

**A G E N D A**  
**BOARD OF APPEALS - TOWN OF BRIGHTON**  
**NOVEMBER 3, 2021**

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

Written comments will be received by Rick DiStefano, Secretary, Brighton Town Hall, 2300 Elmwood Avenue, Rochester, NY 14618 via standard mail and/or via e-mail to [rick.distefano@townofbrighton.org](mailto:rick.distefano@townofbrighton.org), until November 3, 2021 at 12:00 PM.

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

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

7:00 P.M.

**CHAIRPERSON:** Call the meeting to order.

**SECRETARY:** Call the roll.

**CHAIRPERSON:** Approve the minutes of the September 1, 2021 meeting.  
Approve the minutes of the October 6, 2021 meeting. **To be done at the December 1, 2021 meeting.**

**CHAIRPERSON:** Announce that the public hearings as advertised for the BOARD OF APPEALS in the Daily Record of October 28, 2021 will now be held.

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11A-01-21 Application of Amanda and Michael Dreher, owners of property located at 1300 French Road, for 1) an Area Variance from Sections 203-2.1B(3) and 203-9A to allow for a detached garage to be 960 sf in size in lieu of the maximum 600 sf allowed by code; and 2) an Area Variance from Section 207-6A(1) to allow said detached garage to be 20 ft. 2 in. in height in lieu of the maximum 16 ft. allowed by code. All as described on applications and plans on file.

11A-02-21 Application of Katherine Solano, owner of property located at 4 Cardiff Park, for Area Variances from Sections 203-2.1B, 203-9A(4) and 207-6A(2) to allow for a shed to be located in a side yard and less than 5 ft. from a lot line in lieu of the rear yard no closer than 5 ft. to a lot line as required by code. All as described on application and plans on file. **POSTPONED AT APPLICANTS REQUEST**

**CHAIRPERSON:** Announce that public hearings are closed.

**NEW BUSINESS:**

NONE

OLD BUSINESS:

9A-03-21 Application of Jeffrey Ashline, architect and Joel Thompson, owner of property located at 36 Eastland Avenue, for 1) an Area Variance from Sections 203-2.1B(3) and 203-9A(4) to allow for the construction of a detached garage 672 sf in size in lieu of the maximum 600 sf allowed by code; and 2) an Area Variance from Section 207-6A(1) to allow said garage to be 18 ft. 3.25 in. in height (modified from 19 ft. 5 in. in height) in lieu of the maximum 16 ft. allowed by code. All as described on application and plans on file. **TABLED AT THE OCTOBER 6, 2021 MEETING, PUBLIC HEARING CLOSED**

Additional Info 9A-06-21 Application of Bell Atlantic Mobile Systems LLC, lessee, and 1850 WRS LLC, owner of property located at 1850 Winton Road South, for an Area Variance from Section 207-42C(1)(b) to allow for the installation of cellular support equipment on the ground outside the building in lieu of inside the building as required by code. All as described on application and plans on file. **TABLED AT THE OCTOBER 6, 2021 MEETING, PUBLIC HEARING CLOSED**

9A-08-21 Application of Save Monroe Ave., Inc. (2900 Monroe Avenue LLC, Cliffords of Pittsford L.P., Elexco Land Services, Inc., Julia Kopp, Mike Boylan, Anne Boylan and Steven DePerrior) appealing the issuance of a building permit (3<sup>rd</sup> building - Whole Foods) 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. All as described on application and plans on file. **TABLED AT THE OCTOBER 6, 2021 MEETING, PUBLIC HEARING CLOSED**

9A-09-21 Application of Brighton Grassroots, LLC, appealing the issuance of a building permit (3<sup>rd</sup> building - Whole Foods) by the Town of Brighton Building Inspector (pursuant to Section 219-3) to the Daniele Family Companies, developer of the Whole Foods Plaza project located at 2740 / 2750 Monroe Avenue. All as described on application and plans on file. **TABLED AT THE OCTOBER 6, 2021 MEETING, PUBLIC HEARING CLOSED**

PRESENTATIONS:

NONE

COMMUNICATIONS:

Letter, with attachments, from Nancy Guerdat, 12 Cardiff Park, dated October 22, 2021, with comments and concerns regarding application 11A-02-21, 4 Cardiff Park.

Letter from Kate Solano, 4 Cardiff Park, dated October 22, 2021, requesting postponement of application 11A-02-21 to the December 1, 2021 meeting.

Letter, with attachments, from Jeffrey Ashline, Mossien Associates Architects, dated November 1, 2021, modifying application 9A-03-21, 36 Eastland Avenue.

PETITIONS:

NONE



Rick DiStefano <rick.distefano@townofbrighton.org>

## Response to Shed Variance 4 Cardiff Park

1 message

**Nancy Guerdat** <ncguerdat@gmail.com>  
To: rick.distefano@townofbrighton.org

Fri, Oct 22, 2021 at 1:08 PM

Hi Rick,

Thank you for getting back to me! Attached is our response to the shed variance requested by the Solanos for 4 Cardiff Park along with pictures. Could this be read at the Board meeting? Would it be better if we read it? Are Board meetings on Zoom?

Thanks for your help with this.

Sincerely,  
Nancy Guerdat  
12 Cardiff Park

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3 attachments



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10523K



PXL\_20210824\_143841286.MP.jpg  
14506K

[Shed.pdf](#)  
65K

In response to the variance requested by our neighbors Kate and Alex Solano, 4 Cardiff Park

On or about August 6, 2021, the Solanos started construction of a shed in their side yard, at the southeast corner (front edge) of their house. This shed is does not adhere to the 5 foot spacing from our property line, nor is it in the backyard, as required. My husband spoke to Alex, twice, and voiced his concerns that the shed was too close to the line and should not be in the side yard, thus not conforming to town code. Each time Alex assured him he had spoken to the town and the town said it was okay. I then emailed Mike Guyon asking if this did in fact meet code and was told the town would look into it.

This shed is all we can see from the bay window in our living room. It is unsightly. The distance between our two houses is small and this structure should not be allowed. While there are three other houses with sheds attached to the sides, their placements and sizes preclude viewing from a neighbor's window and none from a living room window. As noted in the Solano's request for a variance, our bushes are tall but are due to their request to keep them as tall as possible. We don't like that them that tall, as it makes the bushes more difficult to trim from our side. Both parties agreed that the Solanos would maintain their side of the bushes but rarely do so. When we did fully trim them we had to enter their property to trim and clean up. We were trying to be good neighbors but then were told we had trespassed. Our preference would be to remove the bushes, especially since an application for a backyard fence by the Solanos has already been entered. When the fence is installed, the shed would have no bearing on access to trim since the fence would preclude trimming and we would have to trespass in any event.

The Solanos have over one acre of land on the west side, with no neighbors, this shed does not need to be placed in this spot. They have adequate space in their backyard, adjacent to the back door to their garage or on the rear wall, or even the existing chicken coop, which would enhance the ability to use the stored garden implements. Placement there would conform to code and allow them easy access to whatever they wish to store in the shed. In addition, the view from our deck is immaterial due to the layout of our deck as well as the impending backyard fence, as noted above.

This is not the first time they have ignored town code and process. In May of 2020, they widened their driveway, on our side, by dumping a load of gravel that came within a few inches or so of the property line. We asked the town for assistance and the town told them they should have had a permit and since the driveway was not in compliance they needed a variance. After a few conversations and some cleanup and edging with the gravel we conceded to this modification. The variance, Application 10A-01-20, was discussed on October 7, 2020, with Kate Solano stating they would be paving the driveway in the Spring of 2021. The driveway is still only a few to several inches from the property line, half paved and half gravel.

This shed is not something we wish to look at. We feel, unlike the driveway, there is adequate room in the back of their yard or on the west side to accommodate their needs. We would also appreciate existing projects already submitted by the Solanos to be completed prior to any others being approved.

Thank you for your time and consideration.

Photos attached...





# Katherine Solano

4 Cardiff Park  
Rochester, NY 14610  
315.247.9482  
kategsolano@gmail.com

22 October 2021

**Rick DiStefano**  
Town Planner, Town of Brighton  
2300 Elmwood Ave  
Rochester, NY 14618

**RECEIVED**  
**OCT 27 2021**  
**TOWN OF BRIGHTON**  
**BUILDING & PLANNING**

Dear Mr. DiStefano and the Board of Appeals,

I am writing to formally request to adjourn my variance application until the December 2021 Board of Appeals meeting. I was just notified by the U.S. Embassy of Managua that my presence is mandatory at a visa interview for my stepdaughter on November 3rd. Therefore, I will be out of the country at the time of the November meeting. My husband must travel with me as well, therefore we don't have anyone who can represent us at the meeting.

Thank you for considering this unique request and I appreciate your flexibility.

Sincerely,



Kate Solano



Mr. Rick DiStefano  
Secretary  
Town of Brighton  
2300 Elmwood Avenue  
Rochester, NY 14618  
[Rick.distefano@townofbrighton.org](mailto:Rick.distefano@townofbrighton.org)

November 1, 2021

**Attn: Zoning Board of Appeals**

RE: **36 Eastland Avenue, Rochester NY 14618**  
**MAA #2021 033**

Dear Members of the Zoning Board

Please find this letter and attached sketch dated November 1, 2021 as supplemental information related to our ZBA application for the following:

1. An Area Variance from Sections 203-2.1B(3) and 203-9A(4) to allow for the construction of a detached garage 672 sf in size in lieu of the maximum 600 sf allowed by code; and
2. An Area Variance from Section 207- 6A(1) to allow said garage to be 19 ft. 5 in. in height in lieu of the maximum 16 ft. allowed by code. (*Update – Requesting an Area Variance to allow said garage to be 18'-3 1/4" +/-, in lieu of the maximum 16ft allowed by code. This is a reduction of approximately 1'-1 3/4" from the originally submitted building height.*)

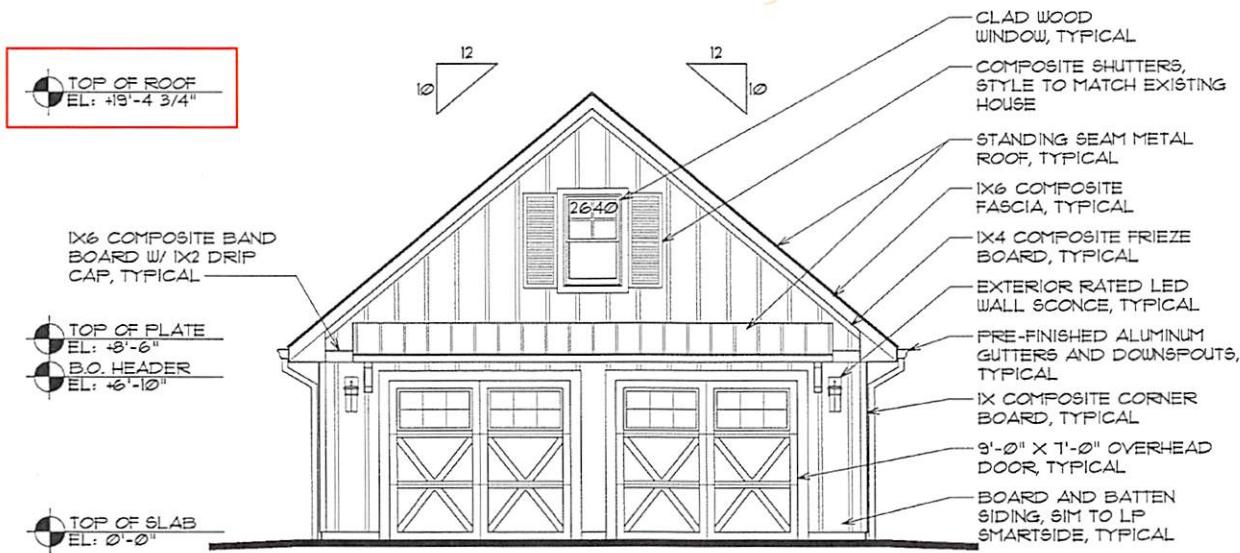
The Owner has asked if we can reduce the roof pitch from 10:12 to 9:12, thus reducing the overall proposed garage height by more than a foot from what was originally shown. This would be a modification to the original height variance request but one that we feel is a nice compromise based on ZBA feedback to date.

Should you have any questions please do not hesitate to contact our office.

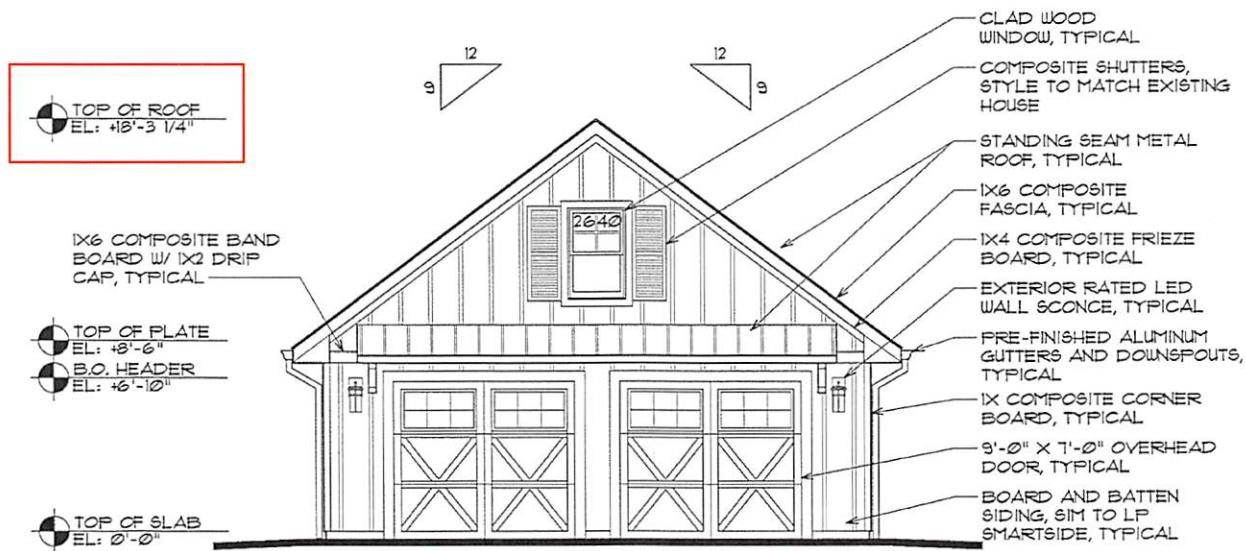
Sincerely,

A handwritten signature in black ink, appearing to read 'J. M. Ashline'.

Jeffrey M. Ashline  
Sr. Project Manager  
**MOSSIEN ASSOCIATES ARCHITECTS, P.C.**



Original Design, 10:12 Pitch



Modified Design, 9:12 Pitch

State Environmental Quality Review

**NEGATIVE DECLARATION**

Notice of Determination of Non-Significance

**Project Number:** ER-10-21 *19A-06-21*      **Date:** November 3, 2021

This notice is issued pursuant to Part 617 of the implementing regulations pertaining to Article 8 (State Environmental Quality Review Act) of the Environmental Conservation Law.

The Brighton Zoning Board of Appeals, as lead agency, has determined that the proposed action described below will not have a significant effect on the environment and a Draft Environmental Impact Statement will not be prepared.

**Name of Action:** Application of Bell Atlantic Mobile Systems LLC, lessee, and 1850 WRS LLC, owner

**SEQR Status:** Unlisted

**Conditioned Negative Declaration:** No

**Description of Action:** Application for an area variance from Section 207-42C(1)(b) to allow for the installation of cellular support equipment on the ground outside the building in lieu of inside the building

**Location:** 1850 Winton Road South, Brighton N.Y., Monroe County

**Reasons Supporting This Determination:**

Based on information submitted to the lead agency and after considering the action contemplated and reviewing the Environmental Assessment Form prepared by the applicant, the Criteria for determining significance in the SEQR regulations and other supplemental information, documentation, testimony and correspondence, the Town Zoning Board Appeals finds that the proposed action will not have a significant impact on the environment based on the following findings:

1. Air, Water, Waste, Erosion, Drainage, and Site Disturbance.

The equipment will be installed on an existing concrete pad. There will be no ground penetration, no alteration of the earth surrounding the concrete pad, and there will be no impact on any of water quality, watercourse flood-carrying capacities. The grading plan indicates the equipment will not be located in either the floodplain or floodway. The proposed project will not create any significant adverse impact in the existing air quality or water quality, nor in solid waste production, nor potential for erosion, nor promote flooding or drainage problems.

2. Noise, Visual, and Neighborhood Character.

The Project will not impact the neighborhood character of the surrounding area nor will it create any adverse noise or visual impacts. The project is located in an office park which abuts NYS 590. The proposed equipment will be located behind the building and will not be visible from Winton Rd S. There are no additions or increase in building density proposed as part of this Project.

The nature of the improvements to be made as part of this Project and the intensity of the proposed uses are consistent with the existing uses within the surrounding office uses.

The project will not be detrimental to the health, safety or general welfare of persons residing or working in the area of the proposed use or will not be detrimental or injurious to the property and improvements in the area or to the general welfare of the Town.

3. Agriculture, Archeology, Historic, Natural, or Cultural Resources.

The equipment will be installed on an existing concrete pad with minimum. The Project will not adversely impact agricultural, archeological, historical, natural, or cultural resources. The EAF Mapper Summary Report indicates that the project area is located near archaeologically sensitive areas. Minimal site improvements disturbance will be made to the property. The Project area has also been previously disturbed during the construction of the existing building. There are no known archaeological resources within project site.

4. Vegetation, Fish, Wildlife, Significant, Habitats, Threatened or Endangered Species, Wetlands, Flood Plains.

The Project will not have a significant adverse impact on plant or animal life. The property does not host any threatened or endangered species, and therefore the Project will have no impact on any threatened or endangered species. There are no State or Federal wetlands on the property, and the project is not within any designated floodway or floodplain. Therefore, the Project will have no significant adverse impact on any wetlands or floodplains.

5. Community Plans, Use of Land, and Natural Resources.

The project is located in a BE-1 - Office and Office Park District and will need to obtain an area variance to allow for the installation of cellular support equipment on the ground outside the building in lieu of inside building. The Town's Comprehensive Plan does not specifically address the property. The Project is consistent with a number of the Plans recommendations. The Project The equipment will be installed on an existing concrete pad and will have no adverse impacts on the natural resources found on the site.

6. Critical Environmental Area.

The Project will not have an impact on any designated Critical Environmental Area as set forth in 6 N.Y.C.R.R. Section 617.14(g).

7. Traffic.

The proposed project will not generate any additional vehicle trips to or from the project site. The Project will not have a significant adverse impact on vehicular, bicycle, or pedestrian traffic. Thus, the Project will not result in any significant adverse traffic impacts.

8. Public Health and Safety.

The Project will not have a significant adverse impact on public health or safety. The Project is subject to all applicable Federal, State, and Local laws, regulations, and code requirements including all requirements.

Pursuant to SEQRA, based on the abovementioned information, documentation, testimony, correspondence, and findings, and after examining the relevant issues, including all relevant issues raised and recommendations offered by involved and interested agencies and Town Staff, the Lead Agency determines that the Project will not have a significant adverse impact on the environment, which constitutes a negative declaration, and, therefore, SEQRA does not require further action relative to the Project.

The Lead Agency has made the following additional determinations:

- A. The Lead Agency has met the procedural and substantive requirements of SEQRA.
- B. The Lead Agency has carefully considered each and every criterion for determining the potential significance of the Project upon the environment as set forth in SEQRA, and the Lead Agency finds that none of the criteria for determining significance set forth in SEQRA would be implicated as a result of the Project.
- C. The Lead Agency has carefully considered (that is, has taken the required “hard look” at) the Project and the relevant environmental impacts, facts, and conclusions in connection with same.
- D. The Lead Agency has made a reasoned elaboration of the rationale for arriving at its determination of environmental non-significance, and the Lead Agency’s determination is supported by substantial evidence, as set forth herein
- E. To the maximum extent practicable, potential adverse environmental impacts will be largely avoided or minimized by the Applicant’s careful incorporation in its application materials of measures designed to avoid such impacts that were identified as practicable.

Date Issued: November 3, 2021

For Further Information: Contact Ramsey A. Boehner, Environmental Review Liaison Officer, Building and Planning Department, Town of Brighton, 2300 Elmwood Avenue, Rochester, New York 14618, (585) 784-5229 or [ramsey.boehner@townofbrighton.org](mailto:ramsey.boehner@townofbrighton.org)

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 3rd day of November, 2021, at approximately 7:00 p.m.

**PRESENT:**

Dennis Mietz, Chairperson

Andrea Tompkins Wright  
Judy Schwartz  
Kathleen Schmitt  
Edward Premo  
Heather McKay-Drury (recused)  
Zoning Board of Appeals Members

Rick DiStefano, Secretary  
Kenneth W. Gordon, Town Attorney

WHEREAS, on or about July 19, 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 9A-08-21 (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. 20200504 (the "Third 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; and

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

WHEREAS, on October 6, 2021, the ZBA held a regular meeting, which was duly noticed and public as required by law; and

WHEREAS, on October 6, 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 October 6, 2021, the ZBA closed the public hearing and commenced deliberations with respect to the Appeal; and

WHEREAS, on November 3, 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 \_\_\_\_\_, Seconded by \_\_\_\_\_, it is hereby

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

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

RESOLVED, in accordance with the records, proceedings, and Findings set forth as Attachment A, the ZBA affirms the issuance of the Third 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	_____
Andrea Tompkins Wright, Board Member	Voting	_____
Judy Schwartz, Board Member	Voting	_____
Kathleen Schmitt, Board Member	Voting	_____
Edward Premo, Board Member	Voting	_____
Heather McKay-Drury, Board Member	Voting	RECUSED

This Resolution was thereupon declared adopted.

Dated: November 3, 2021

**ATTACHMENT A**

**FINDINGS**  
**TOWN OF BRIGHTON ZONING BOARD OF APPEALS**  
**APPLICATION 9A-08-21**

Application of Save Monroe Ave., Inc., et al., appealing the issuance of a building permit (Building #1) 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 First 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 "First Appeal").

12. On December 2, 2020, the ZBA denied the First 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, New York Office of the Building Inspector*, Index No. E2021000033. The first cause of action alleged 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 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 Second Appeal by SMA**

15. On January 20, 2021, the Building Inspector issued Building Permit No. 20200419 (the "Second Building Permit") for the Project. The Second 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 "Second Appeal").

17. On July 7, 2021, the ZBA denied the Second Appeal pursuant Resolution and Findings attached as Exhibit 2.

### **IV. The Third Building Permit and the Current Appeal**

18. On May 21, 2021, the Building Inspector issued Building Permit No. 20200504 (the "Third Building Permit") for the Project. The Third Building Permit was for "Building #1, a 50,000 sf building shell for future retail tenant."

19. On or about July 15, 2021, SMA filed an application with the ZBA appealing the Building Inspector's issuance of the Third Building Permit for the Project (the "Appeal").

20. SMA submitted the following documents in support of the Appeal: (1) Town of Brighton Zoning Board of Appeals Application,

dated July 15, 2021; (2) Appeal/Notice of Appeal, dated July 19, 2021, with Exhibit A-C; and (3) copy of Project site plan.

21. On August 20, 2021, in accordance with Town Law 267-a(5)(b), the Building Inspector filed with the ZBA the administrative record with bates numbers ZBA000001-ZBA000214. The Building Inspector also submitted to the ZBA a letter, dated August 20, 2021, in opposition to the Appeal.

22. On October 6, 2021, the ZBA conducted the public hearing.

#### DOCUMENTS CONSIDERED BY THE ZBA

23. The ZBA has considered the following documents in connection with the Appeal: (1) Letter from Hodgson Russ LLP, dated July 19, 2021, enclosing documents associated with the Appeal; (2) Town of Brighton Zoning Board of Appeals Application, dated July 15, 2021; (3) Appeal/Notice of Appeal, dated July 19, 2021, with Exhibits A-C; (4) copy of Project Site Plan; (5) Administrative record with bates numbers ZBA000001-ZBA000214; and (6) Letter from Building Inspector, dated August 20, 2021.

#### JURISDICTION AND STANDARD OF REVIEW

24. 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).

25. 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 Third 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

26. 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.

27. The Second and Third Grounds for Appeal were also raised by SMA in the First Appeal and Second 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.

28. In the ZBA's Resolution and Findings denying the First 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. The foregoing findings were also incorporated by reference in the ZBA's Resolution and Findings denying the Second Appeal.

29. SMA also raised these issues in an Article 78 proceeding challenging the First Building Permit and the ZBA's Resolution and Findings denying the First Appeal. Supreme Court has upheld the issuance of the First Building Permit and the ZBA's Resolution and Findings denying the First Appeal, 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."

30. 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 First Appeal, and were decided against SMA.

31. 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 First Appeal. See Ex. 1.

32. This portion of the Appeal is denied.

## **II. Square Footage of Building #1**

33. SMA alleges in the First Ground for Appeal that the Third Building Permit allows the construction of a building (Building #1) larger than the size approved in the site plan.

34. 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."

35. 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."

36. 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."

37. 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."

38. The Incentive Zoning Resolution provides for the following condition: "The food market (Whole Foods) shall not exceed 50,000 square feet...." (ZBA000125).

39. The approved Site Plan depicts Building #1 as having a footprint of 50,000 square feet. (ZBA000145). The site/plot plan filed as part of the building permit package indicates that Building #1 has a "Buildable Area" or "GFA" (gross floor area) of 50,000 square feet. (ZBA000008).

40. Section 201-5 of the Comprehensive Development Regulations 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...." The ZBA finds that the floor

area on the site/plot plan is the footprint or floor area of Building #2.

41. The Developer's architect has certified that "using CAD, the exterior walls of Building #1 of the Wholefoods Plaza in Brighton NY measures 50,000 square feet as designed." (ZBA000046).

42. The ZBA finds that the Third Building Permit authorizes construction of Building #1 at a floor area of 50,000 square feet, the exact square footage referenced on the Site Plan and as authorized by the Incentive Zoning Resolution.

43. SMA alleges that the Third Building Permit was issued in violation of the Comprehensive Development Regulations, the approved site plan, and prior approvals, because the Town failed to require elimination of square footage from Building #1 to compensate for the "excess square footage added to Building #2."

44. In the ZBA's Resolution and Findings denying the Second Appeal, the ZBA found that the Second Building Permit was issued in conformity with the Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations. See Ex. 2.

45. The Incentive Zoning Resolution provides as a condition that "the maximum building development on the [Project Site] shall not exceed 83,700 square feet." (ZBA000125). At the time of the public hearing, the Town had issued three building permits authorizing the construction of three buildings totaling 74,377 square feet, as follows: (i) First Building Permit - Starbucks building (1,997 square feet); (ii) Second Building Permit - Building #2 (22,380 square feet); and (iii) Third Building Permit - Building #1 (50,000 square feet). In both written submissions and during the public hearing, the Town Associate Planner indicated that the Town would not approve building permits for Building #4 or Building #5 in excess of 9,323 square feet, and the overall Project will not exceed 83,700 square feet.

46. The Third Building Permit also references that the "53,330 Area (sq ft) above is comprised of 50,000 sf building footprint, 3100 sf canopies and 230 sf ramp." According to the Town Associate Planner, this is the overall square footage of Building #1 that is utilized to calculate the building permit fees due to the Town. This figure includes "architectural projections and other elements. The square footage of buildings on an approved site plan does not include architectural projections." These additional architectural elements are approximately 3,330 square feet based on the calculations performed by the Town Architect, but do not comprise the building footprint.

47. The ZBA finds that the Third Building Permit was issued in conformity with the Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations. The ZBA finds that SMA has

not met its burden of showing that the Third 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 Third 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 Third 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 Third 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 Third 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 3rd day of November, 2021, at approximately 7:00 p.m.

**PRESENT:**

Dennis Mietz, Chairperson

Andrea Tompkins Wright  
Judy Schwartz  
Kathleen Schmitt  
Edward Premo  
Heather McKay-Drury (recused)  
Zoning Board of Appeals Members

Rick DiStefano, Secretary  
Kenneth W. Gordon, Town Attorney

WHEREAS, on or about July 20, 2021, Brighton Grassroots, LLC ("BGR") filed Application 9A-09-21 (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. 20200504 (the "Third 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; and

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

WHEREAS, on October 6, 2021, the ZBA held a regular meeting, which was duly noticed and public as required by law; and

WHEREAS, on October 6, 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 October 6, 2021, the ZBA closed the public hearing and commenced deliberations with respect to the Appeal; and

WHEREAS, on November 3, 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 \_\_\_\_\_, Seconded by \_\_\_\_\_, it is hereby

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

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

RESOLVED, in accordance with the records, proceedings, and Findings set forth as Attachment A, the ZBA affirms the issuance of the Third 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	_____
Andrea Tompkins Wright, Board Member	Voting	_____
Judy Schwartz, Board Member	Voting	_____
Kathleen Schmitt, Board Member	Voting	_____
Edward Premo, Board Member	Voting	_____
Heather McKay-Drury, Board Member	Voting	RECUSED

This Resolution was thereupon declared adopted.

Dated: November 3, 2021

**ATTACHMENT A**

**FINDINGS**  
**TOWN OF BRIGHTON ZONING BOARD OF APPEALS**  
**APPLICATION 9A-09-21**

Application of Brighton Grassroots, LLC appealing the issuance of a building permit (Building #1) 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 BGR**

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

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

13. On January 4, 2021, BGR commenced an Article 78 proceeding challenging the ZBA's Resolution and Findings upholding the issuance of the First Building Permit. See *Brighton Grassroots, LLC. v. Town of Brighton Zoning Board of Appeals*, Index No. E2021000039. The first cause of action alleged 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. The second cause of action alleged 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.

14. Pursuant to Decision dated April 13, 2021, and Order and Judgment dated June 15, 2021, Supreme Court, Monroe County, among other things, denied BGR's first and second causes of action in the Verified Petition.

### **III. The Second Building Permit and appeal by Save Monroe Avenue, Inc. only**

15. On January 20, 2021, the Building Inspector issued Building Permit No. 20200419 (the "Second Building Permit") for the Project. The Second 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, 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 ZBA appealing the Building Inspector's issuance of the Second Building Permit for the Project (the "SMA Second Appeal").

17. BGR did not appeal the issuance of the Second Building Permit.

18. On July 7, 2021, the ZBA denied the SMA Second Appeal pursuant Resolution and Findings attached as Exhibit 2.

### **IV. The Third Building Permit and the Current Appeal**

19. On May 21, 2021, the Building Inspector issued Building Permit No. 20200504 (the "Third Building Permit") for the Project. The Third Building Permit was for "Building #1, a 50,000 sf building shell for future retail tenant."

20. On or about July 20, 2021, BGR filed an application with the ZBA appealing the Building Inspector's issuance of the Third Building Permit for the Project (the "Appeal").

21. BGR submitted the following documents in support of the Appeal: (1) Town of Brighton Zoning Board of Appeals Application, dated July 20, 2021; and (2) Corrected Appeal to ZBA/Notice of Appeal, dated July 20, 2021, with Exhibit A.

22. The Appeal does not raise any substantive arguments, but states that it is "based on the same facts and arguments set forth in Save Monroe Avenue, Inc.'s appeal of the Third Building Permit."

23. On August 20, 2021, in accordance with Town Law 267-a(5)(b), the Building Inspector filed with the ZBA the administrative record with bates numbers ZBA000001-ZBA000214. The Building Inspector also submitted to the ZBA a letter, dated August 20, 2021, in opposition to the Appeal.

24. On October 6, 2021, the ZBA conducted the public hearing.

#### DOCUMENTS CONSIDERED BY THE ZBA

25. The ZBA has considered the following documents in connection with the Appeal: (1) Town of Brighton Zoning Board of Appeals Application, dated July 20, 2021 (submitted BGR); (2) Corrected Appeal to ZBA/Notice of Appeal, dated July 20, 2021, with Exhibit A (submitted by BGR); (3) Letter from Hodgson Russ LLP, dated July 19, 2021, enclosing documents associated with the Appeal (submitted by SMA); (4) Town of Brighton Zoning Board of Appeals Application, dated July 15, 2021 (submitted by SMA); (5) Appeal/Notice of Appeal, dated July 19, 2021, with Exhibits A-C (submitted by SMA); (6) copy of Project Site Plan (submitted by SMA); (7) Administrative record with bates numbers ZBA000001-ZBA000214; and (8) Letter from Building Inspector, dated August 20, 2021.

#### JURISDICTION AND STANDARD OF REVIEW

26. 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).

27. 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 Third 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

28. SMA alleges in its appeal that the Developer (1) 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 (2) 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.

29. These grounds for appeal were also raised by BGR in the First Appeal, where BGR 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.

30. In the ZBA's Resolution and Findings denying the First 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.

31. BGR also raised these issues in an Article 78 proceeding challenging the First Building Permit and the ZBA's Resolution and Findings denying the First Appeal. Supreme Court has upheld the issuance of the First Building Permit and the ZBA's Resolution and Findings denying the First Appeal, holding that: (i) BGR 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) BGR is not "awarded any Article 78 relief in regard to the construction schedule aspect of the Building Permit or ZBA appeals results."

32. The ZBA finds that these 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 BGR in connection with the Appeal were before the ZBA and Supreme Court in connection with the First Appeal, and were decided against BGR.

33. With respect to the merits of these grounds for appeal, the ZBA adopts and incorporates by reference as if more fully set forth herein paragraphs 44 through 80 of its Findings of Fact and Determinations adopted on December 2, 2020, in connection with the First Appeal. See Ex. 1.

34. This portion of the Appeal is denied.

## II. Square Footage of Building #1

35. SMA alleges in its appeal that the Third Building Permit allows the construction of a building (Building #1) larger than the size approved in the site plan.

36. 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."

37. 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."

38. 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."

39. 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."

40. The Incentive Zoning Resolution provides for the following condition: "The food market (Whole Foods) shall not exceed 50,000 square feet...." (ZBA000125).

41. The approved Site Plan depicts Building #1 as having a footprint of 50,000 square feet. (ZBA000145). The site/plot plan

filed as part of the building permit package indicates that Building #1 has a "Buildable Area" or "GFA" (gross floor area) of 50,000 square feet. (ZBA000008).

42. Section 201-5 of the Comprehensive Development Regulations 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..." The ZBA finds that the floor area on the site/plot plan is the footprint or floor area of Building #2.

43. The Developer's architect has certified that "using CAD, the exterior walls of Building #1 of the Wholefoods Plaza in Brighton NY measures 50,000 square feet as designed." (ZBA000046).

44. The ZBA finds that the Third Building Permit authorizes construction of Building #1 at a floor area of 50,000 square feet, the exact square footage referenced on the Site Plan and as authorized by the Incentive Zoning Resolution.

45. SMA alleges in its appeal that the Third Building Permit was issued in violation of the Comprehensive Development Regulations, the approved site plan, and prior approvals, because the Town failed to require elimination of square footage from Building #1 to compensate for the "excess square footage added to Building #2."

46. In the ZBA's Resolution and Findings denying the SMA Second Appeal, the ZBA found that the Second Building Permit was issued in conformity with the Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations. See Ex. 2.

47. The Incentive Zoning Resolution provides as a condition that "the maximum building development on the [Project Site] shall not exceed 83,700 square feet." (ZBA000125). At the time of the public hearing, the Town had issued three building permits authorizing the construction of three buildings totaling 74,377 square feet, as follows: (i) First Building Permit - Starbucks building (1,997 square feet); (ii) Second Building Permit - Building #2 (22,380 square feet); and (iii) Third Building Permit - Building #1 (50,000 square feet). In both written submissions and during the public hearing, the Town Associate Planner indicated that the Town would not approve building permits for Building #4 or Building #5 in excess of 9,323 square feet, and the overall Project will not exceed 83,700 square feet.

48. The Third Building Permit also references that the "53,330 Area (sq ft) above is comprised of 50,000 sf building footprint, 3100 sf canopies and 230 sf ramp." According to the Town Associate Planner, this is the overall square footage of Building #1 that is utilized to calculate the building permit fees due to the Town. This figure includes "architectural projections and other elements. The square footage of buildings on an approved site plan does not include architectural projections." These additional architectural elements

are approximately 3,330 square feet based on the calculations performed by the Town Architect, but do not comprise the building footprint.

49. The ZBA finds that the Third Building Permit was issued in conformity with the Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations. The ZBA finds that BGR has not met its burden of showing that the Third Building Permit was not issued in conformity with the Site Plan for the Project.

50. This portion of the Appeal is denied.

#### CONCLUSION

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

52. The ZBA denies BGR's request for costs and fees associated with the Appeal.

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