

Daniel A. Spitzer
Direct Dial: 716.848.1420
Facsimile: 716.849.0349
dspitzer@hodgsonruss.com

March 24, 2017

Via Email and U.S. First Class Mail

Hon. Town Supervisor and Members of the
Town Board of the Town of Brighton
2300 Elmwood Avenue
Rochester, New York 14618

Dear Supervisor Moehle and Members of the Board:

Re: Monroe Avenue Plaza Redevelopment; Letter to the Town
Board regarding the SDEIS Prepared for the Whole Foods Plaza dated
February 2017

This firm represents Save Monroe Ave., Inc. (“Save Monroe Ave.”) in connection with the Monroe Avenue Plaza Redevelopment/proposed Whole Foods Plaza (the “Project”). We submit this letter in response to the Daniele Family of Companies (the “Developer”)’s recent re-submission of a Supplemental Draft Environmental Impact Statement (“SDEIS”) and revised Traffic Impact Study (the “Revised TIS”) for the Project, and its now-apparent willful disregard of the Town Board’s directives and its obligations under the State Environmental Quality Review Act (“SEQRA”).

As previously noted in our January 6, 2017 submission, the Developer has repeatedly failed to comply with the Town Board’s instructions to address all non-traffic related comments on the draft environmental impact statement (“DEIS”) in the SDEIS submission. As you will remember, at the December 14, 2016 meeting, counsel for the Developer argued with Supervisor Moehle, stating that the Developer was not required to address non-traffic related public comments. Supervisor Moehle reiterated that the Town Board directed the Developer to do so. We had assumed that the Developer would follow the Town Board’s direct instructions after the Board rejected the first submission of the SDEIS, but we underestimated the Developer’s willingness to openly defy the Board and refuse to address critical public comments.

Indeed, the Developer’s refusal has resulted in even the Town Board members’ comments being ignored. For example, in his August 1, 2016 comment letter, Town Board Member James Vogel raised concerns about the proposed density of the Project. And by letter dated July 28, 2016, Town Board Member Christopher Werner questioned the real value to the community of many of the “amenities” proposed by the Developer. These concerns are a handful among many issues identified by the Town Board and other members of the community during the public comment period on the DEIS that the Developer refuses to respond to. The law

states that these comments cannot be retroactively addressed in the final environmental impact statement for the Project because that would unlawfully circumvent the public review process under SEQRA. The time to address those issues is now, per the Town Board's direction, and as per applicable law.

In addition, the Developer continues to refuse to address all of the issues in the DEIS final project scoping document adopted by the Town of September 23, 2015 (the "Final Scope"). For example, Section IV.A of the Final Scope requires the Developer to explain how the "amenities" offered by the Developer could not be required by the Town's zoning regulations and/or general SEQRA mitigation principles. The Developer continues to ignore this issue. The Final Scope also required the Developer to provide proof of its right to access the area south of Monroe Avenue for implementation of the proposed Access Management Plan; yet no binding agreements to that effect have been presented to the public or the Town Board. The Town Board (and the public) cannot evaluate the sufficiency of the mitigation if there is no evidence or certainty that the Developer has the legal ability to implement it. Other issues under the Final Scope also remain unaddressed. The Developer should be required to address each and every one of these issues before the SEQRA review process can continue.

Like the Developer's prior submission, the revised SDEIS is also substantively deficient because it failed to provide a code-compliant, "as-of-right" baseline alternative for the Project that meets the design and density requirements for the BF-2 zoning district under the Town Code. As noted by Town Board Member Christopher K Werner in his July 28, 2016 comment letter, "[a]ccurate background conditions and baseline traffic levels *are essential* for evaluation of the impact of this project." (emphasis added); *see also Matter of Committee to Preserve Brighton Beach & Manhattan Beach v. Council of City of N.Y.*, 214 A.D.2d 335, 337 (1st Dep't 1995) (holding an appropriate baseline condition for impact consideration was an "as of right" development analysis under existing zoning regulations).

A review of the Developer's "baseline" proposal, referred to in the SDEIS as Alternative 6, reveals several serious deviations from the permitted development restrictions in the Town Code. For example, under Town Code § 205-7, the maximum coverage for lots in BF-2 districts, *including all impervious services*, is 65%. Under Town Code § 205-1, the term "coverage" is defined as "all buildings on a lot, expressed as a percentage of the total lot area." As such, total lot coverage in the BF-2 zoning district is calculated by adding building footprints, plus all other impervious services. However, the Developer's proposed "baseline" alternative improperly separates "building" and "impervious area" coverage. Under Alternative 6, the impervious area alone is 60% of the lot. Coupled with the stated 23% coverage attributable to footprints of the proposed buildings, the actual coverage for the Developer's purported "baseline" appears to be 83% — a number well above what is permitted by the Town Code, and only 4% smaller than the coverage proposed for the Developer's preferred alternative.

The significance of this should not be overlooked. By misrepresenting the development size permitted under the Town Code, the Developer is attempting to mislead the Town Board as to the cumulative impact/increase of traffic generated by its primary proposal in both the SDEIS and TIS. The Developer is also attempting to skew the analysis of the benefits

of the use of incentive zoning, versus the amenities proposed. As Town Board Member Werner noted (and the law requires), a proper baseline is “essential” to a proper analysis under SEQRA (e.g., the alternatives analysis and evaluation of traffic impacts) and for incentive zoning.

Similarly, the Developer’s baseline analysis is fundamentally flawed as it does not start with what the Developer is permitted to build “as of right.” Instead, the Developer improperly assumes it will obtain a number of special permits and variances. This is not a baseline analysis. While the Developer could theoretically obtain these variances, permits and approvals, it is not entitled to them “as of right” and they have no place in an “as of right” baseline analysis.

We further note that while the Developer may be permitted to seek a special use permit from the Town Board for stores like the proposed Whole Foods that are larger than 20,000 square feet of floor area, again the special permit is not allowed “as of right.” Any such special use must meet two conditions: (1) any building larger than 20,000 square feet must be a minimum distance of 25 feet from any side property line; and (2) the proposed use must not result in an adverse change in traffic levels on any street within the Town. Town Code § 203-84(B)(17). The Developer’s proposed “baseline” does not clear either hurdle. The 50,000 square foot grocery store is proposed to be a mere 11 feet from the side property line, and, as discussed at length in the public comment period, the traffic studies for the proposed plaza have definitively stated that the development will negatively affect area traffic.

The SDEIS cannot be deemed adequate for public review until a truly code-compliant baseline for a project size “as of right” is submitted and compared against the Developer’s preferred proposal.

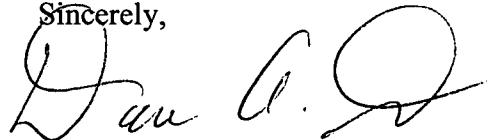
Also troubling is the fact that the “Revised TIS” in the SDEIS is essentially the same study that was rejected by the Town Board last year for containing numerous inaccuracies, false statements, and faulty assumptions and methods of analysis. And perhaps most importantly, the Revised TIS substantiates Save Monroe Ave.’s previously expressed fear that the Developer’s exclusive reliance on signal timing adjustments by the New York State Department of Transportation are insufficient to mitigate the traffic impacts of this supersized proposal. The Revised TIS indicates that even with these highly touted adjustments, numerous movements along Monroe Avenue would still operate at very poor/failing levels of service — ***including the new proposed signalized intersection directly in front of the proposed plaza.*** If anything, the Revised TIS underscores the need for the Developer to examine additional/alternative traffic mitigation measures for the Project beyond those suggested in the DEIS and SDEIS (which would apparently do nothing to address the existing traffic problem, and would in fact make things worse by adding a new, failing level of service intersection to the mix).

In short, rather than supporting the Project as proposed, the TIS actually underscores the need for the Developer to propose a reduced sized project which will not create these admitted traffic problems/failing conditions.

We appreciate the Town's decision to require the Developer to re-submit the SDEIS because of its inadequacy. However, the Developer continues to refuse to address the deficiencies identified by the Town Board, and has refused to address those issues the Town Board specifically required. This must be done before Town Board accepts a SDEIS as adequate for public review. At a minimum, this would require the Developer to address all non-traffic related comments on the DEIS, provide an appropriate "baseline" for analysis, address all outstanding issues in the Final Scope issued by the Town Board, provide a project alternative which does not result in poor/failing traffic conditions, and cure the remaining deficiencies in the re-submitted SDEIS.

We thank you for your consideration and look forward to working with the Town on these important issues.

Sincerely,



Daniel A. Spitzer

DAS/say

cc: Assembly Majority Leader Joseph D. Morelle (*via email*)
Kevin C. Bush, NYSDOT Region 4 Director (*via email*)
David Goehring, New York State DOT (*via email*)
Kenneth Gordon, Esq. (*via email*)
Ramsey Boehner, Associate Planner (*via email*)
Save Monroe Ave., Inc. (*via email*)
Charles W. Malcomb, Esq. (*via email*)
Joel Terragnoli, Esq. (*via email*)
Jerry A. Goldman, Esq. (*via email*)
Robert W. Burgdorf, Esq. (*via email*)
Robert Galbraith, Esq., Brighton Community of Concerned Citizens (*via email*)
Michael Flanigan, Stantec, Town Engineering Consultants (*via email*)
Adam Frosino, McFarland Johnson (*via email*)