
BRIGHTON
ZONING BOARD OF APPEALS
MEETING

July 7, 2021
At approximately 7 p.m.
Brighton Town Hall
2300 Elmwood Avenue
Rochester, New York 14618

PRESENT:

DENNIS MIETZ, CHAIRPERSON

EDWARD PREMO)	
JEANNE DALE)	
KATHLEEN SCHMITT)	
ANDREA TOMPKINS WRIGHT)	Board Members
JUDY SCHWARTZ)	

KEN GORDON, ESQ.
Town Attorney

RICK DiSTEFANO
Secretary

REPORTED BY: HOLLY E. CASTLEMAN, Court Reporter,
FORBES COURT REPORTING SERVICES, LLC
21 Woodcrest Drive
Batavia, NY 14020

1 MR. MIETZ: Good evening, everyone, and
2 welcome to the July meeting of the Zoning Board of
3 Appeals. Now, just a couple little things. You know,
4 everyone understands the masking requirements in the
5 town facility. If you are a speaker and we're having
6 trouble hearing you, we may ask you to drop your mask
7 so we can hear you properly. We'll see how it goes.
8 So it's important to speak right into the microphone
9 so everyone in the audience can hear properly. Okay?
10 And Board Members, please move your microphones
11 forward so we can hear you because it's a little more
12 difficult in person.

13 So let us just -- so you understand how we
14 operate this meeting, that we have a couple months of
15 minutes to go through, which we'll do that first. And
16 then we will take the applications the way they are on
17 the agenda. There's one holdover and then there's a
18 couple new applications. It might take us an hour or
19 so or hour and a half to go through those.

20 When the clerk reads your application, then
21 you come up to the podium, introduce yourself, give us
22 your name and address and then please tell us why you
23 believe we should approve your application. The Board
24 Members will ask questions as they wish. And then we
25 will ask anyone in the audience that might want to

1 speak related to that application. And then we'll
2 move on to the next one.

3 Once we complete all of those those public
4 hearings, we may take a couple minutes break and then
5 we will start the deliberations. You're welcome to
6 stay for the deliberations and listen if you'd like.
7 We don't have any other discussions between the Board
8 Members and applicants once the public hearings are
9 closed, but you can listen if you wish. If you decide
10 not to, then you can call Town Hall tomorrow and speak
11 to Rick DiStefano and he will let you know what the
12 results of your application was.

13 Okay. So is there anything you want to add,
14 Rick?

15 MR. DiSTEFANO: I don't have anything. Any
16 members have any questions regarding any of these
17 applications? Questions? Good?

18 MR. MIETZ: Okay. I guess, I get to say my
19 fire statement that I haven't said in a long time.
20 Our building is equipped with a fire alarm system. If
21 this should go off, then it's probably a good idea we
22 leave. We'd either go out the front of the building
23 or out the side entrance and out the back. Okay. So
24 other than that, Rick, would you call the roll?

25 MR. DiSTEFANO: I'm going to state for the

1 record that the meeting was properly advertised in the
2 Brighton-Pittsford Post of July 7th of 2021.

3 MR. MIETZ: That you will.

4 (Whereupon the roll was called.)

5 MR. DiSTEFANO: Let the record reflect all
6 members are present.

7 MR. MIETZ: Okay. Very good. All right.
8 So we have two sets of minutes. We have May and then
9 we have June. Let's start with May, Judy.

10 MS. SCHWARTZ: Page 9, line 1, the second
11 word is "exacerbated." On page 21, line 14, insert
12 the word "be" after would, it would be. Page 33,
13 line 4, add the word "the" at the end of the line.
14 Page 36, line 19, the second word is "as." Page 48 --
15 oh, yes. Line 12, insert the word "this" before
16 district. Page 52, line 6, I believe the first word
17 should be "even," E-V-E-N. On line 15 -- oh. It
18 should be 4,000. Page 62, delete the first word in
19 line 7. Page 88, line 20, insert the word "be" after
20 to, to be. On page 90, line 11, the third word is
21 "most." Page 97, line 10, delete the first word.
22 Page 98, line 1, the last word is "where," W-H. On
23 page 102, line 24, the second to last word is lost,
24 L-O-S-T. Page 105, line 5, the end of that sentence
25 should be "scale," S-C-A-L-E. Page 108, line 22, it

1 should be "existing tennis," tennis. Page 110,
2 line 9, the second word should be "character." 111,
3 line 18 the first word should be "tennis." And
4 that's all I have.

5 MR. MIETZ: Okay. Anyone else have anything
6 for May?

7 MR. PREMO: No, not for May.

8 MR. MIETZ: May going once, twice. Okay.
9 Can I get a motion for May?

10 MS. TOMPKINS WRIGHT: I move to approve as
11 amended.

12 MR. MIETZ: Second please.

13 MR. PREMO: Second.

14 MR. MIETZ: Okay, Ed.

15 MR. DiSTEFANO: Motion is to approve with
16 corrections.

17 (Mr. Premo, aye; Ms. Schwartz, aye;
18 Ms. Tompkins Wright, aye; Ms. Dale, aye; Mr. Mietz,
19 aye; Ms. Watson, aye; Ms. Schmitt).

20 MR. DiSTEFANO: Motion to approve with
21 corrections carries.

22 MR. MIETZ: Okay. Now, we have June.

23 MS. SCHWARTZ: Page 10, line 20, the last
24 word in the first sentence is "season." Page 12,
25 line 11, after the word you is "know," K-N-O-W.

1 Page 23, line 15, second to last word is "rationale."
2 Line 18, delete the word "that." Page 26 -- oh, gosh.
3 If you guys could look at that because I underlined
4 it. Take a look at lines 19.

5 MR. PREMO: Which page?

6 MS. SCHWARTZ: 26. It's my argument and it
7 doesn't make sense.

8 MR. MIETZ: Okay.

9 MS. SCHWARTZ: So it starts in line 19.
10 "The town was given satisfactory proof that the
11 proposed construction of building 2 had a floor area
12 of 22,300 square feet and is in full compliance
13 with" -- I think I added "controversial, proposal" but
14 I don't -- I mean, I can leave it out, but I don't
15 think it came up --

16 MS. DALE: I think it's okay.

17 MS. TOMPKINS WRIGHT: This was the Town
18 Attorney.

19 MS. SCHWARTZ: Oh.

20 MR. PREMO: Oh.

21 MR. MIETZ: Yeah.

22 MR. GORDON: I think that reads correctly.

23 MS. SCHWARTZ: Okay. Just checking. Yes,
24 he did. You know what -- I'm sorry. Okay. Let's go
25 on to page -- thank you, thank you --

1 Page 51, line 18, add the word "have" to the
2 end of it, line 18. Page 63 -- oh. Line 25, just
3 reverse "facing sign." So "second sign facing."
4 Okay. And at the end of the line add -Townline Road.
5 And then on page 64, the same, reverse the "facing
6 sign" and again add the Townline Road. Okay. And I
7 think you guys -- if you want to look at 64 I think we
8 need to add the section Brighton-Henrietta Townline
9 Road. It's not Brighton. We need to add the rest of
10 the street name.

11 MS. TOMPKINS WRIGHT: It's not Townline Road
12 is it?

13 MS. SCHWARTZ: What? It says section off
14 West Henrietta -- section off of Brighton -- off --

15 MR. DiSTEFANO: Are you talking --

16 MS. SCHWARTZ: Pardon?

17 MR. DiSTEFANO: Yeah. I don't know where.

18 MS. SCHWARTZ: It's going to
19 Brighton-Henrietta Townline Road. I don't know.
20 But --

21 MR. GORDON: Are you on line 6, Judy?

22 MS. SCHWARTZ: Yes.

23 MR. GORDON: I think the word "of" should be
24 "on."

25 MS. SCHWARTZ: Ah. Brighton on -- yes.

1 Thank you. So on line 6 change the "of" to "on,"
2 Brighton on. That's right. Okay.

3 And then on 13, I would just put "Town of
4 Henrietta." Page 67, line 22, the last word is raps,
5 R-A-P-S. Page 77, on line 11, I think it should be
6 "for," F-O-R. Okay. And page 92, line 14, the third
7 word is "few" with an "F." Page 93, line 19, please
8 insert the word "know" after don't. Know. And one
9 more. Page 100, line 13, the second word should be
10 "appreciate." That's all I have.

11 MR. MIETZ: Okay. Does anyone have anything
12 else? Ed?

13 MR. PREMO: Yes. Just on the cover pages on
14 page 1 and the cover pages for deliberations which are
15 page 84 it should be June 2nd. It says June 6th for
16 the date. Then on page 86, lines 16 through 17 it
17 should be 6 NYCRR §-- we talked about that --
18 §617.5(c) and then put parens around 16 and 17.

19 MR. MIETZ: Yes.

20 MS. TOMPKINS WRIGHT: I don't think Jennifer
21 was there in June.

22 MR. DiSTEFANO: Who?

23 MS. SCHWARTZ: Jennifer wasn't. She's
24 listed as being present on the first page.

25 MR. DiSTEFANO: Remove Jennifer Watson.

1 MR. PREMO: Then on page 99, line 10 it says
2 "no, this building," delete the word "no." Page 101,
3 line 17 to 18 it should read "I do not think" -- "I do
4 think res judicata applies" should be the new word and
5 delete "has been adjudicated." Page 121, starting
6 with line 14 going on to line 15 it should read
7 6NYCRR §, the symbol, 617.5. So take out the first 7.
8 So 617.5 and then in parentheses, (c) and then in
9 parentheses the number 21, (21). That's all I have.

10 MS. SCHWARTZ: I didn't mean to interrupt
11 you.

12 MR. PREMO: Huh?

13 MS. SCHWARTZ: I didn't mean to interrupt
14 you.

15 MR. PREMO: Oh.

16 MR. MIETZ: Okay. Is there anything else?
17 Okay. Can I have a motion?

18 MS. SCHWARTZ: So moved.

19 MR. MIETZ: Second?

20 MS. TOMPKINS WRIGHT: Second.

21 MR. DISTEFANO: Motion is to approve with
22 corrections.

23 (Mr. Premo, aye; Ms. Schwartz, aye;
24 Ms. Tompkins Wright, aye; Ms. Dale, aye; Mr. Mietz,
25 aye; Ms. Watson, aye; Ms. Schmitt.)

1 MR. DiSTEFANO: Motion to approve with
2 corrections carries.

3 MR. MIETZ: Okay. Rick, when you're ready,
4 read the first application.

5 MR. DiSTEFANO: Can I just ask the audience
6 when you come up to speak, to just sign and print your
7 name on that sheet that's by the microphone. Thank
8 you.

9 **Application 6A-03-21**

10 Application of Thomas Fantauzzo, owner of
11 property located at 2041 South Clinton Avenue, for an
12 Area Variance from Section 205-12 to allow for 10 on
13 site parking spaces in lieu of the minimum 16 parking
14 spaces required by code. All as described on
15 application and plans on file.

16 **Application 7A-01-21**

17 Application of Thomas Fantauzzo, owner of
18 property located at 2041 South Clinton Avenue, for an
19 Area Variance from Section 205-6 to allow a building
20 addition to extend 3.5 feet into the existing 13.5
21 feet side setback where a 20 foot side setback is
22 required by code. All as described on application and
23 plans on file.

24 MR. MIETZ: Okay. Okay.

25 MR. FANTAUZZO: Hello, everyone. I'm Tom

1 Fantauzzo, the owner of the property. The first
2 application was for the parking reduction. We simply
3 don't need it. That's why -- there's no real space
4 for it, but we don't need it. We only book two
5 patients per hour. So even if there were a couple
6 walk in-people into the business during that time, we
7 have six, seven people in the building at one time.
8 They have 16 parking spaces. It's crazy. So there's
9 no real reason for it.

10 And I don't want -- the addition is actually
11 going over some of the parking that's currently there,
12 which is the half black top and half grass. And, you
13 know, we're going to lose a little bit. It's not
14 necessary to add parking to it. And I don't -- that
15 one -- trying to find an extra five or six spaces on
16 that property is not needed. And it's not -- I don't
17 think it's possible.

18 We could probably do it, but I'll probably
19 use a lot of green space. And the addition that we're
20 putting on is in between the back building and the
21 front building. It's really taking up no space. It's
22 not hindering anything.

23 MR. MIETZ: Can you just for the record tell
24 us why it is planned for that location versus other
25 options?

1 MR. FANTAUZZO: Well, basically where we're
2 putting the addition, there's only about 400 square
3 feet in the bottom portion of that building. So we're
4 adding another 5 or 600 square feet on the bottom of
5 it for one -- if you see on the plans it's two patient
6 rooms and a little bit of storage. We need some elbow
7 room. It's quite small the way it is now. So, you
8 know it's 20 by 20 that we to have work with. And
9 that's tight.

10 So for us to have a couple patients in there
11 and a little bit of elbow room and get everything
12 around in there, that space is needed.

13 MR. MIETZ: Did you look at any other ways
14 to add that square footage?

15 MR. FANTAUZZO: To that property?

16 MR. MIETZ: Yes.

17 MR. FANTAUZZO: Well, this way it's -- not
18 necessarily because right directly between the two
19 buildings is really a dead spot. And you're not going
20 to see it. It's hidden behind -- if you go straight
21 back with it the way we want to, it will look really
22 good with the building. It will look like it was
23 built originally with that. You know, it comes in
24 real close to the other building. I would have
25 attached it if I could to that back building and it

1 couldn't -- it wouldn't look right. And it just
2 doesn't make sense. This was the best spot to put it
3 with the area that we're not using around it and will
4 not use.

5 MR. MIETZ: Okay.

6 MR. FANTAUZZO: And it's hidden back there.
7 No one will see it.

8 MR. MIETZ: Questions?

9 MS. TOMPKINS WRIGHT: How many parking --
10 what's the maximum number of people parking there?

11 And would you describe the addition? I know
12 you said you --

13 MR. FANTAUZZO: There's three in the far
14 back. I believe there's three back there. We have
15 the two for the easements that we own off the one side
16 and six -- I believe six up front.

17 MS. TOMPKINS WRIGHT: Right. But how many
18 are actually used? I know you said two patients at
19 time. So how much --

20 MR. FANTAUZZO: Right. Well -- yeah. Two.
21 I'm sorry.

22 MS. TOMPKINS WRIGHT: So how many
23 employees -- what is the normal parking load
24 currently?

25 MR. FANTAUZZO: So there's two full-time and

1 two part-timers. So that's it right now. So use for
2 the public or that we need?

3 MR. MIETZ: Both.

4 MS. TOMPKINS WRIGHT: Yeah, both. How many
5 parking spaces would be used at max capacity on any
6 given day right now?

7 MR. FANTAUZZO: Oh. I feel we use the six
8 up front unless we're using one or two off the side.
9 You have the ability to use ten. I think it's six --
10 three, nine, ten, eleven. Or it is -- yeah. Six. So
11 there might be five up front because there's a
12 handicap.

13 MS. TOMPKINS WRIGHT: So how -- it looks
14 like you're at capacity for parking then if that's how
15 many are being used and you can't quite accommodate
16 what you have.

17 MR. FANTAUZZO: Well, maybe I misunderstood.
18 You're asking how many could be used?

19 MS. TOMPKINS WRIGHT: No. No. I'm asking
20 how many -- at max capacity how many are being used?

21 MR. FANTAUZZO: None. We're not open yet.

22 MS. TOMPKINS WRIGHT: Okay.

23 MR. FANTAUZZO: We don't occupy the space
24 until -- we're supposed to move in on the 19th of this
25 month.

1 MS. TOMPKINS WRIGHT: Based on staff and
2 turnover of patients, how many parking spaces would
3 you estimate would be used.

4 MR. FANTAUZZO: Two or three up front, four
5 maybe at the most. We only have one or two patients
6 there per hour. We'll be parking either in the back
7 or off the side. There's a side that is open. So you
8 have the two there. And if you say one or two that
9 walk in besides the one or two patients, maybe four
10 spots. And you got six or seven. You got two plus
11 five or six up front.

12 MS. TOMPKINS WRIGHT: And this addition will
13 add additional parking strain?

14 MR. FANTAUZZO: No. It has nothing to do
15 with that. It's strictly more room for us to move
16 around in the business. It's not like we're adding
17 population to come into the business. No, not doing
18 that.

19 MR. MIETZ: Okay. Kathy?

20 MS. SCHMITT: The application, if I read it
21 correctly, is for space purely used for storage. Is
22 that not accurate?

23 MR. FANTAUZZO: Well, there is storage built
24 into the plan.

25 MS. SCHMITT: Okay. But this says it's

1 primarily used for storage and I thought you just said
2 it's for elbow room and it's going to be used for
3 patients, et cetera.

4 MR. FANTAUZZO: Well, there's -- on the
5 plans -- if you look at the plans, it's some of both.
6 There is two -- there is two patient rooms built into
7 the addition. You're talking about strictly the
8 addition?

9 MS. SCHMITT: Maybe I'll ask this more
10 bluntly. Can you -- can you explain in more detail
11 how the 599 feet will be used?

12 MR. FANTAUZZO: Well, it -- basically what I
13 was saying, a little bit of elbow room, storage and
14 two patients.

15 MS. SCHMITT: So you're adding two
16 additional patient rooms?

17 MR. FANTAUZZO: Currently, yes, because
18 there's none.

19 MS. SCHMITT: So right now there are no
20 places to see patients?

21 MR. FANTAUZZO: We've put up a temporary --
22 temporary patient room. If the addition goes forward,
23 it will be a temporary room. If the addition doesn't
24 go forward, I'm going to have to figure out where to
25 build.

1 MR. DiSTEFANO: When all is said and done,
2 how many patient rooms are you going to have?

3 MR. FANTAUZZO: Two -- or one patient room
4 and an office. No more than two.

5 MR. DiSTEFANO: Okay. Thank you.

6 MR. MIETZ: All right. Okay. So I think
7 we're clear as we can be, clear on the parking count.

8 MR. GORDON: Can I take a crack at parking?
9 I'm not clear.

10 MR. MIETZ: Okay. Go ahead.

11 MR. GORDON: So you have a maximum of two
12 patient rooms; right?

13 MR. FANTAUZZO: Yeah.

14 MR. GORDON: You have you, you have two
15 full-timers?

16 MR. FANTAUZZO: No. I'm me and one
17 full-timer.

18 MR. GORDON: You and one full-timer?

19 MR. FANTAUZZO: Yes.

20 MR. GORDON: All right. You have two
21 part-timers?

22 MR. FANTAUZZO: Yup.

23 MR. GORDON: You take walk-in patients?

24 MR. FANTAUZZO: No. We take patients by
25 appointment only.

1 MR. GORDON: Okay. So what you said about
2 walk-ins doesn't apply. All right. So you have
3 appointments booked back-to-back?

4 MR. FANTAUZZO: Hour by hour.

5 MR. GORDON: All right. So you have two
6 people being treated and two people arriving for their
7 appointments.

8 MR. FANTAUZZO: Possibly. Yes. Yes.

9 MR. GORDON: So that count is eight cars
10 right there. Does that sound fair to you?

11 MR. FANTAUZZO: Eight people in the store,
12 it's a possibility. It's --

13 MR. GORDON: You, your staff, your patients,
14 and the patients that just arrived for their
15 appointments.

16 MR. FANTAUZZO: Yes. It's a possibility.

17 MR. MIETZ: Okay. So we've got ten. Sounds
18 like the max is eight. Okay. So I hope that's clear
19 to everybody because I know he was asked this question
20 a few different ways.

21 Can you just tell us are you operating this
22 business in another location previously?

23 MR. FANTAUZZO: Yeah. We're in the plaza
24 across the street.

25 MR. MIETZ: Okay. So your patient count is

1 not likely to drastically change by this move?

2 There --

3 MR. FANTAUZZO: I can show you bookings of
4 patients for the last four years.

5 MR. MIETZ: Okay.

6 MR. FANTAUZZO: It doesn't change.

7 MR. MIETZ: Okay. It's an existing customer
8 base is my -- what we're --

9 MR. FANTAUZZO: Yes.

10 MR. MIETZ: Okay. Other questions for
11 Mr. Fantauzzo? Okay. Thank you very much. Is there
12 anyone in the audience that would like to speak
13 regarding either of these two applications? Okay.
14 There being none, then the public hearings are closed.

15 **Application 7A-02-21**

16 Application of John Smyth, agent, and
17 Rochester Electrical Workers Building Corp., owner of
18 property located at 2300 East River Road, for renewal
19 of a Temporary and Revocable Use Permit pursuant to
20 Section 219-4 to erect a tent and hold a one day
21 clambake event in September 2021 and September 2022.
22 All as described on application and plans on file.

23 MR. SMYTH: Good evening, everyone. My
24 name, as stated, is John Smyth. I'm here on behalf of
25 the Rochester Electrical Workers. We are located at

1 2300 East River Road. And we're looking to have our
2 annual clambake again on the property. Typical
3 questions we get is it's an adult-only party for our
4 members. We have parking on our yard on the property
5 green space aside from where the tenants park their
6 vehicles. Typically we have a maximum of 500 people.
7 I am going to reduce that by a little bit, about 450,
8 to add some space under the tent for unvaccinated
9 individuals to get extra room.

10 We have security overnight for, you know,
11 materials we have all set up in the tent and
12 everything happens on Friday night. But no security
13 during the event. No music. No bands. And we've
14 been doing this, aside from last year, for about 14 to
15 15 years on that property. To my knowledge, no
16 complaints.

17 MR. MIETZ: Very good. Questions?

18 MR. PREMO: I'll go first.

19 MR. MIETZ: Go ahead.

20 MR. PREMO: Do you know the dates you're
21 going to have it? Is it the Saturday after Labor Day?

22 MR. SMYTH: It's going to be -- yes,
23 Saturday after Labor Day, which this year is September
24 11th. I know the other one is at the end of the
25 month. I do not know what the date is of the next

1 one.

2 MR. PREMO: Okay. So your prior permitted
3 the two Saturdays after Labor Day.

4 MR. SMYTH: Yes. It is the Saturday
5 following Labor Day, which this year falls on
6 September 11th. And I'm not sure --

7 MR. PREMO: And you're -- and you're
8 agreeable to a condition that there will be no band or
9 sound system?

10 MR. SMYTH: Absolutely.

11 MR. PREMO: In the prior conditions you had
12 previously required that.

13 MR. SMYTH: Yes.

14 MR. MIETZ: Good? Okay. Go ahead, Judy.

15 MS. SCHWARTZ: Were there any complaints
16 over the last years?

17 MR. DiSTEFANO: No. I have not received
18 anything.

19 MS. SCHWARTZ: Okay.

20 MR. MIETZ: Very good. Other questions?
21 No. Okay. Thank you.

22 MR. SMYTH: Thank you very much. Great to
23 see half of your faces.

24 MR. MIETZ: Good luck with that. All right.
25 Is there anyone in the audience who would like to

1 speak regarding this application? Okay. There being
2 none, then the public hearing is closed.

3 **Application 7A-03-21**

4 Application of Mike Dorsett and Alissa
5 Seidman, owners of property located at 362.
6 Susquehanna Road, for a Temporary and Revocable Use
7 Permit pursuant to Section 219-4 to allow for a
8 skateboard ramp on said property. All as described on
9 application and plans on file.

10 MR. DORSETT: Hey. I'm Mike Dorsett, owner
11 of 362 Susquehanna. I grew up in Brighton and in high
12 school I had a friend that had a ramp that was
13 actually a little bit bigger than the one that I was
14 thinking about getting. The reason I want it is just
15 because it's a healthy activity as my daughter grows
16 up in the next couple of years. It will be something
17 I can do with her, as well as to have friends, some
18 older children that are interested in it.

19 It's not going to be something that's
20 noticeable from the street or really any other view.
21 So I don't think it will change the look or the feel
22 or neighborhood at all. I have talked about it with
23 all of my neighbors and with the funeral home behind
24 the property and they are -- they've all signed
25 statements saying they are agreeable to it.

1 I think one of the concerns you guys might
2 have is that it's going to be like a hangout for lots
3 of teenagers or they're will be late night gatherings.
4 This won't be something that's probably even in use
5 everyday. This is an occasional thing. I don't plan
6 on having, you know, large groups. This will not
7 become a gathering spot for people.

8 And I'm willing to make reasonable
9 concessions. I know I won't be using it after dark.
10 Safety concerns, I know in previous experience that
11 usually people will put a chain with PVC pipe over it
12 so it can't be used without permission. I don't think
13 it should be really any louder than, you know, the
14 basketball hoops that are around. Yeah.

15 MR. MIETZ: Okay. Kathy?

16 MS. SCHMITT: In the application you say
17 your yard is completely fenced in in the back?

18 MR. DORSETT: Correct.

19 MS. SCHMITT: How tall is the fence?

20 MR. DORSETT: I think four feet -- four and
21 a half feet.

22 MS. SCHMITT: Okay. Do you think it will be
23 visible?

24 MR. DORSETT: So right now, the existing
25 structure that is there, it's a playground set, which

1 is more visible. The base of the skateboard ramp
2 would be below the fence line. And so I suppose if
3 you're standing on it, you might see people. But
4 there's really -- it doesn't back up -- a parking lot
5 is who would have the view of it and then the
6 neighbors on either side would not view it.

7 MS. SCHMITT: And how does somebody enter
8 into the backyard? Is there a gate that you use?

9 MR. DORSETT: There's a gate, yes.

10 MS. SCHMITT: Is there a locking mechanism
11 or a way to -- the reason I'm asking, we have a
12 zipline in our yard and that basically, all the kids
13 were taking advantage, without permission, to play on
14 the zipline. So I'm just curious, is there a way for
15 people to enter your backyard and use the ramp or is
16 there --

17 MR. DORSETT: So I think the two things that
18 would prevent that would be one, if it's chained
19 across the bottom, there isn't a way to even use the
20 ramp. So that would be the primary locking mechanism.
21 I think we could put something on the gate, but I
22 think that was really going to prevent use. Although
23 it would be pretty hard to use this at night, because
24 you know, we have motion sensors and a dog.

25 MS. SCHMITT: And you expect it will only be

1 up for two years?

2 MR. DORSETT: Well, two years is the maximum
3 amount of time you can get a removable permit for. I
4 know you have to re-file for that. That was my
5 understanding at least.

6 MR. MIETZ: That is correct.

7 MS. SCHMITT: All right. Thank you.

8 MR. MIETZ: Other questions?

9 MS. TOMPKINS WRIGHT: I just have a question
10 for Rick. This is the first time I've seen the
11 skateboard ramp application. Is this something --

12 MR. DiSTEFANO: We have done it a few times
13 in the past.

14 MS. TOMPKINS WRIGHT: Is the reason is --
15 because it's a temporary structure, that's why we have
16 to do the temporary removal permit as opposed to a
17 variance?

18 MR. DiSTEFANO: It's kind of a -- it's an
19 interesting type of structure --

20 MS. TOMPKINS WRIGHT: Yeah.

21 MR. DiSTEFANO: -- the fact that it isn't
22 spelled out in the code as a permissible use.
23 However, it's similar to the recreational-type --

24 MS. TOMPKINS WRIGHT: Yeah.

25 MR. DiSTEFANO: The thing at issue with

1 these is the noise that they can create. And we do
2 have -- the few that we've done, they're really for
3 teenagers. And they can get pretty loud. So it's a
4 way to control some of the negative impacts of it,
5 music playing and --

6 MS. TOMPKINS WRIGHT: Okay.

7 MR. DiSTEFANO: -- after hours, you know,
8 type of -- try to keep it limited to daylight hours.

9 MS. TOMPKINS WRIGHT: Okay.

10 MR. PREMO: Rick, does the town require any
11 building permits or anything?

12 MR. DiSTEFANO: No. We do not for
13 recreational type of structures.

14 MR. PREMO: Okay. So it's up to them to put
15 it up, make sure it's safe.

16 MR. DiSTEFANO: Yup. Liability and
17 responsibility for it if someone were to get hurt.

18 MR. DORSETT: It's something I helped build
19 when I was younger and I got advice from my friend's
20 parent who had to go through this 15 years ago.

21 MR. PREMO: You've been involved in the
22 building of a ramp?

23 MR. DORSETT: Yes.

24 MR. MIETZ: Okay. Other questions? Okay.
25 Very good. Thank you very much.

1 MR. DORSETT: Great. Thank you.

2 MR. MIETZ: Okay. Is there anyone in the
3 audience who wants to speak regarding this
4 application? Okay. There being none, the public
5 hearing is closed.

6 **Application 7A-04-21**

7 Application of James Hondorf, owner of
8 property located at 319 South Landing Road, for an
9 Area Variance from Section 203-2.1B to allow a pergola
10 structure to be located in a side yard in lieu of the
11 rear yard as required by code. All as described on
12 application and plans on file.

13 MR. HONDORF: Hi. I'm Jim Hondorf. I'm the
14 owner of 319 Landing Road South. I'm here to talk
15 about the pergola we want to locate on our side yard.
16 Rick, you should have gotten some emails from our
17 neighbors --

18 MR. DiSTEFANO: Members do have those
19 emails.

20 MR. HONDORF: -- in support of the project.
21 We're lucky enough to have a little over a half acre
22 in our yard. So the pergola -- it's going to be 12 by
23 10. It will be about 83 feet from the road and about
24 35 feet from the side lot line. And with the plans I
25 submitted, I also submitted the landscaping plans from

1 the landscape architect, which would consist of
2 landscaping to give good coverage for both neighbors
3 and us for privacy. And I think we've enhanced the
4 property.

5 We cannot place the pergola behind the house
6 because of the swimming pool that's been there since
7 1998. We also have some concerns about sight lines.
8 To locate the three young children, we want to be able
9 to leave that sight line to the pool open. I believe
10 that's about it.

11 MR. MIETZ: Okay. Okay. Questions for
12 Mr. Hondorf? Judy, anything?

13 MS. SCHWARTZ: No.

14 MR. MIETZ: You're good? Okay. Anyone
15 else? Pretty straight forward. Okay. Thank you.

16 MR. HONDORF: Thank you.

17 MR. MIETZ: Anyone in the audience who would
18 like to speak on 7A-04? Okay. There being none, the
19 public hearing is closed.

20 **Application 7A-05-21**

21 Application of Amy Gleckel, owner of
22 property located at 240 Rhinecliff Drive, for an Area
23 Variance from Section 207-2A to allow a 6.5 foot high
24 fence in a front yard where a maximum 3.5 foot high
25 fence is allowed by code. All as described on

1 application and plans on file.

2 MS. GLECKEL: Good evening. I'm Amy
3 Gleckel. I'm the owner of 240 Rhinecliff Drive. I'm
4 located on the corner of Rhinecliff and Imperial on a
5 corner lot. I'm proposing an extension of a privacy
6 fence to afford my lot some additional privacy on the
7 corner lot, which it does not have. I recently had a
8 patio installed in 2019. And then last year, I had a
9 fence put alongside the -- alongside the property line
10 as far as it could go under the current regulations.
11 That currently doesn't provide me with enough privacy
12 from my neighbors at 745 Union. I have a direct sight
13 line into their backyard. They are a fairly large
14 family. They spend a lot of time in the backyard.
15 But they have built some garden beds and compost piles
16 right along the property line. So when I have on my
17 patio my guests or my children, they are typically
18 right alongside that property line and we're not
19 provided the privacy I would like.

20 The style of the fence would be inline with
21 the neighborhood. And the other thing I was made
22 aware of, because of how the property is located and
23 it's required to get this variance to extend the
24 fence, but if my neighbors wanted to put a fence in
25 the same spot, they would not require any sort of

1 variance because of how their house is situated on the
2 lot.

3 Making an extension of this fence would not
4 impact traffic in any way. It doesn't go all the way
5 to Imperial. It doesn't block any pulling out of my
6 driveway or the sidewalk. The fencing does not impact
7 anyone's view. And the fence does not face anyone's
8 front door. Our side or back is actually our front.
9 So it's a little misleading, but it's not facing
10 anyone's front door. I think that's it. Are there
11 any questions?

12 MS. TOMPKINS WRIGHT: Yeah.

13 MS. DALE: I think you said you in an
14 attempt for privacy, you built the fence, but that was
15 not sufficiently provided?

16 MS. GLECKEL: So when they had the patio --
17 I wanted it around the patio as well. So this would
18 build even more privacy between myself and the
19 neighbor.

20 MS. TOMPKINS WRIGHT: So have you spoken to
21 your neighbor about this? The one that -- the one
22 that's you're trying to gain privacy from?

23 MS. GLECKEL: When I put the initial fence
24 in, I talked to him about it. He had no issue with
25 it. I have not spoken to him about the extension.

1 We're friendly, but we don't speak often. I don't
2 imagine there would be any problems, but I'm willing
3 to have that conversation if that is required.

4 MS. TOMPKINS WRIGHT: And the plans expand
5 18 feet in the front yard. How many feet would that
6 be past the patio?

7 MS. GLECKEL: Yeah. Right now the fence
8 goes to the edge of my garage. The patio kind of ends
9 right there as well. So it's going to go about
10 18 feet past the edge of the patio on that side.

11 MS. TOMPKINS WRIGHT: So can you kind of
12 speak to why 18 feet is needed into the front yard,
13 versus a lesser amount, for that privacy patio that's
14 further into the grass space?

15 MS. GLECKEL: I mean it provides -- sitting
16 on my couch on my patio I have a straight line into
17 their backyard. It blocks that view onto my patio, to
18 have it go that long. I was told I could go to the
19 very edge of the back of 765 Union. That's my goal
20 point as far as going -- not hitting the sidewalk on
21 Imperial.

22 MS. TOMPKINS WRIGHT: And then my other
23 question is, did you consider maybe not going as far
24 as the 18 feet and then cutting in towards the garage
25 making it more of a -- you know, more enclosed on your

1 property rather than --

2 MS. GLECKEL: If that's an option, I would
3 consider that. I have been told that would not be a
4 option just speaking to builders because that's
5 cutting into -- anything we'd be talking about would
6 beyond the garage and that I wouldn't be able to do
7 that because it wouldn't be in line with the edge of
8 the house. If I could go further and like -- closed
9 space that would be acceptable.

10 MS. TOMPKINS WRIGHT: And one of my thoughts
11 was could you take the fence straight out at the patio
12 then and not go much further than the front of the
13 house?

14 MS. GLECKEL: My concern with that is that
15 it would feel closed in. You know, like I said if I
16 could get it sort of around the patio, if I can go
17 around that kind of grass space, that would be ideal.

18 MR. MIETZ: Okay. Very good. Questions by
19 Board Members? Okay. Thank you very much. Is there
20 anyone in the audience that would like to speak
21 regarding this application? Okay. There being none,
22 the public hearing is closed.

23 **Application 7A-06-21**

24 Application of Jon Musson, Interstate
25 Paving, agent, and Danielle Moskowitz, owner of

1 property located at 115 Sylvan Road, for an Area
2 Variance from Section 207-10E(5) to allow for the
3 extension of a driveway into the rear yard 1.5 feet
4 from a side lot line in lieu of the minimum 4 feet
5 required by code. All as described on application and
6 plans on file.

7 MS. MOSKOWITZ: Hi, everybody. I'm Daniel
8 Moskowitz and I'm the owner of the property located on
9 Sylvan Road. I moved in on December 30th. The house
10 is lovely. Love the neighborhood. Love Brighton. I
11 got a two-car garage attached. And the people who I
12 bought the house from made the unfortunate decision to
13 take out some of the pavement from the driveway
14 because they wanted more room in the backyard for
15 their dogs.

16 So this house already had a driveway gone
17 back to the garage. You can look online at previous
18 pictures. And so all I would like to do is put back
19 that pavement, just straight shot. When they took out
20 the pavement to the garage, part of it is gravel and
21 there's a fence that you could open and a car can go
22 through. And then the rest is -- there's just gravel
23 under there and just a little bit of sod where grass
24 is attempting to grow, but is right now dying.

25 Anyways, specifically living in the

1 Rochester area, it would be nice to use my garage in
2 the winter, put my car in there and not have to take
3 snow off it.

4 MS. TOMPKINS WRIGHT: Do you -- sorry. Do
5 you know when that driveway was removed?

6 MS. MOSKOWITZ: I know it was during the
7 last time the -- the previous owners -- sometime when
8 they owned the property. Like I said, essentially
9 it's just gravel and then there's just grass, which
10 I'm sure if you take the grass, there's gravel under
11 there too. Looking at old pictures, it looked like
12 there was a two-car garage. I just want to have a
13 straight line of driveway. It's just me and one car
14 and a dog. So that's all I need.

15 MS. SCHMITT: And there's fencing along the
16 side where you're going up?

17 MS. MOSKOWITZ: The driveway goes up against
18 the fence.

19 MS. SCHMITT: There's a fence between you
20 and --

21 MS. MOSKOWITZ: Yeah. There's a fence
22 between me and my neighbors. I talked to them, but I
23 didn't get anything in writing from them. Nobody has
24 any problems. They -- essentially the overwhelming
25 thought was it was silly thing to do to remove when

1 you live in Rochester.

2 MR. MIETZ: Okay. Other questions?

3 MS. TOMPKINS WRIGHT: No concern about water
4 runoff --

5 MS. MOSKOWITZ: No.

6 MS. TOMPKINS WRIGHT: -- on the neighboring
7 property?

8 MS. MOSKOWITZ: No. I mean, there already
9 was a driveway there before. They just added a shed
10 back in the corner. And their house is in the front.
11 So there's just trees right there.

12 MR. MIETZ: Okay. Other questions? Good.

13 MS. MOSKOWITZ: Thank you.

14 MR. MIETZ: Is there anyone in the audience
15 that would like to speak regarding this application?
16 Okay. Then the public hearing is closed.

17 **Application 7A-07-21**

18 Application of Natalia Reggi, owner of
19 property located at 149 Cloverland Drive, for Area
20 Variances from Section 205-2 to allow a building
21 addition to 1) extend 5 feet into the existing 16.1
22 foot front setback from Florence Street where a 40
23 foot front setback is required by code, and 2) extend
24 10 feet into the Cloverland Drive 40 foot front
25 setback required by code. All as described on

1 application and plans on file.

2 MR. MIETZ: Hi.

3 MR. MILES: Hello, everybody. I'm Alex
4 Miles. I'm the owner and also my fiancé's the owner
5 of 149 Cloverland. Basically just looking to do a
6 6-foot addition. We're going to add a bedroom, a
7 large master bedroom and a master bath. And we're
8 going to be updating the siding. Currently it's like
9 a green, yellow-ish faded color. We're going to turn
10 that into a gray, neutral color. We're going to
11 update the shingles and tie it all in. We're going to
12 make that black.

13 And basically just looking to accommodate
14 our growing family. We have a two-year-old son and we
15 have two dogs and we're planning on having another
16 child in the near future. Currently the house is only
17 two bedrooms. Then we'll have three bedrooms, two
18 baths. So that's about it.

19 MR. MIETZ: Okay. So did you look at any
20 other possibilities of how to handle this situation
21 when you realized you needed the additional space?

22 MR. MILES: Yeah. So right now it's a
23 rectangle ranch. And the left side is the garage. So
24 basically the only way we could go out is to the
25 right. And we're planning like an "L" shape. So it's

1 not just like a continuing rectangle. We thought that
2 was the best bet.

3 MR. MIETZ: Okay. What about the
4 neighborhood? What would you say -- are there similar
5 additions in the -- similar additions from the street?

6 MR. MILES: Well, on our street I think
7 there's only one other ranch and they're a similar
8 style that we have now. I'm not sure about the whole
9 neighborhood. We just closed today.

10 MR. MIETZ: Right. Okay.

11 MS. TOMPKINS WRIGHT: Just along those
12 lines, I mean, it's a significant decrease in the
13 amount of space in between the home and Cloverland
14 Drive in particular. So what you're seeing in the
15 neighborhood you've been in for 12 hours so far -- so
16 I can appreciate that -- from what you're seeing, do
17 you see other homes that are that distance, that close
18 to those drives?

19 MR. MILES: Yeah. I mean, the front yards
20 aren't very large in the neighborhood. So they're all
21 pretty close to the road. So I don't think it's
22 unusual for the neighborhood.

23 MR. MIETZ: And the addition is single story
24 to match the existing house?

25 MR. MILES: Yes. Yup.

1 MR. MIETZ: All right. Good. Okay. Other
2 questions? Questions? Good. Okay. Thanks.

3 MR. MILES: Thanks.

4 MR. MIETZ: Anyone in the audience wish to
5 speak regarding this application? There being none,
6 the public hearing is closed.

7 That finishes the public hearings; correct?

8 MR. DiSTEFANO: Correct.

9 MR. MIETZ: So do we need a couple minutes
10 or are we good to plod along and finish? Yes? Yes?
11 Okay.

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1 REPORTER CERTIFICATE

2
3 I, Holly E. Castleman, do hereby certify
4 that I did report the foregoing proceeding, which was
5 taken down by me in a verbatim manner by means of
6 machine shorthand.

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

11
12 Dated this 3rd day of August, 2021
13 at Rochester, New York.

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20
21 *Holly E. Castleman*

22 -----
Holly E. Castleman,
23 Notary Public
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25

**BRIGHTON
ZONING BOARD OF APPEALS
MEETING
DELIBERATIONS**

July 7, 2021
At approximately 7 p.m.
Brighton Town Hall
2300 Elmwood Avenue
Rochester, New York 14618

PRESENT:

DENNIS MIETZ, CHAIRPERSON

EDWARD PREMO)	
JEANNE DALE)	
KATHLEEN SCHMITT)	
ANDREA TOMPKINS WRIGHT)	Board Members
JUDY SCHWARTZ)	

KEN GORDON, ESQ.
Town Attorney

RICK DiSTEFANO
Secretary

REPORTED BY: HOLLY E. CASTLEMAN, Court Reporter,
FORBES COURT REPORTING SERVICES, LLC
21 Woodcrest Drive
Batavia, NY 14020

1 **Application 6A-03-21**

2 Application of Thomas Fantauzzo, owner of
3 property located at 2041 South Clinton Avenue, for an
4 Area Variance from Section 205-12 to allow for 10 on
5 site parking spaces in lieu of the minimum 16 parking
6 spaces required by code. All as described on
7 application and plans on file.

8 The Board having considered the information
9 presented by the applicant and having completed the
10 required review pursuant to SEQRA, the Board
11 determines that the proposed project would not likely
12 have a significant environmental impact and has made
13 the following decision.

14 Motion made by Ms. Schmitt to approve
15 application 6A-03-21 based on the following findings
16 of fact.

17 **FINDINGS OF FACT:**

18 1. The variance requested is to decrease the onsite
19 parking spaces to 10 spaces, one of which will include
20 one handicap parking space in the adjacent access
21 aisle. The variance results in the applicant
22 increasing the square footage by 599 feet for a new
23 total of 2,100 square feet. With the additional
24 square footage, the code requires a minimum of 16
25 parking spaces.

1 2. The application was amended to reflect that the
2 additional square footage will be used for storage and
3 two new patient rooms. Total patient rooms will not
4 exceed two.

5 3. Granting of this variance will not produce an
6 undesirable change in the character of the
7 neighborhood or be a detriment to nearby properties.

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

11 **CONDITIONS:**

12 1. The variance will apply only to the use which is
13 described in the application and testimony provided
14 and will not apply to future projects or uses.

15 2. There shall be no more than two patient rooms.

16 (Second by Ms. Tompkins Wright.)

17 (Mr. Premo, yes; Ms. Schwartz, yes;
18 Ms. Dale, yes; Mr. Mietz, yes; Ms. Tompkins Wright;
19 yes.)

20 (Upon roll, Motion to approve carries with
21 conditions.)
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1 **Application 7A-01-21**

2 Application of Thomas Fantauzzo, owner of
3 property located at 2041 South Clinton Avenue, for an
4 Area Variance from Section 205-6 to allow a building
5 addition to extend 3.5 feet into the existing 13.5
6 feet side setback where a 20 foot side setback is
7 required by code. All as described on application and
8 plans on file.

9 Motion made by Mr. Mietz to approve
10 application 7A-01-21 based on the following findings
11 of fact.

12 **FINDINGS OF FACT:**

- 13 1. Due to the irregular north property line the
14 addition increases the existing side setback by 3 and
15 a half feet to 10 feet.
- 16 2. The 10-foot property side setback creates no
17 negative effect on any neighboring property.
- 18 3. The addition squares the building's footprint and
19 maintains the architectural integrity.
- 20 4. The 599 square foot addition is the minimum size
21 required to meet the applicant's needs.

22 **CONDITIONS:**

- 23 1. This variance is based on drawings submitted and
24 testimony given.
- 25 2. All necessary Architectural Review Board

1 approvals, Planning Board approvals and building
2 permits shall be obtained.

3 (Second by Ms. Schmitt.)

4 (Ms. Schwartz, yes; Ms. Tompkins Wright,
5 yes; Ms. Dale, yes; Mr. Premo, yes; Ms. Schmitt, yes;
6 Mr. Mietz, yes.)

7 (Upon roll, Motion to approve carries with
8 conditions.)

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1 **Application 7A-02-21**

2 Application of John Smyth, agent, and
3 Rochester Electrical Workers Building Corp., owner of
4 property located at 2300 East River Road, for renewal
5 of a Temporary and Revocable Use Permit pursuant to
6 Section 219-4 to erect a tent and hold a one day
7 clambake event in September 2021 and September 2022.
8 All as described on application and plans on file.

9 Motion made by Mr. Premo to approve
10 application 7A-02-21 based upon the following findings
11 of fact.

12 **FINDINGS OF FACT:**

- 13 1. The requested temporary irrevocable use permit is
14 a Type II action pursuant to 6 NYCRR §
15 617.5(c) (21) (32) and no review is required pursuant to
16 SEQRA.
- 17 2. The event will be held for one day each year in
18 2021 and 2022 on the Saturday after Labor Day from
19 11:30 a.m. to 6:00 p.m.
- 20 3. There is ample parking on the site for the event.
- 21 4. This is the 18th consecutive year that this event
22 has taken place. No comments were received by the
23 Building Department.
- 24 5. It will have no adverse effect on the neighborhood
25 area as it is bordered by vacant land, CSX Railroad,

1 East River Road and the Genesee River.

2 **CONDITIONS:**

3 1. There will be no band or sound system during these
4 events.

5 2. All equipment brought to the site expressly for
6 the clambake will be removed within 48 hours of the
7 event including all trash

8 3. No parking will be allowed on East River Road.

9 4. All proper fire marshal permits related to the
10 event shall be obtained.

11 (Second my Ms. Schwartz.)

12 (Ms. Schmitt, yes; Mr. Mietz, yes; Ms. Dale,
13 yes; Ms. Tompkins Wright, yes, Ms. Schwartz, yes;
14 Mr. Premo, yes.)

15 (Upon roll, Motion to approve carries.)
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1 **Application 7A-03-21**

2 Application of Mike Dorsett and Alissa
3 Seidman, owners of property located at 362.
4 Susquehanna Road, for a Temporary and Revocable Use
5 Permit pursuant to Section 219-4 to allow for a
6 skateboard ramp on said property. All as described on
7 application and plans on file.

8 Motion made by Ms. Schmitt to approve
9 application 7A-03-21 based upon the following findings
10 of fact.

11 **FINDINGS OF FACT:**

- 12 1. This temporary revocable permit is to allow a
13 skateboard ramp to be placed in the applicant's
14 backyard behind the garage.
- 15 2. The ramp as proposed will be no more than 4 feet
16 high and 16 feet wide.
- 17 3. The ramp would not be visible to anyone unless you
18 were in the backyard as the yard is fenced in on all
19 sides and higher than the ramp.
- 20 4. The granting of this variance will not produce an
21 undesirable change in the character of the
22 neighborhood or be a detriment to nearby properties.
23 Indeed all neighboring properties adjoined to the
24 application have sent in letters of support for this
25 temporary revocable permit.

1 5. As the placement of the ramp will be behind
2 fencing, there is no evidence that there will be a
3 negative impact on the health, safety and welfare of
4 the neighborhood.

5 **CONDITIONS:**

6 1. This permit will apply only to what was described
7 in the application and testimony provided and will not
8 apply to future projects.

9 2. The ramp must be taken down no later than July
10 7th, 2023, if the applicant has not obtained a new
11 permit.

12 3. The skateboard ramp will be used only during
13 daylight hours and only when supervised by the owners.

14 4. The applicants shall secure the skateboard ramp
15 when not in use to ensure it can't be used without
16 their knowledge or permission.

17 5. The violation of any of the foregoing conditions
18 would be cause for revocation of the permit.

19 (Second by Ms. Tompkins Wright.)

20 (Mr. Premo, yes; Ms. Dale, yes;
21 Ms. Schwartz, yes; Mr. Mietz, yes; Ms. Tompkins
22 Wright, yes; Ms. Schmitt, yes.)

23 (Upon roll, Motion to approve carries with
24 conditions.)
25

1 **Application 7A-04-21**

2 Application of James Hondorf, owner of
3 property located at 319 South Landing Road, for an
4 Area Variance from Section 203-2.1B to allow a pergola
5 structure to be located in a side yard in lieu of the
6 rear yard as required by code. All as described on
7 application and plans on file.

8 Motion made by Ms. Schwartz to approve
9 application 7A-04-21 based on the following findings
10 of fact.

11 **FINDINGS OF FACT:**

- 12 1. Placing the pergola in the side yard in lieu of
13 the rear yard will provide the most benefit to the
14 applicant. The rear yard is shadier, fully
15 landscaped, smaller, behind and further from the pool.
16 2. The side yard is a very sunny area and the pergola
17 would offer some needed shade.
18 3. Most importantly the side yard is within a few
19 feet of the pool and the sight lines are not blocked
20 in any way, which creates a greater safety element for
21 the young children when they are using the pool.
22 4. The size of the pergola has been reduced greatly
23 to reduce the impact.
24 5. Extensive landscaping will be installed along the
25 Landing Road south side of the property.

1 6. The pergola will be 83 feet from the road and
2 35 feet from the adjacent property line.

3 7. This variance will not produce an adverse impact
4 on the health, safety or welfare of the neighborhood.

5 **CONDITIONS:**

6 1. The variance applies only to the pergola structure
7 in size and location as per plans submitted and
8 testimony given.

9 2. Landscaping will be installed to shield the
10 pergola from Landing Road South

11 3. All necessary building permits shall be obtained.

12 (Second by Ms. Tompkins Wright.)

13 (Ms. Dale, yes; Mr. Mietz, yes; Mr. Premo,
14 yes; Ms. Schmitt, yes; Ms. Tompkins Wright, yes;
15 Ms. Schwartz, yes.)

16 (Upon roll, Motion to approve carries with
17 conditions.)
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1 **Application 7A-05-21**

2 Application of Amy Gleckel, owner of
3 property located at 240 Rhinecliff Drive, for an Area
4 Variance from Section 207-2A to allow a 6.5 foot high
5 fence in a front yard where a maximum 3.5 foot high
6 fence is allowed by code. All as described on
7 application and plans on file.

8 Motion made by Ms. Tompkins Wright to
9 approve application 7A-05-21 based on the following
10 findings of fact.

11 **FINDINGS OF FACT:**

- 12 1. The granting of the requested variance will not
13 produce an undesirable change in the character of the
14 neighborhood or be a detriment to nearby properties
15 given the corner lot-nature of this property and the
16 placement of the fence in a location that would be
17 permitted if constructed by a neighbor just a few
18 inches to the south on the neighboring lot.
- 19 2. The requested variance is not substantial for the
20 same reason. The existence of this fence if
21 constructed by the neighboring property owner would be
22 permitted.
- 23 3. The benefit sought by the applicant cannot be
24 reasonably achieved by any other method as applicant
25 has testified that they have attempted to use greenery

1 and shrubs and have been unsuccessful at creating
2 privacy for the yard they use as their backyard space.

3 4. There's no evidence that the proposed variance
4 will have an adverse effect or impact on the physical
5 or environmental conditions in the neighborhood or
6 district.

7 **CONDITIONS:**

8 1. The variance granted herein applies only to the
9 fence and location as described in the application and
10 in the testimony given.

11 2. All necessary permits must be obtained.

12 (Second by Ms. Schwartz.)

13 (Mr. Premo, yes; Mr. Mietz, yes;
14 Ms. Schmitt, yes; Ms. Dale, yes, Ms. Schwartz, yes;
15 Ms. Tompkins Wright, yes; Mr. Premo, yes.)

16 (Upon roll, Motion to approve carries with
17 conditions.)
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1 **Application 7A-06-21**

2 Application of Jon Musson, Interstate
3 Paving, agent, and Danielle Moskowitz, owner of
4 property located at 115 Sylvan Road, for an Area
5 Variance from Section 207-10E(5) to allow for the
6 extension of a driveway into the rear yard 1.5 feet
7 from a side lot line in lieu of the minimum 4 feet
8 required by code. All as described on application and
9 plans on file.

10 Motion made by Ms. Dale to approve
11 application 7A-06-21 based on the following findings
12 of fact.

13 **FINDINGS OF FACT:**

- 14 1. The applicant seeks to reestablish use of an
15 existing garage by installing the condition of the
16 present driveway. Both the garage and driveway are
17 less than 4 feet from the lot line.
- 18 2. Granting the variance request will not result in a
19 change in the character of the neighborhood or be a
20 detriment to neighboring properties as the change is
21 at the rear of the home where there is an existing
22 fence along the lot line and will match the fence of
23 the rest of the driveway and extend logically to the
24 garage.
- 25 3. The variance requested is the minimum necessary to

1 grant relief and the pre-existing structures are
2 already in place and non-conforming. The difficulty
3 that lead to the variance request was not
4 self-created.

5 4. There is no evidence that the granting of this
6 variance will have an adverse effect or impact on the
7 physical or visible conditions in the neighborhood.

8 **CONDITIONS:**

9 1. The variance is approved only for the location and
10 size of the driveway as described in the application
11 and testimony.

12 (Second by Ms. Tompkins Wright.)

13 (Ms. Schmitt, yes; Mr. Mietz, yes;
14 Mr. Premo, yes; Ms. Schwartz, yes; Ms. Tompkins
15 Wright, yes; Ms. Dale, yes.)

16 (Upon roll, Motion to approve carries with
17 conditions.)
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1 **Application 7A-07-21**

2 Application of Natalia Reggi, owner of
3 property located at 149 Cloverland Drive, for Area
4 Variances from Section 205-2 to allow a building
5 addition to 1) extend 5 feet into the existing 16.1
6 foot front setback from Florence Street where a 40
7 foot front setback is required by code, and 2) extend
8 10 feet into the Cloverland Drive 40 foot front
9 setback required by code. All as described on
10 application and plans on file.

11 Motion made by Mr. Mietz to approve
12 application 7A-07-21 based upon the following findings
13 of fact.

14 **FINDINGS OF FACT:**

- 15 1. The proposed building addition is the minimum size
16 required to meet the needs of the applicant.
- 17 2. The location of the proposed addition is the only
18 possible alternative to create the space desired and
19 architectural features to integrate with the existing
20 building.
- 21 3. While the front setbacks on Florence Drive is
22 currently non-conforming, it is similar to other
23 properties in the neighborhood area.
- 24 4. No negative impact on the character of the
25 neighborhood will likely result from the approval of

1 this variance.

2 **CONDITIONS:**

3 1. This variance is based on the drawings submitted
4 and testimony given specifically to the location of
5 the addition

6 2. All necessary Architectural Review Board and
7 building permits shall be obtained.

8 (Second by Ms. Schwartz.)

9 (Ms. Tompkins Wright, yes; Ms. Dale, yes;
10 Ms. Schmitt, yes; Mr. Premo, yes; Ms. Schwartz, yes;
11 Mr. Mietz, yes.)

12 (Upon roll, Motion to approve carries with
13 conditions.)

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1 Application 6A-02-21 (tabled form June 2, 2021).

2 Application of Save Monroe Ave., Inc. (2900
3 Monroe Avenue LLC, Cliffords of Pittsford L.P.,
4 ElexcoLand Services, Inc., Julia Kopp, Mike Boylan,
5 Anne Boylan and Steven DePerrior) appealing the
6 issuance of a building permit (building #2) by the
7 Town of Brighton Building Inspector to the Daniele
8 Family Companies, developer of the Whole Foods project
9 located at 2740 / 2750 Monroe Avenue. All as
10 described on application and plans on file. TABLED AT
11 THE JUNE 2, 2021 MEETING.

12 Motion made by Ms. Tompkins Wright to deny
13 Application 6A-02-21 as follows.

14 WHEREAS, on May 3, 2021, Save Monroe Avenue
15 Inc. (2900 Monroe Avenue, LLC, Cliffords of Pittsford,
16 L.P., Elexco Land Services, Inc., Julia D. Kopp, Mark
17 Boylan, Ann Boylan and Steven M. Deperrior)
18 (collectively, "SMA") filed application 6A-02-21 (the
19 appeal) with the Town of Brighton Zoning Board of
20 Appeals (the "ZBA") appealing the Town of Brighton
21 Building Inspector's issuance of building permit
22 number 20200419 (the second building permit) to the
23 Daniele Family Companies (the "Developer") for the
24 Whole Foods Plaza project located at 2740 Monroe
25 Avenue, 2750 Monroe Avenue, 2800 Monroe Avenue, a

1 portion of 175 Allens Creek Road and a portion of 2259
2 Clover Street (the "project"); and

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

12 WHEREAS, on June 2nd, 2021, the ZBA held a
13 regular meeting, which was duly noticed and public
14 required by law; and

15 WHEREAS, on June 2nd, 2021, the ZBA held a
16 properly noticed public hearing with respect the to
17 Appeal, and during the public hearing all persons
18 desiring to speak on the Appeal were heard and such
19 persons also submitted documents and other
20 correspondence for consideration by the ZBA, and all
21 those materials were considered by the ZBA as part of
22 the record for the Appeal; and

23 WHEREAS, on June 2nd, 2021, the ZBA closed
24 the public hearing and commenced deliberations with
25 respect to the Appeal; and

1 WHEREAS on July 7, 2021, the ZBA held a
2 regular meeting, which was duly noticed and published
3 as required by law for the ZBA to continue it's
4 deliberations with respect to the Appeal.

5 NOW, THEREFORE, on motion by Andrea Wright,
6 seconded by Ed Premo, it is hereby

7 RESOLVED, each of the Whereas Clauses in
8 this resolution are incorporated by reference as
9 specific findings of this resolution and shall have
10 the same effect as the other findings herein, and be
11 it further

12 RESOLVED, that after duly considering all of
13 the evidence before it, the ZBA in all respects
14 accepts, approves, adopts and confirms the findings
15 set forth as Attachment A, which findings are
16 incorporated herein in their entirety; and

17 RESOLVED, in accordance with the records,
18 proceedings and findings set forth as Attachment A,
19 the ZBA affirms the issuance of the second building
20 permit; and be it further

21 RESOLVED, in accordance with the records,
22 proceedings, and findings set forth as Attachment A,
23 the Appeal is denied.

24 (Ms. Schmitt, yes; Mr. Mietz, yes; Ms. Dale,
25 yes; Ms. Schwartz, no; Mr. Premo, yes; Ms. Tompkins

1 Wright, yes.)

2 (Upon roll, Motion to deny carries.)

3
4 (Proceedings concluded 9:03 p.m.)

5 * * *

6 REPORTER CERTIFICATE

7
8 I, Holly E. Castleman, do hereby certify
9 that I did report the foregoing proceeding, which was
10 taken down by me in a verbatim manner by means of
11 machine shorthand.

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

16
17 Dated this 3rd day of August, 2021
18 at Rochester, New York.

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23 Holly E. Castleman,
24 Notary Public
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At a meeting of the Zoning Board of Appeals of the Town of Brighton, held at the Brighton Town Hall, 2300 Elmwood Avenue, Brighton, N.Y. on the 7th day of July, 2020, at approximately 7:00 p.m.

PRESENT:

Dennis Mietz, Chairperson

Kathleen Schmitt
Andrea Tompkins Wright
Judy Schwartz
Jeanne Dale
Edward Premo
Zoning Board of Appeals Members

Rick DiStefano, Secretary
Kenneth W. Gordon, Town Attorney

WHEREAS, on May 3, 2021, 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 6A-02-21 (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. 20200419 (the "Second 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 Second 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 June 2, 2021, the ZBA held a regular meeting, which was duly noticed and public as required by law; and

WHEREAS, on June 2, 2021, 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 June 2, 2021, the ZBA closed the public hearing and commenced deliberations with respect to the Appeal; and

WHEREAS, on July 7, 2021, the ZBA held a regular meeting, which was duly noticed and published as required by law, where the ZBA continued its deliberations with respect to the Appeal.

NOW, THEREFORE, on Motion of Ms. Tompkins - Wright Seconded by MR. PREMIO, 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 Second 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>NO</u>
Jeanne Dale, Board Member	Voting	<u>YES</u>
Edward Premo, Board Member	Voting	<u>YES</u>

This Resolution was thereupon declared adopted.

Dated: July 7, 2021

ATTACHMENT A

EXHIBIT A - [illegible]
[illegible]

[illegible text]

ATTACHMENT B

[illegible text]

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FINDINGS
TOWN OF BRIGHTON ZONING BOARD OF APPEALS
APPLICATION 6A-02-21

Application of Save Monroe Ave., Inc., et al., appealing the issuance of a building permit (building #2) by the Town of Brighton Building Inspector to the Daniele Family Companies, developer of the Whole Foods project located at 2740 / 2750 Monroe Avenue.

BACKGROUND

I. Project 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.

II. First Building Permit and Appeal by SMA

10. On July 20, 2020, the Town of Brighton Building Inspector (the "Building Inspector") issued Building Permit No. 20180487 (the "First Building Permit") for the Project. The Building Permit was 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 First Building Permit for the Project (the "Prior Appeal").

12. On December 2, 2020, the ZBA denied the Prior Appeal pursuant Resolution and Findings attached as Exhibit 1.

13. On January 4, 2021, SMA commenced an Article 78 proceeding challenging the ZBA's Resolution and Findings upholding the issuance of the First Building Permit (see *Save Monroe Ave., Inc. v Town of Brighton Zoning Board of Appeals*, Index No. E2021000033). The first cause of action alleged that the Town failed to confirm the Developer's compliance with the cross-access easements for the AMP on the ground that the mortgage holder's approval of the same was absent. The second cause of action alleged that the Town improperly allowed multiple phase construction on the ground that the Building Permit covered erection of only the drive-thru Starbucks although the Project was required to be single phase.

14. Pursuant to Decision dated April 13, 2021, and Order and Judgment dated June 5, 2021, Supreme Court, Monroe County, among other things, denied SMA's first and second causes of action in the original Verified Petition.

III. The Second Building Permit and the Current Appeal.

15. On January 20, 2021, the Building Inspector issued Building Permit No. 20200419 (the "Second Building Permit") for the Project. The Building Permit was for "Building #2, construct a building shell for future retain tenant(s) approx. 22,380 sf tenant space and 22,700 sf building footprint."

16. On May 3, 2021, SMA filed an application with the ZBA appealing the Building Inspector's issuance of the Second Building Permit for the Project (the "Appeal").

17. SMA submitted the following documents in support of the Appeal: (i) Town of Brighton Zoning Board of Appeals Application, dated May 3, 2021; and (ii) Appeal/Notice of Appeal, dated May 3, 2021, with Exhibits A-R.

18. On May 19, 2021, in accordance with Town Law 267-a(5)(b), the Building Inspector filed with the ZBA the administrative record with bates numbers ZBA000001-ZBA000288. The Building Inspector also submitted to the ZBA a letter, dated May 19, 2021, in opposition to the Appeal.

19. On June 2, 2021, the ZBA conducted the public hearing.

DOCUMENTS CONSIDERED BY THE ZBA

20. The ZBA has considered the following documents in connection with the Appeal: (1) Letter from Hodgson Russ LLP, dated

May 3, 2021, enclosing documents associated with the Appeal; (2) Town of Brighton Zoning Board of Appeals Application, dated May 3, 2021; (3) Appeal/Notice of Appeal, dated May 3, 2021, with Exhibits A-R; (4) copy of Project Site Plan; (5) Administrative record with bates numbers ZBA000001-ZBA000288; (6) Letter from Building Inspector, dated May 19, 2021.

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 Second Building Permit; (ii) denies the Appeal; and (iii) makes the following determinations, findings, and interpretations:

I. Cross-Access Easements for the Access Management Plan and Construction Sequencing

23. SMA alleges in the Second Ground for Appeal 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. SMA argues in the Third Ground for Appeal that the Developer did not comply with the Comprehensive Development Regulations because the Developer obtained a permit allegedly allowing for phased construction in violation of the terms and conditions of the Incentive Zoning Approval and SEQRA findings for the Project.

24. The Second and Third Grounds for Appeal were also raised by SMA in the Prior Appeal, where SMA alleged with respect to the First Building Permit that: (i) 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; and (ii) 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.

25. In the ZBA's Resolution and Findings denying the Prior Appeal, the ZBA found, among other things, that: (i) the cross-access easements were executed by the grantor, recorded and enforceable, and satisfactory to substantively implement and construct the AMP; (ii) the First Building Permit authorizes site work for the entire Project Site; (iii) construction is occurring in a single phase in accordance with the Incentive Zoning Approval and Site Plan Approval; and (iv) 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.

26. SMA also raised these issues in an Article 78 proceeding challenging the First Building Permit and the ZBA's Resolution and Findings. Supreme Court has upheld the issuance of the First Building Permit and the ZBA's Resolution and Findings, holding that: (i) SMA is not "awarded any form of Article 78 relief related to the cross-access easements part of the Building Permit or ZBA appeals results"; and (ii) SMA is not "awarded any Article 78 relief in regard to the construction schedule aspect of the Building Permit or ZBA appeals results."

27. The ZBA finds that the Second and Third Grounds for Appeal are barred by the doctrines of collateral estoppel and/or res judicata. The claims and issues associated with the cross-access easements and alleged phased construction now raised by SMA in connection with the Appeal were before the ZBA and Supreme Court in connection with the Prior Appeal, and were decided against SMA.

28. During the public hearing on Appeal, SMA acknowledged that "the court had decided in large measure issues 2 and 3 that we raised in our appeal with respect to the cross access easements in the phase construction... [a]nd so the purpose of including these in our appeal to the Board is to reserve our rights and not to have it be interpreted as we're waiving those arguments because we do hope that we will be successful on appeal."

29. With respect to the merits of the Second and Third Grounds for Appeal, the ZBA adopts and incorporates by reference as if more fully set forth herein paragraphs 27 through 44 and 66 through 83 of its Findings of Fact and Determinations adopted on December 2, 2020 in connection with the Prior Appeal. See Ex. 1.

30. This portion of the Appeal is denied.

II. Square Footage of Building #2

31. SMA alleges in the First Ground for Appeal that the Second Building Permit was issued in violation of the Comprehensive Development Regulations because the Second Building Permit is not in conformity with the Site Plan Approval for the Project.

32. Section 73-12(A) of the Brighton Town Code provide that the Building Inspector "shall review or cause to be reviewed applications for permits, together with the plans, specifications and documented filed therewith."

33. Section 73-12(B) of the Brighton Town Code provides that "[u]pon the payment of the required fee, with the approval of the Associate Planner and upon satisfactory proof being given that the applicant is in compliance with the applicable provisions, rules and regulations of this article and of the Comprehensive Development Regulations, a permit may be issued by and bear the name and signature of the Building Inspector(s) or Fire Marshal, as may be appropriate."

34. Section 225-1 of the Comprehensive Development Regulations provides that "[n]o building permit shall be issued unless the proposed construction or use is in full conformity with all provisions of the Comprehensive Development Regulations."

35. Section 225-3(B) of the Comprehensive Development Regulations provides that "[n]o building permit shall be issued for any building subject to site plan approval by the Planning Board, or subject to review by the Architectural Review Board, except in conformity with the plans approved by either or both of the said Boards as appropriate."

36. According to the Town Associate Planner, "building square footage is based on building footprint measured from the exterior faces of the exterior walls of the building. The square footage of buildings does not include architectural projections, such as canopies or awnings." The ZBA finds that this interpretation is in accordance with Section 201-5 of the Comprehensive Development Regulations, which defines "floor area" as "[t]he sum of the gross horizontal area of the several floors of the building or buildings on a lot, measured from the exterior faces of exterior walls..."

37. The approved Site Plan depicts Building #2 as having a footprint of 22,250 square feet. (ZBA000222). The site/plot plan filed as part of the building permit package indicates that Building #2 has a "Buildable Area" or "GFA" (gross floor area) of 22,380 square feet. (ZBA000008). The ZBA finds that the gross floor area on the site/plot plan is the footprint or floor area of Building #2.

38. The Second Building Permit also references a "22,700 sf building footprint." (ZBA000001). According to the Town Associate Planner, this is the overall square footage of Building #2 that is utilized to calculate the building permit fees due to the Town. This figure includes "architectural and other elements, that, while part of

the overall building design, are in addition to the building footprint reflected on the site plan." These additional architectural elements are approximately 420 square feet based on the calculations performed by the Town Architect.

39. The ZBA finds that the Second Building Permit authorizes construction of Building #2 at a floor area of approximately 22,380 square feet, 130 square feet more than the 22,250 square feet referenced on the Site Plan.

40. According to the Town Associate Planner, who has held the position for approximately 25 years and reviewed thousands of building permits based upon site plan applications, the referenced provisions of the Brighton Town Code and Comprehensive Development Regulations, including Section 225-3(B) of the Comprehensive Development Regulations, require "conformity rather than mathematical precision, which allows for engineering tolerances and reasonable limits of variation in the square footage measurements without significantly affecting the overall building."

41. During the public hearing, in response to questions from the ZBA, the Town Associate Planner stated that it is usually not the case that a building plan submitted with a building permit application will match exactly with the square footage on an approved site plan. A site plan is drawn by an engineer, as compared to building plans drawn by an architect utilizing "CAD" (computer aided design) that provides a more precise square footage. The Town Associate Planner further stated that, in determining conformity, the Planning Department reviews conformance of the building with setbacks and whether the building is placed in the correct location as approved by the Planning Board.

42. The ZBA finds and interprets the language of Section 225-3(B) of the Comprehensive Development Regulations, providing that no building permit shall be issued except "in conformity with" the site plan, as not requiring exact mathematical precision. Consistent with the language of the section, and custom and practice of the Town, the ZBA finds and interprets the language of Section 225-3(B) of the Comprehensive Development Regulations as allowing engineering tolerances and minor mathematical deviations between the square footage as shown on a site plan and the square footage on the building permit.

43. As established by the administrative record, the Project square footage is well within the maximum project density of 83,700 square feet as conditioned by the Incentive Zoning Approval and surveys confirm that Building #2 is located in the exact location as the site plan and in compliance with the site plan setback requirements as approved by the Planning Board. During the public hearing, the Town Associate Planner confirmed several times that the

overall square footage of the Project will not exceed 83,700 square feet.

44. SMA also alleges that the Second Building Permit violates the Project approvals under SEQRA on the grounds that the Town Board as lead agency did not study the impact of a Building #2 larger than 22,250 square feet. The SEQRA Findings Statement adopted by the Town Board studied the impact of a ±31,780 square foot retail building, which was reduced as part of the Site Plan approval process by the Planning Board. (ZBA000123, 209, 222). Further, as stated, the overall square footage of the Project will not exceed 83,700 square feet as approved in the SEQRA Findings Statement adopted by the Town Board and Incentive Zoning Approval.

45. During the public hearing, SMA suggested that the Building Inspector failed to sufficiently explain Town notes containing the statement "Area = 22,380 SF (from inside of walls)." The Town Associate Planner explained in his written submission that this notation was a mistake, and that the Town Architect separately calculated the floor area of Building #2 as 22,387 square feet. Because under Section 201-5 of the Comprehensive Development Regulations "floor area" is measured from the exterior faces of the exterior walls of the building, the ZBA finds that the reference in the notes to "inside of walls" is a mistake as indicated by the Town Associate Planner. Otherwise, considering the Town Architect's separate calculations, which are virtually identical to those prepared with CAD, a contrary finding would conflict with the definition of "floor area" contained in the Comprehensive Development Regulations.

46. The 130-foot difference in the footprint for Building #2 as approved in the Second Building Permit amounts to less than a 0.6% deviation from the Site Plan. The ZBA finds the difference in overall square footage between the Site Plan and Second Building Permit to be trivial or de minimis. Based on the administrative record, the ZBA finds that: (i) the overall density of the Project has not changed as a result of the Second Building Permit; (ii) the overall square footage of the Project will not exceed 83,700 square feet; (iii) Building #2 is being placed as shown on the Site Plan; and (iv) Building #2 meets all the setback and other requirements. The ZBA finds that the Second Building Permit was issued in conformity with the Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations.

47. The ZBA finds that SMA has not met its burden of showing that the Second Building Permit was not issued in conformity with the Site Plan for the Project.

48. This portion of the Appeal is denied.

CONCLUSION

49. In accordance with the records, proceedings, and above Findings, the ZBA finds that: (i) the Building Inspector properly issued the Second 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 Second 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 Second Building Permit.

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

51. The Building Inspector's issuance of the Second 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 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

10-12-32
10-10-32

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CONCLUSION

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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 Bohner, 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.