

Approved
9/8/15

**New Milford Zoning Board of Adjustment
Work Session
August 11, 2015**

Chairman Schaffenberger called the Work Session of the New Milford Zoning Board of Adjustment to order at 7:32 pm and read the Open Public Meeting Act.

ROLL CALL

Mr. Adelung	Present
Ms. DeBari-Vice Chairwoman	Absent
Mr. Denis	Present
Mr. Joseph	Present
Mr. Loonam	Present
Mr. Rebsch	Present
Mr. Stokes	Present
Mr. Weisbrot	Present (7:40)
Mr. Schaffenberger-Chairman	Present
Mr. Sproviero - Attorney	Present
Mr. Ascolese – Traffic Engineer	Present

REVIEW OF MINUTES

The Board Members reviewed the minutes for July 14, 2105 and there were no changes.

RESOLUTION

**15-03 Harris – 239 Graphic Boulevard – Block 606 Lot 11
Second Story addition over garage and two story rear addition**

The Board Members reviewed the resolution and the Chairman made changes.

OLD BUSINESS

**15-02 TOP STONE CHURCH – 435 River Road – Block 1115 Lot 1.01
Child Care Center / Nursery School**

The Chairman noted there was correspondence from Chief Ramaci and a referral from the Health Department. The Board Attorney stated there was a report from Stonefield Engineering dated 8/7/15 received 8/10/15. This report was referred to the police department that generated Chief Ramaci's traffic review correspondence. The Chairman read the correspondence from the Health Department into the record.

The Board Attorney discussed the pending litigation with New Milford Redevelopment Associates and the Fresh and Fancy's application before the County Agricultural Development Board.

Motion to close the work session was made by Mr. Weisbrot, seconded by Mr. Loonam and carried by all.

**New Milford Zoning Board of Adjustment
Public Session
August 11, 2015**

Chairman Schaffenberger called the Public Session of the New Milford Zoning Board of Adjustment to order at 8:00 pm and read the Open Public Meeting Act

ROLL CALL

Mr. Adelung	Present
Ms. DeBari- Vice Chairwoman	Absent
Mr. Denis	Present
Mr. Joseph	Present
Mr. Loonam	Present
Mr. Rebsch	Present
Mr. Stokes	Present
Mr. Weisbrot	Present
Mr. Schaffenberger-Chairman	Present
Mr. Sproviero - Attorney	Present
Mr. Ascolese –Traffic Engineer	Present

PLEDGE OF ALLEGIANCE

OFFICIAL MINUTES OF THE WORK SESSION – July 14, 2015

Motion to accept the minutes were made by Mr. Loonam, seconded by Mr. Denis and carried by all.

OFFICIAL MINUTES OF THE PUBLIC SESSION – July 14, 2015

Motion to accept the minutes were made by Mr. Rebsch, seconded by Mr. Stokes and carried by all.

RESOLUTION TO BE MEMORIALIZED

15-03 Harris – 239 Graphic Boulevard – Block 606 Lot 11

Second Story addition over garage and two story rear addition

A Motion was made by Mr. Weisbrot, seconded by Joseph Loonam to memorialize the resolution.

The Motion passed by a roll call as follows:

For the motion: Members Weisbrot, Loonam, Denis, Joseph, Schaffenberger

Approved 5-0

OLD BUSINESS

**15-02 TOP STONE CHURCH – 435 River Road – Block 1115 Lot 1.01
Child Care Center / Nursery School**

The Board Attorney stated Mr. Stokes and Mr. Adelung were not at the July meeting and asked if they listened to the recordings. Both Members replied yes and signed a form stating so.

Mr. Urdang stated most of the last meeting centered upon the issue on how the children would get to and from the school. He added there was extension testimony from their traffic expert and Pastor Yi. Subsequent to the hearing, there was questions rendered by Mr. Ascolese and they were prepared to answer them this evening, said Mr. Urdang.

The Board Attorney marked the following exhibits:

The report from Mr. Ascolese dated 7/21/15 was marked as exhibit B1

The memorandum from the Chief of Police dated 8/11/15 was marked as exhibit B2

The Stonefield Engineering report dated 8/7/15 was marked as exhibit A2

Mr. Olivo reviewed his 8/7/15 letter in response to the traffic review memorandum dated 7/21/15 by Mr. Ascolese. He explained the first page of his letter gave some facts and information on what is being proposed. The applicant was willing to limit the capacity of the school to approximately 80 children for the daycare facility, said Mr. Olivo. Hearing the board's comments and concerns, Mr. Olivo went back to the applicant to see if they could do something to increase the capacity of the pick up and drop off curb side opportunities coming into and leaving the subject property.

Mr. Olivo reviewed the comments rendered by Mr. Ascolese.

Item 1 asked that a trip generation study be provided. Mr. Olivo provided in his letter and discussed the Institute Transportation Engineers Estimate for an 80-student day care center. He said this was not the typical conventional school operation but with an 80 student day care facility, 80 cars would not be coming in and leaving during a 60 minutes period.

Item 2 speaks about the fact that the site does not have available off street or on site parking and therefore the drop off or pick up in the parking for any aides or staff would be on the street. Mr. Olivo said his testimony at the last hearing was his experience reviewing day care / school facilities approximately 3-4 of them involved curbside drop off. He added the applicant was willing to work with Chief Ramici and any others as part of the traffic division to make sure that this operation occurs in a safe manner. Mr. Olivo acknowledged that safety was a concern for both the board, police department and the applicant.

Item 3 stated that the drop off area on Baldwin Avenue is not 120 feet in length. Mr. Olivo said there was some contention from the board's expert that 6 vehicles would be too much. The applicant, after hearing the testimony about potentially bottlenecking Baldwin and causing congestion, were now willing to have drop off and pick up on Baldwin and Myrtle generally along the sites frontage. He added there would be no walking children across the street. Mr. Olivo said they were effectively doubling the capacity which was more than enough to accommodate certainly the peak condition. The ITE showed the numbers that were stated at the

first hearing being approximately 30 dropping off and 30 leaving and similarly in the weekday evening peak hour there would be similar numbers.

Item 4 questioned how would they prevent arriving parents from stacking up the River Road intersection. Mr. Olivo said they doubled the capacity by using both Baldwin and Myrtle.

Item 5 asked how they would prevent the parents from parking the car and going in and talking with a teacher. Mr. Olivo response was that appointments for teachers or staff would be done through phone calls and emails outside of peak hours. If they wanted to come during off peak times, that could be something that could be scheduled. He added there would be a parent orientation prior to the start of the daycare.

Item 6 asked how would they enforce the drop off and pick up times for the children. Mr. Olivo answered that it would be discussed during the orientation program with the parents. There was no single drop off or pick up time but it happens over a window of two to three hours.

Item 7 commented about different types of car seats and parents not permitting an attendant to strap in their child. Mr. Olivo recognized that a parent might park the car and help the attendant with the car seat. He said with the capacity that they now have with 4 cars on Baldwin and 4 cars on Myrtle, even with a 10 minute time, they still have enough capacity to accommodate drop off and pick up.

Item 8 asked how the attendant would know where a very young child was when a parent comes to pick up the child. Mr. Olivo said speaking with Pastor Yi the program implemented would be colored name tags which cross referenced with a classroom.. He said the parent would temporarily park curbside come out hand the name tag to an attendant who would walkie talkie to an assembly area and the child would be walked out to the car.

Item 9 asked if there would be full time and part time sessions. Mr. Olivo said the expectation was the majority would be full time.

Item 10 asked if some days were more popular than other days. Mr. Olivo said not based on speaking with the Pastor and the operators of the site.

Item 11 asked where the teachers and aides would park. Mr. Olivo said they would be expected to park within available public on street parking.

The Chairman said Mr. Ascolese recommended the consultant give three locations that have the attendants servicing the children with the drivers remaining in the car so those locations can be contacted and/or reviewed. Mr. Olivo said he spoke with Mr. Ascolese regarding this matter. The locations he spoke of were schools and not daycare centers. He said the reason he brought this up was how the driver would communicate which classroom the child was in and how would the attendant get the child. Mr. Ascolese added the Mr. Olivo discussed this tonight. Mr. Ascolese said now there was some modification for two locations to allow for the driver to exit the car, communicate with the attendant and buckle the child in the car. Mr. Olivo agreed. The Chairman asked Mr. Ascolese if he was satisfied that this issue was addressed. Mr. Ascolese said not completely because he could not contact the schools because they were school age children not a daycare facility.

The Chairman said there was a comment in the report that said “the applicant intends to coordinate with the Borough Police Department and zoning officials to attempt to ensure efficient patterns of pick up/drop off that will not impede or influence traffic patterns..” The Chairman was concerned that it said the applicant intends to coordinate with the police and asked if they have contacted the police department. Mr. Olivo said it was his understanding that the

applicant has not yet contacted them but has just received the Police memo and would be happy to. The Chairman said so much of this was conceptual. Mr. Olivo said the memo from the chief read that while he feels it was plausible, he had concerns. He added they would be happy to provide any information the Police Chief and the Board may require as a condition of approval that in writing provides information about circulation patterns or what the program was. He added the applicant was willing to work with anyone and everyone. The Chairman commented that they were dealing with children and public safety. The Chairman added the concept of daycare did not bother him but he was not sure that this plan, has been buttoned down enough to embrace it.

Mr. Denis said there was no school in town that did not have ample parking for a parent to pick up children. His concern was the school was on a major thoroughfare. He had concerns with inclement weather or a parent not picking up their own child. Mr. Denis said he voted for the House of Worship but now they were requesting a daycare center because the church was not making enough money to support itself. Mr. Denis said his main concern was safety for the children and felt they were taking children and putting them in a bad position. Mr. Olivo took exception to that and stated he was a licensed professional engineer who worked on traffic studies for 15 years. He stated he would never support and present a design to a Board who would put anyone in an unsafe situation let alone children. Mr. Olivo stated he respectfully disagreed with him but the design before the board has the capacity and ability to safely accommodate children to and from the facility. Mr. Denis said when the applicant first appeared before the board for a house of worship it was compared to the Jewish Center. The Jewish school was used primarily for a place of study for bar/bat mitzvahs and never had 80 students at one time. Mr. Denis found out the main reason the Montessori school at the Jewish Center failed was because there was no place to pick up their children. Mr. Olivo said he did not compare this operation and the nature in which traffic would move with the Jewish Center.

Mr. Loonam thought this was a unique daycare. He believed the applicant said the church moved from a different location and brought the congregation with them. Mr. Loonam did not know if there would be a lot of people walking to the school. He asked if a credit is given assuming people would be walking and would it be accurate in this case. Mr. Olivo found in studying daycare, typically parents that bring their children to a certain daycare either live in the area or work in the area. He has seen pass-by credits given to daycare but they have not taken any.

Mr. Weisbrot said there was nobody on this board who really wants to help this progress more than him but at this point he did not think he could support this for these reasons. It really seems more conceptual than an actual plan. He felt there were a lot of questions with the answer being "we'll see, we'll try that and talk about it". Mr. Weisbrot was hoping the applicant would have come back to this hearing with a concrete plan. Mr. Weisbrot asked about what was the staggering plan. Mr. Olivo stated they could not create a staggered pattern without understanding the parent schedule in terms of the pick up/drop off. They would create windows of time based on the pickup/drop off and tell a certain group of parents their arrival time. Mr. Weisbrot liked the concept but asked what the times were and how many people would arrive. He wanted to know the plan. Mr. Olivo said the windows were 7-9 am and 3-6 pm, 5 minutes intervals, color-coded classrooms, teachers that were associated with students.

Mr. Rebsch asked how they would avoid all the cars coming at the same time even when you tell them not to. Mr. Olivo said because it was a daycare and this was not a use where 80 would not come all at one time. Mr. Rebsch stated parents could be late and cars coming at one time and parents getting out of the car to buckle in their children. Mr. Olivo said it was accounted for in their analysis and if it took them 10 minutes it would be accommodated for because there was flexibility with the design. The Chairman did not dispute that it could work but did not think it was buttoned up yet.

Mr. Urdang asked how they could work with the police department until they see the actual operation. Mr. Olivo said they have to plan with the police department and then you need data, enrollment and attendance. Mr. Urdang asked Mr. Olivo if the staggering time initially proposed was not serving them well was it not possible to adjust the staggering time whether with or without the consultation with police department. Mr. Olivo said yes.

Mr. Loonam asked if this was the ideal set up for drop off of children curbside. Mr. Olivo said there was no perfect ideal. The way he evaluates sites was is it safe and efficient or was it unsafe and congestion created. He believed with Baldwin and Myrtle it was optimal for pick up/drop off. Mr. Loonam asked if it would be more effective if people entered off the Boulevard turned down Baldwin and proceeded to Charles because it would not have the impact of cars coming off River Road. Mr. Olivo said it could be a safe and effective operation if designed properly and if there were crosswalks and crossing guards. He added there might be options further from the site frontage that could potentially work. Mr. Olivo did not think it was a better plan. Mr. Loonam would like to hear that they had evaluated a few plans and found this plan to be the best. Mr. Olivo thought they would end up with the same plan. Mr. Olivo said if the Board thought there was another plan out there he would have to talk with the applicant. Mr. Loonam asked if he felt this was the best plan. Mr. Olivo said it was a safe and efficient plan.

Mr. Adelung asked if the situation was optimal for the town. He felt when cars are brought into a residential area it poses a problem. He hopes there was data or testimony that shows there was a beneficial use to the town for a daycare facility to go into the church. Mr. Adelung said he did not doubt the church was not a good neighbor for the town but he needs to see how this situation is better for the town. Mr. Olivo said roadways tend to be a double edge sword because in designing roadways in Bergen County they want roads to accommodate cars yet they don't want roads to accommodate cars. Mr. Olivo said as a traffic expert he believes this works.

The Board Attorney said lets presume the Board favorable considers the application and he would then have to draft a resolution that would probably require the imposition of conditions, which would define the drop off and pick up plan. Mr. Sproviero asked what he would write in the resolution. Mr. Urdang said they could not put forward a specific plan until there is some empirical experience about how it works. He added there was a built in flexibility. If a certain amount of the staggering does not work, they would try something else, said Mr. Urdang. He added Mr. Loonam came up with a suggestion that might very well work. Mr. Sproviero said it was not the responsibility of the board. Mr. Urdang said this was covered under the previous resolution which said the police would supervise the issue of traffic. Mr. Urdang said this was a use that has been there for decades. Mr. Urdang did not know if the resolution could have a specific plan. He felt in drafting a resolution it would have to be dealt with in terms of concept.

Mr. Urdang said they could not give a plan that the board would have them adhere to because the applicant might find out the plan needs to be altered.

Motion to open to the public to question Mr. Olivo was made by Mr. Denis, seconded by Mr. Loonam and carried by all.

Karly Tritthart, 223 Myrtle Avenue, stated that there was parking on one side of the street on Myrtle Avenue. She said if there was overnight parking on Myrtle how would they do a drop off. Mr. Olivo said along the frontage of their property on Myrtle there is a “no parking” sign. He stated by law you can load and unload and said the “no parking” sign prohibits parking longer than 3-4 minutes. The resident thought it was a safety concern for her home for fire trucks getting down the street. Mr. Olivo said it does become challenging with parked cars but they are not intending to park. The resident questioned where the parent would park if they needed to pick up a child that needs to leave early. The engineer stated the parent would not park in the pick up spots and would have to park on the street. Ms. Tritthart stated since the staff will be parking on the street, parents would have to park a distance from the school if they need to go into the school to pick up a sick child. Mr. Olivo said the school would have to define that during the orientation program for parents.

Resident, 219 Myrtle Avenue, asked if he was aware that a young child died at one of the schools. Mr. Olivo was not aware of it. The resident asked if he considered taking the green area and making a parking area or semi circle driveway. Mr. Olivo said he heard the concerns and comments from the Board regarding no off street parking. He looked at the plan and did not see any areas that would be beneficial and added that providing access without adequate circulation could be a worse condition. The resident felt the church needed to consider another option. Mr. Olivo said he would not support that plan so he did not consider it. The resident said he could get another expert with a different idea. The resident commented in August there was less traffic because people were on vacation. He wanted to know the traffic flow during all seasons, exact amount of cars and road widths. Mr. Olivo said the Board was aware that he did not just decide this would work but there has been significant amount of analysis and discussion. The engineer stood by his testimony but it was not something that he pulled out of the air. Mr. Olivo told the resident his questions on traffic on River Road had nothing to do with this application. The Board Attorney said to the resident that one of his questions to the traffic expert was that a student died at a school. Mr. Sproviero asked if he was hit by a car. The resident answered no the student died playing soccer in the school. The Board Attorney asked how that impacted the record of this proceeding. The resident answered safety.

Anthony Senzamica, 256 Myrtle Avenue, commented there was no area for outside play. The traffic expert was not aware of any playground area outside but people make their own decisions about where to bring their children to daycare.

Richard Boutillier, 224 Myrtle Avenue, asked if he looked at traffic during the school year. The engineer said they were engaged this summer and looked at traffic generally on Myrtle Avenue and some seasonal numbers along River Road. He expected more traffic during the school year on Myrtle and Baldwin. The resident had concerns about driveways being blocked. He said if someone was parked on the street and there was staging on the other side it would be difficult

getting thru. The engineer said it was a common condition along side streets that were relatively narrow. He added it would slow cars down into the interface. Mr. Olivo understood it was frustrating to wait but it does not mean it was unsafe and it does not mean that it was not an effective way to process traffic. He added there was a peak hour condition where the traffic conditions would be worse and that was why there were two loading zones.

Motion to close was made by Mr. Denis, seconded by Mr. Rebsch and carried by all.

Recess

The Chairman said Mr. Ascolese's made a recommendation to have three locations that have attendants servicing the children with the drivers remaining in the car so those locations could be contacted and/or reviewed. The Chairman would like to have those locations contacted/reviewed. Mr. Ascolese said after speaking with Mr. Olivo, he indicated those locations were grammar schools not daycare. He said the applicant is now looking at opportunities to use Myrtle and Baldwin so there would be an additional capacity for drop off. He said it appears they have changed their operation that was introduced from the last meeting. The Chairman asked Mr. Ascolese what his opinion was on that change. Mr. Ascolese responded that they had a safety valve built in depending on the overall capacity of the school and looking at a section of Myrtle to be used in conjunction with a section on Baldwin this might be able to operate. The Chairman clarified that he was okay with not having the three locations. Mr. Ascolese said he was not thrilled but he was looking at the application, the location and the number of children. Mr. Ascolese asked Mr. Olivo when a school was sanctioned to operate with 80 children what was the effective daily use out of the 80 students regarding full time, part time, three days a week vs five days a week and was this the maximum. Mr. Urdang said Pastor Yi testified that the maximum was about 100 and they agreed to limit it to 80. Mr. Ascolese asked if that was 80 /day or registered 80 in which they might only have 60-70. Mr. Urdang said it would be 80 per day but that number would not be achieved for three or four years. Mr. Ascolese said some parents might choose three days a week instead of five days so were they looking for permission from the state to operate at a maximum use of 100 children. Mr. Urdang said the daily number of children present would not exceed 80 even though the state authorized more. The Chairman asked if there were any daycare facilities that have the curbside drop off/pick up. Mr. Olivo said for the record he testified that there were over 100 traffic impact studies for various projects. He had studied more than 20 daycare centers in the tristate area. Mr. Olivo noted that maybe there was one in Long Island that he worked on that had curbside pickup.

The Board Attorney thought there was a similar daycare in East Rutherford that he used for his children and thought that was one he might want to check into. Mr. Olivo did not know why it all hinged on that and he could not provide a daycare facility with curbside pick up/drop off. The Chairman said because it was a suggestion from the Board's traffic engineer and he would like Mr. Ascolese to be completely satisfied. Mr. Ascolese said that he understood when Mr. Olivo mentioned in July that he studied several curbside pickup which he understood it to be daycare. He added since then he had a conversation with Mr. Olivo who mentioned they were grammar schools.

Mr. Loonam said two years ago the application was very simple. He asked if the board was to grant the requested variances, he wanted to make sure the daycare was a use within the approved house of worship. He wanted to make sure the town was protected down the road if they sold the property and someone wanted to buy it just for a daycare use. Mr. Urdang assured him that it would be part of the summation that a daycare center was considered under NJ case law to be an integral part of a house of worship. He said a few years ago the Board elected to say this was a continuation of a nonconforming use. Mr. Urdang said to answer his question if someone came in to solely operate a day care school and not incidental to a house of worship he did think it fell within what was approved. The Board Attorney agreed.

Motion to open for public comment was made by Mr. Stokes, seconded by Mr. Loonam and carried by all.

Terry Gamble, 433 Charles Street, thought the State required outside space for a school. Mr. Urdang said that was not his understanding and knew of daycare facilities without it. He added that would be in the jurisdiction of the state not the land use board. The Board Attorney asked if the applicant had their state approvals. Mr. Urdang said probably not because they were waiting for a land use approval first. The resident asked what would happen if the state turned the applicant down because there were no outside facilities. Mr. Urdang said this board was required to make their decision first subject to the applicant getting approval from other governmental agencies that have jurisdiction. He stated if they get an approval from this board but the state does not approve them it would not happen. Ms. Gamble thought the existing classrooms at the church were used for Sunday classes. Mr. Urdang said the spaces were there regardless of what they used them for. Ms. Gamble said the Jewish Center use was a very limited use and did not affect the traffic patterns in the town. Mr. Urdang disagreed and said it could not have been that limited because both Myrtle and Baldwin had no parking or standing in a residential zone signs in the area.

Karly Tritthart, 223 Myrtle Avenue, said she was opposed to this application. She believed everyone had a right to worship and commented this school would be teaching Korean so it was not an open daycare for anyone who did not want to learn Korean or their religion. Ms. Tritthart said they were not doing anything but causing stress. The resident noted that Sundays were very difficult for those living on Myrtle Avenue. She added there are fender benders and driveways are blocked and it is inconsiderate for those who live there. Ms. Tritthart understood everyone has a right to park there but had concerns about inclement weather with the drop off with children in a timely manner. The resident said it all comes down to safety for the children.

Motion to close was made by Mr. Loonam, seconded by Mr. Weisbrot and carried by all.

Mr. Urdang said two years ago this Board approved the applicant's use of premises that were formerly occupied by the Jewish Center. He said the resolution characterized the proposed use of Top Stone Church as the continuation of a nonconforming use. The resolution included a reference to the fact that New Milford Jewish Center had a religious school. It also referenced a fact that there was not or ever had been parking on the site. The present application was to permit Top Stone Church to have an early child development center run by the church using the same space that was previously occupied by the Jewish Center. Mr. Urdang said Top Stone Church is a

house of worship and is an inherently beneficial use. The House of Worship is simply a place of sanctuary for prayer. Mr. Urdang said there was case law that makes it very clear that an early childhood center is considered an integral part of a house of worship referencing the Shim v Washington Twp Appellate Division decision. Mr. Urdang said applications involving a house of worship are required to be considered by the board using a legal matrix. The matrix had two parts one was under the state law and the other under the federal law. Under state law, it was an inherently beneficial law where the affirmative criteria of special reasons is deemed to be satisfied and the two negative criteria were considered under a balancing test which is the result of the SICA case. He discussed the four-step analysis for SICA.

Mr. Urdang said the letter from the Chief of Police did not really say anything. He said it expressed a concern but did not say what the concern was. He said their traffic expert gave a full explanation of what were the safety considerations. Mr. Urdang understood the Board's concerns expressed by the Chairman. The applicant would like to have a finite plan to be approved but this was a situation that had to have some experience to see how it working. There were various things that could be changed to help a situation. Mr. Urdang respectively asked if the Board was in a better position to evaluate a traffic pattern or a vehicular solution than the traffic division of the police department. The applicant would cooperate with the police in establishing an appropriate plan as it develops. Mr. Urdang said they were speaking of a public street, which they also have the right to use since they are an abutting neighbor.

He said the second part of the matrix was a federal law being RLUIPA which he read the law into the record. Mr. Urdang said if the Board denied the application they were creating a substantial inhibition against the house of worship. If that happened, the burden of proof shifts to the board and the board had to show that it was doing so as a result of a compelling governmental interest. Mr. Urdang said in looking at what constitutes a compelling governmental interest under federal case law, traffic or aesthetics does not rise to that level. Mr. Urdang said it was important to understand that the focus of the federal statute was different from the state law. He mentioned some people asked how it was benefiting New Milford. Mr. Urdang said under state law the issue they have to show was there was no substantial impact upon the public good but under the federal statute the language speaks on what is the effect on the religious institution not on the municipality. He added if the Board turns it down and overruled in the federal court then New Milford was responsible for legal fees and potentially compensatory damages. Mr. Urdang said the Board was free to disagree but not free to disobey. Mr. Urdang said under any analysis the board was obliged to approve this application.

The Board Attorney made a few comments to the Board Members. He said Mr. Urdang's recitation of the law was entirely accurate but how you interpret the law was subject to some fact finding by the board. He said there was no question that the law provides that a house of worship is an inherently beneficial use and it is entirely undisputed that the law in NJ thru cases has determined that daycare centers are a customary and usual use within the scope of a house of worship. The Board Attorney did not believe anyone on the Board had a problem with the use. It's how the use will be implemented, said Mr. Sproviero. He agreed with Mr. Urdang that when dealing with an inherently beneficial use the special reason requirements are presumed to be satisfied. He also agreed that the SICA analysis must identify whether there were any negative criteria that outweigh the positive criteria and the Board has the ability to impose reasonable

conditions in an effort to offset negative criteria that may have been demonstrated. He also agreed that the core issue in RLUIPA is whether the actions of the board constitute a regulation in furtherance of a compelling governmental interest. The Board Attorney also agreed that there were cases in determining RLUIPA that say a compelling governmental interest does not equal either traffic or aesthetics. The Board Attorney said what the Board needs to ask is this a traffic issue alone or is this a health and welfare and safety issue. The Board Members need to ask if the safety of the children in the community and children in attendance of the daycare center be a compelling governmental interest. Mr. Sproviero asked the Members if they were satisfied that thru what the applicant has proposed this inherently beneficial use was implementable at this site.

The Chairman said that safety to him was a compelling governmental interest. He agreed with Mr. Urdang assessment of the law. The Chairman did not agree with Mr. Urdang comment that the Chief's letter did not really say anything. He read the letter into the record, which asked them to contact his traffic officers. He did not think this was done and again reiterated that this has not been buttoned up yet. The Chairman understood there could be conditions. The Board Attorney interrupted and said he asked Mr. Urdang what were the conditions and Mr. Urdang said to give them the same conditions that were approved for the church use. The Chairman said it was different and he would have liked the applicant to speak to the officers. The Chairman said a condition for him would be to put a cap on the number of students being much less than 80 students to see how it went.

Mr. Rebsch needed to leave the meeting at 10:20 pm.

Mr. Loonam said Mr. Urdang and Mr. Sproviero said that an early daycare center was an integral part of a house of worship. He questioned the law stated than an early daycare center as opposed to religious education. Mr. Sproviero agreed but added as long it was conducted under the umbrella of the church activities. He said if they took away the church activity and just had a daycare it was not afforded the same status. Mr. Loonam thought in terms of the previous applicant there was religious education and it was important that an early day care center was in the understanding of the law because it would operate during the week. Mr. Sproviero said yes.

The Chairman questioned that there was testimony that anyone could attend the school. Mr. Sproviero agreed. The Chairman asked how does this fall under the umbrella of being connected to the church if it was opened to the public. If the principle use was by the members of the church and the curriculum is such that it promotes the church mission than regardless of whom the attendees are it is still afforded the inherently beneficial use status.

Mr. Denis asked about the people in the neighborhood that could be affected by what could happen in the neighborhood. Mr. Sproviero said it is balancing of the positive and negative impact. The Board Attorney said there was no dispute that there would be some negative impact on the neighborhood. He told the Board it was their job on the SICA was to determine whether the negative impact outweighs the positive criteria. He added Mr. Urdang accurately said that when they assess inherently beneficial uses, houses of worship are on the top.

Mr. Weisbrot thought there was a way to handle the traffic with conditions. He stated his traffic concerns were not about people being able to pass quickly enough or get to work quickly but his concern was how traffic would impact safety. Mr. Weisbrot agreed with Mr. Urdang's analysis of the law but where he deferred with him was whether the detriment to the public good has been adequately addressed. His concern has been the detriment of the public good, safety of the children in the neighborhood and children coming to the school. He found it disturbing that they talked a lot about traffic patterns as if it was only about traffic patterns. He took the traffic expert at his word that his concerns for safety for the children were paramount. Mr. Weisbrot said he has not heard how that would be addressed and said he asked last month and again this month and what he hears is "let's try it...let's see how it works...". He said he was not going to try to see if it works and hope children will not get hurt. Mr. Weisbrot would not accept that as a compelling governmental interest and he believed it was detrimental to the public good.

Mr. Joseph asked the Board Attorney once the variance is approved could they rescind it. The Board Attorney said no.

Mr. Loonam felt Mr. Urdang had articulated his position very well from a legal point. He thought this Board really had to understand the law. Mr. Loonam was not comfortable giving his vote of confidence without hearing the answer to the chief's request to contact his officers. Mr. Loonam felt that answer was on public safety and welfare and felt it would be egregious to feel it was okay to approve this application without knowing what the officers feel. He would not like to vote on this until he heard from safety officers.

Mr. Urdang said this was the second hearing on this application. He said the Board had a traffic expert who said with the new additions he did not have any particular objection. Mr. Urdang said they received a letter tonight stating it was plausible but he would like to have the traffic officers look at. Mr. Urdang said they received this letter tonight and asked where they have been all this time. Mr. Sproviero interrupted and said that letter from the Chief was generated as a result of Mr. Olivo's report which was dated on 8/7 and received by us on 8/10 and have turned around a response in a little more than 24 hours. Mr. Sproviero replied when you ask why you are getting this now, don't ask us, ask your traffic expert. Mr. Urdang said if the Chief had concerns at least articulate the concerns. The Board Attorney asked what the rush was for a determination. He asked why they don't want to get it right so the Board could make a truly informed decision. Mr. Urdang said they presented evidence and asked why the traffic division is getting involved. Mr. Sproviero said because that is what you are asking for. Mr. Urdang said he did ask for it prior to approval. He said they would favor monthly inspections from the police department.

Mr. Urdang said the Board should not rely too much on the state law (inherently beneficial use) because it is replaced in this situation by RLUIPO. He thought it was critical for the Board to understand that the issue here under RLUIPO, whether they like it or not, was not whether there a substantial impact upon the community but whether there was a substantial impact upon the house of worship. Mr. Urdang did not see what the police could say when they had an expert testify essentially uncontradicted. He said what could the police possibly say or contribute at this point. The Board Attorney said it behooves all of us to find out. Mr. Urdang said this was something that should be approved under applicable law and the board could impose conditions.

He said why are they waiting another month so the police could deal with a hypothetical situation.

Mr. Urdang wanted clarification. He asked if the reason they were putting this off a month was so that the Board could get input from the police department. Mr. Sproviero answered no the reason was so the applicant could get input from the police department. Mr. Urdang said if they were to say yes then one of the requirements would be that the traffic department would be in consultation with their traffic expert. Mr. Sproviero agreed. Mr. Urdang would discuss this with his client.

Recess

Mr. Urdang said they were inclined to put this off for a month. He verified that they were talking about traffic safety and discussing it with the officers spelt out in the letter and that was the only inquiry open. Mr. Urdang said Mr. Olivo would contact them. Mr. Sproviero would inform the officers. Mr. Urdang said given those conditions they would put it off until September 8, 2015.

As there was no further business to discuss, a motion was made by Mr. Weisbrot, seconded by Mr. Loonam and carried by all.

Respectfully submitted,
Maureen Oppelaar