would be on **Monday, November 23, 2015 at 7:00 p.m.**

**ADJOURN Motion:** Tom Hebert moved to adjourn. Bruce Kudrick seconded. Vote was unanimous in favor of motion. Meeting adjourned at 8:25 p.m.

Respectfully submitted,  
Susan P. Gifford