

MONROE COUNTY CLERK'S OFFICE

THIS IS NOT A BILL. THIS IS YOUR RECEIPT.

Receipt # 3452043

Book Page CIVIL

No. Pages: 34

Instrument: EFILING INDEX NUMBER

Control #: 202306021209

Index #: E2023005785

Date: 06/02/2023

Time: 4:27:19 PM

Return To:  
ALLISON BOSWORTH FIUT

5 State Street Pittsford LLC  
Pittsford Bakery LLC

The Village of Pittsford  
The Zoning Board of Appeals of the Village of Pittsford  
The Planning Board of the Village of Pittsford  
The Village of Pittsford Board of Trustees  
5 State Street Holdings LLC

State Fee Index Number	\$165.00	
County Fee Index Number	\$26.00	
State Fee Cultural Education	\$14.25	
State Fee Records Management	\$4.75	Employee: RR
<b>Total Fees Paid:</b>	<b>\$210.00</b>	

State of New York

MONROE COUNTY CLERK'S OFFICE  
WARNING – THIS SHEET CONSTITUTES THE CLERKS  
ENDORSEMENT, REQUIRED BY SECTION 317-a(5) &  
SECTION 319 OF THE REAL PROPERTY LAW OF THE  
STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK



STATE OF NEW YORK  
SUPREME COURT COUNTY OF MONROE

5 STATE STREET PITTSFORD LLC and  
PITTSFORD BAKERY LLC,

Petitioners-Plaintiffs,

-against-

THE VILLAGE OF PITTSFORD, THE ZONING BOARD OF  
APPEALS OF THE VILLAGE OF PITTSFORD,  
THE PLANNING BOARD OF THE VILLAGE OF PITTSFORD,  
THE VILLAGE OF PITTSFORD BOARD OF TRUSTEES,  
5 STATE STREET HOLDINGS LLC and  
RAOUL CHARLES MANCINI,

Respondents-Defendants.

**SUMMONS**

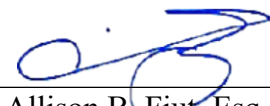
**TO THE ABOVE NAMED RESPONDENTS-DEFENDANTS:**

**YOU ARE HEREBY SUMMONED** to answer the within Verified Petition & Complaint in this hybrid special proceeding/action and to serve a copy of your answer on the Petitioners-Plaintiffs' attorney within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to answer, judgment will be taken against you by default for the relief demanded in the Verified Petition & Complaint.

Petitioners-Plaintiffs designate the County of Monroe as the place of trial pursuant to Section 503(a) and 506(b) of the Civil Practice Law and Rules, because one or more parties are residents of the County of Monroe, and the material events took place in the County of Monroe.

Dated: June 2, 2023  
Pittsford, New York

HARRIS BEACH PLLC

By:   
Allison B. Fiut, Esq.  
Frank C. Pavia, Esq.  
99 Garnsey Road  
Pittsford, New York 14534  
Tel. (585) 419-8800  
afiut@harrisbeach.com  
fpavia@harrisbeach.com  
*Attorneys for Petitioners*

TO: Village of Pittsford  
21 North Main Street  
Pittsford, NY 14534

Zoning Board of Appeals of the Village of Pittsford  
21 North Main Street  
Pittsford, NY 14534

Planning Board of the Village of Pittsford  
21 North Main Street  
Pittsford, NY 14534

Village of Pittsford Board of Trustees  
21 North Main Street  
Pittsford, NY 14534

5 State Street Holdings LLC  
11 James Street  
Fairport, NY 14450

Raoul Charles Mancini  
30 Fords Crossings  
Honeoye Falls, NY 14450

STATE OF NEW YORK  
SUPREME COURT COUNTY OF MONROE

---

5 STATE STREET PITTSFORD LLC and  
PITTSFORD BAKERY LLC,

Petitioners-Plaintiffs,

-against-

THE VILLAGE OF PITTSFORD, THE ZONING BOARD OF  
APPEALS OF THE VILLAGE OF PITTSFORD,  
THE PLANNING BOARD OF THE VILLAGE OF PITTSFORD,  
THE VILLAGE OF PITTSFORD BOARD OF TRUSTEES,  
5 STATE STREET HOLDINGS LLC and  
RAOUL CHARLES MANCINI,

Respondents-Defendants.

---

**VERIFIED  
PETITION &  
COMPLAINT**

**Index No. E2023005785**

Petitioners-Plaintiffs 5 STATE STREET PITTSFORD LLC and PITTSFORD BAKERY  
LLC (herein "Petitioners") by and through their attorneys, HARRIS BEACH PLLC, for their  
Verified Petition & Complaint, complain of Respondents-Defendants as follows:

**PRELIMINARY STATEMENT**

1. This is a hybrid special proceeding brought pursuant to Article 78 of the Civil  
Practice Law and Rules ("CPLR") seeking to annul certain area variances granted by Respondent-  
Defendant Zoning Board of Appeals of the Village of Pittsford (the "PZBA"),<sup>1</sup> due to the PZBA's  
failure to comply with the applicable provisions of the Code of the Village of Pittsford (the  
"Village Code") and multiple New York State statutes, including New York Village Law and the  
New York State Environmental Quality Review Act, Article 9 of the Environmental Conservation

---

<sup>1</sup> The Zoning Board of Appeals of the Village of Pittsford is commonly referred to as the "Village of Pittsford Planning  
and Zoning Board of Appeals." Although the Planning Board of the Village of Pittsford is distinct from the Zoning  
Board of Appeals of the Village of Pittsford, the members of each board are the same.

Law and the regulations promulgated thereunder at 6 NYCRR Part 617 (collectively referred to as “SEQRA”), and further seeking injunctive relief.

2. Petitioners seek an order annulling the April 5, 2023 Decisions on Area Variances of the PZBA, Resolution 2023-6, Resolution 2023-7, and Resolution 2023-8 (collectively referred to as the “Area Variance Resolutions”), which granted Respondent-Defendant, RAOUL CHARLES MANCINI (“Mancini”), three (3) area variances necessary to support Mancini’s application for a special use permit from the Respondent-Defendant Village of Pittsford Board of Trustees (the “Board of Trustees”) to operate a cycle café at the real property located at 5 State Street in the Village of Pittsford, New York (the “Applicant Property”), which is owned by Respondent-Defendant, 5 STATE STREET HOLDINGS LLC (“Applicant Owner” and collectively with Mancini referred to as the “Applicant”). True and accurate copies of the Area Variance Resolutions are collectively attached here as **Exhibit “A”**.

3. Resolution 2023-6 granted the Applicant an area variance permitting the Applicant Property to have 95% lot coverage, whereas Section 210-21.6 of the Village Code requires that the Applicant Property not exceed 60% lot coverage (herein referred to as the “Lot Coverage Resolution”).

4. Resolution 2023-7 granted the Applicant an area variance permitting construction of a masonry and wooden fence/wall around the perimeter of a 40 feet by 50 feet patio in front of the commercial structure located on the Applicant Property, varying in height from eight (8) feet at the building to five (5) feet at the points closest to the sidewalk, whereas Section 98-1 of the Village Code mandates that front yard fence structures not exceed three (3) feet in height (herein referred to as the “Fence/Wall Resolution”).

5. Resolution 2023-8 granted the Applicant an area variance permitting the Applicant Property to have zero (0) off-street parking spaces, whereas Section 210-25.2 of the Village Code mandates, according to the Applicant, that the Applicant Property have 26 parking spaces (herein referred to as the “Parking Resolution”).

6. In granting the Area Variance Resolutions, the PZBA acted arbitrarily and capriciously in its application of the substantive standards governing its review and grant of the area variances, violated applicable lawful procedure in numerous respects, and further infringed on Petitioners’ property right to utilize a handicapped parking space on the Applicant Property.

7. For each and all of these reasons as set forth in greater detail below, the Area Variance Resolutions must be annulled, and Defendants-Respondents preliminarily and permanently enjoined from interfering with Petitioners’ right to the use and enjoyment of their easement over the Applicant Property.

**THE PARTIES**

8. Petitioner-Plaintiff 5 State Street Pittsford, LLC is a limited liability company formed under the laws of the State of New York with its principal place of business located at 16 North Main Street, Pittsford, County of Monroe, State of New York.

9. Petitioner-Plaintiff Pittsford Bakery LLC is a limited liability company formed under the laws of the State of New York with its principal place of business located at 16 North Main Street, Pittsford, County of Monroe, State of New York.

10. Respondent-Defendant PZBA is a “body or officer” as defined in Section 7802(a) of the New York State Civil Procedure Law and Rules (“CPLR”) with its principal place of business at 21 North Main Street in the Village of Pittsford, County of Monroe, State of New York.

11. Respondent-Defendant Planning Board of the Village of Pittsford is a “body or officer” as defined in Section 7802(a) of the CPLR with its principal place of business at 21 North Main Street in the Village of Pittsford, County of Monroe, State of New York.

12. Respondent-Defendant Board of Trustees is a “body or officer” as defined in Section 7802(a) of the CPLR with its principal place of business at 21 North Main Street in the Village of Pittsford, County of Monroe, State of New York.

13. Respondent-Defendant Village of Pittsford is a municipal corporation with its principal place of business at 21 North Main Street in the Village of Pittsford, County of Monroe, State of New York.

14. Upon information and belief, Respondent-Defendant 5 State Street Holdings LLC is a limited liability company formed under the laws of the State of New York with its principal place of business located at 11 James Street, Fairport, New York 14450.

15. Upon information and belief, 5 State Street Holdings LLC is the Applicant Owner who owns a portion of the Property that is the subject of the Area Variance Resolutions.

16. Upon information and belief, Respondent-Defendant Mancini is an individual residing in the Village of Honeoye Falls, County of Monroe, State of New York, and as the Applicant, sought to obtain area variances from the PZBA and a special use permit from the Board of Trustees in order to construct and operate the “La Fabrica Cycle Café” at the Property .

**JURISDICTION AND VENUE**

17. This Court has jurisdiction over this proceeding pursuant to Article 78 of the CPLR and the common law of the State of New York.

18. The County of Monroe is the proper venue for this proceeding pursuant to Sections 506(b) and 7804 of the CPLR, as it is the county where the determinations under review was made,

and pursuant to Section 503(a) of the CPLR, as it is the county where the material events at issue took place and where the multiple parties reside.

**TIMELINESS**

19. The Area Variance Resolutions subject to this Article 78 proceeding were filed with the Village of Pittsford Clerk on May 3, 2023.

20. This action is therefore timely pursuant to Section 7-712-c(1) of the New York Village Law which requires Article 78 proceedings to be commenced within thirty (30) days after the filing of a decision of a zoning board of appeals is made in the office of the Village Clerk.

**STANDING & EXHAUSTION OF ADMINISTRATIVE REMEDIES**

21. Petitioners have standing to maintain this special proceeding/action as Petitioners own and operate a commercial business that adjoins the Applicant Property and possess a right to the use and enjoyment of a handicapped parking space situated on the Applicant Property, and therefore will sustain a special and unique injury in the absence of the relief sought herein.

22. No prior action or proceeding has been brought for the relief sought herein.

23. Petitioners have exhausted their administrative remedies, or alternatively do not need to exhaust their administrative remedies under the circumstances.

**FACTUAL BACKGROUND**

**I. The Applicant Property and the Petitioner Property.**

24. The Applicant Property (Tax Parcel No. 164.06-2-4.2) is located at 5 State Street in the Village of Pittsford, County of Monroe, State of New York.

25. The Applicant Property is situated approximately 100 feet from where State Street (Route 31) intersects Main Street (Route 96), both of which are designated New York State roadways.

26. Upon information and belief, approximately 20,000 vehicles travel through the State Street/Main Street intersection daily.<sup>2</sup>

27. The Applicant Property is improved by a 3,690 square feet commercial building which has previously hosted a number of coffee shops and restaurants, the most recent one being a small-scale restaurant serving American-Mediterranean cuisine.

28. Upon information and belief, the Applicant Owner holds a fee interest in the Applicant Property pursuant to a Warranty Deed, dated March 28, 2018, and recorded in the Monroe County Clerk's office on April 3, 2018, a true and accurate copy of which is attached as **Exhibit "B"** (the "Applicant Deed").

29. Petitioner 5 State Street Pittsford LLC also owns a portion of the real property comprising 5 State Street in the Village of Pittsford (Tax Parcel No. 164.06-2-4.1) pursuant to a Warranty Deed, dated February 4, 2011, and recorded in the Monroe County Clerk's office on February 7, 2011 (the "Petitioner Property"), a true and accurate copy of which is attached as **Exhibit "C"** (the "Petitioner Deed").

30. The Petitioner Property adjoins the Applicant Property at its southern and eastern boundaries by a demising wall and is improved by a 3,627 square feet commercial building where Petitioner Pittsford Bakery LLC has owned and operated for approximately eight (8) years a bakery/restaurant known as the Village Bakery.

31. The image below depicts the approximate boundaries of the Applicant Property (in green) and the Petitioner Property (in blue):

---

<sup>2</sup> See Monroe Avenue Corridor Study, Past Present & Future (April 2010), available at [https://www.villageofpittsford.com/vertical/sites/%7B20315D0E-D7FA-436A-B513-1586646A8CBA%7D/uploads/Monroe\\_Report.Finaldraft.06.22.10rev.pdf](https://www.villageofpittsford.com/vertical/sites/%7B20315D0E-D7FA-436A-B513-1586646A8CBA%7D/uploads/Monroe_Report.Finaldraft.06.22.10rev.pdf) (last visited May 29, 2023).



**II. Parking Easement Benefitting the Petitioner Property.**

32. Upon information and belief, until 1990, the Petitioner Property and the Applicant Property were a single parcel owned by a single owner.

33. To this day, the Petitioner Property and the Applicant Property share the same mailing address and the improvements situated on each property are separated only by a demising wall.

34. Upon information and belief, in 1990, the single parcel was subdivided into the parcels referred to herein as the Applicant Property and the Petitioner Property.

35. Pursuant to a deed, dated June 28, 1990, and recorded in the Monroe County Clerk’s office on June 29, 1990 (the “1990 Deed”), a true and accurate copy of which is attached as **Exhibit “D”**, the Applicant Property was conveyed to Applicant Owner’s predecessors-in-interest.

36. The grantor of the 1990 Deed explicitly reserved for the benefit of the Petitioner Property “the right to use in common with the grantees one handicap parking space situate on lands being conveyed herein[,]” *i.e.*, the Applicant Property (*see* 1990 Deed). The private right in real property referenced in the foregoing paragraph is herein referred to as the “Parking Easement”.

37. Both the Applicant Deed and the Petitioner Deed reference and incorporate the 1990 Deed and, specifically, the Parking Easement.

### **III. Prior Area Variances Granted to Tenants of the Applicant Property**

38. In 2019, the previous tenant located at the Applicant Property, Rachel’s Grill, applied for, and the PZBA granted, an area variance to allow just five (5) regular permanent parking spaces plus one (1) handicapped parking space at the Applicant Property, instead of the eight (8) permanent parking spaces that were then required under Village Code § 210-78’s occupancy rate (based on the 24 seats proposed for the variance applicant’s restaurant). Attached hereto as **Exhibit “E”** is a copy of the PZBA meeting minutes dated July 15, 2019 which contain the applicable Decision on Area Variance (the “2019 Variance Decision”).

39. In its 2019 Variance Decision, the PZBA found that the variance granted was the minimum necessary to permit business operations at the Applicant Property, noting that the Village Code mandates less parking for a restaurant compared to a retail business (Ex. E at p. 12).

40. Upon information and belief, from 1997 until approximately 2018, Starbucks Coffee operated at the Applicant Property and during this period Starbucks maintained the six (6) parking spaces that were approved by the PZBA in 2019 for use by its patrons.

**IV. The Applicant Informally Presents its Project to the PZBA and to the Board of Trustees.**

A. The PZBA provides feedback on the Project at its March 1, 2023 meeting.

41. Upon information and belief, on March 1, 2023, the Applicant appeared at a meeting of the PZBA to present, for informational purposes, its concept of the “LaFabrica Cycle Café” to be located on the Applicant Property (herein referred to as the “Project”). Attached hereto as **Exhibit “F”** is a copy of the minutes of the PZBA meeting held on March 1, 2023.

42. The Project would eliminate all parking at the Applicant Property so that the area could be used as an outdoor year-round courtyard with seven (7) tables and space for bicycle parking, walkways, and planters for greenery.

43. Upon information and belief, at the March 1, 2023 meeting, PZBA Chairperson Justin Vlietstra noted, among other things, that a special permit would be required for the Project; that the proposed alterations of the parking lot “could make it a SEQR Type 1 action” requiring environmental review, with reference being made to the Village’s own list of Type I actions; and that the Applicant Property is well above the lot coverage limit for its zoning district “so adding an outdoor seating area appears prohibited by the code”.

44. At the conclusion of the Applicant’s presentation, the members of the PZBA discussed the obstacles the Project presents in terms of Village Code requirements and further discussed how they could support the Applicant in getting the Project approved expeditiously.

B. The Board of Trustees conducts an initial review of the Special Use Permit Application for the Project at its March 23, 2023 meeting.

45. Upon information and belief, on March 8, 2023, in furtherance of its Project, the Applicant submitted to the Board of Trustees an application for a special use permit (the "Special Use Permit Application").

46. The Special Use Permit Application first came before the Board of Trustees at its meeting on March 23, 2023. Attached as **Exhibit "G"** is a copy of the Board of Trustees' March 23, 2023 meeting agenda and packet materials specific to the Project (including the Special Use Permit Application) as published on the Village's website.

47. Petitioners attended the March 23, 2023 meeting and voiced their objection to the Special Use Permit Application noting, among other things, that the Project would effectively nullify Petitioners' rights under the Parking Easement insofar as the Project contemplates that all parking at the Applicant Property would be eliminated.

48. The Board of Trustees further acknowledged during its March 23, 2023 meeting that the Project presented obstacles in terms of Village Code requirements, but nevertheless set a public hearing on the Special Use Permit Application for April 13, 2023, noting that the public hearing could be adjourned or the Special Use Permit Application could be denied if the Applicant had not provided sufficient additional information to address the concerns by that date.<sup>3</sup>

C. The PZBA violates lawful procedure in holding an improperly-noticed public hearing on the Variances Application at its April 5, 2023 meeting.

49. Upon information and belief, on March 8, 2023, the Applicant submitted an application to the PZBA for the three (3) area variances necessary to proceed with its Project (the "Variances Application").

---

<sup>3</sup> The Public Hearing on the Special Use Permit Application ultimately took place on April 27, 2023.

50. The PZBA held a public hearing on the Variances Application at the conclusion of its April 5, 2023 regular meeting of the PZBA. Attached as **Exhibit “H”** is a copy of the PZBA’s April 5, 2023 meeting agenda and packet materials specific to the Variances Application, including a copy of the Variances Application itself as published on the Village’s website.

51. Pursuant to Sections 210-31.1 and 31.2 of the Village Code, the PZBA was required to give public notice of the public hearing at least 10 days prior to its scheduled date.

52. Pursuant to Sections 210-31.3, 31.4 and 31.5 of the Village Code, notice was required in the following specific forms, among others: (1) in an official newspaper for the Village and on the Village’s website; (2) by mail to owners and tenants of all real property located within 300 feet of the property that is the subject of the hearing; (3) posted at a location plainly visible within the Village Office; and (4) on a sign posted on the property in question in a manner that is plainly visible to passersby.

53. Section 7-712-a of the Village Law requires that notice to the public be given of the public hearing “by publication in a paper of general circulation in the village at least five days prior to the date thereof.”

54. Upon information and belief, the PZBA failed to provide the required notices for the April 5, 2023 public hearing on the Variances Application in an official newspaper for the Village (or one of general circulation in the Village), by mail to the owners and tenants of all real property located within 300 feet of the Applicant Property, or by way of a sign on the Applicant Property.

55. Petitioners, who either own or lease property within 300 feet of the Applicant Property, did not receive a notice by mail of the PZBA’s April 5, 2023 public hearing on the Variances Application.

56. Upon information and belief, numerous owners and tenants within 300 feet of the Applicant Property were not given notice by mail of the public hearing’s date and time.

57. Upon information and belief, this lack of proper notice prevented Village residents and businesses from voicing comments on the substance of the Variances Application at the April 5, 2023 public hearing held thereon by the PZBA.

D. The PZBA adopts the Area Variance Resolutions at the improperly-noticed April 5, 2023 public hearing.

58. At the improperly-noticed public hearing held on April 5, 2023, Petitioners voiced their objections to the Variances Application noting the same concerns they raised to the Board of Trustees at its March 23, 2023 meeting regarding the impacts of the requested area variances on the Parking Easement.

59. Petitioners’ attorneys also outlined these concerns in a letter submitted on their behalf to the PZBA, a copy of which is attached as **Exhibit “I”**.

60. The minutes of the April 5, 2023 public hearing on the Variances Application fail to reflect Petitioners’ objections. Attached as **Exhibit “J”** is a copy of the minutes for the PZBA’s April 5, 2023 public hearing as published on the Village’s website.

61. After voting to close the public hearing on the Variances Application, the PZBA unanimously voted to adopt each of the Area Variance Resolutions.

62. The final, executed, versions of the Area Variance Resolutions filed with the Village Clerk are attached as Exhibit A hereto.

*i. The PZBA's erroneous classification of the Variances Application as a "Type II" action exempt from SEQRA review.*

63. In approving the Area Variance Resolutions, the PZBA violated lawful procedure when it classified the proposed area variances as Type II actions exempt from the requirements of SEQRA.

64. SEQRA requires an agency, before it undertakes, funds or approves a proposed action, to conduct a review of the potential significant adverse environmental impacts of that action pursuant to the procedural and substantive requirements of 6 NYCRR Part 617 (specifically referred to as the "SEQRA Regulations").

65. "Type I" actions, as listed in Section 617.4 of the SEQRA Regulations, are considered to come with the presumption of a potential significant adverse environmental impact requiring the preparation of an environmental impact statement. For all "Type I" actions, a full Environmental Assessment Form (EAF) must be submitted to the lead agency and the lead agency must coordinate the SEQRA review process with other involved agencies.

66. Section 617.5 of the SEQRA regulations provides a list of "Type II" actions that have been determined not to present a potential significant adverse environmental impact, and thus are exempt from a SEQRA review.

67. Lastly, "Unlisted" actions are all other actions that do not fall within the parameters of the "Type I" or "Type II" lists. "Unlisted" actions only require the preparation of a short EAF and the completion of an uncoordinated review by the lead agency, meaning the review does not require the involvement of other agencies before a determination as to whether the action presents a potential significant adverse environmental impact is made.

68. Section 617.5(c)(17) of the SEQRA Regulations provides that the review of an area variance “for a single family, two-family or three-family residence” can be classified as an exempt “Type II” action.

69. According to the SEQRA Handbook published by the New York State Department of Environmental Conservation, “[a]ll other area variances would either be classified as Type I or Unlisted actions” (SEQRA Handbook, Fourth Ed. [2020], p. 180, available at [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf) [last visited May 26, 2023]).

70. In the present matter, the PZBA nonetheless found that each of the requested area variances were “Type II” actions exempt from SEQRA even though the area variances did not involve a single family, two-family or three-family residence.

71. Upon information and belief, the PZBA relied on Section 617.5(c)(9), (16) and (18) of the SEQRA Regulations as the bases for its determination that the requested area variances were exempt “Type II” actions.

72. Section 617.5(c)(16) of the SEQRA Regulations is the “Type II” category applicable where the proposed action involves the “granting of individual setback and lot line variances and adjustments[.]”

73. The area variances sought by the Applicant do not fall within the “Type II” category contained in Section 617.5(c)(16) because the area variances do not involve setback or lot line adjustments.

74. Further, the SEQRA Handbook specifically states that Section 617.5(c)(16) “does not include use or area variances” (SEQRA Handbook, p. 34).

75. Section 617.5(c)(9) of the SEQRA regulations, also cited by the PZBA in support of its decision that the requested area variances were exempt from SEQRA, only applies when the proposed action being reviewed is the:

[C]onstruction or expansion of a primary or accessory/appurtenant, non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls[.]

76. However, the action under consideration by the PZBA was the issuance of area variances, per se, and not the approval of the kind of construction described in Section 617.5(c)(19) of the SEQRA regulations.

77. The Variances Application does not even request approval of “construction or expansion of a . . . structure or facility”, but rather seeks to eliminate parking at the Applicant Property, reduce lot coverage, and construct perimeter walls around a front-yard patio as tall as eight (8) feet, none of which fall within the Section 617.5(c)(9) “Type II” designation.

78. The PZBA lastly cited Section 617.5(c)(18) of the SEQRA Regulations to support its determination that its granting of the requested area variances were exempt “Type II” actions. Section 617.5(c)(18) states:

[R]euse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance, including permitted by special-use permit, and the action does not meet or exceeds any of the thresholds in section 617.4 of this Part[.]

79. The “Type II” action described in Section 617.5(c)(18) is inapplicable since the proposed action subject to SEQRA were, again, the issuance of the area variances, per se, which seek to eliminate parking at the Applicant Property, reduce lot coverage, and construct a 2,000 square feet patio with perimeter walls as tall as eight (8) feet, and not the re-use of commercial or residential structures.

ii. *The PZBA approved the area variances without adequately weighing the mandatory statutory factors.*

80. Section 210-38.1 of the Village Code provides that the rules, regulations, and procedures of Section 7-712-b of New York Village Law shall apply to all applications for area variances.

81. Pursuant to Section 7-712-b(3)(b) of New York Village Law, in making its determination to grant each of the three (3) area variances, the PZBA was required to “take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant.”

82. Pursuant to Section 7-712-b(3)(b), the PZBA was also required to consider the following factors:

- (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
- (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- (3) whether the requested area variance is substantial;
- (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

(*id.* § 7-712-b[3]b)).

83. Lastly, pursuant to Section 7-712-b(3)(c) of New York Village Law, the PZBA was required to “grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.”

84. Furthermore, in connection with the ZBA's issuance of the Fence/Wall Resolution, because the proposed fences would exceed four feet in height and would be constructed of materials other than wood, the ZBA was also required to consider the additional factors set forth in Section 98-1(F) of the Village Code namely:

- (1) The visibility of the fence from neighboring properties; and
- (2) The compatibility of the fence with the general visual character of the surrounding area.

85. In granting the area variances to the Applicant, the PZBA failed to appropriately consider the factors it was legally required to weigh before it could grant an area variance.

86. The PZBA's determination that the Applicant's request for a lot coverage variance "is not substantial" (Lot Coverage Resolution, ¶ C) was arbitrary and capricious and unsupported by the evidence. The PZBA found that the lot coverage reduction was "a negligible change, small improvement in lot coverage relative to existing conditions (almost 100% impervious)" (*id.*).

87. However, the factor set forth in Section 7-712-b(3)(b)(3) of New York Village Law that the PZBA must consider is whether the variance requested (95% lot coverage) is substantial as compared to the governing code requirement (maximum coverage of 60%), not substantial in comparison to the "existing conditions" at the site.

88. The PZBA's conclusory findings set forth in the Area Variance Resolutions that the requested variances "**will not** create an undesirable change in the character of the neighborhood or detriment to nearby properties" (Area Variance Resolutions [Ex. A], ¶ A), and "**will not** have an adverse effect or impact on the physical and environmental conditions of the neighborhood or district" (*id.*, ¶ D), are also arbitrary and capricious and unsupported by evidence. In making these determinations, the ZBA failed to adequately take into consideration the following:

- a. The extent to which the features that will contribute to 100% lot coverage on the Applicant Property will negatively impact drainage in the vicinity, including but not limited to the new 2,000 square feet patio that will be “completely impervious, with no drainage between the stones” (Ex. J at p. 3);
- b. The extent to which eliminating all parking on Applicant Property – a total of six parking spaces – will impact traffic flow in the vicinity, including the highly travelled intersection located less than 100 feet away from the Applicant Property and will put a strain on other parking available in the vicinity;
- c. The fact that Applicant Property is burdened by an easement benefitting Petitioner Property for access to use a handicapped parking space on the Applicant Property which would be eliminated by the Parking Resolution; and
- d. The extent to which the height of the proposed patio perimeter walls (approved to be in excess of eight feet in certain locations) and the fact the walls will not be oriented “outward from the premises”, as required by Section 98-2 of the Village Code, will negatively impact viewsheds of properties in the vicinity of historic landmarks and/or obstruct the visibility of traffic by drivers, cyclists, or pedestrians in the vicinity.

89. Each of the foregoing considerations fall squarely under the statutory factors the PZBA was required to weigh when reviewing the Variances Application.

90. The PZBA’s conclusory findings that the “benefits sought by the applicant **cannot** be achieved by some other feasible method” (Area Variance Resolutions [Ex. A], ¶ B), and that each variance sought “**is** the minimum necessary to provide relief” (*id.*, ¶ F), are also arbitrary and capricious and unsupported by evidence, as well as contrary to the PZBA’s own precedent.

91. In particular, the PZBA's findings in the Parking Resolution that "[t]here is no feasible way to build adequate vehicular parking on this site" and that the variance sought is the minimum necessary to provide relief because "[a] patio cannot be built if the parking spaces remain" (Parking Resolution [Ex. A], ¶ F), are at odds with one another in that a feasible way to operate the Applicant Property as a commercial business would be to operate one without a 2,000 square foot patio, which would permit the existing parking spaces on the Applicant Property to remain.

92. During the April 5, 2023 PZBA meeting, PZBA Chairperson Justin Vlietstra made a similar statement, without any legal or factual support, that "there is no way to legally operate any business in this location with the parking requirements in the Village."

93. Chairperson Vlietstra's statement and the PZBA's findings contained in the Parking Resolution irrationally ignore the fact that Starbucks Coffee successfully operated at the Applicant Property for over twenty (20) years at the same location, with a full six (6) more parking spaces than currently proposed by the Applicant.

94. Therefore, the PZBA's latest finding that zero (0) spaces are the minimum variance necessary to permit commercial use of the Applicant Property – with ten (10) more patron seats than proposed by Rachel's Grill for a total of 34 patron seats – is plainly arbitrary and capricious.

95. Furthermore, although the Fence/Wall Resolution refers to the patio perimeter wall being necessary for the "safety . . . of the patio areas from vehicular traffic from adjacent parking lots" and/or "to protect patio users from vehicular conflict" (Fence/Wall Resolution at "F" and "D"), the PZBA failed to consider whether a wall of a conforming height – or any height lower than the height proposed by the Applicant – could accomplish the same objective.

96. The PZBA acted irrationally in failing to consider the safety of the community including but not limited to drivers, cyclists and/or pedestrians using the adjacent parking lot, sidewalk, and/or street whose vision and/or line of site may be obstructed by the over-sized patio perimeter walls.

97. The PZBA conditioned its grant of the Fence/Wall Resolution upon the Applicant obtaining the following: a certificate of appropriateness from the Village of Pittsford Historic Preservation Review Board; a special use permit from the Board of Trustees; and site plan approval from the PZBA (*see* Ex. A [Fence/ Wall Resolution]).

98. The PZBA did not impose any similar conditions on its grant of either the Lot Coverage Resolution or the Parking Resolution.

99. Additionally, the PZBA imposed a 1-year expiration on the area variance granted by Fence/ Wall Resolution, stating that “[t]his variance shall expire if no building permit is granted for the action within 1 year” (*see id.*).

100. Without providing any explanation, PZBA did not impose any expiration on the area variances granted by the Lot Coverage Resolution or the Parking Resolution.

101. The minutes for the April 5, 2023 public hearing are devoid of any reference to Petitioners’ comments and objections, and do not reflect that the PZBA took Petitioners’ comments and objections into consideration, including the fact that the elimination of the parking spaces on the Applicant Property would effectively divest Petitioners of their property rights set forth in the Parking Easement.

102. The PZBA’s issuance of the Parking Resolution in complete disregard of the Parking Easement, thereby circumventing Petitioners’ private property rights, was in excess of its lawful authority, was arbitrary and capricious, and constituted an abuse of discretion.

E. The Applicant withdrew its Project at the public hearing held by the Board of Trustees at its April 27, 2023 Meeting

103. The Board of Trustees held a public hearing on the Applicant's Special Use Permit Application at its April 27, 2023 meeting. **Exhibit "K"** is a copy of the Board of Trustees' April 27, 2023 meeting agenda and packet materials specific to the Project as published on the Village's website.

104. The publicly available recording of the April 27, 2023 Board of Trustees meeting includes audio of the Applicant's representative stating:

I'm done. This is so stupid. You know what? I'm gonna have my team ... I'm withdrawing my application [for a special use permit] and we are done with this process. Thank you.

(Board of Trustees Regular Meeting, April 27, 2023, at 1:21:50 of 3:37:13, *available at* [https://www.youtube.com/clip/UgkxULKJ5GOcT0BkdBHunlo-svr2Z6A\\_r50I](https://www.youtube.com/clip/UgkxULKJ5GOcT0BkdBHunlo-svr2Z6A_r50I) [last visited May 29, 2023]).

105. A member of the Board of Trustees thereafter stated: "if there is no application, there is nothing [further] to comment on ... if it is withdrawn" (*id.* at 1:22:30). The members of the Board of Trustees voted to close the public hearing on the Special Use Permit Application (*see id.*).

106. In short, the Applicant withdrew its Project from further consideration by the Board of Trustees and the PZBA by withdrawing its application for the requisite special use permit.

F. The PZBA finalizes the Variances Resolutions at its May 2, 2023 meeting over Petitioners' objections and notwithstanding the Applicant's abandonment of the Project.

107. By letter dated April 25, 2023, a copy of which is attached as **Exhibit "L"**, Petitioners renewed their objections to the Variances Application.

108. Nonetheless, and notwithstanding the Applicant's withdrawal of his Special Use Permit Application for the Project, at the PZBA's May 2, 2023 meeting, it finalized the Area Variance Resolutions and the minutes from its April 5, 2023 meeting.

**AS AND FOR A FIRST CAUSE OF ACTION  
(CPLR 7803 – Violations of the Village Code &  
New York Village Law Notice Requirements)**

109. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

110. Pursuant to Section 210-31 of the Village Code, the PZBA was required to give notice of any public hearing on the Variances Application at least 10 days prior to its scheduled date, by each of the means set forth in that section of the Village Code (*Matter of Jones v Zoning Bd. of Appeals of Oneonta*, 61 AD3d 1299 [3d Dept 2009]).

111. Pursuant to Section 7-712-a of New York Village Law, the PZBA was required to give notice of any public hearing on the Variances Application at least five days prior to its scheduled date in a "paper of general circulation in the village."

112. The PZBA failed to give personal notice of the public hearing by mail to Petitioners, who are owner and tenants of real property located within 300 feet of the Applicant Property as required by Section 210-31.3 of the Village Code.

113. Upon information and belief, the PZBA failed to provide personal notice of the public hearing by mail to any of the owners and tenants of real property located within 300 feet of the Applicant Property as required by Section 210-31.3 of the Village Code.

114. Upon information and belief, the PZBA failed to provide notice of the public hearing to the general public by way of a sign placed on the Applicant Property in a manner plainly visible to passersby as required by Section 210-31.5(B) of the Village Code.

115. Upon information and belief, the PZBA failed to provide notice of the public hearing to the general public and media in an official newspaper for the Village as required by Section 210-31.4(A) of the Village Code, or in a “paper of general circulation in the village” as required by Section 7-712-a of New York Village Law.

116. The lack of personal notice to Petitioners and others entitled to personal notice, and the lack of notice to the general public, prevented interested Village residents and businesses from attending, let alone meaningfully participating in, the public hearing held on the Variances Application.

117. The PZBA’s violation of the notice requirements contained in the Village Code and New York Village Law frustrated the purpose and intent of those statutory requirements.

118. The public hearing on the Variances Application held on April 5, 2023, and the PZBA’s grant of the Area Variance Resolutions at the conclusion of same, were in violation of lawful procedure and affected by an error of law.

119. Because the Area Variance Resolutions were granted in violation of lawful procedure and were affected by errors of law as set forth above, they should be annulled, vacated, and/or set aside.

**AS AND FOR A SECOND CAUSE OF ACTION  
(CPLR 7803 – Violations of SEQRA)**

120. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

121. SEQRA’s procedural mechanisms mandate strict compliance, and anything less must result in annulment of an agency’s SEQRA determination.

122. Where an agency’s SEQRA determination is annulled, an agency approval relying upon that SEQRA determination must also be vacated (*Matter of Zutt v State of NY*, 99 AD3d 85, 102 [2d Dept 2012]).

123. The PZBA's classification of the Variances Application as a "Type II" action, and thus not subject to SEQRA, lacked any factual or evidentiary basis, and was in violation of lawful procedures.

124. Upon information and belief, the PZBA should have treated the Variances Application as an "Unlisted" action pursuant to Section 617.6(a)(3) of the SEQRA Regulations and required the Applicant to complete a Short EAF unless the PZBA determined to use a full EAF instead (*see Matter of Rte. 17K Real Estate, LLC v Zoning Bd. of Appeals of the Town of Newburgh*, 168 AD3d 1065, 1067-68 [2d Dept 2019] [project sponsor's applications seeking area variances from town ZBA were "Unlisted" actions under SEQRA and thus ZBA was required to file a short EAF and make a determination of environmental significance]).

125. Although the Applicant submitted a completed Part 1 of a Full EAF to the PZBA the PZBA nonetheless proceeded to treat the Variances Application as an exempt "Type II" action pursuant to SEQRA.

126. SEQRA provides that, prior to making a determination of significance, an agency is required to "identify the relevant areas of environmental concern" by reviewing the EAF and the criteria contained in Section 617.7(c) of the SEQRA Regulations.

127. Because an EAF was not completed by the PZBA for the Variances Application, the PZBA failed to identify the relevant areas of environmental concern associated with the area variances pursuant to the SEQRA regulations.

128. Section 617.7(b)(4) of the SEQRA regulations further provides that, prior to making a determination of significance, an agency, such as the PZBA, is required to "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation."

129. Because the PZBA failed to identify the relevant areas of potential environmental concern or to take the necessary hard look at them, it could not (and did not) set forth its determination of significance in a written form containing a reasoned elaboration.

130. Therefore, because the PZBA incorrectly determined that the Variances Application was a “Type II” action exempt from SEQRA, failed to identify and undertake the necessary hard look at any relevant areas of potential environmental concerns posed by the area variances, as well as failed to set forth its determination of environmental significance in a written form containing a reasoned elaboration, the PZBA failed to strictly comply with the procedural and substantive mandates of SEQRA.

131. Because the Area Variance Resolutions were granted in violation of lawful procedure and were affected by errors of law as described above, they should be annulled, vacated, and/or set aside.

**AS AND FOR A THIRD CAUSE OF ACTION  
(CPLR 7803 – Arbitrary and Capricious Grant of Area Variances)**

132. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

133. In adopting each of the Area Variance Resolutions, the PZBA acted arbitrarily and capriciously and abused its discretion in its weighing of the substantive statutory factors governing the grant of an area variance contained in Section 7-712-b(3)(b) of New York Village Law.

134. The Lot Coverage Resolution, by which the PZBA unconditionally granted the Applicant an area variance permitting the Applicant Property to have 95% lot coverage, whereas Village Code § 210-21.6 mandates that the Applicant Property not exceed 60% lot coverage, should be annulled because it lacks a rational basis, is arbitrary and capricious, and the findings cited by the ZBA as weighing in favor of granting the area variance lack evidentiary support in the record.

135. The Fence/Wall Resolution, by which the PZBA conditionally granted the Applicant an area variance permitting construction of a masonry and wooden fence/wall around the perimeter of a 2000 square feet patio in front of the commercial structure located on the Applicant Property, varying in height from eight (8) feet at the building to five (5) feet at the points closest to the sidewalk, whereas Section 98-1 of the Village Code mandates that front yard fence structures not exceed 3 feet in height, should be annulled because it lacks a rational basis, is arbitrary and capricious, and the findings cited by the PZBA as weighing in favor of granting the area variance lack evidentiary support in the record.

136. The Parking Resolution, by which the PZBA unconditionally granted the Applicant an area variance permitting the Applicant Property to have zero (0) off-street parking spaces, whereas the Applicant acknowledges that Section 210-25.3 of the Village Code mandates the Applicant Property to have 26 parking spaces, should be annulled because it lacks a rational basis, is arbitrary and capricious, and the findings contained cited by the PZBA as weighing in favor of granting the variance lack evidentiary support in the record.

137. The PZBA's adoption of the Area Variance Resolutions also constituted an abuse of the PZBA's discretion and were arbitrary and capricious since the resolutions and deliberations surrounding them reflect that the resolutions were a product of a personal preference by one or more PZBA members to create a walkable or "pedestrian-friendly" Village without proper consideration of the adverse impacts to the business community, traffic, and pedestrian safety, as well as the private property rights of owners and tenants such as the Petitioners.

138. The PZBA's adoption of the Parking Resolution was plainly contrary to Section 7-712-b(3)(c) of New York Village Law, which required the PZBA to "grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character

of the neighborhood and the health, safety and welfare of the community,” insofar as the PZBA approved zero (0) parking spaces on Applicant’s Property whereas just four years prior it had determined in its 2019 Variance Decision that six (6) parking spaces was the minimum necessary to protect the character of the neighborhood and the health, safety and welfare of the community.

139. Moreover, the PZBA’s determination to impose Project-specific conditions on, and an expiration of, the area variances granted by the Fence/Wall Resolution, but not to impose any conditions or expiration on the area variances granted by the Parking Resolution and the Lot Coverage Resolution, lacks a rational basis, is arbitrary and capricious, and constitutes an abuse of discretion.

140. The PZBA further violated lawful procedure, exceeded its jurisdiction, and abused its discretion when, at its May 2, 2023 meeting, it determined to finalize the adoption of the Area Variance Resolutions notwithstanding that the Applicant had withdrawn its Special Use Permit Application and, thus, abandoned the Project for which the area variances were sought.

141. The PZBA further violated lawful procedure, exceeded its jurisdiction, and abused its discretion in approving the Parking Resolution, thereby approving the elimination of all parking spaces on the Applicant Property, notwithstanding that the Applicant Property is burdened by the Parking Easement by which Petitioners are entitled to utilize a handicapped parking space on the Applicant Property.

142. By reason of the foregoing, the Area Variance Resolutions should be annulled, vacated, and/or set aside.

**AS AND FOR A FOURTH CAUSE OF ACTION  
(CPLR 3017 – Declaratory Judgment)**

143. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

144. As set forth above, the PZBA violated lawful procedure, exceeded its jurisdiction, and abused its discretion when it determined to finalize the adoption of the Area Variance Resolutions at its May 2, 2023 meeting, notwithstanding that the Applicant had withdrawn its Special Use Permit Application on April 27, 2023 and, thus, abandoned the Project for which the area variances were sought.

145. By reason of the Applicant's abandonment of the Project for which the area variances were granted, Petitioners are entitled to a judgment declaring that the Area Variance Resolutions are a nullity and of no force and effect.

146. As also set forth above, the PZBA violated lawful procedure, exceeded its jurisdiction, and abused its discretion in approving the Parking Resolution, notwithstanding that the Applicant Property is burdened by the Parking Easement by which Petitioners are entitled to utilize a handicapped parking space on the Applicant Property.

147. To that end, Petitioner 5 State Street Pittsford, LLC, as the owner of Petitioner Property, and Petitioner Pittsford Bakery LLC, as a tenant of Petitioner Property, possess a valid and enforceable right to use in common with the Applicant Owner one handicapped parking space situate on the Applicant Property (*i.e.*, the Parking Easement).

148. By reason of the foregoing, Petitioners are entitled to an order: (i) declaring that the Parking Resolution, or any other determination by the PZBA which purports to eliminate a handicapped parking space on the Applicant Property, or that otherwise infringes upon the rights of Petitioners to enjoy the benefits of the Parking Easement is illegal, null and void; and (ii) preliminarily and permanently enjoining the Applicant Owner, the Applicant, the PZBA (including

both the Zoning Board of Appeals of the Village of Pittsford and the Planning Board of the Village of Pittsford), the Town, the Board of Trustees, and any of their agents or officials, from taking any actions that interfere with or infringe upon the Petitioners' rights to the use and enjoyment of the Parking Easement, or any actions that otherwise would reduce or eliminate Petitioners' rights therein.

**WHEREFORE**, Petitioners respectfully request entry of an Order and Judgment:

- a. Pursuant to Section 7803 of the CPLR, annulling, vacating and/or setting aside the PZBA's Area Variance Resolutions, dated April 5, 2023, on the grounds that the PZBA's determinations were affected by errors of law, were issued in violation of lawful procedures, were arbitrary and capricious, constituted abuses of discretion, and were in excess of the PZBA's jurisdiction;
- b. Pursuant to Section 3017 of the CPLR, (i) declaring that the Area Variance Resolutions are a nullity and are of no force and effect in light of the Applicant's abandonment of the Project; and (ii) declaring that the Parking Resolution, or any other determination by the PZBA which purports to eliminate a handicapped parking space on the Applicant Property, or that otherwise infringes upon the rights of Petitioners to enjoy the benefits of the Parking Easement is illegal, null and void;
- c. Pursuant to Section 6301 et seq. of the CPLR, preliminarily and permanently enjoining the Applicant Owner, the Applicant, the PZBA (including both the Zoning Board of Appeals of the Village of Pittsford and the Planning Board of the Village of Pittsford), the Town, the Board of Trustees, and any of their agents or officials, from taking any actions that interfere with or infringe upon the Petitioners' rights to the use and enjoyment of the Parking Easement, or any actions that otherwise would reduce or eliminate Petitioners' rights therein;

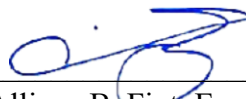
- d. Awarding Petitioners' their reasonable costs, including attorneys' fees, in prosecuting this action; and
- e. Granting such other and further relief as the Court deems just and proper.

Alternatively, should the Court determine a hearing to be necessary and appropriate before the above relief can be granted, Petitioners respectfully request the opportunity to conduct limited discovery after the PZBA produces the full Administrative Record.

Dated: Pittsford, New York  
June 1, 2023

HARRIS BEACH PLLC

By:




---

Allison B. Fiut, Esq.  
Frank C. Pavia, Esq.  
99 Garnsey Road  
Pittsford, New York 14534  
Tel. (585) 419-8800  
afiut@harrisbeach.com  
fpavia@harrisbeach.com  
*Attorneys for Petitioners*

VERIFICATION

STATE OF NEW YORK )  
 ) ss:  
COUNTY OF MONROE )

CHARLES FITZSIMMONS, being duly sworn, deposes and says, that he is a member of both 5 State Street Pittsford, LLC and Pittsford Bakery, LLC, Petitioners-Plaintiffs in the within action; that he has read and knows the contents of the foregoing Verified Petition & Complaint and is acquainted with the facts recited therein; and he knows the same to be true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters, he believes them to be true, for the reasons stated.

  
CHARLES FITZSIMMONS

Sworn to before me on this  
1 day of June 2023

  
Notary Public  
ERIKA MARIE BERGEN  
Notary Public, State of New York  
No. 01BE6161390  
Qualified in Monroe County  
Commission Expires 02/26/2027