

**VILLAGE OF PITTSFORD**  
**PLANNING AND ZONING BOARD OF APPEALS**  
Special Meeting January 3, 2019 at 7:00 PM

**PRESENT:**

Chairperson: Justin Vlietstra  
Members: Jo Anne Shannon  
Renee Stetzer  
Susan Lhota  
Eli Bannister

PZBA Attorney: Mindy L. Zoghlin, Esq.  
Recording Sec: Linda Habeeb

**Motion:** Chairperson Vlietstra made a motion, seconded by Member Shannon, to call the meeting to order at 7:10 pm.

**Vote:** Shannon - yes; Vlietstra - yes; Lhota - yes; Stetzer - yes; Bannister - yes. *Motion carried.*

**Conflict of Interest Disclosure:**

- Member Vlietstra stated that he will recuse himself from the discussion of the 75 Monroe Avenue application because he has made numerous public statements about the project prior to joining the PZBA.

**Pittsford Canalside Properties, LLC, 75 Monroe Ave.**

**Present:** Chris DiMarzo, Bryan Powers, Mark IV Enterprises; Tom Daniels, Attorney

Member Vlietstra left the meeting room at this time.

**Discussion:** Ms. Lhota stated that she will be acting Chairperson for the 75 Monroe Avenue project. She explained that they were there to discuss Condition #3 of the final site plan approval for 75 Monroe Avenue. The applicant has asked the Planning Board to make a determination that Condition #3, involving water flow and a new drainage pipe at the site, has been met.

Mr. DiMarzo stated that this has been a long-standing project, which started in 2008 and has involved numerous public hearings. He reviewed the history of the project that has occurred over the past 10 years. Mr. DiMarzo explained that when PCP started the Brownfield Remediation, it involved taking tons of dirt off the site, and if there was water on the site, it had to be treated and disposed of. So the properties to the east had no means of transferring their water to the canal, and it was just infiltrating into the site.

He further explained that there were 30 conditions associated with the final site plan approval. He stated that they have met all the conditions that they were able to meet. The other conditions are pertaining to the building permit. Condition #3 is an issue that has to do with water that was coming onto the site from adjacent property to the east. He stated that the specific condition has three things that were required to be done.

Condition 3 required that the following three actions be taken:

1. **File a plan:**
  - a. Plan was submitted on February 9, 2015 and approved by the Village Engineer and Village Planning and Zoning Board of Appeals on March 16, 2015. The lapse provision of Condition No. 3 was extended to Sept 21, 2015.
2. **Establish a time line for implementation and construction:**
  - a. Through subsequent actions of the Village Planning and Zoning Board of Appeals resolutions were passed that established that the work was to be completed by October 21, 2015.
3. **Complete agreed upon work:**
  - a. Work was completed the week of October 5, 2015 and inspected by the Village Engineer. A utility as-built plan noting the storm sewer construction as completed was provided to the Village on October 19, 2015.

Ms. Zoghlin commented that there has been conflicting information as to whether the pre-existing flow has been restored. Member Lhota stated that she wants documentation in the record that the flow has been restored.

Mr. DiMarzo further stated that on December 10, 2015, he received a letter from the Village Engineer accepting the construction of the storm sewer. This letter also went on to state that in his opinion, the flow condition through the new storm sewer was less than the preexisting flow condition. (Note: there were no prior flow tests taken or observed on the property prior to replacing the depilated clay tile storm sewer with the new storm sewer required in condition #3.) Pittsford Village Green has cleaned out their storm water detention pond and unclogged the pipe which connects to the new storm sewer on PCP's property. This work commenced earlier this fall and is still in the process of being completed.

He concluded by stating that since PCP has completed the original requirements of Condition #3, along with making additional efforts to have Pittsford Village Green clean out their storm water detention pond and unclog the pipe which connects to the new storm sewer on PCP's property, they are requesting that Condition #3 be deemed completed. Further, the Village of Pittsford being an MS4 as part of the compliance duties, they should take over the inspection and final acceptance that the Pittsford Village Green's storm water detention pond has been cleaned out and restored to the original design dimensions noted on the Village Green Office Park Grading Plan, and also including unclogging the pipe which drains this area into the storm sewer system which has been constructed on PCP's property as required under Condition #3.

Member Shannon asked the applicants about the pipe that goes underneath the railroad tracks. Mr. DiMarzo stated that he believes that is on the Village Green property. They are negotiating with CSX railroad.

**Motion:** Member Lhota made a motion, seconded by Member Shannon, to open the public hearing at this time.

**Vote:** Shannon – yes; Lhota – yes; Stetzer – yes; Bannister - yes. *Motion carried.*

- Janet Reynolds, Church Street, commented that the drainage issue at Village Green has not been resolved.

Ms. Zoghlin explained that the drainage problem is a Code Enforcement issue.

**Motion:** Member Lhota made a motion, seconded by Member Stetzer, stating that PCP has met Condition #3.

**Vote:** Shannon – yes; Lhota – yes; Stetzer – yes; Bannister - yes. *Motion carried.*

Member Lhota stated that the discussion of the LWRP findings will be on the agenda for the next regular board meeting to be held on January 28.

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Member Vlietstra returned to the meeting room at this time.

**Michael Newcomb, 47 State Street** ~ Use variance

Member Vlietstra explained that the applicant requested that this hearing be continued at the next regular meeting, so that he will have time to gather further documentation.

**Motion:** Member Vlietstra made a motion, seconded by Member Stetzer, to leave the public hearing open and continue discussion at the January 28 regular meeting.

**Vote:** Vlietstra – Yes; Shannon – yes; Lhota – yes; Stetzer – yes; Bannister - yes. *Motion carried.*

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**Board of Trustees, 50 State Street ~ Appeal from an Building Inspector’s determination**

**Present:** Don Young, Boylan Code

**Discussion:** Chairperson Vlietstra explained that Hawley Brewing Company is proposing opening a brewery at 50 State Street. The application has been before the Board of Trustees as part of a moratorium relief request. The former Village Building Inspector/Code Enforcement Officer, Steve Lauth, made a determination that the brewery is not a restaurant and that it is an agricultural processing use, which is permitted by the Village Zoning Code. In the determination that the use is a permitted use, the business can operate without any approvals from Village Boards. This determination has been appealed by the Board of Trustees to the Zoning Board of Appeals. One of the purposes of the Zoning Board of Appeals is to hear appeals of zoning law determinations made by Village Officials so that it is not necessary to go to court, thereby keeping costs down and getting to a swift resolution of the dispute. There have been numerous submissions and comments from the public regarding this project. All of the documents were posted on the Village website for the public to review.

He further explained that first, the Board will hear from the attorneys for the applicant and the Board of Trustees. The public hearing remains open, and the board will be taking comments from the public, but asked that comments be limited to the key question of whether this constitutes processing of agricultural products.

Mr. Turner stated that there was some question about how the 15% brewing and 85% sales and serving of alcoholic beverages was determined. He stated that that is a square foot calculation that isn’t necessarily an exact number. He further questioned how a use 85 percent of which is devoted to marketing and serving of alcoholic beverages can be considered the processing of agricultural products.

Mr. Young explained that he is the attorney for both the landlord, Northfield Common, and the proposed tenant, Hawley Brewing Company. Mr. Young explained that the Village directed the applicant to make the application for the brewery as an application for a restaurant, so they amended their plans to include a restaurant component. But after they did this, the Village told them that restaurants are prohibited by the moratorium. Then they submitted an application for an exception to the moratorium. Mr. Young stated that two months after they submitted the application for an exception to the moratorium, he received an email from the Village stating that the brewery/restaurant was not permitted in the B4 Zoning District. He stated that he requested a determination from the Building Inspector/Code Enforcement Officer as to whether a brewery was permitted in the B4 District. The Building Inspector made the determination that the brewery was permitted in this zoning district, and the Village Board decided to appeal the Building Inspector's determination to the Zoning Board of Appeals.

Mr. Young introduced the applicant, Clay Killian, and asked him to explain his proposal. Mr. Killian initially submitted a proposal to the Village Board for a restaurant, thinking that would move the project forward. Mr. Killian stated that the plans were subsequently modified to eliminate the kitchen.

Mr. Young stated that one of the main issues that was discussed was whether the sale and marketing of beer at the brewery disqualifies it as a brewery. In other words, is it true that a brewery can only brew beer and do nothing else? He stated that that's not true. It doesn't line up with any common logic or what we all think of when we talk or think about a craft brewery. As an initial matter, the Village Board is taking the position that there is some 15/85 percent split, 15 percent being devoted to the brewing or the back of the house, and 85 percent being devoted to the front of the house or some tables and a bar for tastings. He stated that when he reviewed it, it appeared to be closer to 50/50. He further stated that it doesn't make sense to distinguish between the back of the house, the brewing process, and the front of the house, the tasting; it's all part of one thing.

Mr. Young further stated that New York State Law, Alcoholic Beverage Law § 51(3), states that a "licensed brewer may, at the licensed premises, conduct tastings of, and sell at retail for consumption on or off the licensed premises, any beer manufactured by the licensee or any New York State labeled beer." New York State Law sees a brewery comprising both the manufacturing and the tasting cells, so subdividing the brewery into two separate parts when it actually comprises a single whole thing in order to deny the fact that it is a brewery doesn't make sense. Mr. Young further explained that New York law is clear that when a local zoning ordinance is ambiguous, it must be construed and interpreted in favor of the applicant and against the municipality. It is the Village Board's job to make sure their code is clear because it is not fair to a landowner to be subjected to the whims of the Village Board applying the code ad-hoc differently to different applicants. The municipality drafts the code and has the obligation to make sure that it's clear. The processing of beer includes malting, milling, mashing, lautering, boiling, fermenting, and sometimes filtering, and bottling and selling the beer. The question is whether the process deals with agricultural products. Mr. Young stated that the ingredients for making beer, grain, hops, fruits, and vegetables, are agricultural products.

Member Vlietstra stated that at the last meeting, there was some uncertainty about whether the proposal is for a restaurant or a brewery. At the last meeting, and in the submitted documentation, Mr. Young stated that the applicant was encouraged to apply for a restaurant use, but because of the moratorium, that process is on hold, and he is now proposing to have a craft brewery. At the

September 11<sup>th</sup> Trustee meeting, it was clear that the proposal is for a brewery and not a restaurant, and this was on the record prior to the Building Inspector's determination. It also appeared that the Building Inspector determined that the proposal was not for a restaurant. Ms. Zoghlin stated that in the present application, the applicant abandoned the request to prepare food for service in this particular use. Mr. Young stated that the Village Code refers to a restaurant as basically having a bona fide kitchen to serve patrons that are looking to sit down and have a meal. Never did this application contain such a kitchen. The kitchen in the original application had a microwave and sink and there is no way it could be used for cooking restaurant meals. The only reason that it was included was because the applicant had received direction that in order to get this through, he was to propose it as a restaurant. Even from the beginning when the proposal included a microwave in the kitchen, it was a brewery and it still is a brewery. The proposal does not include a full kitchen; there is a sink for washing dishes and cleaning up, but not for food preparation.

Board members asked for clarification of some aspects of the proposed use. First, are exterior alterations proposed? Mr Young responded that there are no exterior modifications to the building proposed by the brewery.

Board members questioned the applicants as to the hours of operation. One of the applicants, Brian Myers, stated that the proposed hours of operation are: Weekdays: 2 pm–10pm; Fri-Sat: 2pm – 11pm; Sunday: 2pm – 9pm. The applicant stated that there is no plan to have outside seating or live music.

Board members asked if live music or a dance floor are proposed. Mr. Myers stated they will not have live music or a dance floor because there is no room for them in this small building.

Member Vlietstra stated that the public hearing is open, and the Board will hear any additional comments from the public at this time. He further stated that there was an extensive list of comments at the last meeting, and if there are additional comments, he encourages people to address the board and try to restrict their comments to issues relevant to this debate of whether this constitutes processing of agricultural products.

- **Paul Leone, Executive Director of NYS Brewers Association**, stated that there are over 400 breweries in New York State. The vast majority of them are exactly what Hawley Brewing is proposing: a small brewery with a tasting room, and they are not bars or restaurants, they are breweries, and they bring a positive economic impact to the community.
- **Alyssa Plummer, 66 South Main Street**, questioned the relevance of the Board of Trustees' argument involving percentages of the areas of brewing versus sale and consumption of beer. She commented that tastings are important to give customers the opportunity to sample the product. She also commented that it is a retail business, and the location for the brewery is zoned for retail.
- **Ann Binstock, 3 Stonegate Lane**, commented on the economic viability of the State and the Village, and she quoted statistics that breweries create approximately 11,000 full-time jobs in the State. The Village has a need for viable businesses that present opportunities for tourism dollars, jobs, and tax revenue, and craft breweries definitely seem to fit the bill.
- **Art Pires, 70 State Street**, stated that he appreciates that the Board is following the correct procedure in reviewing this proposal. He further stated that the Village Code is not

ambiguous; breweries are not covered in the Code, and therefore, by default, it is not a permitted use. He also stated that upon review of the liquor license application, the Village can submit to the NYSLA conditional restrictions on the location, hours for serving and sale of alcohol, and hours of any music, with consideration of the health, safety, and welfare of the multiple State Street residents. The adjacent properties are between 100 and 500 feet.

- **Maria Rudzinski, Sunset Blvd**, stated that she works with issues related to agricultural processing and deals with specific agricultural zoning issues. Definitions in local codes are very rarely so thorough and completely unambiguous that there is no need for interpretation. Boards have an obligation to research definitions in making determinations. The courts have found that the ZBA must make a reasonable elaboration of the basis of their decision and if they do so it will be upheld. It is not true that just because one is using an agricultural product that they are an agricultural processor. She also commented that the Village is in the process of updating the zoning code.

Mr. Young stated that the issue is not agricultural processing, rather it's processing of agricultural products. Agricultural processing means processing that is associated with an agricultural use. Processing of agricultural products is distinctly different because the use does not need to be agricultural; only products input into the processing need to be agricultural in nature. There is no question that brewing is a process, and hops and barley are agricultural products. He pointed out that in May of 2018, the Village Board approved an application from Lock 32 Brewing Company for an expansion to allow an outdoor seating area. He stated that also in 2018, the Village Board approved an expansion of the interior of the Lock 32 brewery to accommodate a larger tasting area. He stated that in Village Code § 210-6, it states that grandfathered uses should not be expanded. He concluded that there is precedent for allowing a brewery and a tasting room in the Village.

Mr. Turner explained that Lock 32 was a special permitted use under a Code provision that is no longer in effect, so it's not relevant to this situation. He also stated that reason percentages are important is that breweries are not permitted, so one needs to determine if the processing of agricultural products is the principal use.

Ms. Zoghlin asked if Lock 32 ferments wine or beer on the premises. It was stated that they do not. Member Vlietstra asked if the applicants are proposing to sell only the beer that they brew, and not wine or beer from other businesses. Mr. Killian stated that they plan to sell only the beer that they brew on the premises.

**Motion:** Member Vlietstra made a motion, seconded by Member Lhota, to close the public hearing at this time.

**Vote:** Shannon - yes; Vlietstra - yes; Lhota - yes; Stetzer - yes; Bannister - yes. *Motion carried.*

Ms. Zoghlin explained that the Board's job is to interpret the zoning code as applied to this application and determine whether the applicant is proposing a use that involves the processing of agricultural products. If there is an ambiguity about whether they are proposing that type of use, the Board is required to resolve that ambiguity in favor of the applicant, but still must interpret the code and determine whether this proposed use falls within that definition. If the use does fall within the definition, then the proposed use constitutes processing of agricultural products. Then the Board would find that it is permitted as of right in the B4 District, and if it is not, then it isn't permitted. The Board needs to determine if the tasting and sale of the product is a commonly accepted part of the processing of the agricultural products.

Member Lhota stated that there is ambiguity in prose, for example, but there's also the possibility to be very clear and concise. The Board has heard arguments on both sides that this code at this point is ambiguous. As the saying goes, "The tie goes to the runner" and the applicant is the runner in this situation.

Member Bannister stated that he grew up on a farm and is very involved in farming, and in his opinion, this particular brewery does not constitute the processing of agricultural products.

Member Vlietstra stated that he thought long and hard about a definition of processing of agricultural products and he could think of a couple. And picking one, he would be very concerned about some of the ramifications of that. If the Board were to interpret it and come up with a definition, it could make things more restrictive and restrict other businesses if it applied to other businesses. He suggested that the Board not come up with a broad definition but rather keep the decision very narrow and specific to this situation. He further stated that he is finding it difficult to define exactly what processing of agricultural products is and doing so in such a way that will not cause unintended consequences.

Ms. Zoghlin stated that she does not recommend the Board make a broad definition of processing of agricultural products.

Member Stetzer said the decision should be narrowly focused on whether this particular application is the processing of agricultural products, not whether breweries are permitted under the code. We are narrowly focused on whether this particular application is the processing of agricultural products under our current code. We're not using a blanket qualifier for all breweries or even calling this a brewery. She also noted that the applicant will have to comply with Village Code § 210-42(a), Conditions Regulating Use or Services, which states that "No use shall be permitted to be established or maintained in any B-4 District which, by reason of its nature or manner of operation, is or may become hazardous, obnoxious, or offensive owing to emission of odor, dust, smoke, cinders, gas, fumes, noise, vibration, refuse matter or water-carried waste." All of those things will have to be complied with. Member Vlietstra explained that whatever decision the Board makes, the applicant will still have to obtain a building permit and the conditions will be enforced by the Building Inspector. The Building Inspector previously stated in the last meeting that permits cannot be issued if odors, noise, and the like will be a problem to adjacent properties.

Ms. Zoghlin asked the Board if the particulars of the brewing operation are important to the Board such as the number of brewing tanks, number of tables, number of seats, the hours of operation, the lack of live music, the lack of a full kitchen. Members agreed that these are important.

Member Vlietstra stated the particulars of this operation are important in his opinion and that his interpretation could change if the proposal changes. They are not proposing live music or a dance floor which differentiates this from an entertainment use. They are only selling beer they brew and are not reselling alcoholic beverages purchased from distributors; this differentiates the use from a bar.

Member Vlietstra stated that the Board has heard arguments from Mr. Young that it's reasonably related to agriculture, and from the Brewers Association about the importance of craft breweries. There's documentation that breweries help farms in New York. He stated that in his opinion, brewing is a "process" and it does involve products that seem to reasonably relate to agriculture.

Member Vlietstra made a **motion**, seconded by Member Lhota, to adopt a resolution to affirm the determination of the building inspector that this is processing of agricultural products, to narrowly

focus it on this particular project, and have our attorney write up appropriate language in a resolution that narrowly determines that the zoning code is vague and in such an instance, we are required to rule on the side of the property owner.

**Vote: Shannon – yes; Vlietstra – yes; Lhota – yes; Stetzer – yes; Bannister - no. *Motion carried.***

**Member Items:**

- The Board discussed a proposal to install communication antennas on the grain silo in Schoen Place. These antennas may require a Special Use Permit and Site Plan approval from the Village Planning Board (See 210-88 through 210-97). APRB approval is also required. The Village has not received any application and there has not been a determination by the Building Inspector of which reviews are required of the project. The State Historic Preservation Office (SHPO) is conducting a federal environmental review.

**Motion:** Chairperson Vlietstra made a motion, seconded by Member Shannon, to adjourn the meeting at 10:00 pm.

**Vote: Shannon – yes; Vlietstra – yes; Lhota – yes; Stetzer – yes; yes. *Motion carried.***