

DECEMBER 2nd, 2020
at approximately 7:00 p.m.
Zoom Meeting
2300 Elmwood Avenue
Rochester, New York 14618

JEANNE DALE.)
EDWARD F. PREMO, II)
KATHLEEN SCHMITT) BOARD MEMBERS
JUDY SCHWARTZ)
ANDREA TOMPKINS WRIGHT)
JENNIFER WATSON)

REPORTED BY: Rhoda Collins, Court Reporter
FORBES COURT REPORTING SERVICES, LLC
21 Woodcrest Drive
Batavia, New York 14020

Brighton Zoning Board of Appeals 12/02/2020

CHAIRPERSON MIETZ: Let's welcome everybody to the December Zoom meeting of the Town of Brighton Board of Appeals.

As you know, it is a Zoom meeting, so we will try to accommodate everyone who would like to speak. And hopefully, if you would please pay attention so that when your application is called that you will indicate that you are the person who is going to speak regarding that application.

So at this time, Rick, I'd like to call to order the December meeting of the Zoning Board of Appeals.

Was the meeting properly advertised?

MR. DiSTEFANO: Yes, Mr. Chairman, it was advertised in the Brighton-Pittsford Post of November 28, 2020.

CHAIRPERSON MIETZ: Thank you. And could you please call the roll?

MR. DiSTEFANO: Okay. All present.

CHAIRPERSON MIETZ: And just for the record, Mr. Premo, we would like to welcome him quickly. He will be our new member of the Zoning Board of Appeals. He is not ready to participate in tonight's meeting, so he will be listening in.

Brighton Zoning Board of Appeals 12/02/2020

And welcome, Ed, and thank you for your service.

MR. PREMO: Thank you, Dennis.

CHAIRPERSON MIETZ: Okay. So we have some minutes to look at, and we have two month's worth to look at. We have October and we have November, so why don't we start with October. And do we have any additions or corrections for the October minutes?

MS. SCHWARTZ: Judy.

CHAIRPERSON MIETZ: Yes, Judy, go ahead.

MS. SCHWARTZ: All right. On Page 20, there were two things that Ms. Tompkins Wright said that's inaudible. I don't know how important it is to either figure out what that was to put the words back in, but it was Lines 16 and 18.

MR. DISTEFANO: Judy, if it's marked inaudible then we leave it like that.

MS. SCHWARTZ: We just leave it, okay. That's the first time I've seen it, so I didn't know.

MS. TOMPKINS WRIGHT: I can tell you real quickly, the second inaudible is actually the word enforced. Because you can actually say that half of that word was capped and the second half wasn't.

Brighton Zoning Board of Appeals 12/02/2020

MS. SCHWARTZ: Okay, whatever, okay.

On Page 45, Line 16, the word is amp, A-M-P.

On Page 75, Line 11, starting at the beginning of the sentence the word is building.

Page 84, Line 3, middle of the sentence the word is them.

Page 110, Line 19, I believe the third word is abdicated.

On Page 126, the second to last word is do, D-O.

Page 135, the name of the person I think should be Chris Fitzgerald, not Jacob Zoghlin, Line 19. Okay.

And just a couple more, Hold on here. On Page 161, Line 7, the third word should be feel.

Page 164, Line 18 the last word should be G-A-P with a P.

On Page 187, Line 16, it should be just 75C. You will see when you look back how that should be changed, that will be evident there.

On Page 196, Line 11, after the word shall, please insert the word be.

On Page 197, Lines 21, 22, it looks like

Brighton Zoning Board of Appeals 12/02/2020

there's really -- no, I'm sorry, it's fine, forget it. That page is fine.

On Page 204, the second to last word I believe should be testimony and that's all I have.

CHAIRPERSON MIETZ: Okay. Does anyone else have anything beyond that? Okay, if there's none, then all those in favor?

MR. DISTEFANO: We need a motion.

MS. TOMPKINS WRIGHT: I will move to approve the minutes as amended.

(Second by Ms. Schwartz.)

(Ms. Schwartz, yes; Ms. Tompkins Wright, yes; Ms. Dale, yes; Mr. Mietz, yes; Ms. Watson, yes; Ms. Schmitt, yes.)

(Upon roll call, motion to approve with corrections carries.)

CHAIRPERSON MIETZ: Thank you. So, the next are the minutes from the November meeting. Any corrections on the November minutes?

MS. SCHWARTZ: No, I didn't see any.

CHAIRPERSON MIETZ: Did anyone else see anything? Great. Could we have a motion?

MS. TOMPKINS WRIGHT: I move to approve the

Brighton Zoning Board of Appeals 12/02/2020

November minutes.

MS. SCHWARTZ: I'll second.

(Second by Ms. Schwartz.)

(Ms. Schwartz, yes; Ms. Tompkins Wright, yes; Ms. Dale, yes; Mr. Mietz, yes; Ms. Watson, yes; Ms. Schmitt, yes.)

(Upon roll call, motion to approve carries.)

CHAIRPERSON MIETZ: Okay, very good. So, we are at the agenda, we are starting with 12A-01.

MR. DiSTEFANO: Just for the record, I want to state a couple things. Application 11A-02-20, if anybody is here for that, that application was withdrawn. That is the application for the Country Club of Rochester.

And also, Applications 12A-05-20 and 12A-06-20, that has to do with 1075 Clover Street, the Baptist Temple, those two applications have been postponed to the January 6th, meeting.

CHAIRPERSON MIETZ: Okay, very fine.

APPLICATION 12A-01-20

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

Brighton Zoning Board of Appeals 12/02/2020

60 ft. rear setback is required by code. All as described on application and plans on file.

CHAIRPERSON MIETZ: Okay, great. Who is here to speak on this?

JAYME HURWITZ: Jayme Hurwitz is here. I guess you can't see me.

CHAIRPERSON MIETZ: No problem, Jayme.

JAYME HURWITZ: Well, I think it's something relating to the host. Oh, the host has asked you to start my video. There I go. There I am, okay, I'm here.

Thank you, everybody.

CHAIRPERSON MIETZ: Wonderful.

JAYME HURWITZ: Appreciate --

CHAIRPERSON MIETZ: When you are ready, just give your name and address and then please proceed.

JAYME HURWITZ: My name is Jayme Hurwitz, I live at 190 Hibiscus Drive in Rochester, 14618. My spouse is a co-owner of the home, she is here, but she's dealing with kids and what have you. If we need her, we can get her.

CHAIRPERSON MIETZ: Okay.

JAYME HURWITZ: We have this variance application in relating to a deck that will hopefully be extending a bit beyond the existing deck. I tried to be

Brighton Zoning Board of Appeals 12/02/2020

comprehensive in my application, hopefully that answered a bunch of questions. This is my first go around with a zoning variance, so is there something I am supposed to be saying or do you have any questions of me?

CHAIRPERSON MIETZ: Why don't you give us a little understanding of what you're actually physically doing and why you're doing it. Why don't we start with that.

JAYME HURWITZ: Very good. So, when we purchased this house ten years ago, there was an existing wood deck. It's depicted on Mr. Frisch's screen share here. It was deteriorated at the time, we had done a lot of Band-Aiding of it over the past decade, but it's become difficult to keep up. I would estimate it's probably 30 years old -- well, it's gone now, it's been removed.

And what we would like to do, it's pretty confining, it only extends maybe 15 feet. We would like to make the deck a little larger to accommodate more seating, maybe an umbrella and table, and what you have you. We didn't even understand that the -- not only was the deck in the setback, the house itself was actually in the setback upon purchase.

The house is at 54 and small change feet from the property line. What we'd like to do is extend it back an

Brighton Zoning Board of Appeals 12/02/2020

additional 12 feet beyond so that it accommodates some more outdoor living, particularly given our new environment that we all live in here. I think outdoor living in your own home is going to be pretty important.

I have -- it's just going to be the same height deck, it's about two feet off the ground. It will look very similar, other than it will be a composite structure to the wood deck that existed before, except it will have proper railings and things are supposed to be there for code, which the prior deck didn't have.

I have walked my neighbors through this project, I provided Mr. DiStefano with some photographs, and some e-mails from those neighbors so they understand exactly what they can expect to see. As I educated myself about the zoning rules, I realized that there's a host of items in varies people's homes along this stretch of Hibiscus that are in that 60-foot setback, including both neighbors, in fact, beyond what we proposed.

But we want to be good neighbors, and so we have a very good relationship with both sides and I just brought them into my backyard and showed them the project and my proposed project, and all were okay with what we proposed.

There's nothing fancy, no big, grandiose

Brighton Zoning Board of Appeals 12/02/2020

1
2
3 structures. It's basically just 12 feet more of deck beyond
4 what we had, which has been an education to understand what
5 my house is, as opposed to what I thought it was. And learn
6 about the setbacks and understand, you know, I was surprised
7 to find out that not only the deck but the home itself is six
8 feet into the setback.

9 The good news is, I don't think it changes the
10 character of the neighborhood at all. There's an RG&E
11 easement behind the property line which adds another 15 or
12 20 feet between our property and the Anderson property and
13 other properties behind on Dunrovin, so there's still plenty
14 of nature and space back there. We wouldn't want our
15 neighbors to feel uncomfortable, so that was a huge
16 consideration in the first place.

17 I think it is an enhancement rather than a
18 detriment and it's important for us, you know, I have
19 children that are 14 and 10, we like to be outside. And with
20 activities being as restricted as they are, and I think
21 that's going to continue for certainly six months of 2021, we
22 just want to create some additional space where people can
23 not feel confined and, you know, try to enjoy our existence
24 given the restrictions that are in place.

25 I am happy to answer any questions you might

Brighton Zoning Board of Appeals 12/02/2020

have.

CHAIRPERSON MIETZ: Okay. Maybe just add a couple other things. Could you describe what anyone would see from any of the other properties of this deck?

JAYME HURWITZ: So, if you are standing along the back of the deck line if you will, and you look from my neighbor's yard to the east or to the west, what they will see is, the proposed deck is a gray, slate gray compost decking material. At present, just your standard vinyl white rails with, you know, your kind of garden variety deck, I guess.

So, my neighbors to the east, the Jordans, will see very little because there's a six-foot stockade fence, and also massive 20-foot arborvitaes protecting this area, so they don't see much as it is.

My neighbors to the east, it's much further from their house because of where it is situated and because it is mostly behind the addition that was put on I believe in 1980, which is that sort of squared off area you see behind the house. They will be looking through their existing aluminum screen fence, and they will see only the 12 feet of the deck extending out and really not much more. But it's a solid, it's more than 60 feet from where they are.

Brighton Zoning Board of Appeals 12/02/2020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHAIRPERSON MIETZ: All right, great. And then one last thing, can you describe how you derived the 12 feet? How did you basically --

JAYME HURWITZ: Quite honestly, what we said to the contractor who is pretty established -- he does a lot of this for Ace Swim and Leisure and so forth, that's where we initially found him just kind of looking around and talking to people -- he stated, you know, if you want more living space, how about going 12 feet out further? And it kind of dove tailed with the budget that we have in mind in terms how, you know, what we were prepared to deal with and prepared to spend on this project.

So, I guess you can say it was a little bit arbitrary, right? It plugged into what fit into the yard. I have a swing set back there that it won't really impede. We didn't want to be too far back. My wife really likes the nature and the hedge we have behind the house. We've got a lot of birds and things, so we didn't want to infringe too much on that.

So, long way of saying, it just seemed to make sense and in the budget what the contractor thought was reasonable, and maintaining that same sort of channel behind the house without trying to get too creative.

Brighton Zoning Board of Appeals 12/02/2020

MS. TOMPKINS WRIGHT: This is Member Wright, and just to follow-up on that thought, extending less than 12 feet would not give your family the space the outdoor space is looking for. Would you agree with that?

JAYME HURWITZ: Yes. I think that's a fair statement. So, the prior deck had one of those aluminum canvas gazebo type things you buy at Lowe's for 4- or \$500. And when we put that 12 by 10 item on the deck, in the old days, it took up virtually the whole deck, so we wanted to have a space beyond that for a grill or seating area, or something along those lines.

And when we took pictures and assessed how big that 10 by 12 item was on the deck, we realized that if we didn't extended -- we initially thought about six or eight feet, but we realized how tight that would be if you wanted a table for eight or something like that. God willing, we can have eight people sit together and eat at the same time.

It was still restrictive. Actually, the conversation started at eight and kind of morphed to 12 because if we wanted that canvasy gazebo type thing, that you really just screw to the deck, it's not a fancy thing we needed that extra 12 feet for things like the grill or a

Brighton Zoning Board of Appeals 12/02/2020

little four-person table or what have you. And eight feet gets a little tight when you try to back your chair out and so forth.

MS. TOMPKINS WRIGHT: Thank you.

CHAIRPERSON MIETZ: Great, okay. So do we have any other questions for Mr. Hurwitz?

JAYME HURWITZ: And I would also -- I should mention, things that are in the setback that are on both sides of me that are beyond this, which I think probably why my neighbors weren't terribly concerned. The house to the west has like a 3/4, three and a half season kind of structure that's not attached to the house, and the deck to the east also extends beyond this.

So, we are really trying to keep in concert with what the neighborhood has shown us. It's been an education, but we understand why the rules are there and we -- more than even the Zoning Board, we really want our neighbors to be comfortable. We have excellent relationships on this street with our neighbors.

And as much as I want this body to be comfortable, I hesitatingly say my neighbors are perhaps even just a little bit more important to me. Because they're literally just across the fence every single day and those

Brighton Zoning Board of Appeals 12/02/2020

are great relationships and we want to make sure they stay that way.

CHAIRPERSON MIETZ: Okay, great. Thank you very much.

Is there any other questions by the Board members?

Okay. Is there anyone in the Zoom audience that would like to speak regarding this application?

Okay, there appears to be none, so at this point the Public Hearing is closed.

Thank you very much, Mr. Hurwitz.

JAYME HURWITZ: Is there anything for me -- oh, one other thing I did just sign the -- I put up my sign properly, certification and e-mailed it to Mr. DiStefano.

CHAIRPERSON MIETZ: Okay, all righty.

JAYME HURWITZ: Is there anything else for me to do?

CHAIRPERSON MIETZ: No, other than listening, no.

JAYME HURWITZ: Okay. Do I stay on?

CHAIRPERSON MIETZ: You can stay and listen if you wish.

JAYME HURWITZ: Okay, excellent. Please let

Brighton Zoning Board of Appeals 12/02/2020

me know if you have any other questions.

CHAIRPERSON MIETZ: Thank you.

All right, Rick, when you are ready.

APPLICATION 12A-02-20

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.

CHAIRPERSON MIETZ: Okay. So who is speaking on 12A-02?

NORMAN ROBINSON: Hi, this is Norm Robinson and Kelly is off camera behind me.

CHAIRPERSON MIETZ: Just for the record, name and address.

NORMAN ROBINSON: Norm Robinson, 50 Cheswell Way.

CHAIRPERSON MIETZ: Okay, please proceed.

NORMAN ROBINSON: My wife and I would like to put a hot tub in the side yard, or the side of the room that was added to the back of the house on the driveway. Kind of on the driveway edge.

Brighton Zoning Board of Appeals 12/02/2020

When we originally filed the permit, it was rejected because it had to be in the backyard, which is, if you're looking at the plot map, it is the small area.

The reason we can't put it there is, we're right up on the property line on the left side of that map and there's power that comes in from the power line to approximately where the second six is in the 2.66.

So there's a ten foot setback required from the property line plus there's an electric code issue with being that close to the power lines. There's also an RG&E easement across the back which limits going further to the rear, plus another power line that runs across a little bit inside that dark line. It basically splits the garage in half.

So, too close to power, too close to the setback and too close to the easement, and really not any room for a seven by seven hot tub in that space. We have talked to all the neighbors. The neighbor, I guess, would be to the east, Josh Roadam, he's fine with it. The two directly across the street also are fine with it. All have supplied letters with the application. Actually, two with the application and one follow-up after the application.

And that's it. We're going to put a wooden

Brighton Zoning Board of Appeals 12/02/2020

1
2
3 slat, vertical slat fence around it approximately, well, it
4 will be six feet or less tall, approximately eight feet on
5 one leg and 10 or 12 feet on the other leg, to limit the view
6 from the street and from the Roadam's -- I always get his
7 name wrong -- Roadam's side.

8 It wouldn't be visible from the road any way,
9 because that's a driveway. There's a -- what's not shown on
10 this map is the front door of the house is actually on the
11 right side of the house as you're looking at this picture.
12 There's brick steps and there's a, like, an awning over the
13 front steps and then there's a large bush and that would
14 block the view of even the fence, never mind the tub.

15 The driveway falls off from the road about
16 three feet, and that's not a survey measure that's me eye
17 balling it. It's about three feet lower where the hot tub
18 sits from where the road is. So, and it's always blocked by
19 cars, because even though that says garage, it's very tiny.
20 We can't get cars in that garage, so we have two cars or
21 three cars actually, in the driveway all of the time.

22 CHAIRPERSON MIETZ: Okay. So are there any
23 questions by Board members? Seems pretty straight forward
24 here.

25 Okay. I see no questions coming from the

Brighton Zoning Board of Appeals 12/02/2020

Board members.

So at this point, I guess, is there anyone in the audience that would like to add anything related to this application? There being none, then the Public Hearing is closed.

Thank you, Mr. Robinson.

NORMAN ROBINSON: Thank you. Appreciate all of your time.

CHAIRPERSON MIETZ: Okay.

So, Rick, whenever you're ready.

MR. DiSTEFANO: I'll read the next two applications for the same property.

APPLICATION 12A-03-20

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.

APPLICATION 12A-04-20

12A-04-20 Application of John Geer, George

Brighton Zoning Board of Appeals 12/02/2020

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.

CHAIRPERSON MIETZ: Okay. Who will be speaking related to 12A-03 and 4?

MS. BRUGG: I will be, this is Betsy Brugg.

CHAIRPERSON MIETZ: Good evening, Betsy.

MS. BRUGG: Hi.

CHAIRPERSON MIETZ: Okay. So, for the record if you could just do your name and address and then you may proceed.

MS. BRUGG: Sure. My name is Betsy Brugg, I'm an attorney with Woods, Oviatt, Gilman. My address is 1900 Bausch & Lomb Place.

I submitted this application, well, the two applications you have before you. The applicant, John Geer, the property owner, operator, I think also on the Zoom if there's any questions, as well as Cade Krueger from BDF Engineers if there's any questions on the site plan.

So, as the Board might recall, you granted a use variance to the previous owner on June 5, 2019. That was

Brighton Zoning Board of Appeals 12/02/2020

1
2
3 acquired, it was a legally pre-existing non-conforming use.
4 The property has been a restaurant for some 70-plus years and
5 their prior tenant, there's some litigation that as a result
6 there was an abandonment of the right to use. So that was
7 reestablished for the prior owner. The prior owner did not
8 intend to operate a restaurant himself, but was the applicant
9 on that original application.

10 Since then, we're here and the entity has
11 purchased the property. They've put a bunch of money into
12 the property, they have been making renovations. I know
13 you're probably already familiar with what's been going on.
14 You're probably more familiar than I am, I know he appeared
15 before you with a sprinkler variance, which wasn't granted.
16 So he is now putting in a pretty costly sprinkler system,
17 that was triggered because of the increase and effect it
18 caused by the amount of renovation and improvements -- the
19 money he spent making improvements to the property.

20 So, what we're requesting for today is in
21 connection with his actual proposed operation. He does grant
22 to comply with the variance as it was granted with the
23 modifications that we are proposing and are talking about the
24 Board permit.

25 And then the second variance pertains to a

Brighton Zoning Board of Appeals 12/02/2020

1 wall sign. I think, because the property is not -- it's
2
3 zoned residential, it has no absolute right to have a
4
5 building sign to identify the business, that was approved.
6 We need a wall sign. There's a sign on the property right
7 now. At this point I think that it's planned to go forward
8 with the sign.

9 There's also a Planning Board application in
10 related to this project, as well as with the Conservation
11 Board related to this proposal, and they responded favorably
12 on the landscaping.

13 The sign is 12 and a half feet, it's a
14 relatively small, modest sign. It's a wall sign, we were
15 asking for a variance to allow the sign it still requires. I
16 believe we're asking Architectural Review Board and Planning
17 Board approval.

18 I think what we'd like is the right to the
19 sign. I think the thought is the sign, they used to have a
20 sign to open. He would like to open I think by January, so
21 as far as the operational changes, because he's put all this
22 money into the property. He's been renovating, he's driven
23 by the scene, he's made a lot of upgrades to the condition of
24 the property.

25 The original floor plan was prepared I think

Brighton Zoning Board of Appeals 12/02/2020

by an architect, and now we have an updated floor plan that was prepared by, I think the actual vendor of the furniture and fixtures of the restaurant. So our floor plan is showing 62 feet on the first floor.

We are now proposing to add 24 feet on the second floor. There is a space that's existing up there, I think prior tenants have used it as office space. Now the building is sprinklered, and specifically with all the restrictions on indoor seating it is very important to have that overflow space if it's needed. And hopefully in the future it will be available for small gatherings, showers, meetings, those types of things.

We'd also proposed a takeout window on the, I guess, the north side of the building. I believe the window is there so it's very easy to convert to a takeout window. Again, that's an amenity to the community, particularly in these times when people don't want to or can't go inside for restaurant service. His intent is that primarily that will be for ice cream sales, seasonal, but also for takeout business.

And then, as a result of the increase in seating -- oh, I'm sorry, for the takeout window we're also showing two outdoor, kind of seasonal tables that people

Brighton Zoning Board of Appeals 12/02/2020

could sit and enjoy something. I'm showing that on kind of this front pavement area.

So, the existing parking lot, the site plan is showing a reconfiguration of that parking lot to -- the parking has never really been kind of defined, it's just what's been there. So, they have cleaned up the design of the parking lot, it's more efficient, it's properly striped with linear, you can see the layout of the parking.

New York State DOT is requiring that they pull back the pavement out of their right of way, so there will be some green planted along the road. We're also proposing to remove two curb cuts. There are two kinds of not well defined driveways, I think, on West Henrietta Road. There is a driveway on Doncaster which provides access to -- excuse me, to Doncaster at the signal at the intersection.

And then there's a driveway out on Furlong so, we're proposing to leave those two and eliminate the driveway on West Henrietta to improve the face and it improves the appearance of the property, it allows some green to be added. It works well with the reconfiguration of the parking.

And then the proposal is to extend the parking to the north and we are providing sufficient parking to meet code for the amount of seating. John has been in touch with

Brighton Zoning Board of Appeals 12/02/2020

the neighbors and the neighbors have been very exited for this project from the beginning. There's a number of letters and e-mails in support that were submitted from the neighbors on Doncaster, Furlong and some other neighborhoods in the area. I will point out that among those, two of them are the people closest to the parking expansion on Doncaster.

Let's see, I think in a nutshell that's the extent of the modifications. The neighborhood is supportive, and he's excited to be open. It's still going to be a family-style restaurant. We are going to conform with the conditions of the original approval except to the extent of the additional seating proposed, the takeout window and the modifications in the application.

I am happy to go through the standards for the granting of the relief for the variance of the sign and whatnot if you like, but I think I've done that in writing and hopefully the Board appreciates that. We can't really have a business succeed without some type of business signage.

I believe the property has always had signage, for the previous restaurants. The sign is discrete and it is modest in size and it faces West Henrietta Road.

CHAIRPERSON MIETZ: Okay. Anything else,

Brighton Zoning Board of Appeals 12/02/2020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Betsy, at this point?

MS. BRUGG: No. I should point out again there's some landscaping added. I don't know if you can see it all on this plan. I think we gave you a landscaping plan as well. It was done by a landscaping architect that provides some screening for the neighbors, adjacent neighbors, particularly for headlights, and just to kind of upgrade the overall appearance of the property.

The Conservation Board, I wasn't there but I understand they responded favorably to the proposed landscaping. And I think the Planning Board did not have any particular objections or comments on the plan. And should this Board grant the approval, the project will go back to the Planning Board and to the Architectural Review Board for the sign.

CHAIRPERSON MIETZ: Okay, very good. Thank you very much.

So, Board members, questions for Betsy?

MS. TOMPKINS WRIGHT: I have a question on the previous signage. Do you know where -- was the previous signage in a similar location of a similar size, for the previous restaurant at this site? I assume it was, but I don't actually know what that previous signage looked like.

Brighton Zoning Board of Appeals 12/02/2020

MR. DiSTEFANO: I will answer that. The previous signage was all awning sign. So that building had awnings out in front and the awning signage was previously nonconforming, which every restaurant use that went in there just continued to use that awning signage, just changing the name on it. And now with the awnings gone, that right has also disappeared.

Betsy, I had a question regarding the sign. That is the proposed location above the door on the wall?

MS. BRUGG: Yes.

MR. DiSTEFANO: It is the proposed location above the door?

MS. BRUGG: Yes. They decided to leave it there if the Architectural Review Board for some reason has, you know, if there's some comments or recommendations to move it, I think that it might not be in the optimal location. But a shot here, I think if we can get the right to have this sign, we can work with the Planning Board and Architectural Review Board.

MR. DiSTEFANO: That's one thing I wanted to kind of just make sure the Board understands that this might not be the best place for the sign. I personally think it gets lost in that peak, and on the wall it might be a little

Brighton Zoning Board of Appeals 12/02/2020

more clear for people.

So, if you guys aren't 100 percent sure on this location, because this Board likes to kind of condition that it is how you present it, that maybe there's some flexibility on that front face, keeping the same size or something like that.

MS. BRUGG: I would request that, because I would agree with you. I did talk to John a little bit about that and I think that he would like this looked at a little more carefully, but he wants to be open in January and he's just not going to be able to if the sign isn't there.

So, it may be possible that it would look better, it might project better from somewhere else on the front elevation.

MR. DiSTEFANO: Is that a banner right now?

MS. BRUGG: I think it's an actual vinyl sign.

MR. DiSTEFANO: Okay, so that would be the sign that would be --

MS. BRUGG: That right now is the sign. I don't think he's thrilled with the sign that he has. But, in the interest of getting open in January, he was willing to work with that. So, if we can get kind of this one approved, he can always come back if there's a change needed, we'd kind

Brighton Zoning Board of Appeals 12/02/2020

of like to avoid that if possible.

MR. DiSTEFANO: I would like to avoid it with this Board. You definitely would have to go to the Planning Board and Architectural Review Board for any design change on a sign. I would for this Board to be able to feel comfortable with wherever you might place it.

CHAIRPERSON MIETZ: And, Rick, also, it's the size of it, really. You can't translate this sign to a wall sign, other than the same sign.

MR. DiSTEFANO: Right. Or the same size as proposed.

CHAIRPERSON MIETZ: Yes.

MS. SCHWARTZ: When I saw this, the first thing that came to my mind was what Rick said, with the roof coming over it, it's sort of set back for number one. And number two, you're on a rather busy road, there are no numbers, so that they've got a lot to look for, especially with it being new and the sign being small, and where it is positioned.

So, if there's a possibility later, I would recommend moving it where it is a little more visible. Because to me, I think they're hurting themselves by having it recessed in a way, small, and no numbers. So, you know,

Brighton Zoning Board of Appeals 12/02/2020

1
2
3 you want to make it visible for your customers.

4 MS. BRUGG: So the way the variance is
5 advertised, it's a variance to allow a building an
6 identification sign where one is not allowed. So, if the
7 Board would be willing to be flexible in approving a sign on
8 the front elevation not to exceed a certain size, subject to
9 review and approval of the Architectural Review Board, I
10 think that would give us some flexibility to move it and
11 maybe make some adjustments in the design, if needed.

12 CHAIRPERSON MIETZ: Okay. That's something we
13 can consider.

14 So, why don't we do this. Are there other
15 questions about -- well, let's move this also as it relates
16 to the seating situation, and are there any questions related
17 to that?

18 MS. SCHMITT: I just had a question, Betsy, if
19 you could talk to me about the picnic table out front. Are
20 those, are you planning to keep those during the summer
21 months or is that a 12 month option?

22 MS. BRUGG: I think they're going to be like
23 all outdoor seating, I think it's only useable on a seasonal
24 basis. I don't know if he selected the actual tables,
25 whether they will actually be installed or whether they will

Brighton Zoning Board of Appeals 12/02/2020

1
2
3 be something that can be brought indoors.

4 MS. SCHMITT: And the window, if you could
5 talk to us a little bit about that, the takeout window. I
6 know that it was probably designed in theory, for the summer
7 months, I think you said ice cream, but then now, in light of
8 the pandemic, many restaurants are seeing a need for curbside
9 pick up, takeout. So is the thought that this window would
10 be used 12 months out of the year now?

11 MS. BRUGG: I think that it probably will be.
12 It was not designed for the pandemic, but clearly it's going
13 to have that benefit. That there are -- you know, right now
14 you can't eat in a restaurant and certainly it will be a
15 convenience and an amenity for the neighbors or customers who
16 want to come to the window. I think it will help the
17 business, you know, certainly survive through the situation.

18 It's not his goal to have a primarily takeout
19 kind of operation. The window was already there, he didn't
20 have to install it, so it's just being put to use after added
21 and it is a good way to serve customers.

22 MS. SCHMITT: Thank you.

23 CHAIRPERSON MIETZ: Okay, great. All right,
24 any other questions for Betsy? Good.

25 Thank you, Betsy.

Brighton Zoning Board of Appeals 12/02/2020

Let's see if there's anyone in the audience that would like to speak regarding either of these two applications? There being none, then each of the Public Hearings is closed.

MR. DiSTEFANO: Once again, Applications 12A-05-20 and 12A-06-20 are postponed to the January 6, 2021 meeting.

CHAIRPERSON MIETZ: Okay. So, I guess our point of order here then will be to begin with Application 12A-01 and have our deliberation on those four applications and then we would move into the old business.

All right. So let's begin.

*

*

*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

B R I G H T O N
Z O N I N G B O A R D
O F
A P P E A L S

DECEMBER 2nd, 2020
at approximately 7:47 p.m.
Zoom meeting
2300 Elmwood Avenue
Rochester, New York 14618

PRESENT:

DENNIS MIETZ,	Chairperson	
JEANNE DALE.)	
EDWARD F. PREMO, II)	
KATHLEEN SCHMITT)	BOARD MEMBERS
JUDY SCHWARTZ)	
ANDREA TOMPKINS WRIGHT)	
JENNIFER WATSON)	
DAVID DOLLINGER, ESQ.		
Town Attorney		
RICK DiSTEFANO		
Secretary		

(The Board having considered the information presented by the Applicant in each of the following cases and having completed the required review pursuant to SEQRA, the following decisions were made:)

REPORTED BY: Rhoda Collins, Court Reporter
FORBES COURT REPORTING SERVICES, LLC
21 Woodcrest Drive
Batavia, New York 14020

Brighton Zoning Board of Appeals 12/02/2020

APPLICATION 12A-01-20

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.

Motion made by Mr. Mietz to approve Application 12A-01-20 based on the following findings and facts.

FINDINGS AND FACTS:

1. The previous deck was in a deteriorated condition and has been removed and was too small to accommodate the needs of the applicant.
2. The additional 12-foot extension into the 60-foot rear setback will have minimal impact due to the existing vegetation and fencing.
3. Numerous similar deck structures are present in the subject neighborhood and thus, no negative effect on the character of the neighborhood will result from the approval of this variance.
4. The proposed deck is, in fact, the minimum size required to meet the needs of the applicant.

Brighton Zoning Board of Appeals 12/02/2020

CONDITIONS:

1. This application is based on the testimony given and the specific size and location of the deck in the testimony and drawings.

2. All necessary buildings permits shall be obtained.

(Second by Ms. Schwartz.)

(Ms. Schmitt, yes; Ms. Watson, yes; Ms. Dale, yes; Ms. Tompkins Wright, yes; Ms. Schwartz, yes; Mr. Mietz, yes.)

(Upon roll call, motion to approve with conditions carries.)

Brighton Zoning Board of Appeals 12/02/2020

APPLICATION 12A-02-20

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.

Motion made by Ms. Schwartz to approve Application 12A-02-20 based on the following findings and facts.

FINDINGS AND FACTS:

1. The proposed placement of the hot tub in the side yard rather than the backyard as required by code, is necessitated by the fact that a hot tub must be placed ten feet from the power lines and the property line. Power lines extend across the entire backyard, which is raised from the northwest corner of the lot to the house.

2. There will be no change to the character of the neighborhood if there are other hot tubs and decks on homes in this area.

3. The hot tub will not be visible to surrounding neighbors as the driveway slopes down and there will be a decorative privacy fence from the house to the driveway protecting it

Brighton Zoning Board of Appeals 12/02/2020

from view from the street. Also, the hot tub will be placed immediately adjacent to the rear room of the house within the fenced in yard.

4. In addition, the 1920's garage is not tall enough to accommodate the vehicles which are parked in the driveway and also block the view of the proposed hot tub from the street.

5. There's no other alternative to grant relief from this difficulty and achieve the desired outcome for the applicant.

CONDITIONS:

1. This variance only applies to the placement of the hot tub in the side yard as present in testimony and written application.

2. All necessary building permits shall be obtained.

(Second by Ms. Watson.)

(Ms. Tompkins Wright, yes; Ms. Dale, yes; Mr. Mietz, yes; Ms. Schmitt, yes; Ms. Watson, yes; Ms. Schwartz, yes.)

(Upon roll call, motion to approve with conditions carries.)

Brighton Zoning Board of Appeals 12/02/2020

APPLICATION 12A-03-20

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.

Motion made by Ms. Schmitt to approve Application 12A-02-20 based on the following findings and facts.

FINDINGS AND FACTS:

1. The first variance request is to increase dining seats by 24. The owner will be creating a second floor dining space that will be used primarily for private dining or event space. The second variance is a request to install a walk-up takeout window that will be used primarily for warm weather ice cream sales, and for takeout orders which is important during this pandemic where customers may not be able to or willing to dine inside.

2. Outdoor tables accommodating up to four persons each will be located in the open area at the front of the building,

Brighton Zoning Board of Appeals 12/02/2020

convenient to the takeout window. These tables will increase outdoor seating to 32.

3. Improvements will be made to the current parking lot to accommodate the additional seating. Moreover, landscaping will be installed. The additional and reconfigured parking and additional landscaping will improve the overall appearance, parking, and safety.

4. The property has operated as a restaurant in this location for approximately 70 years and sits on approximately 2.5 acres. Due to its size and location it can accommodate the proposed modifications to the operation and site.

5. The granted variance will not produce an undesirable change in the character of the neighborhood or be a detriment to nearby properties. Indeed, multiple neighbors have sent in letters in support for these variances, seeing both as improvements.

6. There's no evidence that there would be a negative impact on the health, safety, and welfare of the neighborhood.

CONDITIONS:

1. The variances will apply only to those described in the application and testimony provided and will not apply to future projects.

2. All necessary building permits and all necessary Planning

Brighton Zoning Board of Appeals 12/02/2020

Board approvals shall be obtained.

(Second by Ms. Schwartz.)

(Mr. Mietz, yes; Ms. Dale, yes; Ms. Watson, yes; Ms. Tompkins Wright, yes; Ms. Schwartz, yes; Ms. Schmitt, yes.)

(Upon roll call, motion to approve with conditions carries.)

Brighton Zoning Board of Appeals 12/02/2020

APPLICATION 12A-04-20

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.

Motion made by Ms. Tompkins Wright to approve Application 12A-04-20 based on the following findings and facts.

FINDINGS AND FACTS:

1. The granting of the requested variance will not produce an undesirable change in the character neighborhood or be a detriment to nearby properties. This property has been a restaurant for seven years, and previously had signage on an awning, identifying the restaurant to customers. While such awning signage is no longer available, such proposed signage is consistent in its size and purpose with the property's and neighborhood's history.

2. The requested variance is not substantial, the sign is modest in size, faces West Henrietta Road, heavily traveled, on which various mixed uses are located and all lighting is contained to the front of the site/sign by gooseneck

Brighton Zoning Board of Appeals 12/02/2020

lighting.

3. The benefits sought by the applicant cannot reasonably be achieved by any other method. There are no reasonable alternatives to appropriate signage for a restaurant use for the purpose of identifying its location to the public.

4. There is no evidence that the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

CONDITIONS:

1. The variance granted herein applies only to one sign of no more than 12.5 square feet in the location as depicted in the application or at such alternative location along the face of the building facing West Henrietta Road.

2. The sign shall not be internally lit.

3. All necessary Architectural Review Board and Planning Board approvals and other permits must be obtained.

(Second by Ms. Watson.)

(Ms. Schwartz, yes; Ms. Dale, yes; Mr. Mietz, yes; Ms. Schmitt, yes; Ms. Watson, yes; Ms. Tompkins Wright, yes.)

(Upon roll call, motion to approve with conditions carries.)

Brighton Zoning Board of Appeals 12/02/2020

CHAIRPERSON MIETZ: Okay, very good. Thank you and good luck. Okay.

So we've finished, and again, please hang on to your paperwork for 12-A-05 and 06, there were numerous correspondences as you know, so please hang onto all of that stuff.

And at this point we can go on to old business.

Brighton Zoning Board of Appeals 12/02/2020

APPLICATION 9A-04-20

9A-04-20 Application of Save Monroe Ave., Inc. (2900 Monroe Avenue, LLC, Cliffords of Supplement 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.

Motion made by Ms. Tompkins Wright to deny Application 9A-04-20 based on the following findings and facts.

FINDINGS AND FACTS:

Whereas, on August 4, 2020, Save Monroe Ave Inc., also known as 2900 Monroe Avenue, LLC, Cliffords of Supplement Pittsford, L.P. Elexco Land Services, Inc., Julia D. Kopp, Mark Boylan, Ann Boylan and Steven M. Deperrior, collectively known as SMA, filed application 9A-04-20, otherwise known as "the appeal" with the Town of Brighton Board of Appeals, otherwise known as the ZBA, appealing the Town of Brighton building inspector's issuance of Building Permit Number

Brighton Zoning Board of Appeals 12/02/2020

20180487, otherwise known as the "building permit" to Daniele Family Companies, other known as "the developer" for the Whole Foods Plaza project located at 2740 Monroe Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, and a portion of 175 Allen's Creek Road and a portion of 2259 Clover Street, otherwise known as "the project."

And whereas, the appeal request that the ZBA null and reverse the issuance of the building permit. Two, determine that the developer had failed to confirm that it had 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, three, award SNA 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 to the public as require 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 appeals. And during the public

Brighton Zoning Board of Appeals 12/02/2020

1
2
3 appeal all persons desiring to speak on the appeal were heard
4 and such persons also submitted documents and other
5 correspondence for consideration by the ZBA and all those
6 materials were considered by the ZBA as part of the record
7 for the appeal.

8 And whereas, on October 7, 2020, they closed the Public
9 Hearing, tabled the appeal and allowed the building inspector
10 two weeks to respond to new information submitted in
11 connection with the appeal.

12 And whereas, on October 7, 2020, the ZBA commenced
13 deliberations with respect to the appeal which deliberations
14 were continued by the ZBA at its regular meeting on
15 November 4, 2020.

16 And whereas, on November 4, 2020, the ZBA held a regular
17 meeting which was duly noticed and published as required by
18 law.

19 **RESOLVED:**

20 Each of the whereas clauses in this resolution are
21 incorporated by reference as specific findings of this
22 resolution and shall have the same effect as the other
23 findings herein, and it shall be further resolved that after
24 duly considering all of the evidence before it, the ZBA in
25 all respects, accepts, approves, adopts and confirms the

Brighton Zoning Board of Appeals 12/02/2020

findings of fact set forth as Attachment A to this denial, which findings of fact 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.

(Second by Ms. Dale.)

(Ms. Schwartz, yes; Ms. Dale, yes; Ms. Watson, yes; Ms. Schmitt, yes; Mr. Mietz, yes; Ms. Tompkins Wright, yes.)

(Upon roll call, motion to deny the appeal carries.)

Brighton Zoning Board of Appeals 12/02/2020

APPLICATION 10A-02-20

10A-02-20 Application of Brighton Grassroots, LLC, appealing the issuance of a building permit Supplement (Starbucks Coffee) by the Town of Brighton Building Inspector (pursuant to Supplement 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.

Motion made by Ms. Tompkins Wright to deny Application 10A-02-20 based on the following findings and facts.

FINDINGS AND FACTS:

Whereas, on August 20, 2020, Brighton Grassroots LLC, otherwise known as "BGR" filed Application 10A-02-20, otherwise known as "the appeal" with the Town of Brighton Zoning Board of Appeals, otherwise known as ZBA.

Appealing the Town of Brighton building inspector's issuance of Building Permit Number 20180487, otherwise known as "the building permit" to the Daniele Family Companies, otherwise known as "the developer" for the Whole Foods Plaza project located at 2740 Monroe Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, a portion of 175 Allen's Creek Road, and

Brighton Zoning Board of Appeals 12/02/2020

a portion of 2259 Clover Street, otherwise known as "the project."

And whereas, the appeal request that the ZBA, one, reversed the decision of the Town of Brighton building inspector and issued a building permit. Two, annul the building permit. Three, determine that the developer had failed to establish with documentary evidence that it had 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, four, 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.

Brighton Zoning Board of Appeals 12/02/2020

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 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.

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 of 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 as set forth as Attachment A, the

Brighton Zoning Board of Appeals 12/02/2020

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.

(Second by Ms. Watson.)

(Ms. Schmitt, yes; Ms. Watson, yes; Mr. Mietz, yes; Ms. Schwartz, yes; Ms. Dale, yes; Ms. Tompkins Wright, yes.)

(Upon roll call, motion to deny the appeal carries.)

Brighton Zoning Board of Appeals 12/02/2020

CHAIRPERSON MIETZ: Okay. So I think we've had it.

So, a couple things, just a welcome to Ed, and we look forward to working with you on the Board.

And, second, happy holidays to everybody in December, and be safe.

MR. DiSTEFANO: January 6th is the next meeting.

CHAIRPERSON MIETZ: Thank you, everybody.

* * *

REPORTER CERTIFICATE

I, Rhoda Collins, do hereby certify that I did report in stenotype machine shorthand the proceedings held in the above-entitled matter;

Further, that the foregoing transcript is a true and accurate transcription of my said stenographic notes taken at the time and place hereinbefore set forth.

Dated this 3rd day of January, 2021.

At Rochester, New York

Rhoda Collins
Rhoda Collins

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 Ms. Tompkins - Wright Seconded by Ms. Watson, 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	<u>YES</u>
Kathleen Schmitt, Board Member	Voting	<u>YES</u>
Andrea Tompkins Wright, Board Member	Voting	<u>YES</u>
Judy Schwartz, Board Member	Voting	<u>YES</u>
Jeanne Dale, Board Member	Voting	<u>YES</u>
Jennifer Watson, Board Member	Voting	<u>YES</u>

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. For the above reasons The Board finds that the appeal is moot and therefore 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 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 Pedestrian 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 Ms. Tompkins-Wright Seconded by Ms. Dale, 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	<u>YES</u>
Kathleen Schmitt, Board Member	Voting	<u>YES</u>
Andrea Tompkins Wright, Board Member	Voting	<u>YES</u>
Judy Schwartz, Board Member	Voting	<u>YES</u>
Jeanne Dale, Board Member	Voting	<u>YES</u>
Jennifer Watson, Board Member	Voting	<u>YES</u>

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. In the event not withdrawn the Board denies this portion of the appeal.

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. In the event not withdrawn the Board denies this portion of the Appeal.

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 Pedestrian 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 in 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.