

VILLAGE OF PITTSFORD
PLANNING AND ZONING BOARD OF APPEALS
Regular Meeting – October 19, 2015 at 7:00 PM

PRESENT:

Chairperson: Justin Vlietstra (absent)
Members: Jo Anne Shannon
Jeffrey Bove
Susan Lhota
Heather Erwin

Attorney: Jeff Turner
Special Counsel: Mindy Zoghlin
Recording Sec: Linda Habeeb

Member Lhota called the meeting to order at 7:10 pm. She stated that she will be Acting Chairperson of the Zoning Board of Appeals for this meeting. She asked if any members had conflicts of interest with the two area variance applications before the Board. All members stated that they had no conflicts of interest with these applications.

Thomas Chamot, 49 Courtenay Circle ~ Area variance

Present: Richard Chamot, Homeowner

The legal notice was published in the October 1, 2015 edition of the Brighton Pittsford Post:

“Please take notice that a public hearing will be held before the Village of Pittsford Zoning Board of Appeals at the Village Hall, 21 North Main Street, Pittsford, New York, on Monday October 19, 2015 at 7:00 pm, to consider an application made by Thomas Chamot, owner of property located at 49 Courtenay Circle, for an area variance for an addition, pursuant to Village Code § 210-5.”

Discussion: The applicant presented plans for construction of a kitchen addition to be located in the rear of the house. Board members noted that this is a nonconforming property. There is currently an existing concrete slab and the addition footprint will be within the slab. The addition will not alter the nonconformity of the property, and there will be no drainage issues with this proposed project.

Findings of Fact:

1. There are no undesirable changes that will be produced in the character of the neighborhood by granting this area variance.
2. The area variance will not have an adverse effect or impact on the physical or environmental conditions of the neighborhood or district.
3. The benefit sought cannot be achieved by another feasible method.

Motion: Member Lhota made a motion, seconded by Member Erwin, to approve the application for an area variance, as submitted.

Vote: Shannon - yes; Lhota – yes; Erwin – yes; Bove - yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Bove, to reopen the public hearing for 49 Courtenay Circle.

Vote: Shannon - yes; Lhota – yes; Erwin – yes; Bove - yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

There being no one wishing to comment on this application, Member Lhota made a **motion**, seconded by Member Erwin, to close the public hearing at this time.

Vote: Shannon - yes; Lhota – yes; Erwin – yes; Bove - yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Bove, to renew the motion to approve the application for an area variance.

Vote: Shannon - yes; Lhota – yes; Erwin – yes; Bove - yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

David Jewett, 44 N. Main Street ~ Temporary zoning permit

Present: David Jewett

The legal notice was published in the October 1, 2015 edition of the Brighton Pittsford Post:

“Please take notice that a public hearing will be held before the Village of Pittsford Zoning Board of Appeals at the Village Hall, 21 North Main Street, Pittsford, New York, on Monday October 19, 2015 at 7:00 pm to consider an application made by David Jewett for a temporary zoning permit to allow the outside sale of Christmas trees and wreaths in November and December of 2015, at property known as Pittsford Farms Dairy, owned by Charles Corby, and located at 44 North Main Street, pursuant to Chapter 210-109, Temporary permits, of the Code of the Village of Pittsford.”

Discussion: This is an application for a temporary zoning permit for the outside sale of Christmas trees and wreaths at the property known as Pittsford Farms Dairy, located at 44 North Main Street. The applicant stated that he has been granted the permit for a number of years, and he agrees to abide by the same conditions as were agreed to in past approvals. Board members reviewed the conditions with the applicant.

Motion: Member Lhota made a motion, seconded by Member Erwin, to approve the application, as submitted, for a temporary zoning permit to allow the outside sale of Christmas trees and wreaths at the Pittsford Farms Dairy during the holiday season, with the following conditions:

1. The site shall be restored to its original appearance by January 1, 2016.
2. Preparation and sale shall be only on private property side yard no closer than 120 feet from all property lines.
3. Temporary signage shall not be placed in the public right of way.
4. No high-pressure sodium lighting shall be installed or maintained.

Vote: Shannon - yes; Lhota – yes; Erwin – yes; Bove - yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to reopen the public hearing for 44 North Main Street.

Vote: Shannon - yes; Lhota – yes; Erwin – yes; Bove - yes. **Motion carried.** The decision was filed in the Office of the Village Clerk on October 19, 2015.

John Limbeck, 62 State Street ~ Expressed his support for the application for a temporary zoning permit, stating that this will be beneficial for the Village.

Vote: Shannon - yes; Lhota – yes; Erwin – yes; Bove - yes. **Motion carried.** The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Bove, to renew the motion to approve the application, as submitted, for a temporary zoning permit to allow the outside sale of Christmas trees and wreaths at the Pittsford Farms Dairy during the holiday season, with the conditions as previously stated.

Vote: Shannon - yes; Lhota – yes; Erwin – yes; Bove - yes. **Motion carried.** The decision was filed in the Office of the Village Clerk on October 19, 2015.



Pittsford Canalside Properties, LLC, 75 Monroe Avenue ~ Appeal of APRB decision

Present: No one from was PCP was present.

The Village Board of Trustees has passed Local Law 15, which law requires disclosure of conflicts of interest or potential conflicts of interest prior to each meeting of boards with discretionary approval authority.

- Member Bove disclosed that since he had publicly expressed opinions about the 75 Monroe Avenue project, he will recuse himself from the discussion for that portion of the meeting, due to the appearance of having a bias regarding the project.

Discussion: Member Lhota stated that on September 15, 2015, this Board passed a motion to reopen the public hearing on PCP’s appeal from the APRB determination of December 10, 2014 and set the rehearing for September 28, 2015. The Board reopened the public hearing specifically to receive public comment on the two ex parte comments that were disclosed at the September 15th Special Meeting. The September 28th meeting was properly noticed and published. PCP was given an opportunity to, but did not, make any comment on the Mayor’s ex parte communication. Instead, PCP objected to the Board’s characterization of Mr. DiMarzo’s statements as ex parte communications and requested that the Board consider revised plans to address concerns raised in the ZBA’s findings’ statement. At the September 28th rehearing, PCP’s consultant, Roger Brown, stated that the applicant is requesting an opportunity to present to the ZBA a scaled 3-D rendering of the project and could address the ZBA’s stated concerns about the architectural features. The ZBA advised PCP that its jurisdiction was limited to that set forth in Justice Ark’s March 5, 2015 Order and Judgment, which:

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 appeal in accordance with NY Village Law section 7-712-a; and
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 the ZBA lacks jurisdiction to hear the APRB Appeal as a result of the adoption of Local Law No. 17 of 2014.

At the September 28th meeting, PCP requested that the Board keep the hearing open to review the ZBA's concerns and attempt to solve them. Mr. DiMarzo stated that they were not requesting to submit a new application, but were requesting to make minor modifications to the existing application. He agreed that by October 9, 2015, PCP would submit the proposed revisions, 3-D rendering, along with legal argument regarding the issue of the ZBA's jurisdiction in this matter. The Board passed a motion to keep the public hearing open until the next regular meeting on October 19th, and directed PCP to submit the following no later than October 9, 2015:

1. The proposed revised plans and drawings for the Board to consider in connection with the rehearing; and
2. Legal argument as to the Board's jurisdiction to consider the proposed plans and drawings.

On October 9, 2015, PCP, the APRB, and the Village Board of Trustees all submitted legal arguments regarding the jurisdiction issue. The Village Board of Trustees also responded to PCP's comments about the ex parte communications. Copies of these letters have been made part of the file. To date, PCP has not submitted a scaled, 3-D rendering of the project or any revised plans. In its October 9th letter, PCP also asks for three things:

1. An extension of time until November 9, 2015 to submit modified plans;
2. To keep the rehearing open until the November 16th meeting date; and
3. An extension of the tolling agreement for 45 days.

Member Lhota stated that the Board needs to address several open issues with regard to the PCP appeal. She explained that the Board has considered the arguments submitted by PCP's Counsel, and she asked the Board's Special Counsel for a legal opinion as to whether the Board has jurisdiction to consider these modifications.

Ms. Zoghlin stated that there are several legal issues here, and the first legal issue deals with the scope of the rehearing. The Board properly reopened the public hearing on PCP's appeal from the APRB determination for the sole purpose of addressing two ex parte communications that occurred on August 17, 2015. The Board was well within its right to limit the rehearing to those issues, and the Board is not required to consider public comments that address other issues. The ZBA is not legally required to consider PCP's request to submit modified plans. Nonetheless, PCP claimed that it was prepared to make minor revisions to its application to address the Board's concerns, and the Board granted PCP's request to demonstrate that the proposed revisions did not rise to the level of a new application. PCP also asked for an opportunity to submit new evidence in the form of 3-D project renderings in order to address the Board's decision about the mass and scale issue. The Board gave PCP until October 9th to submit the 3-D renderings, and they failed to do so. PCP was also given until October 9th to submit the revised plans and drawings, and they failed to do so. On October 9th, PCP asked for an opportunity to submit the revised plans at a later time, but the Board is under no legal obligation to keep the rehearing open.

Ms. Zoghlin stated that the remaining legal issues deal with whether the Board has jurisdiction to consider revised plans in connection with the rehearing. First, PCP claims that since the ZBA has a *de novo* standard of review, it can do anything the APRB could have done, which includes hearing new evidence. She stated that she disagrees with PCP's analysis of the *de novo* standard of review because there is a difference between considering new evidence with respect to an existing application and considering a new changed application. At the September 28th hearing, PCP essentially asked the Board to do both. They asked Board members to reconsider mass and scale, based upon a 3-D rendering that they were going to submit, but did not, and they also requested an opportunity to present revised plans to address the Board's concerns that were articulated in the findings' statement. She stated that the Board does have a *de novo* standard of review with respect to the appeal from PCP's application to the APRB. In that regard, the ZBA can do anything that the APRB could have done with respect to that application. That is not the same thing as saying that the ZBA has all of the power that the Village granted to the APRB with respect to any new application that may come before the APRB. The *de novo* argument does not require the Board to consider project changes in connection with the rehearing.

Ms. Zoghlin stated that the next legal argument that PCP makes is that since New York Village Law 7-712-b(1) gives the ZBA the power to reverse or affirm or do anything that the APRB could have done, the Board now has the power to collect and consider new information, which is true. New York Village Law does give the ZBA the power, but it does not require the Board to consider or adopt modifications to plans and drawings submitted in connection with this rehearing. If PCP wishes to submit revised plans following the ZBA denial, it must follow the procedure set forth in Village Code section 210-62(C)(5), which states that if the ZBA disapproves of a plan, it shall state its reason for doing so, and the applicant, if it so desires, may make modifications to the plans and shall have the right to resubmit the application at any time after so doing. This modification that is described in section 210-62(C)(5) constitutes a new application that must be made to the APRB. The Village Code specifically states that any application for a Certificate of Approval shall be made to the APRB. The Village Code does not allow an application for a Certificate of Approval to be made, in the first instance, directly to the ZBA. Moreover, under Judge Ark's Decision and Order, the ZBA was required to hear an appeal from the December 10, 2014 APRB decision denying the Certificate of Approval, but Judge Ark did not give the Board the power to cut the APRB out of the review process entirely.

Finally, PCP argues that since the APRB has the power to collect information and make reasonable modifications to the project itself, the ZBA also has this power. But, in this case, the Board's decision and findings statement specifically found that PCP's application was complete, so there is no need for the Board to collect additional information. Moreover, there is a difference between collecting information about a pending application, and considering a new or revised application. PCP also argues that since the Board has the power to approve a project with conditions, it also has the power to consider new conditions suggested by the applicant after the ZBA denies an application. This argument is legally incorrect, and, as a practical matter, it is not workable in this case, because the Board's decision and findings were based, in large part, on the project's mass and scale. The ZBA's decision and findings disapprove specific plans for the project, which plans were 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. If PCP wishes to address the project's mass and scale, the only way that they can do that is by submitting a new building elevation and final site plan, and possibly new landscaping plans. The new application plans must go to the APRB. Moreover, any significant changes to the site plan and landscaping plan will require site plan approval from the Planning Board.

Ms. Zoghlin concluded by stating that for these reasons, it is her opinion that the ZBA lacks jurisdiction to consider the revised plans and drawings in connection with this rehearing. She recommended that the Board:

1. Determine as a matter of law that the ZBA lacks jurisdiction to consider revised plans and drawings in connection with this rehearing.
2. Decline to exercise any discretion that the Board may have to consider project modifications in connection with this rehearing.

Motion: Member Lhota made a motion, seconded by Member Erwin, to close the public rehearing on PCP's appeal from the APRB determination of December 10, 2014 denying its application for a Certificate of Approval.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Member Lhota stated that at the September 28, 2015 meeting, PCP asked the Board to consider modifications to the application for a Certificate of Approval that would, among other things, address concerns raised by the ZBA in the Board's findings. She stated that the Board has the power to decide any question involving the interpretation of any provision of the Zoning Code, under Village Code Section 210-113(b)(1).

Motion: Member Lhota made a motion, seconded by Member Erwin, that PCP's request to submit a revised application is one to decide any question involving the interpretation of the Zoning Code, and that the Board may interpret whether the ZBA has the power to consider a revised application for a Certificate of Approval that is submitted in connection with this rehearing.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to determine that the ZBA lacks jurisdiction to consider a revised application for a Certificate of Approval, for the reasons set forth by the Board's Special Counsel.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Shannon, to decline to exercise any discretion the ZBA has to consider any project modification in connection with this rehearing.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to deny PCP's request to keep the rehearing open until November 16, 2015 and give PCP an additional extension of time to November 9th to submit the proposed modifications.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to grant PCP's request to extend the tolling agreement by thirty days.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Member Lhota stated that the Board members have previously reviewed Resolution 2015-3. At this time, Member Shannon read Resolution 2015-3.

Motion: Member Lhota made a motion, seconded by Member Erwin, to adopt Resolution 2015-3.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to affirm the Board's original determination for the reasons set forth in the findings dated September 15, 2015.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to find that the determination to affirm the August 17th determinations will not prejudice any vested rights PCP may have as a result of the August 17, 2015 determinations.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Member Lhota stated that Board members have previously reviewed Resolution 2015-4. Member Erwin read Resolution 2015-4.

Motion: Member Lhota made a motion, seconded by Member Erwin, to adopt ZBA Resolution 2015-4.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to adjourn the meeting at this time.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to reconvene the meeting at this time.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Shannon, to reopen the public comment portion of the rehearing in regard to the ex parte communications.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

John Limbeck, 62 State Street – Stated a concern that since Judge Ark has made a very specific ruling that the Mayor and the Board of Trustees were not to interfere with the Boards in their determinations regarding this project, the ex parte communication could put the Village in jeopardy.

Ms. Zoghlin and the Board members stated that they have made it very clear that this Board will not tolerate ex parte communications.

Motion: Member Lhota made a motion, seconded by Member Erwin, to close the public rehearing on PCP's appeal from the APRB determination of December 10, 2014 denying its application for a Certificate of Approval.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Shannon, to reaffirm that PCP's request to submit a revised application is one to decide any question involving the interpretation of the Zoning Code, and that the Board may interpret whether the ZBA has the power to consider a revised application for a Certificate of Approval that is submitted in connection with this rehearing.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to reaffirm that the ZBA lacks jurisdiction to consider a revised application for a Certificate of Approval, for the reasons set forth by the Board's Special Counsel.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Shannon, to decline to exercise any discretion the ZBA has to consider any project modification in connection with this rehearing.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to reaffirm the denial of PCP's request to keep the rehearing open until November 16, 2015 and give PCP an additional extension of time to November 9th to submit the proposed modifications.

Vote: Shannon - yes; Lhota - yes; Erwin - yes. Motion carried. The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, reaffirming the granting of PCP's request to extend the tolling agreement by thirty days.

Vote: Shannon - yes; Lhota – yes; Erwin – yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to adopt Resolution 2015-3.

Vote: Shannon - yes; Lhota – yes; Erwin – yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to reaffirm the Board's original determination for the reasons set forth in the findings dated September 15, 2015.

Vote: Shannon - yes; Lhota – yes; Erwin – yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to reaffirm that the determination to affirm the August 17th determinations will not prejudice any vested rights PCP may have as a result of the August 17, 2015 determinations.

Vote: Shannon - yes; Lhota – yes; Erwin – yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

Motion: Member Lhota made a motion, seconded by Member Erwin, to adopt ZBA Resolution 2015-4.

Vote: Shannon - yes; Lhota – yes; Erwin – yes. *Motion carried.* The decision was filed in the Office of the Village Clerk on October 19, 2015.

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Member Lhota stated that the applicant for Northfield Common requested to adjourn the 50 State Street appeal to the November 16<sup>th</sup> meeting.

**Adjournment:** There being no further business, Chairperson Vlietstra adjourned the meeting at 8:15 pm.

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Linda Habeeb, Recording Secretary

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**RESOLUTION 2015-3**  
**Village of Pittsford Zoning Board of Appeals**

At a regular meeting of the Village of Pittsford Zoning Board of Appeals held at the Village Hall on the 19<sup>th</sup> day of October 2015 at 7:00 p.m. The meeting was called to order by Susan Lhota and upon roll being called, the following were present:

PRESENT: Jeffrey Bove  
          Heather Erwin  
          Susan Lhota  
          JoAnne Shannon  
ABSENT: Justin Vliestra

Member Jeffrey Bove recused himself on the basis of conflict of interest.

The following resolution was offered by Acting Chair Susan Lhota, who moved its adoption, and seconded by Board Member Heather Erwin, to wit:

**WHEREAS**, the ZBA held a Special Meeting, duly published and posted on September 15, 2015 (the "Special Meeting"), and

**WHEREAS**, at the Special Meeting this Board unanimously passed a motion adopting written Findings in support of the August 17<sup>th</sup> Motions concerning PCP's appeal from the APRB determination of December 10, 2014 (the "Findings"), and

**WHEREAS**, at the Special Meeting two Board members disclosed *ex parte* communications that occurred at the August 17, 2015 meeting, and

**WHEREAS**, the Acting ZBA Chair disclosed that during the recess for the August 17<sup>th</sup> public hearing on 75 Monroe Avenue, Mayor Corby took her by the arm, escorted her into his office, closed the door and asked her to read the memo from the Village of Board of Trustees to the ZBA dated July 12, 2015 into the public record, and

**WHEREAS**, Board Member Erwin disclosed that during the recess at the August 17<sup>th</sup> ZBA hearing, 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, and

**WHEREAS**, at the September 15<sup>th</sup> Special Meeting, the ZBA concluded that the *ex parte* communications did not provide the applicant or the public with the opportunity to respond to the statements again, and

**WHEREAS**, at the Special Meeting this Board unanimously passed a motion to reopen the public hearing on PCP's appeal from the APRB determination of December 10, 2014 (a "September 15<sup>th</sup> Motion"), and

**WHEREAS**, the ZBA reopened the public hearing specifically to receive public comments on the two *ex parte* communications that were disclosed at the September 15<sup>th</sup> Special Meeting, and

**WHEREAS**, the ZBA held a regular meeting, duly published and posted on September 28, 2015 to rehear the PCP appeal, and

**WHEREAS**, on September 28<sup>th</sup> the ZBA reopened the public hearing to rehear PCP's appeal from the APRB determination of December 10, 2014 denying its application for a certificate of Approval, and

**WHEREAS**, PCP was given an opportunity to but did not make any comment about the Mayor's *ex parte* communication, and

**WHEREAS**, PCP objected to the ZBA's characterization of Mr. DiMarzo's statements as *ex parte* communications and asked this Board to hold the public hearing open so that it could submit a 3-D rendering of the Project and revised plans addressing concerns raised in the ZBA's Findings Statement, and

**WHEREAS**, The ZBA advised PCP that its jurisdiction was limited to that set forth in Justice Ark's March 5, 2015 Order and Judgment, and

**WHEREAS**, PCP disagreed and asked the ZBA to hold the public hearing open until October 19, 2015 so that it could have an opportunity to respond to the ZBA's concern about jurisdiction and submit revised plans, and

**WHEREAS**, the ZBA passed a motion to keep the public hearing open until October 19, 2015 and directed PCP to submit the following no later than the close of business on October 9, 2015:

1. The proposed revised plans and drawings that PCP wishes<sup>d</sup> the ZBA to consider in connection with the rehearing; and
2. Legal argument as to the ZBA's jurisdiction to consider the revised plans and drawings, and

**WHEREAS**, PCP did not submit the 3-D rendering of the Project or any plans or drawings by the October 9<sup>th</sup> deadline, and instead requested that the ZBA keep the rehearing open until November 16, 2015 and give PCP an additional extension of time to November 9<sup>th</sup> to submit the proposed modifications, and

**WHEREAS**, on October 9, 2015 PCP, the APRB and the Village Board of Trustees all submitted legal argument regarding the jurisdiction issue, and

**WHEREAS**, The Village Board of Trustees responded to PCP's comments about the *ex parte* communications, and

**WHEREAS** special counsel has advised the ZBA that it lacks jurisdiction to consider a revised application for a certificate of authority for the following reasons:

1. The ZBA has a *de novo* standard of review with respect to the appeal from PCP's application to the APRB. In that regard, the ZBA can do anything the APRB could have done with that application. The *de novo* standard of review does not give the ZBA all of the power that the Village granted to the APRB with respect to any new application that may come before the APRB.

2. New York Village Law section 7-712-b(1) gives the ZBA the power to "reverse or affirm, wholly or partly, or it may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made." It does not require the ZBA to consider or adopt modifications to the plans and drawings submitted in connection with an application for Certificate of Approval.

3. If PCP wishes to submit revised plans following the ZBA denial, it must follow the procedure set forth in Village Code section 210-62(C)(5):

If the APRB disapproves of such plans, it shall state its reasons for doing so and shall transmit a record of such action and reasons therefor, in writing, to the Building Inspector and to the applicant. The APRB may advise what it thinks is proper if it disapproved of the plan submitted. The applicant, if he/she so desires, may make modifications to the plans and shall have the right to resubmit the application at any time after so doing (emphasis supplied).

These modifications and revisions constitute a new application that must be made to the APRB: "Application for a certificate of approval shall be made in writing, in duplicate, to the APRB ..." (emphasis supplied). Village Code Section 210-62(C)(1).

4. Under Judge Ark's Decision and Order, the ZBA was required to hear an appeal from the December 2014 APRB decision denying the Certificate of Approval. The Court did not give the ZBA the power to cut the APRB out of the review process.

5. There is a difference between collecting additional information about a pending application and considering a new or revised application. The ZBA decision and Findings found that PCP's application was complete and "disapproved 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's decision and Findings were based in large part <sup>on</sup> of the Project's mass and scale. If the applicant wants to address the Project's mass and scale, it must submit new building elevations and final site plans, and possibly new landscaping plans. The new application plans must go to the APRB. Moreover, any significant changes to the site plan and landscaping plan would require site plan approval from the Planning Board.

**NOW THEREFORE**, be it resolved as follows:

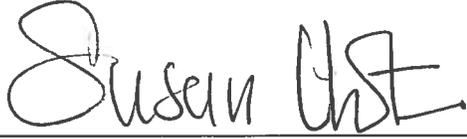
1. The ZBA has the power to decide any question involving the interpretation of any provision of the Zoning Code under Village of Pittsford Zoning Code Section 200-113(B)(1), and this power includes the power to determine whether it has jurisdiction to consider PCP's request to submit a revised application for Certificate of Approval.
2. The ZBA lacks jurisdiction to consider a revised application for a Certificate of Approval for the reasons set forth by Special Counsel.
3. The ZBA declines to exercise any discretion it may have to consider PCP's proposed revisions to its application for a Certificate of Approval in connection with this rehearing.
4. The ZBA denies PCP's request to keep the rehearing open until November 16, 2015 and give PCP an additional extension of time to November 9<sup>th</sup> to submit the proposed modifications.
5. The ZBA grants PCP's request to extend the Tolling Agreement by 30 days.

The question of the foregoing resolution was duly put to vote as follows:

|                 | Yes                                 | No                       | Abstain                             |
|-----------------|-------------------------------------|--------------------------|-------------------------------------|
| Justin Vliestra | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/>            |
| Jeffrey Bove    | <input type="checkbox"/>            | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Heather Erwin   | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| Susan Lhota     | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| JoAnne Shannon  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |

Dated: October 19, 2015  
Pittsford, New York

By order of the Village of Pittsford Zoning Board of Appeals

A handwritten signature in black ink that reads "Susan Lhota". The signature is written in a cursive style with a large, looped initial "S".

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Susan Lhota, Acting Chair

**RESOLUTION 2015-4**  
**Village of Pittsford Zoning Board of Appeals**

At a regular meeting of the Village of Pittsford Zoning Board of Appeals held at the Village Hall on the 19<sup>th</sup> day of October 2015 at 7:00 p.m. The meeting was called to order by Susan Lhota and upon roll being called, the following were present:

**PRESENT:**

Jeffrey Bove  
Heather Erwin  
Susan Lhota  
JoAnne Shannon

**ABSENT:** Justin Vliestra

Member Jeffrey Bove recused himself on the basis of conflict of interest.

The following resolution was offered by Acting Chair Susan Lhota, who moved its adoption, and seconded by Board Member Heather Erwin, to wit:

**WHEREAS**, Pittsford Canalside Properties, LLC (“PCP”) applied to the Village Architectural Preservation and Review Board (“APRB”) for a Certificate of Approval on March 21, 2013, and

**WHEREAS**, The APRB conducted informational meetings regarding PCP’s application on April 1, 2013 and November 3, 2014,

**WHEREAS**, The APRB considered PCP’s application at public meetings conducted on December 1, 2014 and December 10, 2014, and

**WHEREAS**, The APRB denied PCP’s application for a Certificate of Approval on December 10, 2014, and

**WHEREAS**, PCP appealed the APRB decision on December 11, 2014, and

**WHEREAS**, 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 <sup>of</sup> 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”), and

**WHEREAS**, on June 17, 2015 the APRB adopted Findings in support of its December 10, 2014 decision denying PCP’s application for a Certificate of Approval, and

**WHEREAS**, the ZBA held a public hearing, duly published and posted on July 20, 2015, and

**WHEREAS**, at the public hearing all who desired to be heard were heard and their testimony recorded, and

**WHEREAS**, at the conclusion of the public hearing the ZBA ~~held~~ closed the public hearing and left the public comment period open until August 10, 2015, and

**WHEREAS**, on August 10<sup>th</sup> the Village Board asked <sup>for</sup> of an extension until the end of the day on Wednesday August 12 to submit comment, and

**WHEREAS**, THE ZBA granted the Village Board an extension of time to August 12, 2015 to submit comment, and

**WHEREAS**, the Village Board submitted comments on August 12<sup>th</sup>, and

**WHEREAS**, PCP submitted response to comments on August 14<sup>th</sup>, and

**WHEREAS**, the ZBA held a regular meeting, duly published and posted on August 17, 2015, and

**WHEREAS**, at the regular meeting of August 17, 2015, the ZBA unanimously passed the following motions:

1. to grant the Village Board an extension of time to August 12 to submit public comments in connection with this matter and to grant the applicant an extension of time to August 14 to respond to any public comments.
2. to find that PCP’s application for a Certificate of Approval is complete.
3. to consider that PCP’s application is one “to decide any question involving the interpretation of the Zoning Code” and that the ZBA may interpret whether the APRB had the power to deny PCP’s application for a Certificate of Approval based on mass and scale.
4. to find that the APRB properly considered mass and scale in connection with PCP’s application for a Certificate of Approval.

5. to find that the ZBA may consider mass and scale in connection with PCP's appeal of the APRB decision on its application for a Certificate of Approval.
6. to affirm the APRB decision denying PCP's application for a Certificate of Approval for 75 Monroe Avenue.
7. to deny PCP's application for a certificate of approval.
8. to disapprove the 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 "August 17<sup>th</sup> motions")

**WHEREAS**, the ZBA held a Special Meeting, duly published and posted on September 15, 2015 (the "Special Meeting"), and

**WHEREAS**, at the Special Meeting this Board unanimously passed a motion adopting written Findings in support of the August 17<sup>th</sup> Motions concerning PCP's appeal from the APRB determination of December 10, 2014 (the "Findings"), a copy of which is attached hereto and incorporated herein (a "September 15<sup>th</sup> Motion"), and

**WHEREAS**, at the Special meeting two Board members disclosed *ex parte* communications that occurred at the August 17, 2015 meeting, and

**WHEREAS**, the Acting ZBA Chair disclosed that during the recess for the August 17<sup>th</sup> public hearing on 75 Monroe Avenue, Mayor Corby took her by the arm, escorted her into his office, closed the door and asked her to read the memo from the Village of Board of Trustees to the ZBA dated July 12, 2015 into the public record, and

**WHEREAS**, Board Member Erwin disclosed that during the recess at the August 17<sup>th</sup> ZBA hearing, 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, and

**WHEREAS**, at the August 17<sup>th</sup> meeting, the ZBA concluded that the *ex parte* communications did not provide the applicant or the public with the opportunity to respond to the statements again, and

**WHEREAS**, at the Special Meeting this Board unanimously passed a motion to reopen the public hearing on PCP's appeal from the APRB determination of December 10, 2014 (a "September 15<sup>th</sup> Motion"), and

WHEREAS, the ZBA reopened the public hearing specifically to receive public comments on the two *ex parte* communications that were disclosed at the September 15<sup>th</sup> Special Meeting, and

WHEREAS, the ZBA held a regular meeting, duly published and posted on September 28, 2015 to rehear the PCP appeal, and

WHEREAS, the ZBA reopened the public hearing on the PCP appeal at the September 28, 2015 meeting, and

WHEREAS, PCP offered public comment about Antony DiMarzo's *ex parte* statement and asked the ZBA to keep the public hearing open until October 19, 2015 to submit revised plans and drawings that addressed concerns raised by the ZBA in its Findings Statement, and

WHEREAS, PCP did not respond to Mayor Corby's *ex parte* communications, and

WHEREAS, no other member of the public commented on the *ex parte* communications, and

WHEREAS, this Board has previously adopted Resolution 2015-3 denying PCP's request to submit a revised plans and drawings in connection with its application for a Certificate of Approval,

**NOW THEREFORE, IT IS RESOLVED** as follows:

1. That the ZBA affirm its determination of August 17, 2015 for the reasons set forth in the September 15<sup>th</sup> Findings.
2. That the determination to affirm our August 17<sup>th</sup> determinations will not prejudice any vested rights PCP may have as a result of our August 17, 2015 determinations.
3. The September 15<sup>th</sup> Motions are in all respects adopted, ratified and confirmed.

The question of the foregoing resolution was duly put to vote as follows:

|                 | Yes                                 | No                       | Abstain                             |
|-----------------|-------------------------------------|--------------------------|-------------------------------------|
| Justin Vliestra | <input type="checkbox"/>            | <input type="checkbox"/> | <input type="checkbox"/>            |
| Jeffrey Bove    | <input type="checkbox"/>            | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Heather Erwin   | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| Susan Lhota     | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |
| JoAnne Shannon  | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/>            |

Dated: October 19, 2015  
Pittsford, New York

By order of the Village of Pittsford Zoning Board of Appeals

Handwritten signature of Susan Lhota in black ink, written over a horizontal line.

Susan Lhota, Acting Chair