

VILLAGE OF PITTSFORD
PLANNING AND ZONING BOARD OF APPEALS
Special Meeting – September 15, 2015 at 4:00 PM

PRESENT:

Acting Chairperson: Susan Lhota
Members: Jo Ann Shannon
Heather Erwin
Jeffrey Bove

Attorney: Mindy Zoghlin
Recording Secretary: Linda Habeeb

Member Lhota explained that this is a Special Meeting to address Planning and Zoning Board issues related to the 75 Monroe Avenue Project. She stated that she is continuing in the position of Acting Chairperson for the 75 Monroe Avenue matter.

Ms. Lhota then asked the PZBA Secretary to read the public notice for the special meeting and to explain the methods used to notify the public. The Secretary read the special meeting notice and stated that on September 10, 2015, the notice was sent to the Brighton-Pittsford Post and the Democrat and Chronicle newspapers, it was posted on the Village website, it was sent out through the Village Newsletter, it was sent to an email list of members of the public interested in this matter, and it was posted in the Village Hall.

Ms. Lhota stated that the Village of Pittsford Code of Ethics requires all Zoning Board of Appeals meetings to begin with disclosure of conflicts of interest, potential conflicts of interest, and circumstances where there is a potential appearance of impropriety.

Member Lhota stated that she is making a public disclosure that at the August 17, 2015 Zoning Board of Appeals meeting, during a recess, the Village Mayor took her by the arm, escorted her into his office, closed the door, and asked that she read a memorandum from the Village Board of Trustees to the ZBA dated July 12, 2015 into the public record. The July 12th memo was made a matter of public record and was sent to the attorneys for Pittsford Canalside Properties (PCP) on August 12, 2015. By letter dated August 14, 2015, PCP submitted comments to the ZBA responding to the July 12th memorandum.

Ms. Lhota stated that this incident did not influence her decision and was not the basis upon which she rendered her determination. She further stated that she does not believe that the Mayor's conduct prejudiced PCP, but that the Mayor's ex parte communication did not provide PCP an appropriate opportunity to respond and state its case in opposition to the memo again. She stated that she believes that the Mayor's conduct is a circumstance where there is the appearance of impropriety.

Member Erwin stated that she is making a public disclosure that at the August 17, 2015 Zoning Board of Appeals meeting, during the same recess, one of PCP's principals, Anthony DiMarzo, approached her and made statements to her about his dissatisfaction over the number of public

meetings PCP attended prior to the APRB appeal and accusing the ZBA of being hand-picked by the Mayor specifically to deny the PCP appeal. Mr. DiMarzo's comments mirror prior public comments PCP made in connection with this appeal. She stated that this incident did not influence her decision and was not the basis upon which she rendered her determination.

Member Lhota stated the Board's Special Counsel disclosed the ex parte communication to PCP's counsel and the Village by letter dated August 27, 2015, and the Secretary included the letter in the record for this matter.

Member Bove stated that he is recusing himself from the discussion for this matter.

Ms. Lhota stated that after the August 17th meeting, the Board drafted, revised, and finalized written findings in support of the Board's determination to PCP's appeal from APRB's determination of December 10, 2014. She then gave the Findings document, dated September 15, 2015, to the Secretary to include in the record of this matter.

Motion: Member Lhota made a motion, seconded by Member Erwin, to adopt the Board's findings, dated September 15, 2015, in support of the determination of August 17, 2015 concerning PCP's appeal from the APRB's determination of December 10, 2014.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on September 15, 2015.

Member Lhota stated that she and Member Erwin have made public disclosures about circumstances where there is a potential appearance of impropriety. The Mayor made a statement to Ms. Lhota about the July 12th memo, and the memo had already been made a part of the public record and sent to PCP's attorneys on August 12, 2015.

She further stated that by letter dated August 14, 2015, PCP submitted comments responding to the July 12th memo. PCP's August 14th letter included a claim that the Mayor and certain members of the Village Board engaged in inappropriate conduct against the Westport Crossing project, which was intended to undermine approvals for the project. Even though PCP responded to the July 12th memo, the Mayor's ex parte communication did not provide PCP an opportunity to respond and state its case in opposition to the memo once again.

She stated that Mr. DiMarzo made statements to member Erwin about his dissatisfaction over the number of public meetings PCP attended prior to the APRB appeal and accusing the ZBA of being hand-picked by the Mayor, specifically, to deny the PCP appeal. Even though Mr. DiMarzo has made these statements in the past, his ex parte communication did not provide the public an appropriate opportunity to respond.

Member Lhota stated that this Board is highly sensitive to the appearance of impropriety posed by these ex parte comments, particularly in light of PCP's allegations of prior inappropriate conduct.

Motion: Member Lhota made a motion, seconded by Member Erwin, to reopen the public hearing of PCP's appeal of the APRB's determination of December 10, 2014.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on September 15, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, that the ZBA hereby sets its next regular meeting, September 28, 2015, for a public hearing to rehear the appeal of PCP from the decision of Village APRB in regard to the 75 Monroe Avenue project, and further that the notice of the public hearing be published in the Rochester Democrat and Chronicle newspaper, in addition to the Village's official newspaper, to ensure sufficient notice is given to the public.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on September 15, 2015.

Member Lhota stated that PCP has asked the ZBA to extend the statute of limitations to challenge the August 17, 2015 determination. She stated that Counsel for the ZBA has provided Board members with two versions of draft tolling agreements. The first version of the draft tolling agreement did not have the APRB as a party to the agreement and did not toll the APRB denial of December 10, 2014. The second version included the APRB as a party to the agreement and referenced the APRB denial of December 10, 2014.

Motion: Member Lhota made a motion, seconded by Member Erwin, that the ZBA may enter into the first draft tolling agreement with PCP to extend the statute of limitations to challenge the August 17, 2015 determination by 30 days. This is the draft tolling agreement that did not have the APRB as a party to the agreement and did not toll the APRB denial of December 10, 2014.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on September 15, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to hereby appoint the firm of Bansbach Zoghlin P.C., to represent the ZBA in any lawsuit or special proceeding related to the appeal of PCP from the decision of the Village APRB in regard to the 75 Monroe Avenue project.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on September 15, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to hereby appoint the firm of Bansbach Zoghlin P.C., to represent the PZBA in any issue regarding the 75 Monroe Avenue project.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on September 15, 2015.

Member Lhota stated that at a special meeting on December 11, 2014, the Planning Board granted PCP's application for final site plan approval for the 75 Monroe Avenue project, subject to 22 conditions. On January 9, 2015, PCP applied to the Planning Board for an extension of time to comply with conditions #1-4 of final site plan approval. On March 16, 2015, The Planning Board extended PCP's time to comply with Condition #3 to September 21, 2015. By letter dated August 31, 2015, BME Associates., on behalf of PCP, asked to the Planning Board to extend the time to satisfy Condition #3.

Motion: Member Lhota made a motion, seconded by Member Erwin, for the Planning Board to grant PCP's request to extend the time to satisfy Condition #3 and that PCP may have until October 21st 2015 to satisfy Condition #3 of final site plan approval for 75 Monroe Avenue.

9.15.15 PZBA Sp. Mtg.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on September 15, 2015.

Adjournment: There being no further business, Member Lhota adjourned the meeting at 4:30 pm.

FINDINGS
VILLAGE OF PITTSFORD ZONING BOARD OF APPEALS
APPLICATION OF PITTSFORD CANAL PROPERTIES LLC
APPEALING APRB DETERMINATION
DENYING ITS APPLICATION FOR A CERTIFICATE OF APPROVAL

VILLAGE OF PITTSFORD

2015 SEP 15 PM 4 32

RECEIVED

Applicant: Pittsford Canalside Properties, LLC
Address: 75 Monroe Avenue, Village of Pittsford
Tax Account #: 151.18-1-15.1
Zoning District: R-5
Relief Sought: Appeal from APRB Determination dated December 10, 2014 denying Certificate of Approval and Interpretation of Zoning Code.
Applicable Laws: New York Village Law section 7-712(a)(4) and Pittsford Village Code sections 210-113 and 210-65.
Notice
Of Publication: July 9, 2015
Public Hearing
Date: July 20, 2015

This is an appeal from the Village of Pittsford Architectural Preservation and Review Board ("APRB") decision dated December 11, 2014, denying Pittsford Canalside Properties, LLC ("PCP")'s application for a Certificate of Approval for the construction of 167 apartment units within five multi story buildings; a community clubhouse with exterior swimming pool, a 125 seat restaurant; docks along the canal frontage; associated parking including parking below each of the apartment buildings; landscaping; lighting and utilities.

Background

PCP applied to the APRB for a Certificate of Approval on March 21, 2013. PCP submitted the following documents to the APRB in support of its application:

Westport Crossing Application for Certificate of Approval dated 3/21/2013 with Letter from Pittsford Canalside Properties, LLC to APRB dated 3/21/2013 transmitting:

- Tab 1: Application for Certificate of Approval.
- Tab 2: December 18, 2012 Special Permit resolution (Resolution No. 20 of 2012).
- Tab 3: SEQRA Negative Declaration dated 8/9/2012.

- Tab 4: Preliminary site plans prepared by BME Associates dated last revised 2/6/2013.
- Tab 5: Architectural Plans prepared by Martin Associates dated last revised 3/21/2013 .

The APRB conducted informational meetings regarding PCP's application on April 1, 2013 and November 3, 2014. At the conclusion of the November 3, 2014 meeting, "the applicant indicated that it would prepare a formal application review pending the approval of the final site plan and the granting of applicable variances."

The applicant submitted BSB Design scaled elevation drawings dated November 29, 2014; BSB Design Building Footprints dated November 24, 2014; and BME Final Site Plan last revised November 25, 2014.

The APRB considered PCP's application at public meetings conducted on December 1, 2014 and December 10, 2014. The APRB denied PCP's application for a Certificate of Approval on December 10, 2014.

PCP appealed the APRB decision on December 11, 2014.

By Order and Judgment dated March 5, 2015, the Monroe County Supreme Court, Honorable John M. Ark presiding:

1. decreed that PCP properly and timely filed the APRB Appeal Determination on December 11, 2014 and that the ZBA has jurisdiction to hear the appeal;
2. directed the ZBA to accept the APRB Appeal application, issue public notice, schedule a hearing and make a determination on the APRB in accordance with NY Village Law section 7-712-a;
3. decreed that the ZBA may not reject or deny the relief requested in the APRB Appeal on the grounds that (i) it is incomplete as filed on December 11, 2014; or (ii) that ZBA lacks jurisdiction to hear the APRB Appeal as a result on the adoption of Local Law No. 17 of 2014.

Pittsford Canalside Properties, LLC v. Village of Pittsford Zoning Board of Appeals et al (Index No. 2015-280) (the "Order and Judgment").

On June 17, 2015 the APRB adopted Findings of Fact in support of its December 10, 2014 decision denying PCP's application for a Certificate of Approval.

On June 25, 2015 PCP submitted a memorandum to the ZBA dated June 25, 2015, together with the Affidavit of Christopher DiMarzo sworn to January 9, 2015

(Tab 2); the Memorandum of Law dated January 9, 2015 (Tab 2); the Article 78 Petition with Exhibits dated January 9, 2015 (Tab 3) and the March 5, 2015 Order and Judgment (Tab 4).

On July 13, 2015 PCP submitted a memorandum to the ZBA dated July 13, 2015, together with copies of documents previously submitted in support of its APRB Appeal Application and the Westport Crossing: Response to APRB Findings to Disapprove the Certificate of Approval (Exhibit "A"); Letter from SHPO to Village of Pittsford dated May 23, 2012 (Tab 1); Building 3 elevations dated November 29, 2014 (Tab 2); Letter from Crawford & Stearns dated April 27, 2011 (Tab 3); Resolution No. 20 of 2012 (Tab 4) and Westport Crossing - Empirical Analysis Matrix (Tab 5). Tab 5's Empirical Analysis Matrix had a column titled "Final Site Plans Feb. 2014."

The ZBA conducted a public hearing on the PCP appeal on July 20, 2015. The ZBA kept the public comment period open until August 10, 2015 and adjourned the matter to August 17, 2015 for deliberations.

The ZBA received the following public comments after the hearing:

On July 21, 2015 PCP submitted PDFs of the final site plans last revised July 13, 2015 and final landscaping plans last revised July 7, 2015.

On July 22, 2015 PCP submitted a Table of Contents for Exhibit "A" and the five tabbed documents it submitted to the ZBA on July 13, 2015. PCP also submitted a revised Empirical Analysis intended to replace the one behind Tab 5, which was revised to reflect the final site plans as approved by the ZBA on November 11, 2014.

On August 7, 2015 Mike Reynolds submitted public comments.

On August 8, 2015 the APRB submitted a memorandum.

On August 10, 2015 George Wallace submitted public comments.

On August 12, 2015 the Village of Pittsford submitted public comments consisting of a letter from Hodgson Russ dated August 14, 2015 with Exhibit A (a memo from the Village Board of Trustees to the ZBA dated July 12, 2015).

On August 14, 2015 PCP responded to the public comments submitted by Mike Reynolds and the Village of Pittsford consisting of PCP's memorandum dated August 14, 2015 with Attachment A (Roger Brown letter) and Harris Beach letter dated August 14, 2015 with Exhibit A (Justice Ark's Amended Decision dated October 14, 2014 in *PCP v. Village of Pittsford et al* (Index No. 2014-5733)).

SEQRA

On October 12, 2010, the Village Board declared itself as lead agency for SEQRA review of the project. The project was classified as a Type I action requiring coordinated review. On August 9, 2012, the Village Board issued a Negative Declaration. Included in that Negative Declaration were comments from the APRB regarding potential aesthetic impacts of the project. Because the APRB was an involved agency and the project was a Type I action requiring coordinated review, the negative declaration is binding on the APRB. No further SEQRA review is required.

GML 239-m Referral

On January 11, 1994 the Village of Pittsford and Monroe County entered into an Agreement regarding exceptions to the New York General Municipal Law (“GML”) 239-m requirement for county planning agency review of certain local matters (the “GML 239-m Agreement”).

The GML 239-m Agreement exempts applications involving architectural review and applications involving interpretation of zoning ordinance provisions from GML 239-m review.

The issues raised in this appeal involve architectural review and interpretation of zoning ordinance provisions and are therefore exempt from GML 239-m review.

Village Board Request to Extend Comment Period

The ZBA closed the public hearing on July 20th and left the public comment period open to August 10th.

On August 10th the Village Board asked of an extension until the end of the day on Wednesday August 12 to submit comment.

The Village Board explained that it was meeting on August 11th and the comments involve a response to legal issues raised by PCP that the Village Board wished to discuss with counsel.

The ZBA sent the request to the applicant.

The Village Board submitted comments on August 12th.

On August 13th PCP stated it was not in a position to consent to the extension of the comment period, but requested an opportunity to respond to the any comments received by August 14th.

PCP submitted response to comments on August 14th.

The ZBA concludes that:

1. the Village Board's request for an extension of time to August 12 to submit public comments in connection with this matter should be granted; and
2. PCP's request for an extension of time to August 14 to respond to any public comments should be granted.

The bases for this determination are that:

1. the Village Board of Trustees did not have a regularly scheduled meeting between the close of the public hearing on July 17 and the end of the public comment period on August 10; and
2. PCP was given an opportunity to and did in fact respond to all public comments on August 14, 2015.

The Application for a Certificate of Approval is Complete

The Village Code requires the application for a Certificate of Approval to include a verification from the Village Clerk's Office that: (1) the project conforms to the Zoning Code; (2) is a permitted nonconforming project; or (3) that all necessary variances for the proposed project have been granted. Section 210-62(C)(1)(f).

The ZBA finds that the requirements of Section 210-62(C)(1)(f)(1) have been met based upon the following facts:

On December 18, 2012 the Village Board passed Resolution #20 of 2012 approving PCP's application for a special permit subject to final site plan approval by the Planning Board and issuance of a Certificate of Approval by the APRB.

The Special Permit Resolution states that: "The Board of Trustees hereby determines that, subject to precise definition as part of the Site Plan approval and as part of the application for a Certificate of Approval by the APRB, the regulating plan is in compliance with the "Building Design Standards" ... of the Code ..." p. 9.

On November 11, 2014 the Planning Board passed a resolution granting PCP final site plan approval for the project.

The ZBA finds that Section 210-62(C)(1)(f)(2) does not apply based upon the following facts:

There is no issue with respect to a prior nonconforming use.

The ZBA finds that the requirements of Section 210-62(C)(1)(f)(3) have been met and PCP's application for a Certificate of Approval is complete based upon the following facts:

On October 29, 2014 the Village ZBA passed the following resolutions regarding 75 Monroe Avenue project:

1. That PCP did not require an open space variance for the project.
2. Granting PCP's application for an area variance to eliminate the requirement of an elevated speed table at the project entrance.
3. Granting PCP's application for an area variance for restaurant parking in the side yard.
4. Granting PCP's application for an area variance to install two monument signs at the entrance of 75 Monroe Avenue.

The ZBA interprets Judge Ark's decision dated March 5, 2015 in *Pittsford Canalside Properties LLC v. Village of Pittsford Zoning Board of Appeal et al* (Index No. 2014-280) as instructing the ZBA to assume the application requirement has been met.

Application for Interpretation

PCP submitted three memoranda to the ZBA in connection with its appeal. They are dated June 25, 2015; July 13, 2015 and August 14, 2015.

All of these memoranda contain legal argument about whether the APRB had the power to deny PCP's application for a Certificate of Approval based on mass and scale.

All of these memoranda cite provisions of the Village of Pittsford Zoning Ordinance.

The ZBA has the power to decide any question involving the interpretation of any provision of the Zoning Code. Village of Pittsford Zoning Code Section 201-113(B)(1).

It has exclusive authority to interpret provisions of the zoning ordinance, and this power of interpretation includes the power to determine whether the APRB had the power to deny PCP's application for a Certificate of Approval based on mass and scale and whether the ZBA may consider mass and scale in connection with this appeal.

Whether a Certificate of Approval May Be Denied on the Basis of Mass and Scale

PCP asks the ZBA to interpret whether APRB has the right to deny a Certificate of Approval for a Project on the basis of “mass and scale.”

The ZBA concludes that (1) the APRB may deny a Certificate of Approval on the basis of “mass and scale”; and (2) the ZBA may consider “mass and scale” in this appeal on the basis of the following:

1. **The Village Board delegated its power to assess the compatibility of a proposed building’s height, scale, mass and bulk to adjacent and nearby buildings and the surrounding neighborhood to the APRB under Village Code Article XIV:**

- a. In its Certificate of Approval review, the APRB must consider any factors it may deem pertinent, including (but not limited to) the relationship of the building or structure to open spaces, public ways, signs, landscaping and accessory uses located at and nearby the premises being considered. Village Code 210-60(A)(1)(e).
- b. In April 2010 the Village Board amended Section 201-60(A)(1) to require the APRB to consider “compatibility of the building height, scale, mass and bulk to adjacent and nearby buildings and the surrounding neighborhood.” Village Code 210-60(A)(1)(f)(emphasis added).
- c. The APRB must consider composition, design, texture and other visual qualities in issuing a certificate of approval for new construction. Village Code section 210-61(B)(2).
- d. The Zoning Code prohibits any new construction in the Village until the APRB issues a Certificate of Approval. Village Code section 210-62(A)(1).
- e. The NYS Office of Parks, Recreation and Historic Preservation comments in connection with the SEQRA review were made in connection with environmental review of the project and, in any event, are not binding on the APRB.

2. **The APRB’s power to issue a Certificate of Approval under Article XIV of the Village Code is in addition to zoning and planning powers enjoyed by the municipality and serves a different purpose than municipal zoning and planning powers. The basis for this opinion is as follows:**

- a. The Village Code provides for the creation of an Architectural Preservation Review Board (“APRB”) pursuant to NY General Municipal Law 96-a. Village Code 210-57.

- b. NY General Municipal Law 96-a empowers a Village Board to protect historical places in addition to any power or authority it has under planning and zoning laws. NY GML section 96-a.
- c. The purpose of the APRB to protect, enhance, perpetuate and use buildings, structures, places and sights of historic, architectural, cultural or aesthetic value of the Village. Village Code 210-59.
- d. The APRB does not have a zoning purpose. Its purpose is to protect historical places.
- e. The APRB is not allowed to consider an application for a Certificate of Approval until the municipality has determined that all zoning requirements have been established. Village Code Section 210-62(C)(1)(f).
- f. The APRB would never be called upon to review an application unless the proposed use was lawful and complied with zoning requirements.

This principal was decided by the Fourth Department in *Zartman v. Reisem*, 59 A.D.2d 237 (4th Dep't 1977). The Fourth Department held that:

This certificate does not take the place of zoning approval but rather, it is in addition to the requirements of compliance with the zoning regulations, much the same as the requirements of building or health codes are superimposed on zoning requirements. Similarly, reliance upon presumed experts to assess the propriety of planned improvements is not unlike the use of building and engineering experts to determine compliance with building codes before the issuance of a permit. The purpose of the Preservation Board is not a zoning purpose to protect the public health, safety and welfare generally [citations omitted]. The zoning district and the permitted zoning uses have already been established by ordinance and must be met before the Preservation Board comes into the picture. But once it is established that the contemplated use is lawful under the zoning ordinances, then if the property is in a preservation district, the Preservation Board must review the application and determine whether the proposed improvement is consistent with the purpose of the Preservation Ordinance to "preserve the integrity of areas and structures which have been determined to merit special protection" by prior designation of the City Council (Rochester City Code, § 115-37, subd B). The power of the

board is in a sense superficial. It must be concerned with preserving the appearance of existing structures and uses and insuring that new improvements are consistent with the special values and character of the district. *Zartman v. Reisem*, 59 A.D.2d 237 at 239-240 (4th Dep't 1977).

The Preservation Board may deny a Certificate of Approval even if the applicant has received all necessary zoning approvals:

The [preservation] Board is charged with the responsibility of denying a certificate of appropriateness in the reasonable exercise of its powers if the proposed use or improvement fails to meet the standards of the preservation law, permitted uses of the zoning laws, notwithstanding. Indeed, the Preservation Board would never be called upon to review an application unless the proposed use was lawful [citation omitted]. *Zartman* at page 240.

The property is subject not only to the zoning ordinances but also to the additional requirement of this special type of approval because the Common Council has, by prior legislation, placed it in a preservation district. The case is not unlike the power of municipal bodies to deny a special permit to a legislatively authorized use which is subject to the additional requirement of a special permit [citations omitted]. The local legislature having the power to prohibit specific uses in residential districts altogether may lawfully require that those permitted uses be subject to the additional requirement of a special permit, or of Preservation Board approval in preservation districts, as the case may be. *Zartman* at 240.

3. **The Village Board's decision granting the Special Permit and Regulating Plan does not bar the APRB from considering mass and scale.** Resolution 20 of 2012 page 2; 3; 6, para. 8; pages 7; 9; 10 and 11.

- a. Resolution 20 of 2012 stated that "the proposed development will be compatible, in terms of scale, massing, orientation, and architectural design, with the visual character of the Village and will not alter the essential character of the neighborhood nor be detrimental to the residents thereof." (Page 3, para. 2). This is classic zoning language.

- b. Resolution 20 of 2012 states, “The concept design will require refinement to ensure the proposed project is visually compatible with the Village. In particular, adjustments will need to be made to the project’s distribution of bulk, mass and scale. The Village, Schoen Place and canal commercial districts in villages of similar size to Pittsford are comprised primarily of one- and two-story structures. (Refer to appendices 1 through 4). In canal commercial districts, larger taller and longer buildings are usually surrounded by lower barns and sheds giving a sense of hierarchy and a distinctive varied profile to these areas. To be visually compatible with the Village and the canal commercial concept this project will need to incorporate a variety of scale similar to authentic canal commercial districts.” (page 9, para (e).
- c. Resolution 20 of 2012 states was explicitly subject to the APRB’s issuance of a Certificate of Approval. Condition one (1) of the Special Permit granted by Resolution 20 provides that the Special Permit is subject to the issuance of a Certificate of Approval by the APRB in accordance with Article XIV of the Village Code (Page 11, item 1).
- d. Resolution 20 of 2012 states that the building height and percentage of building stories were established as maximums (Page 2, last paragraph). It did not establish minimum story heights or minimum percentages of building stories.
- e. The project has changed since the Village Board of Trustees issued the Special Permit in 2012. So even if the Special Permit somehow limited the APRB’s authority to consider mass and scale, that limitation would only apply to the project as it existed in 2012.

4. The Village Zoning Code’s R-5 Zoning sections dos not bar the APRB from considering mass and scale.

Section 210-19.2 set forth the use regulations for the R-5 District and the special permit review procedures the Village Board of Trustees must follow in considering applications in an R-5 District.

Section 210-19.3 sets for the building dimensional standards for the R-5 District. It includes things like the maximum permitted building heights, minimum building setbacks, and minimum floor area.¹

¹ With respect to multiple family dwellings, section 210-19.3(B) states that:

(a) No building shall exceed 4 1/2 stories in height.

(b) No more than half the footprint area of the buildings within a complex shall exceed 3 1/2 stories in height.

Section 210-19.4 set forth Building Design Standards for the R-5 District. It covers things such as which way the building's primary facade must face, encouragement of unenclosed entrances or siting porches, types of building materials, and screening of mechanical equipment.

Section 210-19.5 sets the Site Design Standards for the R-5 Zoning District and details about such things as the construction of new streets, sidewalks and alleys and parking, as well as the conservation of mature specimen trees, landscapes, streams, wetlands and topography.

Nothing in Article VA of the Village Code limits the APRB's authority to consider mass and scale in connection with issuance of a Certificate of Approval.

5. The Village did not take back the authority it granted to the APRB to consider mass and scale.

- a. Nothing in the Village Code limits the APRB's ability to evaluate mass and scale.
- b. The Village Board cannot usurp the APRB's power to consider mass and scale. The Village Board delegated its power to assess the compatibility of a proposed building's height, scale, mass and bulk to adjacent and nearby buildings and the surrounding neighborhood to the APRB under the zoning ordinance. Village Code 210-59(A)(1)(f).
- c. Once a legislative body delegates its power to an administrative body, that delegation cannot be undone except by amendment of the zoning ordinance. *See, Commco, Inc. v. Amelkin*, 62 N.Y.2d 260, 267-68 (1984)(Holding that a Town Board may only alter a ZBA's decision by Article 78 or amendment of the zoning ordinance); *Town of Smithtown v. Haynes*, 278 A.D.2d 312 (2d Dep't 2000)(Holding that stipulation of settlement entered into by Town Attorney usurped the ZBA's jurisdiction and cannot be enforced absent a zoning ordinance amendment); *Vil. of Pomona v. Creative Corners*, 86 Misc.2d 994 (Sup. Ct. Rockland Co. 1976) (Holding that Village Board could not usurp the jurisdiction of the ZBA and Building Inspector by issuing conditional certificate of occupancy for operation of a nursery school in a zoning district where that use was not permitted).

(c) To prevent an out-of-scale, monolithic appearance, larger buildings shall be visually divided into smaller sections no longer than 150 feet in length by gaps, recesses, or other architectural devices.

(d) Accessory structures, such as clubhouses, pool buildings, storage buildings, and trash enclosures, shall be located in a manner that does not disturb or encroach upon the public realm of the site (pedestrian walkways, roadway, etc.).

Merits of the Appeal

The ZBA's role in this appeal is to consider the application for a Certificate of Approval in light of the criteria set forth in the Village Code.

Section 210-60(A)(1) states that The APRB shall have the following powers and duties:

- (1) Review of plans. It shall be the duty of the APRB to review, approve or disapprove all plans and building permit applications for the construction, reconstruction, removal, restoration, alteration or demolition of any exterior architectural feature within the District. The APRB shall have the power to pass upon such activity before a certificate of approval is granted, provided that the APRB shall pass only on the exterior features of a building or structure as are visible from the public street or waterway and shall not consider interior arrangements. In deciding upon all such plans, the APRB shall be guided by the standards for review enumerated in § 210-61 and shall give consideration to any factors it may deem pertinent, including:
 - (a) The historic, cultural or architectural value and significance of any building or structure.
 - (b) The appropriateness and authenticity of the proposed exterior design, arrangement, texture or material and fenestration proposed.
 - (c) The relationship of the proposed exterior design and design features to the historic value and architectural style and character of buildings and structures in the surrounding area and in the District.
 - (d) The extent to which the action proposed in the permit application will promote the purposes of this article.
 - (e) The relationship of the building or structure to open spaces, public ways, signs, landscaping and accessory uses located at and nearby the premises being considered.
 - (f) The compatibility of the building height, scale, mass, and bulk to adjacent and nearby buildings and the surrounding neighborhood.

Section 210-61(B) of the Village Code states that the APRB shall be guided by specific standards in issuing a certificate of approval for new construction.

They are:

- (1) New construction shall be consistent with the architectural styles of historic value in the applicable District. On sites of proposed new construction, where

structures adjoining the site are of significantly dissimilar periods or styles of architecture, the APRB may approve such period or style of architecture as it deems proper for the site and in the best interests of the District.

(2) In applying the principles of consistency and compatibility with the architectural styles existing in the District, the APRB shall consider the following factors: composition, design, texture and other visual qualities.

210-62 of the Village Code sets forth procedure for an applicant to apply for and receive a Certificate of Approval from the APRB. The application must contain the documents described in 210-62(C)(1). 210-62(C)(4) states that the “APRB shall approve or disapprove such plans and, if approved, shall issue a certificate of approval The Chairman shall also stamp all prints submitted to the APRB signifying its approval.”

The ZBA applied these criteria to the PCP application and:

1. Affirms the APRB decision denying PCP’s application for a Certificate of Approval for 75 Monroe Avenue.
2. Denies PCP’s application for a certificate of approval.
3. Disapproves plans for the Westport project as described in the BSE Building elevations dated November 29, 2014; BME final site plans dated July 3, 2015; and the BME final landscape plans dated July 7, 2015 (the “Plans”).

The ZBA makes the following Findings as a basis for these determinations:

As a preliminary matter, we recognize that there is a subjective element in judgments about design quality and people may reasonably disagree about what they like. However it is possible to arrive at opinions about design quality that are based on objective criteria even though people may hold different subjective opinions and have different personal taste.

1. Village Code section 210-60(A)(1)(b) requires the APRB to consider “the appropriateness and authenticity of the proposed exterior design, arrangement, texture or material and fenestration proposed.” The ZBA finds that the only application materials that show the material proposed for the Westport Crossing Development are set forth in the BSE Building elevations dated November 29, 2014, and that, based upon that document:

- a. The buildings in the proposed Westport Crossing Development will be constructed of the same materials, and this is not consistent

with and does not conform to the buildings in the Village which are constructed of varied materials.

- b. The amount of stone in the proposed Westport Crossing development is not appropriate, authentic or consistent with the architecture of the rest of the village
- c. The proposed Westport Crossing development has rows of ostentatious balconies. No other residential area in the Village has balconies.
- d. The proposed Westport Crossing development's attempt to use color to create implied utilitarian and/or the look of multiple buildings within a single structure does not work. Moreover, the groups of buildings in the Village have little to no color, only neutrals, except for the brick and stone outside of one building that is colonial red.
- e. NYS Office of Parks, Recreation and Historic Preservation under its Guide to New Construction recommends materials used in new construction should be compatible with those of corresponding historic properties and their features. For the reasons set forth above, the materials proposed for the Westport Crossing development are not compatible with those of corresponding historic properties and their features.

2. Village Code section 210-60(A)(1)(c) requires the APRB to consider the relationship of the proposed exterior design and design features to the historic value and architectural style and character of buildings and structures in the surrounding area and in the District. The ZBA finds that the proposed Westport Crossing development does not fit in with the architectural style and character of buildings and structures in the surrounding area and in the District because:

- a. The buildings in the proposed Westport Crossing Development as shown on the November 24, 2014 building elevations have a consistent, similar building style and function. It appears to be an attempt to recreate a single building function at a single period of time. Other groups of buildings along the Erie Canal, particularly Schoen Place, represent different building functions (that developed over a span of centuries. Other groups of buildings along the Erie Canal, including Schoen Place, have a mixture of building elevations which are indicative of historical development that takes place over a period of time. Consequently, there is no cohesive contextual unity between the proposed Westport Crossing Development and Schoen Place or the village as a whole.

- b. The proposed Westport Crossing Development is inconsistent with other vistas in the village. The buildings on the East Avenue, State Street and South Main Street maintain the village's historic character. The proposed Westport Crossing Development has a dramatically different horizon than buildings in the rest of the Village. The heights of the buildings in the proposed development are not managed in a way that is consistent with the rest of the Village.
- c. As Schoen Place developed over a period of time, the buildings that constitute these entrances have been built at different times as the Village developed. As a result, the entrances of State Street and South Main Street are residential and the East Avenue entrance is also residential, but surrounded by expansive college campuses, all built in different eras.
- d. The exterior design proposed on site plans is not contextual. Building 1000 and 5000's scale and mass is out of proportion in relation to the villagescape.
- e. The Westport Crossing balconies are not in keeping with the historical aesthetic of the village. The proposed Westport Crossing balconies are non-utilitarian (superfluous), pretentious and ostentatious.
- f. The vertical elements meant to separate become an entity in themselves as a part of the whole. At certain points where the vertical elements do not reach the base the viewer sees no separation. Building 2000's scale and mass is out of proportion in relation to the villagescape and the use of stone is not in keeping with the historical look of the village as well. There is very little stone in our village.
- g. The proposed Westport Crossing Development attempts to "blocking out" areas to recreate the feel of store fronts do not work. The vertical banding does not give a sense of separate spaces. The Project's aesthetic remains an out of proportion large scale project with buildings that feel more suburban than urban or village. To block out the project at 75 Monroe the architects must find a way to create the look of something quaint that is in keeping with the village. The height must also be taken into consideration as the code states up to but of course does not mandate height. This is why the proposed Westport Crossing Development is not in unity or harmony with the Village in the way the Schoen Place is.
- h. The buildings in Schoen Place and the village as a whole convey a

feeling of repetition and rhythm. The proposed Westport Crossing development, on the other hand, would create a sharp break or high contrast area creating discord along the canal visually, rather than a continuation of the historic village. To be seen as a continuation of the historic village, the larger structures in the proposed Westport Crossing development would need to demonstrate more alternation or variety in order to harmonize with Schoen Place whose natural aesthetic is to differentiate again through color, materials and genuineness in form.

- i. The use of stone is not in keeping with the historical look of the village as well. There is very little stone in the Village.
- j. The proposed Westport Crossing development will damage the quality of the Village horizon because it would be situated at one of the most important entrances to the Village and, because of its sheer size, will become a visual focal point that overshadow the Village itself.
- k. Schoen place has multiple buildings that are of varying sizes and materials which help to delineate their utilitarian use. The individual businesses further identify themselves with color, variations on architectural style that are in keeping with one another and the Village as a whole. The proposed Westport Crossing development, on the other hand, attempts to create delineation that does not exist. In doing so there is there is a sharp contrast in styles in relation to both structure and materials.
- l. The proposed Westport Crossing development presents itself as an isolated community that is more “residential retail” than an integral contextual part of the Village of Pittsford as a whole. The materials and building details do not blend with surrounding properties and creates a visually isolated impression when entering the Village.
- m. The proposed Westport Crossing development facade does not have a strong composition in the pattern of solid to void/opening. The “blocking” of areas within buildings to create a sense of contrast does not work and the attempts are at best superfluous. An example of this is the “chimneys”.
- n. The access arrangements are not convenient as the railroad tracks run alongside 75 Monroe preventing traffic lights from being installed to help alleviate heavy traffic patterns due to New York State law. The existing route of Monroe Avenue which runs

through the village is a major route for commuters returning to eastern suburbs. The traffic at times can back up past site location as far as to French Road.

- o. The NYS Office of Parks, Recreation and Historic Preservation's Guide to New Construction recommends that new construction be comprised of individual features comparable, but not identical, to those of similar to those of similar historic properties. For example, in an historic district characterized by dwellings having front porches, paired windows and dormers, new buildings should include these same features. The proposed Westport Crossing development does not have individual features that are comparable to similar historic properties.

3. Village Code section 210-60(A)(1)(e) requires the APRB to consider "the relationship of the building or structure to open spaces, public ways, signs, landscaping and accessory uses located at the and nearby the premises being considered."

The ZBA finds that the proposed Westport Crossing development will negatively impact open spaces, public ways, landscaping and accessory uses for the reasons set forth herein. Moreover,

- a. The proposed Westport Crossing development is inconsistent with the open spaces because it would fill the skyline with a wall of buildings.
- b. The proposed Westport Crossing development would be the largest massing of buildings in the Village and would overpower the villagescape itself.
- c. This Board finds that the Village is so small that the entire Village would be Westport Crossing's neighbor, and that the proposed development does not respect the scale and rhythm of the Village.
- d. The landscaping and the entrance to the village need to be altered in a significant way so that when traffic is stopped and people are forced to view the site, they see an aesthetic that is in keeping with the village they are entering.

4. Village Code section 210-60(A)(1)(f) requires the APRB to consider "the compatibility of the building height, scale, mass, and bulk to adjacent and nearby buildings and the surrounding Neighborhood." The ZBA finds that the proposed Westport Crossing development is incompatible with the building height, scale, mass, and bulk to adjacent and nearby buildings and the surrounding Neighborhood because:

- a. Scale is the relative or apparent size of the building or architectural element in relation to nearby buildings and its surroundings. The dimensions of a building define its scale. Individual elements including doors, window, porches, wings and roof elements all influence a building's apparent scale. Scale is one of the most important features determining whether a building is compatible with its setting. A stark contrast of scale between new and existing buildings disrupts the visual harmony of the street and neighborhood.
- b. The proposed site plan dominates and fills the site, whereas the prior Brown plan broke up of the facade of the buildings' roof lines and setbacks in a way that resulted in a better visual appearance. The Board agrees with this comment set forth in Ted Bartlett's letter dated December 2, 2013, page 2, para. 2. For this reason, the proposed plan is not compatible with the rest of the buildings along the canal in the Village of Pittsford.
- c. The new construction will not be within 10% of the scale of historic equivalents, as recommend by the New York State Office of Parks, Recreation and Historic Preservation Guidelines for new construction.
- d. The building heights in many locations, scale, mass and bulk shown on current site plan for the proposed Westport Crossing development is not compatible to adjacent and nearby buildings and the surrounding neighborhood. A long tradition in the village of Pittsford is to sit on the bleachers and view the city in the distance with no visual interference. The fourth of July is an event that many in the village take on opportunity to use Sutherland street and the high school to view the fireworks and the Cite from afar. By impeding upon the horizon that exists will result negatively to traditions that have long been held in our village for decades. Instead of viewing open space the citizen driving down Monroe Avenue heading into the four corners of Pittsford or those sitting in the bleachers will now see clutter in the horizon. If the proposed Westport Crossing development were to be built according to site plans the emphasis and focal point upon entering the village from one of its most impactful entrances will overpower the village itself.

5. In connection with Village Code section 210-60(A)(1)(f), the ZBA agrees with and incorporates by reference the following Findings of Facts made by the APRB:

- a. This proposed commercial development is comprised of 5 separate residential apartment buildings clustered together in relatively close proximity together with one restaurant building, one club house building and 6 detached garages. The total combined footprint of these buildings on the site is 92,018 square feet.
- b. The project's above ground volume, which represents the visual mass and scale of the structures on the site, is calculated to be a minimum of 2,839,920 cubic feet for the combined total of the buildings. This is calculated by the building footprint length multiplied by the footprint width multiplied by the building height. This calculation does not include the visual mass or volume resulting from the space between the eaves to the roof peak since the necessary data for this calculation was not available to the APRB. Thus, the indicated cubic feet of volume is considered to represent a minimum figure for the total project.
- c. The following details the footprint and visible above ground volume of each building as well as the total site footprint and volume:

Westport Crossing Structures

| | Footprint (sq. ft') | Volume ("cubic ft.) |
|-----------------------------|---------------------|---------------------|
| Building 1000 | 18,300 | 569,585 |
| Building 2000 | 9,800 | 351,978 |
| Building 3000 | 15,000 | 676,050 |
| Building 4000 | 13,000 | 432,746 |
| Building 5000 | 17,500 | 553,487 |
| Restaurant | 5,600 | 119,448 |
| Club House | 4,370 | 52,146 |
| 6 Detached Garages | 8,448 | 84,480 |
| TOTAL ALL STRUCTURES | 92,018 | 2,839,920 |

- d. The total building volume of the Westport Crossing structures is 2,839,920 cubic feet on a site of 7.39 acres. Volume density per average acre is 384,292 cubic feet, calculated by dividing the total building volume of 2,839,920 by 7.39 acres.
- e. In considering Westport Crossing's mass and scale compatibility to the Village of Pittsford's existing physical character as required by the Code, two geographic areas in the Village are considered to be most relevant for comparison.
- f. The Schoen Place and commercial Main Street districts have the highest

concentration of the largest buildings in the Village as well as being located on similar size property sites.

- g. These two districts consist of commercial buildings, as does the Westport Crossing project.
- h. Commercial Main Street is less than 500 yards from the subject property and Schoen Place is approximately 600 yards from the subject property.

Comparison of Westport Crossing with Schoen Place and commercial Main Street:

| Site | Volume in Cubic Feet | Site Acreage | Density per Site Acre in Cubic Feet |
|-------------------|----------------------|--------------|-------------------------------------|
| Main Street | 1,301,858 | 6.0 | 216,976 |
| Schoen Place | 950,004 | 7.36 | 129,076 |
| Westport Crossing | 2,839,920 | 7.39 | 384,292 |

- i. When compared to Schoen Place and commercial Main Street for massing, scale, bulk and density on the property site, the proposed Westport Crossing project is significantly out of character with the historic physical aspects of the Village.
- j. In terms of visual volume, Westport Crossing is over twice as massive as commercial Main Street and more than three times the size of Schoen Place.
- k. When compared on a property site density perspective, Westport Crossing is nearly twice as dense per site acre as Main Street and about three times as dense as Schoen Place.
- l. Other massive clusters or concentration of buildings that exist in the nearby surrounding neighborhood to the project were also examined for mass and scale compatibility with the project. The most massive of these nearby neighborhood buildings or clusters of buildings include the Sutherland High School complex and the compound comprised of New York State, Pittsford Town and Canal Authority maintenance buildings adjacent to the project across the canal. These two comparative sets are within line of

site of the project.

Comparison of Westport Crossing to Sutherland High School and Lomb Building and the 3 Town and State Buildings:

| <u>Building</u> | <u>Volume in Cu. Ft.</u> | <u>Site Acreage</u> | <u>Acre Density in Cu. Ft.</u> |
|--|--------------------------|---------------------|--------------------------------|
| Sutherland H.S. and & Lomb Building | 1,440,473 | 43.3 | 33,267 |
| 3 Town and State Buildings | 714,778 | 6.2 | 115,287 |
| Westport Crossing | 2,839,920 | 7.39 | 384,292 |

- m. Each of these close proximate building concentrations has relatively minimal visible volume and density on the property site when compared to the significantly larger mass, scale and density of Westport Crossing.
- n. Westport Crossing has two to four times the building volume and about three to ten times the acreage density as these two nearby comparatives.
- o. In applying the New York State Historic Preservation Office guidelines for new construction within a designated historic area, the project far exceeds the allowance of a ten (10%) percent increase above the most massive high density Village property which is commercial Main Street and the complex having the largest volume in the Village, the Sutherland High School and Lomb Building complex.

The application of the New York State Historic Preservation Office Guideline of a maximum of a ten (10%) percent increase over these two most relevant structural benchmarks of commercial Main Street and the Sutherland High School complex, indicates that the Westport Crossing project is nearly double the size that would be permitted by this 10% guideline.

| | <u>Volume in Cubic Feet</u> |
|----------------------------------|-----------------------------|
| Westport Crossing | 2,839,920 |
| Commercial Main Street plus 10% | 1,432,044 |
| Sutherland H.S. Complex plus 10% | 1,584,520 |

- p. The Architectural and Preservation Review Board created a document entitled "Quantitative Analysis of Building Heights" that was adopted by the Board of Trustees to establish maximum

building heights and the maximum number of building stories above ground that are permissible for the project. That document was incorporated in the Special Permit for the project.

- q. The Special Permit allows for a maximum of 4 stories in any building which cannot exceed more than 52 feet from the average finished grade to the eaves of the building. A significant percentage of Building 3000 contains 5 stories and exceeds the maximum height requirement of 52 feet. This also demonstrates a mass and scale out of character with the various comparative backgrounds.
- r. When comparing Westport Crossing to any of the most massive concentrations of buildings in the Village or close by the project, the inappropriate nature of Westport Crossing's massing and scale is very visibly striking and significant.
- s. The project's mass and scale does not fit the character of the Village because it does not meet the visual proportions of any other building or set of buildings in the Village.
- t. The project's mass and scale is too large to meet the quantifiable and perceptual constraints established by the surrounding context, the Village.

6. Village Code section 210-61(B)(1) requires new construction to be consistent with the architectural styles of historic value in the applicable district. On sites of proposed new construction, where structures adjoining the site are of significantly dissimilar periods or styles of architecture the APRB may approve such period or style of architecture as it deems proper for the site and in the best interests of the district.

The ZBA finds that the proposed Westport Crossing Development is inconsistent and incompatible with the architectural styles of historical value existing in the District because it does not create a visual unity with its historic neighbor Schoen Place or the village as a whole. There is no visual unity because the scale is disproportionate, materials are not in keeping with what is historically seen in the village, and the current plans do not have the aesthetic that would create visual blocking similar to Schoen Place, which are based on utilitarian usages.

7. Village Code section 210-61(B)(2) requires the APRB to consider "other visual qualities" in applying the principles of consistency and compatibility with the architectural styles existing in the District.

This Board has considered architectural elements of unity, harmony, contrast, repetition (rhythm, pattern), variety (alternation) emphasis (dominance, focal point) proportion or scale, functionality, attraction, genuineness in media and/or form, proximity, color theory, de-cluttering or harmonization or organization of structures

as “other visual qualities” of the proposed Westport Crossing development.

The ZBA finds that the proposed Westport Crossing Development is inconsistent and incompatible with the architectural styles existing in the District based on the following:

- a. The proposed Westport Crossing Development would overpower the village scape. The impact on close views will be huge, particularly when traffic is stopped. It would stand in sharp contrast to the appearance of other groups of buildings in the District.
- b. The village’s residential and commercial neighborhoods are characterized by regular setbacks and spacing that creates a sense of visual unity. The proposed Westport Crossing development is out of proportion in relation to the village itself and therefore does not enhance the harmony of the village but does the opposite by becoming a focal point that stands on its own minimizing the village scape. The proposed development does not demonstrate a positive and/or imaginative response to the aesthetic concerns that the APRB raised.
- c. It would be an abrupt visual element that is not in harmony with the rest of the village because it is inconsistent with what is already there. It would not appear to be a continuation of what is already in place along the canal and in the Village.
- d. It would disrupt the rhythm and movement of the Village, which is a historic farming community, as epitomized by Schoen Place.
- e. The existing architectural styles in the Village reflect different property uses and buildings of different sizes and elevations. The proposed Westport Crossing development would appear as a single, uniform residential development with accessory buildings.
- f. The impact of the proposed Westport Crossing development is out of scale, not in keeping with creating unity and/or harmony with the village as a whole and creates far too high contrast with existing structures, the repetition (rhythm, pattern) does not lend itself to “creating visual blocking” that would be in keeping with the utilitarian aspects of Schoen Place. It does not continue the patterning that can be seen at Schoen place. Moreover, the emphasis (dominance, focal point) of the village becomes the proposed Westport Crossing development rather than the village itself which attracts people because of its aesthetics, genuineness

in media and/or form, proximity, color theory, de-cluttering or harmonization or organization of structures.

Dated: September 15, 2015.