

**New Milford Zoning Board of Adjustment  
Special Meeting  
November 18, 2013**

Acting Chairwoman DeBari called the Public Session of the New Milford Zoning Board of Adjustment to order at 7:07pm and read the Open Public Meeting Act.

**ROLL CALL**

Mr. Binetti	Recused
Ms. DeBari	Present
Mr. Denis	Present
Father Hadodo	Recused
Mr. Ix	Present
Mr. Loonam	Present
Mr. Rebsch	Present
Mr. Stokes Vice Chairman	Recused
Mr. Schaffenberger-Chairman	Recused
Ms. Batistic – Board Engineer	Present
Mr. Sproviero – Board Attorney	Present
Also attending	
Mr. Grygiel – Planner	Present
Mr. Tombalakian – traffic engineer	Present

**PLEDGE OF ALLEGIANCE**

**12-01 New Milford Redevelopment Associates, LLC- Block 1309 Lot 1.02-  
Mixed Use Development- Supermarket, Bank and Residential Multifamily Housing  
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.

The Board Attorney stated there was an issue that was embodied by way of a motion regarding the Board's direct engagement of an independent expert to assess traffic issues presented for this application. Mr. Sproviero had expressed concern and requested an opportunity to research the issue and to further advise the Board. Notwithstanding that request, the matter was brought to a vote and carried to engage an independent expert by a vote 3-1. The Board Attorney explained immediately after the vote was taken Mr. Denis advised him that he thought he was going to table it. Mr. Sproviero said this raised another issue as to what was actually voted on. Mr. Sproviero explained after his research and analysis on this matter his concerns remain. The purpose of this Board was to serve as a quasi-judicial board and they were in many ways a court where they hear evidence, access the creditability of the evidence and on the basis of the evidence the Board makes

a determination as to the merits of every application that comes before the Board. The Board Members were neutrals and they were not here to support nor to oppose any application but to hear facts and make a determination based on the analysis of the evidence presented to them as to whether the standards articulated by the MLUL have been satisfied and the burden of proof was on the applicant, said the Board Attorney. Mr. Sproviero said his concern at the last meeting was that by engaging an independent expert gives the impression that the Board was introducing their own independent evidence, which was not the role of a quasi-judicial entity. He added it was not the role of a land use board to create or introduce new evidence. His second concern was to avoid the appearance of expert shopping. The Board Attorney would like to have Mr. Tombalakian complete his cross examination and any redirect examination and if there are still questions on the completeness or methodology of which he undertook to form his opinions at that time it would be appropriate to express that opinion. He thought the motion moved and passed last week was premature and would like the Board to delay the engagement of any independent witness.

Mr. Denis said at the time of the vote he was Acting Chairman and put out the vote to be tabled, he believed that the first vote was a second to his motion. He misunderstood what the vote was for and wanted to change his vote. Mr. Sproviero stated the appropriate remedy to the circumstances articulated was a motion to reconsider the prior motion from the last meeting to engage an independent expert.

A motion was made to reconsider the 11/12/13 motion to engage an independent expert by Mr. Denis, seconded by Ix.

The motion passed on a roll call vote as follows:

For the Motion: Members Denis, Ix, Loonam, DeBari, Rebsch.

Mr. Loonam stated the reason he made the motion on 11/12/13 was because there was a Mayor and Council meeting the next night and time was of the essence.

The Board Attorney stated they received correspondence dated 11/8/13 from Mr. Del Vecchio and correspondence from Mr. Alonso. Mr. Sproviero understood what Mr. Del Vecchio was asking for and would also like this application brought to a conclusion. Mr. Sproviero said with the league of municipalities and holidays he did not see getting more than the regular and one special meeting in the next six week period. He added in January they could assess where they were in the process and he would be in favor of enhancing their efforts to add another special meeting into January and maybe February. This Board has very diligently prosecuted this application, said the Board Attorney. Mr. Sproviero stated they could entertain the request to limit the time permitted to the public in cross-examination. The Board had imposed a 7-minute limitation and explained a strict time limitation was somewhat arbitrary in its enforcement because there might be times when members of the public were engaged in a bonafide dialogue with the witness that could not be cut off because of a time limitation. Mr. Sproviero said to please appreciate his reluctance to impose a strict time limitation because there have been members of the public who have consistently engaged in a meaningful dialogue with the witnesses. He wanted to avoid repetition or any overt effort to filibuster the application and felt it

should be dealt with on an instance-by-instance basis. The Board Attorney might not feel the same when it comes to final comments of the public where it would be appropriate to limit their time. Chairwoman DeBari agreed and thought the public was entitled to speak and this was an application important to the town. Mr. Sproviero said it was not a question of entitlement and added the public has the right to be heard and the applicant was entitled to due diligence in the prosecution of the application. Ms. DeBari asked if the Board Members had any comments. Mr. Loonam understood the dialogue portion and at the end when the public could comment there would be no dialogue. Mr. Sproviero agreed.

Mr. Del Vecchio stated in regard to the number of special meetings requested he felt the scales have gone flat to one direction. They have provided the Board with ample notice with the deadline but two years to prosecute a hearing for an application that should have been prosecuted in the 120 days under the statute was now six times in excess of that. Mr. Del Vecchio stated the Board had made a procedural decision by its members to impose a time limit and it has stopped being enforced and he did not know how the Board would decide a particular comment as being designed to filibuster or not. Mr. Del Vecchio did not find anything wrong with imposing a time limit for cross examination and if someone runs out of time and requests more time then the Board could entertain the request which could be handled on a case by case basis. The procedures to date have led to elongated hearings, said Mr. Del Vecchio. Mr. Sproviero said Mr. Del Vecchio had an obligation to his client to move this along and he had an obligation to the Board to move it along. He said they both had the desire and obligation to do all they could to move the proceeding along. Mr. Sproviero would recommend to limit the time and the questioner could ask if they could continue. Ms. DeBari would agree as long as it would be up to the Board to continue or not. The Chairwoman asked Mr. Del Vecchio how many revisions have been made to the application. Revisions generate more questions, said Chairwoman DeBari. Mr. Del Vecchio said they have not heard direct testimony on revisions.

The Board Members discussed special meetings and a special meeting was scheduled for December 2, 2013 at 7 pm.

The Board Attorney swore in the planner Mr. Grygiel. Mr. Sproviero asked Mr. Del Vecchio if he would like to hear Mr. Grygiel's qualifications. Mr. Del Vecchio had no objection to Mr. Grygiel's qualifications.

Mr. Grygiel prepared a review letter dated 9/10/13 and a supplemental letter dated 11/12/13. The planner reviewed that the subject property was 13.69 acres block 13.09 lot 1.02. The adjoining lot 1.01 retained by United Water was subdivided from the subject property in 2011, which impacted some of the calculations in the Master Plan. The property was currently vacant with no permanent structures on the subject property and the site had no regular activity nor generated any traffic in its current undeveloped state.

Mr. Grygiel said in terms of the environmental constraints, the southwestern corner of the lot was in the flood hazard area and there were some steep slopes on the site generally

along the edges with the center mostly level. There was extensive environmental remediation undertaken testified by Ms. Batistic.

Mr. Grygiel recapped the proposed application was for a mixed-use development, a supermarket on the northern half of the site, multifamily residential building and a drive thru bank in the southern portion of the site. There is a proposed two way access road connecting River Road from Madison Avenue between the two parts of the site. The planner pointed out while the three proposed uses on the site would share some infrastructures each of the uses could independently exist.

The proposed supermarket was just over 70,000 sq ft, designed to face River Road and setback approximately 270 sq ft from the street. The proposed drive thru bank is 63' back from River Road at its closest point with a canopy and drive thru lane proposed. The proposed parking was adjacent to the residential building. Mr. Grygiel commented that the applicant presented little information on the bank's standard details for the Board to consider in a use application. An architectural plan had been recently submitted, said the planner but there was a lack of information about the bank and its proposed use. The residential building was proposed to be three stories with 24 affordable dwelling units. He noted that the original application included 221 units with 40 affordable dwelling units, amenities for the residents and a parking garage. With the revised plan, there were no amenities and no parking garage. The surrounding area was primarily residential, public and utility uses and some commercial uses nearby.

A use variance was being requested because the proposed use was not permitted in the Residential A zone district and the only permitted principle use in that zone was one family dwellings, public parks, public recreation which included permitted conditional uses for schools and houses of worship.

Mr. Grygiel reviewed in his letter the bulk standards. He explained a D6 variance was required for height for the proposed supermarket and the residential building because it exceeded the maximum permitted building height in the RA zone by more than 10%. Three bulk variances were required for the maximum number of stories 2 ½ permitted 3 proposed, the maximum number of families per building one permitted 24 proposed and the minimum number of parking spaces 547 spaces required 438 spaces provided. He added the applicant indicated the variance for 109 parking spaces was to allow the supermarket ratio to be one space for every 200 sq ft. There might be two additional variances to consider, said the planner. With regard to section 30-21.5c4 that no building to be used as a dwelling shall be constructed or altered in the rear of a building on the same lot and Mr. Grygiel noted that the multifamily residential building was situated on the same lot as the bank building. In section 30-28.1d the standards for driveways and the entire street frontage opposite any residential zone shall be landscaped to prevent any use from hindering the development. The planner stated there was a landscaped strip proposed along River Road frontage and the Board would have to determine whether the proposed buffer depth and height and size of landscaping were adequate.

The planner stated that the 2004 full Master Plan recommended that Block 1309 Lot 1 was to be a mixed-use development comprised of professional offices in the north end and age restricted residential on the remainder of the property. It also recommended a parking lot for the high school could be accommodated on the site.

Mr. Grygiel explained that the 2008 Master Plan Housing Element and Fair Share Plan was submitted to COAH for certification of its housing plan. In that document for this site, it dealt with the total 16-acre site for residential development of approximately 200 units 40 affordable dwelling units. It recommended that a zoning amendment be prepared to allow for that type of housing when the site was ready for development. No commercial development was recommended in this part of the housing element. The Planning Board adopted in 2010 a Reexamination Report to the Master Plan. The document did not recommend any changes to the zoning for the subject property and it did include a Land Use map similar to the one in 2004 plan. All three of these documents dealt with the 16 acres not the current 13+ acres for this site. The Board Attorney clarified in the 2010 reexamination report it recommended no change and asked if that was no change from the 2004 report. Mr. Grygiel stated it recommended no change from the current RA zoning and this property except for the land use map it was essentially the same as in the 2004 document. Mr. Sprioviero asked if the 2010 reexamination report supported the initial 2004 Master Plan or the 2008 Housing Element. Mr. Grygiel thought it was more in line with the 2004 Master Plan because it was not multifamily residential in the entire site.

Mr. Grygiel pointed out it has been difficult to determine the full extent of the application of what was being proposed because testimony has gone on for two years but also the applicant has made modifications throughout the course of the hearings. The planner thought it was difficult for the Board to follow exactly what was proposed, what was current and what they would be voting on. He said details typically provided for a use variance were lacking and thought it would be useful as part of their summation to have a written document of exactly what was proposed, what relief was sought and what the Board was being asked to vote on.

Mr. Grygiel stated the RA zone did not permit commercial uses / multifamily residential or a mix of the uses. He stated the requirement that needs to be addressed was in the MLUL at N.J.S.A. 40:55D-70d(1). The applicant needs to address both the negative and positive criteria. The positive being that the site would be particularly suitable for the proposed use, that the use was inherently beneficial or there was an undue hardship. The applicant has cited both the inherently beneficial aspects and the particular suitability. The negative criteria was that there was no substantial detriment to the public good and no substantial impairment to the intent or purpose of the master plan or zoning ordinance. A use variance is required and the applicant has indicated its inherently beneficial use - one that promotes the public welfare. The MLUL was amended a few years ago to define inherently beneficial uses but it did not include affordable housing. He added there has been case law that affordable dwelling units do qualify as inherently beneficial uses. Mr. Grygiel said an important question was if a mixed use inclusionary development qualifies as inherently beneficial as a whole / part or not at all. The planner said there has been a

court cases dealing with this issue and he referred to the Smart SMR Case in Fair Lawn in his letter but more recently there has been a case decided on November 1st in which he prepared a supplemental letter that addressed this case. The key point in the Branchburg case was whether the inclusion of affordable dwelling units resulted in the entire development being inherently beneficial. Mr. Grygiel said the court in that case indicated that affordable housing has been called inherently beneficial and did qualify as a whole but the language this case used was to point out that there was a difference when adding affordable units to an overall development that was not typically inherently beneficial. Mr. Grygiel was not aware of any cases that have tested this or any other actions by other boards to look at for direction. The planner said the key was to determine if the inherently beneficial aspects apply to the overall development and he thought this case does provide some direction with that issue. The planner noted in his letter regarding the case out of Princeton was no longer valid in determining whether the inherently beneficial status applies to the entire development.

Mr. Grygiel stated that Dr. Kinsey testified before the application was changed so he thought the Board would have to consider whether his testimony was even relevant since the mix of uses were much different than when his testimony was offered. He added the more relevant testimony was from Mr. Steck who testified more recently.

Mr. Grygiel did not believe there was any evidence with regard to the inherently beneficial aspects of the mixed-use inclusionary concept regarding financial viability of the development. He questioned what needed to be provided was it a certain amount of dwelling units or a certain size commercial development or would it be enough to be a smaller use to justify making inherently beneficial arguments. Mr. Sproviero asked what type of proofs he would envision to satisfy that requirement. Mr. Grygiel thought there needs to be more on the record as to beyond just that they were proposing housing and the affordable units were being paid for by development of a bank and supermarket. According to the planner, the Board had nothing to make a decision on this issue and nothing is on the record that talks about the viability of the project financially.

Another inherently beneficial issue was whether affordable housing existed in New Milford, said Mr. Grygiel. The applicant had not testified as to what the affordable rents or sale prices would be. Mr. Grygiel thought that was important because over one third of New Milford's housing stock is comprised of multifamily dwellings and it was possible that the market rents of the units may be in line with the affordable units and the Board should consider if providing new affordable units were a benefit. The Board Attorney questioned if affordable housing was black and white or is it a little more than that. Mr. Grygiel said it was black and white if you follow the state formula but affordable units in terms of someone trying to pay their rent or buy a unit it was not black and white. Mr. Sproviero asked where they were today in terms of the affordable housing law. Mr. Grygiel said based upon the recent Supreme Court decision it sent COAH back to the drawing board and in a few months COAH will come up with standards for affordable housing compliance and how to determine municipalities' affordable housing obligations. Mr. Sproviero asked if it was fair to say that in accordance with the recent Supreme Court pronouncement COAH lives but we did not know what COAH looks like yet. Mr.

Grygiel agreed. Mr. Sproviero said he did not know what COAH looked like today other than that the concept still exists, the offer still exists, the constitutional imperative was still recognized but how it would be implemented was an undetermined direction. Mr. Grygiel agreed.

Mr. Grygiel said if the Board determines an inherently beneficial use being proposed there was a court case *Sica v. Board of Adjustment of Township of Wall* that outlined a four part test – to determine the public interest at stake, determine the potential harmful impacts on the use, determine if there are conditions which could be imposed on a potential inherently beneficial use and balance the positive and negative.

According to Mr. Grygiel, Mr. Steck had testified at hearings regarding the legal standards, there was a need for affordable housing in New Milford and the subject property was the only site that was substantial and eligible for provision of this housing. Mr. Grygiel said that was fair in accordance with the 2008 Master Plan Housing Element. He said if it was not an inherently beneficial use, the applicant's planner testified the site would still be considered particularly suitable for the proposed uses and there would be no detriments to the public good or to the zone plan or zoning ordinance from a mixed use inclusionary development. Mr. Grygiel said the Board should consider that if it was not considered an inherently beneficial use they still need to weigh if the site was particularly suitable and the negative criteria was met. The Board Attorney understood that with Branchburg it recognizes the affordable housing component was an inherently beneficial use and should be adjudicated as such and it said the economic engine might not be subject to inherently beneficial use consideration. From a procedural perspective, the Board Attorney questioned how the Board adjudicates the application given the various standards that appear to be imposed upon the law of the case. Mr. Sproviero said he did not expect an answer now but stated this Board would be one of the first cases to decide an issue under the direction of the Branchburg decision.

Mr. Grygiel said the applicant's planners testified to examples of existing mixed use inclusionary developments. He did not think these were completely relevant because none of the cited developments required a use variance either in the zoning or redevelopment plan permitted the mix of uses on the site. The planner reviewed the d(6) variances for the height for the residential and supermarket. The residential being a three-story building and the height for the supermarket was testified as more of an ornamental feature. Mr. Grygiel explained in both cases for the d(6) variance the applicant needs to follow another court case as far as the proofs that need to be demonstrated. The planner stated in the *Grasso vs. Spring Lake Heights* case it talks about a Board determining if the additional height could be accommodated on the site. He added there has been testimony offered regarding the proofs. Mr. Grygiel said the applicant's planner testified to the supermarket having mainly aesthetic interest for the proposed height and the residential testimony was that the applicant could more efficiently provide for affordable housing by having additional height and a more efficient building.

There were two additional C variances for the dwelling located behind another building and parking lot landscaping across from a residential zone. With regard to C variances,

the Board could grant a c(1) hardship variance or a c(2) variance where the purposes of zoning are advanced and the benefits of granting the variance would outweigh any detrimental impacts. The benefits of granting a c(2) variance must be to the community as a whole not just to the property owner. The negative criteria must also be addressed for any variance, said Mr. Grygiel.

With regard to the parking lot landscaping, the applicant has submitted some amended plans showing some additional landscaping. The Board should be satisfied that there would not be a substantial detriment to the public good considering the neighboring residential properties across River Road from having a commercial use in that location. Regarding issues of public good, the Board could consider traffic, noise, lights, and pedestrian safety. The Board Attorney clarified his testimony was that the Board should be satisfied and questioned that he was not saying that based upon the evidence heard the applicant had established it but the Board needs to take into consideration and satisfy itself that. The planner said it was the applicant's burden of proof. Mr. Sproviero said when he said the Board should be satisfied he was saying that was the standard that the Board needs to undertake in analyzing the facts. Mr. Grygiel added when evaluating the applicant in the testimony put forth. The planner said all the discussions on safety, impacts on the surrounding area, neighboring high school and pedestrian safety were relevant considerations for a use variance application when deciding if the public good was significantly impacted.

With regard to the other aspect of negative criteria was the question if there were any substantial impairment to the master plan or zoning ordinance. The Planner said Mr. Steck testified that at least one of the master plan documents identified the site as a potential inclusionary housing site. Mr. Grygiel said affordable housing was recommended in one document but the master plan does not in any of its forms have the exact mix of uses as proposed on this property. The Board Attorney asked how this development proposal varies from that contemplated by the 2004 Master Plan. Mr. Grygiel thought the main difference was the size of the commercial component. The Master Plan Land Use Plan showed one third of the property being utilized for nonresidential or commercial with remainder residential. In this case, Mr. Grygiel said the supermarket was larger part of the property. Mr. Grygiel thought the Board should reread the Master Plan documents to get their own opinion as to what was recommended in each of them and if the applicant has reconciled the differences in the mix of uses.

The Board needed to consider the type and magnitude of variance relief being sought cumulatively, said the planner. He added there were both the individual use requests and what would be the impacts of allowing for this type of development in light of the fact it was a residential zone, whether there was adequate mitigation proposed, whether there were ways to reduce impacts, or maybe in the Board's opinion there might not be.

The Board Attorney stated the Board has heard much over the course of the planning testimony and comments from the public with regard to potential impairment of the public good or the lack of impairment of the public good that results from the proximity of the proposed development to the high school. Mr. Sproviero asked if he formed an



opinion as to how the two integrate with each other upon application of that standard articulated in the negative criteria standard. Mr. Grygiel said he had not but there have been issues that he has raised and concerns about the proximity of the two potential uses. He thought it was the Board's decision to make based on the testimony they have heard and they would have to decide whether the context of New Milford's character was appropriate to have those two uses next to each other. The planner added a way to quantify it was from the traffic testimony with regard to impacts on public safety and whether there was conflict between what was proposed on the property closest to the high school. He stated the supermarket was separated by a residential building and bank but it was a more intense use than a residential zone. The Board Attorney clarified that he was impressing upon the Board that these were issues and the Board needs to find the facts. Mr. Grygiel agreed and stated he represents a lot of Boards and review many applications but he never states if the Board should approve or deny but he points out some issues and considerations for a Board to be informed.

Mr. Del Vecchio would defer his questions to the end of the public questions.

Mr. Loonam clarified his testimony regarding a c(2) variance and the benefits to the community as a whole and asked if that meant the town of New Milford or the surrounding area. Mr. Grygiel thought it was mainly the surrounding area that was mostly impacted. Mr. Loonam said the applicant proposed what they deemed inherently beneficial use so he questioned if it would be a benefit to the entire town or if it was specific to the area. Mr. Grygiel said inherently beneficial use is dealing just with use aspects and they have to meet the burden of proof for the bulk variances.

Ms. DeBari asked what makes it a COAH rental and questioned if a person had to meet a yearly salary to be eligible. Mr. Grygiel said yes and COAH had 6 multiple housing regions throughout the state and the income across the region was taken into account. It was also based on household size but the affordability was a percentage of that. Mr. Sproviero clarified that it doesn't necessarily mean it would be less expensive than other existing housing. Mr. Grygiel said there was no guarantee because COAH does not have deviations based on local market conditions.

Mr. Rebsch asked if he would in a mixed development the size of the supermarket. Mr. Grygiel could not say that 70,000 sf was not in line with what a modern full size supermarket was today. It doesn't mean it was appropriate for the site but Mr. Grygiel could not offer an opinion on what would be best.

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

Ulises Cabrera, 659 Columbia Street, said in the Master Plan there was a reference to a flood map. Mr. Grygiel responded that he has seen a map that shows what was reported as the 100-year flood plain. Mr. Cabrera questioned that the applicant was seeking property that was underwater. Mr. Grygiel stated it was not underwater and recalls the map in the 2004 Master Plan was an existing land use map. There was no citation if it came from FEMA or DEP maps and agreed it shows the site in the flood plain but he

could not vouch for the accuracy of it. Mr. Cabrera asked if the southwest corner of the property was in the flood zone. Mr. Grygiel agreed. Mr. Cabrera asked if the Board should consider in their determination that the town was below national levels of open space. Mr. Grygiel would not advise the Board to make a decision on the deficiency of open space.

Richard Mide, 666 Columbia Street, questioned if a 70,000 sf supermarket was for their own self interest. Mr. Grygiel stated it was a valid consideration if a larger commercial space benefited the property owner but the applicant believes that there was a need for that size development. It was the Board's job to determine whether that was appropriate, whether it was contrary to the master plan or if the master plan would be unduly impacted. Mr. Mide asked if he saw a flaw in the proposal. Mr. Grygiel said his role was to advise the board on the issues and point out facts and did not want to take a stand on if the application was flawed. The planner said what was proposed was different from what the Planning Board recommended for this property with the three documents. Mr. Mide asked if the flooding would be a major impact. Mr. Grygiel said the Board should consider it based upon the testimony offered.

Lori Barton, 399 Roslyn Avenue, asked if there was a big difference in having professional offices as compared to having a 70,000 sf supermarket and its impacts to the area. Mr. Grygiel answered typically there was a difference and if it was a smaller scale of professional offices it would tend to have less impact than a larger supermarket. Ms. Barton asked if professional offices would have traffic seven days a week. Not typically, said the planner.

Michael Gadaleta, 270 Demarest Avenue, asked as the Borough's planner should they be looking for him for recommendations and guidelines specifically for this application. Mr. Grygiel has focused his guidance to the Board what proofs the applicant needs to provide and whether there were issues the Board needs to consider. Mr. Gadaleta questioned when considering rezoning a piece of property would part of his review be to consider the impact of traffic and the impact on the surrounding residential area. Mr. Grygiel agreed. The resident asked if it was good planning practice to introduce the number of cars that the applicant has been testifying to into a residential neighborhood without any major roads accessible to the site. Mr. Grygiel said typically it was not the ideal situation to introduce additional traffic but there were circumstances that it could be done and would be appropriate. Mr. Gadaleta asked if it was good planning practice to approve an application with this proposed application in a neighborhood predominately one and two family homes on a site zoned for one and two residential. It would not be fair to say it was good or bad but the Board needed to focus on specific impacts, said the planner. Mr. Gadaleta asked if it would have significant values on the residential zone surrounding this property. The planner said having a commercial use would have some impacts but the issue would be if they could be mitigated by design, by accommodating traffic and providing buffers. Mr. Gadaleta asked if the introduction of traffic seven days a week thru a residential area would be good planning. Mr. Grygiel said introducing traffic was not desirable but any use proposed at this site would introduce traffic. Mr. Gadaleta asked if it was good planning to propose a commercial development next to an existing high

school. According to the planner, it could be and he would not say in all cases it was a bad thing. He added land uses can coexist next to each other in many instances but it would not always be accepted in every case. Mr. Sproviero said in reaching that decision it was not necessarily the planning consultant but the Board Members as the finders of fact in this application. Mr. Grygiel agreed. Mr. Gadaleta said he was looking for the planner's opinion. Mr. Sproviero said the planner's role was to identify the issues and facts to be considered and the Board Members make a decision. The Board was the quasi-judicial neutral fact finder, said the Board Attorney. Their role was to hear the evidence, apply the evidence and make a decision not to produce evidence. The applicant had the burden of proof. Mr. Gadaleta asked if it would be wrong to expect that the planner would have a recommendation for this application. The Board Attorney said he was identifying the issues and facts and the board professionals were not here to tell the Board what to do. Mr. Gadaleta wanted a recommendation without being so vague. Ms. DeBari did not think Mr. Grygiel was vague at all and thought he did a commendable job and was satisfied with his report.

Mr. Gadaleta asked if he was aware that Shop Rite typically had another story of mechanicals and refrigeration on top of that unit that has not been reflected and might be entered into the height variance. Mr. Grygiel said sometimes supermarkets have second floors but he could only offer guidance on the proposed plans. Mr. Gadaleta asked if this was spot zoning. The planner said no this was a use variance application. Spot zoning was a specific thing that the governing body rezones a property contrary to the surrounding area.

## RECESS

Anna Leone, 505 Boulevard, asked if he would elaborate on his statement that the applicant had not provided adequate information regarding the bank and the housing component for the Board to make a decision. Mr. Grygiel said a use variance was being requested for three different uses and there generally is testimony on the operations, design of the building and all aspects of it. He commented there were no floor plans for the residential, no information about the bank users, hours, number of employees and more additional information should be provided.

Karl Schaffenberger, 173 North Park Drive, questioned that one third of the New Milford residents live in rental units. Mr. Grygiel said a third of the housing units in New Milford were multifamily units not necessarily rentals. Mr. Schaffenberger asked if it would surprise him that of the four major apartment complexes there were 2,070 rental units. Mr. Grygiel said it would not surprise him. Mr. Schaffenberger clarified that four units were one bedroom and 15 units were two bedrooms in the 24 affordable housing units. Mr. Grygiel responded that the applicant was proposing 4 one bedroom, 15 two bedroom and 5 three bedroom units. Mr. Schaffenberger said based on the his testimony on the criteria for rental pricing for units was it possible that the 15 affordable housing units rent for more than the Brookchester's 936 one bedroom units that rent for \$1,275 and the 246 two bedroom units that rent for \$1,410. Mr. Grygiel said it was possible because the total rents were determined across the region. Mr. Schaffenberger asked if it is possible that

the affordable housing units rent for more than the Dorchester 166 one bedroom units that rent for \$1,220-1,320 and 44 two bedroom units that rent for \$1,540. Mr. Grygiel said it was possible.

John Rutledge, 335 River Road, questioned if the DEP made a revision to the maps and indicated a different scenario how it would affect the application or would it be grandfathered in. Mr. Grygiel would defer that to the lawyers.

Gene Murray, 425 Madison Avenue, asked if he would agree there would be an impact on the town from a planning perspective regarding the applicant's intention to move the Shop Rite from its existing location to a new location. Mr. Grygiel agreed there would be impacts to move one retailer because the existing location would be left vacant. Mr. Murray asked if he was aware that all but 110 units of the 2,070 units that Mr. Schaffenberger testified to existed around the existing Shop Rite. Mr. Grygiel did not know the exact unit count. Mr. Murray asked if he thought the residents might have chosen to live in the location of the existing store because of the conveniences provided by the existing and adjacent store. The planner said having commercial nearby could be a benefit. The resident asked if he considered the economic impact upon the Brookchester development if it moved from its existing location. The planner stated the use variance runs with the land. The existing Shop Rite could close and be reoccupied by another user and he did not think the Board should be giving too much weight to that issue. Mr. Murray asked if he found any reference in the applicant's testimony to consideration to the negative impacts that would result if the town ended up with two supermarkets in town. Mr. Grygiel did not hear any testimony on that.

Mr. Murray asked if he considered the economic vitality of the Brookchester shopping center if the existing supermarket moved from its location. Mr. Del Vecchio objected that they were focusing on questions to a piece of property that was not subject to the application and should not be considered by the Board. The resident said it was a piece of property that was directly impacted. Mr. Sproviero said that was not the standard for determining the proposed application but he would allow the witness to answer the question. Mr. Grygiel said as a planner representing the borough he would consider economic vitality but as far as advising the Board on this application the impacts should be focused on the subject property and surrounding area. Mr. Murray questioned the applicant's planner's testimony that the proposed development would generate the need for eight new additional low and moderate income housing units. Mr. Grygiel said that was based on COAH's standards for nonresidential growth share. Mr. Murray asked if there was a formula to determining the number of units generated by commercial development. The Board Attorney questioned if there was one. Mr. Grygiel said there was a formula but he did not know if it was valid. The resident thought it was one housing unit for each 16 jobs generated in a community by commercial development. Mr. Grygiel thought it sounded right. Mr. Murray said with that logic this commercial development would have to create 128 new jobs to validate the need for 8 additional housing units. Mr. Grygiel said the math is correct but cautioned that the calculations were based on square footage. Mr. Murray said there was no assurance that the existing

site would be redeveloped for commercial use. Mr. Grygiel said it could be reoccupied as is or another approval.

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

Ms. DeBari asked if anyone could rent the proposed affordable housing. Mr. Grygiel said COAH had specific standards and stated it was not just for local residents. He added that affordable housing units were marketed across the four county regions. Ms. DeBari asked if New Milford residents would have preferential treatment. Mr. Grygiel said that was not permitted under COAH regulations.

Mr. Del Vecchio asked if he agreed that two planners reviewing the same facts could come to different conclusions. Mr. Grygiel agreed. Mr. Del Vecchio said as a professional planner would he ever offer an opinion that was not professionally valid or would he ever let his testimony to be swayed or directed by a client as opposed to his own professional standards. Mr. Grygiel said no. Mr. Del Vecchio asked what the status of the housing element in the master plan. Mr. Grygiel said it adopted in 2008 by the Planning Board and the Mayor and Council submitted it COAH at the end of that year along with a petition for substantive certification. COAH deemed the petition complete and believed there were no objections but no action was taken before their operations ceased. According to the planner, New Milford right now did not have certification but has prepared a housing element that was submitted. Mr. Del Vecchio asked if that plan has ever been withdrawn from COAH. Mr. Grygiel was not aware of it. Mr. Del Vecchio asked if the Planning Board was required to analyze the housing stock in the community. Mr. Grygiel said that was a requirement. Mr. Del Vecchio asked in analyzing the housing stock of a community is that analysis supposed to look at units that have affordability controls. That was part of the analysis, said the planner. Mr. Del Vecchio questioned that he would not consider as submitting to COAH for satisfaction of an obligation, units that were not subject to affordability controls. Mr. Grygiel clarified that looking at existing housing stock meant just that it was not just looking at COAH units. It was a different story if submitting for credit from COAH. Mr. Del Vecchio asked if any of the units that were mentioned by the public meet the affordability controls. Mr. Grygiel did not know. Mr. Del Vecchio asked if knew if the Housing Element suggested that they do or don't. Mr. Grygiel reviewed the Housing Element and said it appears that it did not analyze the units that he mentioned. Mr. Del Vecchio asked if he could conclude that those units did not meet the criteria and were not submitted for credits for that reason. Mr. Grygiel could not say that with certainty. Mr. Del Vecchio asked if the housing element leaves a very large unmet need unsatisfied from prior rounds. Mr. Grygiel said there was a decent need from prior rounds. Mr. Del Vecchio said if there was a need unsatisfied and units that would have satisfied them by way of credits that they met, would that not have surprised him that a planner would have connected the two if they could. Mr. Grygiel said he would like to think that but in 2008 planners were under the gun from an arbitrary deadline from COAH to finish the plans. To say it was the optimal way to plan for affordable housing was a mischaracterization, said the planner. Mr. Del Vecchio asked if it was a fair statement that as part of the preparation of the housing plans the planning

board and municipality was obligated to take an inventory of the potential sites suitable for low and moderate housing. Mr. Grygiel agreed. Mr. Del Vecchio clarified that New Milford's Housing Element submitted only cited 1070 River Road and the United Water property that fit that need. Mr. Grygiel agreed. Mr. Del Vecchio stated the Housing Element envisioned the property would be used for 40 low to moderate housing and 160 market rate multifamily units at 12 units/acre. Mr. Grygiel agreed. Mr. Del Vecchio asked if 1070 River Road was developed to date. Mr. Grygiel said no.

Mr. Del Vecchio asked if the New Milford 1987-1999 obligation was set at 23 units. The planner agreed. Mr. Del Vecchio asked if New Milford sought approval of a housing plan by COAH or the court prior to 2008. Mr. Grygiel was not aware of it. The attorney asked if the 1070 River Road property were developed as called for in the Master Plan, New Milford would still have a short fall in its prior round obligation unless the United Water site was developed. Mr. Grygiel agreed.

Mr. Del Vecchio asked if New Milford implemented a rehabilitation plan or rehabilitated any units within the community. The planner was not aware of a plan or any action to rehabilitate any units. Mr. Del Vecchio said the housing plan also made reference to funding the rehabilitation program with monies in a housing trust fund. The planner answered that it said it would pay thru past, current and future development fees and he did not believe there was money in a trust fund.

Mr. Del Vecchio said in his testimony regarding the Supreme Court decision he indicated the Supreme Court had not provided any direction back to COAH on how to address in the next five months the obligation by COAH. Mr. Grygiel did not recall that testimony. Mr. Del Vecchio asked if he was aware whether or not the Supreme Court directed COAH to calculate the third round obligation utilizing the methodology for the first and second round. The planner recalled the five-month deadline and an issue of growth share being problematic but did not recall an exact methodology regarding the first and second round calculations. Mr. Del Vecchio asked if he knew the age of the 2,000 apartments units that he was questioned about from the public. Mr. Grygiel thought some of the complexes were built in the late 1950s and the others appear to be more recently constructed.

Mr. Del Vecchio said the location for affordable housing was a serious decision by the community and the site was a recipient of benefits and obligations. Mr. Grygiel agreed. Mr. Del Vecchio asked if he was involved on behalf of the borough with drafting an ordinance that designated a potential third site as an inclusionary housing site. Mr. Grygiel agreed. Mr. Del Vecchio asked when he was first involved in that matter. Mr. Grygiel said sometime in the past few months. The attorney asked if there were any records to establish a date when first involved. Mr. Grygiel could find out. The Board Attorney asked to define what he was asking for. Mr. Del Vecchio requested the first billing statement that referenced work done in connection to ordinance 2013:19 to be produced and provided to the applicant. The Board Attorney asked Mr. Grygiel if there was a resolution adopted by the Mayor and Council directing his assignment. Mr. Grygiel did not know if there was a resolution directing his involvement but he could determine

when he was first retained to assist with that property. Mr. Sproviero asked if he would supply it to him. Mr. Del Vecchio asked who was paying for his services in connection to the drafting of the ordinance. The planner said the invoices were submitted to the Borough of New Milford. Mr. Del Vecchio asked whose was funding the escrow account. Mr. Grygiel believed the property owner asking for the rezoning. Mr. Del Vecchio said ordinance 2013:19 proposed to identify and rezone certain sites for affordable housing and asked what the highest permissible density under that proposed ordinance. Mr. Grygiel answered 38 units per acre. Mr. Del Vecchio asked if he had a vested interest as the drafter of the ordinance to see that the ordinance succeed and the planning recommendations for the area be realized. Mr. Grygiel answered that was not true and said he did not have a vested interest in whether it was approved or not. He was asked to draft an ordinance and it was up to the people who hired him to determine what to do. Mr. Del Vecchio asked if the ordinance represented a good planning alternative. Mr. Grygiel said it does but it was not the same as saying he had a vested interest because he does not get compensated on its passage. Mr. Del Vecchio did not mean to infer monetary interest. Mr. Del Vecchio asked if he agreed or disagreed that as a drafter of an ordinance for a third site for affordable housing it creates a bias on his part on how he viewed a previously selected site. Mr. Grygiel did not think it was a fair statement. Mr. Del Vecchio asked if it had any impact given the few sites that have been identified appropriate in the community. The planner said no.

Mr. Del Vecchio stated in his analysis he did not include his review and analysis of the rezoning study for this block 1309 lot 1.02. Mr. Grygiel did not. Mr. Del Vecchio stated he did not disclose it in his document or direct testimony. Mr. Grygiel did not see the need to do so. Mr. Del Vecchio said he reached certain conclusions and made recommendations in the rezoning study as to what was appropriate and what the facts were in the community. Mr. Grygiel agreed. Mr. Del Vecchio asked if he recalled in the report that passage that said *the subject property therefore was entirely responsible for addressing New Milford's COAH Third Round Growth Share Obligation as well as part of its Prior Round Obligation, pursuant to the petition submitted to COAH...* Mr. Grygiel recalled it. Mr. Del Vecchio asked if he rendered an opinion that *New Milford had a somewhat significant prior round and rehabilitation obligation that will need to be addressed if not changed. It was strongly recommended that the Borough continue to consider how to address affordable housing obligation in deciding whether to rezone the subject property.* Mr. Grygiel was familiar with the passage and added the Borough still has the prior round and rehab obligation, the borough still needs to consider how to address its obligation as to whether to decide to rezone the subject property and the Mayor and Council made the decision not to. Mr. Del Vecchio said in the rezoning study he reached a planning conclusion and summarized it by saying: *a larger non-residential development could be considered perhaps as a large modern supermarket. But given the impacts resulting from that use, the zoning should then require provision of a 100% affordable housing component for commercial uses over a certain size which would be subsidized by increased development yield on the site.* Mr. Grygiel said it was not read correctly into the record and it stated "*perhaps as large as a supermarket*" Mr. Grygiel never recommended that a supermarket was the appropriate use for the site. Mr. Del Vecchio clarified that he recommended a large retail use could be an appropriate use for

this site under a planning context. Mr. Grygiel explained if the appropriate regulations were put in place and as part of an appropriate rezoning. Mr. Del Vecchio questioned if it was only for rezoning and no other context. Mr. Grygiel said they also discussed redevelopment options and other ways to accomplish that objective. Mr. Del Vecchio asked if the fact that an application for a large retail space with 100 percent affordable housing project have less planning validity being presented in the context of a use variance as opposed to rezoning. Mr. Grygiel answered no the issues on the neighboring community were similar. Mr. Del Vecchio asked if there a recommendation that could resolve the traffic impact that he alluded to in his testimony. Mr. Grygiel would not make a traffic recommendation since he was not a traffic engineer.

Mr. Del Vecchio marked as Exhibit A-48 Ordinance 2013:19  
Exhibit A-49 Rezoning Study Block 1309 Lot 1.02  
Exhibit A-50 Housing Element 2008

Mr. Del Vecchio asked if his opinion was this site was suitable for multifamily housing. Mr. Grygiel said in the context of appropriate design multiple family housing could work on this property. Mr. Del Vecchio asked if that opinion was in his rezoning study. Mr. Grygiel answered it made a recommendation that inclusionary mixed use development multifamily component could be appropriate. Mr. Del Vecchio asked what was the basis of that opinion. Mr. Grygiel said he looked into the analysis of the surrounding area and development patterns of the existing zoning. Mr. Del Vecchio asked in determining the site was suitable for multifamily housing would that include multifamily housing with a low and moderate income component. Mr. Grygiel said yes. Mr. Del Vecchio asked if there was a retail component that generated a housing need that housing would be supported by the retail component. Mr. Grygiel said that was not the calculus that COAH had in mind. It was an obligation based on development that occurred it was not necessarily funding the affordable housing development. Mr. Del Vecchio said in the context of the proposed application what would be the generator for the supermarket and bank on the site and how many units would it generate under the growth share methodology. Mr. Grygiel said with the numbers COAH had in place, he would concur with 8 units. Mr. Grygiel questioned whether that non-residential growth share was still valid at this time. Mr. Del Vecchio stated the application was proposing 3x the minimum that would be generated under the growth share methodology by offering 24 units. Mr. Grygiel said the math was 3 times.

Mr. Del Vecchio questioned his testimony that the affordable housing might trigger a bulk variance because it was located to the rear of the bank. Mr. Grygiel agreed. Mr. Del Vecchio questioned if the affordable housing fronted on Cecchino Drive without any intervening building. Mr. Grygiel said without any access and it fronts of four streets. Mr. Del Vecchio questioned why he would single out the fact that the bank intervenes between the affordable housing and one of the streets but there was no intervening use of the street it had frontage to. Mr. Grygiel said if they were proposing access to Cecchino Drive he might change his opinion. River Road was the main access point to the bank and supermarket, said the planner.



Mr. Del Vecchio asked if he made a comment that a C variance was required for the landscape along River Road between the proposed property and uses across the street. Mr. Grygiel agreed. Mr. Del Vecchio asked if there was an objective test in the ordinance that dictates the number of rows of planting, the types of planting or the heights. Mr. Grygiel was not aware of it. Mr. Del Vecchio asked if it was a subjective test. Mr. Grygiel said it would appear to be that way. Mr. Del Vecchio asked with a subjective test could two different people come to different conclusions. Mr. Grygiel said by definition it could.

Mr. Del Vecchio said he alluded to the subject property was subdivided from a larger piece in prior years and asked what the balance of the property was that is not subject to the application. Mr. Grygiel said 2-3 acres remain which was utilized by United Water. Mr. Del Vecchio asked if he would be surprised that the property was in the flood zone and encumbered by the wetlands. The planner would not be surprised.

Mr. Del Vecchio asked if he was familiar with the Branchburg decision. Mr. Grygiel agreed. Mr. Del Vecchio asked if knew whether or not Branchburg had a significant prior round on unmet need. Mr. Grygiel did not recall. Mr. Del Vecchio asked whether or not in Branchburg the community had identified other potential sites for affordable housing. Mr. Grygiel did not know.

Mr. Del Vecchio stated he reviewed the three master plan documents in his testimony and asked if his opinion was that the zoning of the community was inconsistent with the master plan recommendations in any of the three documents. Mr. Grygiel said the existing zoning is contrary to those documents because they have not been changed to match any of them. He added the zoning remains what it was previously. It wasn't that it was changed to become inconsistent.

Mr. Del Vecchio asked if he would find that having affordable housing in a location that had walking access to a school, bank, food and goods to be a good or bad thing in site selection. Mr. Grygiel said generally those factors would be good things for affordable housing.

Mr. Del Vecchio said in his rezoning study he referenced the site being considered as a candidate for redevelopment or rehabilitation and did he do an analysis to determine if the site would meet the criteria for redevelopment or rehabilitation. Mr. Grygiel did not.

The Board Attorney stated they would continue with the public cross-examination of Mr. Tombalakian.

Lori Barton, 399 Roslyn Avenue, asked if his testimony that signalization was not necessary at Madison/Main was based on the current traffic conditions without the reopening of the Elm Street Bridge. Mr. Tombalakian answered that the volumes for both the existing and the proposed condition meet the peak hour volume warrant at that intersection. Ms. Barton asked if there would be an increase in volume at Madison/Main once the Elm Street reopens. Mr. Tombalakian answered yes. Ms. Barton asked if this

application was approved did he think that automobile and truck traffic would increase at the intersection of Madison/Main. Mr. Tombalakian answered yes. Ms. Barton asked if he thought that signalization would be necessary after the Elm Street Bridge reopens and a 70,000 sf supermarket was built. Mr. Tombalakian said it did not appear likely and added the warrant was met but the accident history and operation conditions at that location based on his feedback from both police departments doesn't lead him to recommend that intersection be signalized. The resident asked if it might be possible that it would be necessary to widen Madison Avenue, Main Street or both. Mr. Tombalakian did not think it would be necessary based on the information provided in the traffic report. He pointed out that intersection was in Oradell so it would be a topic for the governing body of Oradell.

Michael Gadaleta, 270 Demarest Avenue, asked if there was anything he could offer to the Board outside of his conversations with the Chief of Police from both towns. Mr. Tombalakian said he asked if there were any operational problems at the intersection, was there any accident history that was out of the ordinary or what they deemed to be high. Both told him there were no operational problems, said the traffic engineer. Mr. Gadaleta asked if it would be beneficial to the Board to have accident reports. The traffic engineer said if either police chief said they had a problem there, he would have asked for it. Mr. Gadaleta asked if this warranted more of an investigation than a conversation. Mr. Tombalakian said his job was not to do a full warrant study but to answer a question posed to him if the volumes at the intersection warrant a signal and what his recommendation was. Mr. Gadaleta asked if traffic would be positioned in a way that trucks would not have to rely on someone backing up because a signalized intersection would be able to hold traffic for trucks to make the turn. Mr. Tombalakian said no. He understood the testimony was that a truck would not make that turn to service the site but the trucks would come down Kinderkamack making a right on Madison and into the site. Mr. Gadaleta said daily trucks were not supposed to be coming from River Road but they widened that road to allow trucks. The traffic engineer said that would have to be something for the Board to consider.

Mr. Gadaleta asked if he an opportunity to revisit safety issues with the school safety officer or the Board of Education. Mr. Tombalakian said no. Mr. Gadaleta asked how he proposed someone from Demarest Avenue get to the shopping center because they would have to cross four lanes of traffic. Mr. Tombalakian said it would be three lanes and the traffic report indicated there would be an increase of delay for traffic movements attempting to cross River Road. Mr. Gadaleta asked how a pedestrian would cross at that intersection. Mr. Tombalakian said a crosswalk was proposed. Mr. Gadaleta asked if he thought it a good idea to request a limited pedestrian safety study. Mr. Tombalakian believed that the applicant submitted pedestrian counts at peak times for the school and the school board has weighed in with their concerns and he did not think a pedestrian safety study was needed. Mr. Gadaleta asked when the Board of Education voiced their concerns on traffic studies. Mr. Tombalakian believed there was correspondence from the school board. Mr. Gadaleta asked how many times he sat on a Board where he heard traffic reports from Dolan and Dean in the last two years. The Board Attorney said how many other cases has he had with the applicant's traffic consultant where he was the

board traffic engineer. Mr. Tombalakian said he has reviewed about a half dozen reports this year prepared by Dolan and Dean in various communities.

Daniel Kemp, 217 Cooper Street, questioned if he realized the Getty Station was closed when the traffic counts were done. Mr. Tombalakian did not make that observation.

John Rutledge, 335 River Road, said the County provided a striped crosswalk from Cooper to River and did it impact his analysis. Mr. Tombalakian said it did not. Mr. Rutledge questioned if he looked into the queuing in front of the high school. Mr. Tombalakian said he did see it but it was a short-term phenomenon that happens during the peak drop off /pick up periods and lasts about 20 minutes. Mr. Rutledge questioned if 20 minutes was not a problem. The traffic engineer said it takes place and the Borough could review it with the police department and he did not change the results of his review. Mr. Rutledge asked with the ITE and the 1.2% per year growth for traffic would it be more than 9,000 cars if you extrapolate that number over a ten year period. Mr. Tombalakian said you couldn't go back in time and bring it forward.

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

Mr. Alonso stated his objection to Mr. Del Vecchio's request to limit the public's participation. He submitted a letter that cited different examples. Mr. Alonso said you couldn't come in and complain objectors were wasting time when they were wasting time. The Board Attorney asked if this was regarding the applicant discerning that they would not grant any further extension beyond February 14<sup>th</sup>. Mr. Alonso said the applicant could go to court and say their rights were violated because the Board did not act within 120 days. The Court would look at this record and say this Board acted diligently and given more opportunities then he has seen in any applications to present his case, said Mr. Alonso. The Board Attorney said in regard to the special meetings, the Board believed they have been and continued to be diligently prosecuting the application and have continued to schedule special meetings. Mr. Alonso thought the Board had the right to limit the comments and questions to relevancy. The Board Attorney said that is what they have agreed upon. Mr. Alonso said it was a two way street. The Board Attorney said they recognize that.

The Board Attorney said Mr. Del Vecchio would cross-examine Mr. Tombalakian on December 2, 2013.

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

Respectfully submitted,  
Maureen Oppelaar