AGENDA
BOARD OF APPEALS - TOWN OF BRIGHTON
FEBRUARY 2, 2022

Due to the public gathering restrictions because of COVID-19 and the adoption of Chapter 417 of the laws of 2021, this Zoning Board meeting will be conducted remotely beginning at 7:00 pm or as soon thereafter as possible. Members of the public will be able to view the meeting via Zoom.

Written comments may be submitted to 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.

Applications subject to public hearings are available for review on the town's website no later than twenty-four hours prior to the meeting.

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: Agenda Review with Staff and Members

CHAIRPERSON: Approve the minutes of the December 1, 2021 meeting.
Approve the minutes of the January 5, 2022 meeting. **To be done at the March 2, 2022**

CHAIRPERSON: Announce that the public hearings as advertised for the BOARD OF APPEALS in the Daily Record of January 27, 2022 will now be held.

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12A-03-21
Additional Info

Application of Jerry Goldman, attorney, and Jagdish Kaur, owner of property located at 30 Jefferson Road, for a Use Variance from Section 203-93A to allow a retail liquor store to be located in an IG Light Industrial District where not allowed by code. All as described on application and plans on file. **POSTPONED TO THE FEBRUARY 2, 2022 MEETING AT APPLICANTS REQUEST**

12A-04-21
Additional Info

Application of Jerry Goldman, attorney, and Jagdish Kaur, owner of property located at 30 Jefferson Road, for an Area Variance from Section 205-18A to allow front yard parking where not allowed by code. All as described on application and plans on file. **POSTPONED TO THE FEBRUARY 2, 2022 MEETING AT APPLICANTS REQUEST**

1A-03-22

Application of FSI Construction / Frank Imburgia, owner of property located at 3300 Brighton Henrietta Town Line Road, for an Area Variance from Section 205-8 to allow an office building to be constructed with a 42 ft. front setback (Brighton Henrietta Town Line Road frontage) in leu of the minimum 75 ft. front setback required by code. All as described on application and plans on file. **POSTPONED AT APPLICANTS REQUEST**

1A-04-22 Application of FSI Construction / Frank Imburgia, owner of property located at 3300 Brighton Henrietta Town Line Road, for an Area Variance from Section 203-129B to allow a new office building and other site improvements (e.g. parking area) to encroach into the 100 ft. natural vegetative watercourse EPOD buffer where not allowed by code. All as described on application and plans on file. **POSTPONED AT APPLICANTS REQUEST**

1A-05-22 Additional Info Application of Lindsay Agor, owner of property located at 387 Bonnie Brae Avenue, for an Area Variance form Section 209-10 to allow liveable floor area, after construction of an addition, to be 3,415 sf in lieu of the maximum 3024.8 sf allowed by code. All as described on application and plans on file. **TABLED AT THE JANUARY 5, 2022 MEETING - PUBLIC HEARING REMAINS OPEN**

1A-06-22 Application of Clinton Signs, Inc., agent and Dorell, Inc., owner of properties located at 2654 West Henrietta Road (Tax ID #148.16-1-15) and 2674 West Henrietta Road (Tax ID #(148.16-1-16), for Sign Variances form Section 207-32B to allow for the installation of nonbusiness identification signs on two (2) building's frontage where not allowed by code. All as described on application and plans on file.

2A-01-22 Application of Daniele SPC, LLC, owner of property located at 2740 Monroe Avenue, for an Area Variance from Sections 203-84B(20)(a) and 203-84B(20)(e) to allow for outdoor storage in a side yard unscreened in lieu of the rear yard screened by a 6 ft. high fence as required by code. All as described on application and plans on file.

2A-02-22 Application of FSI Construction / Frank Imburgia, owner of property located at 3300 Brighton Henrietta Town Line Road, for an Area Variance from Section 203-164A to allow front yard parking (along Brighton Henrietta Town Line Road and Canal View Blvd.) Where not allowed by code. All as described on application and plans on file.

CHAIRPERSON: Announce that public hearings are closed.

NEW BUSINESS:

NONE

OLD BUSINESS:

1A-07-22 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 two building permits (4th building and 5th building) 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 JANUARY 5, 2022 MEETING.**

1A-08-22 Application of Brighton Grassroots, LLC, appealing the issuance of two building permits (4th building and 5th building) 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 JANUARY 5, 2022 MEETING.**

PRESENTATIONS:

NONE

COMMUNICATIONS:

Letter from Maryn Karahan, dated January 29, 2022, in support of 1A-05-22, 387 Bonnie Brae Avenue.2A-01-22

PETITIONS:

NONE

From: **Maryn Karahan** <marynkarahan@gmail.com>
Date: Sat, Jan 29, 2022 at 8:26 PM
Subject: Lindsay Agor 387 Bonnie Brae
To: <ramsey.boehner@townofbrighton.org>

Hello,

My name is Maryn Karahan, I am a friend of Lindsay's and wanted to take a minute to share my support of her renovation project.

I grew up at 260 Bonnie Brae and I now live off Elmwood Ave in Brighton. We are finishing up on our own addition so I have spent a lot time talking to Lindsay about both of our projects.
Lindsay has put in the time and the energy to ensure her project compliments not only her home that she loves but also the neighborhood.
She is a very considerate person and I know several neighbors that appreciate her efforts!

Her addition would be done at the highest level and the neighborhood will only benefits from this action.

Best,
Maryn

State Environmental Quality Review

NEGATIVE DECLARATION

Notice of Determination of Non-Significance

Project Number: 1A-03-22, 1A-04-22, 2A-02-22 **Date**: 2/02/22

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: 1A-03-22 3300 Brighton Henrietta T L Road, Area Variances

SEQR Status: Unlisted

Conditioned Negative Declaration: No

Description of Action: Application of FSI Construction / Frank Imburgia, owner of property located at 3300 Brighton Henrietta Town Line Road, for 1) an Area Variance from Section 205-8 to allow an office building to be constructed with a 42 ft. front setback (Brighton Henrietta Town Line Road frontage) in leu of the minimum 75 ft. front setback required by code; for 2) an Area Variance from Section 203-129B to allow a new office building and other site improvements (e.g. parking area) to encroach into the 100 ft. natural vegetative watercourse EPOD buffer where not allowed by code; and 3) for an Area Variance from Section 203-164A to allow front yard parking (along Brighton Henrietta Town Line Road and Canal View Blvd.) Where not allowed by code.

Location: 3300 Brighton Henrietta Town Line Rd.

Reasons Supporting This Determination:

After considering the action contemplated and reviewing the Environmental Assessment Form prepared by the applicant and the Criteria for determining significance in the SEQR regulations (6 N.Y.C.R.R. Section 617.11), the Town Planning Board finds that the proposed action will not have a significant impact on the environment based on the following finding:

1. Soil erosion control measures will be implemented during and after construction based upon a detailed grading and erosion control plan.

2. There will be disturbance in the EPOD and floodplain that will be minimized and additional plantings will be added to the area outside the floodway. The building is located outside of the floodplain.

3. A traffic survey was completed and showed that the proposed development will not negatively affect street networks or intersections. Monroe County Department of Transportation has reviewed and approved the project. All required County permits will be obtained.

4. Some areas in the floodplain will be filled affecting flood storage, however enough compensatory storage is proposed to result in net positive flood storage on site.

5. The site will be serviced by sanitary sewers and public water. There appears to be adequate capacity to service the proposed development.

6. The storm water drainage system is designed and will be constructed in accordance with all applicable Town requirements and designed in a manner so as to mitigate storm water pollutant loads.

7. The requirements of the State Environmental Quality Review Law have been complied with.

8. The duration of all impacts will be short term in nature.

9. There will be no resources of value irreversibly lost.

10. No threatened or endangered species of plants or animals will be affected by this project.

For further information:

Contact Person: Ramsey A. Boehner, Environmental Review Liaison Officer

Address: Town of Brighton
2300 Elmwood Avenue
Rochester, N.Y. 14618

Telephone: (585)784-5229

State Environmental Quality Review

NEGATIVE DECLARATION

Notice of Determination of Non-Significance

Project Number: ER-1-22 / 1A-06-22 **Date**: January 5, 2022

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 Clinton Signs, Inc., agent and Dorell, Inc.

SEQR Status: Unlisted

Conditioned Negative Declaration: No

Description of Action: Application for a sign variances from Section 207-32B to allow for the installation of nonbusiness identification signs on two (2) building's frontage where not allowed by code.

Location: 2654 West Henrietta Road (Tax ID #148.16-1-15) and 2674 West Henrietta Road (Tax ID # (148.16-1-16), 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 proposed signage will be located on the building façade. There will be no ground penetration, no alteration of the earth surrounding, and there will no impact on any of water quality, watercourse flood-carrying capacities. 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 proposed signage 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 a commercial area which abuts West Henrietta Rd. There are no additions or increase in building density proposed as part of this Project.

The nature of the of the applicant's request is consistent with the existing uses within the surrounding commercial area.

The proposed signage 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 proposed signage will be installed on an existing building(s). The proposed signage will not adversely impact agricultural, archeological, historical, natural, or cultural resources. There are no known archaeological resources within project site.

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

The proposed signage 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 proposed signage 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 proposed signage will have no significant adverse impact on any wetlands or floodplains.

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

The proposed signage will be located in a BF-2 General Commercial District and will need to obtain a sign area variance to allow for the installation of the signage. The Town's Comprehensive Plan does not specifically address the property. The proposed signage will be installed on an existing building(s) and will have no adverse impacts on the natural resources found on the site.

6. Critical Environmental Area.

The proposed signage 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 signage will not generate any additional vehicle trips to or from the project site. The proposed signage 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 proposed signage will not have a significant adverse impact on public health or safety. The proposed signage 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: January 5, 2022

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

Town of
Brighton

Planning Board
Executive Secretary – Ramsey Boehner

State Environmental Quality Review

NEGATIVE DECLARATION

Notice of Determination of Non-Significance

Project Number: 12A-03-21 & 12A-04-21 Date: November 30, 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,, 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: 12A-03-21 30 Jefferson Rd – Use and Area Variance

SEQR Status: Unlisted

Conditioned Negative Declaration: No

Description of Action: Application of Jerry Goldman, attorney, and Jagdish Kaur, owner of property located at 30 Jefferson Road, for a Use Variance from Section 203-93A to allow a retail liquor store to be located in an IG Light Industrial District where not allowed by code and for an Area Variance from Section 205-18A to allow front yard parking where not allowed by code. All as described on applications and plans on file.

Location: 30 Jefferson Rd

Reasons Supporting This Determination:

After considering the action contemplated and reviewing the Environmental Assessment Form prepared by the applicant (Part I) and Town Staff (Parts II & III) and the Criteria for determining significance in the SEQR regulations (6 N.Y.C.R.R. Section 617.11), the Town of Brighton Zoning Board of Appeals finds that the proposed action will not have a significant impact on the environment based on the following finding:

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

The proposed Project is taking place on a previously disturbed site with most areas of disturbance taking place in previously disturbed areas. The site is relatively flat and the proposal does not significantly alter grade or drainage on the site. The proposed use is retail in nature and in itself will not disturb the site beyond the work done during the site improvement. Soil erosion control measures will be implemented during and after construction based upon a detailed grading and erosion control plan. The storm water drainage system will be designed and will be constructed in accordance with all applicable Town requirements. The proposed use is a retail liquor store will not create a substantial increase in solid waste production.

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 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 a currently vacant building in an industrial district. The proposed use and alterations will improve the overall look of the property by improving the building, adding landscaping, and cleaning up the property and building. Noise generated will be from vehicle traffic and it is not adjacent to residential areas.

The nature of the improvements to be made as part of this Project and the intensity of the proposed use are less than the existing uses within the surrounding area.

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 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. Proposed improvements are taking place on a previously disturbed site. 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. The Project is within a Watercourse Environmental Overlay District (EPOD) and parts of the proposed new front yard parking are located within a floodplain. The Project will be required to obtain an Environmental Overlay District Permit and Site Plan Modification approval from the Brighton Planning Board and must compensate for any impact to the flood plain and mitigate impacts to the EPOD. There are no wetlands located on the Project site.

The improvements will be short term and will not result in extended disturbance to the property. Therefore, the Project will have no significant adverse impact on wetlands or the floodplain.

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

The Project is located in an IG – Light Industrial District and as part of this application is applying for an area variance to allow for the installation of parking in the front yard. They also seek a use variance to allow for a retail liquor store where one is not allowed by code. The Town's Comprehensive Plan does not specifically address the property. The Project changes will be installed on already disturbed areas 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 generate more vehicle trips to or from the project site but is located on two significant roads and will not significantly increase traffic to these roads. 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.

For further information:

Contact Person:	Ramsey A. Boehner, Environmental Review Liaison Officer
Address:	Town of Brighton 2300 Elmwood Avenue Rochester, N.Y. 14618
Telephone:	(585)784-5229

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 February, 2022, 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 December 9, 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 1A-07-22 (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. 20210374 (the "Fourth Building Permit") and Building Permit No. 20210373 (the "Fifth 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 Fourth Building Permit and Fifth 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 Fourth Building Permit and Fifth Building Permit; and (iii) award SMA all costs and fees associated with the Appeal; and

WHEREAS, on January 5, 2022, the ZBA held a regular meeting, which was duly noticed and published as required by law; and

WHEREAS, on January 5, 2022, 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 January 5, 2022, the ZBA closed the public hearing and commenced deliberations with respect to the Appeal; and

WHEREAS, on February 2, 2022, 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 Fourth Building Permit and Fifth 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: February 2, 2022

ATTACHMENT A

FINDINGS
TOWN OF BRIGHTON ZONING BOARD OF APPEALS
APPLICATION 1A-07-22

Application of Save Monroe Ave., Inc., et al., appealing the issuance of two building permits (4th building and 5th building) 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. <u>First Building Permit and Appeal by SMA</u>

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.

18. On August 4, 2021, SMA commenced an Article 78 proceeding challenging the ZBA's Resolution and Findings upholding the issuance of the Second Building Permit. *See Save Monroe Ave., Inc. v. Town of Brighton, New York Office of the Building Inspector,* Index No. E2021007288. The first cause of action alleged the Second Building Permit allowed construction of Building #2 larger than the size depicted in the Site Plan Approval. The second cause of action alleged town failed to obtain sufficient cross-access easements to implement the AMP. The third cause of action alleged the Third Building Permit improperly allowed multiple phase construction. The fourth cause of action alleged a violation of the Open Meetings Law.

19. Pursuant to Decision dated November 29, 2021, and Order and Judgment dated January 3, 2022, Supreme Court, Monroe County,

denied SMA's first and fourth causes of action and dismissed SMA's second and third causes of action in the Amended Verified Petition.

IV. The Third Building Permit and the Third Appeal by SMA

20. 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."

21. 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 "Third Appeal").

22. On November 3, 2021, the ZBA denied the Third Appeal pursuant to Resolution and Findings attached as Exhibit 3.

V. The Fourth Building Permit and Fifth Building Permit, and the Current Appeal

23. On October 13, 2021, the Building Inspector issued Building Permit No. 20210374 (the "Fourth Building Permit") and Building Permit No. 20210373 (the "Fifth Building Permit") for the Project. The Fourth Building Permit was for "Building #4, construction of a 6,117 sf building shell." The Fifth Building Permit was for "Building #5, construction of a 3,200 sf building shell."

24. On or about December 9, 2021, SMA filed an application with the ZBA appealing the Building Inspector's issuance of the Fourth Building Permit and Fifth Building Permit (the "Appeal").

25. SMA submitted the following documents in support of the Appeal: (i) Town of Brighton Zoning Board of Appeals Application, dated December 9, 2021; (ii) Appeal/Notice of Appeal, dated December 9, 2021, with Exhibits A-C; and (iii) copy of Project site plan.

26. On December 27, 2021, in accordance with Town Law 267-a(5)(b), the Building Inspector filed with the ZBA the administrative record with bates numbers ZBA000001-ZBA000200. The Building Inspector also submitted to the ZBA a letter, dated December 27, 2021, in opposition to the Appeal.

27. On January 5, 2022, the ZBA conducted the public hearing.

DOCUMENTS CONSIDERED BY THE ZBA

28. The ZBA has considered the following documents in connection with the Appeal: (i) Letter from Hodgson Russ LLP, dated December 9, 2021, enclosing documents associated with the Appeal; (ii) Town of Brighton Zoning Board of Appeals Application, dated December 9, 2021; (iii) Appeal/Notice of Appeal, dated December 9, 2021, with Exhibits A-C; (iv) copy of Project Site Plan; (v) Administrative

record with bates numbers ZBA000001-ZBA000200; and (vi) Letter from Building Inspector, dated December 27, 2021.

JURISDICTION AND STANDARD OF REVIEW

29. 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).

30. 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 Fourth Building Permit and Fifth 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

31. 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 alleges 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.

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

33. 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 and Third Appeal.

34. 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."

35. 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.

36. SMA also raised these issues in an Article 78 proceeding challenging the Second Building Permit and the ZBA's Resolution and Findings denying the Second Appeal. Supreme Court has upheld the issuance of the Second Building Permit and the ZBA's Resolution and Findings denying the Second Appeal, holding that SMA's cross-access easements and phased construction claims are not the subject of fresh judicial review under res judicata and/or collateral estoppel.

37. 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.

38. This portion of the Appeal is denied.

II. <u>Square Footage of Building #4 and Building #5</u>

39. SMA alleges in the First Ground for Appeal that the Fourth Building Permit and Fifth Building Permit allow the construction of buildings (Building #4 and Building #5) larger than the size approved in the Site Plan.

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

41. 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."

42. 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."

43. 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."

44. The approved Site Plan depicts Building #4 as having a footprint of 6,250 square feet and Building #5 as having a footprint of 3,200 square feet. (ZBA000134). The plans filed as part of the building permit package indicates that Building #4 has a square footage of 6,117 square feet and Building #5 has square footage of 3,200 square feet. (ZBA00013-14, 21-22).

45. 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 square footages on the plans are the footprints or floor areas of Building #4 and Building #5.

46. The Developer's architect has certified that Building #4 is "6,117 SF gross" and Building #5 is "3,200 SF gross," and "[t]hese areas are based on 'as designed' dimensions taken at the exterior face of the exterior walls of each building, being the same as the Passero AutoCAD drawing referenced above in each case." (ZBA00031).

47. The ZBA finds that the Fourth Building Permit authorizes construction of Building #4 at a floor area of 6,117 square feet, 133 square feet less than the square footage referenced on the approved Site Plan. The ZBA finds that the Fifth Building Permit authorizes construction of Building #5 at a floor area of 3,200 square feet, the exact square footage referenced on the approved Site Plan.

48. SMA alleges that the Building Inspector "had no authority or discretion to issue a building permit that deviated from the size of Building IV per the approved site plan."

49. In the ZBA's Resolution and Findings denying the Second Appeal, the ZBA found that 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, does not require exact mathematical precision, and allows engineering tolerances and minor mathematical deviations between the square footage as shown on a site plan and the square footage on the building permit.

50. In upholding the ZBA's Resolution and Findings with respect to the Second Building Permit, Supreme Court also found that conformity does not mean identical.

51. The ZBA finds that: (i) the Fourth Building Permit was issued in conformity with the Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations; and (ii) the Fifth 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 Fourth Building Permit or Fifth Building Permit were not issued in conformity with the approved Site Plan.

52. SMA alleges that the five approved building permits total 84,397 square feet and, as such, the Project exceeds the Project approvals by 697 square feet based on the issued building permits.

53. The Incentive Zoning Approval provides as a condition that "the maximum building development on the [Project Site] shall not exceed a total of 83,700 square feet." (ZBA000111). The ZBA finds that the five buildings depicted on the approved Site Plan may not exceed 83,700 square feet of floor area as a condition of the Incentive Zoning Approval.

54. The Town has issued five building permits authorizing the following square footages of floor area for the five Project buildings: (i) First Building Permit - Starbucks building (1,997 square feet); (ii) Second Building Permit - Building #2 (22,380 square feet); (iii) Third Building Permit - Building #1 (50,000 square feet); (iv) Fourth Building Permit - Building #4 (6,117 square feet); and (v) Fifth Building Permit - Building #5 (3,200 square feet). The ZBA finds that the building permits authorize construction of five buildings totaling 83,694 square feet of floor area, which is six square feet less than the maximum permitted in the Incentive Zoning Approval.

55. The Developer's architects have also certified that the square footage of the five Project buildings is as follows: (i) Starbucks building - 1,997 square feet; (ii) Building #2 - 22,380 square feet; (iii) Building #1 - 50,000 square feet; (iv) Building #4 - 6,117 square feet; and (v) Building #5 - 3,200 square feet. (ZBA00030-31). The Building Inspector has also confirmed that the total square footage of the five buildings is 83,694 square feet and

complies with the maximum building development of 83,700 square feet allowed in the Incentive Zoning Approval. (ZBA00032).

56. Although not stated in the Appeal, SMA's calculation of overall Project square footage includes the square footage of architectural projections and other elements approved in the First Building Permit and Second Building Permit. In the ZBA's Resolution and Findings denying the Third Appeal, the ZBA found that, according to the Town Associate Planner, the square footage of buildings on an approved site plan does not include architectural projections and other elements, which are utilized by the Town solely to generate the building permit fee. These items include, among other things, building canopies and ramps.

57. The ZBA finds that these additional architectural features and other elements, such as canopies and ramps, to the extent proposed as part of Building #1, Building #2, and Building #3, do not comprise the building floor area and, therefore, are not included in the maximum building development of the Project. Otherwise, a contrary finding would conflict with the definition of "floor area" contained in the Comprehensive Development Regulations.

58. The ZBA finds that the overall square footage of five buildings approved pursuant to the First Building Permit, Second Building Permit, Third Building Permit, Fourth Building Permit, and Fifth Building Permit does not exceed 83,700 square feet, and is in conformity with the Incentive Zoning Approval and Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations.

59. This portion of the Appeal is denied.

CONCLUSION

60. In accordance with the records, proceedings, and above Findings, the ZBA finds that: (i) the Building Inspector properly issued the Fourth Building Permit and Fifth 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 Fourth Building Permit and Fifth Building Permit meet 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 Fourth Building Permit and Fifth Building Permit.

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

62. The Building Inspector's issuance of the Fourth Building Permit and Fifth 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	YES
Kathleen Schmitt, Board Member	Voting	YES
Andrea Tompkins Wright, Board Member	Voting	YES
Judy Schwartz, Board Member	Voting	YES
Jeanne Dale, Board Member	Voting	YES
Jennifer Watson, Board Member	Voting	YES

This Resolution was thereupon declared adopted.

Dated: December 2, 2020

ATTACHMENT A

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

dated August 3, 2020; and (ii) Appeal/Notice of Appeal, dated August 3, 2020, with Exhibits A-G.

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

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

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

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

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

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

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

DOCUMENTS CONSIDERED BY THE ZBA

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

with enclosures; (9) Letter from Building Inspector, dated October 21, 2020, and updated spreadsheet; (10) Additional documents submitted by the Building Inspector with bates number ZBA010544-010581; (11) Email from Howie Jacobson, dated September 2, 2020; and (12) Email from Paul Adams, dated October 16, 2020.

JURISDICTION AND STANDARD OF REVIEW

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

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

FINDINGS OF FACT AND DETERMINATIONS

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

I. Irrevocable Letters of Credit

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

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

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

26. For the above reasons The Board finds that the appeal is moot and therefore this portion of the appeal is denied.

II. Cross-Access Easements for the Access Management Plan

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

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

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

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

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

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

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

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

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

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

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

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

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

40. The ZBA finds that, in determining whether to issue the Building Permit, the Town must be held to the standards set forth in the applicable approvals and Comprehensive Development Regulations. The Town has ensured that any easement or similar property agreement required for development is executed by the grantor, validly recorded,

and that the substance of the document is sufficient for the specific purpose for which it is required. Here, the cross-access easements were executed by the grantor, recorded, and as stated in Building Inspector's September 23, 2020 response, the Building Inspector confirmed that the cross-access easements were satisfactory to substantively implement and construct the AMP.

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

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

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

44. This portion of the Appeal is denied.

III. State and County Approvals

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

A. New York State Department of Transportation

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

47. On August 23, 2019, NYSDOT completed its review of the potential impacts of the Project in accordance with the requirements of SEQRA and adopted its Findings Statement. (ZBA000124-136). NYSDOT found that the "mitigating measures will be the responsibility of the [Developer] and will be a condition to NYSDOT's approval of the Highway Work Permit for the Project." The NYSDOT found, among other

things, that "[c]onsistent with social, economic, and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided through implementation of the mitigation measures identified herein" and "[c]onsistent with social, economic, and other essential considerations, from among the reasonable alternatives thereto, the action to be undertaken is an alternative which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the environmental impact statement."

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

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

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

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

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

B. Other State and County Approvals

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

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

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

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

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

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

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

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

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

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

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

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

65. This portion of the Appeal is denied.

IV. <u>Construction Sequencing</u>

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

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

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

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

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

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

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

73. The Site Plan Approval is subject to condition that "[a]ll comments and concerns of the Town Engineer as contained in the attached memo dated September 16, 2018 from Michael Guyon, Town Engineer, to Ramsey Boehner, shall be addressed." (ZBA000102). The Town Engineer stated that the Developer provide a "phasing plan

demonstrating that the total earth disturbance will not exceed 5 acres." (ZBA0000105). The Developer provided the requested plan in accordance with the condition of Site Plan Approval. (ZBA000218).

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

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

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

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

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

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

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

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

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

83. This portion of the Appeal is denied.

V. <u>Access Management Plan Improvements</u>

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. <u>The Pedestrian Easements</u>

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

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

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

Monroe, LLC runs through the back of the southerly portion of the Project Site to the adjoining property.

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

105. The Appellate Division, Fourth Department, found issues of fact as to "whether there was an express or implied dedication of the [Pedestrian Easements] subject to the public trust doctrine." *Clover/Allen's Creek Neighborhood Association LLC v M&F, LLC*, 173 A.D.3d 1828 (4th Dep't 2019). The Fourth Department stated: "To establish that property has been dedicated as a park or for public use, formal dedication by the legislature is not required. Rather, a parcel of property may become a park by express provisions in a deed ... or by implied acts, such as continued use [by the municipality] of the parcel as a park .... A party seeking to establish ... an implied dedication and thereby successfully challenge the alienation of the land must show that (1) [t]he acts and declarations of the land owner indicating the intent to dedicate his [or her] land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication and (2) that the public has accepted the land as dedicated to a public use." *Id.* (internal citations and quotations omitted).

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

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

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

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

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

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

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

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

114. The Building Inspector has confirmed that the Pedestrian Easements will not be closed during or after construction. The ZBA has confirmed, based on a visual inspection of the Project Site, that the Pedestrian Easements are protected from obstruction by construction fencing. As part of the Incentive Zoning Approval, the Developer will be improving and extending the Auburn Trail for the benefit of the public. The ZBA finds that the public's right to access and use the Auburn Trail will be enhanced and improved as a result of the Project. The ZBA finds the Project will not substantially interfere with the Pedestrian Easements.

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

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

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

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

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

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

121. This portion of the Appeal is denied.

CONCLUSION

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

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

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

At a meeting of the Zoning Board of Appeals of the Town of Brighton, held at the Brighton Town Hall, 2300 Elmwood Avenue, Brighton, N.Y. on the 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. Premo, 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	YES
Kathleen Schmitt, Board Member	Voting	YES
Andrea Tompkins Wright, Board Member	Voting	YES
Judy Schwartz, Board Member	Voting	NO
Jeanne Dale, Board Member	Voting	YES
Edward Premo, Board Member	Voting	YES

This Resolution was thereupon declared adopted.

Dated: July 7, 2021

ATTACHMENT A

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. <u>First Building Permit and Appeal by SMA</u>

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 interpretated 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. <u>Square Footage of Building #2</u>

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 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 MR. PREMO, Seconded by MS. TOMPKINS-WRIGHT, 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	YES
Andrea Tompkins Wright, Board Member	Voting	YES
Judy Schwartz, Board Member	Voting	YES
Kathleen Schmitt, Board Member	Voting	YES
Edward Premo, Board Member	Voting	YES
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").

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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").

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II. <u>First Building Permit and Appeal by SMA</u>

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)."

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

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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.

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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 2nd day of February, 2022, 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 December 10, 2021, Brighton Grassroots, LLC ("BGR") filed Application 1A-08-22 (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. 20210374 (the "Fourth Building Permit") and Building Permit No. 20210373 (the "Fifth 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) 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 Fourth Building Permit and Fifth Building Permit; (ii) annul and reverse the issuance of the Fourth Building Permit and Fifth Building Permit; (iii) grant the Appeal; (iv) order the Developer to immediately stop work related to the Fourth Building Permit and Fifth Building Permit; (v) direct the relevant Town employees to immediately issue a stop work order to the Developer with respect to any work related to the Fourth Building Permit and Fifth Building Permit; and (vi) award BGR all costs and fees associated with the Appeal; and

WHEREAS, on January 5, 2022, the ZBA held a regular meeting, which was duly noticed and published as required by law; and

WHEREAS, on January 5, 2022, 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 January 5, 2022, the ZBA closed the public hearing and commenced deliberations with respect to the Appeal; and

WHEREAS, on February 2, 2022, 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 Fourth Building Permit and Fifth 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: February 2, 2022

ATTACHMENT A

FINDINGS
TOWN OF BRIGHTON ZONING BOARD OF APPEALS
APPLICATION 1A-08-22

Application of Brighton Grassroots, LLC appealing the issuance of two building permits (4th building and 5th building) 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. <u>First Building Permit and Appeal by BGR</u>

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.

19. On August 4, 2021, SMA commenced an Article 78 proceeding challenging the ZBA's Resolution and Findings upholding the issuance of the Second Building Permit. *See Save Monroe Ave., Inc. v. Town of Brighton, New York Office of the Building Inspector,* Index No. E2021007288. The first cause of action alleged the Second Building Permit allowed construction of Building #2 larger than the size depicted in the Site Plan Approval. The second cause of action alleged town failed to obtain sufficient cross-access easements to implement the AMP. The third cause of action alleged the Third

Building Permit improperly allowed multiple phase construction. The fourth cause of action alleged a violation of the Open Meetings Law.

20. Pursuant to Decision dated November 29, 2021, and Order and Judgment dated January 3, 2022, Supreme Court, Monroe County, denied SMA's first and fourth causes of action and dismissed SMA's second and third causes of action in the Amended Verified Petition.

IV. The Third Building Permit and the Third Appeal by BGR

21. 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."

22. 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 "Third Appeal").

23. On November 3, 2021, the ZBA denied the Third Appeal pursuant to Resolution and Findings attached as Exhibit 3.

V. The Fourth Building Permit and Fifth Building Permit, and the Current Appeal

24. On October 13, 2021, the Building Inspector issued Building Permit No. 20210374 (the "Fourth Building Permit") and Building Permit No. 20210373 (the "Fifth Building Permit") for the Project. The Fourth Building Permit was for "Building #4, construction of a 6,117 sf building shell." The Fifth Building Permit was for "Building #5, construction of a 3,200 sf building shell."

25. On or about December 10, 2021, BGR filed an application with the ZBA appealing the Building Inspector's issuance of the Fourth Building Permit and Fifth Building Permit (the "Appeal").

26. BGR submitted the following documents in support of the Appeal: (1) Town of Brighton Zoning Board of Appeals Application, dated December 10, 2021; and (2) BGR Appeal to ZBA/Notice of Appeal, dated December 10, 2021, with Exhibits A-Q.

27. On December 27, 2021, in accordance with Town Law 267-a(5)(b), the Building Inspector filed with the ZBA the administrative record with bates numbers ZBA000001-ZBA000200. The Building Inspector also submitted to the ZBA a letter, dated December 27, 2021, in opposition to the Appeal.

28. On January 5, 2022, the ZBA conducted the public hearing.

DOCUMENTS CONSIDERED BY THE ZBA

29. The ZBA has considered the following documents in connection with the Appeal: (i) Town of Brighton Zoning Board of Appeals Application, dated December 10, 2021; (ii) BGR Appeal to ZBA/Notice of Appeal, dated December 10, 2021, with Exhibits A-Q; (iii) Administrative record with bates numbers ZBA000001-ZBA000200; and (iv) Letter from Building Inspector, dated December 27, 2021.

JURISDICTION AND STANDARD OF REVIEW

30. 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).

31. 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 Fourth Building Permit and Fifth 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

32. BGR argues in the First 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. BGR 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.

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

34. 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 SMA Second Appeal and Third Appeal.

35. 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."

36. The ZBA finds that the First and Second 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.

37. SMA also raised these issues in an Article 78 proceeding challenging the Second Building Permit and the ZBA's Resolution and Findings denying the SMA Second Appeal. Supreme Court has upheld the issuance of the Second Building Permit and the ZBA's Resolution and Findings denying the SMA Second Appeal, holding that SMA's cross-access easements and phased construction claims are not the subject of fresh judicial review under res judicata and/or collateral estoppel.

38. 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.

39. This portion of the Appeal is denied.

II. <u>Square Footage of Building #4 and Building #5</u>

40. BGR alleges in the Third Ground for Appeal that the building permits "unlawfully authorize construction of larger buildings and more square footage than is authorized…."

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

42. 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."

43. 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."

44. 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."

45. The approved Site Plan depicts Building #4 as having a footprint of 6,250 square feet and Building #5 as having a footprint of 3,200 square feet. (ZBA000134). The plans filed as part of the building permit package indicates that Building #4 has a square footage of 6,117 square feet and Building #5 has square footage of 3,200 square feet. (ZBA00013-14, 21-22).

46. 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 square footages on the plans are the footprints or floor areas of Building #4 and Building #5.

47. The Developer's architect has certified that Building #4 is "6,117 SF gross" and Building #5 is "3,200 SF gross," and "[t]hese areas are based on 'as designed' dimensions taken at the exterior face of the exterior walls of each building, being the same as the Passero AutoCAD drawing referenced above in each case." (ZBA00031).

48. The ZBA finds that the Fourth Building Permit authorizes construction of Building #4 at a floor area of 6,117 square feet, 133 square feet less than the square footage referenced on the approved Site Plan. The ZBA finds that the Fifth Building Permit authorizes construction of Building #5 at a floor area of 3,200 square feet, the exact square footage referenced on the approved Site Plan.

49. In the ZBA's Resolution and Findings denying the SMA Second Appeal, the ZBA found that 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, does not require exact mathematical precision, and allows engineering tolerances and minor mathematical deviations between the square footage as shown on a site plan and the square footage on the building permit.

50. In upholding the ZBA's Resolution and Findings with respect to the Second Building Permit, Supreme Court also found that conformity does not mean identical.

51. The ZBA finds that: (i) the Fourth Building Permit was issued in conformity with the Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations; and (ii) the Fifth 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 Fourth Building Permit or Fifth Building Permit were not issued in conformity with the approved Site Plan.

52. BGR alleges that the square feet approved by the building permits totals 87,727 square feet and the building permits authorize the construction of "significantly more square footage than is allowed by the municipal approvals for the Project."

53. The Incentive Zoning Approval provides as a condition that "the maximum building development on the [Project Site] shall not exceed a total of 83,700 square feet." (ZBA000111). The ZBA finds that the five buildings depicted on the approved Site Plan may not exceed 83,700 square feet of floor area as a condition of the Incentive Zoning Approval.

54. The Town has issued five building permits authorizing the following square footages of floor area for the five Project buildings: (i) First Building Permit - Starbucks building (1,997 square feet); (ii) Second Building Permit - Building #2 (22,380 square feet); (iii) Third Building Permit - Building #1 (50,000 square feet); (iv) Fourth Building Permit - Building #4 (6,117 square feet); and (v) Fifth Building Permit - Building #5 (3,200 square feet). The ZBA finds that the building permits authorize construction of five buildings totaling 83,694 square feet of floor area, which is six square feet less than the maximum permitted in the Incentive Zoning Approval.

55. The Developer's architects have also certified that the square footage of the five Project buildings is as follows: (i) Starbucks building - 1,997 square feet; (ii) Building #2 - 22,380 square feet; (iii) Building #1 - 50,000 square feet; (iv) Building #4 - 6,117 square feet; and (v) Building #5 - 3,200 square feet.

(ZBA00030-31). The Building Inspector has also confirmed that the total square footage of the five buildings is 83,694 square feet and complies with the maximum building development of 83,700 square feet allowed in the Incentive Zoning Approval. (ZBA00032).

56. BGR's calculation of overall Project square footage includes the square footage of architectural projections and other elements approved in the First Building Permit, Second Building Permit, and Third Building Permit. In the ZBA's Resolution and Findings denying the Third Appeal, the ZBA found that, according to the Town Associate Planner, the square footage of buildings on an approved site plan does not include architectural projections and other elements, which are utilized by the Town solely to generate the building permit fee. These items include, among other things, building canopies and ramps.

57. The ZBA finds that these additional architectural features and other elements, such as canopies and ramps, to the extent proposed as part of Building #1, Building #2, and Building #3, do not comprise the building floor area and, therefore, are not included in the maximum building development of the Project. Otherwise, a contrary finding would conflict with the definition of "floor area" contained in the Comprehensive Development Regulations.

58. The ZBA finds that the overall square footage of five buildings approved pursuant to the First Building Permit, Second Building Permit, Third Building Permit, Fourth Building Permit, and Fifth Building Permit does not exceed 83,700 square feet, and is in conformity with the Incentive Zoning Approval and Site Plan as required by the Brighton Town Code and Comprehensive Development Regulations.

59. This portion of the Appeal is denied.

CONCLUSION

60. In accordance with the records, proceedings, and above Findings, the ZBA finds that: (i) the Building Inspector properly issued the Fourth Building Permit and Fifth 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 Fourth Building Permit and Fifth Building Permit meet 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 Fourth Building Permit and Fifth Building Permit.

61. The ZBA denies BGR's request to order the Developer to immediately stop work and to direct Town employees to issue a stop work order with respect to the Project.

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

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

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

PRESENT:

Dennis Mietz, Chairperson

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

Rick DiStefano, Secretary
David Dollinger, Deputy Town Attorney

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

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

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

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

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

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

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

NOW, THEREFORE, on Motion of MS. TOMPKINS-WRIGHT Seconded by MS. DALE, it is hereby

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

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

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

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

UPON ROLL CALL VOTE, the vote was as follows:

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

This Resolution was thereupon declared adopted.

Dated: December 2, 2020

ATTACHMENT A

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

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

BACKGROUND

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

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

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

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

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

restaurant building and a vacant 44,600 +/- sf bowling alley on property located at 2740 Monroe Avenue and 2750 Monroe Avenue as set forth in applicable application and plans on file; (iv) Demolition Review and Approval to raze a restaurant building on property located at 2800 Monroe Avenue as set forth in applicable application materials and plans on file ([iii] and [iv] are collectively "the Demolition plan Approval"); (v) Preliminary and Final Subdivision/Resubdivision Approval to combine and reconfigure several lots into two on properties located at 2740, 2750 and 2800 Monroe Avenue, 2259 Clover Street and 175 Allens Creek Road as set forth in applicable application and plans on file; (vi) Preliminary and Final Subdivision Approval to create two lots from one on property located at 175 Allens Creek Road, as set forth in applicable application materials and plans on file ([v] and [vi] are collectively, the "Subdivision Approval") (each of the forgoing applications may be referred to collectively as "the Planning Board Approvals").

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

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

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

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

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

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

12. BGR submitted the following documents in support of the Appeal: (i) Town of Brighton Zoning Board of Appeals Application, dated August 19, 2020; (ii) BGR Notice of Appeal, dated August 19,

2020; and (iii) BGR Appeal to ZBA, dated August 20, 2020, with Exhibits A-E.

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

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

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

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

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

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

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

DOCUMENTS CONSIDERED BY THE ZBA

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

enclosures; (10) Letter from BGR, dated October 7, 2020; (11) Second Supplemental Affirmation of Mindy L. Zoghlin, dated October 6, 2020, with Exhibits A-H; (12) Letter from BGR, dated October 7, 2020; (13) Letter from Building Inspector, dated October 21, 2020, and updated spreadsheet; (14) Additional documents submitted by the Building Inspector with bates number ZBA010544-010581; (15) Email from Howie Jacobson, dated September 2, 2020; and (16) Email from Paul Adams, dated October 16, 2020.

JURISDICTION AND STANDARD OF REVIEW

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

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

FINDINGS OF FACT AND DETERMINATIONS

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

I. Irrevocable Letters of Credit

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

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

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

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

II. Public Service Commission Approval

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

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

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

III. Building Inspector Certification on Site Plan

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

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

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

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

34. Section 73-5 of the Brighton Town Code establishes the office of the Building Inspector. Section 73-5(A)(1) of the Brighton Town Code states that the office "shall be headed by the Associate

Planner and shall employ an official or officials designated as the 'Building Inspector.' The Building Inspector(s) shall be appointed by the Town Board, upon recommendation of the Commissioner of Public Works, and may be either the Commissioner of Public Works, the Associate Planner or other Town employee(s)…."

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

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

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

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

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

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

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

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

43. This portion of the Appeal is denied.

IV. Cross-Access Easements for the Access Management Plan

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

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

46. Paragraph 8 of Schedule E-2 of the Incentive Zoning Approval provides that "prior to the issuance of any Town permits for

the Project with the exception of the issuance of any permit for demolition of the buildings currently located on the Property, the [Developer] shall provide and file access rights for cross-access and cross-parking easements between proposed Lot 1 and Lot 2."

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

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

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

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

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

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

53. Paragraph 1.11(a) of the aforementioned mortgage is contained in the covenant section of the mortgage, and is not a bargain and sale of property rights. Instead, such a provision may only render such a conveyance a default under the terms of the mortgage and provide certain remedies to the mortgage holder. As

such, the ZBA finds that the cross-access easements, as recorded, are enforceable.

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

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

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

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

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

59. The ZBA finds that it is unreasonable to require a Town in issuing a building permit to review mortgages or other third party

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

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

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

62. This portion of the Appeal is denied.

V. Construction Sequencing

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

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

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

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

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

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

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

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

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

72. The Building Inspector has confirmed that the New York State Stormwater Management Design Manual recommends "projects avoid mass grading of a site and suggests that the project area be divided into smaller areas for phased grading." The New York State Standards and Specifications for Erosion and Sediment Control similarly recommend that a "properly designed erosion and sediment control plan

for a commercial site will typically involve several phases, and that good construction and site management includes site phasing and construction sequencing measures."

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

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

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

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

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

78. During the public hearing on October 7, 2020, BGR stated that the Developer is pulling permits piecemeal and has not shown any indication they have applied for or pulled, or are prepared to pull,

any other permits. The ZBA finds no evidence to this effect. The ZBA has verified with the Town Building and Planning Department that, in fact, the Developer (i) on September 16, 2020 applied for a building permit to construct the internal build-out for new tenant Starbucks Coffee, and (ii) on October 13, 2020 applied for a building permit to construct a building shell for the 22,380 square foot building approved as part of the Project.

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

80. This portion of the Appeal is denied.

VI. Compliance with Zoning

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

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

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

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

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

86. The foregoing incentive grants the Project relief from Section 201-9(A)(3) of the Comprehensive Development Regulations,

which states: "In all cases where a district boundary divides a lot in one ownership, and more than 50% of the area of such lot lies in the less restricted district, the regulations prescribed by these regulations for the less restricted district shall apply to such portion of the more restricted portion of the said lot which lies within 30 feet of such district boundary. For purposes of this section, the more restricted district shall be deemed that district subject to regulations which prohibit the use intended to be made of said lot, or which require higher standards with respect to coverage, yards, screening, landscaping and similar requirements."

87. The Incentive Zoning Approval is not before the ZBA in connection with the Appeal, which involves the issuance of the Building Permit. The ZBA is without jurisdiction or authority to review the Incentive Zoning Approval, including the incentives that the Town Board granted to the Project.

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

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

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

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

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

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

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

95. This portion of the Appeal is denied.

VII. The Pedestrian Easements

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

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

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

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

100. At the time the easements were granted, the various properties contained an office park, bowling alley, and other commercial buildings. As reflected by the maps attached to the

Pedestrian Easements, at the time, and presently, they run over pavement, including a parking lot. As stated by Board Member Schmitt during the public hearing on October 7, 2020, who has utilized the Pedestrian Easements, the easement area is "a parking lot and has always been a parking lot."

101. The Appellate Division, Fourth Department, found issues of fact as to "whether there was an express or implied dedication of the [Pedestrian Easements] subject to the public trust doctrine." *Clover/Allen's Creek Neighborhood Association LLC v M&F, LLC*, 173 A.D.3d 1828 (4th Dep't 2019). The Fourth Department stated: "To establish that property has been dedicated as a park or for public use, formal dedication by the legislature is not required. Rather, a parcel of property may become a park by express provisions in a deed ... or by implied acts, such as continued use [by the municipality] of the parcel as a park …. A party seeking to establish … an implied dedication and thereby successfully challenge the alienation of the land must show that (1)[t]he acts and declarations of the land owner indicating the intent to dedicate his [or her] land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication and (2) that the public has accepted the land as dedicated to a public use." *Id.* (internal citations and quotations omitted).

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

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

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

105. According to the Town Superintendent of Parks, the Town currently manages almost 500 acres of parkland and open space for the benefit and enjoyment of the Town's residents and visitors. The Town Superintendent states that the Town "has not designated this pedestrian pathway as a park, and has not accepted this area as parkland. This area is not among the hundreds of acres of parkland

and open space managed by the Town Parks Department. The Town does not maintain this area as a park. This area is not identified on any official Town maps as a park, and the Town has not erected any signs on or near this pathway which identify it as a park." (ZBA010566).

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

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

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

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

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

111. The Building Inspector has confirmed that the Pedestrian Easements will not be closed during or after construction. The ZBA has confirmed, based on a visual inspection of the Project Site, that the Pedestrian Easements are protected from obstruction by construction fencing. As part of the Incentive Zoning Approval, the Developer will be improving and extending the Auburn Trail for the benefit of the public. The ZBA finds that the public's right to access and use the Auburn Trail will be enhanced and improved as a result of the Project. The ZBA finds the Project will not substantially interfere with the Pedestrian Easements.

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

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

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

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

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

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

118. This portion of the Appeal is denied.

VIII. <u>Trail Amenity</u>

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

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

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

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

123. The construction of the trail amenity is governed by Paragraph 1 of the Amenity Agreement, which requires the Developer to provide and file all necessary trail easements within sixty (60) days of the completion of the trail. The Amenity Agreement requires the Developer to complete the trail within three hundred sixty five (365)

calendar days of the date on which the Town issues the first building permit for the Project. (ZBA000079-80).

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

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

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

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

128. This portion of the Appeal is denied.

IX. State and County Approvals

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

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

A. New York State Department of Transportation

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

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

the maximum extent practicable, including the effects disclosed in the environmental impact statement."

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

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

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

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

B. New York State Department of Environmental Conservation

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

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

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

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

C. Monroe County Pure Waters

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

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

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

D. Monroe County Department of Health

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

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

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

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

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

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

F. Monroe County Department of Transportation

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

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

152. The applicable condition requires only "approvals" prior to the issuance of building permits. The summation of the actions of the

State and County together with their specific positive findings are consistent with our conclusion that the State and County approved the Project.

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

154. This portion of the Appeal is denied.

CONCLUSION

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

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

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. Premo, 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	YES
Kathleen Schmitt, Board Member	Voting	YES
Andrea Tompkins Wright, Board Member	Voting	YES
Judy Schwartz, Board Member	Voting	NO
Jeanne Dale, Board Member	Voting	YES
Edward Premo, Board Member	Voting	YES

This Resolution was thereupon declared adopted.

Dated: July 7, 2021

ATTACHMENT A

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. <u>First Building Permit and Appeal by SMA</u>

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 interpretated 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. <u>Square Footage of Building #2</u>

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 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 MR. PREMO, Seconded by MS. TOMPKINS-WRIGHT 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	YES
Andrea Tompkins Wright, Board Member	Voting	YES
Judy Schwartz, Board Member	Voting	YES
Kathleen Schmitt, Board Member	Voting	YES
Edward Premo, Board Member	Voting	YES
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. <u>First Building Permit and Appeal by BGR</u>

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.