# VILLAGE OF MONROE
# ZONING BOARD OF APPEALS
# MEETING
# JULY 9, 2019
# MINUTES

**PRESENT:** Chairman Baum, Member McCarthy and Member Zuckerman; Alternate Member Czerwinski and Alternate Member Gilstrap; Building Inspector Cocks; Richard B. Golden, Esq.

**ABSENT:** Member Margotta and Member Martuscelli

Chairman Baum called the meeting to order at 8:05pm with the Pledge of Allegiance to the flag.

Chairman Baum began the meeting by welcoming Alternate Board members John Gilstrap and Jason Czerwinski to the Zoning Board of Appeals. Chairman Baum appointed the Alternate Members as sitting members to take the places of Member Margotta and Member Martuscelli.

**APPLICATION: Timothy Mitts – Interpretation – 206-5-4.12**
**Present: David Niemotko, Architect for the Applicant, and Mr. Timothy Mitts**

An interpretation of Local Law #2 of 2019 – Adaptive Re-Use of Buildings listed on the National and State registers of Historic Places, sections 200-61.1F(2)(b) and 200-61.F(4) regarding maximum height allowed in this district.

The property, which is the subject of said action by the Board, is located in an SR-10 Zoning District and is identified as Section 206, Block 5, Lot 4.12 on the tax map of the Village of Monroe and is also known as the address 236 High Street.

Mr. David Niemotko, architect for this project, addressed the Board. He said that he has been working with Mr. Mitts on and off for the last few years. "We're here making an application to you for an interpretation of a portion of Local Law #2, Adaptive Re-Use of Buildings listed on National and State registers of Historic Places."

Mr. Nietmotko said that 236 High Street, also known as Rest Haven, has a historic feature to it. It's on the National Register of Historic Structures, not only for its history but also for its architectural elements. The project has been before the Planning Board because of its re-use as an adult care facility and is going through the process of getting Planning Board approval. During that process the height of the building came under question. It was in a Planning Board memo, one of several comments, indicating the height. It also came up as a memo from the Building Department which was submitted with the application. The third paragraph of the memo, dated April 26, 2019, states, "Because you're performing alterations and the fact that your building exceeds the maximum height allowed in this district, you will need to appear

before the Zoning Board of Appeals pursuant to Village Code 200-61.1F(2)(b) for either an area variance or an interpretation before you can proceed with the Planning Board review." Member Zuckerman asked how high the building is and how high should it be? Mr. Niemotko answered that the zoning code allows for a maximum height of 30 feet and two stories. This building exceeds it. Mr. Niemotko said that it's probably around 38 feet. Building Inspector Cocks responded that it was 50 feet. Mr. Niemotko said that he would like to confirm that.

Mr. Niemotko continued, saying that the Local Law #2 paragraph F(2)(b) requirements that are referenced in the Building Department memo states, "When an existing building is to be converted for a use allowed herein without alteration the dimensional requirements of said historic building shall be deemed conforming notwithstanding the requirements set forth in subsection paragraph 4. Paragraph 4 states where an existing building is to be converted for a use allowed herein without any alteration to the building size, the dimensional requirements of the said historic building shall be deemed conforming to the bulk requirements of the zoning district within which the building is located." We're not changing the size of the building at all. The footprint remains the same. In fact, the architectural elements associated with this building are part of the national historic register, so we would not want to alter the exterior of the building or change the size. We request that the Zoning Board grant an interpretation in our favor. In either case, this building conforms to the zoning code. Again, as it states in (2)(b) "when an existing building is to be converted for a use allowed herein without alteration" we are converting to a use that's allowed within the zoning code, "the dimensional requirements of said historic building shall be deemed conforming notwithstanding the requirements in section 4." Mr. Niemotko said that definition of "notwithstanding" in Webster's dictionary is: however, although, even though, still, yet, etc. It's qualified by paragraph 4. Paragraph 4 states, as mentioned previously, "without any alterations to the building size, the dimensional requirements of the building shall be deemed conforming." Mr. Niemotko reiterated that they will not be changing the building size at all.

Chairman Baum said that this says without alteration. Obviously, you're making some alterations. The letter from Building Inspector Cocks points out "structural alterations to accommodate the elevator, relocation of walls to accommodate an ADA bathroom, a new interior egress pathway to bypass the kitchen area." So, there are alterations being made to the structure, correct? Mr. Niemotko responded that they were within the building.

Chairman Baum said that he is just trying to understand. Reading the code he said, "When you're having a building that's being converted for use without alteration" but you're making an alteration. Mr. Niemotko said they were making interior alterations. Mr. Niemotko continued on, reading, "Notwithstanding the requirements set forth in subsection (4)." Member Zuckerman said that what's important is the definition of "notwithstanding." Mr, Niemotko responded that the definitive comment or outline is in paragraph (4), "without any alteration to the building size." We're not changing the building size. Member Zuckerman responded but we have to interpret what is the meaning of "notwithstanding" within F(2)(b). You mentioned certain things I'm sure that the Building Inspector also checked before he made his determination. He asked Building Inspector Cocks if he checked sources for the definition? Building Inspector Cocks said he checked Webster's and Black's Law dictionary which defines "notwithstanding" as "literally meaning irrespective of." He said that it also can mean "despite" and "regardless of."

Chairman Baum asked Building Inspector Cocks if there are any other additions or alterations that are being made to the building other than for the elevator and the ADA bathroom? Building Inspector Cocks responded that the major things are what he pointed out in his letter. Those are structural alterations. Chairman Baum asked if there are other alterations being made that aren't structural? Building Inspector Cocks responded that there are other, smaller things, but not structural. Mr. Niemotko then said that none of those structural requirements change the building size, nor the dimensional requirements of the building.

Alternate Member Czerwinski asked about the elevator bulkhead? Mr. Niemotko responded that there won't be one. They have a vertical conveyor. He said that they supplied pictures with the application showing the exterior of the building. It remains as is.

Chairman Baum asked if 200-61F(2)(b) can't stand on its own? He said to forget about the word "notwithstanding." If 200-61F(4) is violated as long as your client doesn't violate 200-61F(2)(b) your client should be ok. Alternate Member Czerwinksi said, "They're alternatives" to which Chairman Baum responded, 'That's right." He continued, saying that his client has to meet the requirements of 200-61F(2)(b) and if he doesn't meet the requirements of 200-61F(4), "nothwithstanding that" if his clients meets 200-61F(2)(b) then he would be deemed conforming. He said, "That's the way I read it."

Member Zuckerman said that he thinks again it's the definition of "notwithstanding" because if it's "irrespective of" as the Building Inspector says, then the applicant is deemed conforming or not irrespective of the requirements set forth in subsection F(4). So basically that is saying to ignore the requirements in subsection 4 and make your determination as to the violation in only this section. If you read the Building Inspector's report that we received, the only thing he has before us as an interpretation is F(2)(b) not (4) because (2)(b) says "notwithstanding" that other particular section.

The Building Inspector said that it also stands alone. It's a separate paragraph. Mr. Niemotko disagreed, saying that it's *conjunctive* with paragraph 4. Chairman Baum asked if it has to be read together? Mr. Niemotko said yes.

Chairman Baum said that the way he reads it is, if you fail on the one then this is not going to save you because it says, "notwithstanding that." In other words, even if you don't meet that. And if you meet this then you're ok. Alternate Member Gilstrap agreed. He said you can be conforming either under the law as set forth in 4 or despite the fact that you are not within 4 you can be found conforming within the law as set forth in 2. Surely that is what the function of the word "notwithstanding" can be referred to.

Member Zuckerman asked if we could look at an article written by Kenneth A. Adams, the author of an article in the New York Law Journal dated July 5, 2002. He is a professor and a lawyer and he has written two of the largest books on legal writing. Attorney Golden said that the Board can hear Mr. Zuckerman if it wants. But he clarified the role of this Board for interpretations is obviously different than its other roles concerning variances, etc. The courts have interpreted that your role on interpretations is that you are to be guided by the specific

words in the statue as to what you think those intend. If you can read that in context and you think that the words intend something that's what you have to apply, whether that's in conformance or not with respect to the Building Inspector's earlier interpretation. If this Board believes, reading the words, that it was the intent of the Board of Trustees, that for instance, you should start with F(4) to see if that fits and if it doesn't you could still go to F(2) and see if it fits there. But I think that there are a couple of things that ought to be focused in on. Personally, I don't think "notwithstanding" is the biggest word. "Notwithstanding" is fairly clear. It's irrespective of or regardless of this other provision. One talks about whether or not the building is without alteration. So you have to look at what do you think, based upon these words, and the different characterization of it in F(4) where it talks about the building size. F(2) doesn't talk about size, it just talks about the building. There is some distinction there that you have to recognize. You can't say they're the same thing because they use two different words. The law says there has to be a reason for that distinction. The question is, "building without alteration" - does that mean interior or does it just mean exterior? That's one of the issues you can talk about. The size I think is well fairly defined. The size of the building. So in other words there may be alterations to something other than the size of the building such as the interior that wouldn't be relevant with respect to this. You have to look at this and see whether or not objectively using those words you believe that it fits into one or the other or neither.

Chairman Baum asked Member Zuckerman what was the purpose of bringing up this article? Member Zuckerman responded that it provides expert opinion as to the uses or misuses of "notwithstanding." What is the meaning and how it should be interpreted in a legal document. Attorney Golden said that the Board's deliberations are similar to what courts look at with respect to statutes (if this were to ever get challenged). The courts look at it in a similar basis. You look at your code and its interpretation. You're trying to determine what was intended by the Board of Trustees when they passed this given the specific language. Unless there is something that's very clear at the time they adopted it saying, "We intend this to mean…" and then you can go ahead and look at that if, in fact, there's ambiguity. If there's no ambiguity you're just bound by the words that are said here. And what your code says, and what most codes say, is that, and in fact you don't always have this with statutes because sometimes they define things in a different way or make different references but for your code the courts of New York have said that if it's not a defined term you should look into the ordinary dictionary. Sometimes it actually gives you a specific dictionary, Merriam's 5th or whatever it happens to be. I don't think yours goes into that category. But I think it does say the ordinary dictionary meaning. Building Inspector Cocks said that it references Webster's dictionary. Attorney Golden continued, saying that Black's dictionary doesn't matter it's only really Webster's dictionary. Member Zuckerman said that the Village's code does mention Black's also for legal terms.

Member Zuckerman then read the paragraph written by Mr. Adams:

> *To illustrate my approach, consider "notwithstanding." It is a regular fixture in corporate agreements. "Notwithstanding any provision of Section 3.2 Acme may own one percent or less of a publicly traded company." In this sentence "notwithstanding" means "in spite of" or "despite" and serves to indicate that*

*while the subject matter of Section 3.2 overlaps with that of the quoted sentence, the quoted sentence should be read and interpreted as if Section 3.2 did not exist.*

Attorney Golden remarked that Mr. Adams' remarks seem to suggest the definition is an ordinary dictionary meaning. Chairman Baum agreed. We're suggesting that we should read F(2) as if F(4) didn't exist. Alternate Member Gilstrap said that it does sound like it's consistent with the interpretation that Chairman Baum was advancing. He asked if Member Zuckerman found something else different? To which Member Zuckerman responded no.

Chairman Baum said that it's clear there's an alteration. He asked Mr.Niemotko if he is saying that these alterations shouldn't be looked at? Mr. Niemotko responded that the interior alterations should *not* be looked at all. It's the architectural elements on the exterior that govern. The agency that has jurisdiction is concerned would be the national historic society (SHPO). They would be concerned about those things. Mr. Mitts has done everything within his power to keep that building in compliance with the historicity of its nature and also within SHPO's regulations. So, to say alteration as a blanket word is ridiculous. It's not within the realm of reality. Every building goes under some alteration without question.

Attorney Golden said that there are two provisions here and they're only related to the extent of saying well, if that regardless of that, you might be able to come under this other provision. But they're stated slightly differently so there is some distinction. But they both use the term alteration. One is alteration to the building the other is alteration to the building size. If you're saying that exterior is the only thing that's important, not interior, on F(4) it's alteration to the building size on the exterior That is, you can't somehow alter the size of the building by exterior alterations you're saying and on F(2)(b) you're saying that alterations are something other than size on the exterior. Is that what your position is? Mr. Niemotko responded yes.

Attorney Golden then said that the Board has to consider whether that's reasonable. Mr. Niemotko then said, let's take that one step further. If we were to amend the size of the building how would you amend the size of your house? What would you do? You would add an addition. It would not be called an alteration. It would be an addition to the building. That's how you would alter the size of your building. Even if you added a floor, that floor wouldn't be called an alteration, it would be called an addition.

Chairman Baum asked if you can alter your house by taking out a wall and making it an open space and putting up a microlam? Mr. Niemotko responded that this would not change the building size. Chairman Baum responded but it's an alteration of the building. The other one talks about, as Attorney Golden pointed out, an alteration to the size of the building.

Mr. Niemotko said that we're talking about two types of alterations. The interior alterations are not applicable. Chairman Baum said that's your position.

Member Zuckerman reiterated that the letter from Building Inspector Cocks only states an interpretation on 200-61.1F(2)(b). Mr. Niemotko responded that the applicant amended that in his application. Our application includes paragraph 4. Member Zuckerman said we're saying that (2) says that it stands alone because it's "notwithstanding (4)."

Chairman Baum said frankly I don't understand how if you have an alteration whether the building size clearly is an alteration I don't understand why you needed a second one. I'm not clear what they were thinking when they put it in twice. Obviously, there was some discussion. He asked Building Inspector Cocks if he was involved in the drafting of this? Building Inspector Cocks said, "Not whatsoever."

Mr. Mitts said, "Mr. Chairman, can I just point out to the Board when you talk about using the word alterations and I've been restoring the house for three years now, the only alteration that is being done to the house was for ADA compliance. If it wasn't for Mr. Cocks saying you have to do this none of this would be happening. We asked for the path through the kitchen. He said the code cannot have that. He said you have to find another path. Go this way, that way or whatever. So it's not an alteration that I'm making to a building because I want to, I'm making because I'm being told I have to. So now you're putting me in a position where he says, well make the alterations here. You're telling me I have to make the alterations. I have to put a ramp outside, I have to put a vertical lift in and I have to put in ADA. Now let's talk about the three. The ramp's not an issue. I already talked to SHPO and they're all on board with me about the ramp. I've talked about the vertical lift. There's nothing structural. We're going from the first floor to the second floor into a bathroom that's not a bearing wall. It's just opening up the floors so that anyone can go through. As far as the bathroom goes, there were two illegal bathrooms consisting of six bathrooms. The second area bathroom has been cleaned up and made to look better than when we got there three years ago. The second one was left alone for the very purpose of Mr. Cocks was going to come and say, "You need an ADA bathroom," one room, all the original tiles and everything on it. All the original plans for walls and everything, that should be opened up, divided into two thirds, and made into one apartment to comply with ADA. If I needn't comply with ADA we wouldn't be doing the ramp, we wouldn't be doing the elevator, we wouldn't be doing the bathroom. But I'm told we have to do it.

Chairman Baum said you have to do that because you're converting the use and you have to be ADA compliant. Mr. Mitts responded that he agreed with that. But he said when you use the word alteration, he said, "I'm not making the alteration. You're pinning two codes against me by doing that." Chairman Baum responded that the Board is trying to understand the application. We have an application before us. We have a statute. Clearly you're making an alteration to the premises. The only reason why you're making the alteration is because you have to, to be ADA compliant because of the use you're converting it to, but you're still making an alteration. We can't look past that. The code says you can't make an alteration and still consider the height. We can't say the reason he's making an alteration is for a really good reason so we'll overlook it. That's not within our purview.

Attorney Golden said that is not under an interpretation and that's why what Building Inspector Cocks has said is that you need an interpretation. You can challenge the interpretation or you can get a variance. The problem with the Board giving an interpretation is it doesn't just apply to you. An interpretation now applies to everybody whenever this particular code is being applied. The Board has to be very concerned about the unintended consequences of defining something in relation to a particular circumstance when it's going to be used in many circumstances going forward. The whole purpose of a variance is contrary to that. The variance is only as to your

circumstances. And in fact as I'm sure you know and the Board knows one of the factors for an area variance is whether or not it is self-created. And what you had just said here is precisely the kind of issue that the Board must weigh on a variance is that this wasn't self-created. This was created by a new law coming into effect and the ADA and other things. This isn't something where you created the need for a variance. You also aren't changing the exterior of the building at all. And so it's hard to see how you would affect the character of the neighborhood by this interior design. Also, the other factors dealing with the environmental impacts or how it impacts the neighbors are really not applicable. The variance makes a lot more sense than trying to contrive a definitional change to fit yours that isn't going to somehow hamstring the Village going forward on an application under different circumstances. Attorney Golden said he thinks that's why the Building Inspector had suggested that you could also do a variance. From my point of view the variance makes much more sense. Member Zuckerman said that he agreed with that. Chairman Baum said well, we don't have an application for a variance before us.

Mr. Niemotko then said that we were hoping not to go through that process. But, Chairman Baum said, it's the same process. You could have asked for it in the alternative. You could have an interpretation or a variance and we'd be hearing it. We would have advertised it that way. But since it wasn't advertised the public doesn't know that that there's a possibility we were going to grant a variance so we really can't entertain a variance. Attorney Golden said unless you amend the application and the Board could hold open the hearing and it could be re-noticed. Chairman Baum said yes, we could do that but we're not even there yet.

Chairman Baum asked Mr. Niemotko if there was anything else he wanted to add? The Chairman summed up by saying that we pretty much have the whole picture. You're making some interior alterations to comply with ADA requirements because the house is being converted for use to an adult facility. And because of that and because of this code section the Building Inspector said you're not being compliant anymore and you're non-comforming because you don't meet the height requirement. Mr. Niemotko said that was correct.

Member Zuckerman said I don't want to be the defender of the Planning Board or the Planning Board attorney, but there is a sentence in here about members of the Planning Board and the Planning Board attorney agreeing with your interpretation. Mr. Niemotko said, "Yes." Member Zuckerman asked if that was at the Planning Board meeting? Mr. Niemotko said, "Yes." Member Zuckerman asked if it was Attorney Steve Reineke who said it? Mr. Niemotko said it was. Member Zuckerman said that he would like to put into the record of the minutes of the meeting of May 8, 2019. Chairman Baum said why don't you just point out what Attorney Reineke had said? Member Zuckerman read from the minutes:

> *Attorney Reineke understood architect Niemotko's position and agreed that the wording of the law appears to be somewhat contradictory and should have been written clearer. Having the two conflicting paragraphs in two separate sections supports the Building Inspector's interpretation of the law.*

Chairman Baum said that the Attorney Reineke goes on to say that the Planning Board doesn't have the authority to interpret the zoning.

Chairman Baum asked the Board members if they had any questions. None did.

Chairman Baum opened the meeting up to the public. Vince La Salle of 17 Summit Street addressed the Board. He said that he lives about a quarter of a mile away from this building. Mr. La Salle said that there are a lot of rumors going around about this building. Sometimes rumors are based on fact, sometimes they're not. Mr. La Salle asked the Board to explain what a variance is. Chairman Baum said that a variance is when we have a code section and we say notwithstanding that code section that says you can't do it we're going to give you a variance and we're going to allow you to do it anyway. Mr. La Salle understood that to mean it's an exception. The Chairman continued, saying that tonight we're not being asked to grant a variance from this section, we're being asked to interpret this section. The applicant wants us to interpret in a way that supports him so that he doesn't need a variance.

Mr. La Salle said that a lot of people in the neighborhood are concerned about the issues involved with this building, about the legitimacy of it, the reasons for it, why do you need an extended level, is it going to be its own business, there's this long-term interpretation of this property that's going to change as this building gets bigger. There are a lot of people in the neighborhood who are concerned. Basically, with tonight's meeting everything is on hold.

Chiarman Baum disagreed with that. He said that we are here for a very limited purpose. The use is not an issue before us. The Planning Board is looking at the site plans and certain elements of the site. Chairman Baum said we're being asked to look at a very particular question. Based upon the interpretation of this code is he allowed to do these alterations to a building notwithstanding that the building exceeds the legal height requirement of the zone. That's the only question that we're here for. If we find that it does exceed it we're done. If he asks for a variance we can find that it exceeded it and then say notwithstanding that it exceeds it we're going to allow you to do it.

Mr. La Salle said that some people in the neighborhood feel the extension of that height is going to change things. Chairman Baum said that they're not increasing the height. Nothing is changing. The height of the building is the height of the building it's not changing. Mr. La Salle said I'm just trying to understand it better. Chairman Baum said, maybe to understand it a little better, that building right now exceeds the height that's allowed in the zone. You couldn't build that today. But the house was built over a hundred years ago. The fact that the house was built and it existed, it's what they call a pre-existing use. It's allowed notwithstanding the fact that it's too high. But this law the way it's being interpreted now since he's making an alteration, that doesn't apply any more. Once you make an alteration you have to comply. Mr. La Salle asked if the fact that it's a historic building doesn't factor into it? The Chairman said no. It only applies because the law applies to historic buildings, to that extent it applies. It's an adaptive re-use of a historic building. So it does apply. The law was designed to deal with these types of structures.

Chairman Baum asked if anyone else from the public had any comments or questions. The Chairman stated for the record that he was sent a letter dated June 26th signed by Mrs. Mariellen Lucks. Chairman Baum asked Mr. Mitts if he had been given a copy and he said he had. Mr. Mitts asked if he should address any of the issues raised in the letter? The Chairman responded

that he did not think it was relevant to the application before the Board. He said that she addresses issues of use and Planning Board and stuff that's not within our purview.

Mr Mitts asked Chairman Baum if he wanted Mr. Mitts to address any of the questions made by Mr. La Salle? The Chairman said that Mr. Mitts could respond to anything that was said by the public if he wanted to. Mr. Mitts introduced Ms. Pamela Lee as the owner of 236 High Street LLC. She is going to be the owner and operator of the property, the licensee. Mr. Mitts said that he is not going to do anything to the outside of that building. He said I'm only doing what we have to do to the inside of the building because Building Inspector Cocks is telling him that he has to do it, not because I want to do it. We've opened the house up to the church (*sic)*, Eitz Chaim, has been holding services there. We're not doing anything to the property but what you see. It has been my game plan from Day 1 and I'm not touching it. I've gone to a few neighbors. One neighbor I worked with my fence on to give him some privacy and me privacy, I have another neighbor who I actually worked with to fix his fence and stuff. I've talked to my neighbors around me and I did talk to Mrs. Lucks. But that's like you said that's not relevant.

Chairman Baum said it's not. I want to keep it relevant. If you want to speak with Mr. La Salle after the meeting and advise him and keep him up to date on everything you're doing, communicate with your neighbors, it's great. But it's really not relevant here. At this point we can either close the public hearing and vote on the application as it is now. Or if you want to request to adjourn the hearing and to amend your application to request for a variance in the alternative relief and re-notice it then we can continue the public hearing next month. Or do you just want to stand on this application and if you decide to apply for a variance we'll do it all over again at another time.

Mr. Niemotko asked if they would have to re-notice anyway? Chairman Baum said they would. Mr. Niemotko then said that keeping the public hearing open would have no advantage or disadvantage. Chairman Baum said other than that you would have to make a new application. Member Zuckerman said that they would have to pay a new fee. He said that this way they could avoid a new fee. Chairman Baum asked if they would have to pay another fee? Attorney Golden said that usually when you ask for an amendment the practice is generally when somebody decides to amend an application they're not issued a new fee. Chairman Baum said unless there's one fee for an interpretation and a different fee for a variance and the variance is more money and now they're amending to request a variance. Chairman Baum asked Mr. Niemotko if he wanted to go forward on the application. We'll vote on this and you'll decide what you want to do. Mr. Niemotko said that he would like to see an interpretation of that paragraph. Attorney Golden said that he would get that. The Board will issue a determination. Mr. Niemotko continued, saying that it was contradictory within the code itself. So, if you're going to introduce an interpretation that clarifies alterations, whether interior or exterior, versus the perimeter or footprint of the building and the exterior dimensions and bulk of a building, then I'd have to talk to my client. But I would like to see that written interpretation. He said that is going to have a major impact. We're asking for a very simple thing, to say the existing building complies. And if you extend that application throughout the Village, any historic building you want it to stay the way it is. You wouldn't want it to be altered on the exterior. So if any historic building, my own office is on the historic register, I made the renovations in compliance with SHPO, you want it to remain in its said dimensions. You would not want the exterior altered.

So take that principal and make it applicable to every historic building in this Village. That would be to your benefit. That would be to the Village's benefit.

Chairman Buam responded that it may be, but we are not a legislative board. We interpret the code based upon what we believe was intended by the people who adopted the law. If we did anything other than that we would be legislative. We don't do that.

Chairman Baum made a motion to close the public hearing.

Mr. Mitts asked Chairman Baum to clarify, so that he could understand it, leaving the hearing open and amending the application versus closing it and filing a new application. Chairman Baum explained that Mr. Mitts has an application before the Board right now and in this application he has asked for an interpretation not a variance. So if you want to amend your application to say, listen, we want an interpretation but if you don't interpret it the way we want it to go, then in that case give us a variance. The application would ask for alternative relief. An interpretation and if that fails then a variance. Chairman Baum said this is fairly typical. But you didn't do that when you filed your application. You only asked for the interpretation. So what I ams saying is if you wanted to now amend your application and ask for a variance in the alternative so that in the event we decide to uphold the Building Inspector's interpretation then we would get to the variance aspect of it. Right now we can't get to the variance aspect of it. So if you wanted to do that what we would do is hold the public hearing open, you would amend your application by submitting a letter of amendment for whatever else and you would re-notice the public hearing for next month which would have the same thing and also a variance. If you didn't want to do that we'll just close the public hearing and vote right now on the interpretation. Mr. Mitts said that what he's hearing is that there's a big problem in the zoning that was written with the word alterations. Because the only thing being done is because I'm told ADA requires it. So the next question before the Board is the word alterations. My understanding of it meant things that I did to the building, not things that the code requires. And that's a big difference.

Chairman Baum said that it doesn't save him. It doesn't say unless the alternations are required to meet ADA standards.

Mr. Mitts said if you go back in the actual zoning it talks about that I'm not allowed to alter any of the building at all on the exterior. It's part of the zoning. Mr. Niemotko added that in paragraph G in the local law:

> *There shall be no exterior alterations of the structure's façade except where such alteration is consistent with the building or property's original historic character.*

Chairman Baum said that clearly there's a theme that runs through this thing. And the theme is "no alterations." It doesn't say "No alterations unless you need the alterations to comply with ADA or some other law that's protective of people's rights." They could have easily done that. You see a lot of laws that will say that you can't do it unless it's necessary to comply with ADA.

Mr. Mitts said that his understanding is that when the law's not clear it favors the plaintiff. Because they wrote the law. They weren't clear about what they wanted. We went based on what they told us and I made no alteration other than what was deemed legally required.

Chairman Baum said there is a legal concept with regard to zoning codes that says when they're ambiguous we are to resolve the ambiguities in favor of the property owner and against the municipality.

Attorney Golden said it is in principal that it applies to interpretations but it's not anywhere near as broad as you state. It derives from the fact that zoning generally is in abrogation of the common law. You generally have real property rights to do whatever you want with your property. Zoning came in and one of the ways that it was constitutional it says they can only change that common law to the extent that they specifically do so. And if they didn't specifically do so then the common law still maintains that it doesn't affect your real property rights. When there's an ambiguity to such an extent that it's unclear whether they meant to change your common law real property rights, that would go in your favor. But simply because there's an ambiguity of a word in the statute doesn't mean that you automatically win.

Chairman Baum asked the applicant what he wished to do. Mr. Niemotko responded that he wanted to leave the public hearing open.

Member Zuckerman said for the record that there is only one property in the Village of Monroe that is on the historical register and that is the building at 236 High Street. He said that Mr. Niemotko's building is part of the historical zone but it is not on the register. The only building that would qualify under this particular statute is Mr. Mitt's property. It's not all-inclusive of every historical property in the zone. Mr. Niemotko felt that was a narrow view of the benefit to the whole Village. I'm saying more than that. Anything within the historic designation of the Village, wouldn't you want those buildings to remain in their natural character? Member Zuckerman responded, "Like the movie theater? Like the race track?" Attorney Golden said that it's not whether this Board wants to or doesn't want to. That's irrelevant to an interpretation.

Member Zuckerman said that if you check the Federal register and the state register the only individual property that is on it is 236 High Street.

Chairman Baum said if I understand you, and let's be clear about what we're doing, you are requesting that we adjourn the public hearing to next month so you have the opportunity to amend the application to request a variance as alternative relief and that you'll re-notice the public hearing for next month. Chairman Baum requested that the applicant remit the amended application within the next 10 days. Member Zuckerman said that the applicant should ask for two variances, one, for the height and, two, for the number of stories.

On a motion made by Chairman Baum and seconded by Member McCarthy, it was unanimously: **Resolved to adjourn the public hearing to August 13 to allow the applicant the opportunity to amend the application to request variance relief.**

**Ayes – 5**
**Nays – 0**
**Absent/Abstaining – None**

## ADOPTION OF MINUTES FROM MARCH 12, 2019 MEETING

The adoption of the minutes was tabled to August 13th given the absence of Member Margotta and Member Martuscelli.

## NEW BUSINESS: UPDATE ON FAR (FLOOR AREA RATIO) LEGISLATION

Member Zuckerman said that the Board of Trustees are attempting to adopt a FAR Law. They are currently working on the fifth draft. There was a meeting on the first of May. He said that Member Martuscelli, Alternate Member Gilstrap and he were at that meeting. Attorney Naughton wrote the first draft of this and it's the best one so far in his opinion. Member Zuckerman said that there has been a change of administration and they have re-written it. They have added a section that involves the Zoning Board for the first time. They felt that if this law passed the way it was written in the fourth version that a large percentage of the properties within the Village would be non-conforming and that if anybody made any kind of alteration to make their house a little bit larger they would have to get a variance from the Zoning Board. So they added the section:

> *Application above the maximum gross area. Applications for a building permit or site plan approval which exceed the maximum in gross floor area shall require an area variance from the Zoning Board of Appeals. In considering the variance… the Zoning Board of Appeals shall consider among other factors any design guidelines set forth in the Village of Monroe code or adopted by resolution by the Village of Monroe Board of Trustees.*

And it goes into all of the things that they want us to do. It was my feeling at the time that this section was totally unnecessary since we knew what we had to do any time we get an area variance. And secondarily, I thought this section was illegal because it was a violation of the Court of Appeals in Cohen v. Village of Saddle Rock which states, "The five criteria test, Section 7-7.12(b) of the Village Law preempts any conflicting local laws, therefore a village may not create a new standard for area variances via local law." Member Zuckerman felt that this section should be removed. We're still waiting for those changes to be made. Chairman Baum asked if under municipal home rule law they could not do that? Member Zuckerman said that was correct.

Attorney Golden said that the variance standards, both use and area, historically prior to the early 90's, was made up by case law. They decided what were the exceptions. And finally the State statute said we're going to try to codify those. Basically, they set it as a five-part test for an area variance and a four-part test for use variance. They said, that's what you have to follow. There were many jurisdictions that tried to change those criteria, finally culminating in the case that was cited in which it said, sorry this is it. The state has pre-empted the field and this is what you've got to look for as to your variances and a Village can't adopt other factors to consider when granting variances.

Member Zuckerman added and they're saying we now have to look at design guidelines set forth in the Village of Monroe Code or as adopted by resolution by the Village of Monroe. Member Zuckerman said that he told the Board they should remove it. Attorney Golden said it may be that in a particular case those may become relevant but only in the context of the five-part test. He added I'm not saying that you would never make reference to that depending upon the circumstances but in my opinion you cannot go ahead and add to the criteria that are set forth in area and use variances under that Court of Appeals case. Member Zuckerman said, secondarily the Planning Board was present and they made all of their problems with it known. The Building Department was not present but there were memos from the Building Department which told them the problems that the Building Department found. So, they said that they were going to rewrite it and we would see a draft of it in a month and that was May 1st. And we're still waiting. But one of the drafts will come to the Zoning Board because we'll either be in it or out of it. Chairman Baum said they don't have to ask our opinion, though. They have to ask the Planning Board's opinion, but not us. Member Zuckerman said I guess we should have an opinion if they're doing something illegal. Attorney Golden reiterated that it's only the Planning Board that has an obligation to go ahead and report. Alternate Member Gilstrap said that I heard they adjusted the tables more recently they have been working on those tables to get them a little more precise so it does sound like progress is being made. As far as I know there isn't another draft. Member Zuckerman said that the Village Board is trying to adjust the tables to have fewer non-conforming houses in the Village. FAR affects three things: New buildings, teardowns and alterations (making buildings larger). That third category is the category with the problems because that will bring on a lot more nonconforming houses and bring more requirements for variances from the Zoning Board.

Attorney Golden said it's also in his opinion that if the law gets changed and you're directed by the code to consider things, you likely would have to consider those, and it will be up to somebody to challenge them saying that you don't have the right to consider those and then the court would make the determination.

Chairman Baum said yet we can't ignore it because it violates our oath of office to follow the law of the State of New York? We can't refuse to follow it. Attorney Golden answered you also have the obligation as the Zoning Board to adhere to the code as written. It's a very unusual event when an administrative agency would say I'm not going to follow the law. Normally that's up to somebody challenging how the law is being applied or how it is passed. Most likely somebody is going to challenge it when it gets passed. Member Zuckerman said that the consultant and Village Attorney have been made aware of the fact of the decision in Cohen. And

also that if they want to keep it in there they could change the word "shall" to "may" and this gives us the option to either follow what they have or not.

Chairman Baum replied that it's not an option. We can only look at it. If they say we'll look at these as part of the balancing factors would that be ok? Attorney Golden said that we will wait to see what happens and either Kelly or I will advise you.

Member Zuckerman mentioned that the Village Board on June 18, 2019 passed Local Law #10 of 2019 which amends the section on the Zoning Board of Appeals so that alternates can now sit not only if there's a conflict of interest but for any reason, if there's an absence of a regular member. It also sets the terms of both at five years.

## OLD BUSINESS: OCMPF SPRING CLASSES

Secretary Doherty noted for the record that the notice announcing the Spring 2019 classes arrived after the March ZBA meeting so it was not recorded in those minutes. The Board of Trustees granted permission for Member Margotta to attend the class on Tuesday April 30th and for Member McCarthy, Member Margotta, Member Martuscelli, Member Zuckerman and Secretary Doherty to attend the class held on Tuesday May 15th. Member Margotta was not able to attend either class due to illness, Member McCarthy was also not able to attend his class due to illness, and Member Martuscelli was not able to attend his class for personal reasons. A refund was obtained for all the missed classes.

Chairman Baum said that the Orange County Municipal Planning Federation gives a lot of opportunities for Board members to take classes to learn more about SEQRA and procedures and processes of the Zoning Board, etc. By law Zoning Board members should attend four credits every two years.

## NEW BUSINESS: ZONING BOARD APPLICATIONS

1. Chairman Baum noted for the record the application submitted by Ziad Abou El Ardat requesting a variance for an existing above-ground pool.
2. Secretary Doherty noted a support class workshop held by the Orange County Planning Federation on September 13 for Planning and Zoning Clerks which she will be attending. She will write a letter requesting permission of the Board of Trustees.

**ADJOURNMENT:**

On a motion by Member McCarthy, seconded by Member Zuckerman, with all in favor, **there being no further business, the meeting was adjourned at 9:14pm.**

**Ayes – 5**
**Nays – 0**
**Absent/Abstaining – None**

Respectfully submitted,

Elizabeth A. Doherty

Elizabeth Doherty
ZBA Secretary