

**MINUTES**  
**PEMBROKE ZONING BOARD OF ADJUSTMENT**  
**November 23, 2015**

**Pending 11-24-2015**

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

**ALTERNATES PRESENT:** Mark Johansen. William Faith

**EXCUSED:** Paul Paradis

**ALTERNATE EXCUSED:** Mark Simard

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

Chairman Bonney called the meeting to order at 7:00 p.m.

**Case #15-14-Z**

Applicant:	Next Level Church PO Box 736 Somersworth, NH 03878
Property Owner(s):	79 Sheep Davis Road LLC 241 Pine Street Manchester, NH 03103
Property Address:	79 Sheep Davis Road Pembroke, NH 03275 Tax Map (561) Lot (6) in the C-1A Commercial/Light Industrial and the AC Aquifer Conservation Districts

**Case 15-14-Z** A request for a Rehearing of Case 15-11-Z was granted on October 26, 2015. The applicant, Next Level Church, P. O. Box 736, Somersworth, N. H. 03878, is requesting a Variance to operate a church at 79 Sheep Davis Road in the C-1 Zoning District. The property is owned by 79 Sheep Davis Road, 241 Pine Street, Manchester, N. H. 03103. The property is located at 79 Sheep Davis Road, Map (561) Lot (6) in the C-1A Commercial/Light Industrial and the AC Aquifer Conservation Zoning Districts.

Mr. Everett Hodge confirmed that all abutters were notified.

Chairman Bonney opened the public hearing at 7:01p.m.

There were 4 regular members and 2 alternate members present. Bill Faith was designated to vote on Case #15-14-Z. 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.

Attorney Michael Tierney of Wadleigh, Starr and Peters, PLLC, 95 Market Street, Manchester, NH 03101, stated that he is here tonight representing Next Level Church and 79 Sheep Davis Road, LLC. Attorney Tierney stated that indoor amusement parks, movie theaters, hotels, motels, restaurants, daycares, preschools, kindergartens and municipal assemblies are allowed in Pembroke's C1 District. Denying church use in the commercial district violates RLUIPA's Equal Terms Provisions and the 1<sup>st</sup>

Amendment. Allowing some churches and secular uses to operate assemblies but not Next Level Church, violates RLUIPA's Non Discrimination Provision. A secular movie such as Star Wars can be shown at 79 Sheep Davis Road without obtaining a variance but the church cannot broadcast Sunday sermons. The same building could be used for municipal services. Attorney Tierney presumes all ZBA members have read the October 19, 2015 material and realize that you can't treat a religious use differently than a nonreligious use. This would be less than equal terms. Strict scrutiny "requires the government to prove that the restriction furthers a compelling government interest." Attorney Tierney stated that interest in keeping tax revenue up is not a factor in any decision. The ZBA would have to make sure the ordinance is crafted to be least restrictive means of affecting a compelling government interest. If 250 acres in the C1 District is already tax exempt, another 2 acres of church use replacing a prior use that was also tax exempt is not a compelling interest.

Attorney Tierney stated that there is no need to get to the ZBA variance criteria. Twice before in two other cases the ZBA has found the variance criteria was met. One variance was for a non-profit Alzheimer's daycare. The history of variances in the area includes approval of a church up the street in 2014. The overlay Aquifer Conservation District has a lot of properties for sale that have been on the market for some time. 79 Sheep Davis Road has been on the market for several years. Attorney Tierney incorporates everything put in writing in his October 19, 2015 letter into this presentation..

Bob Bourque, Pheasant Lane, Pembroke stated that the limited commercial area is 10% of the town. Ninety percent of the town area is available for church use.

Dianne Schuette, Pembroke Street, stated that she echoes the sentiments of many people who spoke at prior hearings but are not present tonight. The town invested in the C1 Commercial area in 1995 to attract businesses.

Peter Gelunis, 415 Pembroke Road, stated that he would like to see the town make a return on its infrastructure investment.

Dave Doherty, 242 Fourth Range Road, stated that he is presently on the Pembroke School Board. He is opposed to removing property designated for commercial use from the tax rolls.

Dana Carlucci asked if the applicant has looked at other properties since the last hearing.

Attorney Tierney stated that Pastor King looked at over a dozen properties.

Dana Carlucci asked if the church could buy a property somewhere else in town. Does this property demand zoning relief?

Attorney Tierney stated that the town does lots of things to encourage economic development. Yet, a property down the street has been vacant five years.

Dianne Schuette stated that several parcels in town have been vacant for five years, since the start of a major recession. The economy is improving now.

Chairman Bonney summarized the case. Chairman Bonney stated that all of the Zoning Board of Adjustment members have read the October 19, 2015 documents in detail. In Case #15-14-Z, the Next Level Church would like to buy this building and use it for church purposes. Attorney Tierney states

requiring and denying a variance to Next Level Church to use an existing assembly for religious assembly violates the RLUIPA Act and the 1<sup>st</sup> Amendment. It was stated that RLUIPA trumps local zoning, and a town cannot treat a religious use on less than equal terms with a non-secular use. If a town does, it must have compelling interest. Tax revenue is not a zoning criterion. Since the church is replacing a tax exempt Alzheimer's daycare, Attorney Tierney maintains there is no reason to look at the five variance criteria. A variance was granted to Presbyterian Church for church use in the C1 District. There is a limited amount of commercially zoned land in the Town of Pembroke. Approximately 10% of town land is zoned commercial to offset residential property taxes. In 1995 the Town of Pembroke invested in infrastructure to attract businesses and wants to get a return on investment from it. Next Level Church looked at a dozen properties in the area. This property meets its needs better than any other property on the market. There are a number of town properties that have been on the market for 2-5 years since 2008. Attorney Tierney noted that some properties were vacant before the recession. Attorney Tierney stated that 79 Sheep Davis Road paid a betterment assessment for 15 years, like all properties that benefitted from the 1995 sewer improvement.

Attorney Tierney addressed the variance criteria: in his letter of October 19, 2015. He incorporates into the letter by reference all previous representations made in the initial variance application and public hearings of August 24, 2015 and September 22, 2015.

There being no further comment, Chairman Bonney closed the public hearing at 7:27 p.m.

**Deliberations:**

Dana Carlucci stated that the Town of Pembroke's zoning does not allow specific assemblies in the C1 Zoning District, such as golf, tennis and swim clubs, hospitals, institutions, convalescent homes, Bed and Breakfasts, and funeral establishments are NOT ALLOWED in the C1 District. Dana stated that the ZBA approved a variance for the Presbyterian Church because of RLUIPA. Unfortunately, we did not have better counsel two years ago and set a standard. This case set a standard, and the Town may not have won a case under RLUIPA in court. Under RLUIPA, it seems that towns cannot bar a church from any district in town.

Bill Faith commended the information in the packet provided by Attorney Tierney on October 19, 2015. It is a well thought out representation. Business is changing. Less business owners are setting up large offices/manufacturing facilities. The Board made a decision that some life on a property may bring other life and stir up development, versus reserving a site with gas, water and sewer for commercial business.

Dana Carlucci referenced the State Highway system. Towns would rather employ residents locally. The State of NH Highway system has plans to connect Route 106 with Interstate 89. A church or country club can go on a septic system. Some businesses need to be on sewer. Four or five years ago, the town had no idea that the National Guard was going to consume 120 acres. The Soucook River commercial district was created and floundered. I believe the ZBA erred in granting a variance to Presbyterian Church.

Bill Faith noted that clean water is important. Some oils and contaminants used in manufacturing make some commercial businesses unsuitable to locate over the Aquifer Conservation area.

Bruce Kudrick noted that the ZBA does not set precedents. Every case is looked at as a new case. When the other church came to the ZBA for a variance, the board was not provided with enough information. The zoning ordinance was set up by the Planning Board and voted on by the residents of Pembroke. I am

disappointed that Attorney Tierney said that Next Level Church does not need a variance. Every entity must follow the zoning ordinance. It does not restrict churches from coming into Pembroke. Churches cannot locate in the C1 District, but can build exactly what they want in any other district. The Master Plan and the zoning ordinance were both adopted by vote of Pembroke residents. There are many options of land to locate in Pembroke, and the Town of Pembroke would be glad to assist in this process, if they were asked.

When the Zoning Board of Adjustment looked at Case #15-11-Z August 24, 2015 and September 22, 2015, the applicant did not meet four of the five criteria for a variance. The Board will review the criteria with the new information provided in Attorney Tierney's October 19, 2015 letter.

Chairman Bonney stated that if we were looking at this appeal based on the zoning ordinance and criteria, we probably would deny the variance. I am not sure how "Religious Land Use" and "Institutionalized Persons" go together to form this Act. Provisions of RLUIPA provide that towns cannot discriminate against "religious use" (churches) anywhere in town. Even if we allow churches to locate in 90% of the land in town, because we have a Presbyterian church located in the C1 District, we have to allow another church in the C1 District. The town wanted business and commercial use in the C1 District to offset property taxes. The town could end up spending a lot of money on attorneys and Next Level Church would end up right where they want to be.

Mark Johansen agreed that the Town may lose court costs, along with tax revenue.

Chairman Bonney stated that we could as a Board look at the variance criteria.

Bruce Kudrick stated that he understands the reason for RLUIPA, but it ends up discriminating against this town.

Chairman Bonney added, and all towns in the United States because this is a Federal Act.

Bill Faith stated that the Town of Pembroke is not protected by the Federal government.

Bruce Kudrick stated that RLUIPA is political, and it is sad that the Federal government does not help towns.

ZBA members discussed the Variance criteria.

- 1) The variance will not be contrary to the public interest. The use is contrary to the public interest.
- 2) The spirit of the ordinance is observed. Church use deprives Pembroke residents from having close by employment in the commercially zoned district.
- 3) Substantial justice is done. There is a preexisting building and parking lot capable of handling this use.
- 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. This is a small 2 acre lot in the Commercial District.

**MOTION:** Bruce Kudrick moved to APPROVE a Variance in **Case 15-14-Z, Z**, for applicant, Next Level Church, P. O. Box 736, Somersworth, N. H. 03878, to operate a church at 79 Sheep Davis Road in

the C-1 Zoning District with the following conditions:. Must follow all State and local rules and regulations.

Bill Faith seconded.

**VOTE:**            BILL F - YES            TOM - YES            BRUCE - NO  
                      BILL B - YES            DANA- NO

MOTION TO APPROVE VARIANCE WITH CONDITIONS PASSED ON A 3-2 VOTE.

Tom Hebert noted that businesses today typically operate a smaller office and manufacturing space, with warehouses located in the middle of the country when needed. The Zoning Board of Adjustment would like to communicate to Federal representatives the impact of the lack of protection to all NH towns from provisions of RLUIPA.

**PUBLIC HEARING**

Case #15-15-Z

Applicant:            Peter Satterfield/Marie Straiton  
                              708 Cross Country Road  
                              Pembroke, NH 03275

Property Owner(s):    Peter Satterfield/Marie Straiton  
                              708 Cross Country Road  
                              Pembroke, NH 03275

Property Address:     708 Cross Country Road  
                              Pembroke, NH 03275  
                              Tax Map 260 Lot 38 located in the B-1 Business/Residential and AC  
                              Aquifer Conservation Zoning Districts.

**Case 15-15-Z** A request has been made for a Variance under Article V Dimensional and Density Regulations, §143-21 Table of Dimensional and Density Regulations. The applicant, Peter Satterfield and Marie Straiton, 708 Cross Country Road, Pembroke, NH is requesting a Variance to construct an addition 21.7 feet from the side property boundary. A Variance is required because the required set back in the R-3 Zoning District is 30 feet. The property is owned by Peter Satterfield and Marie Straiton. The property is located at 708 Cross Country Road, Map (260) Lot (38) in the R-3 Rural / Agricultural-Residential Zoning District.

Mr. Everett Hodge confirmed that all abutters were notified.

After a brief recess, Chairman Bonney called the meeting back into order at 7:55 p.m. and opened the public hearing at 7:56 p.m.

There were 4 regular members and 2 alternate members present. Mark Johansen was designated to vote on Case #15-15-Z. 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.

The tax card, photographs of the proposed addition, the north side of the property, the front and rear of the house at 708 Cross Country Road, A sketch of the proposed addition floor plan, and a Variance Plan for Tax **Map 935 or 260**, Lot 38 prepared November 4, 2015 for Peter Satterfield and Marie Straiton by JJ Belanger Land Surveying, PLLC, 61 Old Hopkinton Road, Dunbarton, NH 03046 were submitted.

Peter Satterly addressed the variance criteria:

Please give a detailed description of your proposal below:

We are asking that the 30 foot setback on the east side of our property be relaxed in order to accommodate a kitchen addition that will align with the present structure of our 1783 Colonial home. The addition will not violate the setback any more than the present structure, and will still be more than 20 feet from the abutting neighbor's driveway.

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

The existing property already touches the property line, a situation that was created back before the existence of town regulations. Our proposal stays back 20+ feet from the driveway in question. There will be no impact on the public at all, even the neighbor who uses the private driveway.

**1. The spirit of the ordinance is observed.**

We are not encroaching on the property line any more than the existing structure already is, and has been since the setback regulations have been established. (100+ years) In fact, we will still be more than 21 feet away from the property line with the new addition.

**2. Substantial justice is done.** Neither we, nor the Town of Pembroke, nor the owner of the driveway had anything to do with the present location of this driveway to the Haggett farm behind the property. This practice of allowing a driveway to be built on what is now the property line is no longer permitted. While we wish the driveway was further away from our house, it isn't. Therefore, we are requesting a Variance from the 30 feet side setback ordinance.

**3. The values of surrounding properties are not diminished.** If anything, the new addition will enhance the values of surrounding properties. By allowing the variance to the setback ordinance, the addition can be placed between the structural posts of the existing Colonial home. This placement increases the value of the property for the future, instead of a chopped up look that would diminish the value of the property as a whole. The value of all houses in the neighborhood should increase. The building will add to the tax base for Pembroke and should increase the value of the abutting property.

**4. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

**i. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because:**

**ii. The proposed use is reasonable.**

We live in an antique home (1783) that has a preexisting layout. The "layout" that creates this hardship is that, despite the 3.39 acres associated with the property, a private drive was deeded (?) to the neighbor out back around 100 years ago. The private drive was issued with no thought of any setback rules and now represents an obstacle to building an appropriate kitchen addition that maintains the character of the antique home.

**B. If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to make a reasonable use of it.**

Our proposed addition is not any closer to the property line than the existing structure. In fact, the addition keeps the structure 21+ feet from the property line. There are no safety issues created, and no impact on the general public whatsoever. Without this variance, the addition creates the possibility of lowering the property value, a situation not good for this property or other properties in the area.

While we are not knowledgeable about the property lines of all the houses in the area, we don't know of any houses in our neighborhood who have a private driveway built right next to their house. Neighbors are in support of our addition.

Peter Satterly stated that he and Marie thought that the driveway was a right-of-way they were giving to an abutter. He found out it actually belonged to the abutter. Peter displayed a sketch of the proposed kitchen. Without a variance, the plan is cut down the middle of the kitchen sink. With another 6 feet, the addition can go to the corner of the existing house. The original purpose of the driveway was to hand lemonade to the tractor driver. The proposed addition will be no closer to the driveway than the existing house. The design is for a quaint country kitchen that will be 21.7 feet from the property line where 30 feet setback is required. The plan still allows 21.7 feet side setback.

Everett Hodge stated that during "Plan A", Peter Satterfield discovered that the driveway does not belong to his property. Everett Hodge issued a building permit for "Plan B" which did not have the modern amenities desired and so a Variance is being requested for "Plan C".

Mark Johansen noted that this is an active driveway used by abutters to access two houses behind the Satterly property and farms across the street.

Rishard Beaudet, 716 Cross Country Road, stated that the addition will look good. He and Pamela Beaudet are in favor of the variance.

Chairman Bonney summarized the case. This is **Case 15-15-Z**, a request for a Variance under Article V Dimensional and Density Regulations, §143-21 Table of Dimensional and Density Regulations. The applicant, Peter Satterfield and Marie Straiton, 708 Cross Country Road, Pembroke, NH is requesting a Variance to construct an addition 21.7 feet from the east side property boundary where 30 feet setback is required in the R-3 Zoning District. The property is owned by Peter Satterfield and Marie Straiton. The property is located at 708 Cross Country Road, Map (260) Lot (38) in the R-3 Rural / Agricultural-Residential Zoning District. The house is immediately next to a driveway utilized by two abutting houses out back. As originally designed, and meeting the setback, the addition would break up the kitchen. The lot is 3.39 acres, not close to neighbors but close to the driveway. Neighbors are in favor of the addition. With the variance, the addition will be no closer to the driveway than the existing house. The applicant cannot build the as they would like, while maintaining the gunstock corners, without a variance. The unnecessary hardship is that the driveway was deeded to abutters 100 years ago, and provides access to two houses and a farm behind the applicant's property.

There being no further comment, Chairman Bonney closed the public hearing at 8:15 p.m.

Bruce Kudrick stated that the applicants have a situation where the house was built at the edge of the property in 1783 and it was not set up for modern conveniences that we have in our kitchens today. The applicant also wants to preserve the architectural integrity of the colonial house.

**Deliberations:** ZBA members discussed the Variance criteria. Bruce Kudrick .

- 1) The variance will not be contrary to the public interest. Agree. The house was built in 1783 (before zoning regulations), and the addition will align with the existing house.
- 2) The spirit of the ordinance is observed. The addition is no closer to the driveway than the existing house is, and still leaves 21.7 feet for the side setback
- 3) Substantial justice is done. The house was built in 1783 (before zoning regulations), and the addition will align with the existing house.
- 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 driveway was deeded to abutters in back of the property 100 years ago to access two houses and a farm. The driveway location is an obstacle to building an appropriate kitchen addition.

**MOTION:** Bruce Kudrick moved to APPROVE a request for a **Variance for Case 15-15-Z** under Article V Dimensional and Density Regulations, §143-21 Table of Dimensional and Density Regulations. The applicant, Peter Satterfield and Marie Straiton, 708 Cross Country Road, Pembroke, NH is requesting a Variance to construct an addition 21.7 feet from the side property boundary in the R-3 Zoning District, where the required setback is 30 feet. The property is owned by Peter Satterfield and Marie Straiton. The property is located at 708 Cross Country Road, Map (260) Lot (38) in the R-3 Rural / Agricultural-Residential Zoning District.

with the following conditions:

1. Must follow all State and local rules and regulations.
2. Must follow the site plan dated November 4, 2015 submitted with application.

Dana Carlucci seconded.

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

MOTION TO APPROVE VARIANCE WITH CONDITIONS PASSED ON A 5-0 VOTE.

### **MINUTES OF PREVIOUS MEETINGS**

**MOTION:** Tom Hebert moved to approve the minutes of October 26, 2015 as amended. Bruce Kudrick seconded.

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

MINUTES OF OCTOBER 26, 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, December 28, 2015 at 7:00 p.m.**



Pending 11-24-2015

**ADJOURN Motion:** Tom Hebert moved to adjourn. Mark Johansen seconded. Vote was unanimous in favor of motion. Meeting adjourned at 8:27 p.m.

Respectfully submitted,  
Susan P. Gifford  
Recording Secretary