

**New Milford Zoning Board of Adjustment
Special Meeting
May 17, 2012**

Vice Chairman Stokes called the Work Session of the New Milford Zoning Board of Adjustment to order at 7:07 pm and read the Open Public Meeting Act.

ROLL CALL

Mr. Appice	Present
Mr. Binetti	Present (7:25)
Ms. DeBari	Present
Mr. Denis	Present
Father Hadodo	recused
Mr. Loonam	Present
Mr. Rebsch	Present
Mr. Stokes Vice Chairman	Present
Mr. Schaffenberger-Chairman	recused
Ms. Batistic- Engineer	Present
Mr. Preiss Planner	Present
Mr. Sproviero – Board Attorney	Present

PLEDGE OF ALLEGIANCE

OLD BUSINESS

12- 01 - New Milford Redevelopment Associates – Block 1309 Lot 1.02- Mixed Use Development

Mr. Del Vecchio member of the firm of Beattie Padovano on behalf of the applicant stated they were here on continued public hearings and mentioned the 120-day clock had expired and they were requesting a special meeting for July. The Board Members had scheduled a special meeting for June 21, 2012 at 7:30PM and a special meeting was tentatively scheduled for Monday July 30, 2012 at 7 pm.

Chairman Schaffenberger and Father Hadodo have already recused themselves from this application.

The Board Attorney stated the Board had received correspondence dated May 11, 2012 from Mr. Del Vecchio reintroducing the issue of additional recusals. Mr. Del Vecchio stated the letter cites the applicant’s concerns regarding a citizen’s group that had been formed and requested the Board poll their members to insure the integrity of this process was not tainted in any way by participation with the group by its members or immediate family members. Mr. Sproviero read the letter into the record. The Board Attorney polled all the Board Members and there was no conflict of interest regarding attendance of these meetings.

The Board Attorney said they had certification from Ms. DeBari that she had listened to the recording of the May 8, 2012 meeting.

Mr. Del Vecchio brought to the Board's attention the presence of a colleague of his, Howard Geneslaw, who had been in attendance to several meetings. He stated he was a principal of the firm Gibbons and has represented applicants and objectors before many Boards. Mr. Del Vecchio made a request to the Chair if there was a client represented or interest in the application it be made known to the Board during the course of the proceedings as opposed to a later time. The Board Attorney did not feel he was obligated to enter an appearance until he wants to. Mr. Del Vecchio stated he was putting on the record that the invited error doctrine may dictate concerns and issues be made known to the board during the course of the proceedings. The Board Attorney understood the doctrine says that if any counsel does not enter their appearance and then claims at some time during the proceeding that he was prejudiced by the inability to participate his failure to enter the appearance and seek the opportunity to be heard would serve to vitiate any wrongdoing of the board. The Board Attorney asked if there were any legal counsel present who wish to enter their appearance on behalf of a party in either support or opposition. Mr. Marc Leibman stated he was from Kaufman Semeraro Bern Deutsch & Leibman representing Austin Ashley and Mr. Alonso said he was there as a resident of New Milford. The Board Attorney asked if there was any other counsel who wished to enter an appearance on behalf of a client. There was no response.

Mr. Del Vecchio explained Dr. Kinsey had finished his direct testimony and was questioned by the Board Planner and Board Members. Mr. Del Vecchio turned over the proceeding to Mr. Eisdorfer and Dr. Kinsey. Mr. Eisdorfer recalled Dr. Kinsey. The Board Attorney stated they would open to the public for purpose of questioning Dr. Kinsey.

Motion to open to the public was made by Ms. DeBari, seconded by Mr. Denis carried by all.

Al Alonso 45 Clover Court asked if his opinion was contained within his report marked Exhibit A-27. Dr. Kinsey agreed and said also his oral testimony. Mr. Alonso asked if it was his testimony that would justify the granting of the D1 variance. Dr. Kinsey answered he had testified and wrote a report that the project should be considered an inherently beneficial use therefore it meets the positive criteria. Mr. Alonso asked if the D1 variance was the most difficult to prove. Dr. Kinsey answered it was an important decision for a board to make. Mr. Alonso asked if the applicant had to prove special reasons in a D1 variance. Dr. Kinsey agreed. Mr. Alonso asked in order to prove a D1 use variance did the applicant need to prove the positive and negative criteria. Dr. Kinsey agreed. Mr. Alonso asked if his testimony was that he would not provide testimony on the negative criteria. Dr. Kinsey agreed and thought a different planner would testify to those criteria. Mr. Alonso clarified that the negative criteria consisted of two standards one that no relief may be granted unless it was without substantial detriment to the public good and the other without substantially impairing the intent and purpose of the zoning plan and ordinance. Dr. Kinsey agreed. Mr. Alonso questioned that the applicant needs to show special reasons for the positive criteria by undue hardship, whether the site was particularly suitable for the use or the inherently beneficial standards. Dr. Kinsey answered inherently beneficial standards was one of several approaches and inherently beneficial was the standard that he thought would be applicable to this case. Mr. Alonso asked if he analyzed these three circumstances for special reasons in order to make the determination that this would be the standard or was he told to use the inherently beneficial standard. Dr. Kinsey answered the

counsel for the applicant asked him to examine whether this application qualified under the inherently beneficial use category. Mr. Alonso questioned if the application would meet the requirements for undue hardship. Dr. Kinsey answered he did not have an opinion. Mr. Alonso asked if he thought a site to be particularly suited for the use would be the most difficult standard to prove. Dr. Kinsey did not think so. Mr. Alonso asked with this application would it be more difficult to prove particular suitability than inherently beneficial use if there was no case law or statute stating it was an inherently beneficial use. Dr. Kinsey answered no. Mr. Alonso asked in the addition to the particular suitability the applicant must also show an enhanced quality of proof. Dr. Kinsey agreed. There were questions on the definition on Inherently Beneficial uses. Mr. Alonso questioned his testimony that said residents, businesses and local officials do not want an inherently beneficial use in their neighborhoods yet the definition of an inherently beneficial in the MLUL stated it was a use, which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare. Dr. Kinsey stated he cited the definition in his report and this was his understanding how communities react to some proposed inherently beneficial uses. Mr. Alonso questioned if a supermarket, bank and multifamily use fit into the definition of an inherently beneficial use. Dr. Kinsey said his opinion was a proposed mixed use inclusionary development was an inherently beneficial use and it was not one of the cited examples in the statute. Mr. Alonso questioned that his standard was all he had to show was a substantial number of affordable set aside units in order to meet the mixed-use inclusionary development. Dr. Kinsey answered no that his testimony was there was two standards for the board to consider one being if the municipality had a substantial amount of low and moderate income housing that had not been provided and the second standard was the mixed use inclusionary development propose a substantial amount of low to moderate housing. Mr. Alonso clarified that none of the developments in Cherry Hill, Saddle River and Wyckoff were approved based on an inherently beneficial use standard. Dr. Kinsey agreed. Mr. Alonso said these developments were irrelevant for purposes to his testimony as an inherently beneficial uses. Dr. Kinsey disagreed and there were some substantial mixed-use inclusionary developments that have been developed in New Jersey. Mr. Alonso questioned that there was no definition in MLUL for inclusionary development. Dr. Kinsey answered it was in the State Fair Housing Act. Mr. Alonso questioned his definition in his report on inclusionary development. Dr. Kinsey answered he wrote the definition based on his experience and cites the definition of the State Fair Housing Act which was slightly different. Mr. Alonso clarified the definition of inclusionary development was limited to residential development and not a commercial component. Dr. Kinsey agreed. Mr. Alonso clarified that there was no definition in the MLUL on a mixed-use inclusionary development. Dr. Kinsey agreed. Mr. Alonso asked for the legal citation for his standards for evaluating whether a mixed-use inclusionary development was inherently beneficial. Dr. Kinsey answered these were the standards he proposed that the Board consider for evaluating a mixed-use inclusionary development and did not rest on a citation other than the *Estaugh v Haddonfield*. Mr. Alonso asked if it was his opinion that New Milford had not complied with their Fair Share Housing obligation even though New Milford had filed their plan and no administrative agency had decided New Milford to be noncompliant. Dr. Kinsey answered that was his opinion. Mr. Alonso stated the second standard was does the mixed-use inclusionary developer propose to set- aside a substantial amount of low to moderate-income housing. Dr. Kinsey agreed. Mr. Alonso asked if his testimony was the applicant proposed to set aside 40 units, which was 18% of the total units. Dr. Kinsey agreed. Mr. Alonso asked if his testimony was 15% set- aside was substantial. Dr. Kinsey answered 15% was

considered substantial for a rental inclusionary development and the additional units were to capture for the public interest some of the economic value created by the non residential development. Mr. Alonso asked if the 3% set-aside was allocated towards the commercial space. Dr. Kinsey answered it was not allocated but was derived from the commercial space. Mr. Alonso questioned that the *Estaugh v Haddonfield* had no legal binding effect on the Board. Mr. Del Vecchio objected that the witness was not qualified to give a legal conclusion. The Board Attorney agreed with Mr. Del Vecchio and added he would advise the members of the significance of unreported opinions. Mr. Alonso asked if it was true that the *Estaugh* case did find that an inclusionary development was beneficial and did not make a finding to a mixed-use inclusionary development. Dr. Kinsey stated the *Estaugh* case found an inclusionary development was an inherently beneficial land use and did not discuss the mixed-use inclusionary development because none was proposed. Mr. Alonso asked if the four part analysis outlined in the *Smart SMR v. Fair Lawn* decision supported his conclusion that a mixed-use inclusionary development was an inherently beneficial use. Dr. Kinsey answered he analyzed the proposed application using the first three standards. Mr. Alonso clarified this was a cell tower case. Dr. Kinsey agreed. Mr. Alonso questioned his analysis was incomplete because he analyzed only three of the four standards. Dr. Kinsey answered his opinion was on three of the four standards which he testified to the board.

Marc Leibman asked when he was retained for the project. Dr. Kinsey answered in September 2011. Mr. Leibman asked if he was aware and involved with an earlier request for rezoning. Dr. Kinsey answered he was aware but not involved. Mr. Leibman asked how he decides what the numbers of units make a project inherently beneficial. Dr. Kinsey answered that was not an analysis he proposed or did. Mr. Leibman asked if he analyzed the project by number of bedrooms. Dr. Kinsey answered no. Mr. Leibman asked if that would be an important consideration for the Board. Dr. Kinsey said not in regard to whether it was an inherently beneficial use. Mr. Leibman asked if it mattered if the affordable units were 1, 2 or 3 bedrooms. Dr. Kinsey answered it was important to comply with the standards of COAH as to bedroom distribution for the low and moderate housing units. Mr. Leibman asked if that was the existing COAH regulations. Dr. Kinsey answered the COAH regulations that exist and the regulations for bedroom mix are referred to as the Uniform Housing Affordability Control Rules adopted by NJ Housing and Mortgage Finance Agency. Mr. Leibman asked if he knew what the average rents were in New Milford or the average selling prices of a house. Dr. Kinsey answered no. Mr. Leibman asked if he agreed that housing was more affordable now than in the last seven years. Dr. Kinsey answered there was a decline nationwide in housing. Mr. Leibman asked if he ever testified that a municipality had enough affordable housing. Dr. Kinsey answered yes. Mr. Leibman asked if he knew the average income in New Milford and in Bergen County. Dr. Kinsey answered no. Mr. Leibman asked what region he referred to in his testimony. Dr. Kinsey answered under the Fair Housing Act there were housing regions. He believed Bergen County was in a region that included Hudson, Sussex and Passaic. Mr. Leibman asked if there was anything inherently beneficial for a supermarket or a bank. Dr. Kinsey answered no. Mr. Leibman asked if he knew of any pending COAH legislation that would effect this application. Dr. Kinsey answered no. Mr. Leibman asked if he agreed from a planning perspective that financial concerns of the developer were irrelevant in determining a land use application. Dr. Kinsey agreed. Mr. Leibman asked if he thought it would be better to develop with just housing and not the commercial component to decrease the need for more affordable housing units. Dr.

Kinsey did not analyze that. Mr. Leibman asked what his understanding of the goal of this project. Dr. Kinsey answered the goal was to redevelop a site creating housing including low to moderate income housing and a supermarket and bank. Mr. Leibman asked if it was also to generate money. Dr. Kinsey answered the private sector engages in investments for a profit. Mr. Leibman asked if the affordable housing component was to reach that goal. Dr. Kinsey answered affordable housing was a municipal obligation. Mr. Leibman asked when his client went to the Mayor and Council to discuss rezoning was any part of that for the housing component. Dr. Kinsey did not know. Mr. Leibman asked if he knew that request was only for a supermarket. Dr. Kinsey was not aware of the conversations. Mr. Leibman asked if it were possible for COAH to permit regional contributions again. Dr. Kinsey answered if the Fair Housing Act was amended. Mr. Leibman questioned if the old supermarket site became vacant would that be subtracted from his housing calculation. Dr. Kinsey answered under current COAH rules, which are under challenge; the municipality would receive a form of a credit from any non-residential square footage subject to a demolition permit. There were questions on the regional areas being over populated. Mr. Leibman questioned that the preference for a developer today was to put sizable developments near mass transit especially dealing with affordable housing. Dr. Kinsey answered locating residential developments near mass transit would be desirable. Mr. Leibman stated the New Milford application to COAH was never deemed incomplete. Dr. Kinsey answered it was deemed incomplete and then the Borough made a further submission which was deemed complete. Mr. Leibman questioned that COAH had a complete application on file that has never been rejected. Dr. Kinsey answered correct. Mr. Leibman questioned that his testimony on substantial unmet need for affordable housing was his opinion. Dr. Kinsey agreed. Mr. Leibman asked if he checked to see if there was rent control in New Milford. Dr. Kinsey had not. Mr. Leibman asked if that was irrelevant to the question of affordable housing. Dr. Kinsey answered it was irrelevant to the question of compliance with the Mt. Laurel Doctrine and Fair Share Housing Act. Mr. Leibman asked if he concluded that he could not provide testimony favorable to the applicant in regard to the negative criteria and that was why another witness will address it. Dr. Kinsey answered he had not reviewed the pending application. Mr. Leibman asked if he even knows what this application is. Dr. Kinsey said he knows what's in the public notice, which he cited in his report for the number of units and square footage of the two non-residential components and knows the location. Mr. Leibman asked if he reviewed the application. Dr. Kinsey had not.

Mr. Leibman asked the Board Attorney to strike all of Dr. Kinsey's testimony because he has not even reviewed the application before the Board. Mr. Leibman did not think he was qualified to present any testimony about this application having not reviewed it. The Board Attorney stated he would take that under advisement.

John Rutledge 335 River Road asked if he had been to the site. Dr. Kinsey answered he had. The resident asked what a planner does for the applicant to achieve his goal. Dr. Kinsey answered that he was asked of the applicant if this proposed development was a mixed inclusionary development and inherently beneficial land use. He analyzed what an inherently beneficial land use meant in New Jersey, what the applicant was proposing, what was the Fair Share Housing obligation of the municipality, what has it done, was it in compliance and was the amount of affordable housing proposed at this site substantial. Dr. Kinsey stated he testified to his conclusions and how he came to those conclusions. Mr. Rutledge asked if he ever returns to the

site to see if the report meets the standard that the applicant tried to establish that it was inherently beneficial. Dr. Kinsey answered the issue of inherently beneficial had never arisen before in his planning practice. Mr. Rutledge asked if he had seen the engineering plans for this site. Dr. Kinsey had not seen the engineering or architectural plans. The resident asked if the increase in traffic would be inherently beneficial. Dr. Kinsey answered the traffic generated by the site was not something he proposed to be a criterion in evaluating whether something was an inherently beneficial use.

John DeSantis 190 Powell Drive asked when something was inherently beneficial did he take into consideration school systems and the ability to handle more children. Dr. Kinsey answered not in his analysis. The resident asked if he know how many apartments were in town and would it be part of the analysis. Dr. Kinsey answered no. Mr. DeSantis asked if he was involved with the litigation in Cranford on the United Water and Hekemian. Mr. Eisdorfer objected there was no litigation. Dr. Kinsey stated he was retained as an expert for Hekemian interests in Cranford in Mt. Laurel exclusionary zoning litigation. The resident asked if his testimony was on affordable housing. Dr. Kinsey answered yes. Mr. DeSantis asked if the proposed site floods would it still considered inherently beneficial. Dr. Kinsey answered that was a not an issue that he analyzed but it might be addressed under the fourth standard in SMR Supreme Court decision.

Michael Gadaleta 270 Demarest Avenue asked what the number of units and size of property where in Wyckoff. Dr. Kinsey answered the property was 19 acres and the development was approximately 178,000 sq ft of non residential development which included a 80,000 sq ft supermarket with 17 dwelling units and 16 were affordable units. Mr. Gadaleta asked if the development was located on a secondary street. Dr. Kinsey answered it was on a county road and a local street. The resident answered that it had less overall square footage on larger acreage than this proposed site. Dr. Kinsey stated Saddle River had 28 acres with a living facility 70,000 sq ft, hotel 125,000 sq ft, office development 142,000 sq ft and 76 affordable units with an access to East Allendale Road, Boroline Road and access via intersection with Rt 17. Mr. Gadaleta said density and coverage did not come close to New Milford's proposal. Dr. Kinsey stated Cherry Hill had 212 acres, which included 1,659 housing units, retail and restaurant 781,000 sq ft, office 1,580,000 sq ft, 150 rooms (hotel) with a park and off track wagering facility. Mr. Gadaleta commented that this was giant. Dr. Kinsey agreed. Mr. Gadaleta questioned if it would be good or poor planning to have a residential building with no rear or side yards and overlooking the loading dock of a supermarket or bank. Dr. Kinsey said there are all kinds of ways to develop communities with different density; buffering and lighting, planners try to anticipate conflicts and incompatibilities and mitigate them through development programs and design. Mr. Gadaleta asked if he thought a 221 unit residential building should have some amenities associated with it like open space. Dr. Kinsey answered it depended where it was located. Mr. Gadaleta asked if it would be good planning to have 100 kids riding their bikes in a commercial shopping center. Dr. Kinsey answered with that hypothetical case it would not be a good idea. Mr. Gadaleta asked if he thought this development would have an adverse effect on the surrounding community. Dr. Kinsey had not analyzed the filed application. Mr. Gadaleta asked if he was familiar with how United Water managed the river. Dr. Kinsey answered no. Mr. Gadaleta asked if he saw this development as furthering the public good. Dr. Kinsey answered the inclusion of 40 units of low and moderate housing in a community that was not in compliance with its Mt. Laurel obligations was substantial and would further the public good.

Mr. Gadaleta asked if he thought those 40 units with no amenities, no rear yard, no open space and no recreation still furthered the public good. Dr. Kinsey answered he had not reviewed the site plan. Mr. Gadaleta asked if he thought it was a standard of care as a planner to give testimony without looking at the plans. Dr. Kinsey answered yes.

Lori Barton 399 Roslyn Avenue asked if he should be familiar with the site to be able to answer site-specific questions. Dr. Kinsey answered he was somewhat familiar with the community but that was not his assignment. He focused on the low and moderate housing obligations and the mechanisms the borough has employed and where they stand. Ms. Barton asked what the largest supermarket he had been associated with as part of a mixed-use development. Dr. Kinsey answered the Wyckoff and Cherry Hill facilities. Ms. Barton asked if he knew how many other supermarkets where over 70,000 sq ft. Dr. Kinsey answered no. The resident asked if any other mixed use developments that he was associated with were built on flood plains. The planner answered not to his knowledge. Ms. Barton said his testimony was the residential development particularly the affordable housing component was important to provide access to good schools for low to moderate income families. Dr. Kinsey answered that was an important principle. Ms. Barton asked if a lack of available classroom space leading to overcrowded classes would provide access to good schools for low to moderate income families. Dr. Kinsey answered lack of space affects all children and all students deserve an excellent education. Ms. Barton asked if overcrowded classes constitute negative criteria. Dr. Kinsey answered without looking at a specific circumstance he could not analyze it. Ms. Barton asked if it was in the public interest to build on flood plains. Dr. Kinsey answered the development of flood plains was strictly regulated in NJ by the DEP and municipalities. Ms. Barton asked if he considered it to be negative criteria to build on flood plains. Dr. Kinsey had not analyzed on a site-specific basis this plan. The resident asked if negative criteria must be shown not to exist to grant a D variance for inherently beneficial use. Dr. Kinsey answered there was negative criteria the Board must analyze and make findings about. Dr. Kinsey gave the definition on D variances.

Jose Camacho 265 Eagle Avenue asked if he studied what the town lacked or needed to meet COAH or Mt. Laurel Doctrine requirements. Dr. Kinsey said that was part of his analysis. Mr. Camacho asked how many housing units New Milford owed in round one of COAH. Dr. Kinsey answered round one and two were merged by COAH into a cumulative obligation and his analysis was there was a gap of 14 units. The resident questioned that round three was his opinion because of the appeal. Dr. Kinsey agreed. Mr. Camacho asked how many affordable units were required without the development at this property. Dr. Kinsey stated the prospective need was 47 units. The resident asked if that was a total of 47. Dr. Kinsey answered it was the 47 units plus the 14 plus the 34 net indigenous needs with a total of 95. The resident asked how many units would be set-aside for COAH for the 221 residential building. Dr. Kinsey answered his analysis was a 15% for the residential units was 32 with a deduction of 8 for the non-residential development. Mr. Camacho asked if the 32 and 8 were in addition to the 95. The Board Attorney asked if the affordable housing units proposed in this application come off of the 95 and reduce the obligation. Dr. Kinsey answered they address but they don't satisfy the obligation. Dr. Kinsey said since the third round was in limbo because of the challenges pending before the Supreme Court he could not give a definitive answer as to what effect the proposed market rate residential development may or may not have on New Milford's Fair Share Housing obligation. Mr. Camacho believed he gave his opinion on this. The Board Attorney asked if the

third round rules were still in effect would the proposed development result in a net reduction of New Milford's current obligation assuming there were no other developments. Dr. Kinsey answered no. The resident also questioned the negative impact of overcrowding in schools. Dr. Kinsey repeated that all children should have an excellent education. Mr. Camacho asked if the need to increase the size of the schools, fire department and services negate the proposed inherently beneficial use. Dr. Kinsey did not do the negative criteria for this application. His opinion was that this proposed mixed-use inclusionary development should be considered and evaluated by this Board as an inherently beneficial use.

Anna Leone 505 Boulevard asked if he subtracted the affordable housing component from the equation of the mixed-use development would the project be considered inherently beneficial. Dr. Kinsey answered without the substantial contribution of low to moderate income housing units a plain mixed use development would not be an inherently beneficial use. The resident asked if affordable housing units were required in order for the Zoning Board to grant a variance for inherently beneficial use. Dr. Kinsey answered yes and his first standard was the municipality had not met their constitutional fair share housing obligation. Ms. Leone asked if the applicant asked him to include affordable housing units in the application. Dr. Kinsey answered he did not come up with affordable housing units the applicant proposed a mixed use inclusionary development with a certain amount of affordable housing units and amended the application orally at the hearing increasing the count to 40 affordable units. Ms. Leone asked if it cost several million dollars for a developer to include affordable units. Dr. Kinsey answered building affordable units had a range of cost depending on many factors like the price of the land, type of units and construction.

Miriam Pickett 222 Baldwin Avenue asked if the neighboring communities had met their standards on affordable housing. Dr. Kinsey did not know the status.

Ulises Cabrera 659 Columbia Street asked if he was present for the engineering testimony. Dr. Kinsey answered no. Mr. Cabrera asked if it was his opinion or the state's opinion that New Milford was not in compliance with COAH for affordable housing. Dr. Kinsey answered it was his opinion that New Milford was not in compliance with its constitution Fair Share Housing obligation under the Mt Laurel Doctrine, the State Fair Housing Act and COAH rules. Mr. Cabrera questioned that nothing was coming from the State stating New Milford need the 40 affordable units. Dr. Kinsey answered this was his opinion and COAH had not yet made a determination one way or the other on the status of the Borough's pending third round petition. The resident had questions on his other cases before other boards. Mr. Cabrera asked if he thought it was inherently beneficial to build affordable housing along a river. Dr. Kinsey answered affordable housing does exist and makes sense along rivers. Mr. Cabrera asked with the history of flooding did he think building affordable housing in this area was beneficial to the community. Dr. Kinsey answered development in the flood plain was strictly and appropriately regulated by the DEP and by municipalities.

Mary McElroy 297 Greve Drive asked as a planner would making a recommendation to a community that had 25% overcrowding in the school system be a good or bad idea. Dr. Kinsey answered as a planner he would want to know more about what the school situation was, what steps had been taken to deal with it, causes of the problems and alternative solutions and a lot

more before answering that question. The resident asked the planner if he would still need more information if the New Jersey Department of Education Office of School Facilities provided a report to the community stated they were currently operating 25% over capacity. Dr. Kinsey answered yes. Ms. McElroy asked if he looked at their master plan. Dr. Kinsey did. Ms. McElroy cited some goals and asked how they met the master plan. Dr. Kinsey answered he had not analyzed the site specific aspects of the application.

Lucas Hili 260 Eagle Avenue had questions on COAH's third round. Dr. Kinsey explained the three components of the Fair Share Housing Obligation. He analyzed how New Milford stacks up against these three components and stated the third component was in flux. Mr. Hili asked if he based his opinion on what he thought would happen based on something that happened in 2008. Dr. Kinsey answered he had not speculated in terms of the third round but stated this was a part of affordable housing law planning and practice that was in flux. He said he has explained what was done by COAH in 2008, analyzed what New Milford has done to address it and found a gap. Mr. Hili questioned that he was recommending building based on rules that were invalidated. Dr. Kinsey answered no because there were three parts and New Milford had gaps in addressing the indigenous need and prior round obligation. Mr. Hili asked if he suggested this should be built based on what he thought the invalidated rules would project yet he would not comment on the net output of the same set of rules. Dr. Kinsey commented that the rules adopted in 2008 invalidated in 2010. The portion of the rules invalidated was in respect to the Fair Share period in 1999 – 2018. Dr. Kinsey answered hypothetically, if those invalidated rules were made valid today and the proposed mixed use inclusionary development were developed then the net effect for the borough would be more third round obligation. Mr. Hili said he sounded like he wanted it both ways. Dr. Kinsey stated the hypothetical question was what will be the effect on New Milford's third round obligation as a result of actual development of the proposed non-residential and residential development and what will be the impact on the fair share housing obligation. Dr. Kinsey stated outside of the context of the hypothetical question he could not say because the rules were invalidated. He said in response to the counsel's hypothetical if one applies the standards and invalidated rules the amount of development proposed would trigger a projected growth share obligation greater than the existing allocated obligation.

Karl Schaffenberger 173 North Park Drive asked if his testimony was that this was his first inherently beneficial use case. Dr. Kinsey answered yes. Mr. Schaffenberger questioned his testimony that the Mt. Laurel decisions and COAH regulations were enacted to achieve fairness. Dr. Kinsey said that was an important concept. Mr. Schaffenberger asked where the resident's of the town turn to in the Mt. Laurel 1 or 11, COAH regulations or the State Fair Share Housing Act to get their fairness. Dr. Kinsey answered the Borough should comply with their Fair Share Housing Obligation.

Motion to close was made by Ms. DeBari, seconded by Mr. Binetti and carried by all.

Mr. Loonam asked if he thought the mathematical formula in place to meet COAH obligations was too burdensome and was it realistic for a municipality to reach their obligation.. Dr. Kinsey answered it was realistic for many municipalities to achieve and satisfy its fair share housing and many have done it. Mr. Loonam asked how many municipalities were in NJ. Dr. Kinsey answered 565. Mr. Loonam asked how many of the 565 municipalities currently met their third

round COAH obligation if it was not pending. Dr. Kinsey said there were about 4 who were issued substantive certification before the current rules in 2008 rules were invalidated. Mr. Loonam stated 4 out of 565 would be less than 1%.

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Mr. Eisdorfer wanted to follow up on Mr. Sproviero's hypothetical question on how the impact of this project under the third round regulations if the third round regulations were the governing law. Mr. Eisdorfer asked Dr. Kinsey under the existing regulations how he would apply the newly constructed low to moderate income housing units to the three components as previously described. Dr. Kinsey answered under the current COAH third round rules a provision that had not been invalidated was any new low and moderate income units to be first allocated to the prior round obligation to fill the gap. The proposed 40 units would be allocated to the 14 unit net prior round obligations leaving 26 units which would then be allocated to the net indigenous need lowering the gap. Mr. Eisdorfer asked if it would fully satisfy that need without the third round obligation. Dr. Kinsey answered no because there was a gap in the net indigenous need. There was discussion on the third round obligations and filling in gaps referring to exhibit A-21. Dr. Kinsey stated the non-residential development using the growth share factors in the invalidated COAH rules assuming they were valid would trigger a growth share obligation of 8 units. Mr. Eisdorfer asked what the net impact would be if they added that to the total obligation and subtracted the 40. Dr. Kinsey stated assuming the rules were in place there would be a 32 unit net impact.. Mr. Eisdorfer clarified that this was a different from Dr. Kinsey's testimony before because he had taken into account the exclusion. Dr. Kinsey answered the difference was he took into account the COAH rule directing that new affordable units in a plan be allocated to the prior round and to the net indigenous need as a result there was an exclusion of the market rate development from triggering any growth share.

Mr. Del Vecchio recalled Mr. Dipple who had concluded his direct testimony and believed the Board had additional questions.

Mr. Rebsch asked where the affordable units were on the plan. Mr. Del Vecchio answered the architect testified the affordable housing units would be fully integrated within the residential complex. Mr. Rebsch had concerns that the apartments faced the loading docks and the noise and pollution created by the trucks.

Motion to open to the public was made by Ms. DeBari, seconded by Mr. Rebsch and carried by all.

Marc Leibman asked the engineer if he thought flooding was a minor or major constraint on this site. Mr. Dipple answered a minor constraint. Mr. Leibman said he has been advised that the State had plans to update the 32-year-old flood map and did he have any information on it. Mr. Dipple replied no. Mr. Leibman asked from an engineering standpoint would he design the supermarket differently if he learned it was in a floodplain. Mr. Dipple answered the supermarket meets the current floodplain regulations and the finished floor elevation was 2' higher than the current flood elevation. He added half of the residential building was more than 1' higher and the other half was 6' higher than the current flood elevation. Mr. Leibman asked how much smaller

the proposed supermarket would have to be to eliminate the parking variance. Mr. Dipple answered 17,000 sq ft smaller. Mr. Leibman said his testimony was the property was a basin so was the center of the property lower than the edges. Mr. Dipple agreed. Mr. Leibman asked if they would bring in soil to build up the site. The engineer answered there was significant fill that would be required. Mr. Leibman asked if he would need a county soil movement permit. Dr. Dipple was not aware of one.

John DeSantis 190 Powell Drive questioned the reason for the backflow preventer. The engineer answered it was there to stop floodwaters from coming back up through the pipes. The engineer stated the pipe already exists that carries the water from the site off to the river. Mr. DeSantis asked for the elevation of the parking in the front of the shopping center. The Engineer answered the floor of the shopping center was elevation 16 and the parking starts at an elevation of 15.5 in the front and increases to an elevation of 23. Mr. DeSantis asked for the elevation of the apartment building closest to Madison. The Engineer answered an elevation 15.17. Mr. DeSantis believed that property flooded to an elevation of 18. Mr. Dipple was not aware of that. The resident asked if the water was being prevented from going to the site where was the water going. The Engineer answered the water stays in the river channel. Mr. DeSantis stated any water that was prevented would go downstream. Mr. DeSantis said there was 13 acres of water not going there being forced downstream that would exacerbate the flooding and streets that flood. Mr. Dipple answered it was not 13 acres of flood plain and explained the elevations within the site. He stated in the middle of the site it was elevation 12 which became 13 and 14. He added elevation 14 was the regulatory flood elevation for the Hackensack River. Mr. Dipple marked as Exhibit A-28 SKO3 Proposed flood hazard area Map. Mr. Dipple stated the resident came up with an arbitrary number of elevation 18 which he was doubtful and it had not confirmed. Mr. DeSantis believed it was Hurricane Floyd that the water reached an elevation of 18. The resident asked if he would agree that the volume of water would reach the flood hazard downstream. The Engineer answered no because the Hackensack River flows at a very high flow rate. Mr. DeSantis said it had to have some effect. Mr. Dipple answered it would be a drop in the bucket.

Karl Schaffenberger 173 North Park Drive questioned if the basins were retention or detention. The Engineer answered they were a combination of detention and infiltration. Mr. Schaffenberger asked if the basins were above ground at the northern end of the site and the two at the southern end of the property were below ground. Mr. Dipple answered yes. Mr. Schaffenberger asked if he knew what the water table was. The Engineer believed they had estimated in the report elevation 7. Mr. Schaffenberger asked if he dug a hole when would he reach water on the south end of the property. Mr. Dipple answered 4-5'. Mr. Schaffenberger asked for the size of the underground basins. Mr. Dipple discussed the locations and said the one proposed below the parking lot would take up about $\frac{3}{4}$ of the parking lot and the elevation would be 5'. Mr. Schaffenberger asked if they would displace any ground water. The engineer answered no and the rule was it had to stay two feet higher than the seasonal high ground water elevation. Mr. Schaffenberger asked if a detention basin in the courtyard was under 4' of water would it cease to function. Mr. Dipple was not sure where 4 feet of water would come from because if the grade was elevation 15 the water would have to be at elevation 19. Mr. Schaffenberger referred to Exhibit A-28 stating the blue area, which was the DEP flood calculations plus 25%. Mr. Dipple agreed. Mr. Schaffenberger had concerns if the detention basin was under water. He questioned the line on the map and understood they went through the

proper channels and received their numbers from the DEP but felt everyone knew the numbers were meaningless because the river was in the cafeteria of the high school. . Mr. Schaffenberger asked again if the detention basin was underwater would it cease to function. Mr. Dipple said timing was an important part of hydrology and hydraulics and how long does it take the flood water to get there and had the basin filled itself and done its job before the flood waters get there. He said this basin was taking water from the surrounding roof areas and it was designed for 100-year storm event as required by the state and municipal code. He said the basin would fill and do its job . Mr. Schaffenberger asked if he meant it would fill and release the water slowly. Mr. Dipple answered no that was an infiltration basin. He said there was no discharge from those basins. Mr. Schaffenberger said it was his testimony that there was virtually no runoff from this property now and there would still be no runoff from this property. Mr. Dipple answered correct and he was bound by the Storm Water Management rule that says he needs to significantly reduce the runoff that comes off the site. Mr. Schaffenberger asked if the fill for the property was an effort to keep the water off the site. Mr. Dipple answered it was in order to comply with the flood hazard area elevation of building a site above any elevation. Mr. Schaffenberger asked him to answer the question that Mr. Sproviero asked about what independent knowledge they had about the flooding in the area other than what they had from DEP. Mr. Dipple had seen a picture that was in the prior application submitted by United Water. Mr. Schaffenberger asked if he did not think it was necessary to investigate it further. The Engineer answered he had specific guidelines and applied the rules with the elevation. Mr. Schaffenberger said that was his point that he was using the DEP calculations. Mr. Schaffenberger asked if it surprised him that according to United Water the runoff has increases 100% since the 1960s and it was because of overdevelopment. Mr. Dipple answered no.

Anna Leone 505 Boulevard asked if the 32-year-old map was the latest map offered by the DEP. Mr. Dipple answered correct. Ms. Leone asked if he contacted the Dam Safety and Flood Control Office of Engineering and Construction Department of the DEP. Mr. Dipple answered no. Ms. Leone asked if it was okay with him to work with an antiquated map. Mr. Dipple did not feel it was antiquated. The Board Attorney swore in Ms. Leone. Mr. Del Vecchio objected to the resident giving testimony. Ms. Leone stated there would be a preliminary flood plain mapping done in December 2012 and asked if it was drastically different from the map utilized would he redo the study. Mr. Dipple stated the floodwaters don't come onto the site until an elevation of 16 so it would need to be of 2' higher than it was today otherwise there is no change to the calculation. Ms. Leone asked if the DEP deemed it necessary would he comply and redo the analysis. Mr. Dipple will comply with the regulation in place when they submit the application for the flood hazard area permit and will have to use any map adopted by the State of New Jersey. Ms. Leone asked if he considered drastic climate changes and repetitive flooding had an impact of topography of land. Dr. Dipple answered that was not civil engineering.

Mr. Del Vecchio stated this matter would be continued to the June 12, 2012 meeting.

As there was no further business to discuss, a motion to close was made by Ms DeBari, seconded by Mr. Appice and carried by all.

Respectfully submitted,
Maureen Oppelaar