Approved
5/13/14

New Milford Zoning Board of Adjustment
Special Meeting
February 20, 2014

Acting Chairwoman DeBari called the Public Session of the New Milford Zoning Board of Adjustment to order at 7:10 pm and read the Open Public Meeting Act.

ROLL CALL

Mr. Binetti	Recused
Ms. DeBari	Present
Mr. Denis	Present
Father Hadodo	Recused
Mr. Ix	Present
Mr. Loonam	Present
Mr. Rebsch	Present
Mr. Stokes	Recused
Mr. Schaffenberger-Chairman	Recused
Ms. Batistic – Board Engineer	Present
Mr. Sproviero – Board Attorney	Present
Also in attendance	
Mr. Grygiel	Present

PLEDGE OF ALLEGIANCE

OLD BUSINESS

12-01 New Milford Redevelopment Associates, LLC- Block 1309 Lot 1.02- Mixed Use Development- Supermarket, Bank and Residential Multifamily Housing Height, stories, building and impervious coverage, use and parking

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

The Board has assembled to engage in deliberations and make a determination with regard to the New Milford Redevelopment Associates application that has been before this Board for about two years, said the Board Attorney. The planner would give a brief summation to advise the Board as to what variances were implicated by way of the application. Mr. Sproviero added that he would go through some of the issues of law and urged the Board Members to ask questions and verbally engage in a deliberation in front of the applicant and public. He said they would not be entertaining any questions or comments from the public or objectors.

The Board Attorney said a member of the public had asked if letters from the environmental committee, the Board of Education and emails from the public would be read into the record. Mr. Sproviero said the answer was no because they were not evidence and the letters from the environmental committee were not presented by anyone from the committee or read into the record when they appeared nor the Board of Education letters were not read into the record by their representative. The Board Attorney added that emails from the public were not items of evidence. Mr. Sproviero said there were certain pieces of evidence that were held open that were offered by members of the public. It was his determination that no additional items of evidence that were not already included in the record would be accepted as evidence at this time. He said the reason for that was they were not supported by any factual basis by way of witness or expert testimony. The Board Attorney said they would proceed with the record of evidence as it has been compiled to date. The Board Attorney said that Mr. Alonso had a question regarding the redacted transcripts. There has been a number of incidents where this protocol has been followed. He said the one most analogous to what has happened here was Harmon vs Weehawken which was an unreported case out of Hudson County. He discussed other cases regarding redacted transcripts.

The Board Attorney said a certification was distributed and signed by all the Board Members to verify the members have either attended or listened to recordings of regular and special meetings conducted by the Board of Adjustment during 2012-2014 as they relate to the NMRA application. It also said the Board Members have also read the redacted transcripts and would base any consideration and determination of the application based upon the status of the record as reflected in the redacted transcripts.

Mr. Sproviero said their professional advisors need to define the scope of relief that the applicant was seeking and a brief statement of law that should be applied when making their findings of fact and apply those findings of fact to the law that is applicable to this case. The Board Attorney asked Mr. Grygiel to define the variance relief.

Mr. Del Vecchio interjected that Mr. Grygiel was a professional that provides evidence and his portion of the proceedings ended and objected to him offering any further statements. Mr. Del Vecchio did not think it was appropriate because he defined his scope of his belief of variance relief when he testified. The Board Attorney's belief was whether he gave the Board what variances were implicated as the attorney or their advisor did was of little distinction. Mr. Grygiel's statement at this meeting was not offered by way of opinion testimony he was the Board advisor and the members were entitled to his advice, said the Board Attorney. Mr. Sproviero told the Board he believed there was nothing illegal with regard to their planner advising them to the scope of application by way of variance relief. The recommendation from the Board Attorney was the members could hear the advice offered by the Board planner not by way of opinion testimony but by defining the scope of relief. All members agreed.

Mr. Grygiel said the subject property was in the RA single family residential zone which was the primary reason the application was before the Board. The only permitted principle use in the RA zone is single-family residential, public parks and public

recreation grounds. The main item with regard to relief being sought was the use variance. The retail use, multifamily residential and the bank were uses not permitted in the RA zone. The second set of d(6) variances required were building height for the proposed supermarket and residential building exceeding the maximum permitted height in the RA zone by more than 10% or 10 feet. Mr. Grygiel's opinion was four C variances were required. The C variances related to the maximum amount of stories 2 ½ permitted three proposed, maximum number of families per building one permitted 24 proposed, bank building being located between the residential building and River Road and the number of parking spaces 547 required 438 proposed. Mr. Grygiel said the applicant pointed out that the variance of 109 spaces is to allow the supermarket parking ratio to be one space per 200 sf. The planner had previously noted a possible additional variance for the buffer along River Road between commercial and residential uses across the street. He did not believe it was relevant at this point and thought the residential standards could be subsumed within the use variance. The parking variance applies because it was based on the individual uses.

Mr. Grygiel explained the use variance could only be granted in particular cases for special reasons. These reasons may include that the use is inherently beneficial whether it was all or in part in its entirety, that the property owner would suffer undue hardship if they had to use the property in conformance with the uses in the zone which was not being argued and the site was particularly suited for the use so as to promote the general welfare. The planner said to approve the use variance they need to find one or more of those three were addressed for the positive criteria. The negative criteria must be met that there was no substantial detriment to the public good and no substantial impairment to the zone plan and zoning ordinance of the municipality. In this case, he said it was dealing with the omission of commercial uses and multifamily uses from the RA zone and whether allowing them would substantially impair the master plan and zoning ordinances. Mr. Grygiel said regarding the issue on what proofs need to be addressed is with the affordable housing if it was inherently beneficial as to whether in New Milford it should be considered in the same context as other municipalities. He added there has been testimony from the applicant as to non-compliance with COAH issues but it was the Board's determination as to whether this was a valid issue to consider. The planner said there were D variances for height and the relevant standards come out of the Grasso v Spring Lake Heights court decision whether the proposal relates to the purposes of height limitation and whether what is proposed is consistent with the character of the area. The other possibility was that there was some type of hardship that the height restriction prohibits the use of a property for a conforming structure. The negative criteria must also be addressed for the d(6) height variance.

Mr. Grygiel said the C variances the applicant seeks needs to demonstrate there was a c(1) hardship variance due to shape and topography and the applicant can seek a c(2)relief where certain purposes of zoning are advanced by granting the variance and the benefits of the variance outweigh any detriments. These benefits must be to the community as a whole not just to the property owner. Mr. Grygiel said the parking variance was the only one that needed to independently be addressed as a C variance. The negative criteria must be addressed for C variances. He added the signs could be dealt

with under the use variance because single family residential had different standards for signage. The Board Attorney clarified that the only C variance that needed to be considered independently was parking. Mr. Grygiel agreed.

Mr. Sproviero said at the last hearing he recalled the applicant stated that the Board must as a matter of law approve this application. The Board Attorney commented that he wished it was that simple but it was not. He agreed with the applicant in his closing remarks that it you could not make this application based upon your emotions or you cannot make a determination with regard to this application based upon what you thought was the popular thing to do. The determination must be on the basis of the findings of facts and it has to be something that was fact and record driven and based upon what has been heard over the last two years by way of the evidence induced in this proceedings and not so much the emotion of the situation. Every member of the Board must apply the law to the facts as they find them. The Board Attorney said the members had determinations to make on various levels. Those determinations include what the applicable law is, how the law should be applied and what you find to be the facts of record based upon your assessment of the credibility and competency of the evidence presented to the board and apply that evidence to the law. The Board Attorney said if anything in this application was uncontroverted it was the notion that the more things change the more things stay the same. He said from the time they first opened this public hearing, the scope of the application has changed and changed again and changed back to a previous change. The Board Attorney noted that the members were presented with a moving target with respect to the specifics of application towards development. Mr. Sproviero said at this juncture he believed it was clear what the applicant seeks and it was as Mr. Grygiel had outlined to the Board. It was a use variance, height variance and a C variance for parking with respect to the mixed use inclusionary development involving a retail supermarket, bank and 24 low to moderate income housing units. The Board Attorney said he submits to them that contrary to the legal analysis that was presented by the applicant, the applicable law as to how the legal status of what an inherently beneficial use in the context of this MXID has also changed. The Board has been asked over and over again throughout the course application if the development scheme presented to them for consideration in its totality is the case of the "tail wagging the dog". When the application commenced in February 2012, such a question was arguably but debatably possible. However on November 1, 2013 the Appellate Division issued a determination in the Advance at Branchburg lawsuit and the court established a scope of inquiry to be applied in those incidents where inclusionary development was to be asserted in its totality entitled to recognition as an inherently beneficial use and subject to evaluation and determination in accordance with the standard applied by the NJ Supreme Court in accordance with SICA v Board of Adjustment of Wall. Mr. Sproviero's opinion was that the Branchburg's court has defined with specificity what they should be looking at with respect to whether the application should or should not be looked at as an inherently beneficial use. The Branchburg decision said the legislation has defined inherently beneficial use as one *which was universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare. Such a use includes, but is not limited to, a hospital, school, child care center, group home or a wind, solar or photovoltaic energy facility or structure. N.J.S.A.*

40:55D-4. An inherently beneficial use is evaluated under the standard set forth in Sica v Board of Adjustment of Township of Wall…,which calls for a balancing of the positive and negative criteria against one another, taking into account the public interest involves, the detriment to the community and possible conditions the board can apply to mitigate any detriment. The applicant under this more relaxed standard need not satisfy the "enhanced quality of proof" set forth by the Court in Medici. Mr. Sproviero said he indicated that the Appellate division of Branchburg offers specific guidance with respect to when an inclusionary development such as that presented by this application is susceptible to consideration as an inherently beneficial use under Sica standard. It was the Board Attorney's view that the Branchburg court answered a pertinent question that if "the tail was wagging the dog" is the entirety of the beast inherently beneficial. The Board Attorney said it was his opinion that the Branchburg court advised that the tail shall not wag the dog. In Branchburg the appellate decision instructs that the Board must look to the predominant use to determine whether the proposed application for development in its totality involves a project susceptible to recognition as an inherently beneficial use. He added that the legal arguments advanced by the applicant in the Branchburg case were similar to those advanced by NMRA in the context of this application. Only through the economic benefit could be derived from the retail component of this application can the financial viability of the affordable housing component be realized, said Mr. Sproviero. The Board Attorney read from the Branchburg decision that *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.* He added as was case in the Princeton case and in the Branchburg case they said *we do not find that reasoning persuasive. In Medical center, we remanded and focused the decision-making process on the function of the relatively small number of back-office units in relation to the core healthcare purposes of the larger hospital. We opined that, although some of the units might appropriately be built in the residential zoned area adjacent to the hospital because of the integration of their function with the operation of the hospital and the need for close proximity to it, others might not. However, it was the larger beneficial use that potentially permitted the smaller non-inherently beneficial uses in the residential zone. There is nothing in our opinion to suggest that the analysis we established would be applicable where the predominant use is not the inherently beneficial one. In addition, we do not find the financial benefit upon which Advance relies, even if combined with the social benefit of mixed income housing, to be comparable to the relationship between the hospital and back-office operations on which we relied in Medical Center. There, the concern was whether the back-office facilities needed to be near the hospital on an ongoing basis so that it could function as a healthcare institution. Here, the issue is whether Advance needs to build a large, predominantly market-based development in the industrial zone to finance its ability to build a smaller number of affordable units in the same location. A developer's ability to build market-rate units undoubtedly facilitates its building of affordable housing financially, and the mixture of affordable and market-rate housing may well provide benefits to the residents of both. However, we see no basis under our current statutory or decisional law to hold 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 purposes of obtaining a (d)(1) variance under circumstances such as those existing here. The Board Attorney thought that this is closely analogous to what this case presents. He said they heard hours of testimony from Dr. Kinsey concerning whether it was or wasn't an inherently beneficial use or whether New Milford was or was not in compliance with its affordable housing obligations and he felt it was irrelevant. His reasons were in whether New Milford was incompliance or not with its affordable obligations, low and moderate income housing was an inherently beneficial use. The question was what was the predominant use and is this a piece where the retail and banking component is integral to the success of the project in order to establish the financial sustainability of low income housing or is the predominant use a retail complex comprised of a supermarket and bank and the affordable housing riding on their coat tails. The Branchburg case says to look to the predominant use and the Board Attorney advised the Board that their first level of determination that you make was whether the predominant use proposed in this application is entitled to inherently beneficial use status. He said is this a case where the predominant use is that of the creation of low and moderate income housing being financially driven by a larger retail component or was this the case where the predominant use was that of a retail component consisting of a supermarket and bank being justified by the inclusion of low and moderate housing. He said if your answer was that the predominant use is low and moderate income housing you must apply the Sica standard. However, if the answer was the predominant use is the retail component that justified the inclusion of the low and moderate income housing, the standard applied would be the Medici standard which would implicate the particular suitability of the property to the proposed project.

Mr. Sproviero said in the Branchburg decision regarding positive criteria the court has stated *that special reasons takes its definition and meaning from the general purposes of the zoning laws. We observed three situations in which special reasons may be found: (1) where the purposes use inherently serves the public good, such as a school, hospital or public housing facility; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because the proposed site is particularly suitable for the proposed use…All use variance applicants must satisfy the first prong of the negative criteria, which requires proof that "the variance cam be granted without substantial detriment to the public good." In addition, any proponent of a use that is not inherently beneficial must satisfy "an enhanced quality of proof: that requires "clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance. These findings "must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district".*

The Board Attorney wanted to discuss an objector's argument regarding a motion to dismiss this application which motion was denied on his advice that no such procedure existed under the MLUL to dismiss an application for the land use board conducted a court hearing and made a determination on the merits of the application. Objector's

counsel asserted that this application was more a request to rezone the property more than the use variance and such the board should decline to hear the application. The courts have spoken to that issue in the Kinderkamack Road Associate, LLC v Mayor & Council of Borough of Oradell where the appellate decision found *because of the legislative preference for municipal land use planning by ordinance rather than variance, use variances under N.J.S.A. 40:55D-70(d)(1) may be granted only in exceptional circumstances.* The Board Attorney said the court draws attention to *Funeral Home Mgmt., Inc. v Basralian stating that "only exceptional cases warrant use variances". Therefore, a municipal board of adjustment may permit" a use or principal structure in a district restricted against such use or principal structure" only where the applicant can demonstrate special reasons for the variance. This requirement is known as the "positive criteria". In addition, a variance application must meet the "negative criteria," by showing that the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.*

The Board Attorney believed that was the law and he did not intent to get into a specific summarization of the months of testimony. The Board was aware of the witness, heard and questioned the witnesses and he was not here to suggest to the Board what they should find as facts but he was here to give guidance with regard to the issues of law that has been presented to them.

Mr. Sproviero read from the Branchburg decision notes that their standard of review requires the court *to recognize the board's knowledge of local* circumstances *and accord deference to its interpretation….* and the court shall refrain from *"substitute (our) own judgment for that of the municipal board invested with the power...to pass upon the application."*

The Board Attorney suggested as Board Members they were here because of their knowledge of the particular circumstances that involve their community and that they can apply that knowledge in assessing competency and credibility of the testimony they heard. He urged the members to discuss the issues of facts, questions on law and standard of review and in meaningful discussion amongst themselves on what they think was credible and apply those findings to the law that controls this case. He said the job the members have done was admirable and it was what sets this board apart from many of land use boards in Bergen County. He commented on the Board Members dedication and attention to the issues raised before them. The Board Attorney urged the members to maintain those same standards of excellence that they have displayed throughout this application as they deliberate with regard to the relief being requested by the applicant.

RECESS

The Board Attorney asked Mr. Del Vecchio if he would seek to bifurcate any aspect of the application and divide the vote into separate votes for separate reliefs sought or was he seeking one vote for the entirety of the relief being sought. Mr. Del Vecchio said he would leave it to the Board as to best decide how to tackle the application.

Ms. DeBari asked the Board Members if they have any questions.

Mr. Loonam did not know if it was the Board's responsibility to determine whether or not the Board should bifurcate. He felt that was the applicant's request and if they were not requesting it Mr. Loonam did not want to consider it. The Board Attorney agreed but said there is one aspect that perhaps the Board should take into consideration prior to a vote on the application as a whole. It related to the issue whether the entirety of the project viewed in the totality entitled to an inherently beneficial use status. The applicant's position was it must be because they can't have the affordable housing without the economic viability provided by the retail component. The other side to that was when you look to the totality of the project is the predominant aspect project as discussed in the Branchburg case susceptible to inherently beneficial use consideration. Mr. Loonam said if the applicant was not requesting the Board to consider it, he did not see why the Board would or should divide up any portion of the application. The Board Attorney said the Board had to determine what standard this case would be decided on. Whether it would be determined in accordance with Sica or Medica required a finding a fact by the Board that this was either in its totality an inherently beneficial use or not. That is a stage one finding of fact that had to be made then you would apply the appropriate standard to the relief being sought. He added that initial finding of fact drives the entirety of this Board's determination. The Board Attorney added that would be count one in the complaint. Someone would be filing the complaint and someone would not be happy with the standard used, said Mr. Sproviero.

Ms. DeBari said if the Board found this application not inherently beneficial would it be left at that. The Board Attorney said then they would apply the Medici standard which involves particular suitability. He added if they found the entirety of the project is inherently beneficial they would be applying the Sica standard. The Board Attorney explained once you make a determination that it is an inherently beneficial use you have the positive criteria satisfied, then move to the analysis of the negative criteria and then balance that. Ms. DeBari asked if he was suggesting to bifurcate the application. The Board Attorney said they had to make a finding of inherently beneficial or not inherently beneficial and then make a determination as how to apply each standard.

Ms. DeBari thanked the New Milford residents and surrounding towns that have been attending the meeting. She said their commitment to this application has been extraordinary and in the 21 years she has served on the Board she has never seen a group of people with the passion and intellect that they showed. Ms. DeBari said it was obvious that the residents have taken time and effort to investigate each matter and presented it to Board in a professional manner. The knowledge that they brought to the Board was very helpful. Ms. DeBari also thanked Mr. Del Vecchio, Mr. Alonso and Mr. Flora for their professionalism throughout these proceedings. She understood this application has been difficult and believed everyone should be applauded for their self-control and manners.

Ms. DeBari said in making a decision on this application it was the duty of this Board to look at look at the entire picture. They must weigh the negative and positive criteria, the

facts presented by the applicant and their professionals and the facts from the objectors and felt she had done her due diligence. Ms. DeBari said this application from the onset was baffling to her because before this they had approved an application to build a new Shop Rite at its present location along with a bank also presently at the site. After two years testimony from the applicant's experts, changes, revisions and deletions made by the applicant at the suggestion of the Board and the objector's attorney, that application was approved. Aside from the Dorchester apartments who objected to the application, there was not one other person from this community that attended the meetings. Ms. DeBari believed the reason was because that prior application made sense. She said the supermarket was located there for years, the apartments were across the street, easy access for the people in Brookchester and New Milford Village and it was in the correct zone. Ms. DeBari noted that when this application was before the Board, the members knew how many aisles would be in the new Shop Rite, the placement of every specialty department and they knew that Mr. Inserra would make sure all the employees would be moved to other locations and provisions would be made for residents in the apartments during construction. Ms. DeBari said this was a good neighbor but the objector appealed the Board's decision and took this to court. Months later, they returned to the Board and reviewed the application and in one meeting the applicant and objector made a minor adjustment to the plans and it was approved.

The application now before the Board needs a unanimous approval, said Ms. DeBari. The Board Members have been asked to approve a plan consisting of a 70,500 sf building, a bank and a 24-unit complex on the site owned by United Water in a residential zone. It was a site that was directly across the street from the Hackensack River known to flood with storm events. A site, which they were to believe would have no impact and perhaps improve the flood situation that presently plagues this town and many of the residents who live downstream. Ms. DeBari believed that an approval of this application would be a detriment to the town and would change the course and direction of the town forever. She added that this property had a history of flooding and commented that the applicant's plan has provisions for deliveries to the store when there was a flood incident at the site. The applicant made provisions to make sure their property was flood free by the huge water detention basin at the site but no concern with the residents whose homes and lives would be effected when there is another flood incident. Ms. DeBari thought this was about a developer and an applicant just looking at the dollar sign and having a "public be damned attitude". There was a saying Ms. DeBari said "a picture was worth a thousand words". She added there were no words that could describe the pictures seen throughout these proceedings. Ms. DeBari believed the negative criteria overwhelmingly outweighed any positive criteria that the applicant said exists. She did not believe this applicant has met its proofs. There were issues presented to the applicant that were never addressed. A few of Ms. DeBari's concerns were traffic at Demarest/River Road, the fact that Demarest Avenue would be a pass thru street if the project was approved, no sidewalks on Demarest and surrounding streets used daily by the students, the noise level at the site, increase of traffic and the impact on the infrastructure. Ms. DeBari's opinion was this application was one of "smoke and mirrors" and never knew what to expect from one meeting to the next. What started out as an application for 221 units, bank and 70,500 sf building was changed to 24 units, bank and 70,500 sf building and changed again when

there was an offer on the table to donate two acres of land to the school for a field and changed back because the property was not suitable for water retention by the river. Ms. DeBari questioned why that wasn't looked into before the proposal. She believed that the changes proposed were due to the constant appearance of the public that raised questions to the experts and were prepared with knowledge and information questioning each experts testimony. Ms. DeBari stated she had no idea what the other Board Members would say and did not know how they would vote but thought this Board has demonstrated their commitment to this borough by attending many meeting or listening to recordings of missed meetings. Ms. DeBari thanked the public and said they have been instrumental to the Board and the borough. She hoped the applicant might rethink their position and put the best interest of their residents first. Ms. DeBari wished that the applicant would have the foresight to realize the devastation that building this monstrosity would cause the town. Ms. DeBari also thanked the Board Attorney for his expertise and guidance that has helped the board for many years and she was confident if this decision was appealed they would be well represented by him.

Mr. Ix said he sat on the Board for 14 months and listened to 11 months of recordings. He felt the overwhelming problem was the flooding in town with many New Milford and Oradell residents providing pictures and videos to substantiate that the area floods during storms. He said there were pictures of flooding up into the high school and added that basic physics says water runs downhill. Mr. Ix said if a straight line was created from the parking lot behind the CVS building across the back of high school, Cecchino Drive, the subject property and out to Main Street more than half of the subject property would be underwater during a major flood event when the berm was removed. He stated that the water retention basin located at the southwest corner when filled to capacity would overflow going downstream and impact those residents. Mr. Ix said when the basin begins to recede the water would go downstream and questioned why the basin was not put at the highest area of the subject's property so when it leaches off the water runs on the ground of subject property first. He felt this could have been accomplished by underground piping. Mr. Ix felt the two feet of fill onto the property was because the applicant was concerned about the flooding on their property and added all the fill would displace the water on the subject property to another area downstream. Mr. Ix said there is houses under construction now in New Milford that have a substantial grade change from one side of the property to the other and none have proposed to change the grade. He said the only reason the applicant was proposing 2' of fill was because that was all the land use laws in New Jersey would allow.

Mr. Ix said if the application was approved it has been determined that the intersection of Madison/River would need to be widened on both sides of the street totaling about 11'. On the eastbound lane of Madison Avenue, there was a liquor store approximately 10' from the curb and questioned if the building would have to be condemned because of eminent domain to accomplish the road widening. He asked about the loss of jobs and ratables for the town. He said the same scenario would be for the gas station property. Mr. Ix said when resident's property is claimed under eminent domain their taxes should go down but the town tax burden remains the same. Mr. Ix said every New Milford taxpayer would have the burden of the lost ratables caused by the eminent domain.

He thought it was hypocritical that the Board of Education was not here and added the Board of Education had a vested interest in this because they were going to get a field and a lump sum of cash but that didn't work. Mr. Ix said with the previous Shop Rite application at the existing location, Mr. Inserra was going to absorb the entire cost associated with the installation of a traffic light at Dilworth/River Road and questioned why that was not same here.

Mr. Ix said they were relying on 34-year old flood maps but it floods and added that with the 438 parking spaces, curbs and sidewalks the water would run downhill. He added that the flooding was a substantial detriment to the public and said the negative criteria far outweighed the positive criteria.

Mr. Denis thanked the New Milford residents for the way they presented themselves. He said this project was not beneficial for the town and after two years of hearings and listening to professionals who went by books and texts it did not support the reality of what this area undergoes. Mr. Denis said that flooding is evident in the hundreds of photographs presented by the residents. The proposed housing was not beneficial to the people in low income housing between a bank and a super Shop Rite. He felt it was a disservice to what the State wanted for low-income housing. He felt the traffic studies performed failed to show the reality of what a high school student should have to endure to go to and from school. Mr. Denis added that these roads were never made to sustain this volume of traffic and removing the berm would increase flooding. The past flood maps have changed because debris and soil have lessened the river basin over the past 35 years. Mr. Denis said this plan would negatively influence the beauty of their town.

Mr. Rebsch said Mr. Steck, the applicant's expert, described the property as industrial. Mr. Grygiel stated the property was formerly used for actions relating to water treatment processes. Mr. Rebsch's knowledge of the property was that the level of activity and traffic from the utility workers was negligible and the forest buffered their activities from neighboring properties. The subject is currently undeveloped and vacant and not generating any traffic as testified to by Mr. Grygiel and Mr. Steck also stated the property is vacant. The applicant was proposing a 70,500 sf supermarket with parking and a loading area, a three story multifamily residential building with parking, a 4,300 sf drive thru bank and parking lot and a large above ground detention basin with parking totaling 438 parking spaces.

Mr. Rebsch said the current site was located in the RA residential zone which permitted one family dwellings, public parks and public recreation grounds. The three proposed uses of the development are not permitted in the zone. A D1 use variance, D6 height variance and C variances are sought. He added the proposed buffer needs to meet the requirement of preventing impairment to the adjacent property and he did not think the buffer was adequate to meet the requirement. The multifamily building is located to the rear of the bank building, which does not meet the RA zoning requirement that no dwelling be construction in the rear of a building on the same lot and no variance was sought.

Mr. Rebsch stated the most recent master plans have varied recommendations for land uses and development yields on the subject property, including using that land for development and open space. The master plans support both the applicants and objectors desires. Some of the documents seem to indicate a direction but because the direction changes, is changing or never manifested speaks to the will of the governing body. The objectors also presented that the master plan states New Milford is a fully developed community with few areas remaining for providing open space and recreation opportunities, the parks and recreation areas have been identified as inadequate in comparison to standards used by the state comprehensive outdoor recreation plan. Dr. Kinsey said that New Milford lacks sufficient vacant land and the subject property is one of the last remaining large parcels in New Milford. To approve such an intense use of this property in order to satisfy a small part of their COAH obligation, would increase the gap between existing open space and the need for that type of land set by national standards. The need of the 16,000 residents should come before the needs of 24 nonexistent tenants.

Mr. Rebsch said the master plan says *that measures should also be taken to preserve the open space and prevent the development of those sites where significant environmental constraints are present, specifically those areas adjacent to the Hackensack River.* He said the southwestern corner of lot 1.02 is located in the Flood Hazard Area as determined by DEP, the Hackensack River bypass is located about 50 feet west of the northwest portion of the subject property and the existing land use map shows almost the entire subject property in the 100 year floodplain although no source is cited for this determination.

Mr. Rebsch discussed the granting of a d(1) variance if the use was inherently beneficial. He said *inherently beneficial use means a use which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare*. Mr. Rebsch said the proposed use is not universally considered of value to the community as testified by objectors and by Mr. Del Vecchio, in his letter brief to Judge Carver, therefore it cannot be considered inherently beneficial. Mr. Rebsch felt the determination of whether the affordable housing use is inherently beneficial is a legal determination since it is not specifically listed. He added Dr. Kinsey testified that mixed-use inclusionary development was not cited in the MLUL as being inherently beneficial. Mr. Rebsch said that Dr. Kinsey testified that with the substantial contribution of low to moderate income housing units a plain mixed-use development would not be an inherently beneficial use. At the time of this testimony the applicant was proposing 40 affordable units. He added that Dr. Kinsey originally testified that the applicant set aside 33 units to satisfy New Milford's low income housing obligation. Dr. Kinsey also testified that the implementation of the commercial component of the proposed development generates an increased need for affordable housing units increasing it to 40 units. Mr. Rebsch noted the applicant downsized their contribution to 24 units and questioned if a contribution can be considered substantial if only 24 units are being offered and some of those 24 affordable units have to be used to satisfy the increased need generated by the proposed supermarket and bank.

Mr. Rebsch said the applicant made significant changes to his application, the architect testified that it may or may not be a Shop Rite, the bank is largely an unknown tenant and the apartment building was downsized to 24 affordable income units He thought the applicant was looking to develop the property not seeking to develop something particular.

Mr. Rebsch discussed if the site is particularly suited for the use so to promote the general welfare. He said no testimony was offered as to why this particular piece of land would specifically suit any of the three uses except that it is a big piece of land. The applicants expert testified that the site was peculiarly suited which is exactly opposite of particularly suited. Cited examples of existing MIXD did not require a use variance as the mixed uses of each were permitted by zoning so these comparables are irrelevant, said Mr. Rebsch. The Board Member stated that the applicant must demonstrate that the variance can be granted without substantial impairment to the intent and purpose of the zone plan and zoning ordinance of the municipality. The three proposed uses are not permitted in the zone which is the reason the applicant is seeking a d(1) use variance. The applicant is proposing a supermarket, apartment building and bank in a RA zone and Mr. Rebsch said none of the recent master plan document recommends the mix of uses proposed by the applicant.

Mr. Rebsch added the applicant must demonstrate that the variance can be granted without substantial detriment to the public good. Mr. Rebsch stated that Dr. Kinsey analyzed the first three criteria for identifying inherently beneficial uses based on the Smart SMR case stating his opinion under the first three criteria that this proposed MIXD was an inherently beneficial use. Dr. Kinsey testified that he was not asked by the developer to consider any negative criteria. Mr. Rebsch said his analysis was incomplete. Mr. Rebsch commented that no relief may be granted unless it was without substantial detriment to the public good and without substantially impairing the intent and purpose of the zoning plan and ordinance and Dr. Kinsey agreed. He said that Dr. Kinsey wrote his own definition of inclusionary development and proposed his own standards for the Board to consider for evaluation the inherent benefit of a MIXD. Dr. Kinsey testified this was his first time that he testified to the inherent benefit of a development. Mr. Rebsch thought the witnesses presented by the applicant were not credible and the public evidence and comments showed that there would be substantial detriment to the public good.

Mr. Rebsch said the criteria for determining if a use is inherently beneficial in the Smart SMR court decision was whether the proposed facility would be used strictly for commercial purposes. Mr. Rebsch commented that the supermarket and bank are commercial and the apartment building is residential. He added that New Milford has 4 banks and a Shop Rite. There are about 10 more supermarkets within a 5-mile radius, additional banks and housing complexes. New Milford has an existing diverse housing supply with over one third of the towns housing stock are comprised of multifamily units and a number of these market rents may be in line with COAH rents.

Mr. Rebsch said the proposed building height of the supermarket and apartment complex maximum number of stories, families per building and number of parking spaces exceed maximum permitted. He noted there would be an adverse impact to the residential properties since there is no practical way to buffer these building heights. Mr. Rebsch stated that based on those criteria the supermarket and bank are not inherently beneficial and the apartment complex is independently inherently beneficial. He said if the Board finds all or part of the proposed development to be inherently beneficial, Sica indicated that a 4-part test must be applied. One was to determine the public interest at stake and how the use rates on scale of such uses. Mr. Rebsch said there are high school students adjacent to the southern side of the development, a senior center on the eastern side to consider, the ambulance corp. north of the development, residential homes surrounding the property as well as the homes downstream of the development. The existing supermarket on the south end of town is significantly smaller than the one proposed and the apartment complex exceeds the maximum permitted stores and number of families per building in the zone but is otherwise within scale. The three uses would be the largest development in town if permitted. The evidence and comments presented by the public showed there would be substantial detriment to the public good. A forested buffer could be imposed to limit impact. Traffic generated would require removal of heritage trees, widening of roads, loss of property frontages and safety issues to students, seniors and emergency responders. There would be a loss of open space and it would significantly change the character of the neighborhood. Mr. Rebsch said a development of this scale belongs in a commercial zone away from schools and residential homes.

Mr. Rebsch stated the impacts on the community would be significant, even with mitigating amendments. He said regarding balance the bad outweighs the good. Dr. Kinsey and Mr. Steck testified that New Milford has a constitutional obligation to the 24 tenants but he added that New Milford has a greater constitutional zoning obligation to protect the residents from zoning impacts. The Board Member stated for a d(6) variance the applicant must demonstrate how the proposal related to the purposes of height limitations and be consistent with the character of the area. This property has four frontages so the height may be consistent with the school while not be consistent with the properties to the north and east. The three non conforming structures are not permitted in the zone.

The MLUL permits a board to grant variances from bulk regulations of a zoning ordinance and other zoning deviations that do not require a D variance. He explained a c(1) variance is for cases of hardship and a c(2) variance may be granted where the purposes of zoning are advance and the benefits of deviating from the ordinance requirement outweigh any detriments. The benefits derived from granting a c (2) variance must include benefits to the community as a whole. An applicant must address the negative criteria for a C variance. Mr. Rebsch said the Board should consider the type and magnitude of variance relief being sought both individually and cumulatively. He said the Advance at Branchburg decision affects how a Board of Adjustment review use variance applications that include an affordable housing component. The court held that *the addition of affordable units to a proposed development in which most of the proposed units are market rate housing does not make the entire project inherently beneficial.* The

Branchburg decision also clarified that in the analysis in the Medical Center at Princeton case said a *larger beneficial use that potentially permitted the smaller non-inherently beneficial uses in the residential zone* but also said this analysis was not applicable *where the predominant use is not the inherently beneficial one.* Mr. Rebsch noted that the applicant is proposing two commercial uses as a subsidy for the 24 units of affordable housing, the smaller use is proposed to permit the bigger noninherently beneficial use in the residential zone and the predominant use of the development is not the inherently beneficial 24 unit affordable housing building.

Mr. Rebsch discussed the COAH obligations citing questions from board members and the public and answers from the experts. Mr. Rebsch stated some negative impacts would be a significant increase of traffic by the necessity of road widening, a threat to home frontages, pro rata share to widen the road, increase in travel time, removal of heritage trees, displacing wildlife, delayed response time from emergency responders, massive supermarket in RA zone, loss of open space and plant life, pollution, air particulate picked up from previous contaminants at site, students exposed to construction noise and dust, students crossing to track, young drivers dealing with traffic and trucks and the potential increase to flooding.

Mr. Rebsch acknowledged the inherent benefit in affordable housing but he was not convinced by the testimony that a development of this size and nature would not significantly impact the residents of New Milford. Mr. Rebsch disagreed with Mr. Del Vecchio's closing statements that none of the neighboring property owners were present and he named neighboring property owners that were present. He questioned why the applicant never produced a New Milford resident who spoke in favor of this application.

Mr. Loonam stated that his opinion or any board member's opinion did not matter in terms of whether or not they want a brand new state of the art Shop Rite in town. The application has been the longest and most detailed application that he had been part of in his years on the board and probably the longest and most detailed in this boroughs history. It requested the most intensive use he had ever seen proposed and it required the utmost attention and consideration of all the details of this application. He stated that both Mr. Eisdorfer and Mr. Del Vecchio stated during their summation that board members were charged with interpreting data and testimony and applying the law. Mr. Loonam stated that their job is to put aside any personal feelings about an application and to judge it on its merits noting the applicant's attorney said to do the right thing and make the right decision by considering the facts and testimony of the expert witnesses. Mr. Loonam said they must be void of any emotion, public sentiment and focus on the facts and evidence introduced and cross-examined. Mr. Loonam commented on the tremendous amount of testimony and cross examination there was throughout the application with both applicant and objectors asking the board to contemplate many things in many ways. He added that the initial application requested a use variance and bulk variances proposing a supermarket, bank and an apartment complex requesting hundreds of apartments with a set aside of forty low to moderate income units. He said after months of testimony on this proposal the board received a revision or amended application where the 200+ residential component of mostly market rate housing was replaced with 24 units of low and

moderate income housing. The Board was asked to consider this as an amended or new application. Board members accepted the applicant's request, though not unanimously, that this was an amendment and not a new application, said Mr. Loonam.

Mr. Loonam stated that months later, the Board faced another change in the plans and were given a conception plan in which a portion of the subject property would be donated to the BOE presumably for a sports field. He pointed out what never changed was the size or location of the supermarket, referred to by the applicant as the driving economic force. He said by virtue of all the modifications, amendments and concessions, with none of them for the supermarket, the Shop Rite is the focal point of the application. He further commented that by the same logic the bank is the secondary with the low to moderate housing unit assuming the role as a means to an end.

Dr. Kinsey's testimony on his pronged approach was that it was up to the board to decide and that he thought the board should consider them in their totality. Mr. Loonam agreed and thought the board needs to consider all aspects of this application in its totality. Mr. Loonam felt it was Mr. Steck's position that 24 low to moderate housing units justified the entire project because of his testimony that if this application proposed no COAH housing element but just a supermarket the application would not be viable. Mr. Loonam found Mr. Dipple to be informative and a credible witness with his testimony echoed by Ms. Batistic. There was no choice but for him to rely on their professional testimony stating that the downstream flooding would not be exacerbated by the development, said Mr. Loonam.

Mr. Loonam said objectors pointed out that one thing may not make a difference but the totality of all that is added collectively does. He felt their job for this application is not to contemplate collectivity but rather focus solely on the proposals of this applicant. In this case, Mr. Loonam said the board cannot really take that collectively or totality into consideration. The planning board's job was to determine the impervious coverage in an area or zone. The Zoning board's job is to consider allowing relief from land use. Ms. Dolan testified to the traffic studies and Mr. Tombalakian corroborated for the most part those findings. Mr. Loonam did not see how they came to the same conclusion, did not necessarily think they were right and was never completely satisfied with the answers to questions but as the applicant's attorney pointed out, unrefuted testimony must be accepted. Mr. Loonam was compelled by his sworn oath and law to accept that testimony as being accurate and to put aside any individual feelings he may have as to the validity of those findings. He had no reason to dispute the architectural expert testimony and found nothing problematic with it.

What Mr. Loonam did find problematic was Mr. Del Vecchio's summation stating that those neighbors closest in proximity to this development were essentially conspicuous by their absence. Mr. Loonam would not consider this point without being able to ask these neighbors questions as to why they offer no opinion. He also said that the BOE at one time attempted to enter into a deal with the applicant but this board had no idea what the terms of that agreement were and were only aware of a conceptual amendment. The

Board also did not know if there was any other deal made or any currently in negotiation with those parties. He rejected the notion that any board member should speculate as to what any party thinks.

The 24 low to moderate income housing units may not serve to satisfy their obligation under the fair share housing plan and may even be a detriment to the borough ever being able to fulfill a fair share plan but in a vacuum, Mr. Loonam said 24 units is an inherently beneficial use. Mr. Loonam pointed out this is not a vacuum and Dr. Kinsey said to view things in their totality. The board could not ignore that the 24 units make up approximately 20 percent of the proposed project and as with the Branchburg ruling, it was Mr. Loonam's opinion that the 24 affordable units do not make the entire proposal inherently beneficial.

Mr. Loonam pointed out that the supermarket could be replaced with unacceptable uses such as a racetrack, car dealership or manufacturing plant by using the logic that an economic driving force is needed saying the supermarket is then also inherently beneficial or that the inherently beneficial portion of the application makes any economic driving force inherently beneficial. He also rejected Mr. Steck's peculiarly suited testimony. He added the property is in a mostly residential neighborhood adjacent to a school. The adjoining businesses are converted houses and what appears to be a garage. If approved, the supermarket and the bank would be the only two businesses on the block that were built as commercial structures for commercial uses. The infrastructure is not remotely well suited, said Mr. Loonam adding that he was not certain that any property that includes plans for a massive retention basin could be particularly suited for any development attached to it.

Mr. Loonam accepted the expert testimony that property values will not be adversely affected. What he found troublesome was the quality of life for the surrounding neighbors and forever impacting the character of the neighborhood both during and after the construction is complete. The most troubling aspect, Mr. Loonam had was the unrefuted testimony of Mr. Tombalakian. He informed the Board that there was a probability of a need for road widening that could require acquisition of personal property by eminent domain. There is no greater substantial detriment, said Mr. Loonam than to force a man to sell his land. The mere possibility of unsolicited land acquisition would ameliorate any gains and any inherent benefit that would be achieved by construction low to moderate-income housing, said Mr. Loonam.

Mr. Loonam stated that the approval of this application would be the catalyst for eminent domain. He added if not for this application having the supermarket, there would be no potential need to invoke eminent domain. If just the housing element were proposed, the eminent domain threat would be non-existent. He said if property needs to be acquired via eminent domain, it could create another unwarranted problem for homeowners in the area. Homes that are currently on a standard size lot could potentially create future construction issues for the homeowners. Their current lot coverage and impervious ratios would increase the moment part of their property were taken. The real estate expert had not contemplated this when saying property values would not be affected, said Mr.

Loonam. Mr. Loonam also found troublesome was the unwillingness of the traffic engineer to study various intersections as requested, Shop Rite's unwillingness to give the board data on where the current Shop Rite customers come from through price plus registration and Dr. Kinsey creating non accepted industry standards in an attempt to justify his opinion.

Mr. Loonam commented on the totality of this application. The Board is asked to vote on whether or not a supermarket, bank and 24 units of low to moderate incoming unit should be allowed in a RA zone on a property that has experienced catastrophic flooding in the immediate area on more than one occasion. A property that is next to a school and in a vastly residential neighborhood. A property which has a previous environmental concern and has been alleged to house endangered wildlife. Many trees would have to be cut down and a property with no recreation for its residents and very little grass for children. A property that if developed would forever change the character of the neighborhood, increase traffic and could jeopardize student and resident safety. It would force streets to be widened and perhaps eminent domain invoked all for a proposed development where a minority portion is inherently beneficial. Mr. Loonam concluded by saying this is a classic case of "the tail wagging the dog". This application is not about low and moderate-income housing or unmet COAH obligation. Mr. Loonam said this is about building an out of place mega supermarket and using a small portion of the property as a portal to achieve that goal. He added this application fails to meet the standards of the law but also common sense. Mr. Loonam said it is the prototypical example of an attempt to zone by variance.

For these reasons, Mr. Loonam said he would like to make a motion:
Motion made by Mr. Loonam, seconded by Mr. Ix to deny the applicant's request for the d(1) use variance thus eliminating the need for the d(6) and attached C variances. The Board Attorney clarified a vote to approve the motion was a vote to deny the application.

The motion passed on a roll call vote as follows:
For the motion: Member Loonam, Ix, Denis, Rebsch, DeBari
Against the motion: none
Recused: Members Binetti, Hadodo, Schaffenberger, Stokes
Denied: 5-0

Ms. DeBari said she found that the predominant use was not the inherently beneficial low-income housing, the property was not particularly suited for the development proposed by the applicant given the incidents of flooding, the dangerous percentages of pedestrians given the traffic conditions and impacts that this development would have upon the character of the neighborhood.

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

Respectfully submitted,
Maureen Oppelaar