

A G E N D A
BOARD OF APPEALS - TOWN OF BRIGHTON
MARCH 2, 2022

Due to the public gathering restrictions because of COVID-19 and the adoption of Chapter 417 of the laws of 2022, 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 January 5, 2022 meeting. **To be done at the April 6, 2022 meeting.**

Approve the minutes of the February 2, 2022 meeting. **To be done at the April 6, 2022 meeting.**

CHAIRPERSON: Announce that the public hearings as advertised for the BOARD OF APPEALS in the Daily Record of February 24, 2022 will now be held.

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. **TABLED AT THE FEBRUARY 2, 2022 MEETING - WITHDRAWN BY APPLICANT**

3A-01-22 Application of Mark Campisi, contractor, and Eric Bach, owner of property located at 45 Grosvenor Road, for an Area Variance from Section 203-2.1B(6) to allow a rear yard generator to be located in the northwest corner of the rear yard in lieu of in the rear yard behind the house as required by code. All as described on application and plans on file.

CHAIRPERSON: Announce that public hearings are closed.

NEW BUSINESS:

NONE

PRESENTATIONS:

NONE

COMMUNICATIONS:

Letter from Jerry Goldman, Woods Oviatt Gilman LLP, dated February 16, 2022 withdrawing application 2A-01-22, 2740 Monroe Avenue.

Letter from Mindy L. Zoghlin, Zoghlin Group, dated February 16, 2022, regarding legal issues raised by BGR in reference to application 2A-01-22, 2740 Monroe Avenue.

Letter from Sheila Gaddis, 2175 East Avenue, dated March 1, 2022, in opposition to application 3A-01-22, 45 Grosvenor Road.

Letter from James Kiley, dated March 1, 2022, representing Rachael LeChase, 30 Grosvenor Road, with concerns regarding application 3A-01-22, 45 Grosvenor Road.

PETITIONS:

NONE

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February 16, 2022

Town of Brighton Zoning Board of Appeals
2300 Elmwood Avenue
Rochester, New York 14618
Attn: Mr. Rick DiStefano

Re: Applications of Daniele SPC, LLC – Whole Foods Outdoor Display
Board of Appeals Application – 2A-01-22

Dear Board Members:

Daniele SPC, LLC hereby withdraws the pending application referenced above.

Thank you very much for your courtesy.

Very Truly Yours,

WOODS OVIATT GILMAN LLP

A handwritten signature in black ink, appearing to read "Jerry A. Goldman".

Jerry A. Goldman
Please direct responses to Rochester Office

JAG/cjv



VIA EMAIL TO
RICK.DISTEFANO@TOWNOFBRIGHTON.ORG

February 16, 2022

RECEIVED
FEB 16 2022
TOWN OF BRIGHTON
BUILDING & PLANNING

Town of Brighton Zoning Board of Appeals
Brighton Town Hall
2300 Elmwood Avenue
Rochester, New York 14618

**RE: APPLICATION 2A-01-22, RE: 2740 MONROE AVENUE
DANIELE SPC, LLC AREA VARIANCE APPLICATION**

Dear Chairman Mietz and Zoning Board Members:

We represent Brighton Grassroots, LLC (“BGR”)¹, regarding Daniele SPC, LLC’s (the “Developer” or “Applicant”) application (the “Application”) for two area variances for 2740 Monroe Avenue, Rochester, New York 14618 (the “Property”). I write in response to the request made by Mr. Gordon for legal briefing on the issues raised by BGR.

¹ Brighton Grassroots, LLC (“Brighton Grassroots”) is a domestic limited liability company organized and existing under the laws of the state of New York and is authorized to do business in New York. It is comprised of Town of Brighton residents who share the values and objectives of the organization, and has broad community support. Brighton Grassroots constituents come from the entire Brighton community. Many of Brighton Grassroots’ members reside in the immediate area that would be directly and adversely affected by the facts and circumstances of the Project and this Application, and many of its members also regularly use the segment of the recreational trail commonly referred to as the Auburn Trail that runs between Allens Creek Road and Clover Street in the Town of Brighton, and therefore have an interest different from the public at large. The interests sought to be protected by Brighton Grassroots are germane to its purposes.

1. The Area Variances Should Be Denied

In deciding whether to grant an area variance, the ZBA must weigh the benefit to the Applicant against the detriment to the health, safety and welfare of the community. Town Law §267-b(3)(b). In making that determination, this Board must also consider:

1. whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
2. whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
3. whether the requested area variance is substantial;
4. whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
5. whether the alleged difficulty was self-created.

Id. Determinations to grant area variances must be supported by evidence. *Pecoraro v. Bd. Of Appeals of Town of Hempstead*, 2 N.Y.3d 608 (2004). If the ZBA decides to grant an area variance, it must limit the relief to the minimum necessary adequate. Town Law 267-b(3)(c).

A. The Variances Will Result in an Undesirable Change In The Character Of The Neighborhood And Create A Detriment To Nearby Properties

As part of the review process for this Project, traffic and parking issues were of critical concern. The Town of Brighton Town Board (the “Town Board”) identified numerous traffic and internal circulation issues that required study and correction. The Town Board, in granting incentive zoning approval, did not review or consider the new proposed uses for which the Developer now seeks area variances (the “Variances”), or how they would impact interior traffic flow, parking, the nearby residential community, the adjacent Auburn Trail, or any other environmental impact.

The proposed Variances would allow the Developer to create a new outdoor product storage, display and seating/dining area in a location that otherwise would not have been used, and was not approved, for that purpose. This could detrimentally impact the traffic, parking, and internal circulation plans approved as part of the Town Board’s incentive zoning approval for the Project. The addition of a new outdoor seating and display area will be a detriment not just to the existing BF-2 (commercial) zoning district but will also be visible from the adjacent RLA (low density residential) zoning district and Auburn Trail that crosses the subject property. This will be

a detriment to the adjoining RLA zoning district because it will interfere with the purpose and intent of such districts, which is “to promote and encourage a suitable environment for family living by protecting and stabilizing the residential character of the Town’s established neighborhoods.”² Thus, the ZBA should deny the Developer’s request in its entirety because, for the reasons set forth below, it will be a detriment to the health, safety and welfare of the community, and such detriment far outweighs the Developer’s “desire to have the display visible and accessible to customers of the store.”³

The Applicant baldly asserts that the requested Variances are not out of character with the neighborhood. This is not supported by any evidence. The requested Variances would authorize the first such outdoor display on this Property and would create an unscreened display visible by the adjoining RLA district and Auburn Trail. As this outdoor display and storage area would be a first of its kind display on this Property, its creation would invite further changes to the character of the neighborhood and further erode the barrier between the commercial district and the neighboring residential district.

The establishment of an outdoor seating area would further change the character of this Project and neighborhood and would invite use of the area for outdoor dining and congregation, not just displays.

The location of such an outdoor displays and seating uses so close to internal circulation and parking creates a new safety hazard for pedestrians and patrons that was not considered or studied as part of the SEQRA, Incentive Zoning or Site Plan review and approval process. The location of this proposed use so close to internal traffic circulation is also extremely uncommon in the community. Most outdoor dining areas in Brighton have much more space separating the diners from internal traffic and the resulting exhaust. Thus, this new proposed use causes further changes to the community character and requires the ZBA to reopen the SEQRA process.

The placement of an outdoor seating area that permits outdoor dining could also result in more garbage or food waste in the area, further attracting pests and animals, and creating further hazards for pedestrians and vehicles. Thus, the changes contemplated by this Application would cause a change in the character of the Project and neighborhood and would detrimentally impact the health, safety and welfare of the community and neighborhood.

The Developer utterly failed to meet its burden of establishing that the requested Variance will not result in an undesirable change to the character of the neighborhood or create a detriment to nearby properties.

² Town of Brighton Town Code §203-2.

³ Application at page 2.

B. The Benefit Sought by The Applicant Can Be Achieved by Some Other Feasible Method

It is the Applicant's burden to demonstrate that strict compliance with the zoning law will prevent it from using their property without coming into conflict with the zoning ordinance. *Robbins v. Seife*, 215 A.D.2d 665 (2d Dep't 1995). The Applicant has not met this burden.

The benefit sought by the Developer is the "desire to have the display visible and accessible to customers of the store" (the "Benefit").⁴ But there is no need to have an unscreened, outdoor product storage and display area for such a purpose.

To the contrary, an indoor display would obviously satisfy the Developer's "desire to have the display visible and accessible to customers of the store."⁵ A prominently located, indoor display could be seen by all customers entering the store, and so there is simply no need to clutter the outdoor area with this new, unscreened use. The Developer makes no attempt to explain why customers would not be able to see an indoor display or why an indoor display would not achieve its objectives.

The Developer further argues that placement of the proposed seating and display area in the rear yard would defeat the objective of having it be visible, convenient, and accessible. Not so. The Starbucks building which is part of the same Project includes a seating area in the rear yard. This undermines and is inconsistent with the Developer's claim that having such an area in the rear yard would "defeat that objective."

The Applicant offered a self-serving statement that the placement of a screened display in the rear yard would defeat its objectives. But it offers no evidence to support that conclusory statement, nor does it address any other obvious methods of achieving the Benefit sought.

Thus, the Applicant failed to meet its burden of establishing that the Benefit sought can be achieved by some other method. Thus, this factor weighs against the Application, and so it should be denied.

C. The Variances Are Substantial.

The magnitude of desired area of variance is a significant factor since the greater the variance from area restrictions, the more severe the likely impact upon the community. *National Merritt, Inc. v. Weist*, 41 N.Y.2d 438 (1977).

The Applicant seeks a variance to allow the placement of a massive, unscreened, outdoor product storage and display area, and outdoor seating area along almost the

⁴ Application at page 2.

⁵ Application at page 2.

entire side of the supersized grocery building. It seeks to relocate outdoor displays to a side yard that abuts a 450-car parking lot and may encroach on parking and delivery lanes. It also seeks to eliminate the fencing requirement entirely. These requests are substantial.

The fact that the Developer is also seeking to install seating areas under a covered canopy suggests that it is also inviting people to use the area as outdoor dining and/or gathering, which encourages a more intensive use than previously contemplated or studied, and that creates additional concerns for traffic, parking, pedestrian safety, and internal circulation.

The Developer does not articulate why this is not substantial; instead, it summarily states that it would be located “in the front of the store and visible to customers,” and that some other dissimilar stores also have outdoor displays. The Developer’s premise is false. It is very uncommon for businesses in Brighton to have outdoor seating area in the side yard. The Developer has not identified any other business in Brighton that has outdoor dining areas in the side yard, as proposed here. Additionally, the Developer has not identified any grocery store in Brighton that has outdoor dining areas in the side yard, as proposed here. To the contrary, neither the “R’s Market” grocery store in Brighton, nor the Tops Market grocery store in Brighton, have outdoor dining areas in the side yard. Accordingly, the Developer’s suggestion that outdoor dining areas for grocery stores in Brighton are common is not true.

The fact that dissimilar stores that do not directly border residential districts and the Auburn Trail and have different dimensions and buffers, also have outdoor displays does not render the Developer’s requested Variance insubstantial. To the contrary, it highlights that this use is quite significant. This Property is close to a residential neighborhood and public pedestrian trail and the grocery store’s main drive lane is in front of the store’s entrance. Placing this imposing outdoor venue at the proposed location is even more substantial given its proximity to residential districts and recreational uses (like the Auburn Trail). The developer’s comparison to dissimilar businesses is inapposite.

Consequently, this Board must find that the requested variance is substantial, and that this factor weighs against granting the Application.

D. The Difficulty Is Self-Created.

The Applicants’ difficulty is wholly self-created. The Application involves a request for outdoor storage for a 50,000 square foot grocery store specifically designed for this location.

The Developer concedes that his difficulty is self-created in his signed and certified Application. *See Application at page 3 at ¶F (“As with any area variance, there is always some degree of self-creation”).* The Developer’s attorney also admits that the difficulty is self-created. *See Letter from Developer’s Attorney, dated January 10, 2022, at page 2, ¶5 (“As with any area variance, there is always some degree of self-creation”).*

The Town Code requirements were known to the Developer at the time it obtained the Property and sought to use it for this Project. Likewise, the building orientation, lot layout, traffic problems, parking issues, and internal circulation conditions for this Project have been known to the Developer for several years. And yet the Developer nonetheless seeks relief from multiple sections of the Zoning Code even though it knew of its restrictions and the Developer's own intended use of the Property. This is the epitome of a self-created difficulty (as the Developer and its attorney admit).

The Developer further created this difficulty, and the need to request this Variance, by failing to request this relief as an incentive from the Town Board during the Incentive Zoning process and misleading the Planning Board as to its intentions during the site plan review process. The Developer knew (or should have known) when it initially proposed this Project that Whole Foods would want an outdoor seating/dining and display area in this location, and so the Developer should have asked the Town Board to consider it as part of the incentive zoning and site plan approval processes. But because the Developer failed to do so, the only way to obtain that Benefit now is by encroaching into the space set aside for internal traffic circulation, and by further reducing the space available for cars to stop for curbside pick-up. The Developer's failure to request this incentive in its initial Applications to the Town Board and Planning Board suggests that this difficulty is both self-created and an end-run around the Town Board's incentive zoning and site plan approval processes.

Applicant is completely in control over whether it installs a structure, display, and/or seating area on this Property within the parameters allowed under Town Code. Instead of choosing a more suitable lot or location for its Project and its proposed display and seating area, the Developer ask this Board to grant zoning relief so that it can build what it wants where it wants, even if it is contrary to the best interests of neighboring properties and the community.

E. The Proposed Variance Will Have an Adverse Effect or Impact On The Physical Or Environmental Conditions In The Neighborhood Or District

The requested area variance will have an adverse effect on the physical and environmental conditions in the neighborhood and/or district. If granted, the requested variance would adversely affect pedestrian safety, traffic, parking, and internal circulation plans for the Property, all of which were not studied or considered with this new use during any prior part of this Project's SEQRA, Incentive Zoning, or Site Plan approval processes. This would also be detrimental to public safety.

For example, having outdoor seating and dining areas so close to drive lanes and parking poses risks to diners, pedestrians, and motorists, especially without the required 6-foot-tall physical barrier to separate those proposed uses. That proximity invites dangers not just from physical collisions or internal conflict, but also exposes diners to unnecessary and unsafe exhaust from motor vehicles. Exposing people in the outdoor seating area to unsafe air conditions and exhaust is particularly troubling given that such area will likely be used for eating.

Installing an outdoor seating and display area would necessarily reduce the amount of space available for internal traffic circulation in the side yard near the entrance to the grocery store. This would apparently reduce the space drive space to only 2 lanes, thereby interfering with the ability of drivers to stop for curbside pick-up or to load groceries. This could create further internal traffic conflicts that were not studied during the initial review and approval of the Project.

Allowing unscreened, outdoor displays visible from the RLA district and Auburn Trail will also have adverse visual impacts on those areas. The visual and environmental impacts of such potential uses are a clear detriment to the neighborhood and district and public safety on site.

Allowing such new uses so close to an RLA district and so close to the Auburn Trail is also inconsistent with the Town's Comprehensive Plan, which, for example, seeks to promote the Auburn Trail for outdoor recreation. This use is also inconsistent with developing this portion of the Auburn Trail as a public pedestrian pathway in a park-like setting. Granting area variances for outdoor storage, displays, and outdoor seating/dining to the Applicant for this Property would undermine these important goals.

The Applicant does not address these issues; instead, its attorney offers only conclusory statements that no adverse effects or impacts will result. Because the Applicant has not given any serious consideration to this issue, the Developer has failed to meet its burden of proof, and so this factor weighs against granting the Variance.

Indeed, the Developer completely fails to consider how the impacts from this Variance compare to the impacts of not installing the outdoor displays and seating areas, or reconfiguring the location of such areas to comply with the Town Code requirements that they be located in the rear yard and be properly and appropriately screened.

Similarly, the Applicant offers no proof about what it intends to do in order to mitigate the adverse physical or environmental impacts of its proposed outdoor displays and seating areas. Instead, the Applicant suggests that no mitigation is planned whatsoever because it does not believe that any adverse impacts will result. The refusal to consider or propose any mitigation measures further exacerbates the risk of detrimental physical or environmental impacts.

For these reasons, the Applicant did not and cannot establish that the proposed Variance will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood. For these reasons, its application for an area Variance should be denied.

F. The ZBA Must Grant Only the Minimum Relief Necessary

If the ZBA grants the requested area variance, it must grant the minimum necessary and adequate. Town Law 267-b(3)(c). Here, the Applicant reiterated to the ZBA claims it had

previously made to the Planning Board, that it might take “temporary furniture” outside “on a nice day” and might place temporary seasonal displays such as “putting pumpkins outside in October” because they “tend to survive out there better”:

9/17/2018 Planning Board Meeting minutes (pages 12-13), attached (emphasis supplied):

MS. CIVILETTI: There is some outdoor seating shown on the site plan. What is that in front of Whole Foods? Is that merchandizing what does that consist of?

MR. SUDOL: That is just temporary furniture brought out on a nice day so if someone wants to go outside with their kids and grab some food before jumping in the car.

MR. BOEHNER: What is the merchandizing, is that storage outside the store?

MR. SUDOL: No, it is not meant to be outside storage.

MR. OSOWSKI: Would it be like putting pumpkins outside for sale in October.

MR. SUDOL: Yes, and they tend to survive out there better.

Consequently, if an area variance is granted, it should be limited to only what is necessary for seasonal display of produce and temporary fair weather outdoor seating.

2. THE OUTDOOR SEATING ISSUE

The Developer also seeks approval for “outdoor seating,” but has been vague about what that seating would consist of. We ask the ZBA to drill down on this request and determine whether the Applicant intends to seek “park bench” type seating as represented to the Board, or bistro type seating, which would be indicative of an “outdoor dining facility,” and is only available by special permit. An applicant may apply for a conditional use permit for “outdoor dining facilities,” but only in conjunction with a legally established restaurant located on the same parcel. Zoning Code 202-84(B)(4). Moreover, the “outdoor dining facility”

- Shall only operate during the hours of operation of the associated restaurant (Zoning Code 202-84(B)(4)(a));
- shall only be used for dining by seated patrons (Zoning Code 202-84(B)(4)(c));
- shall not be used for food or alcohol service (Zoning Code 202-84(B)(4)(c));
- must be located and configured to ensure the safe and unhindered passage of pedestrians and/or vehicles (Zoning Code 202-84(B)(4)(d)(1)(a));

- must be located and configured to prevent the escape of litter from the dining area (Zoning Code 202-84(B)(4)(d)(1)(b)); and
- may be required to have aesthetically pleasing barriers must be located and configured to ensure the safe and unhindered passage of pedestrians and/or vehicles (Zoning Code 202-84(B)(4)(d)(2)).

This Property does not have a restaurant, and the Applicant has not applied for one. It is not entitled to outdoor seating. Moreover, for the reasons set forth below, the Board must deny the requested relief because the harm to the community greatly outweighs the benefit to the Applicants. Moreover, this Board lacks jurisdiction and authority over this Application because the Applicant must first seek to amend the Town Board's Incentive Zoning approval for these new incentives.

CONCLUSIONS

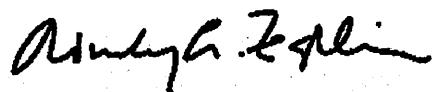
First and foremost, the Board must decline to consider the application because, for the reasons articulated by Save Monroe Avenue, Inc. (which BGR joins and incorporates by reference), it does not have jurisdiction to vary a project approved under Incentive Zoning.

Moreover, even if the Board had jurisdiction, the Developer has failed to present virtually ANY evidence responsive to the five required area variance approval criteria, and as a matter of law failed to meet its burden necessitating denial.

Finally, this Board must deny the area Variance Application because the harm to the community greatly outweighs the alleged Benefit to the Developer. The Developer failed to establish that it is entitled to the requested area Variance and submits no independent, credible evidence in support of its self-serving assertions. Accordingly, granting the requested Variance would be detrimental to the health, safety, and welfare of the community, which far outweighs the non-existent Benefit sought by the Developer. For the foregoing reasons, we respectfully request that this Board deny the Developer's Application for an Area variance. BGR incorporates by references all arguments and submissions made by Save Monroe Avenue, Inc. in connection with this matter. BGR also submits that, if the ZBA is inclined to grant this application, it must condition any such approval on modifications of the approved site plan and incentive zoning approvals and reopen SEQRA to consider the potential significant adverse environmental impact these variances would create.

Thank you for your time and attention to this matter.

Sincerely,



Mindy L. Zoglin



Town of
Brighton

Rick DiStefano <rick.distefano@townofbrighton.org>

Zoning Board of Appeals 3A-01-22 Application 45 Grosvenor Road

1 message

Sheila Gaddis <sgaddis@rochester.rr.com>
To: rick.distefano@townofbrighton.org

Tue, Mar 1, 2022 at 12:01 PM

To: Rick DiStefano, Secretary
Brighton Town Hall
rick.distefano@townofbrighton.org

Re: 3A-01-22. Application of Mark Campisi, contractor, and Eric Bach, owner of property located at 45 Grosvenor Road, for an Area Variance from Section 203-2.1B(6) to allow a rear yard generator to be located in the northwest corner of the rear yard in lieu of in the rear yard behind the house as required by code.

Subject: Objection to Variance Approval

I am requesting the application for an area variance from Section 203-2.1B(6) to allow a rear yard generator be located in the northwest corner of the rear yard be denied.

As a property owner directly impacted by this decision I have standing to comment on the application.

The pool project is directly visible and clearly within the line of sight from my home. The noise generated from the pool activities and, specifically, the pool equipment and generator, will significantly alter the use and enjoyment of my home inside and out; and the noise will negatively affect the property value of my townhome. The stated 10' distance from the rear yard is not sufficient to reduce the loud, incessant, debilitating noise generated by the pool equipment.

The scale of the project, pool and equipment, is extensive and out of character with the surrounding neighborhood. There is not an inordinate economic burden on the homeowner applicant sufficient to justify the variance. This special condition was self created and the request for a variance unreasonable under the circumstances.

The request to allow a rear yard generator to be located in the northwest corner of the rear yard would cause unnecessary hardship to the use and enjoyment of my home for a substantial part of the year. A reasonable request for additional soundproofing of the pool equipment located as far as possible from adjacent neighbors, and additional fencing and landscaping are viable solutions to ensure the wellbeing of all neighbors surrounding 45 Grosvenor Road.

Sheila Gaddis
2175 East Ave



Rick DiStefano <rick.distefano@townofbrighton.org>

Public Hearing on Wed. March 2, 2022, regarding Application Number 3A-01-22

1 message

James Kiley <jkiley@jameswkileypllc.com>

Tue, Mar 1, 2022 at 12:43 PM

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

This is a follow up to my telephone message this morning . I represent Rachel LeChase , the owner of a residence at 30 Grosvenor Rd. , Rochester , NY 14610. This concerns the Application of Mark Campisi contractor , and Eric Bach , owner of property at 45 Grosvenor Road , for an Area Variance ... to allow a rear yard generator to be located in the northwest corner of rear yard in lieu of in the rear yard behind the house as required by code. My client is concerned whether the proposed variance will adversely affect my client's property value. Two items since I got no reply to my call. First , I'd like to review the application and plans on file asap ; and secondly , is the hearing public or by zoom? If zoom and the Town of Brighton is closed , how do I review the documents ? Please advise .

Get Outlook for iOS