Approved
3/11/14

New Milford Zoning Board of Adjustment
Work- Reorganization
January 14, 2014

Chairman Schaffenberger called the Work Session of the New Milford Zoning Board of Adjustment to order at 7:02 pm and read the Open Public Meeting Act.

ROLL CALL

Mr. Binetti	Present
Ms. DeBari	Present (8:00)
Mr. Denis	Present
Fr. Hadodo	Present
Mr. Ix	Present
Mr. Loonam	Present (7:20)
Mr. Rebsch	Present
Mr. Stokes	Absent
Mr. Schaffenberger-Chairman	Present
Ms. Batistic- Engineer	Present
Mr. Grygiel Planner	Present
Mr. Sproviero - Attorney	Present

REORGANIZATION – 2013

The Board Attorney swore in Mr. Rebsch for a two-year term as an alternate member with a term expiring 12/31/15.

The Board Attorney swore in Louis Denis for a four-year term as a full member with a term expiring 12/31/17.

The Chairman called for a motion to dissolve the Firm of Boswell Engineering.
Motion made by Mr. Ix to dissolve the firm of Boswell Engineering from its obligations, seconded by Mr. Rebsch and carried by all.

The Chairman called for a motion to dissolve the legal counsel of Scott Sproviero Esq.
Motion made by Mr. Denis to dissolve the legal counsel of Scott Sproviero Esq. from its obligations, seconded by Mr. Ix and carried by all.

The Chairman called for a motion to dissolve all officers from their obligation to the Zoning Board, that being Vice Chair and Chair.
Motion made by Mr. Ix, seconded by Fr. Hadodo and carried by all.

Meeting turned over to the senior member, Mr. Schaffenberger

Karl Schaffenberger called for a motion to nominate a Chairman for 2014.
Motion made by Mr. Binetti to nominate Mr. Schaffenberger, seconded by Mr. Denis.
There were no other nominations.
The motion passed on a roll call vote as follows:
For the Motion: Members Binetti, Denis, Hadodo, Loonam, Ix, Rebsch
Against the Motion: None
Abstain: Member Schaffenberger

Karl Schaffenberger called for a motion to nominate a Vice Chairperson for 2014.
Motion made by Mr. Ix to nominate Ms. DeBari and a motion made by Mr. Loonam to nominate Mr. Stokes.
A poll was taken for the nomination of a Vice Chairperson. The poll was in favor of Ms. DeBari. Motion was made by Fr. Hadodo, seconded by Mr. Ix confirming Ms. DeBari as Vice Chairman for 2014.
The motion passed on a roll call vote as follows:
For the Motion: Members Hadodo, Ix, Binetti, Denis, Loonam, Rebsch, Schaffenberger.
Against the Motion: None

The Chairman stated all the Board members had received three Qualifications statements for Board Attorney for the Zoning Board of Adjustment for review.

The Chairman called for a motion to nominate a Board Attorney for 2014.
Motion made by Mr. Binetti to nominate Scott Sproviero, Esq., seconded by Mr. Rebsch.
There were no other nominations.
The motion passed on a roll call vote as follows:
For the Motion: Members Binetti, Rebsch, Denis, Hadodo, Loonam, Ix, Schaffenberger
Against the motion: None
Mr. Sproviero thanked the Board Members.

Mr. Sproviero stated the Borough hires a Borough Engineer and it has been the Board's practice in the past not to seek proposals but to work with the Engineer engaged by the Governing Body. The Chairman clarified the Board chooses to do this but they do not have to. The Board Attorney agreed. Mr. Sproviero said the resolution before the Board was regarding the appointment of the Zoning Board's engineer which contemplates that Boswell was engaged by the Borough as the Borough Engineer. The Zoning Board is an autonomous agency capable of soliciting its own proposals. The Board chooses to recognize the appointment made by the municipality and the Board finds Ms. Batistic from Bowell McClave Engineering to be qualified and competent and recognizes Boswell McClave as the Board Engineer. The Board Attorney prepared a resolution and read it into the record.

The Chairman called for a motion to approve the resolution for a Board Engineer for 2014.
Motion made by Mr. Ix, seconded by Mr. Binetti.
There were no other nominations.
The motion passed on a roll call vote as follows:
For the Motion: Members Ix, Binetti, Denis, Hadodo, Loonam, Rebsch, Schaffenberger
Against the motion: None

Ms. Margita Batistic thanked the Board Members.

REVIEW OF MINUTES – November 12, 2013 and November 18, 2013.
The Board Members reviewed the minutes for the Work and Public session and there were no changes.

ANNUAL REPORT 2013
The Chairman asked if everyone had an opportunity to review the report and if there were any changes or comments. No one wished to comment or make a change. The Board Attorney read the resolution for the annual report into the record. The Board was not saying to make a change but they should look at these issues and determine if a change was appropriate, said the Board Attorney.

SPECIAL MEETING FEE
The Board Attorney said an ordinance has been introduced by the Mayor and Council to increase the special meeting fee to $1,750.00.

OLD BUSINESS
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 said Mr. Sproviero and Mr. Alonso would be asking questions of Dr. Kinsey.

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

New Milford Zoning Board of Adjustment
Public Session
January 14, 2014

Chairman Schaffenberger called the Work Session of the New Milford Zoning Board of Adjustment to order at 7:56 pm and read the Open Public Meeting Act.

ROLL CALL

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

PLEDGE OF ALLEGIANCE

OFFICIAL MINUTES OF THE WORK SESSION – November 12, 2013

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

OFFICIAL MINUTES OF THE PUBLIC SESSION – November 12, 2013

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

OFFICIAL MINUTES FOR THE SPECIAL MEETING – November 18, 2013

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

ANNUAL REPORT 2013

The Chairman called for a motion to memorialize the resolution for the 2013 annual report.
Motion made by Mr. Loonam, seconded by Ms. DeBari
The motion passed on a roll call vote as follows:
For the Motion: Members Loonam, DeBari, Binetti, Denis, Hadodo, Ix and Schaffenberger.
Approved 7-0

OLD BUSINESS
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

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

The Board Members scheduled the special meeting for January 23, 2014 at 7 pm.

Mr. Del Vecchio stated at the last hearing Dr. Kinsey was being asked questions by Mr. Alonso. For the record, Mr. Del Vecchio stated Dr. Kinsey was previous sworn, qualified and remained under oath.

Mr. Alonso said they were dealing with question 10 from his report regarding whether or not the proposed 24 affordable units constitute a substantial set aside. Mr. Alonso clarified that Dr. Kinsey's testimony was that there was no COAH standard, case law or statute that provided a standard that he could answer that question. Dr. Kinsey agreed. Mr. Alonso said his testimony was that he came up with four approaches by which the Board could try to determine whether or not the units were a substantial set aside. Dr. Kinsey agreed. Mr. Alonso said his question was that it was a four prong test and did it need to have all four prongs of the test or did it need to be only one of the approaches or the majority. Dr. Kinsey suggested the Board review his report and testimony provided and consider the totality of the four approaches that he tried to answer the question whether what was proposed was a substantial set aside in this MXID. Mr. Alonso said in considering the totality of the four approaches, it would have to be all four approaches. Dr. Kinsey did not establish it in his report nor as a rule. Mr. Alonso asked if he would agree that the applicant had the burden of proving the justifications for granting of variances. Dr. Kinsey said the applicant had the burden of demonstrating that the criteria for variances are met. Mr. Alonso said that was usually done by testimony by the expert witnesses. Dr. Kinsey agreed. Mr. Alonso asked if he considered facts and the law. Dr. Kinsey agreed and said he considered the law as best he could. Mr. Alonso said it was up to him to tell the Board which approach to consider and why. Dr. Kinsey said he did that in his written report and testimony.

Mr. Alonso said the first approach was the growth share standard. Dr. Kinsey said his analysis was based on the growth share standards that COAH adopted. Mr. Alonso said he was asking the Board to consider as one of the approaches, the growth share standard approach, that has been invalidated by the Supreme Court. Dr. Kinsey said no and added that his first approach was based on part of the COAH rules that embodied the growth share methodology.

Mr. Alonso clarified that his second approach was to consider jobs that would likely be created. Dr. Kinsey agreed. Mr. Alonso asked if he took into consideration any of the existing jobs at the existing supermarket that would move to the proposed store. Dr. Kinsey said this was how many jobs would likely be created at this site at full development and at the standard of how many square foot per job were reasonable for different categories of activities. Mr. Alonso questioned if the people at the existing Shop Rite were being fired in order to create 120 new jobs or were

those jobs being transferred over and there were no new jobs to be created. Dr. Kinsey did not know what Shop Rite would do and said he has advised the Board that based on his analysis 120 jobs were likely to be created at this proposed site. Mr. Alonso said he was asking the Board to accept the approach. Dr. Kinsey said he was inviting the Board to consider this as one approach to understand how substantial the applicant's proposal was in terms of affordable housing. Mr. Alonso questioned if his job was to invite or to testify. Dr. Kinsey said he was testifying before the Board.

Mr. Alonso said in the third approach he was considering the economic relationship of the proposed affordable housing with the market rate nonresidential component. Dr. Kinsey agreed that the market rate development is the economic engine that makes possible affordable housing in an inclusionary development. Mr. Alonso asked if the Branchburg case tells us that was not acceptable. Mr. Eisdorfer objected. The Board Attorney said that was the heart of Dr. Kinsey's opinion. Dr. Kinsey understood the Branchburg decision was limited to the circumstances that existed in Branchburg. His opinion was that the circumstances in New Milford were different. Mr. Alonso asked if the Branchburg case said you could not use the commercial component in order to justify financially viability of the affordable component. Mr. Del Vecchio objected that it was asked and answered. The Board Attorney said it was asked but did not know if it was answered. Mr. Del Vecchio stated his answer was that in the Branchburg decision under those facts and circumstances the court did what it did but the facts and circumstances in New Milford were different. Mr. Alonso clarified that his approach was to consider the economic relationship between affordable units and the commercial component and to determine whether or not the commercial space was needed for the financial viability of affordable units. Dr. Kinsey said that was this approach. Mr. Alonso asked if the court in the Branchburg case said that was not an appropriate approach. Dr. Kinsey answered no. Mr. Alonso said in the Branchburg decision it said *the gist of Advance's argument is that, because the financial viability of the affordable units proposed for its development depends on its ability to build four times as many market-rate units, those market-rate units are an integral part of the inherently beneficial use of affordable housing, just as the back-office units were integral to the inherently beneficial operation of the hospital. We do not find that reasoning persuasive.* Dr. Kinsey answered he reads the whole decision and makes his analysis based on the entire decision.

Mr. Alonso clarified that the fourth approach was that he was comparing the number of affordable units in New Milford's Fair Share Housing obligation and whether or not it was met. Dr. Kinsey said no he compared the number of affordable housing units proposed by the applicant with New Milford's Fair Share Housing obligation. Mr. Alonso clarified that the obligation was for 49 units and these 24 units constitute 49% of the total obligation. Dr. Kinsey agreed and said he offered this fourth approach as one of four for the Board to consider and the totality was his analytical approach to evaluate whether the set aside was substantial. Mr. Alonso asked if the 49 affordable units were confirmed by COAH. Dr. Kinsey said COAH's prior round obligation has been established and upheld by the courts. The second component was his estimate using the methodology that the Supreme Court directed that COAH use. He used that data and came up with his estimate of what New Milford's post 1999 Fair Share Housing obligation would be.
Mr. Grygiel concluded that the prior round obligation was 6 units, said Mr. Alonso. Dr. Kinsey said there was a difference between the net and gross obligation and the obligation confirmed by

COAH. The Borough has a pending petition before COAH with a Housing Element and Fair Share Plan, which has not been scrutinized by COAH. His opinion was that he scrutinized it and compared it with the pertinent COAH rules and concluded that the prior round obligation is 23 units. Mr. Alonso said Mr. Grygiel is also a licensed planner and formed his conclusion of 6 units. Dr. Kinsey did not have the letter in front of him so he did not know what it said. Mr. Alonso gave Dr. Kinsey the letter. The Board Attorney asked Mr. Alonso to identify the document. Mr. Grygiel's memorandum dated 4/24/13 to the Board, said Mr. Alonso. Mr. Del Vecchio said Mr. Alonso was using a comment that he indicated was a memo to the Board. He added it was an unsigned memorandum addressed to the Mayor and Council dated 4/24/13 from Mr. Grygiel titled *The Current State of Affordable Housing Regulation in New Jersey and New Milford's COAH Compliance.* Mr. Del Vecchio said this was a document outside of these proceedings and objected to this document being marked but said Dr. Kinsey could answer any questions on what it said. Mr. Alonso asked if he agreed Mr. Grygiel formed an opinion that the prior round obligation was 6 units. Dr. Kinsey said Mr. Grygiel advised the Mayor and Council that the remainder of the Borough's prior round obligation that needs to be addressed was 6 units assigned to the United Water property. Mr. Alonso asked if Mr. Grygiel also formed an opinion that the total obligation was 14 units. Dr. Kinsey said Mr. Grygiel described that as the non-rehabilitation housing obligation that needs to be addressed. Mr. Alonso said this was a difference of opinion between two planners with respect to what the obligations were. Mr. Eisdorfer objected that he was trying to convert Dr. Kinsey's reading of the report into substantive testimony. The Board Attorney said what was in the document was non-evidentiary but he thought the basis of the question remains a valid question. Dr. Kinsey answered there was a difference of opinion. Mr. Alonso asked if he was asking the Board to consider this approach based on his calculations of 49 units but there was a difference on opinions between the planners. Dr. Kinsey agreed that he was asking the Board to review his testimony and analysis. The Board Attorney clarified that it was more than review he was asking the Board to accept it. Dr. Kinsey agreed that he has given solid reasons for them to be accepted.

Mr. Alonso asked if he agreed this parcel was the largest, privately owned undeveloped parcel in New Milford. Dr. Kinsey believed so. Mr. Alonso said the Board was being asked to make a determination and if approved the applicant would allocate 24 affordable housing units to the site and eliminate this site for any further affordable units. Based on Dr. Kinsey's calculations, Mr. Alonso said the Borough still had a 25 unit obligation. The Board Attorney questioned that once we spent this property where were we then. Mr. Del Vecchio said it was not relevant to these proceedings. Mr. Sproviero disagreed. Dr. Kinsey said if he was retained by the Borough and the planning board, he would go through the steps required by the MLUL in terms of documentation to be assembled and try to understand the development patterns, recent developments, look at the current standards in effect and look at the possibilities because COAH offers a number of approaches for compliance. The Board Attorney asked if the subject property would not be included within the inventory for potential future use. Dr. Kinsey said it would not be included if the subject property was developed. He added that underutilized parcels would be reviewed. Mr. Alonso asked if he abandoned his prior approach. Mr. Eisdorfer objected and said that Dr. Kinsey's previous testimony used the SMART test to determine if it was inherently beneficial. Once you determine that an inclusionary development was inherently beneficial, the question was is the magnitude of the low-income units sufficient. Dr. Kinsey said with the 2012 analysis and testimony, he evaluated the pending application, which called for 221 dwelling units with 40

affordable plus non-residential. He asked two questions one was whether the mixed use development proposed was inherently beneficial and part of that analysis was whether the set aside was substantial. He determined that the proposed units amount to an 18% set aside and the norm upheld by the Supreme Court was 15%. He concluded the set aside was substantial. Mr. Alonso said that conclusion was based on the four-prong test that he created in 2012. Dr. Kinsey agreed. Mr. Eisdorfer said that we were confusing two different things. The Board Attorney said they were trying to seek the truth and not prevent questions from being answered and said let the experts answer the questions. Dr. Kinsey said he posed two questions in his report. One was whether the set aside that was proposed was substantial and that the higher set aside count adequately for the economical value created by the non-residential development. He suggested one should go through a four-step process and concluded that the set aside for 40 units for the 221 residential plus non-residential was substantial. Mr. Alonso asked if he was telling the Board that there was no one standard to determine if a set aside was substantial. Dr. Kinsey answered no and said the Board had one application before them today that calls for income restricted affordable housing and non-residential development and the application in 2012 had market rate housing, income restricted housing and nonresidential development. Dr. Kinsey said in 2012 he used the four step process and in 2013 he evaluated the pending application in his written report. Mr. Alonso asked if there were two separate applications. Dr. Kinsey said they were different applications in content. Mr. Alonso said this was one application with two different standards. The Board Attorney asked Dr. Kinsey if his testimony was as a result of the amendment that was previously made to the scope of the application while the precise relief that was sought may not have changed, the scope of the project has caused a change in his opinion as to the the approaches that should be considered by the Board with respect to its determination. Dr. Kinsey said yes. Mr. Alonso clarified that the only difference between that part of the application and this part of the application was one had market rate residential and this one had 100% affordable. Dr. Kinsey said that was the principle difference.

Mr. Alonso asked based on his analysis of the Smart SMR case, was this proposed use inherently beneficial. Dr. Kinsey said his conclusion was that the proposed MXID meets the first three parts of the Smart SMR analysis and the fourth part was beyond his assignment.

Mr. Alonso said he made reference to the Branchburg case in response to Mr. Grygiel's testimony. Dr. Kinsey said no. Mr. Alonso asked if it was his opinion that the Branchburg case was distinguishable from New Milford because Branchburg has met their prior round obligations where New Milford has not. Dr. Kinsey said that was part of it and added that Branchburg had a COAH certified prior round Housing Element and Fair Share Plan and that the plan has satisfied its prior round obligation. He added another was that the subject site was included in the 2008 Housing Element and Fair Share Plan as a site designated for affordable housing development.

Mr. Alonso asked where in the opinion it stated that Branchburg met all its obligations. Dr. Kinsey said at a minimum the decision referred to the trial court opinion. Mr. Alonso asked if this case had an analysis based on whether the prior round obligation was met. Dr. Kinsey said the prior round analysis was in the trial court decision. Mr. Alonso said this court does not form an analysis in the opinion with respect to the prior round obligation. Dr. Kinsey said it does not directly address that issue. The Board Attorney asked if it indirectly addressed the issue. Mr. Sproviero asked if it was a fact that the Branchburg decision in no way distinguished between the

municipalities that did or did not meet their prior round obligations. Dr. Kinsey believed it distinguishes between municipalities in the opinion, which said *under circumstances such as those existing here*. Mr. Sproviero clarified that he interpreted that phrase as meaning the Branchburg decision in someway distinguishes between municipalities that did or did not meet their prior round obligation. Dr Kinsey answered that was a difference in the circumstances. Mr. Alonso asked him to point out what circumstances. Dr. Kinsey said the circumstances that the Appellate Division was referring to are all of the lower court decisions and arguments that the Appellate Division heard, read and considered. Mr. Alonso asked if he could point out what circumstances the court used in their analysis that supports his position and where in their analysis were they considering that Branchburg met their prior round obligations. Dr. Kinsey said it was not stated directly in the Appellate Division decision. Mr. Alonso clarified that other than him reading the trial division record there was nothing in the opinion to support his position. Dr. Kinsey said the facts comparing New Milford and Branchburg are distinguishable as to compliance with Fair Housing Act. Mr. Alonso asked where in that case it was stated. Dr. Kinsey said those facts were not stated in the Appellate Division decision.

Mr. Alonso clarified that he compared the facts in the application for Branchburg and the facts for this application. Dr. Kinsey said yes. Mr. Alonso and Dr. Kinsey agreed that both had a large parcel of land, both had a zone that did not permit the proposed use, both applicants were seeking d (1) variances, both had set asides and both raised an issue of a development as a whole being considered as inherently beneficial use by the inclusion of affordable housing. Dr. Kinsey said he looks at the facts of the context of the applications and there was testimony in Branchburg. He looked at the compliance status issue in New Milford and New Milford was not in compliance. The Board Attorney asked if his sole basis for drawing a distinction between the two overlying factual foundations for each of the applications was that Branchburg complied with its COAH requirement. Dr. Kinsey said Branchburg had COAH certification and satisfied its substantial 300-unit fair share-housing obligation for the prior round. The Board Attorney asked if there were any other distinctions that he was relying on when he says the circumstances were different. Dr. Kinsey said he was relying on the Fair Housing Compliance issue. The Board Attorney asked if there were any other distinctions other than the COAH certification. Dr. Kinsey said there was the prior round COAH certification and the magnitude of the fair share housing obligation which was larger in Branchburg and has been satisfied. Mr. Alonso said the issue on appeal with Branchburg was in the context of a d(1) variance application. He asked if it was in the context of the fair housing act. Dr. Kinsey believed there was an appeal from the zoning board decision. Mr. Alonso questioned that the distinction he was making was whether or not it was compliant with the formula of the housing act. The issue on appeal with Branchburg was whether or not it was an inherently beneficial use within the context of a d (1) use variance. Dr. Kinsey said it was a constitutional obligation for municipalities to provide their fair share affordable housing. Mr. Alonso asked if that was an issue in the case. Dr. Kinsey said it was an issue testified to by the township affordable housing planner in Branchburg. Mr. Alonso said no it was a builder's remedy lawsuit that was filed and was dismissed by motion of the court. Dr. Kinsey said it could have been. Mr. Alonso said the Fair Housing Act compliance and the Mt Laurel Doctrine was dismissed. Dr. Kinsey did not think it could be dismissed because it was always there but the builders remedy lawsuit might have been dismissed. Mr. Alonso said the Fair Housing Act part of the case was dismissed by the court. Dr. Kinsey said the claims seeking a builder's remedy was dismissed. Mr. Alonso said anything that fell under the circumstances

that he relied on couldn't refer to the Fair Housing Act compliance because it was dismissed. Mr. Eisdorfer said he was asked if it was in the record and he answered it was in the trial court decision which was part of the record. The Board Attorney said that was his answer and he would instruct the Board on all of this before a determination.

Mr. Alonso said the issue in the Branchburg decision whether or not it was inherently beneficial use within the context of the d (1) variance is what this Board needs to decide. Dr. Kinsey said that is the application before the Board. Mr. Alonso said not whether or not there was compliance with the Fair Housing Act. Dr. Kinsey said it was a circumstance the Board should review. Mr. Sproviero asked if he was suggesting that the Board should be considering the status of its affordable housing obligation in the context of its determination for this application. Dr. Kinsey agreed.

Mr. Alonso questioned under the decision of the court it said *that the inclusion of affordable housing as a relatively small component of a much larger residential development transforms the entire project into an inherently beneficial use for purpose of obtaining a (d)(1) variance.* Dr. Kinsey said yes *under the circumstance such as those existing here*.

Mr. Alonso asked if his opinion was that this entire project was inherently beneficial. Dr. Kinsey said it should be viewed as an inherently beneficial use in considering the use variance application. Mr. Alonso said if the Board did not find this inherently beneficial than everything he said in his reports were irrelevant in this case. Dr. Kinsey said the Board could reach whatever decision they find appropriate.

Mr. Alonso concluded that he made up approaches and standards for the purpose of supporting his position and asked if there was anything else he made up. Dr. Kinsey asked for a definition of made up. Mr. Alonso said there were no legal standards. The Board Attorney asked Mr. Alonso to define what the standards were that he was asserting are the product of Dr. Kinsey's work product. The Board Attorney clarified they were those that relate to determining the fair share obligations that exist and how it should be integrated into the consideration of this application. Mr. Alonso agreed. Dr. Kinsey said in his 2012 report he posed an answer to questions. One was is a MXID inherently beneficial and second was the mixed use development in New Milford inherently beneficial. He then analyzed it reaching conclusions and summed it up in his report, said the planner. Dr. Kinsey added that in his December 2013 report, he addressed various questions and some were due to the change in the composition of the proposal. Mr. Alonso said the two questions he raised to create a standard was because a standard did not exist. Dr. Kinsey said he proposed a standard in some of the sub questions. Mr. Alonso asked if he created his own two questions. Dr. Kinsey said he developed two questions that were appropriate in addition to his analysis of the first three tests of the four test Smart SMR case. Mr. Alonso asked if there was anything else he created for purpose of supporting his position. Dr. Kinsey said he developed the analytical questions that he spelled out in his reports and testimony. He marshaled facts to address those questions and then presented his opinion.

RECESS

The Board Attorney asked if affordable housing was a public good or an inherently beneficial use with respect to only those units that meet COAH requirements. Dr. Kinsey answered income restricted affordable housing that complies with a Fair Housing Act and COAH standards is inherently beneficial when it is a 100% affordable housing project or in this case as part of MXID. Mr. Sproviero said let's assume for purpose of discussion that New Milford did not have any further inclusionary housing obligation in accordance to the fair housing element. Would inclusionary housing still be considered inherently beneficial use, asked the Board Attorney. Dr. Kinsey answered yes. The Board Attorney asked in the most recent Supreme Court determination was a methodology provided to calculate the municipality prospective COAH obligation and what was it. Dr. Kinsey answered yes and the methodology was to follow the methodology used in the first and second rounds with the best available data. The Board Attorney asked what data they were looking for. Dr. Kinsey answered the data was detailed in his letter of December 2, 2013. The Board Attorney said he read the Supreme Court determination and it appeared they were leaving to COAH to develop the standards to be used on a prospective basis. Dr. Kinsey read it that the Supreme Court remanded back to the Appellate Division for the Appellate Division's order to be enforced .The Appellate Division ordered COAH to calculate municipal fair share housing obligations for the period after 1999 and the Appellate Division gave direction to COAH how to do the calculation. He added one was for the methodology to use the first and second round Fair Share Housing methodologies and second the court directed COAH to use the best available data. The Board Attorney asked what has COAH done to implement that methodology. Dr. Kinsey was not aware that COAH has done anything in response to the courts directive.

The Board Attorney said in the December 2, 2013 report, he assessed where New Milford stands with respect to its prospective COAH obligation. Dr. Kinsey said he spelled out a methodology as close to the methodology used by COAH in its first and second round with updates. The Board Attorney's understanding of his report was that he utilized the formula that was developed by Art Bernard. Dr. Kinsey said Mr. Bernard was a starting point and he also worked on it himself as part of his work for Fair Share Housing Center. The Board Attorney asked if the Fair Share Housing Center was a government entity. Dr. Kinsey said no it was non-profit whose purpose was to defend and advance the Mt. Laurel doctrine. Mr. Sproviero questioned when municipalities throughout New Jersey filed their third round COAH compliant applications, did Fair Share Housing Center take a position or object to any applications with respect to those third round petitions. Dr. Kinsey believed the Fair Share Housing Center objected to some of the petitions for COAH. The Board Attorney asked how many. Dr. Kinsey said more than 50 and more than 300 petitions were filed. Mr. Sproviero asked if he was an advocate for Fair Share Housing. Dr. Kinsey answered no. Mr. Sproviero asked in his efforts to promote the Mt. Laurel Doctrine how would he determine which proposed plans would be the subject of his scrutiny and objection. Mr. Del Vecchio said Dr. Kinsey was not an employee of the Fair Share Housing Center. They retained him in one case. Dr. Kinsey said he has not reviewed on behalf of the Fair Share Housing Center the third round petitions for COAH. The Board Attorney asked if he was aware if Fair Share Housing Center filed an objection with regard to New Milford's petition. Dr. Kinsey believed not because Mr. Grygiel's letter indicated there were no objections filed. The Board Attorney asked how the Fair Share Housing Center was funded. Dr. Kinsey said there were some grants and legal fees as part of the settlements. The Board Attorney questioned that Mr. Bernard developed a formula that he relied on in rendering his opinion in the December

report. Dr. Kinsey said what Mr. Bernard did when retained by the Fair Share Housing Center was to take the COAH methodologies first and second rounds, update it, spell out all the steps, assemble the data to make the calculations. The result was an estimate of the post 1999 Fair Share Housing obligation of a community. The Board Attorney asked if the data that Mr. Bernard and the Fair Share Housing Center utilized in the development of its methodology appropriately updated in order to implement the prospective COAH needs. Dr. Kinsey said yes. The Board Attorney asked what efforts were made to utilize the most recent data. Dr. Kinsey said the website of the State Department of Community Affairs, Division of Local Government Services and the State Department of Labor and Workforce Development.

The Board Attorney asked what was the source of the various factors and coefficients. Dr. Kinsey said the source for each of the 14 steps that he outlined was the first and second round methodology, the court decisions on that methodology and on COAH's methodology. He tried to break it out, assembled the best available data and used it in each of the steps of the procedure. The Board Attorney questioned that he came to his conclusion on what New Milford's prospective obligation would be. Dr. Kinsey agreed it would be 25 units. The Board Attorney asked if that prospective obligation could be calculated in any other methodology. Dr. Kinsey did not think so if one adhered to the Appellate Division directive. The Board Attorney said if the Appellate Division directive was so clear they would all know what the methodology was today to do that calculus. He asked if they knew today with specificity what that calculus should be. Dr. Kinsey said yes because of the plain language of the Appellate Division decision that directed COAH to use the first and second round methodology and his 14 steps outlined and to assemble the best available data. The Board Attorney asked if COAH has proposed a rule to embody it. Dr. Kinsey said no. The Board Attorney questioned there has been nothing by way of law making in accordance with the administrative procedures act that has been triggered to implement the Appellate Division decision. Dr. Kinsey agreed.

The Board Attorney asked if this development was divided into three separate lots and three separate applications, would they be utilizing the same standard for each individual lot. Dr. Kinsey said if it was the same developer developing all three but chose to do it in separate lots and integrated the various uses, it would be similar to the proposed project. The Board Attorney asked if he believed the same standard would apply with regard to the application of the inherently beneficial use standard. Dr. Kinsey said it was the market rate development that makes possible the income restricted housing. The Board Attorney asked if he believed that the inherently beneficial concept for MXID remains alive and well notwithstanding the Branchburg determination. Dr. Kinsey said yes for the inherently beneficial concept for MXID.

Were these growth share standards not invalidated by the Supreme Court determination, asked the Board Attorney. Dr. Kinsey said the Supreme Court did not speak directly to these factors that COAH adopted by rule as part of its third round methodology. The Board Attorney asked if he contended that they remain relevant for the purpose of the information for the Board to rely upon to reach a conclusion. Dr. Kinsey said it was valid to the extent as part of this package of the several approaches. Because of the changed circumstances of the application, he went ahead and developed three other approaches. The Board Attorney said he made reference to the 2012 application and the current application and asked if he viewed them as two different applications. Dr. Kinsey understood them as an amended application.

Mr. Sproviero said in regard to his December 3, 2013 letter he corrected his calculation on the three-bedroom unit but questioned the one bedroom calculation. Dr. Kinsey would take another look at it.

Mr. Sproviero asked in calculating the rents in his 2012 report was he giving the maximum rent before utility charges. Dr. Kinsey agreed and said the utility charges listed in the report were as per HUD.

Mr. Eisdorfer asked Dr. Kinsey if New Milford has a wide variety of vacant available sites. Dr. Kinsey said no and added there were two sites. Mr. Eisdorfer asked how that compared to Branchburg. Dr. Kinsey said Branchburg has numerous sites and sites available for its future obligations. Mr. Eisdorfer asked in New Milford is the present site designated as a housing site in the 2008 housing plan. Dr. Kinsey said yes and in Branchburg the developer's site was not designated in the Housing Element and Fair Share Plan for affordable housing or inclusionary development. Mr. Eisdorfer asked if these were relevant distinctions between New Milford and Branchburg. Dr. Kinsey said yes. Mr. Eisdorfer said Dr. Kinsey asked questions about a decision of the Supreme Court IN RE 5:96 and asked if the Supreme Court determined that the state could not use growth share as a means of determining municipal housing obligation. Dr. Kinsey said no it determined it was not supported by the Fair Housing Act in place. Mr. Eisdorfer asked if he was using the ratio that he cited as a means of determining housing obligations. Dr. Kinsey said no. Mr. Eisdorfer asked if he was aware of any post Branchburg cases in which inclusionary development has been found to be inherently beneficial. Dr. Kinsey said yes, the case was Morris Commons LLC v Board of Adjustment of the Township of Rockaway that was filed yesterday.

Mr. Loonam said he had asked Mr. Steck if the application would be viable if there were no affordable housing units and he answered no. Mr. Loonam asked if the pending application did not have any COAH housing would he agree with Mr. Steck that it would not be viable application. Dr. Kinsey said he did not hear his testimony. The Board Attorney said if you removed the inclusionary housing and were left with the supermarket and the bank, would the inherently beneficial use standard be applicable. Dr. Kinsey said no. Mr. Loonam said Mr. Steck testified it was positive to add some of the affordable housing. Dr. Kinsey said it was important for towns to address their constitutional affordable housing obligations. Mr. Loonam said there is a parcel of land that could be developed up to 221 units and asked why not build the 40 units and not drop down the number of affordable units. He asked as a planner was it a positive or a negative step to reduce the 40 affordable units down to 24. Dr. Kinsey said the 40 units were in context of the 221 residential units. He did not know all the details with the change that the developer made. Mr. Loonam asked regarding the Branchburg case if there was the ability to still have the 40 affordable units, did he think it would be in the best interest for this application to offer 40 instead of 24 affordable units. Dr. Kinsey said 40 units was part of 221 and it was the economic value from 180 units that was important to provide the internal subsidy. With the change, the market rate housing disappeared and the economic value was no longer available for internal subsidy so that was why the number of affordable units decreased, said Dr. Kinsey.

The Board Attorney said for the purpose of this application he was the inherently beneficial expert. Dr. Kinsey said he was the applicant's advisor on that issue. The Board Attorney asked if

this application at 24 units was less beneficial than at the outset of 40. Dr. Kinsey said a trial judge said when someone suggested a site was "kinda suitable" he used the metaphor that someone was either pregnant or not. Dr. Kinsey believed the same stands for inherently beneficial.

The Board Attorney said they had Berge Tombalakian look at the intersection at River and Madison and come up with a cost and plan to make it work well. Mr. Tombalakian said at the request of the Board they looked at the capacity analysis for the build condition submitted by the applicant and how improvements could be modeled at the intersection to improve the performance of the intersection working under the premise the project was approved and constructed. They looked at timing changes, adding different lanes and changing the arrangement of the intersection to develop what improvements would be needed to offset the added traffic. They came to the conclusion that the following improvements would needed. One was to add a left turn lane on the River Road southbound approach, to add a left turn lane on the westbound approach on Madison Avenue, replace the traffic signal equipment and add a leading westbound phase. He added the road would have to be widened, replace curbs, sidewalks, drainage and other improvement needed for the road widening. Mr. Tombalakian said it would be to widen two legs of the intersection and replace the signal and install a new timing plan. The Board Attorney asked for the cost estimate. Mr. Tombalakian said they did a preliminary estimate based on a review of site conditions and what a typical procedure would be for a project of this size. They would have to prepare roadway plans, additional property would have to be bought to widen the road and utility relocation. He estimated roadway plans $40,000, right of way documents $30,000, property easements $230,000, utility relocation $120,000, preliminary construction cost estimate $730,000, construction inspection$ 90,000 totaling approximately 1.25 million dollars. The Board Attorney asked for the specifics of the modifications. Mr. Tombalakian said to add a lane on each approach on southbound River and westbound Madison would be about 11-12'.They worked on the premise that it would be widened evenly on both sides of the road and came up with approximate square footages and approximate property costs based on current appraisal data. The utility costs and construction costs were based on data from projects that they were working on.

Ms. DeBari asked how far the additional lane would go. Mr. Tombalakian said typically the county wanted about 200-250' and taper back into existing conditions so roughly about 300-350' on both approaches. Ms. DeBari asked if it would go to the proposed shopping center. Mr. Tombalakian said no, from the River/Madison intersection on the westbound approach, it would go to Charles Street and roughly to the northern driveway of the CVS mall.

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

Lori Barton, 355 Roslyn Avenue, asked if property would be taken to widen the roads. Mr. Tombalakian said it was anticipated the road widening would require property to be purchased. Ms. Barton asked if the property owners had any say with that. The Board Attorney said there are means of acquiring property for public purposes through eminent domain. The property owners could object and there was a negotiation process. Ms. Barton asked what would happen if they did not want to give up there property. The Board Attorney said they could contest the

legality of it. Ms. Barton questioned what the percentage would be that the applicant would pay and how much the taxpayer would have to pay. The Board Attorney did not know. Mr. Tombalakian did not know yet. Ms. Barton would like an answer prior to the determination.

Michael Gadaleta, 270 Demarest Avenue, asked why he selected River/Madison when there was testimony on Madison/Main. Mr. Tombalakian said the last time he provided information on Madison and Main neither police department saw any operational problems at that location. He said the Board directed him to look at River/Madison. Mr. Gadaleta asked what would it take for him to look at River Road south and Main needing the same improvements. The traffic engineer believed the reason River/Madison was selected was because in the applicant's traffic report their results showed a decrease in performance at that intersection where River/Main did not show any adverse effect. Mr. Gadaleta asked if the 1.25 million dollars would be the same for other intersections that might need improvements. Mr. Tombalakian did not know if the number would be the same for each intersection.

John Rutledge, 335 River Road, asked for clarification on the widening from Charles to River and a right turn lane onto River. Mr. Tombalakian said a left turn lane. Mr. Rutledge clarified it was a middle lane making a left turn. The traffic engineer agreed. Mr. Rutledge asked coming east to Madison would that require widening to turn onto River. Mr. Tombalakian said no. Mr. Rutledge questioned that the number indicated was a baseline estimate. Mr. Tombalakian said with the information available that was what they came up with.

Gene Murray, 425 Madison Avenue, questioned the Sycamore trees on River Road and did he factor in the cost of removing the trees as a result of widening the road. Mr. Tombalakian said yes and it was a difficult design question. He explained they had trees, the sidewalk and houses on the east side close to the road. When designing the project they needed 12' to get a lane. They were faced with the dilemma of the trees or skew the widening all to the east side to save the trees but then they were effecting the property owners. He said that was a difficult decision. Mr. Murray asked for a cost. Mr. Tombalakian said about $3,500 each to remove a tree. He added a project like this would likely be publicly bid. Mr. Murray asked the width of the existing roadway at River Road at River/Madison. Mr. Tombalakian believed it was about 30'. Mr. Murray said expanding another lane would add another 10-12' and the result would be a roadway no wider than the existing infrastructure in front of the existing Shop Rite. Mr. Tombalakian did not recall the width of the roadway in front of the existing Shop Rite.

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

Mr. Del Vecchio asked in evaluating pro rata share for the cost contribution, would he agree that the proper method would be to take the site generated traffic as a proportion to total volume based on each of the approaches at that intersection. Mr. Tombalakian said that was one way to do it. Mr. Del Vecchio asked if that was an approach typically used when assessing pro rata share. Mr. Tombalakian agreed. Mr. Del Vecchio asked if he would assume that for the morning, afternoon, evening and Saturday peak hours that the site generated traffic using that formula discussed for pro rata share range from 7 – 17%. He also asked if he would agree that they would average the impacts from those peaks hours to derive the pro rata share number or take the

highest and apply it. Mr. Tombalakian said it could looked at it a few different ways and the County might have input on how it would be approached. Mr. Tombalakian said the intersection operates now reasonably well and it would deteriorate with the construction of the project. The question was if pro rata share was suitable or not. Mr. Del Vecchio was not asking to opine on whether or not pro rata share was appropriate but if it was the right way to do the math. Mr. Tombalakian believed that was the right track. Mr. Del Vecchio said he indicated a significant entry for utility costs and asked if he was referring to the utility poles and asked who was the service provider. Mr. Tombalakian said it was for the poles and it would be between PSEG and Verizon with Cable. Mr. Del Vecchio asked regarding the widening, would it be made as part of a County road plan. Mr. Tombalakian said it was possible but with past experience if it was part of county master plan, PSEG had a different pricing structure for pole relocation vs someone moving a pole. Mr. Tombalakian said they estimated $20,000 a pole.

Mr. Del Vecchio asked if he was aware that in a case of a project that was part of a county roadway plan, the provider would be legally required to remove the poles at no cost. Mr. Tombalakian said if that determination was made the estimate would be adjusted.

Mr. Del Vecchio said they have no further redirect testimony and no witnesses at this point. This would be the appropriate time to transition into public comments, said Mr. Del Vecchio. The Board Attorney agreed. The Board Attorney told the public on January 23rd to be ready for public comments. Comments would be limited to 7 minutes and it was not the time to represent their evidence but it was for comments. Mr. Alonso would not be able to attend that meeting because he had a prior obligation.

Ms. DeBari asked when they agreed on 7 minutes and why not agree to 10 minutes. Mr. Del Vecchio said that he had submitted correspondence requesting the reimposition of timeframes. Mr. Del Vecchio referred them back to his letter and reminded the Board that February 14 was the date by which they have indicated their willingness to extend time for action to occur. Ms. DeBari said 10 minutes was fair and they were going on two years and many people have been to every meeting and wanted to make comments. The Board Attorney did not have a problem with 10 minutes but the Board was inviting another special meeting.

Mr. Loonam said it would be advantageous if people put there comments on paper and be prepared. Ms. DeBari asked if the Board could agree on 10 minutes. No objections were made.

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