

**New Milford Zoning Board of Adjustment
Work Session
April 9, 2013**

Chairman Schaffenberger called the Work Session of the New Milford Zoning Board of Adjustment to order at 7:35 pm and read the Open Public Meeting Act.

ROLL CALL

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

REVIEW OF MINUTES – February 28, 2013 and March 12, 2013

The Board Members reviewed the minutes for the Work and Public session 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 read into the record a letter from Mr. Carmine Alampi requesting the matter be carried to the May 14, 2013 agenda. The Board Attorney stated they have asked a representative to come to the hearing to put it on the record so the Board could formally carry the meeting and advise no new notice would be necessary.

**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 Board Attorney stated an issue has arisen that implicated another potential conflict. Mr. Sproviero stated that because it involved potential litigation it should be discussed in closed session and it was not anticipated that any formal action of the Board would result tonight.

Motion to move into close session to discuss potential litigation relating to a potential conflict issue with NMRA was made by Ms. DeBari, seconded by Mr. Rebsch and carried by all.

Chairman Schaffenberger, Vice Chairman Stokes and Father Hadodo have recused themselves from the application.

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

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

**New Milford Zoning Board of Adjustment
Public Session
April 9, 2013**

Chairman Schaffenberger called the Public Session of the New Milford Zoning Board of Adjustment to order at 8:09 pm and read the Open Public Meeting Act.

ROLL CALL

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

PLEDGE OF ALLEGIANCE

OFFICIAL MINUTES OF THE SPECIAL MEETING – February 28, 2013

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

OFFICIAL MINUTES OF THE WORK SESSION – March 12, 2013

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

OFFICIAL MINUTES OF THE PUBLIC SESSION – March 12, 2013

Motion to accept the minutes were made by Mr. Loonam, seconded by Mr. Binetti 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

Carmine Alampi made an appearance before the Board and requested an adjournment to the May meeting because the site engineer was on vacation. He added another reason was they also just received the traffic impact assessment from the traffic engineer and the Engineer studied the tree ordinance requirements and submitted revised engineering plans.

The Chairman said their application would be carried to the May 14 meeting and the applicant would not be required to renote.

**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, Ronald Stokes and Father Hadodo recused themselves from the application.

The Board Attorney stated the subject of the closed meeting discussion was regarding an issue that came before the Board relating to a potential conflict involving a Board Member. The Board Attorney stated he was satisfied that no actual conflict existed but explained a Board Member should consider recusal from the application according to the law in the State of New Jersey in the event that the relationship could be construed as reasonably expected to create the appearance of a conflict. Mr. Sproviero stated that Mr. Binetti who is a licensed real estate broker listed and sold a home of a person who at least was involved with the objectors group SOD. The Board Attorney explained he was satisfied that no actual conflict resulted from the contractual relationship that existed between the broker and client in the sale of the home. Mr. Sproviero stated there was an analysis of cases suggesting that similar situations have been construed by the courts to create the appearance of a potential conflict.

Mr. Binetti stated it was not his choice to recuse himself and thought he served the Board very well for all these months on this application. He stated his occupation was real estate and said he could sit and represent the Board to the best of his ability but since counsel has advised him that it could be an appearance of conflict, he would take his advice and recuse himself for this application. The Board Attorney wanted the record to be absolutely clear that he was satisfied that no actual conflict existed and that to avoid any appearance of conflict or impropriety that this was the safer and more prudent course of action. Mr. Binetti wanted to add that the application played no role in hiring him as the realtor or the owner's decision to move out of New Milford. He added there was no discussion between them about anything other than the sale of their home.

Mr. Eisdorfer requested a special meeting for May to be decided at the next meeting and appreciated Mr. Binetti's conscientiousness in handling this matter and they would before the next meeting consider how to protect the integrity of the process in light of his participation.

Mr. Eisdorfer recalled Mr. Steck, still under oath, to continue his testimony.

Mr. Eisdorfer marked as Exhibit A-47 - 11x17 colored document on existing land use by Peter Steck. Mr. Steck reviewed the document stating in the northwest part of the diagram was the Van Buskirk Island which received a grant from DEP, in Oradell there was a contractor yard, DPW, PSE&G and a garage for NJ Transit. In Milford, Mr. Steck reviewed the single and two family residential areas and the subject property. The planner discussed the photographs that he added on the exhibit which was taken by him representing the surrounding conditions.

Mr. Eisdorfer asked if he would analyze the variances for the property and if he was familiar with Dr. Kinsey's testimony. Mr. Steck said he read the transcript and his report. The Planner added Dr. Kinsey was looking at a larger project with 221 units and 40 Mount Laurel units with the same amount of commercial space. He added that Dr. Kinsey concluded it was a mixed use project, an inclusionary project and eligible for a classification as an inherently beneficial use. Dr. Kinsey also had testified, according to Mr. Steck, that there was a substantial need for low and moderate income housing and that the Mount Laurel housing generated by the commercial development was 8 units. According to Mr. Steck, the applicant now has taken a conservative approach by removing all the market rate residential units with the same amount of commercial space but tripled the number of Mt. Laurel units to 24. Mr. Steck's conclusion was with these changes they have lowered the intensity on the property, increased the ratio of units to market generator and it was classified an inherently beneficial inclusionary use.

Mr. Steck stated there was a D1 variance bundled together for the multifamily use, commercial use and more than one use on a piece of property. There was a height variance for the two towers of the supermarket and for the three levels of housing proposed 44' permitted 2 ½ stories and 30'. The planner said they proposed a standard RSIS compliance for the housing, more than required parking for the bank and proposed 5 spaces per 1,000 sf which was the industry standard.

The Planner stated that the case that determined how the inherently beneficial use was evaluated was the SICA case which had a four step process. He added they did not have to show the use was peculiarly suited to the property. One step was to look at how much public benefit was advanced by the nature of the use, secondly, what where the land use impacts of improving it, thirdly, if there were reasonable conditions that the Board could impose that lessen the negative impacts and last was the balancing test that the Board analyzed the negative criteria.

The idea of producing housing other than governmental funds, Mr. Steck said, was not a new phenomenon and that Mount Laurel was in 1975 and the second Mount Laurel case was in 1983. The Planner said New Milford recognized this in the 2004 Master Plan and identified this property as a site for inclusionary housing, in 2006 the Housing Element and Fair Share Plan also identified the site and in 2008 there was a Housing and Fair Share Plan that was sent to COAH. He added that this plan singled out the subject property as one of the few properties that could accommodate the need. According to Mr. Steck, the June 7, 2010 Reexamination Report still spoke of the subject property but it said things were being put on hold until contamination was cleaned up before considering purchase. Mr. Steck said the property was cleaned out, there was no reason for delay and the reasons for waiting had disappeared. The property was right for rezoning in 2010 but the governing body had elected not to rezone it from the single family zone, said Mr. Steck.

The Planner said one of the purposes of the MLUL was that a municipality in order to zone must have a housing element and must recognize the need for low and moderate income housing. He discussed court cases that spoke of low and moderate income housing and it was recognized to advance the public good. The planner said that the definition of inherently beneficial use meant a use which was universally considered of value to the community because it fundamentally served the public good and promoted the general welfare. Some of the cases, Mr. Steck

explained, recognized there were not many government subsidies around and they needed an engine to drive the subsidies which were either market rate housing, commercial development or some incentive for the developer to produce the housing that otherwise would not be profitable.

The planner stated the reason the 24 units were being proposed, which was not a money maker, was the courts through Mt. Laurel II authorized the use of incentives of generating funds to produce housing. The engine here was the supermarket and the bank to generate funds to allow the subsidy to occur for the 24 low and moderate housing units. He stated in general it was an accepted mechanism to support low and moderate income housing to have commercial developments. The planner said it would be a good site with access to a lot of resources which helps support the purpose of having low and moderate-income housing. Mr. Steck felt there was both a functional and financial association with the two uses and without this commercial development the housing would not be built.

The planner testified under the SICA criteria there was a need left over from New Milford's first and second rounds that was 45 units and they were producing 24 units that were substantial and needed. Mr. Steck further stated it was also of significant magnitude because according to the opinion of the Planning Board in the master plan and reexamination reports, this was the only site in town that was substantial and eligible. Instead of the 8 units originally proposed, Mr. Steck said they were producing 24 units of low and moderate income housing associated with the same commercial development that was initially proposed. There was a site that the municipality purchased for green acres which would not produce housing and there was another site on River Road that has not produced the housing, said Mr. Steck.

Mr. Steck said the traffic, the runoff and the aesthetics could be looked at as land use impacts which were addressed from the prior witnesses and were all conditions that mitigate any substantial negative consequences. The fact that the applicant had reduced the scale of the project, Mr. Steck felt the Board could conclude that approval based on the modified site plan could be granted without substantial detriment to the public good and without substantial impairment to the zoning plan. The planner said this was a large site with the ability to set buildings back, the ability to have adequate parking, the ability to have impervious and building coverage lower than what the ordinance anticipated, more detention than proposed, significant architectural features and buildings in the right location. The planner discussed the standards permitted for the residential E zone on River Road.

Mr. Steck said the housing proposed was a compact three-story building which was an efficient way to produce the low and moderate income housing. He thought they met the standards under the SICA test and the Board could conclude it was an inherently beneficial use and on balance the application could be approved and fully meet the negative criteria. Mr. Eisdorfer asked if he was relying on the opinion and testimony of Ms. Dolan, Mr. Dipple and the two architects. Mr. Steck agreed that they have provided a foundation that allowed him to make the planning conclusions and on balance that the statutory criteria was satisfied. Mr. Steck stated if this was not an inherently beneficial use it would fall under the MEDICI standard. He explained the focus was to show that the application promoted some public purpose, to show the use was peculiarly suited to the property and to satisfy the negative criteria. He believed it was an inherently beneficial use but believed the application was also satisfied under the MEDICI criteria. Mr.

Steck testified it was an advancement of the public welfare to have low and moderate income housing and it was one of the purposes of the MLUL. It was a constitutional responsibility, the planner explained, for the housing element to address the issue of low and moderate income housing. Mr. Steck believed that the site was peculiar suited and that the Planning Board's documents backed him up by saying it was a substantial site, the only significant vacant site and a good site for housing and commercial use. The opinion of the planner was that it also met the enhanced burden of proof and there was no reason not to have it rezoned. The planner said because it was identified in the Master Plan as an inclusionary housing site and it was a site for redevelopment because of the infrastructure around it. Mr. Steck believed it could be approved without substantial impairment of the zoning ordinance and zone plan. Mr. Steck stated it was his professional judgment that the negative and positive criteria under the SICA case and MEDICI standard had been satisfied.

RECESS

Mr. Steck stated there was a D6 variance for the height of the supermarket for 37'2" that exceeds the 30'. He added the height was for the two towers that was an aesthetic issue, it was just ornamentation, a small component of the building, less than 2% of the footprint and he felt there were no negative consequences. The planner said the height for the residential project was three stories, 8 units per floor, sloping roof that brings the height to 44' exceeding the 2-1/2 stories 30' requirement. The opinion of the planner was that the placement and handsome architecture advanced the public purpose of providing low and moderate income housing and there was no substantial detriment to the surrounding properties or zoning plan and zoning ordinance.

The planner reviewed the parking variances and said the combined parking required 547 spaces and they were proposing 438 parking spaces. It was a C variance linked to the D variance. Mr. Steck explained the benefits that substantially outweigh the detriments were better site design, more landscaping and a stronger market element to subsidize low and moderate income housing. He added there were no detriments if the parking was functionally adequate and his opinion was the industry standard showed that he believed that was also Ms. Dolan's opinion.

Ms. DeBari questioned what he meant in his testimony regarding no alternate site and the only site. Mr. Steck said for inclusionary housing. Ms. DeBari said there was a site for a supermarket already and they were granted variances to build a new supermarket. Mr. Steck said the reason the prior variances were not implemented was that it was not a good site for the Shop Rite and they needed a larger site. Ms. DeBari said she did not know if there was a pressing need for low and moderate income housing in the town as he testified and asked if he was referring to satisfying COAH. Mr. Steck said New Milford had a constitutional responsibility to provide their fair share of low to moderate income housing which was independent of COAH. Mr. Steck said the governing body endorsed a document that said there was a need. According to the planner, the 24 units would not satisfy the need of the first and second round. He said Dr. Kinsey had testified that the need was greater than the numbers produced by COAH. Ms. DeBari asked why not provide more units to satisfy the need. Mr. Steck answered because there has to be an incentive which was the ratio of low and moderate units to market rate units or commercial units. The planner said they were providing three times the ratio of housing that would be generated by the project. Mr. Spriovero clarified their testimony was that the commercial component was the

economic engine driving the inclusionary units. Mr. Sproviero questioned if it was the minuscule number of inclusionary units that the applicant proposed that served as the engine to drive the commercial unit. The planner said no and the same argument could be where there was a minuscule number of low and moderate income housing units associated with the residential zone E. Mr. Sproviero questioned his testimony that the applicant would lose money with inclusionary units. Mr. Steck said it was uneconomic and no developer without substantial subsidies would produce low and moderate income housing. The Board Attorney questioned why they would do it. The planner answered because the courts have recognized where government subsidies were not available and municipalities were not willing to step up to the plate and use their own funds, this was a realistic and legitimate way to produce low and moderate housing. Mr. Sproviero asked again if it was a fact that the economics of the construction of the inclusionary units was to create an opportunity for a commercial development under an inherently beneficial use standard. Mr. Steck answered that part of the reason for the application was the municipality had not followed through on their responsibilities and it was a recognized technique by the courts under the builder's remedy to provide low and moderate housing. He added because the municipality did nothing there was an opportunity for the developer to use the rules of the game to produce the public good. Ms. DeBari asked if the applicant was doing this out of the goodness of their heart. Mr. Steck said the applicant was hoping to make a profit and thereby use some of the profit to produce the low and moderate housing. Mr. Sproviero clarified the profit was from the commercial component. Mr. Steck agreed. Ms. DeBari questioned his testimony regarding the original 221 residential units and 40 affordable units. Mr. Steck said 32 were related to the residential component and 8 were related to the commercial component. The Board Attorney clarified this still did not satisfy New Milford's COAH obligation. Mr. Steck agreed. Mr. Sproviero asked if he relied on the testimony of Dr. Kinsey. Mr. Steck answered yes in terms of his analysis of the municipality efforts so far. Mr. Steck said his opinion did not change that this composite project was inherently beneficial. Mr. Sproviero asked if he agreed or disagreed that Dr. Kinsey's analysis of the SICA implications were no longer relevant to this proceeding because of the change in the scope of the plan. Mr. Steck disagreed because his characterization of the need in general, the need in New Milford and the way New Milford has attempted to address his need were still valid and important components. Ms. DeBari questioned his testimony that the governing body has failed with COAH obligations and felt this was some type of punishment. Mr. Steck answered it was not a punishment but if New Milford had zoned the site, New Milford would be in a better position to regulate the land use.

Mr. Loonam asked Mr. Steck if he was an expert in COAH. Mr. Steck said he does housing plans and he has been on COAH lawsuits but he did not consider himself an expert in the same degree as Dr. Kinsey. Mr. Loonam said not to compare himself to Dr. Kinsey but was he an expert in COAH. Mr. Steck answered yes. Mr. Loonam asked if New Milford actually had a COAH obligation and does inherently beneficial use currently apply to this application. Mr. Eisdorfer answered that the town had a constitutional obligation and if COAH was currently dysfunctional, which it was, it still had a constitutional obligation which must be met year by year. The Board Attorney asked when this constitutional obligation manifested itself. Mr. Eisdorfer answered 1975. The Board Attorney asked if there was no constitutional obligation before 1975. Mr. Eisdorfer said the Supreme Court first enunciated it in 1975.

Mr. Loonam clarified the current COAH obligation for rounds one and two was 45 units. Mr. Steck agreed. Mr. Loonam asked what Dr. Kinsey projected for round three. Mr. Steck thought the total of all three was 75. Mr. Loonam asked what inclusionary development meant. Mr. Steck answered it was a total development where a portion of the development includes housing units that were designed for low and moderate income households. Mr. Loonam asked if it was his opinion that inclusionary housing with an element of a supermarket as opposed to market rate housing had no benefit of one versus the other. Mr. Steck said there was a benefit that some portions of the market were more potent than others to provide the subsidies. He further explained that as the law evolved COAH has recognized that there could be an engine that could be either residential or commercial. The planner said the key word was realistic opportunity that would deal with density or incentive. Mr. Loonam questioned the difference between peculiarly or particularly well suited. The planner said with an inherently beneficial use the applicant did not have to demonstrate peculiarly suitability but he did mention it because as an alternate argument under the MEDICI standard he believed it was peculiarly suited. The planner said there were cases that use both peculiar and particular.

Mr. Loonam asked what would be the consequences if New Milford did not meet round one and round two. Mr. Steck explained if a Housing Plan was submitted to COAH and COAH said it met all the rules then the town would be protected from a lawsuit for six years. If the town did not submit a plan, then they would be eligible for attack by a builders remedy suit. This would mean the builder gets to pick the land and gets to pick the project. If the developer demonstrated adherence to the COAH principles, Mr. Steck said the court would approve the development independent of their willingness to approve it or not. Mr. Eisdorfer interrupted and said this was a question for Board's counsel. Mr. Sproviero said he was not offering an opinion and it was asked of the witness and he can direct the witness not to answer. Mr. Eisdorfer said their goal was to secure variance approval and they had no opinions as to the consequences were to the town. Mr. Sproviero clarified his position was they had no opinion what happened to the town and they were on their own. Mr. Eisdorfer said they were entitled to the variance and that was what they were pursuing. Mr. Loonam said the witness testified that the Board needs to weigh the negative and positive criteria in terms of an inherently beneficial use application. Mr. Loonam thought if he could answer what the ramifications were, it would help him weigh that decision. Mr. Eisdorfer did not believe that was appropriate and that the legal opinion asked was an appropriate consideration. Mr. Loonam said he was not asking a legal opinion rather what the consequences were based on COAH since the witness was a COAH expert. Mr. Eisdorfer answered his planning opinion was you will have not met the housing obligation. Mr. Loonam said he did not ask his planning opinion but rather his COAH opinion. Mr. Eisdorfer said that was the same thing. Mr. Loonam did not agree. Mr. Loonam asked if every planner was an expert in COAH. Mr. Eisdorfer did not know the answer.

Mr. Loonam questioned his testimony was this was the only site that was substantial and eligible. Mr. Steck said he quoted from a series of New Milford's Planning Board documents. Mr. Loonam asked if his testimony was that New Milford had a constitutional responsibility to provide our fair share of low and moderate income housing. Mr. Steck agreed. Mr. Loonam asked how they could meet their constitutional responsibility, if they were to approve the application with 24 units, knowing the town needed 45 units. Mr. Steck said that was a legislature question. The planner added the Board had before them an application that was

reconfigured and they deserved merit approval of this variance application. Mr. Steck said they have taken the opportunity to craft their own application because the municipality had done nothing. Mr. Sproviero clarified that his testimony was this was the last available suitable piece of vacant property for the Borough to satisfy their COAH obligations. Mr. Steck said there was another site in the E zone that has not been developed and there was site the municipality purchased as open space. According to the planner, the planning documents say this was a good site for inclusionary housing projects. The Board Attorney asked in developing this in accordance to the applicant's specifications with only 24 units, was this reduced low income component in any way preclude or make it more difficult the borough's continued obligation to satisfy the remaining units. Mr. Steck said if by this development there was no vacant land left, there was a possibility of the municipality asking for a vacant land adjustment. Mr. Loonam said he testified that the 2004 Master Plan labeled this site as potential inclusionary housing and a site where it could be put. Mr. Steck agreed that it said the site was characterized as having great redevelopment potential. Mr. Loonam clarified that the town in 2008 submitted their fair share plan. Mr. Steck agreed. Mr. Loonam clarified that in 2010 the contamination issue was cleared. Mr. Steck agreed. Mr. Loonam did not agree with his testimony that the town has not done anything and added in 2010 was the town's first opportunity to do something. Mr. Steck said in the July 2009 minutes the municipality was having discussion with the water company about purchasing the property. Mr. Loonam asked if it was to have inclusionary housing. Mr. Steck said it implied the municipality would purchase it to provide housing. Mr. Loonam thought that was contradictory that the town was not doing anything. Mr. Steck said there was no predictability unless they zone the property. Mr. Loonam asked his expert COAH opinion, if he thought the builders remedy was a substantial detriment to the public good in weighing the balance of negative and positive. Mr. Steck answered no because his argument could be used to defeat every Mt. Laurel site in NJ that did provide the full component. He added the answer was to provide part of the need. Mr. Loonam disagreed and thought it was a valid argument in a town that did not have a lot of vacant land. Mr. Steck said if land was a scare resource there were ways to delay their responsibilities. Mr. Loonam asked if 40 units greater outweigh the negative than the 24 units. Mr. Steck said numerically yes but that was not a valid exercise of the SICA balancing test.

Mr. Sproviero asked if the town somehow satisfied their COAH obligation before the April 19th meeting, what would happen to the inherently beneficial use argument. Mr. Steck did not think it changed because of the builders remedy which would give the builder who made the effort the ability to construct the project. Mr. Eisdorfer said this was hypothetical situation and the applicant's position was in the Home of Hope case it said that affordable housing was an inherently beneficial use whether or not the town has met their housing obligation. The Board Attorney asked what makes it an affordable house unit. Mr. Eisdorfer said they had a state regulation that specified what the rents or sale prices were. Mr. Sproviero questioned if it should be the cheapest price in town. Mr. Eisdorfer said it should satisfy the standard established by the Department of Community Affairs.

Mr. Grygiel questioned if the 2008 Housing Element and Fair Share Plan recommended inclusionary mixed use development at this site. Mr. Steck read from the plan that the United Water Company was a large tract land that has been in discussion for possible redevelopment in the future and the conceptual design was for 12 units / acre that would calculate to 200 units and

the developer would provide 40 low and moderate units. Mr. Grygiel asked if it included commercial development for part of the mix. Mr. Steck said it was residential. Mr. Grygiel asked if the 2004 Master Plan recommended housing on the site without any affordable housing set aside. Mr. Steck said it recommended age restricted housing not affordable housing and the latest map recommended offices at the north end and age restricted at the south end and did not say anything about affordable housing. The Board's planner asked if any of the Master Plan documents recommend the specific proposed mixed uses and non-age restricted housing. Mr. Steck said the only mixture was offices at the north end and housing at the south. Mr. Grygiel asked if there were any alternative mechanisms available besides sites for affordable housing. Mr. Steck said there might be but this was a legislative issue that the governing body should have addressed. Mr. Griegel said when COAH existed did it allow for other ways to address affordable housing obligations such as controlling rents of existing units. He added there are other ways but the municipality has not elected to legislate the other ways. Mr. Grygiel asked if he reviewed the submission from Mayor and Council to COAH. Mr. Steck did and it was his understanding the submission was complete and there was no evaluation of whether it met the regulations according to Dr. Kinsey's testimony. Mr. Grygiel questioned if he was relying on Dr. Kinsey's opinion that New Milford's housing plan was invalid, how he could offer that opinion if nobody in Trenton ruled on the validity of the plan. Mr. Steck said his opinion was on the record but Dr. Kinsey made the judgment for the rules that were not being challenged, the plan did not agree with COAH standards. Mr. Grygiel clarified that was one man's opinion as to the validity of it. Mr. Steck said he already answered that. Mr. Grygiel questioned his testimony on other mixed use inclusionary developments and he was asked if they were created by a use variance or through zoning. Mr. Steck recalled the ones he referenced were done legislatively. Mr. Grygiel asked for the reason he characterized the use of the property as industrial in nature. Mr. Steck answered that materials were trucked to the site, it was moved around, it was mixed with other soils and trucked off the site. He added there were buildings on the site that have been removed and it was not a vacant site it was used by heavy earth moving equipment.

Mr. Loonam said the witness relied on the opinion of Ms. Dolan, Mr. Dipple, two architects and Dr. Kinsey. Mr. Steck agreed. Mr. Loonam asked if that was their testified opinion or their documents. Mr. Steck answered the transcripts and reports. Ms. DeBari asked if Mr. Alonso or Mr. Flora had any questions for the witness. Both attorneys reserved questioning for the next meeting. The Board Attorney would prefer to have the attorney's go first so the public would have the benefit of their questions and answers.

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

Michael Gadaleta 270 Demarest Avenue, asked if he was aware that major roads and major thoroughfares were two different things. Mr. Steck said they were not necessarily two different things. Mr. Gadaleta said that their major roads in town were 50' wide right of way and one lane each direction. Mr. Steck said it had to do with volumes of traffic and who had jurisdiction of the road and determination was not only how many lanes the road had. Mr. Gadaleta asked if he was aware of any double lane roads. Mr. Steck said only turning lanes. Mr. Gadaleta asked if there were permits and what the heavy equipment was doing on the site. Mr. Steck answered he went to the DEP website to find out the nature of the activity and he did he know if any permits were required. Mr. Gadaleta asked if he photoshopped this map. Mr. Steck said he put in black arrows

which emphasized the location for multifamily and commercial areas. Mr. Gadaleta asked if he reviewed the map that indicated the flood zone. Mr. Steck said that was not part of the master plan document. Mr. Gadaleta questioned his testimony that the borough proposed 200 units of single family homes. Mr. Steck said it was zoned for single-family homes but they would not be able to get 200 units of single family homes there. Mr. Gadaleta asked if he did a comparative analysis between what was permitted as a use and what was proposed as a use. Mr. Steck said he knows the zone permitted single family homes and have seen figures of 30 –50 housing units. Mr. Gadaleta asked about Carlton Place and if he was aware that the majority of the property was located in a bed of a creek. Mr. Steck said he did not walk the property. Mr. Gadaleta asked the planner to point out any highways on his map. Mr. Steck said on his exhibit it was a depiction of where major roads where in New Milford in proximity to the site. Mr. Gadaleta clarified that by major roads he meant major thoroughfares not necessarily by width or capacity. Mr. Steck said they were roads that carry a substantial amount of traffic. Mr. Gadaleta asked him to define substantial. Mr. Steck relied on the NJ classification and the county jurisdiction indicates that the traffic was primarily thru traffic as opposed to traffic accessing land uses. Mr. Gadaleta asked what the significant feature of his map was. Mr. Steck said it reinforced his conclusion that the subject's site was particularly or peculiarly suited for the proposed development. The resident asked if there were a significant about of single family homes surrounding the property. Mr. Steck said there were no single family homes that abut the subject property.

Mr. Gadaleta asked if he was aware that Dr. Kinsey has his own development company and would it be a conflict of interest in his testimony to persuade municipalities to follow COAH. Mr. Eisdorfer objected. Mr. Gadaleta questioned the COAH testimony regarding indigenous need for housing and thought that meant housing in disrepair in the borough now. Mr. Steck agreed it was a need that existed today. Mr. Gadaleta asked if the application was addressing any of the town's indigenous needs. The planner said yes because New Milford indicated that the 45 units from round one and two were a combination of indigenous need and a rehabilitation component and they were producing 24 units of low and moderate income housing. Mr. Gadaleta disagreed because Dr. Kinsey's testimony was that the 45 units did not reflect the 15 units of substandard housing that currently existed. Mr. Steck said they were not rehabbing those units but there was an effect on the need for housing because the low and moderate income household could move to this project and be adequately housed. Mr. Gadaleta stated that Main Street was a walking commercial district and asked if there was any commercial development proposed that fronted on Main Street. Mr. Steck answered they were proposing a building with a zero front setback on Main Street. Mr. Gadaleta said there were residential houses along River Road and questioned if it was good planning to have the bank at the premier spot as opposed to the housing. Mr. Steck thought it was a good plan because the housing on the other side of River Road tends to be individual units and the subject unit was a multifamily dwelling. Mr. Gadaleta asked if any financial documents would be presented to the Board to say based on the rent and the development costs they could only afford 24 units. Mr. Steck did not know.

Lori Barton 399 Roslyn Avenue, asked if he was aware that in April 2011 the developer made a presentation to Mayor and Council with no low to moderate income housing. Mr. Steck did not know. The resident asked if he would agree that developed properties could be redeveloped into low and moderate housing. Mr. Steck said in theory anything could be redeveloped. The resident questioned that it didn't have to be only vacant land that was developed into affordable housing.

Mr. Steck said in theory someone could tear down the single homes and build low and moderate housing. He added the standard was a realistic possibility. Ms. Barton said the developer of Brookchester Apartments have been in discussion with the governing body to talk about redevelopment. Mr. Steck was unaware of it. Ms. Barton questioned his testimony that there would be no detriment to the surrounding properties. Mr. Steck's opinion was no substantial detriment to the surrounding property.

John DeSantis 190 Powell Drive, asked what the difference was between COAH obligation and constitutional responsibility. Mr. Steck said from a planning perspective the courts have interpreted the NJ Constitution to say when a municipality uses a tool to control land use, like zoning, they cannot just zone for ratables and large single family homes. They have to address the need for low and moderate income housing whether there was COAH or not. Mr. Steck said COAH has set up rules to follow and hopefully be protected from a lawsuit. He further testified that there were other mechanisms, like a builder's remedy, that give incentive to developers to chase a municipality that was not addressing its need. Mr. DeSantis asked if the apartments met their constitutional responsibility. Mr. Steck answered no because there was COAH and state statutes. There were certain requirements but those garden apartments were not rent restricted. Mr. DeSantis said they were rent restricted. Mr. Steck said a COAH unit had to be restricted for a number of years, deed restricted and a certification of the family residing and a sliding scale. Mr. DeSantis questioned the constitutional responsibility and said every apartment more than three units were rent controlled. Mr. Steck said rent controlled does not mean it was a low level it meant there could not be major increases over time. Mr. DeSantis clarified his testimony that the commercial component would be beneficial to the 24 low and moderate income housing. The resident asked how that could be beneficial if the existing Shop Rite moved from its existing location near 2,000 units. Mr. Steck answered they were addressing the need for low and moderate income housing and there might be another person that steps up to the plate to provide goods and services to those people. He added there was a market demand but the market without incentives does not provide low and moderate income housing. Mr. DeSantis questioned the only thing that was inherently beneficial was the 24 units. Mr. Steck said if they were not proposing any housing and just had the supermarket and bank it would not be inherently beneficial. The resident asked if New Milford fulfilled their obligation elsewhere, would they still be obliged to approve this as inherently beneficial. Mr. Steck referred to a court case Homes of Hope where even though the municipality allegedly met its Mt Laurel need, it did not remove the development from the classification of an inherently beneficial use. Mr. DeSantis asked if the town met its obligation elsewhere, would they be protected from a builders remedy. Mr. Steck thought the only way they would get that protection was if a plan was filed and certified with COAH and the municipality implemented the plan. Mr. DeSantis asked what was considered a realistic plan. The Board Attorney said there needs to be a plan and someone has to do something.

The Board Attorney said the meeting would be carried to April 18, 2013 at 7PM.

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

Respectfully submitted,
Maureen Oppelaar