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August 1, 2016

Via Hand Delivery and Email

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

Ramsey Boehner
Associate Planner – Town of Brighton
2300 Elmwood Avenue
Rochester, New York 14618

Dear Supervisor Moehle and Members of the Board and Mr. Boehner:

Re: Monroe Avenue Plaza Redevelopment; Save Monroe Ave., Inc.'s Comments on the Draft Environmental Impact Statement

This firm represents Save Monroe Ave., Inc. ("Save Monroe Ave.") in the above-referenced matter. In connection with the Town of Brighton's (the "Town") review of the draft environmental impact statement ("DEIS") for the Monroe Avenue Plaza Redevelopment (the "Project"), I am enclosing Save Monroe Ave.'s comments on the DEIS. Pursuant to 6 N.Y.C.R.R. Part 617, these DEIS comments are submitted for the Board's consideration and the Applicant's response.

Please contact me with any questions you may have.

Sincerely,

Daniel A. Spitzer

DAS/say
cc (w/enclosures): Daniel Aman, Town Clerk (*via hand delivery and email*)
Kenneth Gordon, Esq., Town Attorney (*via email only*)
Save Monroe Ave., Inc. (*via email only*)
Charles W. Malcomb, Esq. (*via email only*)

Monroe Avenue Plaza Redevelopment
Comments on the Draft Environmental Impact Statement

INTRODUCTION

Our office represents Save Monroe Avenue, Inc. ("SMA"). SMA is comprised of local residents and businesses living and working around or along the Monroe Avenue corridor in the Town of Brighton, who are concerned with the significant traffic problems that currently exist in that area, which will be significantly exacerbated if the current preferred alternative is approved. The Monroe Avenue Plaza Redevelopment would allow a local-politician developer to exceed existing, sensible zoning limits creating a substantially denser, larger project than the infrastructure can support. The "record breaking" traffic promised by the developer will cause harm to the quality of life in the neighborhood and throughout the Town.

To be clear, SMA's members are not opposed to redevelopment of this plaza. Nor are they opposed to a Whole Foods store at this location. But they are opposed to significant exceedances of the zoning limits (and incentive zoning abuse) that will compound severe traffic problems. SMA also wants the law applied fairly to everyone in the Town, and to Whole Foods, which has built many smaller stores across the country that would fit onto the parcel without the need to rewrite the Town Zoning Code.

The only way to ensure that this occurs is to require the Developer to fairly and adequately consider the potential impacts of this proposed development. The current proposals are supported by an incomplete, indeed a woefully deficient draft environmental impact statement (DEIS). The Town Board should require the Developer to examine issues that were overlooked or otherwise given short shrift, either by rectifying the incomplete nature of the current document, or submitting a supplemental environmental impact statement (SEIS).

That revised document should include an honest evaluation of the incentive zoning proposal. There is nothing preventing the Town from exercising its incentive zoning powers in reviewing a proposal made in basic compliance with the Town Code. What the Town Board cannot continue to allow is the illegal — and immoral — use of incentive zoning to grant this developer a blank check, wiping away the use and bulk limitations. Instead, the Town Board should require the Developer to go through the normal rezoning and site plan process, and if it wishes to pursue incentive zoning for appropriate, modest allowances, propose a fair deal, with real incentives and benefits for the Town, rather than the self-serving, illusory "amenities" offered in the current proposal.

Our members have chosen to remain anonymous for the time being due to the potential for political and/or economic backlash that could result from opposing a high-profile project such as this, particularly given its backing by powerful local politicians and a well-connected development company. As confirmed by the Developer's social media and local news attacks on SMA, those fears have been validated. It appears that with SMA (and every other fair reviewer) pointing out problem after problem with the proposals, the Developer is desperate to deflect attention and thus is more interested in attacking SMA than addressing those issues. This demonstrates that SMA's members wisely exercised their legal right to remain anonymous. That said, SMA's members operate within close proximity to the proposed project and have standing to legally oppose the same, should that become necessary.

COMMENTS ON THE DEIS

The DEIS is incomplete since it fails to comply with SEQRA and 6 NYCRR 617.9. Therefore, the Town Board should require the Developer to rectify its deficiencies, as

noted below, or submit a Supplemental Environmental Impact Statement ("SEIS") which covers the obvious defects.

SEQRA requires that an environmental impact statement be prepared for any action that may have a significant effect on the environment. ECL § 8-0109[2]. "The [DEIS] must include, among other things, a description of the proposed action, its environmental impact and mitigation measures proposed to minimize the environmental impact." *Matter of Bronx Comm. For Toxic Free Schools v. New York City Sch. Constr. Auth.*, 20 N.Y.3d 148, 155 (2012) (citing ECL § 8-0109[2][a], [b], [f]); *see also* 6 NYCRR § 617.9 (listing elements which must be included within a DEIS)). SEQRA also requires that cumulative environmental impacts be considered. 6 NYCRR § 617.9(b)(5)(iii)(a). Further, the DEIS must discuss alternatives to the proposed action (ECL § 8-0108[2][d]), *i.e.*, "a description and evaluation of reasonable alternatives to the action which would achieve the same or similar objectives." *Sun Co. v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34 (4th Dep't 1995). When reviewing an environmental impact statement, "SEQRA mandates that agencies [ ] act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." ECL § 8-0109(1).

The accepted draft DEIS remains inadequate and incomplete under the standards imposed by SEQRA. It fails to comply with applicable regulations and the final scoping document and contains significant deficiencies that hinder the public's ability to thoughtfully comment on the adverse impacts of the development. The Applicant must respond and address the following questions:

A. Traffic.

The impacts of traffic caused by a proposed action are regularly considered for purposes of SEQRA review. *See, e.g.*, *Finger v. DelFino*, 27 A.D.2d 745 (2d Dep't 2000). In the Executive Summary, the Developer concludes that the intersections surrounding the project will experience "small to moderate increases in [traffic] delay during the weekday AM and PM, and Saturday midday peak hours." DEIS at ES-16. A traffic study was appended to the DEIS and cited as support for this conclusion. *Id.*

On May 24, 2016, Stantec Consulting Services, a consultant retained by the Town for purposes of reviewing the Developer's traffic analysis, wrote a letter to the Town Planner with respect to that traffic analysis. A copy of that letter is appended to these comments as **Exhibit A**. In pertinent part, Stantec indicated that it did "not agree with all of the information and results in the DEIS." and that it would be submitting public comments highlighting those disagreements. *Id.* At this writing, the Stantec report has not been submitted (or at least has not been made available). At a minimum, the Applicant must respond to each and every comment in the Stantec report by redoing the study to reflect correct inputs, complying with the final scope, and affording the community a fair basis to evaluate the project.

Independent engineers from the firm McFarland Johnson ("MFJ") performed their own review and analysis of the Developer's traffic study. MFJ determined that many of the Developer's findings and analysis were suspect and/or blatantly incorrect, vastly underestimated the negative effect the proposed project would have on traffic on and around that portion of Monroe Avenue, and failed to supply the information required by the DEIS final scope issued by the Town. Some of the conclusions reached (each of which requires a response under the SEQRA regulations) by MFJ include that:

- The Traffic Information Study ("TIS") does not accurately represent existing traffic operating and safety levels. Without establishing an accurate baseline for these critical items, a TIS provides little value.

- Although there were 11 proposed alternatives in the DEIS, only 6 proposed alternatives were analyzed in the TIS, and all six exceed Town Zoning Code density requirements and/or land use restrictions. The alternatives in the DEIS should each be analyzed in the TIS.

- There is no baseline, or "as-of-right" alternative analyzed that fully complies with the Town Zoning Code using only those uses/setbacks/density limits permitted without need for variances under the Code. This was specifically required by the DEIS Scoping document.

- The TIS should be redone reflecting a compromise, 33,000 sq. ft Whole Foods store, reflecting the typical size of a Whole Foods and reflecting reasonable variances from current limits that would permit a 73,000 sq. ft. plaza.

- The TIS fails to consider a hotel and/or other retail alternatives that would produce less traffic yet fully utilize the potential build out of the Plaza.

- The Applicant understated the size of the Whole Foods store, thereby deliberately underestimating the new traffic projection for the Whole Foods store. The TIS must be redone using actual projected project size.

- The TIS used inaccurate and unsupported trip distribution models, requiring that the TIS be redone.

- The capacity analysis performed shows significant failing operations for various movements and signal approaches. Average delays of 3 minutes and 8 minutes were calculated, and the proposed operating conditions as modeled in the TIS will create significant gridlock conditions on Monroe Avenue in front of the plaza on a daily basis.

- No highway safety analysis was completed for the project despite this area of Monroe Avenue having had 384 accidents in the past 3 years (almost 3 times the statewide average). An analysis must be prepared.

The report concluded:

> The only way to adequately mitigate the traffic impacts would be a reduction in the development size and a potential combination of additional improvements to the Monroe Avenue corridor. The extent of reduced development and the amount of additional improvements required to mitigate traffic impacts is still unknown; primarily because there is no accurate existing conditions model from which to establish a base analysis, and because of the other missing information/material deficiencies set forth above.

A complete copy of the MFJ study is appended to these comments as **Exhibit B.**

The Developer has every incentive to gloss over the potential impacts that increased traffic would have on the area surrounding the proposed project. However, evidence from experts in traffic analysis cast significant doubt on the Applicant's submissions with respect to traffic, and clearly demonstrate that further study on this issue should be required.

The Developer's failure to properly consider traffic impacts is particularly egregious since the New York State Department of Transportation has previously given this section of Monroe Avenue an "F", and the new development is guaranteed to increase traffic there. *See* Environmental Quality Review in New York § 51.12[7] (noting that "the extent to which a new project would worsen already-poor traffic conditions" should be considered when performing a transportation analysis under SEQRA, and compiling cases in support of that proposition); *see also id.* (describing a NYSDOT "F" rating as "a serious traffic jam").

Lead agencies may reject traffic studies submitted by applicants where those studies are shown by opposing experts to be deficient in quality, or contain overly optimistic assumptions about traffic patterns, or otherwise fail to analyze the effect of increased traffic on the area surrounding area. *See Retail Prop. Trust v. Bd. of Zoning Appeals*, 98 N.Y.2d 190, 194-95 (2002). Such is the case here.

Of particular note is the failure to address the recent changes in signals by the NYSDOT. The TIS must be redone to properly consider those conditions. This alone justifies the requirement of an SEIS.

The TIS ignores the serious safety consequences of increased traffic on the nearby highway and its ramps. A study must be conducted showing the reasonably foreseeable impacts during peak traffic times.

The DEIS relies on mitigation using land not currently owned or controlled by the Applicant. The TIS must be redone to reflect the unavailability of those lands.

Throughout the process the Applicant has given conflicting measures on using back roads into a local neighborhood for access. The TIS must be redone to reflect clearly the impact of such options on the traffic, as well as accident potential in the residential area.

The DEIS is incomplete since it fails to adequately address traffic impacts. Therefore, the Town should require the Developer to perform additional studies on the traffic issue to meet its obligations under SEQRA.

B. <u>Project Alternatives.</u>

A DEIS must also contain "a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor." 6 NYCRR 617.9(b)(5)(v). "[T]he description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed," and "must include the no action alternative." *Id.* This discussion is "necessary for agencies to fulfill [their] mandate [to] choose alternatives which minimize or avoid adverse environmental effects." Environmental Quality Review in New York § 5.14.

The DEIS provides an inadequate and incomplete discussion of alternatives as well. The alternatives mentioned include development of the site under existing zoning regulations, alternate developed use, alternate site plans, and no-action.

Notably, the Developer treats the possibility that the site could be developed under existing zoning laws in an extraordinarily dismissive fashion. The Developer claims that developing the site under existing zoning regulations would reduce the property tax and sales tax revenue increases from the redevelopment, would not be financially viable and would result in a negative return on investment, and would not "reflect the goals of the Project Sponsor or future tenants." DEIS at 297. There is no evidence to support this conclusion.

The Developer should indicate the calculations for such a conclusion – as would be required if this proceeding was following the required course and a request was being made for a rezoning.

It appears that what has occurred is the Developer has overpaid for the property. This cannot provide a legitimate basis for the proposal. The alternatives must be redone to consider viable as of right and a reasonable 5% oversized property alternatives.

An analysis of a project must consider that the residentially zoned area will not be available for business use.

The Developer claims that such alternative development "does not meet [the Town's] Comprehensive Plan objectives and Monroe Avenue Corridor objectives." *Id.* The Developer provides no support for these sweeping, blanket assumptions. There are no calculations to that effect either. It is well settled that a DEIS "cannot contain mere assertions unsupported by evidence." Environmental Impact Review in New York, EIS Contents § 5.04[2] (Nov. 2015). Therefore, the Developer's cursory discussion fails to provide "a level of detail

sufficient to permit a comparative assessment of the alternatives discussed," and is clearly deficient and incomplete under controlling regulations. 6 NYCRR 617.9(b)(5)(iii).

In proposing the single development alternative that complies with existing zoning laws, the Developer designed a project with only one large strip-mall style building in the most unattractive manner possible. No effort was made to lay out an appropriate development under the existing zoning, such as including a smaller grocery store or other code-compliant buildings. Without a realistic proposal of what is permitted under the Zoning Code, how can the Board properly evaluate alternatives? The DEIS provides no proper baseline for comparison. The Board should require the Developer to take this requirement seriously and provide the information necessary to comply with its SEQRA obligations. This is particularly true since several courts have struck down EISs for failing to consider reasonable smaller-sized projects. Environmental Quality Review in New York § 5.14[2][f] at FNs 89-91 (compiling cases in support of this proposition).

The Developer also allegedly considered alternatives for a hotel or mixed use development, or other variations of the existing development, and provided very basic concept sketches of what the layout of some of those alternative plazas could look like. DEIS at 298, DEIS at Appendix 5. However, these alternatives are similarly devoid of details. Instead, the Developer again makes broad, unsupported statements that the alternatives "do not meet the stated desires of the Comprehensive Plan," and that "[n]either the Hotel nor Mixed use alternatives are marketable when meeting the height or density maximums required by code." *Id.* Given the Developer's repeated insistence that alternatives would not be financially viable, it is surprising that no supporting data is given to that effect. Other comments with respect to alternatives are confusing and, given the lack of details or context, border on complete

irrelevance. *Id.* at 299 ("These designs do not inspire creativity nor a project that is in keeping with the designs that work for the more sophisticated consumer and retailers that it is built to attract."); *id.* at 300 ("additionally, the anchor tenant, Whole Foods Grocery Store, has very specific needs and has committed to coming into an area of the country with a competitor that is known as a top performer in the grocery industry requiring the anchor tenant to make this store special and to a level that can compete with Wegmans.").

Lastly, the Developer does briefly mention the "no-action" alternative, but makes the meritless suggestion that existing site development is doomed to failure by reason of, "site access safety concerns, limited pedestrian accessibility issues, pedestrian safety issues, untreated stormwater runoff, parking issues, [and] limited commercial viability/sustainability of properties." *Id.* at 303-304. These statements are belied by the fact that the Site housed two successful local restaurants and other businesses which have been operating there for many years. Cursory or inadequate discussions of the "no-action" alternative are grounds for the rejection of an environmental impact statement. *See, e.g.*, Environmental Quality Review in New York § 5.14[2][b] (citing *Town of Amsterdam v. Amsterdam Indus. Develop. Agency*, 95 A.D.3d 1539 (3d Dep't 2012)) (rejecting FEIS where discussion of no action alternative did not meet SEQRA's 'hard look' requirement).

In all, the Developer's discussion of alternatives is substantively lacking in specifics and does not enable the Town to engage in a comparative assessment of the alternatives discussed as opposed the proposed development. Therefore, the DEIS is deficient per 6 NYCRR 617.9(b)(5)(v), and the Town Board should require the Developer to rectify those deficiencies.

C. Cumulative Impacts.

The potential cumulative impacts of a proposed development must also be considered when performing a SEQRA analysis in the DEIS. 6 NYCRR § 617.9(b)(5)(iii)(a); *see, e.g., Henrietta v. Department of Environmental Conservation*, 76 A.D.2d 215, 223 (4th Dep;t 1980). As discussed in the DEC's SEQR handbook:

> Cumulative impacts occur when multiple actions affect the same resource(s). These impacts can occur when the incremental or increased impacts of an action, or actions, are added to other past, present and reasonably foreseeable future actions. Cumulative impacts can result from a single action or from a number of individually minor but collectively significant actions taking place over a period of time. Cumulative impacts do not have to all be associated with one sponsor of applicant. They may include indirect or secondary impacts, long term impacts and synergistic effects."

New York Department of Environmental Conservation, SEQR Cookbook, at p. 83, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf. Cumulative impacts must be assessed when actions are proposed, particularly where the impacts of an action are reasonably foreseeable, included as part of any long range plan, and projected to be significant. *Id.* at 83-84. Cumulative impacts should also be considered in instances where, like here, the construction of a major project is carried out in structured development phases. *Id.* at 84.

With respect to cumulative impacts, the DEIS simply states, "There are no anticipated cumulative impacts resulting from the proposed project. The project is a redevelopment project of commercial properties to ensure continued viability of the project area." DEIS at 227.

It is utterly inconceivable that a 93,000 square foot commercial redevelopment, placed on the doorstep of several residential neighborhoods, in a traffic burdened, accident prone area, which displaces existing, successful commercial enterprises and is seeking wholesale

exemption from a plethora of Zoning Code provisions, could have no cumulative impacts on the proposed project area. For example, the Developer repeatedly references that bringing Whole Foods to Brighton will create a novelty that will bring in persons that would normally not travel there. In turn, this would undoubtedly increase traffic and associated air and noise pollution, while simultaneously affecting pedestrian and vehicular safety. In fact, in a brochure advertising the proposal on its website, the Developer brags that "this Monroe Avenue Whole Food anchored center **all but guarantees record breaking sales and traffic**." http://media.wix.com/ugd/473434_2f8c6a691bdd4bac9d9fb1f9dd284eb8.pdf (emphasis added). The brochure further projects a daily traffic count of 49,249 vehicles, a more than 20% increase over the NYSDOT traffic volume data (40,890 vehicles per day) reported in the DEIS. DEIS at 141. This increase would have a significant, negative effect on traffic along the project corridor. *Contra Matter of Barrett v. Dutchess Cnty. Legislature*, 38 A.D.3d 651, 655 (2d Dep't 2007) (upholding determination that project would not increase existing traffic patterns where the applicant demonstrated that the decrease in staffing levels from the new project would represent a 25% decrease in the intensity of use of the site as compared to the prior use).

It is clear that the Developer is talking out of both sides of its mouth, downplaying the effect of traffic in an attempt to deceive the Town Board into approving the project, while simultaneously advertising that the plaza will attract a "record-breaking" number of visitors and traffic to attract renters and/or further investment. *See* Environmental Impact Review in New York § 5-59 ("likely impacts cannot be swept under the rug; they must be given a 'hard look'").

Instead of addressing the potential cumulative impacts of this project, which are many, the Developer ignored them entirely, and/or is intentionally lying about them to the Town Board. Therefore, the Town Board should require the Developer to go back and address these

issues in the currently incomplete DEIS. *See Segal v. Thompson*, 182 A.D.2d 1043, 1046 (3d Dep't 1992) (discussing how the facts and circumstances of each case will determine whether cumulative impact review is a "relevant concern" during the SEQRA review process).

D. <u>Secondary/Growth Inducing Impacts.</u>

Secondary impacts must also be considered in the DEIS. Environmental Quality Review in New York § 5.10[2]. These impacts are those that result in the surrounding area after a project is completed. For example, where an office center is built, secondary impacts could include increased employment opportunities, and, as a result, changes in population growth, land use patterns, traffic and the need for public services. *Id.* Similarly, New York regulations require that the DEIS include "a description of any growth-inducing aspects of the proposed action, if applicable and significant." 6 NYCRR § 617.9(b)(5)(d).

This type of development would undoubtedly affect the Town's "community character" (*i.e.*, "existing patterns of population concentration, distribution or growth, and existing community or neighborhood character"). SEQR Handbook at p. 87. The Developer boasts about the benefits this proposal will bring to the community and how it will improve and "transform this section of Monroe Avenue." DEIS at ES-3. However, these changes, which by the Developer's own admissions will occur, are either given lip service (such as the traffic analysis), or are otherwise ignored (population growth, commercialization of surrounding residential neighborhoods, etc.).

The DEIS did not substantively attempt to assess the impact the project would have on the surrounding businesses along Monroe Avenue either, other than to comment on how its self-serving access management plan would facilitate traffic between the northern and southern development plazas. Nor did the Developer consider how the creation of this

development would spur additional economic growth in Brighton, which in turn would result in additional environmental impacts as well, such as increased public utility use, bringing additional work commuters to the plaza, and increased road maintenance costs. As stated by the Court of Appeals, "in considering the secondary and long-term effects of this project on population patterns and neighborhood character, respondents must look to more than the potential effects of this one parcel and must consider the potential impacts on the surrounding community." *Chinese Staff & Workers Ass'n v. New York*,, 68 N.Y.2d 359, 367-68 (1986). Since the Developer has failed to do that here, the DEIS is patently deficient, so the Town Board should require the Developer to fix those deficiencies.

E. <u>Failure to Propose Mitigating Factors.</u>

A DEIS is required to propose and discuss mitigation measures to minimize the potential environmental impact of a proposed development project. ECL § 8-0109(2)(f); Environmental Quality Review in New York § 6.01[2] ("Both SEQRA and its implementing regulations make it clear that mitigation must be discussed in an EIS."). In reviewing a DEIS, the lead agency is required to consider the adequacy of the mitigation measures proposed. 6 NYCRR 617.9(a)(4). Further, "SEQRA requires an approving agency to act affirmatively upon the adverse environmental impacts revealed in an EIS," so that the EIS is "[n]ot a mere disclosure statement but rather . . . an aid in an agency's decision-making process to evaluate and balance the competing factors." *Town of Henrietta v. Department of Environmental Conservation*, 76 A.D.2d 215 (4th Dep't 1980); *see also* Environmental Quality Review in New York § 6.02[3] ("[t]he lead agency may not ignore evidence that an applicant's preferred alternative could produce unacceptable environmental consequences.").

A DEIS should be rejected where it fails to adequately discuss mitigation measures. *See In re Bouchard*, DEC Comm'r Interim Decision, at 2 (Jan. 24, 1986) (holding "The Applicant acknowledges the loss of eight acres of wetland but proposed no mitigation or in the alternative only minimal mitigation or replacement," and ordering the submission of a supplemental environmental impact statement); *In re Pyramid Crossgates*, 1981 N.Y. Env. LEXIS, at *15-*16 (June 25, 1981) ("While potential mitigation measures have been identified, no recommendations with the associated traffic and air analyses have been offered by the Applicant or other parties to enable me to approve the project and fulfill my responsibilities with regard to SEQRA.").

Despite the obvious negative effects this proposal would have on local traffic, the Developer completely failed to propose adequate traffic mitigation measures for SEQRA purposes. For example, though acknowledging that construction of the proposed plaza will cause traffic problems, the Developer states that it will, at some unspecified time, develop a maintenance and protection of traffic plan to address these problems in the future. DEIS at 175. In assessing a project under SEQRA, it is impermissible for an agency to rely upon general assurances that after the problems develop the applicant will adequately mitigate them by some appropriate action. *See H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 232 (4th Dep't 1979).

Other claimed "mitigation" measures are in fact actions that facilitate access to the Developer's plaza, and do nothing to alleviate the problems on Monroe Avenue. DEIS at 202-205 (discussing new signal and access management plan to facilitate pedestrian traffic between the northern and southern sides of Monroe Avenue). Elsewhere, the Developer actually makes the convoluted argument that because the plaza will attract many visitors, drawing them

off of Monroe Avenue for a limited time while they are patronizing the plaza, that this somehow has the effect of reducing traffic levels there. DEIS at 213. No citation or other authority is provided which explains or supports this assertion.

In all, the DEIS devotes over thirty pages to discussing "transportation mitigation". DEIS at 202-237. Incredibly, the Developer completes this lengthy discussion without proposing that it be required to take a single action to mitigate the effect of traffic. Instead, the Developer repeatedly implies that it would rely on the efforts of others to mitigate the harmful effects that traffic from the plaza would have on the Monroe Avenue corridor. DEIS at 213 (discussing that in the time surrounding the store opening, "it may be necessary to employ special traffic control measures such as contracting local law enforcement to control traffic during peak times"); DEIS at 221 (in discussing failing service levels at the Monroe Avenue/Clover Street intersection, the Developer states, "All of these decreases in levels of service can be mitigated through minor signal timing changes. The applicant will work with NYSDOT to implement the most appropriate signal timings to achieve the best operating conditions on the corridor."); DEIS at 224 (discussing Monroe Avenue at Westfall-Allens Creek Road intersection, stating "Minor signal timing adjustments can improve the levels of service to "D" or better on all approaches in the PM peak hour."); *see also* DEIS at 224 (discussing Clover Street at Allens Creek Road intersection, where certain movements already operate at "F" levels of service, noting "no mitigation is warranted or recommended at this location").

SEQRA requires reviewing agencies to act upon adverse environmental impacts revealed in an EIS – particularly where the developer fails to propose any real mitigation measures where it is shown that adverse environmental effects are likely to occur. ECL § 8-

0109(2)(f). Since the Developer has failed to do so here, the Town should reject the DEIS as incomplete, and require the Developer to address those deficiencies.

F. Non-compliance with Final Scope.

The DEIS is further incomplete since it does not contain all of the information required by the DEIS Final Scope document issued by the Town on September 24, 2015. Section 2 of the Final Scope requires the Developer to explain how the improvements offered by the project sponsor are not otherwise mandated by the Town's Comprehensive Development Regulations/Zoning Code and/or general SEQRA mitigation principles. Other than making blanket statements to the effect of "we aren't technically required to do this" (*see, e.g.*, DEIS at 47, "The design, construction and maintenance of this access is truly an amenity and is not an essential part of the commercial development and adds no financial benefit to the project sponsor."), the Developer makes no attempt to satisfy this requirement, or address the fact that the majority of the "incentives" it offers could be imposed as conditions on the project under the Zoning Code. And as noted above and in the MFJ report, the Developer's traffic study fails to include items required by the DEIS Final Scope.

Any argument that the DEIS should be approved contingent on the inclusion of the missing/deficient information in the final EIS should be rejected. As noted by the Court of Appeals, where a DEIS fails to include any of the statutorily required items, "the omission [ ] cannot be cured simply by including the item in the final EIS." *Webster Assocs. v. Webster*, 59 N.Y.2d 220, 228 (1983). This is because the abbreviated waiting period before the approval of a final EIS "is not a substitute for the extended period and comprehensive procedures for public and agency scrutiny of and comment on the draft EIS." *Id.*

The deficiencies in the DEIS are clear, and the Town Board should require the Developer to rectify those deficiencies. The Developer should not be permitted to escape public and agency scrutiny and comment by hiding behind inaccurate, incomplete and misleading reports, and hoping that the Town Board ignores the very serious issues raised by this proposal.

G. <u>Community Character and Related Impacts.</u>

The Applicant has made abundantly clear that it feels it has a sense of entitlement to wipe out existing zoning regulations to meet its profit goals. The Developer has repeatedly stated that it is asking for less than other developers have already received in other parts of the Monroe Avenue Corridor. The actual question is what is the capacity of the infrastructure to handle this proposal? The Applicant should instead provide evidence of any major development like this – adding 20,000 ft plus in building space *and* a major change in use being approved in Brighton where the intersections were, prior to approval, already at failing ("F") levels.

The enormous traffic impacts (volume, noise, pollution) will cause other negative impacts as well. In particular, it is well established that property values in neighborhoods are linked to perceptions of traffic concerns. *See, e.g.*, "Residential Noise Damage Costs Caused by Motor Vehicles" (Transportation Research Record 1559), "Property Values and Highway Expansions: An Investigation of Timing, Size, Location, and Use Effects," Brian Ten Siethoff, Cambridge Systematics, Inc., Highway noise and property value, J.P. Nelson, Journal of Transport Economics & Policy, May 1982, p. 117-138. It has been well established that as "traffic volumes increase the safety of our streets declines along with property value, air quality, and the quiet we enjoy in our homes." Community & Environmental Defense Services, Traffic & Neighborhood Quality of Life. Other studies have shown that once congestion hits a certain level, the quality of life of people making those commutes starts to decline, as does area job

growth. Traffic Congestion's Economic Impacts: Evidence from US Metropolitan Regions, Matthias Sweet, Urban Studies (June 11, 2014).

Here the Developer has acted as if his supersized project has floated down onto vacant lands. There is no analysis of the overwhelming negative impacts their gridlock will impose on the community.

Accordingly, the Applicant must revise the DEIS to

- Identify property value impacts on the residential neighborhood and the commercial corridor. The Developer makes much of his promise to pay taxes, yet absent an understanding of the impact on residential values and commercial lease rates, no determination of benefits can be made.

- Identify pollution impacts on nearby residential neighborhoods and within the Monroe Avenue corridor.

- Identify noise impacts on those residential neighborhoods and the corridor.

- Prepare an economic analysis demonstrating the impact the increased traffic will have on the businesses in the immediate vicinity. This is a common feature of legitimate DEISs examining impacts to commercial corridors and should be done here.

Moreover, the Developer is attempting to use incentive zoning for an improper purpose. Therefore, the Town Board should reject the Developer's request to utilize this zoning tool until a proposal is submitted which complies with the principles of incentive zoning – that is, one which offers the Town real amenities and gives real consideration to the Comprehensive Plan and other provisions of the Town's zoning regulations.

Generally speaking, incentive zoning is a planning tool that allows the Town to realize significant public benefits and amenities in exchange for allowing deviations from the zoning regulations as written. Town Law § 261-b provides limitations and guidelines for the use of incentive zoning. For example, the use of incentive zoning must be consistent with the Town's comprehensive plan. *See* Town Law § 261-b(2).

However, incentive zoning is not a vehicle to cut special deals with local politicians to ignore zoning requirements in exchange for token "amenities." Incentive zoning, when used properly, can be a very helpful and positive development tool. That said, incentive zoning was specifically created to benefit towns, not developers – it should not be abused. *Asian Americans for Equality v. Koch*, 72 N.Y,2d 121, 129 (1988) ("Incentive zoning is based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive.").

As a first matter, the Board must act rationally and reasonably in making a determination to grant an incentive zoning application, and must follow State law and the Town's comprehensive plan in doing so. As set forth in respected planning and zoning treatises on the subject, the public benefits of incentive zoning **must** offset the negative effects of the zoning bonus. American Planning Association, "Incentive Zoning",

https://www.planning.org/divisions/planningandlaw/propertytopics.htm. Moreover, the benefit gained from the zoning incentives must equate to the value of the amenities offered.

The proposed development area must contain adequate resources, including transportation, public facilities, waste disposal, water supply, etc., to facilitate the development. 12 NY Jur. Buildings, Zoning, and Land Controls § 220 (2d 2014). Also, in designating areas where incentive zoning may be used, the appropriate legislative body must "determine that there will be no significant environmentally damaging consequences" as a result of the proposed development. *Id.* As set forth in State law, "the purpose of the system of incentive, or bonus, zoning [is] to advance the town's specific physical, cultural and social policies in accordance with the town's comprehensive plan and in coordination with other community planning mechanisms . . . ." Town Law § 261-b(2).

To appropriately address amenities, it is necessary to understand the power of the Board to impose conditions and require SEQRA mitigation. This is because an "amenity" can only be those things that the Board has no legal right to impose on the developer to mitigate impacts. In other words, the amenity must be over and above conditions and/or mitigation of impacts. A review of the development proposal shows that to build what the applicant is proposing under the existing zoning, the Developer would need (1) a conditional use permit; (2) a use variance; (3) site plan approval; (4) subdivision approval; (5) area variances; and (6) ARB review. Pursuant to both State and local law, each of the reviewing boards has the authority to impose conditions incidental to the development to mitigate impacts. *See, e.g.*, Brighton Town Code § 217-4 ("the Planning Board may impose those standards and requirements expressly specified by this chapter and any additional conditions which the Planning Board considers

necessary and reasonable to protect the best interests of the surrounding property, the neighborhood or the Town as a whole.").

One of the many failures of the DEIS is the failure to include a chart showing the rezonings, variances, and other approvals required if the proposal went through regular zoning.

Also, as noted above, each agency, within its jurisdiction, has the authority, indeed the obligation, under SEQRA to require mitigation of impacts. *See* 6 NYCRR § 617.11 (noting that in reviewing an environmental impact statement, the Town must make findings that, in part, contain conditions to mitigate environmental impacts "to the maximum extent practicable."). The conditions only need to be "reasonable" and related to the impacts of the development. If the Board has the legal authority to impose the condition, it cannot be considered an amenity. The Town is supposed to get something in return to which it is otherwise **not** lawfully entitled to already. American Planning Association, "Incentive Zoning" ("Incentive zoning is a tool that allows a developer to develop in a way that ordinarily would not be permitted **in exchange for a public benefit that would otherwise not be allowed**.").

The Developer's proposal offers no real amenities to the community. The first "amenity" proposed is a pedestrian and bicycle access path. The proposed cash value of this "amenity" was $65,000, plus annual maintenance costs of $1,200. The Applicant noted that this will involve "improvement and slight relocation of the existing trail across the development site." In other words, this trail already exists. To the extent it needs improvement, it because the Applicant was responsible for paving over and ruining it during prior development activities. The real value of this amenity is therefore zero, since the Applicant should be required to fix the damaged trail regardless of whether the proposed development is eventually approved.

The second proposed "amenity" is a traffic light. The construction of this light could and should be imposed as a condition of the development by the Town under the zoning code (i.e. a "mandated requirement"), and is therefore not an "amenity", meaning the Town is not getting any benefit here either. Moreover, this light actually serves to benefit the Applicant, not the community, since it is servicing the development and facilitating the flow of traffic into the plaza. In reality, the installation of the traffic light is impact mitigation for this facility, not an "amenity" offered to the Town. The proposed "amenity" was given a cash value of $100,000 to $125,000, with annual costs of $1,800. However, for the foregoing reasons, the real value of this "amenity" to the community is also zero dollars.

The proposed "access management plan" amenity is similarly self-serving in that it facilitates access to the plaza and, while it purports to be a SEQRA mitigation measure, actually does almost nothing to reduce the traffic that the proposal would cause. Regardless of its effectiveness as a mitigation measure, which SMA strongly disputes, this plan is not a public benefit or amenity. Traffic mitigation is a necessary component of this Project as the Board must find that the significant adverse impacts have been mitigated to the maximum extent practicable. Developers are not allowed to say we're going to create a problem, but we will mitigate it somewhat while facilitating access to our property, and then call that action an amenity. The Developer's decision to enter into access related agreements benefitting other private developers across Monroe Avenue does not create a public amenity either. Though the "access management plan" would create 38 additional parking spaces for patrons of Monroe Avenue businesses, the price tag for these improvements – $486,185 per the Developer's estimates (or roughly $12,795 per parking space, since the Developer would be required to create the access point and traffic light for its own development anyways) – is hardly worth the cost.

Regarding the "comprehensive access management plan study": this "amenity" proposes to develop a plan to aid the Town in the future as growth continues and further access points are added and removed for safety and traffic mitigation purposes. In other words, this "amenity" is nothing more than the Developer creating a contingency plan for when traffic caused by its oversize development becomes so problematic that the streetscape surrounding the area must be modified to accommodate it. The estimated value of this "amenity" is $29,250. Since the benefit from this "amenity" actually flows to the Developer, and could easily be required as a mitigation measure and condition of the development under Zoning Code Chapter 217, this also provides no benefit to the Town.

Another proposed "amenity" is the "preservation of passive & active open space." The Developer is not creating or preserving anything from development. Nor it "preventing" the property from being used for residential development a significant benefit. The open space already exists, and is not being used. And in reality, this parcel has significant development challenges due to drainage concerns. To the extent it is being touted as providing a forested buffer between the development and the residential community – the placement of buffers/landscaping is already required under the zoning code. Zoning Code § 217-4 (noting that conditions of a development that may be added by the Planning Board include "fencing, screening, or other facilities and/or preservation and/or planting of trees and landscaping to protect adjacent or nearby property"). So while the value of this "amenity" is listed at $100,000, it has no real value to the Town either.

Also of note, section 2 of the Final Scope requires the Developer to explain how the improvements offered by the project sponsor are not otherwise mandated by the Zoning Code. Other than making blanket statements to the effect of "we aren't technically required to

do this" (*see, e.g.*, DEIS at 47, "The design, construction and maintenance of this access is truly an amenity and is not an essential part of the commercial development and adds no financial benefit to the project sponsor."), the Developer makes no attempt to satisfy this requirement, or, as discussed above, address the fact that the majority of the "incentives" it offers could be imposed as conditions on the project under the Zoning Code. Elsewhere, the developer asserts that the amenities are (at least in part) SEQRA mitigation measures. DEIS at 42 (discussing how the proposed improvements "elevate the proposed Auburn Trail system above typical construction mitigation measures"); DEIS at 43 (discussing traffic signal and noting that "some of these costs fall under the category of traffic mitigation"); DEIS at 48 ("This land will serve as an additional buffer between the commercial development and adjacent residential uses.").

The proposal offers the Town nothing other than what the Developer would be required to otherwise do under the zoning code or SEQRA. The Applicant's compliance with its legal obligations has a cash value of zero for the Town.

The Board has the obligation to evaluate the proposed incentives and amenities and judge whether, pursuant to Zoning Code § 209-5(B), the Application is worthy of further consideration. For the reasons discussed, it is not. But to the extent the Board wishes to press forward, it should require the Developer to provide information on the value of the incentives, or how much additional revenue will be generated from the additional size over the life of the development. That information is critical to the Board's analysis to determine the appropriate amenities and value. The amenities should be roughly equal to the value of the incentives. Again, incentive zoning is not just an excuse to allow certain developers to do whatever they want on a given project. If the Board truly values this development tool, it must take this charge seriously.

The Application also fails to comply with applicable State and local laws and violates the Town's Comprehensive Plan. Incentive zoning proposals must be consistent with the Comprehensive Plan and inconsistency requires rejection of the Application.

H. <u>An SEIS Should Be Required</u>.

Given the incompleteness and deficient nature of the DEIS, the Town Board should require the developer to submit a supplemental environmental impact statement, or SEIS, particularly with respect to the issue of traffic, but also for the other issues discussed above.

Per 6 NYCRR § 617.9, a lead agency may require that a SEIS be prepared with respect to specific significant adverse environmental impacts not addressed or inadequately addressed in a DEIS that arise from: (i) changes proposed for the project, (ii) newly discovered information; or (iii) a change in circumstances related to the project." A decision to require the preparation of a SEIS due to "newly discovered information" is based on the importance and relevance of that information, and the present state of the information in the DEIS. *See id.* "In making this fact-intensive determination, the lead agency has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals." *Id.* The "change in circumstances" language is "a catch-all provision" intended to encompass situations not directly related to project changes or to the discovery of new information." *Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency*, 224 A.D.2d 15, 22 (4th Dep't 1996) (citing Gerrard, Ruzow and Weinberg, Environmental Impact Review in New York § 3.13[2][c] at 3-185 to -186 (1990)).

If the DEIS is not rejected as incomplete, the Developer should be required to submit a SEIS on the issue of traffic since "newly discovered information" – namely, the

deficiencies and inaccuracies in the Developer's traffic study as identified by Stantec, DOT, and MFJ – raise serious doubts as to the credibility of the that traffic study, and/or whether it adequately addressed the environmental impacts which could result from increased traffic from the proposed development. *Matter of Riverkeeper, Inc*, 9 N.Y.3d at 231.

Requiring a SEIS would also permit the developer to rectify the other deficiencies in the DEIS discussed above, such as properly addressing secondary/growth impacts, cumulative impacts, and other requirements in the DEIS Final Scope that the Developer ignored. The Town Board has the authority to order the Developer to submit a SEIS on these issues under the "change in circumstances" catch-all provision, which is intended to address issues in the DEIS where, like here, those issues are "not directly related to project changes or to the discovery of new information." *Mobil Oil Corp.*, 224 A.D.2d at 22. In particular, close scrutiny of the DEIS has revealed it to be inaccurate, incomplete, and deficient in numerous respects. Therefore, for those issues, the Developer should be required to submit an SEIS.