

A G E N D A
BOARD OF APPEALS - TOWN OF BRIGHTON
DECEMBER 2, 2020

Due to the public gathering restrictions and executive orders in place because of COVID-19, this Zoning Board of Appeals meeting will be conducted remotely. Members of the public will be able to view the meeting via Zoom.

Written comments will be received by Rick DiStefano, Secretary, Brighton Town Hall, 2300 Elmwood Avenue, Rochester, NY 14618 via standard mail and/or via e-mail to rick.distefano@townofbrighton.org, until December 2, 2020 at 12:00 PM.

Applications subject to public hearings are available for review on the town's website.

The public may join the Zoom meeting and share comments with the Board. For Zoom meeting information, please reference the town's website at <https://www.townofbrighton.org> prior to the meeting..

7:00 P.M.

CHAIRPERSON: Call the meeting to order.

SECRETARY: Call the roll.

CHAIRPERSON: Approve the minutes of the October 7, 2020 meeting.
Approve the minutes of the November 4, 2020 meeting.

CHAIRPERSON: Announce that the public hearings as advertised for the BOARD OF APPEALS in the Brighton Pittsford Post of November 26, 2020 will now be held.

11A-02-20 Application of the Country Club of Rochester, owner of property located at 2935 East Avenue, for a variance from Section 73-29 (Structures required to have an automatic fire sprinkler system) in accordance with Section 73-34 to allow for the construction of a maintenance building without the installation of an automatic sprinkler system as required by code. All as described on application and plans on file. **TABLED AT THE NOVEMBER 4, 2020 MEETING - WITHDRAWN BY APPLICANT**

12A-01-20 Application of Jayme and Laura Hurwitz, owners of property located at 190 Hibiscus Drive, for an Area Variance from Section 205-2 to allow a deck to extend 12 ft. into the existing 54.9 ft rear setback where a 60 ft. rear setback is required by code. All as described on application and plans on file.

12A-02-20 Application of Kelly Walsh and Norman Robinson, Jr., owners of property located at 50 Cheswell Way, for an Area Variance from Section 207-11A to allow for a hot tub to be located in a side yard in lieu of the rear yard as required by code. All as described on application and plans on file.

12A-03-20 Application of John Geer, George Family Restaurants, owner of property located at 2171 West Henrietta Road, for modification of an approved use variance (5A-01-19, restaurant in a residential district) requesting an increase of 24 indoor dining seats

(second floor) and the installation of a walk-up take-out window used primarily for ice cream sales. All as described on application and plans on file.

12A-04-20 Application of John Geer, George Family Restaurants, owner of property located at 2171 West Henrietta Road, for a Sign Variance from Section 207-31 to allow for a building face business identification sign where not allowed by code. All as described on application and plans on file.

12A-05-20 Application of Clover Park Properties, LLC, contract purchaser, and the Baptist Temple, Inc., owner of property located at 1075 Clover Street, for a Use Variance from Chapter 203, Article IA to allow for a church building (with a proposed 10,000 sf addition) to be converted into professional and medical office use in a residential RLA District where not permitted by code. All as described on application and plans on file. **POSTPONED TO THE JANUARY 6, 2021 MEETING AT APPLICANTS REQUEST**

12A-06-20 Application of Clover Park Properties, LLC, contract purchaser, and the Baptist Temple, Inc., owner of property located at 1075 Clover Street, for an Area Variance from Section 207-10E(3) to allow rear yard impervious surface coverage (parking area) to increase from 52.3% to 65% where a maximum 35% is allowed by code. All as described on application and plans on file. **POSTPONED TO THE JANUARY 6, 2021 MEETING AT APPLICANTS REQUEST**

CHAIRPERSON: Announce that public hearings are closed.

NEW BUSINESS:

NONE

OLD BUSINESS:

9A-04-20 Application of Save Monroe Ave., Inc. (2900 Monroe Avenue, LLC, Cliffords of Pittsford, L.P. Elexco Land Services, Inc., Julia D. Kopp, Mark Boylan, Ann Boylan and Steven M. Deperrior), appealing the issuance of a building permit (Starbucks Coffee) by the Town of Brighton Building Inspector (pursuant to Section 219-3) to the Daniele Family Companies, developer of the Whole Foods Plaza project located at 2740 / 2750 Monroe Avenue. All as described on application and plans on file. **TABLED AT THE NOVEMBER 4, 2020 MEETING**

10A-02-20 Application of Brighton Grassroots, LLC, appealing the issuance of a building permit (Starbucks Coffee) by the Town of Brighton Building Inspector (pursuant to Section 219-3) to the Daniele Family Companies, developer of the Whole Foods Plaza project located at 2740 / 2750 Monroe Avenue. All as described on application and plans on file. **TABLED AT THE NOVEMBER 4, 2020 MEETING**

PRESENTATIONS:

NONE

COMMUNICATIONS:

Letter from George Conboy, 1209 Clover Street, dated October 22, 2020, with comments and concerns regarding the proposed reuse of the Baptist Temple located at 1075 Clover Street, application 9P-NB1-20.

Letter from Sarah Nemetz, 1260 Clover Street, dated October 22, 2020, with comments and concerns regarding the proposed reuse of the Baptist Temple located at 1075 Clover Street, application 9P-NB1-20.

Letter from Jeannie Clark, 2530 Highland Avenue, dated October 23, 2020, in opposition to application 9P-NB1-120, 1075 Clover Street.

Letter from Don Seipel, 2419 Highland Avenue, dated October 24, 2020, regarding application 9P-NB1-20, 1075 Clover Street.

Letter from Thomas Farrell, 1285 Clover Street, dated October 25, 2020, with comments and concerns regarding the proposed reuse of the Baptist Temple located at 1075 Clover Street, application 9P-NB1-20.

Letter from Neal Levitt, 1390 Clover Street, dated October 26, 2020, with comments and concerns regarding the proposed reuse of the Baptist Temple located at 1075 Clover Street, application 9P-NB1-20.

Letter from Robbie Taksen, 2409 East Avenue, dated October 26, 2020, with comments and concerns regarding the proposed reuse of the Baptist Temple located at 1075 Clover Street, application 9P-NB1-20.

Letter from Errol Pinto, 2405-5 East Avenue, dated October 26, 2020, with comments and concerns regarding the proposed reuse of the Baptist Temple located at 1075 Clover Street, application 9P-NB1-20.

Letter from Brian McGarry, 2562 Highland Avenue, dated October 28, 2020, with comments and concerns regarding the proposed reuse of the Baptist Temple located at 1075 Clover Street, application 9P-NB1-20.

Letter from Joshua Rodems, 64 Cheswell Way, dated November 4, 2020, in support of application 12A-02-20 (50 Cheswell Way).

Letter from Lisa Shearing, 53 Cheswell Way, in support of application 12A-02-20 (50 Cheswell Way).

Letter from Adam and Catherine Towsley, 59 Cheswell Way, dated November 9, 2020, in support of application 12A-02-20 (50 Cheswell Way).

Letter from Holly and Lindsay Crawford, 1166 Clover Street, dated November 17, 2020, with comments and concerns regarding the proposed reuse of the Baptist Temple located at 1075 Clover Street, application 9P-NB1-20.

Letter from Andrew Spencer, BME Associates, dated November 10, 2020, withdrawing application 11A-02-20 (2935 East Avenue).

Letter from Greg Danylak, dated October 31, 2020, in support of application 12A-01-20.

Letter from Andrew Jordon, 200 Hibiscus Drive, dated October 31, 2020, in support of application 12A-01-20.

Letter from Jerry Goldman, Woods Oviatt Gilman LLP, dated November 24, 2020, requesting postponement of applications 12A-05-20 and 12A-06-20 to the January 6, 2021 meeting.

Letter from Tom McDonough, 1156 Clover Street, dated December 1, 2020, in opposition to applications 12A-05-20 and 12A-06-20.

From: Sarah Nemetz <sbnemetz@gmail.com>

To: ramsey.boehner@townofbrighton.org, rick.distefano@townfobrighton.org

Cc:

Bcc:

Date: Thu, 22 Oct 2020 19:36:54 -0400

Subject: 1075 Clover Street Baptist Temple

I just learned today of the proposal to convert the Baptist Temple site to high density office use. As a neighbor on Clover St (1260 Clover is my address), I walk by this property on my daily walk with the dog. The church has always been generous with their property and has never objected to polite dog owners crossing their charming lawn. The park-like beauty of their huge old trees is an important asset to the neighborhood. I understand that the developer wants to take down 18 trees, many of which are large specimens, to make room for a larger parking lot. This would be a terrible loss.

I understand that the traffic study used in the proposal is outdated: 2011 DOT data for Clover St and 2016 data for Highland. This neighborhood is already plagued by speeding cars, and additional traffic from a high density office building will worsen the traffic. The families that live on Clover St walk on the shoulder (no sidewalks) and would be in greater danger from this additional traffic.

Please protect the integrity of our low density residential zoning!

Sarah Nemetz, MD (and Michel Berg, MD)

1260 Clover Street

[Reply](#)

[Forward](#)





Town of
Brighton

Rick DiStefano <rick.distefano@townofbrighton.org>

1075 Clover Street

1 message

Conboy, George <gtconboy@brightonsecurities.com>
To: "rick.distefano@townofbrighton.org" <rick.distefano@townofbrighton.org>

Thu, Oct 22, 2020 at 5:41 PM

Dear Mr. DiStefano,

As a Clover Street neighbor of the Baptist Temple (I live 3 houses to the south), I have two serious concerns about the proposed project:

1. The removal of several trees, some of which are quite mature, strikes me as a serious negative. Our neighborhood benefits from the existence of those trees, and their removal - particularly of the larger trees, cannot be replaced in our lifetimes.
2. Is it true that the traffic surveys mentioned in the site plan are from 2011 and 2016? It seems that a more recent survey could give neighbors more confidence that there will not be an unreasonable increase in traffic.

I understand that it may be difficult or impossible to maintain the Baptist Temple as a quiet church. I, and many of my neighbors, would be grateful for your efforts in ensuring that any zoning variance will not alter the character of our neighborhood.

Thank you,
George T Conboy
1209 Clover Street

R E C E I V E D
OCT 23 2020
**TOWN OF BRIGHTON
BUILDING & PLANNING**

Clover highland concerns citizens

1 message

suzanne seipel <suzanneseipel@icloud.com>
To: rick.distefano@townofbrighton.org

Sat, Oct 24, 2020 at 5:55 PM

From Don A. Seipel. 2419 Highland Ave

We have lived in the above address for 45 years. My wife, Suzanne and I have enjoyed our neighborhood as it has a feel which is special.

A correspondence from Mary Jane Mahon has alerted us to a proposal to drastically alter this special place. Our home is 5 sites south of the Baptist Temple.

Why have I not been informed of a drastic zoning change proposal? I am requesting all communication re 1075 Clover Street Proposal effective immediately.

Specifically, please send me the meeting agenda and meeting opportunity to express my opinion at any Future meetings re this.

I understand you have already had a planning board meeting on Oct 21. I was not notified. Pls send me the agenda for the zoning board appeals on Nov 14 and minutes from the planning board latest unannounced meeting.

From what I know, this proposal has not been handled in a transparent way. Start now
Sent from my iPhone



Rick DiStefano <rick.distefano@townofbrighton.org>

1075 Clover street

1 message

Farrell, Thomas <farrellt@rochester.edu>

Sun, Oct 25, 2020 at 7:50 AM

To: "rick.distefano@townofbrighton.org" <rick.distefano@townofbrighton.org>

Cc: Farrell Thomas <farrellphl@aol.com>

My name is Thomas Farrell and I own and reside at 1285 Clover street with my family. I received a flyer on the potential rezoning of the Baptist Temple property and am sufficiently concerned to write to you today. It does not seem consistent to me to build a commercial office building on that lot when this is such a residential area.

Where does this stand and how can we get more information on this situation?

Thank you.

Tom Farrell

773-255-0256

1075 Clover St.

1 message

nlevitt557@aol.com <nlevitt557@aol.com>

Mon, Oct 26, 2020 at 11:52 AM

Reply-To: nlevitt557@aol.com

To: "RICK.DISTEFANO@TOWNOFBRIGHTON.ORG" <RICK.DISTEFANO@townofbrighton.org>, "RAMSEY.BOEHNER@TOWNOFBRIGHTON.ORG" <RAMSEY.BOEHNER@townofbrighton.org>

My name is Neal Levitt and I have been a resident of Brighton (1390 Clover St.) since September 1985- 35 years. I love the town. I appreciate the great work the Zoning Board and Planning Board have done to protect the quality of life in our town. Thank You.

The proposed changes at the corner Highland and Clover are very troubling. The increased traffic at this intersection is worrisome. There is a large elderly population that both walk and drive in the area. This change will cause increased risk to their safety. There are a lot of dog walkers also in the area. Again a safety issue. Studies, I'm sure, have evaluated the traffic patterns and the impact of such traffic in the area. However, there is always the unseen effects that can cause problems.

The other significant factor is the loss of trees. This may sound frivolous but the size and beauty of these trees is what makes Brighton what it is. I'm not a tree hugger or fanatic, but taking down these trees would be a shame ! Even if the new owners promise to replant trees and shrubbery, it can not replace the splendor and history of these trees.

This corner lot is essentially a park in the middle of a busy intersection. Please keep Brighton and especially this intersection safe, green and protected for all our residents. Thank You for your work and consideration.

Neal Levitt 1390 clover St. 14610

Neal



Town of
Brighton

Rick DiStefano <rick.distefano@townofbrighton.org>

Baptist Temple Plans

1 message

Robbie Taksen <jrtaksen23@outlook.com>
Reply-To: Robbie Taksen <jrtaksen23@outlook.com>
To: rick.distefano@townofbrighton.org

Mon, Oct 26, 2020 at 11:37 AM

Hi. I have been a life long resident of Brighton. My wife and I live at 2409 East Ave, at the corner of Clover St and Highland Ave. We were unable to attend the developer's meeting with the town regarding the Baptist Temple redevelopment.

We do not object to the change in use of the property, but highly object to the removal of any of the large old trees on the north or north-east side of the property. They look very healthy, and are gorgeous. Let them build their addition on the south side or west side of the existing building. The trees are too important to the appearance of the property .

The parking lot location is directly across from the entrance to our property. I believe that this would cause unwanted traffic through our property to avoid the traffic light at the corner. Again, the lot may would be better expanded at the present location.

I can be reached at +15853305132 if you have questions or comments. Thank you. J. Robert Taksen

Sent from myMail for iOS

1075 Clover Street, Baptist Temple

1 message

Errol Pinto <ejpzz@gmail.com>

To: rick.distefano@townofbrighton.org, ramsey.boehner@townofbrighton.org

Mon, Oct 26, 2020 at 7:16 PM

Rick Distefano & Ramsey Boehner
Town of Brighton, NY

Re: 1075 Clover Street, Baptist Temple

Dear Sirs,

I am a 20-year homeowner about 200 yards from the Baptist Temple and am troubled by the proposed conversion of this edifice from a genteel, decorous, literally sacred location to one dedicated transparently and entirely to corporations in search of profit. Having spent four decades in the management of large American multinational corporations, both at home and overseas, I have an insider's deep respect for Business Enterprise and for its place in the success of our city and country. The profit motive is greatly important to the well-being of society; but it is most certainly not paramount, as the current pandemic has painfully proved.

The Baptist Temple is located in surroundings that have been kept pristinely non-commercial perhaps since homo sapiens first perceived it. It is precisely this bucolic charm that a profits-first (not a sin of itself) corporation now seeks to appropriate with gross disregard to wider societal considerations. Business putting profit for itself first is understandable, even fitting. Actively enabling such crass self-interest is not. We trust you to draw the line against the latter.

The reason for my use of strong words is that there are available a large number of already-zoned real estate properties/locations all across Brighton that would benefit from fresh investment and occupation. In perfectly pleasant and appropriate commercial zones. In 2020s Brighton, there is NO convincing reason for a corporation looking for a 'workplace' to invade and permanently despoil a long standing, low-density residential zone. It smacks of self-centered brattiness.

Forgive the terminology but I believe the threatened offence calls for it. A workplace, its parking lots and its concomitant daily traffic have their appropriate place and it is not the lush park-like locale of the Baptist Temple. When the case has not been made that nowhere else in Brighton is good enough this proposal has the air of a heist.

Please Messrs. Distefano and Boehner we count on your experience and good judgment in helping this corporation put its workplace in one of Brighton's many wonderful available locations dedicated to commercial activity. Absent extremis, the divine natural surroundings of the Baptist Temple must pass on for the benefit of future generations.

Thank you very much for the important work you do upholding the high living standards of Brighton. Please stay safe and healthy.
Sincerely,

Errol Pinto

2405-5 East Ave. 14610. Tel: 585-298-4464

Opposition to proposed development at 1075 Clover Street

1 message

McGarry, Brian <Brian_Mcgarry@urmc.rochester.edu>

Wed, Oct 28, 2020 at 11:35 AM

To: "rick.distefano@townofbrighton.org" <rick.distefano@townofbrighton.org>, "ramsey.boehner@townofbrighton.org" <ramsey.boehner@townofbrighton.org>

Mr. Distefano and Mr. Boehner,

I live at 2562 Highland Avenue and I am writing to express my concern about the proposed development at 1075 Clover Street by Baptist Bible Temple and Clover Park Properties.

I believe their proposed conversion of a church into an office complex would significantly alter the character of our neighborhood. As you know, this is a residential area that is well-known for stately homes and a park-like setting. The introduction of a sizeable office complex and an expansive parking lot, coupled with the removal of a significant number of mature trees is not in keeping with the character of the neighborhood.

More importantly, it seems likely that an office complex, if used at the capacity proposed, would generate a large increase in vehicle traffic, particularly on Highland Avenue with cars traveling east from the 590 N exit. This is very concerning to me. My wife and I have two daughters, ages 8 and 5. The older is a current second grader at Council Rock Primary School; the younger will be a kindergartener there next year. Most in-person days, we walk to and from school. This is a surprisingly risky journey as the north side of Highland (where we reside) lacks any sidewalks and there are no crosswalks where we can cross Highland. This situation is only manageable because of the current traffic levels on this portion of Highland. The introduction of an office at the corner of Clover and Highland is likely to increase traffic enough to make our neighborhood unwalkable. In the July 15 meeting minutes from the planning board, I noticed that the applicants stressed this influx of traffic was likely to be concentrated to weekdays. This is precisely the problem! Traffic volume at this time is already high relative to nights and weekends, exactly when a large number of children on and north of Highland are attempting to commute to and from the primary school located on Esplanade. Given the absence of continuous sidewalks, crosswalks, traffic lights, or even crossing guards, an increase in traffic during the morning and afternoons would eliminate the possibility of walking to school. At a time when we are being encouraged not to use busing services and the line of cars waiting to drop off/pick up children from CRPS often extends down Grosvenor, removing the option to walk seems extremely detrimental to the Brighton community and the values it purports to uphold.

Finally, as someone who has been forced to work from home over the last 7 months and will not be allowed into my office at the University of Rochester for the foreseeable future, I urge the Planning and Zoning Boards not to change in the residential classification of our neighborhood in support of a business venture that appears to have a high risk of failure. Brighton, and the world at large, does not seem particularly in need of more office space at the moment, so the promise of additional tax revenue seems very dubious.

I am happy to discuss this issue further and would be glad to submit my comments as a formal letter for the next meetings of your respective boards. After reviewing your website, it was unclear to me how to go about doing so. It is my hope that this email will suffice.

Sincerely,

Brian E. McGarry, PhD

Brighton Resident

November 4, 2020

Town of Brighton
Zoning Board
2300 Elmwood Avenue
Rochester, NY 14618

RE: Hot Tub Variance for 50 Cheswell Way

To Whom it may concern,

It was brought to my attention that Norm Robinson and Kelly Walsh (50 Cheswell Way) would like to install a hot tub on the east side of their house near the rear of the dwelling. Per Town code, hot tubs should be installed in rear yards only and have proper enclosures around them.

Norm and Kelly have shared the approximate location and enclosure/privacy measures for the proposed hot tub with me. It is my understanding that locating the hot tub on the side of the house is the only variance from the Town code and all enclosures will be per code.

I own the property immediately east of the subject property on Cheswell Way and I take no exception to this proposed variance.

Sincerely,



Joshua T. Rodems
64 Cheswell Way
Rochester, NY 14610

11/09/2020

Re: 50 Cheswell Way permit request

We are the owners of 59 Cheswell Way which is across the street from 50 Cheswell Way. We fully support, and have no objections to, Kelly and Norm adding a hot tub to their property. They are responsible home owners and take excellent care of their property. We are confident that this change to their property will be in line with the aesthetics of the neighborhood and will in no way negatively impact our property.

Feel free to contact us by email (atowsley@yahoo.com) or phone (615-430-9504) with any questions.

Sincerely,

Adam and Catherine Towsley
59 Cheswell Way
Brighton NY



Rick DiStefano <rick.distefano@townofbrighton.org>

1075 Clover Street

1 message

Holly Crawford <hgcrawler160@gmail.com>
To: rick.distefano@townofbrighton.org

Tue, Nov 17, 2020 at 6:40 PM

Dear Mr. DiStefano,

My husband and I live diagonally across from the Baptist Church at 1166 Clover Street. While we were encouraged to hear that the church had new ownership, we were not happy to hear about the new construction or removal of the numerous trees. Those trees block much of the building from our home and provide a parklike setting on the corner of Highland and Clover.

We are also concerned about the additional traffic the new occupancy may bring. While being quieter during the weekend, we anticipate there could be more traffic and activity during the day and early evening. Adding to an already busy street.

We would ask that you take these into consideration in your approval of the planning.

Thank you for your time and consideration.

Sincerely,
Holly and Lindsay Crawford



Rick DiStefano <rick.distefano@townofbrighton.org>

CCR Fire sprinkler variance

1 message

Andrew Spencer <aspencer@bmepc.com>

Wed, Nov 18, 2020 at 1:34 PM

To: "rick.distefano@townofbrighton.org" <rick.distefano@townofbrighton.org>

Cc: Rick Holfoth <rholfoth@ccrochester.org>, Bruce Dumbaugh <bdumbaugh@hbtarchitects.com>

Rick,

Upon further review and discussion with the Country Club of Rochester, CCR would like to withdraw application number 11A-02-20 for the variance to the Fire Sprinkler ordinance. CCR had thought that the additional life safety measures proposed to be implemented in the building as well as the proposed site improvements would be satisfactory to allow the ZBA to grant the requested variance. Please let us know if you need anything further to conclude this matter.

Regards.

Andrew R. Spencer, RLA, ASLA



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Think Green. Please consider the environment and print this message only if necessary



From: Greg Danylak <greg@masonmarketing.com>
Sent: Saturday, October 31, 2020 1:15:03 PM
To: jhurwitz@hurwitzlawpc.com <jhurwitz@hurwitzlawpc.com>
Subject: Deck note

After reviewing our neighbor, Jamie Hurwitz's proposed deck plans, we have no issues with what they are proposing to do.

Gregory Danylak



Gregory Danylak
Senior Art Director | Creative Group Supervisor

p: 585.249.1135
masonmarketing.com



From: Andrew Jordan <andrew.jordan.aj@gmail.com>

Sent: Saturday, October 31, 2020 1:37:23 PM

To: Jayme Hurwitz <jhurwitz@rhdlaw.com>

Subject: Deck project

To whom it may concern:

This note concerns the project of my neighbor, Jayme Hurwitz. He is constructing a new deck behind his home to replace an old one.

I have no objections to his project going forward.

Sincerely,

Andrew Jordan

200 Hibiscus Dr.

Rochester, NY

14618



Rick DiStefano <rick.distefano@townofbrighton.org>

Baptist Temple property -- 1075 Clover Street

1 message

Goldman, Jerry A. <jgoldman@woodsoviatt.com>

Tue, Nov 24, 2020 at 5:28 PM

To: "Town of Brighton-Rick DiStefano (rick.distefano@townofbrighton.org)" <rick.distefano@townofbrighton.org>

Rick-

This e-mail is to confirm our conversation where I informed you that the applicant wishes to pull this matter (use and area variance) from the December 2 agenda to allow further discussions with neighbors. Please place this matter on the January 6, 2021 agenda.

Thank you very much for your courtesy. Have a nice Thanksgiving holiday.

Stay safe,

Jerry

Jerry A. Goldman, Esq.

Partner

Direct Dial: 585-987-2901

Direct Fax: 585-362-4602

Mobile: 585-329-7070

jgoldman@woodsoviatt.com



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Rick DiStefano <rick.distefano@townofbrighton.org>

Baptist Temple on Clover Street

1 message

McDonough, Tom <Tom.McDonough@kdgcorp.com>
To: "rick.distefano@townofbrighton.org" <rick.distefano@townofbrighton.org>

Tue, Dec 1, 2020 at 10:03 PM

My name is Thomas McDonough and I own and reside at 1156 Clover street with my family. I received information on the potential rezoning of the Baptist Temple property and do not agree with building a commercial office building in a residential area. There is no other office building on the street and feel it would take away from the neighborhood atmosphere .

You can reach me at 585.703.3478 to discuss further.

Thank you,

Tom McDonough

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At a meeting of the Zoning Board of Appeals of the Town of Brighton, held at the Brighton Town Hall, 2300 Elmwood Avenue, Brighton, N.Y. on the 2nd day of December, 2020, at approximately 7:00 p.m.

PRESENT:

Dennis Mietz, Chairperson

Kathleen Schmitt

Andrea Tompkins Wright

Judy Schwartz

Jeanne Dale

Jennifer Watson

Zoning Board of Appeals Members

Rick DiStefano, Secretary

David Dollinger, Deputy Town Attorney

WHEREAS, on August 4, 2020, Save Monroe Ave, Inc. (2900 Monroe Avenue, LLC, Cliffords of Pittsford, L.P., Elexco Land Services, Inc., Julia D. Kopp, Mark Boylan, Ann Boylan and Steven M. Deperrior) (collectively, "SMA") filed Application 9A-04-20 (the "Appeal") with the Town of Brighton Zoning Board of Appeals (the "ZBA") appealing the Town of Brighton Building Inspector's issuance of Building Permit No. 20180487 (the "Building Permit") to the Daniele Family Companies (the "Developer") for the Whole Foods Plaza project located at 2740 Monroe Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, a portion of 175 Allens Creek Road and a portion of 2259 Clover Street (the "Project"); and

WHEREAS, the Appeal requests that the ZBA: (i) annul and reverse the issuance of the Building Permit; (ii) determine that the Developer has failed to confirm that it has met all of the required conditions set forth in the Brighton Town Code and in the Incentive Zoning and Site Plan approvals necessary for the issuance of the Building Permit; and (iii) award SMA all costs and fees associated with the Appeal; and

WHEREAS, on September 2, 2020, the ZBA held a regular meeting, which was duly noticed and public as required by law; and

WHEREAS, on October 7, 2020, the ZBA held a regular meeting, which was duly noticed and published as required by law; and

WHEREAS, on September 2, 2020 and continued on October 7, 2020, the ZBA held a properly noticed public hearing with respect to the Appeal, and during the public hearing all persons desiring to speak on the Appeal were heard, and such persons also submitted documents and other correspondence for consideration by the ZBA, and all those

materials were considered by the ZBA as part of the record for the Appeal; and

WHEREAS, on October 7, 2020, the ZBA closed the public hearing, tabled the Appeal, and allowed the Building Inspector two weeks to respond to new information submitted in connection with the Appeal; and

WHEREAS, on October 7, 2020, the ZBA commenced deliberations with respect to the Appeal, which deliberations were continued by the ZBA at its regular meeting on November 4, 2020; and

WHEREAS, on November 4, 2020, the ZBA held a regular meeting, which was duly noticed and published as required by law.

NOW, THEREFORE, on Motion of _____, Seconded by _____, it is hereby

RESOLVED, each of the Whereas Clauses in this Resolution are incorporated by reference as specific findings of this Resolution and shall have the same effect as the other findings herein, and be it further

RESOLVED, that after duly considering all the evidence before it, the ZBA in all respects accepts, approves, adopts, and confirms the Findings set forth as Attachment A, which Findings are incorporated herein in their entirety; and

RESOLVED, in accordance with the records, proceedings, and Findings set forth as Attachment A, the ZBA affirms the issuance of the Building Permit; and be it further

RESOLVED, in accordance with the records, proceedings, and Findings set forth as Attachment A, the Appeal is denied.

UPON ROLL CALL VOTE, the vote was as follows:

Dennis Mietz, Chairperson	Voting	_____
Kathleen Schmitt, Board Member	Voting	_____
Andrea Tompkins Wright, Board Member	Voting	_____
Judy Schwartz, Board Member	Voting	_____
Jeanne Dale, Board Member	Voting	_____
Jennifer Watson, Board Member	Voting	_____

This Resolution was thereupon declared adopted.

Dated: December 2, 2020

ATTACHMENT A

FINDINGS
TOWN OF BRIGHTON ZONING BOARD OF APPEALS
APPLICATION 9A-04-20

Application of Save Monroe Ave., Inc., et al., appealing the issuance of a building permit (Starbucks Coffee) by the Town of Brighton Building Inspector (pursuant to Section 219-3) to the Daniele Family Companies, developer of the Whole Foods project located at 2740 / 2750 Monroe Avenue.

BACKGROUND

1. On February 25, 2015, the Daniele Family Companies (the "Developer" or "Daniele") submitted an application to the Town of Brighton Town Board ("Town Board") for Incentive Zoning for a proposal now known as the Whole Foods Plaza (the "Project").

2. The Project is located on certain property consisting of approximately 10.1 +/- acres of land located at 2740 and 2750 Monroe Avenue in the Town of Brighton (the "Project Site").

3. Following receipt of the Developer's application for Incentive Zoning and pursuant to the New York State Environmental Quality Review Act ("SEQRA"), the Town Board identified the Project as a Type I action, declared itself lead agency for the environmental review of the Project, and directed a coordinated review with potential involved agencies and interested agencies.

4. The Town Board completed its review of the potential impacts of the Project in accordance with the requirements of SEQRA and by Resolution dated March 28, 2018 adopted its Findings Statement. On March 28, 2018, the Town Board approved the Incentive Zoning application subject to conditions and the amenities set forth in the application (the "Incentive Zoning Approval").

5. Subsequently, the Developer submitted to the Town of Brighton Planning Board (the "Planning Board") applications for the following Project approvals: (i) Preliminary and Final Site Plan Approval to construct a five (5) building retail plaza totaling 83,700 sf, which includes a 50,000 sf Whole Food Store and a 2,000 sf drive-thru coffee shop on properties located at 2740 Monroe Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, a portion of 175 Allens Creek Road and a portion of 2259 Clover Street, as set forth in more detail in applicable application materials and plans on file (the "Site Plan Approval"); (ii) Site Plan modification to construct shared parking and access, known as the Access Management Plan ("AMP"), on and across 2835 Monroe Avenue, 2815 Monroe Avenue, 2799 Monroe Avenue, 2787 Monroe Avenue, 2775 Monroe Avenue, 2735 Monroe Avenue, 2729 Monroe Avenue and 2717 Monroe Avenue, as set forth in applicable application materials and plans on file (referred to as "AMP Approval"); (iii) Demolition Review and Approval to raze a vacant 10,800 +/- sf restaurant building and a vacant 44,600 +/- sf bowling alley on property located at 2740 Monroe Avenue and 2750 Monroe Avenue

as set forth in applicable application and plans on file; (iv) Demolition Review and Approval to raze a restaurant building on property located at 2800 Monroe Avenue as set forth in applicable application materials and plans on file ([iii] and [iv] are collectively "the Demolition plan Approval"); (v) Preliminary and Final Subdivision/Resubdivision Approval to combine and reconfigure several lots into two on properties located at 2740, 2750 and 2800 Monroe Avenue, 2259 Clover Street and 175 Allens Creek Road as set forth in applicable application and plans on file; (vi) Preliminary and Final Subdivision Approval to create two lots from one on property located at 175 Allens Creek Road, as set forth in applicable application materials and plans on file ([v] and [vi] are collectively, the "Subdivision Approval") (each of the forgoing applications may be referred to collectively as "the Planning Board Approvals").

6. The Planning Board was identified as an Involved Agency under SEQRA due to its authority to make discretionary decisions with respect to the Planning Board Approvals. The Planning Board completed its review of the potential impacts of the Project in accordance with the requirements of SEQRA and by Resolution dated August 15, 2018 adopted its Findings Statement.

7. On August 15, 2018, the Planning Board approved, with conditions, the Demolition Plan Approval.

8. On September 17, 2018, the Planning Board approved, with conditions, the AMP Approval, the Subdivision Approval, and the Site Plan Approval.

9. On January 9, 2019, the Developer and the Town entered into the Amenity Agreement for the Project, which contains the parties' agreement relative to the amenities being offered to the Town by the Developer in exchange for the incentives to be granted to the Developer by the Town in connection with the Incentive Zoning Approval.

10. On July 20, 2020, the Town of Brighton Building Inspector (the "Building Inspector") issued Building Permit No. 20180487 (the "Building Permit") for the Project. The Building Permit is for "site work & construction of a building shell for a 1996sf building to include future retail tenants (Star Bucks)."

11. On August 4, 2020, Save Monroe Ave, Inc. (2900 Monroe Avenue, LLC, Cliffords of Pittsford, L.P., Elexco Land Services, Inc., Julia D. Kopp, Mark Boylan, Ann Boylan and Steven M. Deperrior) (collectively, "SMA") filed an application with the Town of Brighton Zoning Board of Appeals (the "ZBA") appealing the Building Inspector's issuance of the Building Permit for the Project (the "Appeal").

12. SMA submitted the following documents in support of the Appeal: (i) Town of Brighton Zoning Board of Appeals Application, dated August 3, 2020; and (ii) Appeal/Notice of Appeal, dated August 3, 2020, with Exhibits A-G.

13. SMA submitted a letter to the ZBA, dated August 26, 2020, together with the Affidavit of Aaron M. Saykin, sworn to August 26, 2020, with Exhibits 1-5.

14. On September 2, 2020, the ZBA conducted the public hearing. The ZBA tabled the application and continued the public hearing in order to receive and file SMA's August 26, 2020 materials and granted the Building Inspector until September 23, 2020 to submit his response to the Appeal.

15. On September 23, 2020, in accordance with Town Law 267-a(5)(b), the Building Inspector filed with the ZBA the administrative record with bates numbers ZBA000001-ZBA010543. The Building Inspector also submitted to the ZBA a letter, dated September 23, 2020, in opposition to the Appeal and a spreadsheet containing an outline of the arguments raised in the Appeal, the Building Inspector's response, and references to the administrative record.

16. On September 23, 2020, the Developer submitted a letter with enclosures to the ZBA.

17. On October 5, 2020, the Developer submitted a letter to the ZBA.

18. On October 7, 2020, the ZBA continued the public hearing. The ZBA closed the public hearing on October 7, 2020, but granted the Building Inspector permission until October 21, 2020 to submit a response to supplemental submissions made by Brighton Grassroots, LLC ("BGR") in its related appeal 10A-02-20.

19. On October 21, 2020, the Building Inspector submitted to the ZBA a letter, and an updated spreadsheet containing an outline of the arguments raised in the Appeal and the Building Inspector's response that incorporates reference to BGR's additional submissions. The Building Inspector also filed with the ZBA additional documents with bates numbers ZBA010544-010581.

DOCUMENTS CONSIDERED BY THE ZBA

20. The ZBA has considered the following documents in connection with the Appeal: (1) Town of Brighton Zoning Board of Appeals Application, dated August 3, 2020; (2) Appeal/Notice of Appeal, dated August 3, 2020, with Exhibits A-G; (3) SMA letter to the ZBA, dated August 26, 2020; (4) Affidavit of Aaron M. Saykin, sworn to August 26, 2020, with Exhibits 1-5; (5) Administrative record with bates numbers ZBA000001-ZBA010543; (6) Letter from Building Inspector, dated September 23, 2020, and spreadsheet; (7) Letter from Warren Rosenbaum, Developer's Counsel, dated September 23, 2020; (8) Letter from Warren Rosenbaum, Developer's Counsel, dated October 5, 2020, with enclosures; (9) Letter from Building Inspector, dated October 21, 2020, and updated spreadsheet; (10) Additional documents submitted by the Building Inspector with bates

number ZBA010544-010581; (11) Email from Howie Jacobson, dated September 2, 2020; and (12) Email from Paul Adams, dated October 16, 2020.

JURISDICTION AND STANDARD OF REVIEW

21. The ZBA is authorized to hear and decide appeals from and review any order, requirement, decision, interpretation or determination made by an administrative official to decide the "meaning of any portion of the text of Comprehensive Development Regulations or of any condition or requirement specified or made under the provisions of the Comprehensive Development Regulations." Brighton Town Code 219-2(A)(1); see also Town Law 267-a(4).

22. In accordance with Town Law 267-b(1), the ZBA's standard of review with respect to the Appeal is *de novo*, such that the ZBA "may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken."

FINDINGS OF FACT AND DETERMINATIONS

After considering all the proof and evidence before it, the ZBA: (i) affirms the Building Inspector's issuance of the Building Permit; (ii) denies the Appeal; and (iii) makes the following determinations, findings, and interpretations:

I. Irrevocable Letters of Credit

23. SMA alleges that the Developer failed to provide to the Town the required letter of credit for the AMP.

24. The Town, however, provided in its September 23, 2020 response, copies of the three necessary irrevocable letters of credit for the Project. (ZBA000004-9).

25. Thus, the ZBA finds that all required letters of credit were received.

26. This portion of the Appeal is denied.

II. Cross-Access Easements for the Access Management Plan

27. SMA alleges that the Developer failed to meet the conditions set forth in the Incentive Zoning Approval for failure to obtain valid and necessary cross-access easements for the AMP.

28. Paragraph 2(b) of the Amenity Agreement provides that “[p]rior to the issuance of any Town building permits with the exception of the issuance of any permit for demolition of the buildings currently located on the Property, Daniele shall provide all cross access and other easements necessary to implement and construct the AMP The easements shall be prepared and submitted to the Town for review and approval. Upon satisfactory completion and execution of the documents, the easements shall be filed by Daniele at the Monroe County Clerk's Office with the Town being provided copies of each easement with the liber and pages of filing.”

29. Paragraph 8 of Schedule E-2 of the Incentive Zoning Approval provides that “prior to the issuance of any Town permits for the Project with the exception of the issuance of any permit for demolition of the buildings currently located on the Property, the [Developer] shall provide and file access rights for cross-access and cross-parking easements between proposed Lot 1 and Lot 2.”

30. As established by the administrative record, prior to the issuance of the Building Permit for the Project, the Developer provided to the Town cross-access and other easements necessary to implement and construct the AMP, which cross-access easements were executed by the owner of the granting party and recorded in the Monroe County Clerk's Office. (ZBA000143-184).

31. The Building Inspector has confirmed in his September 23, 2020 response that the cross-access easements were completed to the Town's satisfaction and copies were provided to the Town.

32. SMA argues that the cross-access easements are invalid because the Developer was not required to obtain approval for the cross-access easements from the recorded first-mortgage holders on two affected properties located at 2729 and 2735 Monroe Avenue prior to the issuance of the Building Permit for the Project. The ZBA finds this argument unconvincing and a mischaracterization of New York law. A valid easement can be granted by a property owner who has title to the servient estate. As established by the administrative record, the owners of the affected properties executed the cross-access easements through their members before a notary public and the cross-access easements contained the required formalities. (ZBA000143-184).

33. The ZBA finds that a mortgage recorded against the servient estate does not render the cross-access easements invalid or unenforceable.

34. SMA has not submitted any evidence that the owners of 2729 and 2735 Monroe Avenue lack authority to convey the cross-access and other easements necessary to implement and construct the AMP.

35. Paragraph 1.11(a) of the mortgage over 2735 Monroe Avenue states that “neither the Property, nor any part thereof or interest therein, shall be sold, conveyed, disposed of, alienated, hypothecated,

leased ..., assigned, pledged, mortgaged, further encumbered or otherwise transferred, nor Mortgagor shall be divested of its title to the Property or any interest therein, in any manner or way, whether voluntarily or involuntarily ... in each case without the prior written consent of Mortgagee being first obtained." Nothing in this paragraph renders the conveyance of an easement void.

36. Paragraph 1.11(a) of the aforementioned mortgage is contained in the covenant section of the mortgage, and is not a bargain and sale of property rights. Instead, such a provision may only render such a conveyance a default under the terms of the mortgage and provide certain remedies to the mortgage holder. As such, the ZBA finds that the cross-access easements, as recorded, are enforceable.

37. SMA has not submitted any evidence to the ZBA that the mortgagee has actually availed itself of any such remedies. No foreclosure action has been commenced and no court has entered a judgment extinguishing the cross-access easements. Whether this occurs in the future is speculative. The possibility that the grant of an easement may be a breach a mortgage covenant is speculative and beyond the purview of the ZBA when determining that the easements required to effect the intention of the AMP have been provided by the Developer and duly recorded as required by the applicable approval. SMA has not submitted any evidence that the cross-access easements are insufficient to implement and construct the AMP as required by the Amenity Agreement.

38. As the party seeking to annul the Building Permit, SMA has the burden of showing that the Building Permit was improperly issued. See *Hariri v. Keller*, 34 AD3d 583 (2d Dep't 2006). The ZBA finds that SMA has not met its burden of showing that the cross-access easements are void because they were not approved by the mortgage holder.

39. Further, the ZBA finds that it is not the obligation of the Town to enforce private mortgages. See *Vandoros v. Hatzimichalis*, 131 A.D.2d 752 (2d Dep't 1987) (stating that it "is not the obligation of the Department of Buildings to enforce private easements"). In issuing a zoning approval, "a municipality determines only that the application complies with the municipality's standards and conditions contained in the zoning ordinance." See *Chambers v. Old Stone Hill Rd. Assoc.*, 1 N.Y.3d 414 (2004).

40. The ZBA finds that, in determining whether to issue the Building Permit, the Town must be held to the standards set forth in the applicable approvals and Comprehensive Development Regulations. The Town has ensured that any easement or similar property agreement required for development is executed by the grantor, validly recorded, and that the substance of the document is sufficient for the specific purpose for which it is required. Here, the cross-access easements were executed by the grantor, recorded, and as stated in Building Inspector's September 23, 2020 response, the Building Inspector confirmed that the cross-access easements were satisfactory to substantively implement and construct the AMP.

41. The ZBA finds that it is unreasonable to require a Town in issuing a building permit to review mortgages or other third party contractual agreements that may pertain to a property to ensure that such execution does not breach said mortgage or third party contractual agreement. The rights and remedies of a private mortgage holder are not relevant under the Comprehensive Development Regulations. It would be similarly unreasonable to require a town to research signatory authority of the grantor to confirm that the person executing the agreement is authorized to do so.

42. Testimony was presented by multiple qualified Real Estate attorneys, with significant experience in drafting and interpreting easements and mortgages, confirming that the cross-access easements were executed by the appropriate property owners and are duly recorded in the Monroe County Clerk's Office. The easements are valid and enforceable against the property owner and provide legal access to the proposed users of the easements as contemplated by the AMP.

43. Importantly, SMA has not submitted any evidence that the cross-access easements are insufficient to implement and construct the AMP as required by the Amenity Agreement. Thus, the ZBA finds no evidence in the record that the cross-access easements are on their face invalid or unenforceable.

44. This portion of the Appeal is denied.

III. State and County Approvals

45. Condition #41 of Site Plan Approval states that "prior to the issuance of building permits for the project, State and County necessary approvals shall be obtained." (ZBA000103).

A. New York State Department of Transportation

46. SMA alleges that the Building Permit was improperly issued because Developer failed to obtain permits from the New York State Department of Transportation ("NYSDOT").

47. On August 23, 2019, NYSDOT completed its review of the potential impacts of the Project in accordance with the requirements of SEQRA and adopted its Findings Statement. (ZBA000124-136). NYSDOT found that the "mitigating measures will be the responsibility of the [Developer] and will be a condition to NYSDOT's approval of the Highway Work Permit for the Project." The NYSDOT found, among other things, that "[c]onsistent with social, economic, and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided through implementation of the mitigation measures identified herein" and "[c]onsistent with social, economic, and other essential considerations, from among the reasonable alternatives

thereto, the action to be undertaken is an alternative which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the environmental impact statement."

48. The Building Inspector has interpreted the issuance of a positive Finding Statement and certification to approve the Project, as evidencing the ability of the Developer to obtain the necessary Highway Work Permits for the Project. As supported by the administrative record, the ZBA finds that the NYSDOT's issuance of a positive Findings Statement under SEQRA and certification to approve the Project as evidence that the Developer obtained the necessary State approvals for the Project.

49. On November 14, 2019, the NYSDOT issued a Highway Work Permit to allow construction of utilities. (ZBA000116-119).

50. On August 3, 2020, the NYSDOT issued a second Highway Work Permit for the installation of parking lot entrances and modification of existing curbs, and installation of two signalized intersections and pedestrian cross walks. (ZBA000120-123).

51. The applicable condition requires only "approvals" prior to the issuance of building permits. The summation of the actions of the State and County together with their specific positive findings are consistent with our conclusion that the State and County approved the Project.

52. As all NYSDOT permits required to be issued have been received, the ZBA finds this issue is moot.

B. Other State and County Approvals

53. Although not raised in the Appeal, during the public hearing on October 7, 2020, BGR stated that the Project did not obtain all State and local approvals, and requested that its comments be incorporated into the record of the Appeal.

54. The Building Inspector has confirmed that a NYSDEC permit is not issued for sanitary sewer. The ZBA agrees, and finds that no NYSDEC permit exists or is required for sanitary sewer.

55. There is not proof before the ZBA or any cited NYSDEC regulation indicating a requirement to obtain a NYSDEC permit for sanitary sewer.

56. Further, on July 8, 2020, Monroe County Pure Waters ("MCPW") and Monroe County Department of Health ("MCDOH") signed the Utility Plan approving the sanitary sewer extension for the Project. (ZBA000215).

57. On January 1, 2020, MCPW signed the Unity Plan indicating that the plan conforms to the MCPW Master Plan. (ZBA000215).

58. The ZBA finds the MCPW's signing of the Utility Plan to be its approval, which was received prior the issuance of the Building Permit.

59. Consistent with the language of Condition #41 of the Site Plan Approval and as supported by the administrative record, the ZBA finds that MCDOH backflow prevention and greased interceptor approvals are not "necessary approvals" for the issuance of the Building Permit. The Building Inspector has confirmed that these approvals are separate from the Building Permit process.

60. Of note, however, on July 14, 2020, the MCDOH approved the applicable backflow prevention devices for the relevant portion of the Project being constructed pursuant to the Building Permit. (ZBA010573-578).

61. With respect to the Realty Subdivision Approval, Article III Realty Subdivisions of the Monroe County Code defines a subdivision as "[a]ny tract of land which is divided into five or more parcels... for sale or for rent as residential lots"

62. The Project does not include the subdivision of five or more lots and is not residential. The administrative record does not contain any proof or cite any Monroe County law or regulation indicating a requirement to obtain MCDOH Realty Subdivision approval. The ZBA finds that the Project does not require MCDOH Realty Subdivision approval.

63. The Project Site is located along Monroe Avenue (New York State Route 31) in the Town of Brighton. Monroe Avenue is not a County Highway. The administrative record does not contain any proof or cite to any Monroe County law or regulation indicating a requirement to obtain Monroe County Department of Transportation ("MCDOT") approval. The ZBA finds that the Project does not require the approval of the MCDOT.

64. As established by the administrative record, prior to the Issuance of the Building Permit, the ZBA finds the Town obtained all necessary State and County approvals as required by Condition #41 of Site Plan Approval.

65. This portion of the Appeal is denied.

IV. Construction Sequencing

66. SMA argues that the Developer did not comply with the Comprehensive Development Regulations because it obtained a permit allegedly allowing for phased construction in violation of the terms and conditions of the Incentive Zoning Approval and SEQRA findings.

67. The Incentive Zoning Approval approved the construction of the Project in a single phase (ZBA000088). This single construction phase is projected to last 18 months. (ZBA000064).

68. The Building Permit approved "site work & construction of a building shell for a 1996sf building to include future retail tenants (Star Bucks)." The ZBA finds that the Building Permit authorizes the site work for the entire Project and is in accordance with the approval of the construction of the Project in a single phase.

69. During the public hearing on October 7, 2020, the Developer testified that the site work will take approximately 6-7 months and is the most difficult part of the Project. The Developer testified that once complete, construction of buildings takes less than 90 days. The Developer further testified that it hopes to have the entire Project complete by the summer of 2021.

70. Accordingly, SMA has not submitted any evidence to the ZBA that the Building Permit authorizes construction, or that the Project is currently being constructed, in multiple phases.

71. In fact, the Amenity Agreement states that the Developer "shall complete construction of the trail within three hundred sixty five (365) calendar days of the date on which the Town issues the first building permit for the project." (ZBA000079). The Building Inspector interprets this language as evidencing that the Town Board anticipated the issuance of multiple building permits for the Project. Consistent with the language of the Incentive Zoning Approval and as supported by the administrative record, the ZBA interprets and finds that the Project approvals contemplate the issuance of multiple building permits.

72. Schedule E-2 of the Incentive Zoning Approval states that "the site plan for the development of the [Project Site] shall be approved by the Planning Board The Planning Board has the authority to modify the proposed plan for the Project to address ... adequacy and arrangement of buildings, parking areas, pedestrian traffic access and circulation, including separation for pedestrians from vehicular traffic, sidewalks, linkages, pedestrian convenience, stormwater management and utilities." (ZBA000088).

73. The Site Plan Approval is subject to condition that "[a]ll comments and concerns of the Town Engineer as contained in the attached memo dated September 16, 2018 from Michael Guyon, Town Engineer, to Ramsey Boehner, shall be addressed." (ZBA000102). The Town Engineer stated that the Developer provide a "phasing plan demonstrating that the total earth disturbance will not exceed 5 acres." (ZBA0000105). The Developer provided the requested plan in accordance with the condition of Site Plan Approval. (ZBA000218).

74. The Building Inspector has confirmed that it is "common for commercial projects with multiple buildings to have construction proceed in sequences, i.e. to construct one building while other buildings are waiting to begin the building permit process." Pursuant to the New York Department of Environmental Conservation ("NYSDEC") State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity, the Town required the Developer

to prepare a plan for construction defining the maximum disturbed area per construction sequence.

75. The Building Inspector has confirmed that the New York State Stormwater Management Design Manual recommends "projects avoid mass grading of a site and suggests that the project area be divided into smaller areas for phased grading." The New York State Standards and Specifications for Erosion and Sediment Control similarly recommend that a "properly designed erosion and sediment control plan for a commercial site will typically involve several phases, and that good construction and site management includes site phasing and construction sequencing measures."

76. The Town Building and Planning Department is comprised of, among others, the Building Inspector, Town Engineer, and Commissioner of Public Works, who are certified planners, licensed engineers and/or professionals with decades of experience in land use planning and construction. The ZBA finds that the issuance of the Building Permit and approved construction is consistent with the SPDES permit and NYSDEC guidance, and supported by the Incentive Zoning Resolution, Site Plan Approval, and administrative record. SMA has not submitted any evidence that the issuance of the Building Permit or the construction sequencing implemented as part of the Project is contrary to NYSDEC regulation or guidance.

77. As established by the administrative record, the ZBA finds that: (i) the Building Permit authorizes site work for the entire Project Site; (ii) construction is occurring in a single phase in accordance with the Incentive Zoning Approval and Site Plan Approval; and (iii) the Town reasonably and rationally required construction to proceed in sequences to mitigate overall disturbance of the Project Site, and to manage stormwater and control erosion.

78. The ZBA finds that the Building Permit issued to the Developer allowing the construction and development of the site work for the entire Project supports the finding that the Developer is developing the Project in a single phase consistent with the Incentive Zoning Approval.

79. As was noted in both testimony and the extensive record, the Town Board did not require that the building permits for all of the proposed buildings would be issued simultaneously.

80. The evidence and testimony describing the common sequencing of larger projects evidences that the issuance of the Building Permit for the Starbucks building and the site work for the entire Project is consistent with the sequencing of construction that is customary for projects of this size and scope. The Developer further testified that construction of the Project is anticipated to be fully completed in summer 2021, which evidences that construction is not proceeding in multiple phases, but instead is a continual construction project consistent with the original intention of a "Single Phase". The SEQRA

Statement anticipates a single construction phase is projected to last 18 months or less.

81. During the public hearing on October 7, 2020, it was suggested that stated that the Developer is pulling permits piecemeal and has not shown any indication they have applied for or pulled, or are prepared to pull, any other permits. The ZBA finds no evidence to this effect. The ZBA has verified with the Town Building and Planning Department that, in fact, the Developer (i) on September 16, 2020 applied for a building permit to construct the internal build-out for new tenant Starbucks Coffee, and (ii) on October 13, 2020 applied for a building permit to construct a building shell for the 22,380 square foot building approved as part of the Project.

82. The ZBA finds that SMA has not met its burden of showing that the Building Permit authorizes construction in multiple phases in violation of either the Findings Statement adopted by the Town Board, or the Incentive Zoning Approval. The ZBA finds that the evidence presented supports a conclusion that the Project is being constructed in a single phase.

83. This portion of the Appeal is denied.

V. Access Management Plan Improvements

84. SMA argues that the Building Permit should be annulled because the Developer was required to undertake all traffic improvements required by the AMP during the first phase of construction.

85. Paragraph 2(c) of the Amenity Agreement states that "[p]rior to the issuance of a Temporary or Final Certificate of Occupancy for the Project, the Access Management Plan improvements shall be installed and operational." (ZBA000081).

86. Consistent with the language of the Amenity Agreement, the ZBA finds that the AMP improvements must be installed and operational prior to the issuance of a Temporary or Final Certificate of Occupancy for the Project, not prior to or in the first alleged phase of construction (as discussed above, the ZBA finds that the Project is being constructed in a single phase) pursuant to the issuance of the Building Permit.

87. This portion of the Appeal is denied.

VI. Other Issues Raised During Public Hearing

88. Although not raised in the Appeal, during the public hearing on October 7, 2020, it was suggested that: (i) the Building Inspector did not certify on the site plan that the Project meets the requirements of the Comprehensive Development Regulations; and (ii) the Building Permit was improperly issued because the Town did not obtain state legislative approval with respect to the pedestrian easements. BGR

requested that these comments be incorporated into the record of this Appeal, and thus the comments are being addressed by the ZBA.

A. Building Inspector Certification on Site Plan

89. Section 217-12(A)(3) of the Comprehensive Development Regulations provides that the "Building Inspector shall certify on each site plan or amendment whether or not the plan meets the requirements of all Comprehensive Development Regulations other than those of this article regarding site plan approval."

90. Section 217-12(A)(3) is contained in Article III of the Comprehensive Development Regulations. Article III of the Comprehensive Development Regulations applies to the "Approval of Site Plans" by the Planning Board. The Planning Board Approvals, including the Site Plan Approval, are not before the ZBA in connection with the Appeal, which involves the issuance of the Building Permit. The ZBA is without jurisdiction or authority to review the Site Plan Approval.

91. Chapter 73 of the Code of the Town of Brighton (the "Brighton Town Code") and Sections 225-1 and 225-2 of the Comprehensive Development Regulations govern the issuance of building permits. These provisions do not impose a requirement that the Building Inspector certify a site plan as a condition of issuing a building permit.

92. Section 73-5 of the Brighton Town Code establishes the office of the Building Inspector. Section 73-5(A)(1) of the Brighton Town Code states that the office "shall be headed by the Associate Planner and shall employ an official or officials designated as the 'Building Inspector.' The Building Inspector(s) shall be appointed by the Town Board, upon recommendation of the Commissioner of Public Works, and may be either the Commissioner of Public Works, the Associate Planner or other Town employee(s)...."

93. By resolution, the Town Board has lawfully designated the Commissioner of Public Works, the Associate Planner, the Town Engineer, the Town Architect, and the Fire Marshall to "carry out the functions of the office of Building Inspector, as laid out in the Comprehensive Development Regulations." (ZBA010544-551).

94. The Commissioner of Public Works relies on the Associate Planner to review building permit applications and site plans for compliance with the Comprehensive Development Regulations. As established by the administrative record, the Town reviewed the Developer's application for the Building Permit as follows: (i) if required, use and area variances have been obtained; (ii) the Planning Board has granted final site plan approval; (iii) the Town Engineer confirms that all technical issues have been resolved; (iv) all easements have been executed and filed in the Monroe County Clerk's office, with the liber and page must be recorded on the plans; (v) the Associate Planner confirms that all of the conditions of Planning Board approval have been met; (vi) the Associate Planner confirms that the requirements

of SEQRA, including any conditions contained in a SEQRA findings statement have been met; (vii) in the case of an incentive zoning project, the Associate Planner confirms that the conditions of the incentive zoning and amenity agreements have been met; (viii) the Associate Planner confirms that any other requirements of the Comprehensive Development Regulations have been met; and (ix) the plans have been signed by the jurisdictional agencies.

95. Although Section 217-12(A)(3) of the Comprehensive Development Regulations provides that the Building Inspector "certify" on the site plan that it meets the requirements of the Comprehensive Development Regulations, the Comprehensive Development Regulations do not define a specific or particular form of the certification.

96. On July 16, 2020, the Commissioner of Public Works and Town Engineer signed the Utility Plan contained in the final site development plan package. (ZBA000215). Based on the submissions and evidence contained in the administrative record, the ZBA finds that the custom and practice of the Town is for the Town Engineer and Commissioner of Public Works to sign and approve the Utility Plan to "certify" that the plans meet the requirements of the Comprehensive Development Regulations. The Commissioner of Public Works and Associate Planner, both of whom are lawfully designated as the Town Building Inspector, confirmed that all the requirements needed to approve the plans were satisfied prior to endorsing the final drawings.

97. The argument is conflating the standards governing Site Plan approval with the standards governing the Building Permit approval. The standard of certifying the site plan is a standard to be applied by the Building Inspector during the process of Site Plan approval. The Building Permit process does not require or authorize the Building Inspector undertaking a second Site Plan process review at the time of the issuance of the Building Permit.

98. The ZBA interprets the requirement in Section 217-12(A)(3) that the Building Inspector "certify on each site plan or amendment whether or not the plan meets the requirements of all Comprehensive Development Regulations" as being satisfied in this case when the Commissioner of Public Works and Town Engineer signed and approved the Utility Plan for the Project. (ZBA000215). To find otherwise would be to elevate the form of certification over the substance of the certification itself.

99. In his submission to the ZBA, the Building Inspector has also "confirm[ed] and certif[ied] that the plans meet the requirements of the Comprehensive Development Regulations."

100. Based on the administrative record, the ZBA finds that the comments made during the public hearing are insufficient for SMA to meet its burden of showing that the plans do not meet the requirements of the Comprehensive Development Regulations. As established by the administrative record, the ZBA finds that the Building Inspector properly

certified that the site plans for the Project meet the requirements of all Comprehensive Development Regulations.

B. The Pedestrian Easements

101. Condition #41 of Site Plan Approval states that "prior to the issuance of building permits for the project, State and County necessary approvals shall be obtained." (ZBA000103).

102. The Project Site is subject to certain easements granted to the Town of Brighton that run through a portion of the Project Site (collectively, the "Pedestrian Easements"). The ZBA has been provided with copies of four Pedestrian Easements, which were granted to the Town of Brighton between 1997 and 2003 by various property owners for the purpose of pedestrian use by the Town of Brighton, "its licensees, and the public, together with the right, privilege and authority of the Town of Brighton to install, construct, reconstruct, extend, operate, inspect, maintain, repair, replace, and at its pleasure, to install a pedestrian pathway which the [Town] shall require for public use...."

103. The land containing the Pedestrian Easements was formerly owned by RG&E. The Pedestrian Easements run through the back of various properties between Allens Creek Road and Clover Street in the Town. The Pedestrian Easements do not run continuously from Allens Creek Road to Clover Street. The Pedestrian Easement granted by Executive Square Office Park, LLC to the Town of Brighton runs southerly from Allens Creek Road to the boundary of the Project Site. The administrative record does not contain any evidence of a Pedestrian Easement from Mario & Flora Danielle to the Town of Brighton for the northerly portion of the Project Site between the Executive Square Office Park and the former Clover Lanes property. The Pedestrian Easement granted by Clover Lanes, Inc. and Mamasan's Monroe, LLC runs through the back of the southerly portion of the Project Site to the adjoining property.

104. At the time the easements were granted, the various properties contained an office park, bowling alley, and other commercial buildings. As reflected by the maps attached to the Pedestrian Easements, at the time, and presently, they run over pavement, including a parking lot. As stated by Board Member Schmitt during the public hearing on October 7, 2020, who has utilized the Pedestrian Easements, the easement area is "a parking lot and has always been a parking lot. "

105. The Appellate Division, Fourth Department, found issues of fact as to "whether there was an express or implied dedication of the [Pedestrian Easements] subject to the public trust doctrine." *Clover/Allen's Creek Neighborhood Association LLC v M&F, LLC*, 173 A.D.3d 1828 (4th Dep't 2019). The Fourth Department stated: "To establish that property has been dedicated as a park or for public use, formal dedication by the legislature is not required. Rather, a parcel of property may become a park by express provisions in a deed ... or by implied acts, such as continued use [by the municipality] of the parcel as a park A party seeking to establish ... an implied dedication and

thereby successfully challenge the alienation of the land must show that (1) [t]he acts and declarations of the land owner indicating the intent to dedicate his [or her] land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication and (2) that the public has accepted the land as dedicated to a public use." *Id.* (internal citations and quotations omitted).

106. The administrative record does not contain any evidence demonstrating an express or implied dedication of parkland. The administrative record does not contain any evidence of acts or declarations by the landowners indicating an intent to dedicate land to the public use. The administrative record does not contain any evidence that the Town has accepted the land as dedicated to a public use. Based on the administrative record, the ZBA finds that the comments made during the public hearing are insufficient for SMA to meet its burden of showing that the Pedestrian Easements were dedicated as parkland and are subject to the Public Trust Doctrine based on the standards articulated by the Fourth Department.

107. As established by the administrative record, until 1978, the Town "had no official parkland of its own except, perhaps, for the pocket parks that exist in many residential neighborhoods such as Rose Park in the Rose Lawn subdivision." Between 1978 and present, the Town has formally recognized several parks, such as Brighton Town Park, Persimmon Park, Buckland Park, Meridian Park, Lynch Woods, and Sandra L. Frankel Nature Park." (ZBA010579). None of these parks are related to or otherwise involve the Pedestrian Easements.

108. According to the Town Superintendent of Parks, the Town currently manages almost 500 acres of parkland and open space for the benefit and enjoyment of the Town's residents and visitors. The Town Superintendent states that the Town "has not designated this pedestrian pathway as a park, and has not accepted this area as parkland. This area is not among the hundreds of acres of parkland and open space managed by the Town Parks Department. The Town does not maintain this area as a park. This area is not identified on any official Town maps as a park, and the Town has not erected any signs on or near this pathway which identify it as a park." (ZBA010566).

109. According to the Town Associate Planner, who supervises and directs the activities of the Town's Building and Planning Department, and has held that position since 1990 (during the time the Town acquired the Pedestrian Easements), the Town has "never made any improvement to the lands subject to the [Pedestrian] Easements to allow for its use as a park. Neither has the Town done any maintenance work on this land or erected any signage on or adjacent to this land to state that this area is a park. At the time the Town acquired the [Pedestrian] Easements, it was not the Town's intent to have the land subject to the Easements become a park or unequivocally dedicate this land as parkland." The Town Associate Planner further states that the Town "has not expressly or implicitly through any action taken dedicated this area as a park." (ZBA010569).

110. The relevant portions of the Town Comprehensive Plan 2000 and Envision Brighton 2028 (adopted after the Town Board approved the Incentive Zoning Approval), identifies the area subject to the Pedestrian Easements as a proposed trail. In fact, Envision Brighton 2028 states that this area "is currently planned to be developed, at no cost to the Town, as an amenity approved as part of the Whole Foods zoning project." (ZBA010570). The ZBA finds that the Town Comprehensive Plans evidence a future opportunity to develop a trail in this area. The ZBA further finds that the Town did not intend to accept the Pedestrian Easements as parkland at the time they were granted.

111. During the public hearing, a member of the ZBA asked BGR to explain how the Building Permit interferes with the use and enjoyment of the Auburn Trail. BGR responded that the Project as approved allows the Town to interfere with the Pedestrian Easements, but did not provide any evidence as to the alleged interference. However, according to the Town Associate Planner, the Project "as approved by the Town will not interfere with or otherwise obstruct the public's use of the existing [Pedestrian Easements]. The Project proposes no parking spaces within the lands subject to the Easements. In fact, as part of the Town's review of the site plan, the Planning Board ensured that the Auburn Trail would not be obstructed by parking spaces." (ZBA010570-571). SMA also stated during the public hearing that the portion of the Project relating to the Building Permit "is probably the furthest from the Auburn Trail on the site."

112. Based on the final plans contained in the administrative record, the Project proposes no parking spaces within the Pedestrian Easement area. (ZBA000211, 214). The ZBA finds that the Pedestrian Easements on the Project Site have always been located on a parking lot, and that will continue to be the case after the Project is constructed. The ZBA further finds that the Pedestrian Easements will not be obstructed by parking spaces as reflected on the final plans.

113. During the public hearing, BGR stated that the ZBA should look at whether tractor trailer turnarounds are consistent with a public pedestrian pathway. The loading dock and tractor trailer turnarounds for the Whole Foods building are located in the rear of the proposed building, in the northwest corner of the Project Site. (ZBA000214). However, nothing in the administrative record indicates that the northerly portion of the Project Site (the former site of the Mario's Restaurant between the Executive Square Office Park property and the former Clover Lanes property) is subject to the Pedestrian Easements. In the absence of a documented easement, the ZBA finds that that the comments made during the public hearing are insufficient for SMA to meet its burden of showing that the loading dock or tractor trailer turnarounds are inconsistent with the Pedestrian Easements.

114. The Building Inspector has confirmed that the Pedestrian Easements will not be closed during or after construction. The ZBA has confirmed, based on a visual inspection of the Project Site, that the

Pedestrian Easements are protected from obstruction by construction fencing. As part of the Incentive Zoning Approval, the Developer will be improving and extending the Auburn Trail for the benefit of the public. The ZBA finds that the public's right to access and use the Auburn Trail will be enhanced and improved as a result of the Project. The ZBA finds the Project will not substantially interfere with the Pedestrian Easements.

115. The Pedestrian Easements contain language stating that "[u]pon completion of any construction, installation, maintenance or repair of any improvement over the Easement Premises as required by the [Town], [Town] agrees to restore the Easements Premises to park like condition" The ZBA interprets this language in the Pedestrian Easements as requiring the Town to restore the Pedestrian Easements to "park like" condition only after a pedestrian pathway is constructed. Based on administrative record and testimony before the ZBA, the ZBA finds that the Town has not constructed or maintained a pedestrian pathway within the Pedestrian Easements.

116. The administrative record does not contain any evidence indicating that the Town has constructed a pedestrian pathway within the Pedestrian Easements. The ZBA finds that this language in the Pedestrian Easements does not evidence an express or implied dedication of the Pedestrian Easements subject to the Public Trust Doctrine.

117. Based on the administrative record and evidence before the ZBA, the ZBA finds that the Pedestrian Easements are not parkland for purposes of the Public Trust Doctrine. The ZBA finds that the issuance of the Building Permit complies with Condition #41 of the Site Plan Approval because no State legislative approval is required.

118. Under Town Law 62(2), upon adopting a resolution, the Town Board may "convey or lease real property in the name of the town, which resolution shall be subject to a permissive referendum."

119. According to the Associate Planner, as approved by the Town, the Pedestrian Easements "will remain of record without change and will not be abandoned, conveyed, released or otherwise modified." (ZBA010570). Nothing in the administrative record indicates that the Town Board has adopted a resolution authorizing the conveyance or abandonment of the Pedestrian Easements. The Pedestrian Easements are reflected on the final site plan. (ZBA000214).

120. The administrative record does not contain any evidence that the Town is conveying or abandoning the Pedestrian Easements. The ZBA finds that the comments made during the public hearing are insufficient for SMA to meet its burden of showing that the Town is conveying or abandoning the Pedestrian Easements. Based on the administrative record and evidence before the ZBA, the ZBA finds that the Town is not conveying or abandoning the Pedestrians Easements. The ZBA finds that the Town is not required to conduct a permissive referendum.

121. This portion of the Appeal is denied.

CONCLUSION

122. In accordance with the records, proceedings, and above Findings, the ZBA finds that: (i) the Building Inspector properly issued the Building Permit in accordance with the requirements of the Brighton Town Code, Comprehensive Development Regulations, Incentive Zoning Approval, Site Plan Approval, and other applicable conditions of approval; (ii) the Building Permit meets all of the required conditions for the issuance of a building permit as set forth in the Brighton Town Code, Comprehensive Development Regulations, Incentive Zoning Approval, and Site Plan Approval; and (iii) the Developer satisfied all required conditions before the Building Inspector issued the Building Permit.

123. The ZBA denies SMA's request for costs and fees associated with the Appeal.

124. The Building Inspector's issuance of the Building Permit is affirmed, and Appeal is denied in its entirety.

At a meeting of the Zoning Board of Appeals of the Town of Brighton, held at the Brighton Town Hall, 2300 Elmwood Avenue, Brighton, N.Y. on the 2nd day of December, 2020, at approximately 7:00 p.m.

PRESENT:

Dennis Mietz, Chairperson

Kathleen Schmitt
Andrea Tompkins Wright
Judy Schwartz
Jeanne Dale
Jennifer Watson
Zoning Board of Appeals Members

Rick DiStefano, Secretary
David Dollinger, Deputy Town Attorney

WHEREAS, on August 20, 2020, Brighton Grassroots, LLC ("BGR") filed Application 10A-02-20 (the "Appeal") with the Town of Brighton Zoning Board of Appeals (the "ZBA") appealing the Town of Brighton Building Inspector's issuance of Building Permit No. 20180487 (the "Building Permit") to the Daniele Family Companies (the "Developer") for the Whole Foods Plaza project located at 2740 Monroe Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, a portion of 175 Allens Creek Road, and a portion of 2259 Clover Street (the "Project"); and

WHEREAS, the Appeal requests that the ZBA: (i) reverse the decision of the Town of Brighton Building Inspector to issue the Building Permit; (ii) annul the Building Permit; (iii) determine that the Developer has failed to establish, with documentary evidence, that it has met all of the required preconditions/requirements for issuance of the Building Permit as set forth in the Brighton Town Code, Incentive Zoning Resolution, and Site Plan Approval Resolution; and (iv) identify which outstanding preconditions/requirements the Developer must satisfy before a building permit can be issued; and

WHEREAS, on October 7, 2020, the ZBA held a regular meeting, which was duly noticed and published as required by law; and

WHEREAS, on October 7, 2020, the ZBA held a properly noticed public hearing with respect to the Appeal, and during the public hearing all persons desiring to speak on the Appeal were heard, and such persons also submitted documents and other correspondence for consideration by the ZBA, and all those materials were considered by the ZBA as part of the record for the Appeal; and

WHEREAS, on October 7, 2020, the ZBA closed the public hearing, tabled the Appeal, and allowed the Building Inspector two weeks to respond to new information submitted by BGR; and

WHEREAS, on October 7, 2020, the ZBA commenced deliberations with respect to the Appeal, which deliberations were continued by the ZBA at its regular meeting on November 4, 2020; and

WHEREAS, on November 4, 2020, the ZBA held a regular meeting, which was duly noticed and published as required by law; and

NOW, THEREFORE, on Motion of _____, Seconded by _____, it is hereby

RESOLVED, each of the Whereas Clauses in this Resolution are incorporated by reference as specific findings of this Resolution and shall have the same effect as the other findings herein, and be it further

RESOLVED, that after duly considering all the evidence before it, the ZBA in all respects accepts, approves, adopts, and confirms the Findings set forth as Attachment A, which Findings are incorporated herein in their entirety; and

RESOLVED, in accordance with the records, proceedings, and Findings set forth as Attachment A, the ZBA affirms the issuance of the Building Permit; and be it further

RESOLVED, in accordance with the records, proceedings, and Findings set forth as Attachment A, the Appeal is denied.

UPON ROLL CALL VOTE, the vote was as follows:

Dennis Mietz, Chairperson	Voting	_____
Kathleen Schmitt, Board Member	Voting	_____
Andrea Tompkins Wright, Board Member	Voting	_____
Judy Schwartz, Board Member	Voting	_____
Jeanne Dale, Board Member	Voting	_____
Jennifer Watson, Board Member	Voting	_____

This Resolution was thereupon declared adopted.

Dated: December 2, 2020

ATTACHMENT A

FINDINGS
TOWN OF BRIGHTON ZONING BOARD OF APPEALS
APPLICATION 10A-02-20

Application of Brighton Grassroots, LLC appealing the issuance of a building permit (Starbucks Coffee) by the Town of Brighton Building Inspector (pursuant to Section 219-3) to the Daniele Family Companies, developer of the Whole Foods project located at 2740 Monroe Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, a portion of 175 Allens Creek Road, and a portion of 2259 Clover Street.

BACKGROUND

1. On February 25, 2015, the Daniele Family Companies (the "Developer" or "Daniele") submitted an application to the Town of Brighton Town Board ("Town Board") for Incentive Zoning for a proposal now known as the Whole Foods Plaza (the "Project").

2. The Project is located on certain property consisting of approximately 10.1 +/- acres of land located at 2740 and 2750 Monroe Avenue in the Town of Brighton (the "Project Site").

3. Following receipt of the Developer's application for Incentive Zoning and pursuant to the New York State Environmental Quality Review Act ("SEQRA"), the Town Board identified the Project as a Type I action, declared itself lead agency for the environmental review of the Project, and directed a coordinated review with potential involved agencies and interested agencies.

4. The Town Board completed its review of the potential impacts of the Project in accordance with the requirements of SEQRA and by Resolution dated March 28, 2018 adopted its Findings Statement. On March 28, 2018, the Town Board approved the Incentive Zoning application subject to conditions and the amenities set forth in the application (the "Incentive Zoning Approval").

5. Subsequently, the Developer submitted to the Town of Brighton Planning Board (the "Planning Board") applications for the following Project approvals: (i) Preliminary and Final Site Plan Approval to construct a five (5) building retail plaza totaling 83,700 sf, which includes a 50,000 sf Whole Food Store and a 2,000 sf drive-thru coffee shop on properties located at 2740 Monroe Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, a portion of 175 Allens Creek Road and a portion of 2259 Clover Street, as set forth in more detail in applicable application materials and plans on file (the "Site Plan Approval"); (ii) Site Plan modification to construct shared parking and access, known as the Access Management Plan ("AMP"), on and across 2835 Monroe Avenue, 2815 Monroe Avenue, 2799 Monroe Avenue, 2787 Monroe Avenue, 2775 Monroe Avenue, 2735 Monroe Avenue, 2729 Monroe Avenue and 2717 Monroe Avenue, as set forth in applicable application materials and plans on file (referred to as "AMP Approval"); (iii) Demolition Review and Approval to raze a vacant 10,800 +/- sf restaurant building and a vacant 44,600 +/- sf bowling

alley on property located at 2740 Monroe Avenue and 2750 Monroe Avenue as set forth in applicable application and plans on file; (iv) Demolition Review and Approval to raze a restaurant building on property located at 2800 Monroe Avenue as set forth in applicable application materials and plans on file ([iii] and [iv] are collectively "the Demolition plan Approval"); (v) Preliminary and Final Subdivision/Resubdivision Approval to combine and reconfigure several lots into two on properties located at 2740, 2750 and 2800 Monroe Avenue, 2259 Clover Street and 175 Allens Creek Road as set forth in applicable application and plans on file; (vi) Preliminary and Final Subdivision Approval to create two lots from one on property located at 175 Allens Creek Road, as set forth in applicable application materials and plans on file ([v] and [vi] are collectively, the "Subdivision Approval") (each of the forgoing applications may be referred to collectively as "the Planning Board Approvals").

6. The Planning Board was identified as an Involved Agency under SEQRA due to its authority to make discretionary decisions with respect to the Planning Board Approvals. The Planning Board completed its review of the potential impacts of the Project in accordance with the requirements of SEQRA and by Resolution dated August 15, 2018 adopted its Findings Statement.

7. On August 15, 2018, the Planning Board approved, with conditions, the Demolition Plan Approval.

8. On September 17, 2018, the Planning Board approved, with conditions, the AMP Approval, the Subdivision Approval, and the Site Plan Approval.

9. On January 9, 2019, the Developer and the Town entered into the Amenity Agreement for the Project, which contains the parties' agreement relative to the amenities being offered to the Town by the Developer in exchange for the incentives to be granted to the Developer by the Town in connection with the Incentive Zoning Approval.

10. On July 20, 2020, the Town of Brighton Building Inspector (the "Building Inspector") issued Building Permit No. 20180487 (the "Building Permit") for the Project. The Building Permit is for "site work & construction of a building shell for a 1996sf building to include future retail tenants (Star Bucks)."

11. On August 20, 2020, Brighton Grassroots, LLC ("BGR") filed an application with the Town of Brighton Zoning Board of Appeals (the "ZBA") appealing the Building Inspector's issuance of the Building Permit for the Project (the "Appeal").

12. BGR submitted the following documents in support of the Appeal: (i) Town of Brighton Zoning Board of Appeals Application, dated August 19, 2020; (ii) BGR Notice of Appeal, dated August 19, 2020; and (iii) BGR Appeal to ZBA, dated August 20, 2020, with Exhibits A-E.

13. On September 23, 2020, in accordance with Town Law 267-a(5)(b), the Building Inspector filed with the ZBA the administrative record with bates numbers ZBA000001-ZBA010543. The Building Inspector also submitted to the ZBA a letter, dated September 23, 2020, in opposition to the Appeal and a spreadsheet containing an outline of the arguments raised in the Appeal, the Building Inspector's response, and references to the administrative record.

14. On September 23, 2020, the Developer submitted a letter with enclosures to the ZBA.

15. BGR submitted a letter to the ZBA, dated September 25, 2020, together with the Supplemental Affirmation of Mindy L. Zoghlin, dated September 25, 2020, with Exhibits A-J, which was received by the ZBA on September 30, 2020.

16. On October 5, 2020, the Developer submitted a letter to the ZBA.

17. On October 7, 2020, BGR submitted a letter to the ZBA, together with the Second Supplemental Affirmation of Mindy L. Zoghlin, dated October 6, 2020, with Exhibits A-H.

18. On October 7, 2020, the ZBA conducted the public hearing. The ZBA closed the public hearing on October 7, 2020, but granted the Building Inspector permission until October 21, 2020 to submit a response to the supplemental submissions made by BGR on September 30, 2020 and October 6, 2020.

19. On October 21, 2020, the Building Inspector submitted to the ZBA a letter, and an updated spreadsheet containing an outline of the arguments raised in the Appeal and the Building Inspector's response that incorporates reference to BGR's additional submissions. The Building Inspector also filed with the ZBA additional documents with bates numbers ZBA010544-010581.

DOCUMENTS CONSIDERED BY THE ZBA

20. The ZBA has considered the following documents in connection with the Appeal: (1) Town of Brighton Zoning Board of Appeals Application, dated August 19, 2020; (2) BGR Notice of Appeal, dated August 19, 2020; (3) BGR Appeal to ZBA, dated August 20, 2020, with Exhibit A-E; (4) Administrative record with bates numbers ZBA000001-ZBA010543; (5) Letter from Building Inspector, dated September 23, 2020, and spreadsheet; (6) Letter from Warren Rosenbaum, Developer's Counsel, dated September 23, 2020; (7) Letter from BGR, dated September 25, 2020; (8) Supplemental Affirmation of Mindy L. Zoghlin, dated September 25, 2020, with Exhibits A-J; (9) Letter from Warren Rosenbaum, Developer's Counsel, dated October 5, 2020, with enclosures; (10) Letter from BGR, dated October 7, 2020; (11) Second Supplemental Affirmation of Mindy L. Zoghlin, dated October 6, 2020, with Exhibits A-H; (12) Letter from BGR, dated October 7, 2020; (13) Letter from Building Inspector, dated October

21, 2020, and updated spreadsheet; (14) Additional documents submitted by the Building Inspector with bates number ZBA010544-010581; (15) Email from Howie Jacobson, dated September 2, 2020; and (16) Email from Paul Adams, dated October 16, 2020.

JURISDICTION AND STANDARD OF REVIEW

21. The ZBA is authorized to hear and decide appeals from and review any order, requirement, decision, interpretation or determination made by an administrative official to decide the "meaning of any portion of the text of Comprehensive Development Regulations or of any condition or requirement specified or made under the provisions of the Comprehensive Development Regulations." Brighton Town Code 219-2(A)(1); see also Town Law 267-a(4).

22. In accordance with Town Law 267-b(1), the ZBA's standard of review with respect to the Appeal is *de novo*, such that the ZBA "may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken."

FINDINGS OF FACT AND DETERMINATIONS

After considering all the proof and evidence before it, the ZBA: (i) affirms the Building Inspector's issuance of the Building Permit; (ii) denies the Appeal; and (iii) makes the following determinations, findings, and interpretations:

I. Irrevocable Letters of Credit

23. BGR initially alleged that the Developer failed to provide to the Town the required letters of credit for the AMP, and for landscaping, stormwater mitigation, infrastructure, and erosion control. BGR has subsequently withdrawn this argument.

24. The Town, however, provided in its September 23, 2020 response, copies of the three necessary irrevocable letters of credit for the Project. (ZBA000004-9).

25. Thus, the ZBA finds that all required letters of credit were received.

26. This portion of the Appeal is denied.

II. Public Service Commission Approval

27. BGR initially alleged that the Developer did not obtain all necessary state and county approvals for the trail amenity because Rochester Gas & Electric ("RG&E") did not validly obtain the Public Service Commission's written approval. BGR has withdrawn this argument.

28. RG&E notified the Public Service Commission on April 30, 2019 of its intent to grant an easement to the Town of Brighton. The record does not contain any evidence that the Public Service Commission made a determination under Public Service Law 70(1) that the public interest requires its review and written consent. Accordingly, RG&E is permitted under the statute to grant an easement to the Town of Brighton for the trail amenity.

29. This portion of the Appeal is denied.

III. Building Inspector Certification on Site Plan

30. BGR alleges that the Building Inspector did not certify on the site plan that the Project meets the requirements of all Comprehensive Development Regulations.

31. Section 217-12(A)(3) of the Comprehensive Development Regulations provides that the "Building Inspector shall certify on each site plan or amendment whether or not the plan meets the requirements of all Comprehensive Development Regulations other than those of this article regarding site plan approval."

32. Section 217-12(A)(3) is contained in Article III of the Comprehensive Development Regulations. Article III of the Comprehensive Development Regulations applies to the "Approval of Site Plans" by the Planning Board. The Planning Board Approvals, including the Site Plan Approval, are not before the ZBA in connection with the Appeal, which involves the issuance of the Building Permit. The ZBA is without jurisdiction or authority to review the Site Plan Approval.

33. Chapter 73 of the Code of the Town of Brighton (the "Brighton Town Code") and Sections 225-1 and 225-2 of the Comprehensive Development Regulations govern the issuance of building permits. These provisions do not impose a requirement that the Building Inspector certify a site plan as a condition of issuing a building permit.

34. Section 73-5 of the Brighton Town Code establishes the office of the Building Inspector. Section 73-5(A)(1) of the Brighton Town Code states that the office "shall be headed by the Associate Planner and shall employ an official or officials designated as the 'Building Inspector.' The Building Inspector(s) shall be appointed by the Town Board, upon recommendation of the Commissioner of Public Works, and may be either the Commissioner of Public Works, the Associate Planner or other Town employee(s)...."

35. By resolution, the Town Board has lawfully designated the Commissioner of Public Works, the Associate Planner, the Town Engineer, the Town Architect, and the Fire Marshall to "carry out the functions of the office of Building Inspector, as laid out in the Comprehensive Development Regulations." (ZBA010544-551).

36. The Commissioner of Public Works relies on the Associate Planner to review building permit applications and site plans for compliance with the Comprehensive Development Regulations. As established by the administrative record, the Town reviewed the Developer's application for the Building Permit as follows: (i) if required, use and area variances have been obtained; (ii) the Planning Board has granted final site plan approval; (iii) the Town Engineer confirms that all technical issues have been resolved; (iv) all easements have been executed and filed in the Monroe County Clerk's office, with the liber and page must be recorded on the plans; (v) the Associate Planner confirms that all of the conditions of Planning Board approval have been met; (vi) the Associate Planner confirms that the requirements of SEQRA, including any conditions contained in a SEQRA findings statement have been met; (vii) in the case of an incentive zoning project, the Associate Planner confirms that the conditions of the incentive zoning and amenity agreements have been met; (viii) the Associate Planner confirms that any other requirements of the Comprehensive Development Regulations have been met; and (ix) the plans have been signed by the jurisdictional agencies.

37. Although Section 217-12(A)(3) of the Comprehensive Development Regulations provides that the Building Inspector "certify" on the site plan that it meets the requirements of the Comprehensive Development Regulations, the Comprehensive Development Regulations do not define a specific or particular form of the certification.

38. On July 16, 2020, the Commissioner of Public Works and Town Engineer signed the Utility Plan contained in the final site development plan package. (ZBA000215). Based on the submissions and evidence contained in the administrative record, the ZBA finds that the custom and practice of the Town is for the Town Engineer and Commissioner of Public Works to sign and approve the Utility Plan to "certify" that the plans meet the requirements of the Comprehensive Development Regulations. The Commissioner of Public Works and Associate Planner, both of whom are lawfully designated as the Town Building Inspector, confirmed that all the requirements needed to approve the plans were satisfied prior to endorsing the final drawings.

39. BGR is conflating the standards governing Site Plan approval with the standards governing the Building Permit approval. The standard of certifying the site plan is a standard to be applied by the Building Inspector during the process of Site Plan approval. The Building Permit process does not require or authorize the Building Inspector undertaking a second Site Plan process review at the time of the issuance of the Building Permit.

40. The ZBA interprets the requirement in Section 217-12(A)(3) that the Building Inspector "certify on each site plan or amendment whether or not the plan meets the requirements of all Comprehensive Development Regulations" as being satisfied in this case when the Commissioner of Public Works and Town Engineer signed and approved the Utility Plan for the Project. (ZBA000215). To find otherwise would be to elevate the form of certification over the substance of the certification itself.

41. In his submission to the ZBA, the Building Inspector has also "confirm[ed] and certif[ied] that the plans meet the requirements of the Comprehensive Development Regulations."

42. As the party seeking to annul the Building Permit, BGR has the burden of showing that the Building Permit was improperly issued. See *Hariri v. Keller*, 34 AD3d 583 (2d Dep't 2006). The ZBA finds that BGR has not met its burden of showing that the plans do not meet the requirements of the Comprehensive Development Regulations. As established by the administrative record, the ZBA finds that the Building Inspector properly certified that the site plans for the Project meet the requirements of all Comprehensive Development Regulations.

43. This portion of the Appeal is denied.

IV. Cross-Access Easements for the Access Management Plan

44. BGR alleges that the Developer failed to meet the conditions set forth in the Incentive Zoning Approval for failure to obtain valid and necessary cross-access easements for the AMP.

45. Paragraph 2(b) of the Amenity Agreement provides that "[p]rior to the issuance of any Town building permits with the exception of the issuance of any permit for demolition of the buildings currently located on the Property, Daniele shall provide all cross access and other easements necessary to implement and construct the AMP.... The easements shall be prepared and submitted to the Town for review and approval. Upon satisfactory completion and execution of the documents, the easements shall be filed by Daniele at the Monroe County Clerk's Office with the Town being provided copies of each easement with the liber and pages of filing."

46. Paragraph 8 of Schedule E-2 of the Incentive Zoning Approval provides that "prior to the issuance of any Town permits for the Project with the exception of the issuance of any permit for demolition of the buildings currently located on the Property, the [Developer] shall provide and file access rights for cross-access and cross-parking easements between proposed Lot 1 and Lot 2."

47. As established by the administrative record, prior to the issuance of the Building Permit for the Project, the Developer provided to the Town cross-access and other easements necessary to implement and construct the AMP, which cross-access easements were executed by the

owner of the granting party and recorded in the Monroe County Clerk's Office. (ZBA000143-184).

48. The Building Inspector has confirmed in his September 23, 2020 response that the cross-access easements were completed to the Town's satisfaction and copies were provided to the Town.

49. BGR argues that the cross-access easements are invalid because the Developer was required to obtain approval for the cross-access easements from the recorded first-mortgage holders on two affected properties located at 2729 and 2735 Monroe Avenue prior to the issuance of the Building Permit for the Project. The ZBA finds this argument unconvincing and a mischaracterization of New York law. A valid easement can be granted by a property owner who has title to the servient estate. As established by the administrative record, the owners of the affected properties executed the cross-access easements through their members before a notary public and the cross-access easements contained the required formalities. (ZBA000143-184).

50. The ZBA finds that a mortgage recorded against the servient estate does not render the cross-access easements invalid or unenforceable.

51. BGR has not submitted any evidence that the owners of 2729 and 2735 Monroe Avenue lack authority to convey the cross-access and other easements necessary to implement and construct the AMP.

52. Paragraph 1.11(a) of the mortgage over 2735 Monroe Avenue states that "neither the Property, nor any part thereof or interest therein, shall be sold, conveyed, disposed of, alienated, hypothecated, leased . . . , assigned, pledged, mortgaged, further encumbered or otherwise transferred, nor Mortgagor shall be divested of its title to the Property or any interest therein, in any manner or way, whether voluntarily or involuntarily . . . in each case without the prior written consent of Mortgagee being first obtained." Nothing in this paragraph renders the conveyance of an easement void.

53. Paragraph 1.11(a) of the aforementioned mortgage is contained in the covenant section of the mortgage, and is not a bargain and sale of property rights. Instead, such a provision may only render such a conveyance a default under the terms of the mortgage and provide certain remedies to the mortgage holder. As such, the ZBA finds that the cross-access easements, as recorded, are enforceable.

54. BGR states that "[i]f the Lender for the Mamasan's and/or S&A parcels is successful in any foreclosure actions on its mortgages, it will cut off the after-acquired cross-access easements..." In making this statement, BGR admits the cross-access easements are valid as delivered to the Town and recorded in the Monroe County Clerk's Office, and would need to be "cut off" in a foreclosure action.

55. BGR, however, has not submitted any evidence to the ZBA that the mortgagee has actually availed itself of any such remedies. No foreclosure action has been commenced and no court has entered a judgment extinguishing the cross-access easements. Whether this occurs in the future is speculative. The possibility that the grant of an easement may be a breach a mortgage covenant is speculative and beyond the purview of the ZBA when determining that the easements required to effect the intention of the AMP have been provided by the Developer and duly recorded as required by the applicable approval. BGR has not submitted any evidence that the cross-access easements are insufficient to implement and construct the AMP as required by the Amenity Agreement.

56. As the party seeking to annul the Building Permit, SMA has the burden of showing that the Building Permit was improperly issued. See *Hariri v. Keller*, 34 AD3d 583 (2d Dep't 2006). The ZBA finds that BGR has not met its burden of showing that the cross-access easements are void because they were not approved by the mortgage holder.

57. Further, the ZBA finds that it is not the obligation of the Town to enforce private mortgages. See *Vandoros v. Hatzimichalis*, 131 A.D.2d 752 (2d Dep't 1987) (stating that it "is not the obligation of the Department of Buildings to enforce private easements"). In issuing a zoning approval, "a municipality determines only that the application complies with the municipality's standards and conditions contained in the zoning ordinance." See *Chambers v. Old Stone Hill Rd. Assoc.*, 1 N.Y.3d 414 (2004).

58. The ZBA finds that, in determining whether to issue the Building Permit, the Town must be held to the standards set forth in the applicable approvals and Comprehensive Development Regulations. The Town has ensured that any easement or similar property agreement required for development is executed by the grantor, validly recorded, and that the substance of the document is sufficient for the specific purpose for which it is required. Here, the cross-access easements were executed by the grantor, recorded, and as stated in Building Inspector's September 23, 2020 response, the Building Inspector confirmed that the cross-access easements were satisfactory to substantively implement and construct the AMP.

59. The ZBA finds that it is unreasonable to require a Town in issuing a building permit to review mortgages or other third party contractual agreements that may pertain to a property to ensure that such execution does not breach said mortgage or third party contractual agreement. The rights and remedies of a private mortgage holder are not relevant under the Comprehensive Development Regulations. It would be similarly unreasonable to require a town to research signatory authority of the grantor to confirm that the person executing the agreement is authorized to do so.

60. Testimony was presented by multiple qualified Real Estate attorneys, with significant experience in drafting and interpreting easements and mortgages, confirming that the cross-access easements were executed by the appropriate property owners and are duly recorded in the Monroe County Clerk's Office. The easements are valid and enforceable against the property owner and provide legal access to the proposed users of the easements as contemplated by the AMP.

61. Importantly, BGR has not submitted any evidence that the cross-access easements are insufficient to implement and construct the AMP as required by the Amenity Agreement. Thus, the ZBA finds no evidence in the record that the cross-access easements are on their face invalid or unenforceable.

62. This portion of the Appeal is denied.

V. Construction Sequencing

63. BGR argues that the Developer did not comply with the Comprehensive Development Regulations because it obtained a permit allegedly allowing for phased construction in violation of the terms and conditions of the Incentive Zoning Approval and SEQRA findings.

64. The Incentive Zoning Approval approved the construction of the Project in a single phase (ZBA000088). This single construction phase is projected to last 18 months. (ZBA000064).

65. The Building Permit approved "site work & construction of a building shell for a 1996sf building to include future retail tenants (Star Bucks)." The ZBA finds that the Building Permit authorizes the site work for the entire Project and is in accordance with the approval of the construction of the Project in a single phase.

66. During the public hearing on October 7, 2020, the Developer testified that the site work will take approximately 6-7 months and is the most difficult part of the Project. The Developer testified that once complete, construction of buildings takes less than 90 days. The Developer further testified that it hopes to have the entire Project complete by the summer of 2021.

67. Accordingly, BGR has not submitted any evidence to the ZBA that the Building Permit authorizes construction, or that the Project is currently being constructed, in multiple phases.

68. In fact, the Amenity Agreement states that the Developer "shall complete construction of the trail within three hundred sixty five (365) calendar days of the date on which the Town issues the first building permit for the project." (ZBA000079). The Building Inspector interprets this language as evidencing that the Town Board anticipated the issuance of multiple building permits for the Project. Consistent

with the language of the Incentive Zoning Approval and as supported by the administrative record, the ZBA interprets and finds that the Project approvals contemplate the issuance of multiple building permits.

69. Schedule E-2 of the Incentive Zoning Approval states that "the site plan for the development of the [Project Site] shall be approved by the Planning Board The Planning Board has the authority to modify the proposed plan for the Project to address ... adequacy and arrangement of buildings, parking areas, pedestrian traffic access and circulation, including separation for pedestrians from vehicular traffic, sidewalks, linkages, pedestrian convenience, stormwater management and utilities." (ZBA000088).

70. The Site Plan Approval is subject to condition that "[a]ll comments and concerns of the Town Engineer as contained in the attached memo dated September 16, 2018 from Michael Guyon, Town Engineer, to Ramsey Boehner, shall be addressed." (ZBA000102). The Town Engineer stated that the Developer provide a "phasing plan demonstrating that the total earth disturbance will not exceed 5 acres." (ZBA0000105). The Developer provided the requested plan in accordance with the condition of Site Plan Approval. (ZBA000218).

71. The Building Inspector has confirmed that it is "common for commercial projects with multiple buildings to have construction proceed in sequences, i.e. to construct one building while other buildings are waiting to begin the building permit process." Pursuant to the New York Department of Environmental Conservation ("NYSDEC") State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity, the Town required the Developer to prepare a plan for construction defining the maximum disturbed area per construction sequence.

72. The Building Inspector has confirmed that the New York State Stormwater Management Design Manual recommends "projects avoid mass grading of a site and suggests that the project area be divided into smaller areas for phased grading." The New York State Standards and Specifications for Erosion and Sediment Control similarly recommend that a "properly designed erosion and sediment control plan for a commercial site will typically involve several phases, and that good construction and site management includes site phasing and construction sequencing measures."

73. The Town Building and Planning Department is comprised of, among others, the Building Inspector, Town Engineer, and Commissioner of Public Works, who are certified planners, licensed engineers and/or professionals with decades of experience in land use planning and construction. The ZBA finds that the issuance of the Building Permit and approved construction is consistent with the SPDES permit and NYSDEC guidance, and supported by the Incentive Zoning Resolution, Site Plan

Approval, and administrative record. BGR has not submitted any evidence that the issuance of the Building Permit or the construction sequencing implemented as part of the Project is contrary to NYSDEC regulation or guidance.

74. As established by the administrative record, the ZBA finds that: (i) the Building Permit authorizes site work for the entire Project Site; (ii) construction is occurring in a single phase in accordance with the Incentive Zoning Approval and Site Plan Approval; and (iii) the Town reasonably and rationally required construction to proceed in sequences to mitigate overall disturbance of the Project Site, and to manage stormwater and control erosion.

75. The ZBA finds that the Building Permit issued to the Developer allowing the construction and development of the site work for the entire Project supports the finding that the Developer is developing the Project in a single phase consistent with the Incentive Zoning Approval.

76. As was noted in both testimony and the extensive record, the Town Board did not require that the building permits for all of the proposed buildings would be issued simultaneously.

77. The evidence and testimony describing the common sequencing of larger projects evidences that the issuance of the Building Permit for the Starbucks building and the site work for the entire Project is consistent with the sequencing of construction that is customary for projects of this size and scope. The Developer further testified that construction of the Project is anticipated to be fully completed in summer 2021, which evidences that construction is not proceeding in multiple phases, but instead is a continual construction project consistent with the original intention of a "Single Phase". The SEQRA Statement anticipates a single construction phase is projected to last 18 months or less.

78. During the public hearing on October 7, 2020, BGR stated that the Developer is pulling permits piecemeal and has not shown any indication they have applied for or pulled, or are prepared to pull, any other permits. The ZBA finds no evidence to this effect. The ZBA has verified with the Town Building and Planning Department that, in fact, the Developer (i) on September 16, 2020 applied for a building permit to construct the internal build-out for new tenant Starbucks Coffee, and (ii) on October 13, 2020 applied for a building permit to construct a building shell for the 22,380 square foot building approved as part of the Project.

79. The ZBA finds that BGR has not met its burden of showing that the Building Permit authorizes construction in multiple phases in violation of either the Findings Statement adopted by the Town Board, or the Incentive Zoning Approval. The ZBA finds that the evidence

presented supports a conclusion that the Project is being constructed in a single phase.

80. This portion of the Appeal is denied.

VI. Compliance with Zoning

81. BGR alleges that the Building Inspector cannot legally certify that the site plan meets the requirements of the Comprehensive Development Regulations because (i) the primary tenant intends to place Amazon Lockers in the 50,000 square foot grocery store, and (ii) the placement of the stormwater management structures and commercial parking areas supporting commercial uses in the RLA district is not permitted without use variance.

82. Section 209-2 of the Comprehensive Development Regulations provides that all zoning districts in the Town of Brighton are eligible for zoning incentives.

83. Section 209-4 of the Comprehensive Development regulations provides that the Town Board may grant certain incentives to an application with respect to a specific site, including changes in use; increases in lot coverage, changes in setbacks, and "[a]ny other changes in the Comprehensive Development Regulations provisions."

84. The Appellate Division, Fourth Department, has determined that the Town's Incentive Zoning Law is consistent with New York State law and valid. See *Brighton Grassroots, LLC v. Town of Brighton*, 179 A.D.3d 1500 (4th Dep't 2020).

85. Schedule F, Exhibit 1, of the Incentive Zoning Approval grants the incentives for the Project. (ZBA000091-97). The incentives include the following contained in paragraph 1.a.: "Section 201-9.A. The granted incentive allows the regulations of the less restrictive zoning district to apply 108' (measured to edge of parking lot/ turnaround pavement) beyond the 30' zone." (ZBA000092).

86. The foregoing incentive grants the Project relief from Section 201-9(A)(3) of the Comprehensive Development Regulations, which states: "In all cases where a district boundary divides a lot in one ownership, and more than 50% of the area of such lot lies in the less restricted district, the regulations prescribed by these regulations for the less restricted district shall apply to such portion of the more restricted portion of the said lot which lies within 30 feet of such district boundary. For purposes of this section, the more restricted district shall be deemed that district subject to regulations which prohibit the use intended to be made of said lot, or which require higher standards with respect to coverage, yards, screening, landscaping and similar requirements."

87. The Incentive Zoning Approval is not before the ZBA in connection with the Appeal, which involves the issuance of the Building

Permit. The ZBA is without jurisdiction or authority to review the Incentive Zoning Approval, including the incentives that the Town Board granted to the Project.

88. The majority of the Project Site (fronting on Monroe Avenue) is located in the BF-2 General Commercial Zoning District. A small portion of the rear of the Project Site is located in the RLA Residential Low Density District.

89. The Building Inspector has interpreted the incentive granted in paragraph 1.a. of Schedule F, Exhibit 1, of the Incentive Zoning Approval as allowing the stormwater management structures and commercial parking areas, which are allowed in the less restrictive BF-2 General Commercial Zoning District, to extend beyond the 30' zone into the RLA Residential Low Density District. Consistent with the Incentive Zoning Approval and as supported by the administrative record, the ZBA interprets and finds that the incentive granted by 1.a. of Schedule F, Exhibit 1, of the Incentive Zoning Resolution allows the stormwater management structures and commercial parking areas to apply 108' (measured to edge of parking lot/ turnaround pavement) and extend beyond the 30' zone.

90. Condition #15 of the Incentive Zoning Approval provides that "any deviation from the incentives granted in Exhibit 1 of this Resolution or any other applicable provisions under the Town Code shall require an area variance or a use variance, as applicable, from the Town Zoning Board of Appeals..." (ZBA000090).

91. The ZBA finds that all stormwater management structures and commercial parking areas are compliant with the Incentive Zoning Approval and do not extend beyond the 108' buffer authorized by paragraph 1.a. of Schedule F, Exhibit 1, of the Incentive Zoning Approval. (ZBA000214). As a result, the Project does not require a variance.

92. Condition #40 of the Site Plan Approval provides that "[i]f and when Amazon Lockers are proposed, further Town review and approval may be necessary." (ZBA000103).

93. The administrative record does not contain any proof that Amazon Lockers are proposed or permitted as part of the Project. As established by the administrative record, the ZBA finds that no Amazon Lockers are proposed or permitted as part of the Project, and to the extent they are proposed in the future, the Project would be subject to further Town review and approval.

94. BGR has not provided any evidence that the site plan fails to meet the Comprehensive Development Regulations in light of the Incentive Zoning Approval and the administrative record.

95. This portion of the Appeal is denied.

VII. The Pedestrian Easements

96. BGR alleges that the Building Permit was improperly issued because the Town did not obtain state legislative approval with respect to the pedestrian easements.

97. Condition #41 of Site Plan Approval states that "prior to the issuance of building permits for the project, State and County necessary approvals shall be obtained." (ZBA000103).

98. The Project Site is subject to certain easements granted to the Town of Brighton that run through a portion of the Project Site (collectively, the "Pedestrian Easements"). BGR has submitted copies of four Pedestrian Easements, which were granted to the Town of Brighton between 1997 and 2003 by various property owners for the purpose of pedestrian use by the Town of Brighton, "its licensees, and the public, together with the right, privilege and authority of the Town of Brighton to install, construct, reconstruct, extend, operate, inspect, maintain, repair, replace, and at its pleasure, to install a pedestrian pathway which the [Town] shall require for public use...."

99. The land containing the Pedestrian Easements was formerly owned by RG&E. The Pedestrian Easements run through the back of various properties between Allens Creek Road and Clover Street in the Town. The Pedestrian Easements do not run continuously from Allens Creek Road to Clover Street. The Pedestrian Easement granted by Executive Square Office Park, LLC to the Town of Brighton runs southerly from Allens Creek Road to the boundary of the Project Site. The administrative record does not contain any evidence of a Pedestrian Easement from Mario & Flora Danielle to the Town of Brighton for the northerly portion of the Project Site between the Executive Square Office Park and the former Clover Lanes property. The Pedestrian Easement granted by Clover Lanes, Inc. and Mamasan's Monroe, LLC runs through the back of the southerly portion of the Project Site to the adjoining property.

100. At the time the easements were granted, the various properties contained an office park, bowling alley, and other commercial buildings. As reflected by the maps attached to the Pedestrian Easements, at the time, and presently, they run over pavement, including a parking lot. As stated by Board Member Schmitt during the public hearing on October 7, 2020, who has utilized the Pedestrian Easements, the easement area is "a parking lot and has always been a parking lot."

101. The Appellate Division, Fourth Department, found issues of fact as to "whether there was an express or implied dedication of the [Pedestrian Easements] subject to the public trust doctrine." *Clover/Allen's Creek Neighborhood Association LLC v M&F, LLC*, 173 A.D.3d 1828 (4th Dep't 2019). The Fourth Department stated: "To establish that property has been dedicated as a park or for public use, formal dedication by the legislature is not required. Rather, a parcel of property may become a park by express provisions in a deed ... or by implied acts, such as continued use [by the municipality] of the parcel

as a park A party seeking to establish ... an implied dedication and thereby successfully challenge the alienation of the land must show that (1) [t]he acts and declarations of the land owner indicating the intent to dedicate his [or her] land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication and (2) that the public has accepted the land as dedicated to a public use." *Id.* (internal citations and quotations omitted).

102. BGR's submissions are limited to the Pedestrian Easements and two court decisions. BGR has not submitted any evidence demonstrating an express or implied dedication of parkland. BGR has not submitted any evidence of acts or declarations by the landowners indicating an intent to dedicate land to the public use. BGR has not submitted any evidence that the Town has accepted the land as dedicated to a public use.

103. Based on the administrative record, the ZBA finds that BGR has not met its burden of showing that the Pedestrian Easements were dedicated as parkland and are subject to the Public Trust Doctrine based on the standards articulated by the Fourth Department.

104. As established by the administrative record, until 1978, the Town "had no official parkland of its own except, perhaps, for the pocket parks that exist in many residential neighborhoods such as Rose Park in the Rose Lawn subdivision." Between 1978 and present, the Town has formally recognized several parks, such as Brighton Town Park, Persimmon Park, Buckland Park, Meridian Park, Lynch Woods, and Sandra L. Frankel Nature Park." (ZBA010579). None of these parks are related to or otherwise involve the Pedestrian Easements.

105. According to the Town Superintendent of Parks, the Town currently manages almost 500 acres of parkland and open space for the benefit and enjoyment of the Town's residents and visitors. The Town Superintendent states that the Town "has not designated this pedestrian pathway as a park, and has not accepted this area as parkland. This area is not among the hundreds of acres of parkland and open space managed by the Town Parks Department. The Town does not maintain this area as a park. This area is not identified on any official Town maps as a park, and the Town has not erected any signs on or near this pathway which identify it as a park." (ZBA010566).

106. According to the Town Associate Planner, who supervises and directs the activities of the Town's Building and Planning Department, and has held that position since 1990 (during the time the Town acquired the Pedestrian Easements), the Town has "never made any improvement to the lands subject to the [Pedestrian] Easements to allow for its use as a park. Neither has the Town done any maintenance work on this land or erected any signage on or adjacent to this land to state that this area is a park. At the time the Town acquired the [Pedestrian] Easements, it was not the Town's intent to have the land subject to the Easements become a park or unequivocally dedicate this land as parkland." The Town Associate Planner further states that the Town "has not expressly

or implicitly through any action taken dedicated this area as a park." (ZBA010569).

107. The relevant portions of the Town Comprehensive Plan 2000 and Envision Brighton 2028 (adopted after the Town Board approved the Incentive Zoning Approval), identifies the area subject to the Pedestrian Easements as a proposed trail. In fact, Envision Brighton 2028 states that this area "is currently planned to be developed, at no cost to the Town, as an amenity approved as part of the Whole Foods zoning project." (ZBA010570). The ZBA finds that the Town Comprehensive Plans evidence a future opportunity to develop a trail in this area. The ZBA further finds that the Town did not intend to accept the Pedestrian Easements as parkland at the time they were granted.

108. During the public hearing, a member of the ZBA asked BGR to explain how the Building Permit interferes with the use and enjoyment of the Auburn Trail. BGR responded that the Project as approved allows the Town to interfere with the Pedestrian Easements, but did not provide any evidence as to the alleged interference. However, according to the Town Associate Planner, the Project "as approved by the Town will not interfere with or otherwise obstruct the public's use of the existing [Pedestrian Easements]. The Project proposes no parking spaces within the lands subject to the Easements. In fact, as part of the Town's review of the site plan, the Planning Board ensured that the Auburn Trail would not be obstructed by parking spaces." (ZBA010570-571).

109. Based on the final plans contained in the administrative record, the Project proposes no parking spaces within the Pedestrian Easement area. (ZBA000211, 214). The ZBA finds that the Pedestrian Easements on the Project Site have always been located on a parking lot, and that will continue to be the case after the Project is constructed. The ZBA further finds that the Pedestrian Easements will not be obstructed by parking spaces as reflected on the final plans.

110. During the public hearing, BGR stated that the ZBA should look at whether tractor trailer turnarounds are consistent with a public pedestrian pathway. The loading dock and tractor trailer turnarounds for the Whole Foods building are located in the rear of the proposed building, in the northwest corner of the Project Site. (ZBA000214). However, nothing in the administrative record indicates that the northerly portion of the Project Site (the former site of the Mario's Restaurant between the Executive Square Office Park property and the former Clover Lanes property) is subject to the Pedestrian Easements. In the absence of a documented easement, the ZBA finds that BGR has not met its burden of showing that the loading dock or tractor trailer turnarounds are inconsistent with the Pedestrian Easements.

111. The Building Inspector has confirmed that the Pedestrian Easements will not be closed during or after construction. The ZBA has confirmed, based on a visual inspection of the Project Site, that the Pedestrian Easements are protected from obstruction by construction fencing. As part of the Incentive Zoning Approval, the Developer will

be improving and extending the Auburn Trail for the benefit of the public. The ZBA finds that the public's right to access and use the Auburn Trail will be enhanced and improved as a result of the Project. The ZBA finds the Project will not substantially interfere with the Pedestrian Easements.

112. The Pedestrian Easements contain language stating that "[u]pon completion of any construction, installation, maintenance or repair of any improvement over the Easement Premises as required by the [Town], [Town] agrees to restore the Easements Premises to park like condition" The ZBA interprets this language in the Pedestrian Easements as requiring the Town to restore the Pedestrian Easements to "park like" condition only after a pedestrian pathway is constructed. Based on the administrative record and testimony before the ZBA, the ZBA finds that the Town has not constructed or maintained a pedestrian pathway within the Pedestrian Easements.

113. BGR has not submitted any evidence to the ZBA indicating that the Town has constructed a pedestrian pathway within the Pedestrian Easements. The ZBA finds that this language in the Pedestrian Easements does not evidence an express or implied dedication of the Pedestrian Easements subject to the Public Trust Doctrine.

114. Based on the administrative record and evidence before the ZBA, the ZBA finds that the Pedestrian Easements are not parkland for purposes of the Public Trust Doctrine. The ZBA finds that the issuance of the Building Permit complies with Condition #41 of the Site Plan Approval because no State legislative approval is required.

115. Under Town Law 62(2), upon adopting a resolution, the Town Board may "convey or lease real property in the name of the town, which resolution shall be subject to a permissive referendum."

116. According to the Associate Planner, as approved by the Town, the Pedestrian Easements "will remain of record without change and will not be abandoned, conveyed, released or otherwise modified." (ZBA010570). Nothing in the administrative record indicates that the Town Board has adopted a resolution authorizing the conveyance or abandonment of the Pedestrian Easements. The Pedestrian Easements are reflected on the final site plan. (ZBA000214).

117. BGR has not submitted any evidence that the Town is conveying or abandoning the Pedestrian Easements. The ZBA finds that BGR has not met its burden of showing that the Town is conveying or abandoning the Pedestrian Easements. Based on the administrative record and evidence before the ZBA, the ZBA finds that the Town is not conveying or abandoning the Pedestrians Easements. The ZBA finds that the Town is not required to conduct a permissive referendum.

118. This portion of the Appeal is denied.

VIII. Trail Amenity

119. BGR alleges that the Building Permit was improperly issued prior to the Developer obtaining valid easements to construct the trail amenity.

120. The Site Plan Approval approved the construction of a "five (5) building retail plaza totaling 83,700 sf, which includes a 50,000 sf Whole Food Store and a 2,000 sf drive-thru coffee shop on properties located at 2740 Monroe Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, a portion of 175 Allens Creek Road and a portion of 2259 Clover Street." (ZBA000100).

121. Condition #41 of the Site Plan Approval states that "prior to the issuance of building permits for the project, State and County necessary approvals shall be obtained." (ZBA000103).

122. The Building Inspector has interpreted the Site Plan Approval and Condition #41 as relating only to those approvals necessary to construct the Project within the Project Site, and not the construction of the trail amenity outside the Project Site within the easement area to be granted by RG&E to the Town running between Allens Creek Road and Highland Avenue. Consistent with the language of Condition #41 of the Site Plan Approval and as supported by administrative record, the ZBA finds that the Town must obtain "State and County necessary approvals" prior to issuing a building permit for the Project.

123. The construction of the trail amenity is governed by Paragraph 1 of the Amenity Agreement, which requires the Developer to provide and file all necessary trail easements within sixty (60) days of the completion of the trail. The Amenity Agreement requires the Developer to complete the trail within three hundred sixty five (365) calendar days of the date on which the Town issues the first building permit for the Project. (ZBA000079-80).

124. The Findings Statement specifically provides that with respect to filing of the public access easement from RG&E, such would be provided "[a]fter construction of such improvements is complete." (ZBA000013). Given this timeline, it is illogical to conclude that the Town intended to condition issuance of the Building Permit on any easement from RG&E required to construct the trail amenity.

125. The Building Inspector issued the first building permit on July 20, 2020. Thus, the Developer has until July 20, 2021 to complete the trail, and an additional 60 days to provide and file all necessary trail easements.

126. The Developer has obtained a license agreement from RG&E in order to complete the necessary trail work (ZBA000137).

127. The ZBA finds that the filed RG&E easement is not a required condition to issuance of the Building Permit.

128. This portion of the Appeal is denied.

IX. State and County Approvals

129. BGR alleges that the Developer failed to provide the Town with all State and local approvals.

130. Condition #41 of Site Plan Approval states that "prior to the issuance of building permits for the project, State and County necessary approvals shall be obtained." (ZBA000103).

A. New York State Department of Transportation

131. BGR alleges that the Building Permit was improperly issued because Developer failed to obtain permits from the New York State Department of Transportation ("NYSDOT").

132. On August 23, 2019, NYSDOT completed its review of the potential impacts of the Project in accordance with the requirements of SEQRA and adopted its Findings Statement. (ZBA000124-136). NYSDOT found that the "mitigating measures will be the responsibility of the [Developer] and will be a condition to NYSDOT's approval of the Highway Work Permit for the Project." The NYSDOT found, among other things, that "[c]onsistent with social, economic, and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided through implementation of the mitigation measures identified herein" and "[c]onsistent with social, economic, and other essential considerations, from among the reasonable alternatives thereto, the action to be undertaken is an alternative which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the environmental impact statement."

133. The Building Inspector has interpreted the issuance of a positive Finding Statement and certification to approve the Project, as evidencing the ability of the Developer to obtain the necessary Highway Work Permits for the Project. As supported by the administrative record, the ZBA finds that the NYSDOT's issuance of a positive Findings Statement under SEQRA and certification to approve the Project as evidence that the Developer obtained the necessary State approvals for the Project.

134. On November 14, 2019, the NYSDOT issued a Highway Work Permit to allow construction of utilities. (ZBA000116-119).

135. On August 3, 2020, the NYSDOT issued a second Highway Work Permit for the installation of parking lot entrances and modification of existing curbs, and installation of two signalized intersections and pedestrian cross walks. (ZBA000120-123).

136. As all NYSDOT permits required to be issued have been received, the ZBA finds this issue is moot.

B. New York State Department of Environmental Conservation

137. BGR alleges that the Building Permit was improperly issued because Developer failed to obtain a NYSDEC Sanitary Sewer Extension permit.

138. The Building Inspector has confirmed that a NYSDEC permit is not issued for sanitary sewer. The ZBA agrees, and finds that no NYSDEC permit exists or is required for sanitary sewer.

139. BGR has not submitted any proof or cited any NYSDEC regulation indicating a requirement to obtain a NYSDEC permit for sanitary sewer.

140. Further, on July 8, 2020, Monroe County Pure Waters ("MCPW") and Monroe County Department of Health ("MCDOH") signed the Utility Plan approving the sanitary sewer extension for the Project. (ZBA000215).

C. Monroe County Pure Waters

141. BGR alleges that the Building Permit was improperly issued because Developer failed to obtain approval from MCPW.

142. On January 1, 2020, MCPW signed the Unity Plan indicating that the plan conforms to the MCPW Master Plan. (ZBA000215).

143. The ZBA finds the MCPW's signing of the Utility Plan to be its approval, which was received prior to the issuance of the Building Permit.

D. Monroe County Department of Health

144. Applicant alleges that the Building Permit was improperly issued because Developer failed to obtain cross-contamination control approval, grease interceptor approval, and Realty Subdivision approval, each from MCDOH.

145. Consistent with the language of Condition #41 of the Site Plan Approval and as supported by the administrative record, the ZBA finds that MCDOH cross-contamination control (or backflow prevention) and grease interceptor approvals are not "necessary approvals" for the issuance of the Building Permit. The Building Inspector has confirmed, and the ZBA agrees, that these approvals are separate from the Building Permit process.

146. Of note, however, on July 14, 2020, the MCDOH approved the applicable backflow prevention devices for the relevant portion of the Project being constructed pursuant to the Building Permit. (ZBA010573-578).

147. With respect to the Realty Subdivision Approval, Article III Realty Subdivisions of the Monroe County Code defines a subdivision as

"[a]ny tract of land which is divided into five or more parcels... for sale or for rent as residential lots"

148. The Project does not include the subdivision of five or more lots and is not residential. BGR has not submitted any proof or cited any Monroe County law or regulation indicating a requirement to obtain MCDOH Realty Subdivision approval.

149. The ZBA finds that the Project does not require MCDOH Realty Subdivision approval.

F. Monroe County Department of Transportation

150. BGR alleges that the Building Permit was improperly issued because Developer failed to obtain approval from the Monroe County Department of Transportation ("MCDOT").

151. The Project Site is located along Monroe Avenue (New York State Route 31) in the Town of Brighton. Monroe Avenue is not a County Highway. BGR has not submitted any proof or cited any Monroe County law or regulation indicating a requirement to obtain MCDOT approval. The ZBA finds that the Project does not require the approval of the MCDOT.

152. The applicable condition requires only "approvals" prior to the issuance of building permits. The summation of the actions of the State and County together with their specific positive findings are consistent with our conclusion that the State and County approved the Project.

153. As established by the administrative record, prior to the Issuance of the Building Permit, the ZBA finds the Town obtained all necessary State and County approvals as required by Condition #41 of Site Plan Approval.

154. This portion of the Appeal is denied.

CONCLUSION

155. In accordance with the records, proceedings, and above Findings, the ZBA finds that: (i) the Building Inspector properly issued the Building Permit in accordance with the requirements of the Brighton Town Code, Comprehensive Development Regulations, Incentive Zoning Approval, Site Plan Approval, and other applicable conditions of approval; (ii) the Building Permit meets all of the required preconditions/requirements for the issuance of a building permit as set forth in the Brighton Town Code, Comprehensive Development Regulations, Incentive Zoning Approval, and Site Plan Approval; and (iii) the Developer satisfied all preconditions/requirements before the Building Inspector issued the Building Permit.

156. The Building Inspector's issuance of the Building Permit is affirmed, and Appeal is denied in its entirety.