

Approved
11/10/15

**New Milford Zoning Board of Adjustment
Work Session
October 13, 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	Present
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
Ms. Batistic – Engineer	Present

RESOLUTION

**15-05 Hettinger – 261 Milford Avenue – Block 1316 Lot 15
Deck and porch – building coverage/front yard setback**

The Board Members reviewed the resolution and there were no changes.

REVIEW OF MINUTES

The Board Members reviewed the minutes for September 8, 2105 and there were no changes.

OLD BUSINESS

15-04 PSEG – 182 Henley Avenue – Block 501 Lots 15 and 17

The Board Attorney thought the Board would hear from the landscape architect.

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

The Chairman hoped this application would be resolved at this meeting. The Board Attorney thought it would be resolved tonight one way or the other. There were no comments from the Board Members on the application.

**New Milford Zoning Board of Adjustment
Public Session
October 13, 2015**

Chairman Schaffenberger called the Public Session of the New Milford Zoning Board of Adjustment to order at 7:43 pm and read the Open Public Meeting Act

ROLL CALL

Mr. Adelung	Present
Ms. DeBari- Vice Chairwoman	Present
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
Ms. Batistic – Engineer	Present
Also attending:	
Mr. Ascolese – Planner	Present (8:43)

PLEDGE OF ALLEGIANCE

OFFICIAL MINUTES OF THE WORK SESSION – September 8 2015

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

OFFICIAL MINUTES OF THE PUBLIC SESSION – September 8, 2015

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

RESOLUTION TO BE MEMORIALIZED

15-05 Hettinger – 261 Milford Avenue – Block 1316 Lot 15

Deck and porch – Building coverage/front yard setback

Motion made by Mr. Stokes, seconded by Mr. Loonam to memorialize the resolution.

The motion passed by a roll call vote as follows:

For the motion: Members Stokes, Loonam, Rebsch, DeBari, Joseph, Adelung, Schaffenberger

OLD BUSINESS

15-04 PSEG – 182 Henley Avenue-Block 501 Lots 15 and 17

Renovate and upgrade substation

D variance – height –Existing nonconformities front yard/side yard

The Chairman stated for the record Mr. Denis and Mr. Weisbrot listened to the recording from the meeting that they did not attend and signed statements to that effect.

Mr. Glen Kienz, attorney from the law firm of Weiner Lesniak representing PSEG, stated they have finished the entire case and put in all their testimony. He said one open item was that they put testimony in their landscaping plan stating that it was greatly enhanced.

Mr. Kienz stated since their submission, the potheads went from 36.08' to 28'. Mr. Stokes clarified that was for the north side. Mr. Kienz agreed. He stated the only other issue with the variances were dealing with the two buildings – the switchgear platforms that were coming out. Mr. Kienz said the original was at 18.1 and now they were at 21.6 but it still required variance relief. The Chairman asked why there was a change in the cantilever. Mr. Kienz said they had not included the platform. The Chairman asked if it was on the plans now. Mr. Kienz said it was on a set to be submitted. He added the Board Attorney drafted some of the conditions which they had conferred on and they had no problem with any of them as drafted.

Mr. Loonam asked Mr. Kienz what his opinion was on the application being an inherently beneficial use. Mr. Kienz thought it was inherently beneficial. He added that we do not function as a society without electricity so it was his opinion that public utilities were clearly inherently beneficial. He added the Yahnel case was about a telephone switching station and was found to be inherently beneficial. He thought this application was more inherently beneficial because electricity was inherently beneficial but there was not the emotional issue you have with a hospital for special needs children.

Mr. Rebsch asked what would happen if everyone used generators. Mr. Kienz said then hypothetically they would be out of business.

Mr. Weisbrot thought everyone could agree that electricity was a good thing. He asked if the choice was if they did not approve this they would not have electricity in New Milford. Mr. Kienz believed what public utilities did is inherently beneficial. Mr. Weisbrot questioned if that was anything public utilities did. Mr. Kienz responded the electricity part. Mr. Kienz said if the Board did not find it inherently beneficial it would not make or break the application because they fulfilled the other criteria.

The Board Attorney swore in Mr. Bruce Hawkins, Paulus, Sokolowski and Sartor, LLC, Warren NJ.

The Board accepted Mr. Hawkins as a licensed Landscape Architect.

Mr., Kienz marked as **Exhibit A-9** Landscape Management Plan dated 6/8/15 no revisions.

Mr. Hawkins discussed the plan and stated that most of the plant material was chosen because of their hardiness, deer resistance and color. He mentioned the biggest changes coming east to west would be buffering the area with evergreens. They added 30 trees to offset the 4 removed and there will also be small flowering plants to add color. The Chairman asked what kind of plants. Mr. Hawkins said some of the plants they were using were Catmint and Coreopsis. The

Chairman clarified that these would be “hardy” and did they take into consideration that this area sometimes floods. Mr. Hawkins said they did. Mr. Kienz asked if they would amend and adopt these plans after consultation with the Boards professionals. Mr. Hawkins added it could be discussed if there were other plant materials or other issues that need to be addressed.

Ms. DeBari asked if PSEG would continue to maintain the area outside the fence. Mr. Hawkins said yes but added the plantings were chosen because of their low maintenance and the lawn would be mowed. Ms. DeBari asked if they knew how often they mowed at the site. Mr. Hawkins did not know.

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

No one in the audience wished to ask this witness any questions regarding his testimony.

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

The Chairman asked the Board Engineer if she had any comments regarding the plan.

Ms. Batistic said they have addressed her comments from her letter.

The Chairman asked how large the 4 trees that they were removing were. Mr. Hawkins said they vary in size but the largest was 24” caliber. He added it was a significant tree in the front of the site which is why most of the trees being planted were in that area. The architect stated they will never be able to hide the building completely but some of the trees would grow to 15’.

The Chairman asked if the applicant needs to notify the Shade Tree Commission when removing a tree. Ms. DeBari thought all trees on your property being removed needs a permit with the Shade Tree Commission. Mr. Sproviero would put that in as a condition.

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

No one wished to be heard in the audience.

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

Mr. Kienz thanked the Board for listening to all their testimony on this project. He added that the Board Attorney has been helpful in drafting all the conditions. Mr. Kienz thought they have proven their case and proved their willingness to work with the Board as best they could to make it better for everyone.

The Board Attorney asked him to review to the Board the variances the applicant is seeking.

Mr. Kienz said they are requesting a site plan approval, height variances for the GIS/Control building, the transmission structures at 23.08 and 65’, lightning masts 75’, transmission structures 65’, the front yard setback for the cantilevered structures, use variance and fence with the barb wire. The Board Attorney clarified that the use component relates to the construction of lightning masts, the transmission structures and the control building. Mr. Sproviero said the

variances sought in connection with this application as well as site plan approval have been articulated by the applicant. He said a question that has come up was the issue on inherently beneficial use. Mr. Sproviero advised the Board that the Supreme Court recognizes this type of utility request to encompass inherently beneficial use. The Board Attorney said there were no substation cases reported by the NJ Supreme Court but there were cellular tower, telephone and other types of public utility plants. He told the Board when employing the analysis undertaken by the Supreme Court with respect to the other cases, there was no question in his mind that this was indeed an inherently beneficial use. Mr. Sproviero said that satisfies the positive criteria and it was up to the Board to balance the inherently beneficial positive criteria with any negative criteria that the board might have found demonstrated thru the testimony. He added there are two D variances implicated by the application. One was for height for the control building, transmission structures, lightning masts and the existing transmission structures which were non-conforming. There was a use component which was a D variance. He clarified that the remaining C variances sought were the front yard setback and the fencing. The Board Attorney said if the Board was inclined to favorably consider the application, he prepared a preliminary list of proposed conditions. The Board Attorney read into the record the proposed conditions of approval.

The Chairman asked if there was any testimony on noise. He understood the existing structures makes some noise and asked if they anticipated the new structures making more noise. Mr. Kienz answered no. He added that any noise that was made would be in compliance with state law standards. The Chairman asked if the noise from the structures fluctuate. Mr. Kienz said there would be a greater hum when it was hot out because the things that make the noise were the transformers. He added at the property line it was required to hit 50 db at the fence line and they will be providing a report for the file to show compliance. The Chairman asked what the db was at the fence line now. Mr. Kienz believed it was under 50 db and there was a report. Ms. Batistic stated a report was submitted to her and there was testimony that the proposed would be less than currently. Ms. DeBari clarified that it would be less. Ms. Batistic stated because it would be enclosed and newer equipment.

Mr. Loonam thought that if this application was not an inherently beneficial use than the term should be thrown out. His opinion was that the potential negative impact to the neighborhood was slight and the potential positive impact to the neighborhood and surrounding neighborhoods was tremendous. Mr. Loonam had no problems with any part of this application and thought the applicant and team did a fantastic job with presenting evidence. He said there were no neighbors or other businesses in the area that were present at the hearings with any comments or complaints. The Board Attorney asked Mr. Loonam regarding the character of the neighborhood, if he believed the site was particularly suited for use proposed by the applicant. Mr. Loonam said absolutely and added that with the history of flooding and the area that they were in, the applicant was attempting to make everybody's life better and easier in the town. He did not think this application was self-soothing but was public soothing. Mr. Loonam had no problem with this application and had no problem with the heights.

Ms. DeBari concurred with Mr. Loonam. The Chairman also agreed with them and with counsel regarding the inherently beneficial use not being the same as a hospital for special needs but no

less inherently beneficial. He thought the impact to the neighbors would be during construction and thought the applicant would make every effort to minimize it as much as possible.

Motion made by Mr. Loonam to approve the application for the reasons mentioned with the proposed conditions, seconded by Mr. Rebsch.

The motion passed on a roll call vote as follows:

For the motion: Members Loonam, Rebsch, Denis, Stokes, Weisbrot, DeBari, Schaffenberger

Motion passed 7-0

Mr. Kienz thanked the Board and stated that he appreciated the Board's comments a lot and said this was a nice Board to appear before. He stated it was nice to see a Board do their job.

Recess

The Chairman noted that Mr. Loonam has left for the night due to surgery on his foot.

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

Mr. Elliott Urdang, appearing on behalf of Top Stone Church, said at the last hearing there was testimony from the police officer. Mr. Sproviero stated that no police officers actually testified. The Chairman clarified that there was a referral letter and it was suggested that the New Milford's traffic officers and the applicant's traffic expert meet and determine whether or not this was a safe application. The Board Attorney said discussion took place at the August meeting. The Board received Mr. Olivio's letter 9/8/15 which was given to the police department for their review and opinion. The police letter was received 9/9/15.

Mr. Urdang marked as **exhibit B-3** Letter from Lt Robert Jones dated 9/8/15.

Mr. Urdang stated there was a comment regarding an ordinance change and thought it was covered under title 39 and an ordinance would not be necessary for this type of operation.

Mr. Olivo, remaining under oath, stated he had the opportunity to meet with Sgt. DiGenio and Lt. Jones. He met with Sgt. DiGenio on August 27 and on September 8 he met with both of the officers. They discussed the concerns from the Board and the public and developed a plan. The concerns raised on safety were dropping off children on the opposite side of the street, walking children across the street and dropping off/picking up along River Road. Mr. Olivo said neither of those two items were being proposed. In addition, they discussed an expanded pickup/drop off area that encompassed Myrtle, Baldwin and also considered the use of Charles. Mr. Olivo said it was brought up about picking up/dropping off within an area designated with "no parking" signs because Myrtle has that in areas proximate to the Top Stone Church. The Board Attorney asked if the "no parking" signs were located on the northerly side of the street. Mr. Olivo said yes. He stated that section 39:4-139 speaks of loading or unloading passengers or materials. Mr. Olivo read into the record section 39:4-139 and stated his interpretation was that "no parking" allows for loading or unloading in terms of the 3 minute duration. He clarified that "no parking or

standing” which he believed was on the opposite side of the street would be no loading or unloading permitted.

Mr. Adelung questioned that testimony was for the duration being 8 minutes. Mr. Olivo stated he mentioned that on some of the projects that he worked on with vehicles entering the site, pickup/drop off could take as long as 8 minutes. He clarified that this application was for curbside and his opinion was that pickup /drop off time would be well under that duration. Mr. Adelung said, for the record, what was the duration that was being proposed. Mr. Olivo said 2-3 minutes curbside. Mr. Adelung questioned if that was what he talked about at the last hearing. Mr. Olivo said at the first hearing, he spoke about the 2-3 minute duration curbside. He stated there was discussion that the 2-3 minutes was unrealistic and they played it out in an 8-9 minutes hypothetical situation. Mr. Olivo added that now they were talking about upwards of 750’ along Baldwin, Charles and Myrtle for pickup/drop off. Mr. Adelung questioned when he spoke with the police was he speaking about 8 minutes or 3 minutes. Mr. Olivo said they respectfully said it would take longer than anyone thinks but the concern was not with the duration but with where it was and where it was not occurring. Mr. Olivo said in Lt Jones letter it spoke of 10 vehicles at any given time.

Mr. Weisbrot clarified that the police letter spoke of 10 vehicles at any given time but said the chart submitted was 20 children ½ hour. Mr. Olivo agreed. Mr. Weisbrot questioned the 10 vehicles ½ hour. Mr. Olivo said if you thought about 10 cars at a time with a 2-3 minute you could accommodate much more than 10 cars at any snapshot in time. Mr. Olivo stated they were speaking of 20 cars over the course of 1/2 hour. Mr. Weisbrot asked how they know all 20 cars would not come at the same time. Mr. Olivo said that was exactly why the police department wrote the letter. Mr. Weisbrot said the police said 10 vehicles at any given time. Mr. Olivo understood the applicant would have to abide by it as a condition. Mr. Weisbrot understood and was sure the applicant would make an effort to abide by it. Mr. Weisbrot said his plan had 20 cars and questioned how they would ensure compliance with the 10 cars. Mr. Olivo said by operations, orientation and time categories. Mr. Weisbrot said his chart stated 20 cars in any ½ hour. He asked again what the plan was on how they would ensure it would not be more than 10 cars. Mr. Olivo said this was the plan which was to break up 10 at one time and 10 in ½ hour were two different things. The question was how they make sure that 20 in a peak ½ hour do not come at one given time and Mr. Olivo’s said they would manage it with the condition that the police department provided.

Ms. DeBari said there was testimony on the three drop off areas but questioned if there would be 10 cars at each location. Mr. Olivo said they could use any of those locations because it was public curbside parking. Ms. DeBari stated it was parking not dropping off. She questioned if parents would be getting out of their car and walking the child into the facility or having someone outside to take the child from the car and walking them in. Mr. Olivo said it was the same testimony as provided before which was they would have attendants outside. There was a concern from the board that a parent might want to speak to a teacher. Those parents could be directed to park on Charles Street. Ms. DeBari thought Charles Street would be for a parent if a child needed to be walked in. Mr. Olivo stated there was a sidewalk on Charles and you would not have to walk a child across the street. There was no expectation for staff to be that far out but a parent could walk their child to the staff to be walked in. Ms. DeBari said there was no

guarantee to make sure everyone would drop off at the right time. Mr. Olivo said there are no guarantees but they met with the police to discuss safety issues. Mr. Olivo said this program was set up with staggered times and the police were aware of their proposal. He stated the safety concerns that the police had were crossing the street with a child and loading and unloading on River Road.

Mr. Adelung asked for the optimum condition to keep every child, parent and citizen in the neighborhood as safe as possible. Mr. Adelung said there was existing “no parking” signs and questioned why the town put those signs by the church. Mr. Olivo said the no parking signs were on Myrtle. Mr. Olivo thought the plan before the board has been worked and refined and it was safe and optimal for drop off and pick up for this project.

Mr. Denis did not think children could get in and out of a car in 2-3 minutes. He stated that River Road was a main thoroughfare and people were being brought in from out of town and not familiar with the community. He had concerns with accidents on the roads and causing back up for the residents. Mr. Denis felt the Korean Church was a positive thing but felt the children were being put in position of danger. He had concerns about a fire or a fire drill and who would be taking responsibility of all the children on the streets and their safety.

Mr. Adelung asked if there was a traffic study control. Mr. Olivo said yes they looked at all three streets. Mr. Adelung asked if they did another study when they decided to include Charles. Mr. Olivo said it worked with Myrtle and Baldwin so it would be just more capacity. Mr. Olivo said there was parking on Charles and he did not believe it created any safety issues. Mr. Adelung asked if the width of the road was the same on River as Charles, Myrtle and Baldwin. Mr. Olivo thought River was wider. Mr. Adelung asked if there was any drop off explored for River Road. Mr. Olivo said the police said for safety purposes no drop off on River Road.

Ms. DeBari asked where the staff would be parking. Mr. Olivo said on street parking.

Mr. Joseph asked what would happen if the people on Charles Street decided to park their cars on the street. Mr. Olivo said it would be unfortunate for the community because it would shift traffic to the other neighbors and likely push the demand to Baldwin and Myrtle. Mr. Joseph said they were creating a problem on Baldwin and Myrtle. Mr. Olivo did not see a problem on Baldwin and Myrtle because there was 765 linear feet of staging area.

Ms. DeBari asked if they were requesting any signage for drop off and pick up on Baldwin and Myrtle. Mr. Olivo said not unless the Board thought it helpful. Mr. Olivo said there was no reason to interrupt the look of the street and there was no proposal for signage. Ms. DeBari thought they might run into problems.

The Chairman clarified that his understanding of title 39 was if that the drop off and pick up times were less than 3 minutes, no new ordinance was required. Mr. Olivo said that was his understanding and it was only on Myrtle. He added Myrtle was the only street on that side that had “no parking” signs. The Chairman asked if a new ordinance would be needed if it was more than 3 minutes. Mr. Olivo understood they would need an ordinance or it became an enforceable condition where the people could be fined.

Mr. Ascolese said when he visited the site in July, Myrtle had “no stopping or standing” signs along the north side from address #213 east. It had a “no parking” sign in front of the synagogue which encompassed the area from #213 west. He stated if Myrtle Avenue were to become part of drop off/pick up zone the present “no stopping or standing” regulation would have to be changed to a “no parking anytime” regulation. He added under 39:4-139 they are committed to pick up or discharge people or pedestrians or passengers up to 3 minutes in a “no parking anytime” zone. Mr. Ascolese wanted to clarify that if this was to take place the way it was depicted on Mr. Olivo’s latest report, the “no stopping or standing” regulation on the north side of Myrtle needs to be changed to “no parking anytime” regulation.

Mr. Olivo said he would agree if there was a no stopping or standing on the north side of Myrtle Avenue.

Mr. Sproviero said under the parking law there is a school drop off section. He explained that statute is the “no parking anytime” statute which says you can drop off for schools, churches or business loading/unloading for three minutes. He stated that the church exception did not apply in the no stopping or standing restricted areas because you were not parking. The Board Attorney wanted testimony on how much linear footage they have from the point of the “no parking anytime” zone to 50’ from the intersection of Myrtle /River. Mr. Olivo said he did not count that or driveways. He added there was 299’ of curbside parking which was not including the driveways.

Mr. Adelung asked if it exceeds 3 minutes does it trigger an ordinance change. Mr. Sproviero answered it made them susceptible to being ticketed. The Chairman said or an ordinance change.

The Chairman read into the record the memo to the NM Zoning Board of Adjustment from Lt Jones dated 9/8/15.

The Chairman thought there were a lot of “ifs” in the application.

Motion to open to the public to ask questions of Mr. Olivo was made by Ms. DeBari, seconded by Mr. Denis and carried by all.

Meg Bassillo, 218 Myrtle Avenue, questioned if the handicap designated area on Baldwin was part of the drop off area and the requirements for handicap parking. Mr. Olivo said regarding ADA requirements he was not sure how many on street parking stalls were needed to be ADA. He said there was one there now and expected it would be more infrequently used than other spaces but he did factor it in.

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

Motion to open to the public for comments on the application was made by Ms. DeBari, seconded by Mr. Denis and carried by all.

Karly Tritthart, 223 Myrtle Avenue, had concerns about the drop off on Myrtle if construction vehicles were working on the street. The resident also questioned how they would use the sidewalk to walk their dogs with all these people standing on a regular basis. She felt a loss of privacy. The resident said there is a curbside drop off at BF Gibb School which does not happen in 2-3 minutes. Ms. Tritthart thought it was not realistic for this to happen.

Rich Boutillier, 224 Myrtle Avenue, said during the school year between 7-9 am Myrtle Avenue was a cut thru between River Avenue and the Boulevard. He thought it would be a nightmare with traffic backing up if a car was legally parked on one side of the street and a car dropping off on the other side of the street.

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

Mr. Urdang stated that the Board needed to understand what the law requires, what powers the Board had and what powers the board did not have under the law. He stated there was no doubt this was an inherently beneficial use and it took over from a previous inherently beneficial use. He added the resolution refers to the fact that there was not and never has been parking on the site. The present application was to permit Top Stone Church to have an early childhood center which would be run by the church and they would be using the same existing seven classrooms. He stated there was no legal doubt that the Top Stone Church is a house of worship and thus was an inherently beneficial use. He said that a daycare center was considered to be integral to the functions of the church and added the citation for that was *Shim v. Wash. Tp. Planning Board* and had to be decided with a specific legal matrix. One part was under state law and the one part was under federal law. Under state law, the affirmative criterion of special reasons was deemed to be satisfied. In analyzing the negative criteria which was what is substantially detrimental to the public good and what would impair the intent and purposes of the zone plan and zoning ordinance, has to be examined in the context of the SICA analysis. This would be a 4 part approach to answer the question of whether the negative criteria had been met. Mr. Urdang reviewed the SICA steps.

Mr. Urdang stated that Mr. Adelung used the term “optimal” and stated that was not something used in the case statutory law. The issue was whether there was substantial detriment to the public good. Mr. Urdang said this was not the optimal situation but that does not mean it becomes substantially detrimental. He added this is not the only facility that uses on street parking. Mr. Urdang understood everyone’s concern and they also were concerned about the safety of the children. He said the issue of safety has been looked at by three experts and all said the situation could be accommodated. Mr. Urdang said they have indicated that the applicant intends to be flexible because everyone was interested in a smooth transition and it may be something that might be “tweaked”. They would continually deal with the police department and accept their recommendations. Mr. Urdang thought it is going too far to say this was an unsafe situation. He added that the experts believed this was something that could be done safely and they could not say this was inherently unsafe.

Mr. Urdang said the Board would have a continuing jurisdiction over this and that stems from the original approval from the church. They would be in close touch with the police department

for suggestions and would expect them to monitor the situation. They would designate a person to contact to deal with any situations.

Mr. Urdang said if the Board uses the SICA analysis and the balancing test, under state law they have satisfied the criteria that there was no substantial detriment to the public good nor did it substantially impact the zone plan and zone ordinance.

Mr. Urdang said there was a tremendous difference between the focus under the SICA analysis and the analysis required by the Board by the federal statute. He added the issue is substantial burden but it is not the burden on the community but the burden on the house of worship. If there was a substantial burden placed upon the house of worship, the burden of proof shifts to the board. The only way the Board could refuse to grant the relief sought was if there was a compelling governmental interest. Mr. Urdang explained the compelling governmental interest was a higher standard and the law stated that traffic and parking were not generally considered to be compelling governmental interests. He stated that the federal statute has priority over the state law. Mr. Urdang said this is an application that must be approved under the existing law and he added that the Church was a good neighbor and has the same interests at heart as the neighbors.

The Chairman said to the Board Attorney that this application seems to hang on the inherently beneficial use component. Mr. Sproviero did not think so. The Chairman questioned that Mr. Urdang commented that this was the highest form of inherently beneficial use. Mr. Sproviero said that was like being a little pregnant. You are inherently beneficial use or not and they were. The Chairman clarified that the church was an inherently beneficial use and a child care center was an integral part of the church. Mr. Sproviero said that was the law. The Chairman said there was testimony that anyone could go to the church and asked if that made a difference. The Board Attorney said no. The Chairman asked how was that an integral part of the church if you did not need to be a member of the church. The Board Attorney said because it was part of the church mission and the one of the church's mission was to provide for the welfare of children and not limited to any specific denomination. The provisions of those child services were part of the overall mission of not only a Christian church but any denomination. Mr. Urdang stated that denying this would be a substantial burden to the house of worship, said the Chairman. The Board Attorney agreed with Mr. Urdang stating it was an inherently beneficial use and this activity was a recognized component of church activity. He stated that RLUPA says the focus of that legislation was to protect the religious interests that include the component of the church activity from unwarranted governmental interference. If the actions of this board or any governmental unit substantially burdens that church related activity, then RLUPA protects the religion institution. In order to overcome that burden, the governmental interest has to show there was a compelling governmental interest that supersedes the mission of the church. There were cases that say traffic is not a compelling governmental interest. The Chairman agreed and said also parking. Mr. Sproviero said this is a quasi-judicial board. The board members were the judges of the law by determining what law applies and judges of the facts. The facts as the board finds them must be applied to the law. The board must examine exactly what the compelling governmental interest was. He said the board has discussed this already whether it was indeed traffic or was it public safety. He asked is the compelling governmental interest the safety of the interest of the children attending the school as well as the neighbors. Mr. Sproviero said that is what the board has to decide and that was the law that was applicable. He said with the SICA

standard this was an inherently beneficial use and it satisfied the positive criteria. The board makes a determination as to whether or not there exists any factual circumstances that support the existence of the negative criteria. If the board was to identify any negative criteria, how does the negative criteria outweigh the positive criteria or were they satisfied thru this inherently beneficial use. Both standards were similar but one significant distinction. Under the state standard, the board presumed to be correct provided that there was a rational basis to support your determination and you were not acting arbitrarily, capriciously or unreasonable. It was the burden of the applicant that they have provided that standard. Under the RLUPA, the burden was for the governmental entity to demonstrate that a compelling governmental interest is such so as to place a substantial burden on the house of worship.

The Board Attorney said it was not his role to tell the board these were the facts that they should find. He said this was for the board to discuss. The Board Attorney said it was his opinion that there were three critical pieces of evidence – the letter dated 9/4/15 from Mr. Olivo, response from Lt Jones dated 9/8/15 and the report from Mr. Ascolese.

The Chairman said a daycare center was an integral part of the church and asked the Board Attorney if it was his opinion to deny this application would be a substantial burden to the house of worship. Mr. Sproviero said the analysis must continue. He asked is the Top Stone Church a house of worship. The Chairman answered yes. Mr. Sproviero said the daycare was part of the church activities. Mr. Sproviero was not prepared to concede that by and thru steps taken to deny the application and not permit the daycare component that it was not in itself constitutes a substantial burden on the house of worship. The Board Attorney said that was a finding of fact. He said let's assume that the board found that it was, that burden was overcome by a demonstration of a compelling governmental interest. He said if the board found that it was not, then the SICA would apply.

Mr. Urdang said if they know that the early childhood center is an integral part of the church and the result of the Board's determination was to deny the application that would per se place a substantial burden on the house of worship. The Board Attorney did not agree. Mr. Urdang said that once you make the determination that there is a substantial burden at that point the burden of proof shifts to the board. The standard that the board must use in order to deny the application is to determine that this is a compelling governmental interest, said Mr. Urdang. If it is a compelling governmental interest the law says you have to apply it in the least restricted manner. He added traffic and parking were not considered to be compelling governmental interests because it was considered a very high standard. With regard to saying they were speaking about safety not traffic, Mr. Urdang said the consequences of vehicular activity was traffic. He stated that was a distinction without a difference.

The Chairman disagreed and did not think you could separate the two. He said you cannot base it on traffic and parking but you could base it on safety. Mr. Urdang said it was your burden of proof to show there was a compelling governmental interest and two out of the three experts agreed it was not imposing a safety problem. He asked how they could come to the determination that they could meet the high standard of a compelling governmental interest. The Chairman said in the letter from Lt. Jones he wrote that "although this plan of staggering drop off and pick up times seems to be a reasonable plan on paper, if it was not followed by the parents

many problems could arise". The Chairman noted that there was a human quotient involved. Mr. Urdang said they would continually monitor and there was a mutual interest that it functions safely. The Chairman asked what happens if the board grants the variances and it is not working. Mr. Urdang agreed that every application has a human quotient and the board never knows for sure what they were approving would work exactly. He commented that by giving the Board the continuing jurisdiction over this and inviting the police to monitor the situation they were throwing them out before they could prove it could function safely. The Chairman asked if the Board could rescind the variances if it was proven that it could not function safely. Mr. Urdang said presumably so. The Board Attorney said they could condition it that way. Mr. Urdang said even with the condition it would come back to them under the RLUPA analysis and the board would have a shot at it. Mr. Urdang said there were two things that could help the situation. One was the police. If the police say to try something, they comply with it, it isn't better and there was nothing further the police could say, the board has jurisdiction and could tell the applicant to come back and explain themselves. The Chairman did not know if that was good enough for him.

The Chairman asked if the variances go with the property. Mr. Sproviero agreed. The Chairman asked if the church sold the property to another church could they run a day care center. The Board Attorney said yes.

Mr. Weisbrot commented that he was supportive of this application because it was a great idea and was a fan of permitting this sort of use. He added that he would bend over backwards to try to find a way to make it work. Mr. Weisbrot agreed with the legal analysis and said the question becomes is the issue of safety a sufficient compelling governmental interest to override if there was a substantial burden. He added that the analysis was very simple and he heard it a thousand times. Mr. Weisbrot said he was voting against this application for one reason which he said was regarding Lt. Jones letter discussing 5 vehicles on one street and 5 vehicles on another street at any given time. Mr. Weisbrot thought they were taking a liberal characterization of this by saying two experts were fine with this. He added this letter does not say it was fine unless there was 10 drop offs at a time and there shouldn't be a problem if everyone follows it. Mr. Weisbrot was not as concerned about the human factor because he assumed no one would follow it. He added he did not care about the traffic issues and the burden of the community in this application because he agreed it was not relevant. Mr. Weisbrot stated that the expert plan indicated 20 vehicles at a given time and he asked that expert what he would do to ensure the 10 cars because if it was not the police department was not behind this. Mr. Weisbrot said they can all agree if it was not 10 cars it was unsafe. Mr. Weisbrot said Mr. Olivo answered his question saying they would manage it. Mr. Weisbrot said that was not a sufficient answer to him only on the issue of the safety of the children. Mr. Weisbrot said it was a heightened compelling governmental interest to protect the citizens of the community. He added they spent a long time educating the board on issues that were not really relevant. Mr. Weisbrot said the only question was is there a sufficient concern about the safety and he did not hear an answer on it. Mr. Urdang said they heard it from the police. Mr. Weisbrot said the police said 10 vehicles at a time. Mr. Urdang said they also heard from Mr. Ascolese. Mr. Weisbrot said they were here tonight to hear from the police department who indicated 10 vehicles and the expert saying they would manage it was not enough. He understood the point that with applications they would work with the board and the police department would have a dedicated person. He said that would work with anything but safety. Mr. Weisbrot questioned how many children would be hit before they come back to the

board. He did not want to take a chance that they would manage it so that someone might not get hit.

Mr. Urdang asked if he did not think they had any concerns for the safety of the children. Mr. Weisbrot said he would not be favor of the application and have to live with the fact that they did not manage it appropriately. Mr. Weisbrot said even though he was in favor of this application he could not vote for this application because the expert could only come up with the answer “we will manage it”.

The Chairman asked if the whole issue was safety can't the issue of safety be the result of traffic and parking. The Board Attorney believed there was a distinction but also said safety could be triggered by traffic issues. The Chairman clarified the board could not deny the application on the traffic and parking because of case law. He said traffic and parking could create safety issues. The Board Attorney agreed and explained that traffic was traffic flow but this was not a traffic flow issue parking. Mr. Urdang said with that reasoning this was not a traffic issue. The Board Attorney agreed it was a safety issue generated by traffic.

Mr. Urdang said they welcome the supervision but to ask in the abstract how this would work was asking for too much at this time. The Board Attorney said this was Mr. Weisbrot's problem that there was a pick up /drop off chart from Mr. Olivo's plan which showed 10/20/30 vehicles. He added that Mr. Weisbrot's concern was that the police letter wanted 10 vehicles for any ½ hour period.

Mr. Urdang said he stated his case. He added the likelihood was that this would not start at full capacity and there would be instruction to the parents to make sure it work. The Board Attorney said he has not attempted to steer the board one way or the other but wants them to make sure what the law is and what factual analysis has been presented to the board. He referred to Mr. Olivo's report because he wanted the board to be clear on what Mr. Weisbrot was predicating his factual analysis on. Mr. Urdang said this was something that might be changed as the empirical situation developed. The Board Attorney understood. Mr. Urdang said to say no they can't have it because they can't tell exactly what would happen at any exact thing so therefore they presume it poses a safety hazard. The Board Attorney agreed until he said the “presume” part because is it a question of this board presuming or as articulated by Mr. Weisbrot. It is a question on the how we would deal with this if it doesn't work.

Mr. Adelung asked if the compelling governmental interest comes into play with the police department having to monitor this. The Board Attorney said all parties had an obligation but it was not to say that it was the obligation of the borough to station police officers there on a daily basis. He added that the monitoring process was not the compelling governmental interest, the safety was. The Board Attorney said that Mr. Urdang said there were three expert reports that says this should work. He added that the compelling governmental interest was safety. Mr. Sproviero said the only way to get to the monitoring aspect was for the board to decide that the safety concerns were not compelling. He said safety was always compelling because Mr. Urdang said there were three experts that say this should work if everyone follows instructions. The Board asked how they provide for continuing monitoring of those conditions is beyond the issue of compelling governmental interests. Mr. Urdang said the realistic approach was to see how it

develops. Mr. Weisbrot said coming back to the board for traffic or parking did not matter because it was not sufficiently compelling. They would not be coming back to us because it was not working for traffic or parking. He added they only would be coming back if safety was not working and he was curious as to how they would find that out.

Mr. Adelung asked about the obligation and financial ramifications to the town to have a police officer monitoring the site. The Board Attorney said the town was paying for it. Mr. Urdang said that was the function of the police department and they were not suggesting that there would be a police officer out there all the time.

Mr. Urdang said they were entitled under the law to at least a chance and the board's protection was if it was not working to the point that it was creating a safety issue the recommendation of the police department would be to the board that they should bring the applicant back.

Mr. Weisbrot said his issue was not "let's see if this works or not". His issue was the applicant has presented a plan that the police department have not signed off on. The police department did not think it was safe if it was more than 10 cars at a time and the applicant's plan allowed for as much as 30 at a time. Mr. Weisbrot said it was not the burden of the board to come up with ways to ameliorate it. Mr. Urdang said the board has the power to impose a condition. Mr. Weisbrot said fine then the condition can be 10 cars during each of the time periods with 40 students maximum. Mr. Weisbrot said he was not putting children at risk just because the applicant says they will manage it and he wants to know how it will happen.

The Board Attorney said the underlying issue was is it up to the board thru the imposition of conditions to develop the applicants plan or was it the obligation of the applicant to present the plan. Mr. Urdang asked how they can develop the plan in the abstract.

Mr. Urdang said he respectfully submits that the board was not giving full effect to the law and if the board denies this they will let a court decide.

The Chairman asked Mr. Ascolese if he had anything to add to this. Mr. Ascolese said he visited the sites and was a little concerned about running two way traffic on Baldwin and Myrtle if the parking regulations were to be relaxed. Mr. Ascolese thought there could be an opportunity to widen the north side of Myrtle along the frontage and the south side of Baldwin along the frontage of the synagogue to make it a little safer. He was a little confused about a statement from Mr. Urdang concerning the parameters that traffic and parking cannot or should not be taken into consideration. He still had concerns about the safety of the site and the federal regulations to be considered.

Mr. Weisbrot made a motion to deny the application for his reasons given, seconded by Mr. Denis

The motion was denied on a roll call vote as follows:

For the motion: Members Weisbrot, Denis, Rebsch, DeBari, Joseph, Schaffenberger

Against the motion: Stokes

Ms. DeBari said she was supportive of this application until the drop off /pick up times regarding the 10/20/30 cars which she had an issue with. The Chairman said he was in favor with having the police department looking at this site. He added that if the police department came back with no problems he would have no grounds to deny this. The Chairman said they came back with some problems and the numbers they came back with were not on Mr. Olivo's report. The police department said there should not be a problem if followed by all involved but the numbers do not match. The Chairman thought this was a doable thing but did not think the applicant has demonstrated it to the board at this time.

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

Respectfully submitted,
Maureen Oppelaar