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Return To:
MINDY LEE ZOGHLIN
300 State Street, Suite 502
Rochester, NY 14614

Brighton Grassroots, LLC.

Town of Brighton Zoning Board of Appeals
Town of Brighton Office of the Building Inspector
Town of Brighton
M&F LLC
Daniele SPC, LLC

Total Fees Paid: \$0.00

Employee:

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS
ENDORSEMENT, REQUIRED BY SECTION 317-a(5) &
SECTION 319 OF THE REAL PROPERTY LAW OF THE
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JAMIE ROMEO

MONROE COUNTY CLERK



STATE OF NEW YORK
SUPREME COURT

COUNTY OF MONROE

BRIGHTON GRASSROOTS, LLC,

vs.

Petitioner/
Plaintiff,

TOWN OF BRIGHTON ZONING BOARD OF APPEALS,
TOWN OF BRIGHTON OFFICE OF THE BUILDING INSPECTOR,
TOWN OF BRIGHTON,
M&F, LLC; DANIELE SPC, LLC
MUCCA MUCCA LLC; MARDANTH
ENTERPRISES, INC.; DANIELE
MANAGEMENT, LLC; COLLECTIVELY
DOING BUSINESS AS DANIELE FAMILY
COMPANIES, JOHN DOES 1-20, AND
ABC CORPORATIONS 1-20,

Index No.:

Respondents/Defendants.

**AFFIRMATION IN SUPPORT OF MOTION
TO CONSOLIDATE**

MINDY L. ZOGHLIN, an attorney admitted to practice in the State of New York, affirms
under the penalty of perjury:

1. I am an attorney and Senior Partner at The Zoghlin Group, PLLC, attorneys for
petitioner/plaintiff Brighton Grassroots, LLC ("BGR" or "Brighton Grassroots"). As such, I am fully
and personally familiar with the facts and circumstances related to this action.

2. My firm also represents Brighton Grassroots in related actions (Monroe County
Supreme Court Index Numbers: E2019011722; E2019008518; E2019000427; E2018008343;
E2018007330; and E2018002961).

3. This is a motion to consolidate a new action (BGR 8)¹ with a prior action (BGR 2)² in the Whole Foods Plaza litigation pursuant to CPLR 602 because the cases involve common questions of law and fact. Moreover, consolidation is needed to make sure ongoing discovery in the BGR 2 case is able to continue, prevent the ZBA from derailing ongoing discovery on the public trust and permissive referendum claims that are common to both cases, make sure a mere ZBA does not somehow hijack factual determinations and legal issues that are being litigated in Monroe County Supreme Court, and provide a single, appropriate forum to complete discovery and conduct a trial on these important issues.

The Public Trust and Permissive Referendum Claims

4. The public trust and permissive referendum claims that are common to BGR 2 and BGR 8 have their genesis in a series of easements over a strip of land that runs between Allens Creek Road and Clover street in the town of Brighton (the "Easements"). The land was formerly a railroad bed, then acquired by RG&E. There are legal and factual disputes in BGR 2 and BGR 8 as to whether the pedestrian trail located within these Easements constitutes public parkland subject to the public trust doctrine and whether the Project proposed by the Developer and approved by various Town Boards will substantially interfere with the public's right to use and enjoy that pedestrian trail.

¹ The verified petition in BGR 8 is attached hereto as **Exhibit A.**

² The verified petition in BGR 2 is attached hereto as **Exhibit B.**

³ The verified petition in BGR 3 is attached hereto as **Exhibit C.**

5. The public trust and permissive referendum claims are being actively litigated in BGR 2. In Brighton Grassroots, LLC v. Town of Brighton et al, 179 AD3d 1500 at 1501-1502 (4th Dept. 2020), the Fourth Department reinstated BGR's public trust and permissive referendum claims, holding that "there are unresolved factual issues concerning the impact of the Whole Foods development on the recreation trail known as the Auburn Trail, including whether the development would require the constructive abandonment of the existing public use easements for that trail." See also Matter of Clover/Allen's Cr. Neighborhood Assn. LLC v. M&F, LLC, 173 A.D.3d 1828 (4th Dept. 2019) (Recognizing "issues of fact [as to] whether there was an express or implied dedication of the Town Easements subject to the public trust doctrine.") BGR's Reply Brief in the above referend appeal is attached hereto as **Exhibit F**.

6. It is abundantly clear that the purpose and intent of the Easements was for recreational use by the public.

Express Language of the Easements

7. The Easements expressly state that their purpose was for a public pedestrian trail. Each of the Easements contain the following relevant language:

Grantor hereby grants to Grantee [Town of Brighton and the public] a nonexclusive, perpetual easement for the following purpose... to install, construct, reconstruct, extend, inspect, maintain, repair, and replace a pedestrian pathway for public use (the "Pathway") ... Upon completion of any construction, installation, maintenance or repair of any improvement over the Easement Premises as required by the Grantee, Grantee agrees to restore the Easement Premises to a park-like condition (emphasis added).

See Reply Brief (Exhibit F) or Easements attached to Petition in BGR 8.

8. This intent and purpose is not only clear from the text of the Easements, but also in the recorded metes and bounds descriptions and Town maps which note and convey a "10 FT WIDE PEDESTRIAN EASEMENT ... TO THE TOWN OF BRIGHTON." (See attachments to Reply Brief, p. 69 of 134). Indeed, these notations for the Recreation Easement are shown and depicted, four times on four maps recorded with the Easements, and three times in the metes and bounds descriptions of the trail. (See Exhibit F, attachments to Reply Brief, pp. 71-80 of 134).

9. The Easements are part of the larger Auburn Recreational Trail (the "Trail") that runs from the City of Rochester, through Brighton and Pittsford, to the Erie Canal and beyond.

Town Records Leading up to the Easements

10. That the Town's intent was for the Easements to be used by the public as a recreational trail is not only plain from the language of the Easements and the metes and bounds descriptions/maps, but also from Town records leading up to the grant of the easements. The Town's own planning documents confirm public and recreational uses for the Trail.

11. In one example, the Brighton Pedestrian and Bicycle Plan shows people relaxing, reading, playing with animals, roller blading, riding bicycles, walking, jogging, and enjoying nature on the Trail. Administrative Return, TBRecord005753, also produced at CAC (Index No. E2018000937) NYSCEF Doc. No. 53, at Exhibit 2, Figure 28. As the Town itself acknowledges, from the time of the Trail's creation the purpose of the Trail was to provide "connectivity to schools, adjacent neighborhoods, existing parks and trail systems, and community resources" including the "[p]otential connection to [the] Erie Canalway Trail via bicycle . . ." *Id.*, Figure 27. Ensuring Auburn Trail contiguity was also critical to the Town's recreational goals and the acquisition of the Recreation Easement. *Id.*

12. The Town showed the location of the Trail on a map, referenced the Town's easement rights ("10 ft. pedestrian pathway") over the section of the Trail that crosses the Property, and extolled the Trail's benefits, including "recreation, [] health and fitness opportunities for residents and visitors," and noted the Trail's "enhancement of existing habitats and ecosystem services." *Id.*, Figure 27. The Town also acknowledged the benefits of the Trail to connect "existing parks and trail systems," including the Erie Canalway Trail. *Id.* Further, the Town contemplated "enhancements" to the Trail, including installation of asphalt, resting points, trail banners, and vegetative buffering, in order to continue fostering existing recreational uses. *Id.* at Figure 28 (Administrative Return, TB Record 005753).

13. The Auburn Trail *"is an established regional trail system that runs through parts of Monroe and Ontario Counties."* *Id.* at p. 67. As the Town observed, the portion of the Trail through the Property provides opportunities to take advantage of a trail already *"used by residents . . ."* *Id.*; which is indeed the case, as the Easements have been extensively used by the public for over two decades (and more) for walking, jogging, biking and cross-country skiing. As noted, these Easements connect to the Pittsford portion of the recognized Auburn Recreational Trail, which connects Brighton through Pittsford to the Erie Canal path and beyond.

14. The Brighton Comprehensive Plan 2000, (the "Plan"), referencing the Town's 1990 Master Plan, and its 1990 Parkland Acquisition Study, addresses the Town's clear intent to develop the Trail for recreational purposes (see Plan, BGR NYSCEF Doc 128 (Index No. E2018007330) at p. 31) and SMA (Index No. E2018007331) NYSCEF Doc. No. 153 at p. 31:

"Trails Plan – Existing and Proposed Trail Descriptions"... The Penn Central Right-of-Way [which includes the Easement areas at issue here] should be developed as a trail. This would provide an important linkage to the Town of Pittsford. The Town already has an easement on portions of the right of way near Monroe Ave. RG&E owns the majority of the right of way, and they are receptive to using this property for a trail. It will be important to obtain the support of the neighbors given the close proximity to residences. Full public access rights and development are necessary.

Id., Plan, p. 38.

15. While the intent of the Trail for public recreational use is incontrovertible from these examples, more evidence will be obtained through discovery.

The Developer itself (and the Town) expressly acknowledged and agreed in 1996 that the easement was for public pedestrian use as a recreation trail

16. Respondent Developer is well aware that the purpose of the Easements was for a public recreational trail. On June 19, 1996, in anticipation of Mario's (a restaurant owned by Respondent Developer) obtaining the strip of land from RG&E upon which one of the Easements is now located, the Planning Board conditioned the merger of the lots on the condition that Mario's grant the Town the contemplated 10-foot wide easement for pedestrian access, as had been the intent and part of the discussions between RG&E, the Town, and the Parcel owners. (**Exhibit F**, Reply Brief, pages 47 – 50 of 134.)

17. The Conservation Board recommended proceeding with the merger of the lots and recognized and thanked Mario's for the "public access easement, helping to establish a trail system." The Community Services Committee also strongly supported "the concept of a public walking trail linking Clover St and Allens Creek Rd." (see **Exhibit F**, Reply Brief, page 47 of 134.)

18. Indeed, the subdivision map submitted to the Town by Mario's clearly depicts the recreation trail on the segment behind Mario's. (See **Exhibit F**, Reply Brief, pages 52-53 of 134.)

19. The Town and Developer now claim that the Easements are not for recreational purposes. This claim is belied by their own words and actions, and requires discovery and a trial to resolve.

Respondents repeatedly admitted during the 2015-2018 zoning process for the Project that the Easements were for the public's recreational use.

20. During the zoning process for the Project, the Town and Developer repeatedly acknowledged that the existence and purpose of the Easements was for public recreational use. Some examples that the Town produced in its Administrative Return include:

- Developer referred to the easements as **“the proposed park area”** which will be relocated and which is **“regularly used by walkers and cyclists”** and that **“a lot of people use the trail today.”** (See Reply Brief pages 130 -131 of 134, citing PBRecord024150).
- Developer admitted the Auburn Trail **“crosses the properties and is part of a trail system which extends from the Village of Pittsford, through... the town of Brighton.”** (Reply Brief page 130 of 134, citing TBRecord022086).
- Developer conceded that the **“current trail running through the property is to be relocated.”** (Reply Brief page 130 of 134, citing PBRecord024150).
- Developer admitted that the **“...trail is important because it has been identified in ...[the] pedestrian bike plan in all of the master plans of the Town.”** (Reply Brief page 131 of 134, citing TBRecord021939).

21. The Town and Developer dispute that the Easements were intended for and are used by the public for walking and other recreational public uses, and that the Project will substantially interfere with the public’s use of the Trail where currently located (which also constitutes an abandonment of the Easements where currently located, under the permissive referendum claim).

The Substantial Interference Issue

22. Contrary to the public's rights in the clearly acknowledged recreation Easements, the Developer proposed, and the Town authorized, a plan that eliminates the recreation Easements in their current location by constructing over them, among other things, a parking lot, drive lanes, loading dock access, and tractor trailer routes. So obviously intrusive are these intrusions to the Trail that the Town required the Developer to re-route the Trail.

23. It was not until Petitioners brought these lawsuits and raised the public trust doctrine and the permissive referendum claims that the Respondents pivoted 180 degrees and suddenly began advancing the fiction that the Easements were never intended to be used as a public path - in the case of the public trust doctrine; and in the case of the permissive referendum, that the fact that the Easements would technically remain recorded somehow magically meant the Town did not abandon the easements to the Developer, even though it is allowing the Developer to overlay this massive Project on top of it and obviously interfere with the Trail and Easements to the extent it needed to be relocated.

24. This new position by Respondents that the Trail and Easements are not being abandoned is defied even by their own admissions in a Trail Map they submitted to the Town for the FEIS:

"Existing 10' wide pedestrian easement to the Town of Brighton per Liber 9531 of Deeds Page 441 to be abandoned." (See Reply Brief, page 134 of 134, reproducing TBRecord019536).

Court-Ordered Discovery Must Proceed on the Public Trust and Permissive Referendum Claims

25. The Town and developer dispute that the Easements were intended for and are used by the public for walking and other recreational public uses, and that the Project will substantially interfere with the public's use of the Trail where currently located (which also constitutes an abandonment of the Easements where currently located, under the permissive referendum claim).

26. Discovery is needed to resolve these issues.

27. And, in fact, this Court appointed The Hon. Thomas A. Stander (Ret.) to manage discovery disputes related to the public trust and permissive referendum claims in BGR2. See **Exhibit G** [Stipulation and Order, dated June 30, 2020, E2018007330, ECF Doc. No. 403].

28. Justice Stander has decided three contested discovery motions since his appointment. One motion resulted in a stipulated order in which the Developer agreed to produce certain documents subject to a Confidentiality Agreement. A second motion resulted in an order directing the Developer to respond to discovery demands served by Save Monroe Avenue, Inc. in related litigation. The third motion ended in denial of the Town's motion for a protective order and to shift fees regarding the production of electronically stored information. The Town appealed Justice Stander's decision to Supreme Court, and that motion is awaiting re-argument once the case is reassigned to a new Supreme Court Justice. Neither the Town nor the Developer have produced any of the documents that were the subject of these discovery motions. After paper and electronic discovery is completed, there will be depositions.

29. In addition to the discovery that is being managed by Justice Stander, there is also outstanding discovery against Whole Foods related to the substantial interference issue. In related litigation, Save Monroe Avenue, Inc. served Whole Foods with a subpoena duces tecum

in the state of New Jersey. Whole Foods moved to quash the subpoena and lost. Whole Foods was ordered to produce responsive documents and has not yet done so. After production, a representative of Whole Foods will be deposed.

The ZBA Determination and Findings Purport to Resolve Issues That Are Being Litigated in Supreme Court

30. The ZBA Determination found that BGR did not meet its burden of proof showing that (a) the Pedestrian Easements were dedicated as parkland and are subject to the Public Trust Doctrine. **Exhibit D** [Findings], par. 103; and (b) the Town is conveying or abandoning the Pedestrian Easements. (**Exhibit D** [Findings], para. 117).

31. Upon making these Determination, all the ZBA was legally entitled to do was deny BGR's appeal with respect to these claims. Instead, the ZBA exceeded its jurisdiction and purported to make factual determinations based on certain *Ex Parte* Submissions:

- a. "The ZBA finds that the public's right to access and use the Auburn Trail will be enhanced and improved as a result of the Project. The ZBA finds the Project will not substantially interfere with the Pedestrian Easements." **Exhibit D** [Findings], para. 111; and
- b. "The ZBA finds that the Town has not constructed or maintained a pedestrian pathway within the Pedestrian Easements" (**Exhibit D** [Findings], para. 112)
- c. "The ZBA finds that this language in the Pedestrian Easements does not evidence an express or implied dedication of the Pedestrian Easements subject to the Public Trust Doctrine. The ZBA finds that the issuance of the Building Permit complies with Condition #41 of the Site Plan Approval because no State legislative approval is required." (**Exhibit D** [Findings], para. 113)
- d. "[T]he ZBA finds that the Pedestrian Easements are not parkland for purposes of the Public Trust Doctrine" (**Exhibit D** [Findings], para. 114).
- e. "Based on the administrative record, the ZBA finds that the Town is not conveying or abandoning the Pedestrian Easements. The ZBA finds that the Town is not required to conduct a permissive referendum." (**Exhibit D** [Findings], para. 117).

32. The ZBA acted in excess of its jurisdiction by purporting to make factual findings as to issues that are being litigated in BGR 2.

33. The ZBA took it upon itself to make factual findings and legal determinations on the public trust and permissive referendum claims that were entirely outside of their jurisdiction, let alone expertise. Consolidation is needed to ensure that discovery proceeds in accordance with the CPLR, as required by the orders granted to BGR by the Fourth Department and Supreme Court, and that a Court of Law, not a municipal board, makes the factual and legal determinations needed to resolve these important claims.

A Town ZBA Cannot Interfere With Two Supreme Court TROs Related to the Public Trust and Permissive Referendum Issues

34. In addition to ongoing discovery in Supreme Court, public trust and permissive referendum issues are involved in two Temporary Restraining Orders (“TROs”) issued by this Court.

35. BGR applied for and was granted a TRO with respect to activities at the Project Site in the BGR 2 case. The TRO application was triggered by the Town’s issuance of the Building Permit that is the subject of this special proceeding. See BGR 2, Index No. E2018007330, Motion #15, Doc Nos. 416-437. The Town and Developer opposed BGR’s TRO application based, among other things, on the fact that it was triggered by issuance of the **Building Permit which is the subject of this** action. See BGR 2, Index No. E2018007330, Motion #15.

36. This Court granted BGR’s application and issued a TRO against the Town and Developer to protect the members of the public who exercise their rights to use the Pedestrian

Trail pursuant to the recorded easements that are the subject of the same public trust and permissive referendum claims as are litigated in this action. See **Exhibit E (the "TRO")**.

E2018007330, Doc. No. 452. The TRO requires the Developer to (1) maintain the fencing and supervision that protects the public use of the pedestrian easement area and (2) limit crossing of the pedestrian easement area by construction vehicles or project activities to the maximum extent practicable. **Exhibit E**, page 4. The TRO issued in BGR 2 protects the public's rights to use the Pedestrian Trail as is, where is.

37. The TRO also enjoins the Town from issuing a temporary or final certificate of occupancy for any building in the Project until (1) all traffic mitigation as described in the approved Project Applications and presented in the Environmental Impact Statement is installed and operational, and (2) the Access Management Plan improvements ("AMP") are installed and operational. **Exhibit E**, page 4. Consequently, the TRO issued in BGR 2 requires the Town to protect public safety by prohibiting issuance of any certificate of occupancy until such time as the AMP Traffic Mitigation measures, **including those related to the cross-access easements**, are installed and operational.

38. On December 30, 2020, this Court issued an Amended TRO that continues the original TRO until the earlier of April 3, 2021 or further order of this Court. **Exhibit E**.

39. A mere ZBA determination in excess of its jurisdiction cannot be allowed to interfere with TROs issued by Supreme Court.

40. The Court's decision(s) on issues of law and/or fact in BGR 2 will affect proceedings in BGR 8.

41. The failure to consolidate BGR 2 with BGR 8 could result in inconsistent

determinations on common issues of law and fact.

42. The parties and the Court will be forced to waste resources and time if BGR 2 is not consolidated with BGR 8.

CONCLUSION

43. By reason of the foregoing, BGR 2 and the BGR 8 involve common questions of law and/or fact, and therefore warrant consolidation pursuant to CPLR §602(a).

44. For these reasons, the consolidation of BGR 8 with BGR 2 (the "Consolidation") will provide a single convenient forum for all the parties' claims to be heard. To allow these actions to continue separately would be counterproductive and may result in inconsistent results, jury confusion, duplicative discovery, and inconvenience to the parties and nonparty witnesses involved in both cases. Moreover, Consolidation of BGR 8 with BGR 2 will save judicial time and resources.

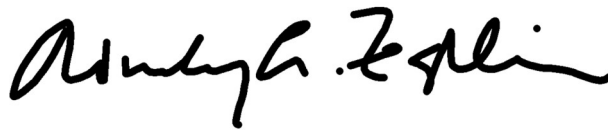
45. The parties and the Court will be better served by the Consolidation.

46. Upon information and belief, no party will be prejudiced by the Consolidation.

WHEREFORE, BGR respectfully request that this Court grant an order, pursuant to CPLR §602, as follows:

- A. consolidating the above-captioned with the prior, closely-related proceeding captioned *Brighton Grassroots, LLC v. Town of Brighton Planning Board, et al*, Monroe County Index Number E2018007330; and
- B. Granting such other and further relief as may this Court deems just and proper.

Dated: January 4, 2021
Rochester, New York



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EXHIBITS:

- A. Verified petition and complaint for the Later Action (BGR 8).
- B. Verified pleadings for BGR 2 (E2018007330, ECF Doc. No. 1).
- C. Verified pleadings for BGR 3 (E2018008343, ECF Doc. No. 1)
- D. ZBA Determination
- E. TROs
- F. BGR Reply Brief in Appeal
- G. Stipulation and Order Appointing Justice Stander as Discovery Referee dated June 30, 2020, E2018007330, ECF Doc. No. 403.