

Approved
4/8/14

**New Milford Zoning Board of Adjustment
Work Session
February 11, 2014**

Chairman Schaffenberger called the Work Session of the New Milford Zoning Board of Adjustment to order at 7:36 pm and read the Open Public Meeting Act.

ROLL CALL

Mr. Binetti	Absent
Ms. DeBari	Present
Mr. Denis	Present
Fr. Hadodo	Absent
Mr. Ix	Present
Mr. Loonam	Present
Mr. Rebsch	Present
Mr. Stokes	Present
Mr. Schaffenberger-Chairman	Present
Ms. Batistic – Engineer	Present
Mr. Sproviero - Attorney	Present
Also present	
Mr. Grygiel – Planner	Present

REVIEW OF MINUTES – December 2, 2013 and January 9, 2014

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

OLD BUSINESS

**13-02 Alex and Sons Real Estate, LLC – 391 Madison Avenue - Block 1211 Lot 32
Three story 14 unit multiple dwelling with parking underneath building
Use, building coverage, front yard and height**

The Chairman assumed they could continue with the planner, Mr. Ochab. Ms. DeBari commented on how many times the application has been carried. Mr. Sproviero thought they would need an overview of the application and did not think the application would be voted on at this meeting.

**12-01 New Milford Redevelopment Associate, LLC – Block 1309 Lot 1.02
Supermarket, Bank and Multifamily Residential Units
Height, stories, building and impervious coverage, use and parking**

The Chairman thought Mr. Del Vecchio would give his summation. The Board Attorney agreed and said given the depth of the application and the two years of meetings it was his recommendation not to start the Board's discussion nor commence deliberations nor consider a vote on the application at 10 pm. The Board Attorney wanted the Board to have an opportunity

to hear what Mr. Del Vecchio had to say, digest it all and come back on the 20th when they had time to discuss, deliberate and ultimately vote.

The Chairman questioned if all the Board would be available for the 20th. The Board Members agreed to the date.

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

**New Milford Zoning Board of Adjustment
Public Session
February 11, 2014**

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. Binetti		Absent
Ms. DeBari		Present
Mr. Denis		Present
Father Hadodo		Absent
Mr. Ix		Present
Mr. Loonam		Present
Mr. Rebsch		Present
Mr. Stokes		Present
Mr. Schaffenberger-	Chairman	Present
Mr. Sproviero -	Attorney	Present
Ms. Batistic	Engineer	Present
Also Present		
Mr. Grygiel	Planner	Present

PLEDGE OF ALLEGIANCE

OFFICIAL MINUTES OF THE SPECIAL MEETING – December 2, 2013

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

OFFICIAL MINUTES OF THE WORK SESSION – January 9, 2014

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

OFFICIAL MINUTES OF THE PUBLIC SESSION – January 9, 2014

Motion to accept the minutes with a change were made by Mr. Ix, seconded by Mr. Denis and carried by all.

OLD BUSINESS

**13-02 Alex and Sons Real Estate, LLC – 391 Madison Avenue – Block 1211 Lot 32
Three Story 14 Unit Multiple Dwelling with parking underneath building
Use, Building Coverage, Front Yard and Height**

Mr. Alampi stated this was a continuation of an application filed last March and their last meeting was in November 2013. He added that Mr. Ochab concluded his testimony regarding the revised plans but did not believe the public nor the Board had an opportunity to question the planner. Mr. Ochab was available for questions, said Mr. Alampi.

The Board Attorney stated it has been several months since they have heard the application and asked Mr. Alampi to briefly summarize where they were on the application. Mr. Alampi said they have presented their various witnesses and several of them were recalled because of the change to the footprint and the reduction in the number of units. Mr. Alampi stated originally the application was filed requesting 14 dwelling units on two levels with parking underneath. The new design has reduced the 10 dwelling units and the number of bedrooms assigned to each unit changed. He noted that although they reduced it by 4 units they added bedrooms to some of the units. The configuration presently is four 3 bedroom units and six 2 bedroom units. There were questions raised as to whether or not the reduction of the number of units were meaningful if the bedroom count was increased. Mr. Alampi said they addressed those issues. There were also concerns regarding garbage removal. He said they introduced exhibit A-15 which was a letter issued by Mike Borer dated 11/11/13 from GAETA Recycling that had a privately contracted facility using a small truck and they could control the number of pickups and times. The Board Attorney said his recollection was that the truck would have to back in and out of the site. Mr. Alampi said yes.

Mr. Alampi said the building went from a footprint of 9,285 to 8,091 sf. He explained it was 18,570 sf on both levels and now it was 16,200 sf. There was originally a variance for one parking space which was controlled by the number of units under RSIS. With the reduction of the units, Mr. Alampi pointed out the plans called for 25 units but only 20 units were required and they eliminated the parking variance which was an improved site plan.

The Board Attorney asked if they anticipated any additional evidentiary presentation with regard to the application after Mr. Ochab. Mr. Alampi said no they would not require any further witnesses and did not see the introduction of any new exhibits. The Board Attorney asked if time permits would he like to open to the public for their comments. Mr. Alampi agreed.

Mr. Ochab was recalled and the Chairman reminded him he remained under oath.

The Board Attorney asked if the amendment to reduce the units resulted in a more intense use of the premises given the increase in bedrooms. Mr. Ochab answered from a building standpoint the answer was the reduction of the project from 14 to 10 bedrooms was less intensive because there were less units and less building space. In the terms of building coverage, the revised plan was more advantageous. From a parking standpoint, it was more advantageous because there would be less parking under this scenario. Mr. Ochab said the parking requirement under the RSIS for the prior plan was 27 spaces and they had 28 based on a one and two bedroom scenario. He explained under the revised application the total parking requirement under RSIS was 21 parking spaces and they were providing 24 spaces. He said less spaces, less cars which would mean less traffic. He said based on the Rutgers demographic study there would be about 25 people occupying the 14 units and with the two and three bedroom scenario there would be less adults but 5-6 children. Mr. Ochab said the school population over the last 5 years has declined in New Milford by about 60 students so adding 5-6 children would not be a significant impact. The Board Attorney counted 14 children beds with their configuration. Mr. Ochab said forgetting the studies he came up with 34 total people of which 14 were children. He said that was okay to start with but they rely on the Rutgers study because what occurs is there are couples with less children, more single households, seniors living on their own and the empty nesters. Mr. Ochab

said Rutgers has a formula that could be used and felt the 5-6 children was reasonable based on the Rutgers analysis. The Board Attorney asked if he was predicating his opinion on the Rutgers analysis. Mr. Ochab agreed. He said these units were a minimum of \$1500-2000/month which was not an income level conducive to single parents with 2 children. Mr. Ochab said COAH did have a formula for the types of units, number of bedrooms and the occupancy. This project was not intended to be affordable and it was not intended to be the lower end of the market, said the planner.

The Chairman clarified that this revised project has fewer units but the same number of bedrooms as the prior design. Mr. Ochab agreed but said demographically the profile would be different.

Mr. Loonam asked in general what was good planning. Mr. Ochab answered it was the development of a community that was balanced and economically viable and environmentally acceptable and uses the social, physical and environmental factors to make the appropriate use of land. Mr. Loonam asked if this application met those terms. Mr. Ochab thought it did and added one of the reasons was this was an odd piece of property because it was oddly shaped, a large piece of property and in an area where the land uses were clearly mixed. He noted to the east there was an apartment complex with more than 100 units, a business area with a couple of businesses, single family homes and the learning center for autistic center. Mr. Ochab's opinion was that this use fits in with the character of that side of Madison Avenue. He added that it was an appropriate use because there was a significant environmental issue in the back of the property. The property slopes off and there was a wetland area in the rear. He thought this type of project develops the front of the property but leaves the back open to protect the sloped area and the wetlands. The slope of the land was helpful because they could have a building with parking under the building and would save on the total amount of impervious coverage. Looking at the revised plans, Mr. Loonam asked where the children would play. Mr. Ochab said there was an area behind the building to the east and if a family was looking for an apartment complex with a recreational area they might choose a different housing alternative. Mr. Loonam noted if a house was built at the site as the zoning permitted, there would be plenty of grass. From a planning perspective when changing the allowed use, Mr. Loonam questioned how you give back the land that would be taken away by concrete and a larger building. Mr. Ochab answered that was a question on alternatives. He explained there most likely would not be a single family house constructed on this type of property because of the size. He stated someone might subdivide it which would require a road and driveways having a lot more land disturbance than this project. Mr. Ochab said the best way to protect the wetlands was to have it under one business entity. Individual property owners backing to a wetland tend to try to expand their yards which would negatively impact the wetlands. The planner felt this was the best alternative.

Mr. Denis said excluding the wetlands how much of the area was buildable. Mr. Ochab could not say but stated under any subdivision scenario the wetlands would be part of the individual lots. Mr. Denis clarified that the lot was zoned for single family. Mr. Ochab agreed but his view was this property would not remain as single family lot property and would be subdivided or developed in some other matter.

Ms. DeBari questioned why he thought that would happen. Mr. Ochab said because the property was over an acre and it was the third largest property in this stretch of Madison Avenue. Ms. DeBari said someone could build a single family home on a large piece of property. Mr. Ochab thought it was possible but not likely.

Mr. Denis said the property was an acre but asked how much of the property was buildable. Mr. Ochab thought about 30 percent was not buildable. He said that was not necessarily a disadvantage because the wetlands count to lot area. Mr. Denis asked if he was aware that the apartment complex had to be restructured from the bottom up from the wetlands. Mr. Ochab did not know much about the apartment complex and said they would not be close to the wetlands area as far as construction.

Mr. Grygiel asked if the applicant was proposing any affordable housing units as part of the development. Mr. Ochab said no. Mr. Grygiel asked, if approved, did he think since New Milford had an obligation to provide units would it be reasonable to require a set aside of one or more affordable units. Mr. Ochab responded with a project with such a small number of units some alternative other than a set aside might be more advantageous. Mr. Grygiel said such as a payment in lieu of the unit. Mr. Ochab agreed or said some fee structure and he did not see the development fee ordinance.

In the COX book with granting of a D variance, the Chairman said it reads that *the “special reasons” requirement of the statute is also referred to as the “positive criteria” for a use variance. Note that it was the applicant’s burden to show “special reasons” in order for the board to exercise its jurisdiction to grant relief under subsection d. The “special reasons” required for a use variance may be found in three categories of circumstances.* The Chairman said one of the special reasons was *that the proposed use inherently served the public good* and questioned that it would not apply here. Mr. Ochab said no it was not an inherently beneficial use. The Chairman said another reason was *the property owner would suffer undue hardship if compelled to use the property in conformity with the permitted uses in the zone* and said that would not comply here either. Mr. Ochab agreed. The third was *where the use would serve the general welfare because “the proposed site is particularly suitable for the proposed use”* and the Chairman assumed that was what he was focused on. Mr. Ochab agreed and said he spent time last year going over the uniqueness of the site, shape of the site and the development potential of the site itself that it would be particularly suited for the proposed use. He added it was also based on the nature of the area that was clearly a mixed use area with apartments, institutional uses, businesses and single family homes on the north side of Madison. These all went to the particular suitability of the site and the purposes of the land use law particularly promoting the public welfare. The Chairman asked if it was intentional that he listed the single family homes at the end of the list. Mr. Ochab said in terms of acreage they were the least significant in the total land area occupied by the use.

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

Terence Mc Mackin, 400 Madison Avenue, asked if he was aware that previously there was a five bedroom three bathroom house. Mr. Ochab was aware. Mr. Mc Mackin said they were

proposing 24 bedrooms with a possibility of 35 people and asked if that was an intensification of use of the property. Mr. Ochab said no because the existing use was an underutilization of the property. Mr. Mc Mackin said with a surveyor's wheel he walked east to west approximately 125' and from the front to the rear was about 150' which measured about 1/3 of an acre which he thought was more accurate than 30 percent of unusable land.

Lori Barton, 399 Roslyn Avenue, asked if he was aware of the cost to educate a student. Mr. Ochab did not look up the New Milford figure. Ms. Barton asked if he would be surprised if it was about \$13,000 per student. Mr. Ochab would not. Ms. Barton said with an approximate number of 10 children that would be \$130,000 and asked if they expected \$130,000 in tax revenue from the complex. Mr. Ochab did not do the calculation as to the tax ratable but thought it would be a lot more than \$130,000. He added that single family homes with respect to school cost and tax revenue was a clear loser. Ms. Barton said there would not be that many students generated from the site if there was a single family home on the property. Mr. Ochab's view was there would not be one house on that property. Ms. Barton asked if he was aware variances were granted at the school because it was an inherently beneficial use. Mr. Ochab agreed. Ms. Barton asked if he agreed that a single family home on the property would be the least aggressive use. Mr. Ochab agreed. Ms. Barton asked if there would be anything bad about having a single family home on the property. Mr. Ochab said only from the standpoint that it would be an underutilization of land. He thought over time there would be multiple applications to develop that property and he did not think this was a bad way to lock up the density of this project. Ms. Barton said his testimony was if that land was subdivided a road would be necessary and the resident questioned how would there be 75 x 100 lots. Mr. Ochab said that was his point and they would have to be creatively designed and might need variances. The resident asked how would granting the variances and allowing this multifamily development benefit New Milford compared to denying the variances and only allowing a single family home. Mr. Ochab said the benefits come from the testimony regarding the use variance and whether the site was particularly suited for the use. It was also a way to provide additional rental housing. Ms. Barton asked if he thought New Milford needed more rental housing. Mr. Ochab said at this scale.

Lorraine Mc Mackin, 400 Madison Avenue, stated that most of the wetlands dropped off and was not usable. Ms. Mc Mackin thought the only solution for a subdivision would be for two lots that would maintain the wetland buffer with more grass. Mr. Ochab said that was a scenario but thought a builder would still look at a road. Ms. Mc Mackin asked if two lots with two single family homes would be a less intense use than this project. Mr. Ochab did not think so when looking at the amount of grading that would take place and each house would have a different demographic profile. Ms. Mackin asked if developer had to make one of the units affordable. Mr. Ochab said typically there a number of ways to achieve the obligation whether to construct one on site or a contribution to the municipality housing fund which could be used to provide housing elsewhere. Ms. Mackin thought RCA's were not permitted. Mr. Ochab said not an RCA it would be a contribution to the municipal fund to be used to construct or provide affordable housing within the municipality.

Terence Mc Mackin, 400 Madison Avenue, questioned his testimony that the population was declining and asked if there was a possibility in a few years that could change. Mr. Ochab said because he saw a decrease of New Milford students it tells him there might not be capacity

issues. He said his view was the 10 unit project that generated a number of children was not significant. Mr. Mc Mackin thought this theory could be questioned. Mr. Ochab did not agree.

Richard Mide, 660 Columbia Street, questioned his testimony that people were having less children. Mr. Ochab said this was with respect to the anticipated occupancy of this project. Mr. Mide asked if there was anything in the plan that prevents children from going back by the slope of the property. Mr. Ochab could not answer that question. Mr. Mide asked if the garbage truck would be able to back up in the driveway. Mr. Ochab said it was a two way driveway that went to the bottom with a right turn to the back of the building with parking spaces underneath. Mr. Mide questioned if the garbage truck was backing out and another car was exiting. Mr. Ochab said the typical maneuver was that there were two men in the vehicle and one directed the process.

Gene Murray, 425 Madison Avenue, said his testimony was he did not like to represent objectors and asked if people might suspect bias in his testimony. Mr. Ochab said he spend 30 years of his career working for the public so his view with respect to the public was clear and he now choses to represent applicants instead of objectors for personal reasons. Mr. Murray asked if he could comment as to the market need for market rate units in New Milford in a low mortgage rate environment and questioned if people were looking for \$2000/month apartments. Mr. Ochab said marketing was not an issue in land use applications but an objective of the project was to provide upscale rental housing which the applicant felt was not in great supply in New Milford. The resident asked if the small garbage truck met the clearance underneath the building. Mr. Ochab did not know. Mr. Murray asked if trucks backing in or backing out of the driveway would have a negative impact on the neighborhood and traffic safety. Mr. Ochab said it was not his area of expertise.

Mr. Murray asked if he thought about children cutting through at that site accessing the private homes behind the property and the negative impact it would have on the homeowners. Mr. Ochab said he had not. Mr. Murray asked if he thought it was good planning to have a high volume residential complex near the school playground for the autistic children. Mr. Ochab said he works with a school for autistic children that was next to a church/school parking lot with 150 cars a day. Mr. Murray asked if it was good planning to have this complex next to a school for autistic children. Mr. Ochab said it was good planning when there was adequate safeguards. Mr. Murray was concerned about noise and activity that negatively stimulate autistic children. Mr. Ochab was not aware that would negatively stimulate autistic children and added he has been involved with autistic children education in Paramus for 20 years and did not think of this project as a high activity environment. Mr. Murray asked if this project was contrary to the master plan or any of the zoning documents. Mr. Ochab said it was not contrary to any of the documents. He said the master plan does not discuss this property. Mr. Murray read from the 2010 reexamination report on major problems and objectives relating to land development in New Milford. He said the neighborhood was primarily single and two family residents. Mr. Ochab did not view it as a residential neighborhood and he testified that it was a mixed use area on a major county road. He thought the master plan was referring to residential neighborhoods off the main arteries and this was not strictly residential. Mr. Ochab said what he was reading was not applicable to the application. Mr. Murray discussed the single family homes in the area and said the business zone was one storefront. Mr. Murray asked if there was any evidence made in the

town documents that New Milford had any intention of making this area multifamily zone. Mr. Ochab said that was the reason the applicant was seeking a use variance. The documents were not specific to this property. Mr. Murray asked what the date was on the Rutgers study. The planner said 2006. The resident asked if the marketing conditions from 2006 were applicable in 2014. Mr. Ochab said they were valid that they could make projections from it. Mr. Murray asked if the application was approved have they established a new standard to allow all of New Milford to be redeveloped as apartment buildings. Mr. Ochab said the process was that each application and property stands on its own merits and was based on the uniqueness and location of the property. The Board granting a variance in this case would mean nothing towards granting variances of a similar nature because the neighborhoods and streets would be different, said the planner.

John Rutledge, 335 River Road, asked if there was any discussion with the fire department. Mr. Alampi said the fire department reviewed the plans and submitted reports.

The Chairman said they have run out of time and the applicant would return in March for the public to make comments, Mr. Alampi would make a summation and then there would be a vote. Mr. Alampi agreed and said he would not recall Mr. Ochab.

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

**12-01 New Milford Redevelopment Associates, LLC – Block 1309 Lot 1.02
Supermarket, Bank and Multifamily Residential Units
Height, stories, building and impervious coverage, use and parking**

Karl Schaffenberger, Ronald Stokes, Joseph Binetti and Father Hadodo have previously recused themselves from the application.

Mr. Del Vecchio said the summation has been broken up into two parts and Mr. Eisdorfer would start and he would conclude the remarks.

Mr. Eisdorfer said the Board was sitting here as a judicial body and the board's decision would be based upon the board's application of the law to the facts that have been presented through sworn testimony. The applicant was applying for a mixed use inclusionary development consisting of supermarket, bank and 24 units of low and moderate income housing. The applicant seeks a use and bulk variances. He added it could be analyzed in two ways. First as an inherently beneficial use or as a non-inherently beneficial use. Mr. Eisdorfer stated that under the law, the Board would be obligated to approve it either way it was analyzed.

Mr. Eisdorfer said the inherently beneficial use was a court made doctrine that concerns uses that advances the public good and was well established in New Jersey. This project consists of low to moderate income housing and other kinds of market rate development. One way to look at this was to follow the model set by NJ Supreme Court in the Smart SMR vs Fairlawn case. The court said there would be a set of criteria to identify an inherently beneficial use. He stated that this mixed use residential development in New Milford that has an unmet housing obligation is such

a use under the Smart SMR analysis. An alternative way to analyze it was under the case Medical Center of Princeton where the courts break it up in pieces and said they would look at the inherently beneficial use and the part that was not obviously inherently beneficial and asked if they were integrally related. If it was integrally related, then they would say the whole use was inherently beneficial. Mr. Eisdorfer said these were two different ways to look at it. Under Smart SMR the court said to look at the need and ask if this is something for which there was a local or regional need. Mr. Eisdorfer said under the case Hills vs Bernards Twp. when evaluating the magnitude of the need they were obligated to use the uniform standards established by COAH. Under the New Milford 2008 Housing Plan, the need was divided in three parts. There was a prior round need of 23 units which said they were entitled to credits for the Gramercy project, for nine units in two group homes and for the zoning of the site in question. Under COAH standards, no credits were justified for any of those. The Gramercy site has not been built and proposed a total of 4 one bedroom units. He added under COAH standards no more than 20% of units in the project could be one bedroom units. The nine units in two group homes under COAH standards have to provide extensive documentation to show they were low income units and they have long term controls on them and no documentation has been submitted. The NMRA site has never been rezoned so the town was not entitled to credits against the 23 units.

The municipal housing plan identified a five unit indigenous need and it said they would meet that need by creating a municipal rehabilitation program municipally funded which he said there was no such program. There was also a prospective need from 2008 -2018 that said their housing obligation for that period was 23 units. Mr. Eisdorfer said under the 2008 COAH regulations that was a flaw because the obligation could go up if there was more development but not down. The Supreme Court last year said that the 2008 methodology was not an appropriate methodology to determine municipal housing obligation because it was outside the COAH statutory powers that had to be calculated differently. It was the testimony of Dr. Kinsey who went through the analysis and calculated the town's obligation was 25 units with an unmet obligation between 54-72 units. He added that none of the garden apartments satisfy the standards of being affordable to low to moderate income housing. Under the COAH regulations, you cannot get credit against your housing obligation for pre-1980 units because they have been counted once.

Mr. Eisdorfer said a piece of reality was that anyone that builds this builds it at a loss at every step of the operation. This means that this housing does not get built without subsidies, said the attorney. He said to meet that need it has to be met through private subsidies. In New Jersey, he said there was a working model for what private subsidies mean and that was inclusionary development where projects that include market rate development generates the subsidies necessary to subsidize the cost of construction operation of low to moderate housing. He explained when there was a need for low and moderate income housing it means there was a need for inclusionary development because that was the way it gets done. There were three facts that make that particularly appropriate in New Milford. New Milford identified in its 2008 housing plan inclusionary development as the principle means of meeting its housing obligation and it specifically identified this as the site for inclusionary development and the plan recognized there were no other substantial vacant sites in the town. Mr. Eisdorfer said there was no intrinsic difference between residential inclusionary development and mixed use inclusionary development. He added in either case it was the profit producing part of the development that subsidizes the low and moderate income housing and the COAH treats them the same way. Mr.

Eisdorfer said they have established that there was an unmet need that could be met through an inherently beneficial use. He answered questions under Smart SMR stating that the low and moderate income housing would be operating at a loss for 30 years, it was limited by the towns housing obligation and available sites, the low and moderate housing was regulated by uniform standards and there was testimony that this site was zoned for single family uses but no planning document in New Milford suggested that it was the appropriate use. He stated the site was historically an industrial use with trucks coming in and out of a dewatering facility, surrounded by single family homes on one side, senior center, high school, playing fields, river, DPW works, mixed uses and commercial. Mr. Eisdorfer said this was a zone that was in a mixed use zone and did have a distinctive single family character. He added that the low and moderate income units were small in scale in comparison to the existing garden apartments and the supermarket was only 15% larger in floor area than the existing supermarket and it was less impervious coverage than development for single family housing. Mr. Eisdorfer said these were indicators that this was not disruptive of the character of the existing neighborhood. He said in 2008, COAH did a series of studies on what was the relationship between jobs and the housing need and based on Dr. Kinsey analysis the appropriate ratio for a 70,000 sf supermarket, 4,000 sf bank would be 8 units of low and moderate income housing. He added based on that analysis there was three times as much low and moderate income housing and the amount of affordable housing being proposed was proportional. Mr. Eisdorfer stated the housing provides housing for people that might be employed there and the jobs provide employment for the people who live in the housing.

Mr. Eisdorfer said in Homes for Hope, the court says not to look at whether the town has an unmet housing obligation but there was a need everywhere regardless if the town has met their obligation. He said based on the Smart SMR and his analysis this was inherently beneficial use and saying it was an inherently beneficial use satisfies the positive criteria which was the special reason. Mr. Eisdorfer said a different way to analysis this was under the Medical Center at Princeton vs. Princeton. It said instead of looking at it as a whole it could be broken up in pieces. He said the Advance at Branchburg case did this in one particular set of facts. Mr. Eisdorfer said Advance at Branchburg took as a critical fact that 20% of a residential inclusionary development was low and moderate and the court pointed out that was a minimum required by COAH. He said in this case they were proposing to do three times the minimum. Mr. Eisdorfer said there was an integral relationship here between the low and moderate income housing and market housing that was not the case in Advance at Branchburg. Mr. Eisdorfer said for all these reasons and each of those ways of analyzing it, the Board had to find this was an inclusionary development.

Mr. Sproviero asked where the factual basis was for his comment that the affordable housing component would be operating at a loss for thirty years. Mr. Eisdorfer said they have represented that they would conform to the uniform affordable housing controls promulgated by the NJ housing and mortgage finance agency and that requires that period of controls. The Board Attorney said they would make sure they operate at a loss for thirty years. Mr. Eisdorfer said that was what they need to do for the town to get credit and they were prepared to do it. The Board Attorney asked what physical equipment was on the site to operate as a dewatering facility. Mr. Eisdorfer said they spread it out, brought it, spread it and dried it and trucks carried it away. The

Board Attorney questioned if that could be permitted as a sludge dewatering facility. Mr. Eisdorfer did not know what the permitting laws were.

Mr. Del Vecchio said the application has changed from its inception of filing. This applicant has tried to do what it thought to be best for the property and still make the project viable. It adapted and changed to the various comments from different sources. The original application had a much larger market rate housing project. There was concern about the parking garage, the location of the buildings, the mass of the building and its proximity to the sidewalk and in response the application was reviewed. They further downsized the project and took off all but the affordable housing component. It allowed them to remove the mass, move the building back off the property line to provide a greater setback and allowed them to remove the parking garage. There was also concerns about safety of the children and construction impacts to the school but added these were not concerns raised by the school board. In an effort to do right, they met with the school board and they thought they found a way to make the project better for the school board. They asked the zoning board not hold a hearing one night so they could have the discussions. The applicant tried to come up with a way to provide the athletic facility that the school board wanted but they found it not feasible and had to proceed with the plan. There was a lot of concern and testimony regarding flooding. Mr. Del Vecchio said nobody denied that New Milford has a flooding issue and the applicant tried to make the application as good as they could but there were certain constraints that they had to adhere to. Flooding was a major concern and major source of testimony over the hearings. He said the project as proposed has an insignificant impact on the flooding that the community experiences whether this was built or not. They proposed to take down the berms that surrounded the property and provided a higher level of protection to allow the flood waters to come onto the site and have a place to go. Mr. Del Vecchio said they proposed a large open detention basin as opposed to a structured detention basin.

Mr. Del Vecchio said this Board must base its determination upon substantial credible evidence. The Board could not ignore uncontradicted expert testimony in favor or against the variance. He said they have a D1 use variance for use and D3 use variance for height. Mr. Del Vecchio explained to satisfy the positive criteria there were three choices. One was if this was an inherently beneficial use which they firmly believed this was inherently beneficial use as proposed and is the site particularly suited so to justify a use variance which Mr. Steck testified to that alternate theory should the board not find it inherently beneficial. The final reason for a use variance was a hardship basis which the applicant has not requested. Mr. Del Vecchio said the Medici decision addressed the particular suitability standard and the SICA case governs how inherently beneficial use applications would be dealt with. An application must demonstrate that the use promotes the general welfare because the use was particularly suited for the site where it was to be located. The attorney discussed decisions that were samples of how the Medici language has been implemented. Mr. Del Vecchio said with *Burbridge v. Mine Hill*, the Supreme Court upheld the granting of the use variance were the proofs supported the variance or the project would further one or more goals of the MLUL. He also discussed the case *Price v. Himeji* which the Supreme Court clarified what was required for particular suitability. Mr. Del Vecchio said the term of inherently beneficial use in the MLUL was defined as *a use that was universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare*. He stated in *Mt Laurel I* it said *it was plain beyond dispute that*

proper provision for adequate housing of all categories of people is certainly an absolute essential in the promotion of the general welfare required in all land use regulation. The attorney thought the project as a mixed use affordable housing inclusionary project is inherently beneficial particularly when tying those two pieces together. Mr. Del Vecchio said there were approximately 8 cases dealing with affordable housing as inherently beneficial - Homes for Hope, Conifer Realty, Salt & Light, Estaugh vs Haddonfield, Tiecher American Communities vs City of Asbury Park, the Borough of Ridgefield vs Ridgefield Park, the Advance at Branchburg and the Morris Commons Case. He stated that all but the Branchburg case have held that affordable housing to be inherently beneficial even when it is a piece of a larger project.

Mr. Del Vecchio said if the project is inherently beneficial the standard to apply was the SICA decision. The Board has to identify the public interest, identify the detriments that were at stake, seek to reduce the detriments by imposing conditions and weigh the positives and negatives from the development after doing those. The first prong of the negative criteria refers to the detrimental impacts to the area in which the property was situated. Once that is identified the board has to balance the harms after trying to impose reasonable conditions to ameliorate it. The Board has to and cannot ignore uncontradicted expert testimony, said the attorney. The potential negative impacts raised during the hearings have been flooding, traffic, school related safety and aesthetic or buffering of the building. The second part of the negative criteria was there should not be a substantial impairment to the zone plan and zoning ordinance. He added that the site is recommended for mixed use inclusionary development in New Milford's planning documents. There were no other sites in New Milford identified to achieve the creation of the amount of affordable housing they proposed on the site, said Mr. Del Vecchio. He added that the master plan identifies that the commercial areas are River Road and Main Street were outdated and NMRA provides a modern facility. He said the planning documents identify the site as having a *great redevelopment potential*. The property has frontage on all four sides two being county roads, the site has access to mass transportation, the site provides substantial setbacks and would provide an upgrade to the commercial uses. He said there was testimony that the site has been used as a dewatering soil moving and mixing operation by United Water. The attorney said the general welfare would be advanced by the affordable housing. The planning documents recommend the affordable housing but also commercial and housing on the same site in a mixed use fashion which the applicant proposed, said the attorney.

Although a small edge of the site was partially located in the flood hazard area, Mr. Del Vecchio said the majority of the site was not located in the flood hazard area. The application makes the situation better not worse, said Mr. Del Vecchio. He said this project would not relieve flooding in New Milford but this property would not remain vacant and would be developed. Mr. Del Vecchio believed they proposed the best alternative and tried to address every comment.

Mr. Del Vecchio said with the Burbridge decision furthering the purposes of the MLUL was another way for the positive criteria to be satisfied in the use variance context. He read one of the purposes *to encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site*. Mr. Del Vecchio said in 2004, the master plan document said it referred to the site as *the site is currently underutilized. Due to its proximity to a commercial area (Main Street) and its proximity to residential land uses, the site is recommended for a mixed*

use development comprised of professional offices in the north end that have access to Main Street, and age-restricted residential development for the remainder of the property. A development feasibility sketch plan was developed by our office to show the extent and type of development that could occur on the site. In 2006 the housing element and fair share plan recommended residential development of the 16 acre Block 1309 Lot 1 for 215 units of housing with 45 for low and moderate income households. He said the plan indicated the Borough was committed to purchase the development. In 2008, the plan indicated *there has been in discussion for possible redevelopment in the future. The subject property is approximately 16.08 acres. The conceptual design is for 12 units an acre that would calculate to 200 units. The developer would provide 40 l/m units on site in the form of for-sale and rental units. The Borough of New Milford is committed to purchase development in accordance with the Plan contained herein. In response to the Borough's request, United Water Company is currently implementing reclamation of the site development activity on the site. Currently, Department of Environmental Protection (DEP) is monitoring the subject property. There has been no update on the progress of the environmental cleanup. As a public utility company, the sale must be reviewed and approved by the New Jersey Watershed Review Board.* In 2010, the plan provides that the Carlton Place property, the only other potential site for affordable housing, has been acquired and designated for open space. The United Water property was identified as a mixed use commercial multifamily residential development site. The 2010 reexamination report had a map with the northern portion of the site designated for commercial use and the southern portion for age restricted multifamily residential. Mr. Del Vecchio said these plans were developed by the town's professionals and added that they were just following their plans.

Discussing negative impacts, Mr. Del Vecchio said the first was the site would not cause any significant flooding concerns which was supported by the testimony of Mr. Dipple verified by Ms. Batistic in her review of the document. The project would not cause any significant traffic impacts to any of the community intersections. The only potential intersection effected was by the corner of the property which was fixed by the condition of the signal modification. The other intersection that was potentially impacted was Madison/River Road. The board's traffic consultant had concerns that one movement in that intersection would suffer a degradation in time by seconds. Although they did not believe it was necessary, the applicant offered to provide their pro rata share available to do it.

Mr. Del Vecchio said the testimony from the Board's engineer was that there would not be any significant environmental impact from the development given its prior use. The applicant has provided setbacks, landscaping, building orientation all to mitigate the impacts of the development. He said there were comments regarding why the residential buildings were not facing the street. Mr. Del Vecchio stated that the narrowness portion of the building was made to face the street so it would have the least impact for the high school. The applicant increased the landscape area and integrated a landscape screen for the rooftop mechanicals.

Mr. Del Vecchio said Oradell placed their bus garage and DPW along New Milford's border and that this application was consistent with the uses that Oradell has placed adjacent to the site.

The applicant has taken 221 units and reduced it to 24 affordable units, reduced the visual impact, provided designated lanes into/out of the site, would make the signal adjustment to its

timing, provide their pro rata share and enlarged the stormwater basin. Mr. Del Vecchio said there were C variances associated with the application but said the C variances were subsumed by the D variance application. Mr. Del Vecchio said regarding the off street parking requirement the town's ordinance was 6 per thousand and the testimony has been that 5 per thousand was the norm which was what the applicant was proposing. The applicant said the proposed height variances were not for purposes of creating more building, density or floor area. For the retail space there were two towers that were architectural features to provide the aesthetics of the building instead of a flat roof. The applicant made a determination that from a desirable visual environment standpoint, the residential housing sloped roof was a better finished product. He noted that the height limitation for this zone was for a single family residential.

Mr. Del Vecchio said there was a lot of public participation but thought it odd that the school and retail uses on River /Madison were missing. He said those likely to be most impacted by any development on the site were the ones who have not complained. It has been a long application with many facts and many proofs and thought when the Board looks at what the uncontradicted expert testimony has been and the relevant facts to the application and applies them to the law, Mr. Del Vecchio said there was only one legal result which was the approval of the application. It was not a popular result but it was the correct and legally sustainable result. Mr. Del Vecchio thanked the Board for their consideration and asked the members to look at the undisputed facts and apply them to the law. The attorney said sometimes the emotion needs to be put aside and they had to make the hard decision because it was the right decision.

The Board Attorney said he would take an opportunity to give his recitation of the law and then the Board would engage in a public deliberation process which the public could observe but not participate in. Mr. Sproviero said there was a special meeting scheduled for February 20, 2014 where they would bring the application to a conclusion. Mr. Del Vecchio said the applicant would extend the time within which the Board may act thru the end of the February 20th meeting.

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

Respectfully submitted,
Maureen Oppelaar