

**Village of Lansing
Board of Zoning Appeals
March 19, 2002**

The meeting of the Village of Lansing Board of Zoning Appeals was convened at 7:32 P.M. by Acting Chairperson Mary Sirois. Present at the meeting were Board members Don Eckrich, Lorraine Johnson, John Dennis and Mike Ward, Code Enforcement Officer Ben Curtis, Village Attorney William Troy, and members of the public.

Appeal 2002-1. Bradley C. Grey, 45 Dart Drive, requesting an interpretation/determination from the Village of Lansing Board of Zoning Appeals that, pursuant to Sections 103, 104.08, 303.01, 304.04(e), and 307 of the Village of Lansing Zoning Law, that Building and Land Use Permit No. 1701 for the Target Department Store violates the Village of Lansing Zoning Law and is null and void. Building and Land Use Permit No. 1701 is for the construction of Target Department Store at Pyramid Mall, 40 Catherwood Road in the Commercial High Traffic District, Tax Parcel No. 47.1-1-22.

Chairperson Sirois asked Troy to oversee the procedural aspects of the hearing.

Edward Premo, firm of Harter Seacrest & Emery of Rochester NY, introduced himself. His client Bradley Grey was present, as well as colleague Peter Hentsche from Premo's office.

Troy stated a motion has been filed by attorneys Shanley, Sweeny, Reilly & Allen for Pyramid Companies of Ithaca NY and these have been delivered to Premo as well who stated he is in receipt of them. Pyramid is represented here by Attorney J. Michael Naughton who was present with Jim Bold and Eric Goetzmann from the Pyramid Companies.

Troy stated that all motion papers have been distributed to Board members. The motion seeks various forms of relief including a request to intervene and to dismiss Mr. Grey's request for interpretation/determination. Troy felt the Board should take up each of the requests separately. First, would be the motion for intervention. Troy also stated that Premo has stated he has no objection to the motion for intervention but opposes the request to dismiss. Sirois asked for a motion to permit intervention. Johnson moved to allow the intervention by Pyramid Mall. Seconded by Ward. All aye.

Troy stated the second part of the motion seeks to dismiss Mr. Grey's request for interpretation/determination. Troy stated the Board has several options available to it: it can grant the request, it can deny it outright, or it can deny it without prejudice. Troy would recommend the third option as the best. This would allow both Premo's client and Pyramid the opportunity to be heard and offer evidence and there would be no prejudice to then granting Pyramid's request to dismiss if

the Board decided the findings supported such a decision. Dennis moved for the third option to deny the motion without prejudice. Seconded by Eckrich. All aye.

Troy then turned the floor over to Premo for his arguments. Premo is appearing on behalf of Bradley Grey, 45 Dart Drive resident, in support of his request for an interpretation and determination that building and land use permit number 1701 issued for Target Stores to be constructed in Pyramid Mall is null and void. This appeal was filed on February 28th, 2002. Premo summarized the appeal. As noted in the appeal, Grey is concerned that the proposed Target Department Store will have an adverse impact on the use and enjoyment and value of his property. The proposed store will be located at the northern end of the mall and will most likely be accessed by people using Graham Road as an ingress/egress to the mall. Graham Road directly connects to Dart Drive and will be used by customers attempting to reach the proposed Target store. Grey has informed Premo that Graham Road and Dart Drive are currently being used by mall customers to access the mall particularly during periods of traffic congestion on Route 13 and N. Triphammer Road. Increased traffic from the Target Department store will result in increase in noise, air pollution, and traffic congestion in the road directly in front of Grey's house. Premo gave the Board a letter from William Holthoff of the Sear Brown Group addressed to Premo which states Holthoff's professional concern about an increase in traffic along Dart Drive due to the Target Store. Premo went on to express Grey's contention that the numerous concerns raised by the Tompkins County Planning Board about traffic from the proposed development have not been properly considered or analyzed. Premo further noted that the harm to Grey and other residents of Dart Drive is different than the harm to the public at large. Dart Drive will be used as an access road to the mall directly harming the residential value of the neighborhood. In addition, no public hearing has been held on the proposed Target store. The Village requires a "large scale development", such as the proposed Target store, to undergo a full environmental assessment, approval by the Board of Trustees, a public hearing, and referral to the Tompkins County Planning Department, for the issuance of a Special Permit. None of these steps were taken prior to the issuance of the building land use permit no. 1701. The issue is not what the Planning Board did in 1999 or 2000, but what the Board of Trustees did not do which is approve a "large scale development" for the Target store. Without such an approval, the Feb. 6th issuance of permit no. 1701 is not authorized and must be deemed void. This Board has jurisdiction to hear such a challenge pursuant to Village Law 7-712a(4) and Zoning Law 502.02 which specifically provides for appeals for any person aggrieved by issuance of a building/land use permit. The first point can be stated simply: the wrong type of permit was issued by the Zoning Officer with respect to the proposed Target store. The Target store is 126,000 sf and will obviously be used for general retail use as a department store. The permit issued for the proposed Target store is identified as permit number 1701 and there is no indication on the permit itself that it has ever been approved by the Board of Trustees. The Pyramid Mall site is located in the Commercial High Traffic district (CHT) and permitted uses are limited to utilities, natural parks, alterations to existing buildings or approved sites, and temporary commercial uses. All other uses are special permitted uses. Zoning Law Section 2.208c8 includes "sales, repair and maintenance" as such a use. Zoning Law Section 603.25 defines this to include all retail soft and hard goods. Therefore, under the Village's Zoning Law, a Special Permit was required for the proposed Target store and not a building and land use permit. Pursuant to

Zoning Law Section 303, a building land use permit can only be used for a permitted use and not a special permitted use. In addition, the Zoning Law specifically provides that “large scale developments” require a Special permit approved by the Board of Trustees and not merely a building/land use permit. Zoning Law section 104.08 provides in part that certain developments which are determined to be large scale according to criteria established in section 307 require a Special Permit rather than a building land use permit. Therefore, any project which is “large scale” cannot proceed by a building /land use permit.

Troy interrupted to state that section 104.08 states that the referral for the environmental review of a “large scale development” is based upon a determination that there is a large scale development, and that determination is made by the Zoning Officer. Premo stated this is correct and that is what it says.

Troy questioned whether Premo had the opportunity to review the entire file and Premo stated he had reviewed it. Troy asked Premo if he was familiar with the written memorandum by Ben Curtis, Zoning Officer in 1999, that there was no large scale development involved in the proposal to expand the mall. Premo stated he would address this as he goes forward.

Premo continued his presentation, stating the obvious question: How do you determine what is “large scale”? Zoning Law section 103 defines large scale development as a use which meets the criteria for a Type I action in Article 8 of the Environmental Conservation Law. Section 307 of the Village Zoning Law further provides that an environmental review is a required condition for issuance of a Special Permit for any proposed development which the Zoning Officer determines is a “large scale development” according to the criteria for a Type I action found in the rules and regulations established under Article 8 of the Environmental Conservation Law. Zoning Law section 304 dealing with Special Permits, also clarifies that a Special Permit is required for all “large scale developments” as defined in section 307 of this Law. Zoning Law section 304.02 goes on to state that the Board of Trustees shall have the decision authority over all Special Permits with regard to “large scale developments” defined in section 307 or 308 of this Law. This is also confirmed in Village Law section 307.07 and 307.08. Section 307 of the Zoning Law provides that the Zoning Officer determine whether a project is a “large scale development” by applying the criteria for a Type I action found in the rules and regulations established under Article 8 of the Environmental Conservation Law. Section 617.4 of NYCCR shows the Type I actions list published by NYS Dept. of Environmental Conservation. This is the list referred to in the Village Zoning Law. The Type I list starts with the following text: “The purpose of the Type I list in this section is to identify for agency, project sponsors and public those actions and projects which are more likely to require the preparation of an EIS than an unlisted action.” All agencies are subject to this Type I list. Pursuant to SEQRA Section 617.2b, a local municipality such as the Village, is considered to be a local agency and therefore guided by the Type I list. Section 617.4(b) is a listing of Type I actions. Subdivision (b)(6) provides Type I actions include construction of non-residential facilities that exceed any one of a number of standards listed which include the expansion of existing non-residential facilities by more than fifty percent of any such standard. The standards in (b)(6)(iv), state that in a city, town or village with a population of 150,000 or less, a non-residential facility of more than 150,000 sf is a Type I action. Therefore, pursuant to the

regulations issued by the NYS Dept. of Environmental Conservation, in a village the size of Lansing, any new non-residential building over 100,000 sf or an expansion of an existing non-residential facility by 50,000 sf is a Type I action. Pursuant to the definitions contained in the Zoning law, such actions are "large scale developments". The proposed Target store is 126,000 sf. Therefore, under the Village's own Zoning Law, it is a "large scale development", and subject to the requirements of section 307. The Chart of Procedures in section 607 of the Zoning Law show the special set of required approvals for "large scale development". The Village's Zoning Law requires a draft environmental report, referral to the Planning Board, notice of completion, comment period, public hearing, recommendation from the Planning Board to the Board of Trustees, decision by the Board of Trustees as to whether to hold a second public hearing and finally approval by the Board of Trustees. In at least three different places in the Zoning Law, the Zoning Law provides that the Village Board of Trustees must approve a Special Permit for all "large scale developments". Pursuant to the definition section of the Zoning Law and section 307, the Target store is a "large scale development" requiring approval of a Special Permit by the Board of Trustees. The Board of Trustees did not approve a Special Permit for Target. Since such an approval was not issued, the building and land use permit is improper and should be set aside. The required approval to allow the construction of the Target store was never made by the Board of Trustees. Premo further stated that the Zoning Officer and Pyramid Mall would likely argue that the building and land use permit number 1701 was justified because the proposed Target store allegedly falls within the special permit for the overall expansion of the Pyramid Mall which was approved by the Planning Board on December 28, 1999. Their argument will be since the overall square footage of the Pyramid Mall has not exceeded the size approved in 1999, there is no need for any further permit. Mr. Naughton who poses this argument is wrong. The Planning Board approval in December 1999 for the mall expansion can not justify the Target store. The Planning Board alone could not approve such an expansion. The Board of Trustees had to issue an approval and no such approval was ever issued. Troy asked why this was so. Premo stated it was a "large scale development", a Type I action under SEQR, and under the definitions in the Village Law, a "large scale development". Troy stated that under the Village Zoning Law, a "large scale development" determination is made by the Zoning Officer/Code Enforcement Officer. Troy asked Premo if this were correct, yes or no. Premo responded that the Zoning Officer is to apply the standards provided for in the Environmental Conservation Law. Ward stated he did so in June 24th when he made a decision that he did not believe it was a "large scale development". Premo stated the Zoning Officer did not apply the criteria provided. Ward stated Curtis looked at the SEQR information and in his determination it was not a "large scale development". Premo stated that under the Zoning Law, Curtis must apply the criteria for Type I actions, it says a Type I action includes any expansion project over 50,000 sf or new construction over 100,000 sf. Premo stated that is the criteria in the Zoning Law which determines whether or not a project is large scale development. Troy asked Premo if he felt Curtis got in wrong in June of 1999. Premo stated that was correct. Troy then asked if an appeal was taken at that time by Premo's client. Premo stated no appeal was taken at that time and there were no approvals issued for a project at that time which would have affected his client. Troy stated an appeal for an interpretation could have been taken within 60 days to this Board if there were some concern over the Zoning Officer's interpretation. Premo responded that he didn't think the issue was ripe at that time. Troy stated no Article 78 proceeding was brought. Premo stated

that was correct. Troy stated that was in June of 1999. Premo stated the issue is not what happened in 1999 or in 2000, but the issue is what happened in 2002. There was a building and land use permit which was issued for the Target store. The Target store is clearly a Type I action. There should have been an approval issued by the Board of Trustees under the Village's own Zoning ordinance. That did not take place. That action took place in February 2002, issuance of a permit, which he believes is a wrongfully issued permit, and a challenge is being brought to the Board of Zoning Appeals. Troy asked if there was an Article 78 proceeding in 1999. Premo responded that in Dec. 28th, 1999, the Planning Board issued a decision with respect to 150,000 sf expansion of Pyramid Mall. Troy stated the Planning Board approved a Special Permit. Premo stated that since that was also a Type I action, it required a separate approval by the Board of Trustees which never occurred. Troy stated that section 502.02b of the Zoning Law states clearly that the Board of Zoning Appeals does not have jurisdiction to hear appeals of determinations by the Planning Board or Board of Trustees. Premo responded that the Board of Zoning Appeals is not being asked to hear an appeal by the determinations of the Planning Board or Board of Trustees but rather to hear an appeal of the issuance of a building and land use permit which the Board of Zoning Appeals has the authority to do. Troy stated that in December of 1999, if Premo's client took offense at that decision, it could not be appealed to the Board of Zoning Appeals because it was based on the Planning Board's determination. Premo stated his client is aggrieved by the decision in 2002 and if a permit had been issued in 1999 and Grey felt it aggrieved him, he could have appealed the issuance of that building permit because it would not have had the required approvals by the Board of Trustees. Troy stated the remedy in December of 1999 would have been an Article 78 proceeding within 30 days. Premo's position is that the expansion in 1999 would require approval of a Special Permit by the Board of Trustees. The issue now is whether there was approval by the Board of Trustees that justified the issuance of a permit on Feb. 6, 2002 for the Target store and his answer is there was not.

Premo continued. The Planning Board's approval in December of 1999 for mall expansion does not justify the permit for the Target store. The Planning Board alone could not approve such an expansion and the Board of Trustees has to issue such an approval and no approval was issued. After filing Grey's request for interpretation of appeal, he was provided with the memorandum prepared by Curtis on June 24th 1999. It is not mentioned in his original application because it was provided after the application was written. Through the memorandum, Curtis informed the Planning Board in 1999 that he reviewed the application of Pyramid Mall for what was proposed to be a 440,000 sf expansion. Curtis stated in the memorandum, pursuant to section 307 of the Zoning Law, he determined such an expansion was not a "large scale development". The Zoning Law is clear and states the Officer is instructed to determine whether a project is "large scale" according to the criteria listed in a Type I action. If the proposed project meets the criteria for a Type I action, then it is a "large scale development". The 2001 approvals issued for the Home Depot store can not be substituted for the approvals which should have been for the Target store. The Home Depot store was large enough and should have also followed the procedures for a "large scale development". Again, no Special Permit was issued by the Board of Trustees and the approval process was incomplete. The Home Depot store is different from the Target store. The Planning Board in prior minutes stated the traffic consultant stated the traffic generated by a home improvement store is less

than that of a retail store and therefore the two types of stores are different. No one has considered the traffic impact generated by a Target store versus a home improvement store.

Premo stated the appeal paper maintains there were violations of general municipal law as well as SEQR. The arguments are the same that there should have been a Special Permit issued for the Target store with compliance with the general municipal law and SEQR.

Premo also believes that SEQR mandates both the Home Depot store as well as the Target store be considered together. The site of the proposed Target store was already an approved site for a Home Depot store. With Target located at the northern end of the mall, the Home Depot store will be located elsewhere. There has been a proposal to rezone a neighboring parcel for Home Depot which is currently pending. The two stores are part of one action and require one coordinated review under SEQR.

Assuming a building land use permit was appropriate for the Target store, Premo stated building land use permit number 1701 fails to comply with the zoning requirements of section 303. Section 303.01b contains specific conditions which must be met prior to the issuance of the building land use permit. Premo does not believe a building land use permit is appropriate but even if it were, the permit does not comply with the requirements of the Zoning Law. Proposed construction under section 303 must comply with all requirements of the Zoning Law. The applicant must also establish that the proposed alterations of the building or site meet all applicable building and fire codes. Exhibit A contains three pages of 21 separate conditions showing that they were not met at time of issuance of the permit. In conclusion, Grey is asking that the Target store undergo the approval process according to the Zoning Law as a Type I action for a "large scale development" with approval by the Board of Trustees.

Premo stated that today he received extensive papers from Pyramid counsel and he would like to request the opportunity to respond with case law if no decision is made today.

Grey stated the Target store is larger than the Home Depot and will draw a lot more traffic. There are already traffic problems on Dart Drive and Graham Road and this will only add more and more problems which have not been addressed. Procedures need to be followed and studies done or the full impact will never be known. Troy asked Grey if he lived on Dart Drive in 1999 and he responded that he did.

Troy asked Premo for clarification of his concerns regarding section 239 of general municipal law. Troy has reviewed the documents and on July 25, 2000 the Planning Board approved an amendment of the 150,000 sf approval given earlier in 1999. Premo stated this was for the Home Depot store. Troy stated this was made for the land use and not a particular tenant. Troy stated the Planning Board considered the review done by the County in August 1999. On Feb. 12, 2001, the Planning Board approved the 150,000 sf plan and referenced the 239m letter from the county. Because of the 239m review letter, a supermajority approval was required by the Planning Board and approval was

unanimous. Premo stated to keep the record clear that the initial county planning review was for a detached Home Depot store. There was later a modification where it became a proposed attached building. Premo stated that when the Planning Board overrode the county determination, the Planning Board was overriding comments about a different configuration. Premo's main argument about a 239m review is that a Special Permit was required for Target and when a Special Permit is considered, which was not done for Target, you must comply with the 239m. Since the village did not refer the Target store to County Planning prior to issuing the building and land use permit, it did not comply with 239m.

Eckerich stated he did not have any questions for Premo but he did have procedural questions and wanted to know what the Board of Zoning Appeals is obliged to do. Troy stated that if the Board makes a decision tonight, the Board will need to make findings of fact announcing why the Board has arrived at the decision. Troy stated that in response to the FOIL request by Premo for handwritten notes of Curtis, Troy determined that these should be made available and tonight he turned them over to Premo who should be allowed the opportunity to review them.

Dennis stated he would be interested in seeing the additional case law from Premo. Troy stated further arguments and briefs can be submitted after tonight's meeting by both counsel and then deliberations and a decision can occur at a future meeting. Dennis also suggested a glossary of technical terms be provided for the Zoning Board.

Naughton was provided the opportunity to address the Board. Naughton stated the Board has received the memorandum of law from Pyramid Mall. The June 24, 1999 decision by Curtis makes it clear that this project of 442,000 sf is not a "large scale development". This decision or memorandum to the Planning Board chairman was filed in the village office at that time and a determination to appeal that decision should have been made within 60 days of the determination. Based on the June 24th decision, there were many meetings and public hearings held. On Feb. 12th a special use permit was granted. Naughton stated if Grey had concerns, they should have been expressed through an article 78 or an appeal in 1999. The law states objections must be made to the Planning Board saying they do not have the authority to grant approval and it must go to the Board of Trustees at that time. The Feb. 2002 permit is consistent with the Planning Board's approvals. If Grey disagrees with those Planning Board approvals, he should do an article 78 proceeding in court and have a judge make a determination. Naughton stated this is not the responsibility of Curtis. A decision was filed for an amended Special Permit and it is Curtis' job to issue a building permit if it is consistent with that special permit approval. Many of the arguments are being brought too late and should be time barred. Also the right to make these arguments has been waived as they were not presented at the time of the Planning Board's review. Naughton stated the letter dated March 14, 2002 from Sear Brown is not relevant as it was written after the issuance of building land use permit number 1701. As a result of the permits issued in Feb. 2002, Pyramid has demolished over 40,000 sf of the shopping center and over \$750,000 has been spent. With regard to Grey's concern about additional traffic and noise, he would like to note that Grey's home is over a mile from the Pyramid Mall entrance and Cayuga Mall is between the two. Regarding noise concerns, Grey's home backs up directly on Route

13.

Naughton provided the Board with colored photos of construction at Pyramid Mall to replace the black and white copies in their notice of motion.

Naughton has no concerns with additional arguments or papers being filed but would like to be given a week to respond.

Premo asked Curtis if the June 24, 1999 determination was filed in the clerk's office. Curtis responded that it was filed in his files in the Village Office where building documents are filed.

Premo stated they are challenging the building and land use permit issued in 2002 at which point Grey became aggrieved. The project was issued a permit and a review not undergone under the requirements of the Zoning Law. There was no public process for the Target store permit. The application was submitted on February 1st and permit issued on February 6th with a weekend in between within only three business days without any public process.

Troy asked Premo if his court reporter who was present tonight would be able to provide a transcript for the Board and Premo responded that could be arranged.

Troy stated it was now time to schedule the next steps. Premo felt a week to respond would be necessary. After that, Naughton would like a week to respond to Premo. Ward would like additional time to digest the information provided as well as additional information which might be forthcoming. Johnson stated that when the approval was given in February 2001 for an additional 150,000 sf of leasable space for Pyramid Mall use, it was not tenant specific. Based on the approval for retail space by the Planning Board, Curtis then issued a building land use permit for Target. Curtis also noted that the Planning Board approved the configuration for the space as well as the amount of space. Johnson stated she does not see what the argument is then. Troy recommended that the chair entertain public comments since this is a public hearing. After comments are made, the Board will decide when to meet next and do a formal deliberation and make a written decision. Troy will write a draft decision if this will help the Board. Troy recommended continuing the meeting at a later date. Submittals of additional documents must be received by 5:00 PM March 29th from Premo and by 5:00PM April 9th from Naughton. The meeting will be continued on April 23rd to allow the Board time to review the submittals.

Dennis questioned what would happen if in fact the Board of Trustees should have been required to make the approval and did not due to some flaw; what would be the remedy under due process of law. Troy stated it is not for the Zoning Board to determine if there was such an error, as in his opinion, under the Zoning Law it is the Zoning Officer who decides if it is a "large scale development". If he decides it is a "large scale development", then the Board of Trustees makes the decision. If it is determined by the Zoning Officer it is not a "large scale development", then the Planning Board makes the decision and there is no need to go to the Board of Trustees. The decision

Curtis made in early summer 1999 is the critical decision and who has the right to appeal it and within what timeframes are the questions.

Sirois opened the Public Hearing. Joel Harlan, 50 Heeth Lane (Dryden), spoke first. He stated he attended the meeting when the mall expansion was discussed. He remembered that there was a proposal for a two-story WalMart in Wards and many people came around. He recollected a Robertson lady from Ellis Hollow who did not want WalMart because it would bring too much traffic in her area. He says no one seems to want a WalMart or a Target but the people he talks to want to see both here but they don't come to the meetings because only the negative people show up.

John Gillott, 141 Brook Way, spoke next. He feels Grey should have brought up his concerns or appeals years ago rather than now. Gillott does not differentiate between a Target and a Home Depot but feels a Home Depot would generate far more traffic. The village has lost Wards, JC Penneys, and Jamesway and the public needs a place to shop in Ithaca. People leave this area to shop in outlying areas and everything can not be refused and new stores should be allowed in.

Sirois entertained a motion to continue this appeal at the Tuesday, April 23rd meeting at 7:30 PM. Seconded by Dennis. All aye.

For the record, Curtis noted that counsel had provided proof-of-mailing.

Approval of Minutes –

Minutes will be considered at the April 23 meeting.

Adjournment

As noted above, the meeting was continued to April 23 at 7:30 PM.