

**THE BOROUGH OF WATCHUNG**  
**Planning Board**  
**Regular Meeting**  
**June 15, 2021**

**OFFICIAL MINUTES**  
**Adopted 7/20/21**

Chairwoman Tracee Schaefer called the Regular Meeting to order at 7:30 p.m.

**ROLL CALL**

Ms. Tracee Schaefer, Chairwoman  
Mr. Donald Speeney, Vice Chairman  
Mr. Keith Balla, Mayor  
Mr. Pietro Martino, Councilman  
Ms. Ellen Spingler, Secretary  
Mr. Al Ellis (Absent)  
Ms. Karen Pennett  
Mr. Steve Pote  
Mr. Paul Fiorilla

Mr. Troy Sims  
Ms. Yvette Nora  
Mr. Francis P. Linnus, Esq.  
Mr. Mark Healey, PP  
Mr. Ricardo Matias, PE, Engineer  
Mr. John Jahr, Traffic Engineer  
Mr. Joe Fishinger, Traffic Engineer  
Ms. Theresa Snyder, Board Clerk

Chairwoman Schaefer read the statement indicating the meeting was being held in compliance with N.J.S.A. 10:4-6 of the Open Public Meetings Act, the Municipal Land Use Law requirements, and the recording of the Minutes as required by law. She also stated that in order to comply with the executive orders signed by the governor, and in an effort to follow best practices recommended by the CDC, the meeting was being held virtually for all board members, board professionals, the applicant, the applicant's professionals, interested parties and members of the public. The Board members identified themselves for the record. She then led the flag salute to the American flag.

**MINUTES**

On motion by Mr. Pote, seconded by Ms. Pennett, the minutes and transcript from the meeting held on April 20, 2021, were accepted and carried on voice vote.

On motion by Mr. Fiorilla, seconded by Mayor Balla, the minutes, transcript, and the reconstruction of the lost minutes from the meeting held on May 18, 2021, were accepted and carried on voice vote.

**APPLICATIONS**

**CASE NO.: PB 19-02; THE LEARNING EXPERIENCE**

**100 UNION AVENUE**

**BLOCK: 7801 LOT: 1**

**REPRESENTED BY: Stephen F. Hehl, Esq.**

**BB ZONE**

**Expiration Date: 7/31/21**

*The contents of the hearing for the above referenced application is recorded in the below transcript.*

ADJOURN

The Board unanimously voted to adjourn the meeting.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Theresa Snyder', is written over the printed name.

Theresa Snyder  
Board Clerk

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BOROUGH OF WATCHUNG PLANNING BOARD.  
COUNTY OF SOMERSET - STATE OF NEW JERSEY

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REGULAR MEETING FOR:  
THE LEARNING EXPERIENCE  
BLOCK 7801, LOT 1  
100 UNION AVENUE  
CASE NO. PB 19-02

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TUESDAY, JUNE 15, 2021  
COMMENCING AT 7:30 P.M.  
TRANSCRIPT OF PROCEEDINGS  
VIRTUAL PUBLIC HEARING  
BOARD MEMBERS PRESENT:  
TRACEE SCHAEFER, CHAIRPERSON  
KEITH S. BALLA, MAYOR  
PAUL FIORILLA  
PIETRO MARTINO, COUNCILMAN  
YVETTE NORA  
KAREN PENNETT  
STEPHEN POTE  
TROY SIMS  
DONALD SPEENEY, VICE-CHAIRPERSON

ELLEN SPINGLER

ALSO PRESENT:

FRANCIS P. LINNUS, ESQUIRE, BOARD ATTORNEY

RICARDO MATIAS, P.E., BOARD ENGINEER

MARK HEALEY, P.P., BOARD PLANNER

JOSEPH FISHINGER, P.E., P.P., PTOE, TRAFFIC ENGINEER

JOHN JAHR, P.E., PTP, TSOS, BOARD TRAFFIC ENGINEER

THERESA SNYDER, BOARD SECRETARY

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A P P E A R A N C E S: (Via Video Conference)

JAVERBAUM WURGAFT HICKS KAHN WIKSTROM & SININS, P.C.

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--Counsel for the Applicant

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--Counsel for the Objector, Weldon Materials, Inc.  
A L S O P R E S E N T:  
GERRY GESARIO, P.E.  
Jarmel Kizel Architects and Engineers

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I N D E X  
ROBERT FREUD, P.E. PAGE  
DIRECT BY ATTORNEY HEHL 38  
CROSS BY ATTORNEY BUTLER 47  
PUBLIC COMMENT:

NAME ADDRESS PAGE  
None.

E X H I B I T S  
EXHIBIT DESCRIPTION PAGE  
A-14 State of New Jersey Flood Hazard  
Area Applicability Determination  
letter, dated June 7th, 2021

43

By the Board:

PB-1 Report from Green Brook Flood  
Control Project, prepared by U.S.  
Army Corps of Engineers,  
dated January, 2001

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1 CHAIRPERSON SCHAEFER: In accordance  
2 with the DCA requirements for emergency meeting  
3 protocol, this meeting is being held virtually for  
4 all board members, board professionals, the  
5 applicant, the applicant's professionals, interested  
6 parties and members of the public.  
7 Notice has been posted on the Borough  
8 website, at Borough Hall in compliance with DCA  
9 requirements for emergency meeting protocol, and has  
10 been given to the Echoes Sentinel, Courier News and  
11 The Star Ledger. Notice has been filed with the  
12 Borough Clerk.

13 And now we'll go on, and please all  
14 stand and salute the flag.

15 (Pledge of Allegiance.)

16 Theresa, roll-call, please.

17 BOARD CLERK: Mr. Ellis? Ms. Pennett?

18 MEMBER PENNETT: Here.

19 BOARD CLERK: Councilman Martino?

20 COUNCILMAN MARTINO: Present.

21 BOARD CLERK: Mayor Balla?

22 MAYOR BALLA: Here.

23 BOARD CLERK: Mr. Speeney?

24 VICE-CHAIRMAN SPEENEY: Here.

25 BOARD CLERK: Ms. Spingler?

5

1 MEMBER SPINGLER: Here.

2 BOARD CLERK: Mr. Pote?

3 MEMBER POTE: Here.

4 BOARD CLERK: Mr. Fiorilla?

5 MEMBER FIORILLA: Here.

6 BOARD CLERK: Mr. Sims?

7 MEMBER SIMS: Here.

8 BOARD CLERK: Ms. Nora?

9 MEMBER NORA: Here.

10 BOARD CLERK: Madam Chair?

11 CHAIRPERSON SCHAEFER: Here.

12 BOARD CLERK: Mr. Linnus?

13 ATTORNEY LINNUS: Here.

14 BOARD CLERK: Mr. Matias?

15 BOARD ENGINEER: Here.

16 BOARD CLERK: Mr. Healy?

17 BOARD PLANNER: Here.

18 BOARD CLERK: Mr. Jahr?

19 ENGINEER JAHR: Here.

20 BOARD CLERK: Mr. Fishinger?

21 ENGINEER FISHINGER: Here.

22 CHAIRPERSON SCHAEFER: Thank you. We

23 have a quorum to conduct business.

24 Chair seeks a motion to approve the

25 minutes and transcripts of our April 20th, 2021

6

1 meeting.

2 MEMBER POTE: So moved.  
 3 CHAIRPERSON SCHAEFER: Thank you,  
 4 Steve. Second?  
 5 MEMBER PENNETT: Second.  
 6 CHAIRPERSON SCHAEFER: Who was that,  
 7 Karen?  
 8 MEMBER PENNETT: Karen, yeah.  
 9 CHAIRPERSON SCHAEFER: Thank you.  
 10 Discussion?  
 11 All in favor?  
 12 MEMBER POTE: Very helpful. Having  
 13 this transcript is always so helpful to read through  
 14 before the meeting again.  
 15 CHAIRPERSON SCHAEFER: That's true.  
 16 Thank you, Mr. Hehl.  
 17 Okay, all in favor state by saying  
 18 "Aye."  
 19 MEMBERS IN UNISON: Aye.  
 20 CHAIRPERSON SCHAEFER: Anyone opposed?  
 21 Anyone not voting?  
 22 Okay. And as you all know, we had some  
 23 technology difficulties last month in May because  
 24 Theresa, unfortunately, had not turned on the  
 25 recording right away, and add insult to injury, the  
 7  
 1 court reporter had an issue as well. So Mr. Hehl  
 2 and Theresa were gracious enough to re-create  
 3 missing parts to the meeting.  
 4 So I'm going to read both details into  
 5 the record, one from Theresa and one from Mr. Hehl.  
 6 And then we'll discuss it, if anybody thinks that  
 7 we're missing anything. It was really only about  
 8 five to ten minutes that we missed, just the  
 9 beginning of the meeting.  
 10 So I'm first going to read Theresa's.  
 11 It says, one, entered public session from executive  
 12 session. Frank and I left for a minute. Three,  
 13 when we returned, roll call. Four -- I'm going to  
 14 ask everybody to please mute. A lot of background  
 15 noise. Four, Tracee outlined how we would proceed  
 16 for the evening, starting with Mr. Hehl responding  
 17 to our board professionals' memos. Five, Mr. Hehl  
 18 began speaking. Six, the court reporter began  
 19 transcribing. She missed very little of what he  
 20 said.  
 21 She did add a side note and I do have  
 22 to add it, she writes, "And that's my story and I'm  
 23 sticking to it."  
 24 So then Mr. Hehl wrote an email  
 25 memorandum and what he wrote was, "The following is  
 8  
 1 what is believed to be missing from the recorded  
 2 portion of the planning board meeting; one,  
 3 roll-call of board members and professionals. All  
 4 members and professionals were present.  
 5 "Two, Tracee gave proceedings for the  
 6 night: We would review the professional reports;  
 7 Mr. Hehl would have a chance to speak followed by  
 8 Mr. Butler. After reports, Mr. Butler would have  
 9 Mr. Bob Weldon and Mr. Simoff testify.  
 10 "Three, Mr. Hehl said the applicant  
 11 would comply with the conditions set forth in the  
 12 professionals' memos. Some examples were sidewalk

13 contribution. If Somerset County required a  
14 sidewalk, the applicant would comply. The applicant  
15 would comply with the tree ordinance. If the  
16 applicant was not able to plant a sufficient number  
17 of trees on the site he would make a contribution.  
18 "The applicant would comply with  
19 Chapter 20 of the zoning ordinance. They would seek  
20 any and all approvals from NJDEP for flood hazard.  
21 "Four, Mr. Matias agreed that the NJDEP  
22 approvals could be obtained after and if the  
23 applicant received preliminary approval, Mr. Matias  
24 did not think it was the planning board's  
25 responsibility to make DEP determinations.

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1 "Five, Mr. Butler disagreed with the  
2 timing of those NJDEP approvals. Mr. Butler stated  
3 those approvals should be obtained prior to the  
4 preliminary site plan approval of the board.  
5 "Mr. Butler directed questions to Mark  
6 Healy about Chapter 20, which Mr. Healy referred  
7 back to Mr. Matias's engineering issues. And then  
8 the start of the reporting by the court reporter."

9 I read the transcripts this evening and  
10 I happen to agree with both of them, that's exactly  
11 where we picked up on the recordings both --  
12 ATTORNEY LINNUS: Madam Chair, Madam  
13 Chair, may I interrupt?

14 CHAIRPERSON SCHAEFER: Yes.

15 ATTORNEY LINNUS: On Item Number 3 and  
16 Item Number 5, are we really talking about Chapter  
17 22?

18 CHAIRPERSON SCHAEFER: Chapter 22,  
19 yes. Mr. Hehl --

20 ATTORNEY HEHL: Yes.

21 ATTORNEY LINNUS: It says 20.

22 ATTORNEY HEHL: It says 20 but, in  
23 fact, it's 22.

24 And by the way, we can't take credit  
25 for this. This actually is just a recap of what  
10

1 Theresa sent so, but we agreed with her assessment,  
2 so it's -- it's Theresa's help there.

3 ATTORNEY LINNUS: But it is Chapter  
4 22; is that not correct, Mr. Hehl?

5 ATTORNEY HEHL: Yes, that's correct,  
6 Frank.

7 BOARD ATTORNEY: Now, I assume -- I  
8 see that Mr. Butler received a copy of this, as well  
9 as I did. Does this constitute the record according  
10 to Mr. Butler and Mr. Hehl?

11 ATTORNEY BUTLER: Yeah, Mr. Linnus,  
12 how did Mr. Hehl -- I don't think I have a problem  
13 here. How did Mr. Hehl reorganize the ten minutes  
14 and send us that memo?

15 What did he do to -- to get that  
16 information?

17 ATTORNEY LINNUS: I don't know. He's  
18 here and he can answer that.

19 ATTORNEY BUTLER: Well, that's what  
20 I'm asking.

21 ATTORNEY HEHL: There's two things; I  
22 was there and we took notes. And then we received  
23 a -- received a recap from Theresa which we

24 concurred with. And you were -- you were copied on  
25 that.

11

1 ATTORNEY BUTLER: And there was a  
2 transcript that was sent of about ten pages.  
3 Would that have anything to do with the ten missing  
4 pages? And that was --

5 ATTORNEY HEHL: No, that was before --  
6 that was before the -- the meeting -- before  
7 transcription and the recording started.

8 ATTORNEY BUTLER: Okay. Well, I would  
9 take -- I would take both Theresa's and Steve's  
10 presentations. I have no problem. Put them  
11 together or put them separately, they're acceptable  
12 to objector Weldon.

13 CHAIRPERSON SCHAEFER: Okay, thank  
14 you.

15 So, Chair makes a motion to approve the  
16 minutes, transcripts, and emails of both Mr. Hehl  
17 and Theresa Snyder of the May 18th, 2021, meeting.  
18 Do I have a motion? Anyone?

19 MEMBER FIORILLA: So moved.

20 CHAIRPERSON SCHAEFER: Thank you --

21 MEMBER FIORILLA: Paul.

22 CHAIRPERSON SCHAEFER: -- Paul?

23 MEMBER FIORILLA: Yeah.

24 CHAIRPERSON SCHAEFER: Thank you.  
25 Second?

12

1 MAYOR BALLA: Second.

2 CHAIRPERSON SCHAEFER: Mayor Balla,  
3 thank you.

4 All in favor say, "aye."

5 BOARD MEMBERS IN UNISON: Aye.

6 MEMBER PENNETT: Tracee, you might  
7 want to remind people to unmute.

8 CHAIRPERSON SCHAEFER: Yes, everybody  
9 unmute. Pete, are you an aye or --

10 MEMBER MARTINO: Yes, I agree.

11 CHAIRPERSON SCHAEFER: Anyone opposed?

12 Anyone not voting? Okay, thank you. We got that  
13 straight.

14 Ellen, can you please call our next  
15 application.

16 MEMBER SPINGLER: Case Number PB 19-02,  
17 The Learning Experience, 100 Union Avenue. Block  
18 7801, Lot 1, BB zone. Expiration, 6/30/21.

19 CHAIRPERSON SCHAEFER: Thank you. So  
20 last month we left off at the end of all the  
21 testimony. And next is that Mr. Hehl has the  
22 opportunity to rebuttal. And this will be followed  
23 by opening up to the planning board and public  
24 basically for questions. And then we have closing  
25 arguments which will start by Mr. Butler and end  
13

1 with Mr. Hehl.

2 VICE-CHAIRMAN SPEENEY: Chair?

3 CHAIRPERSON SCHAEFER: Yes, Don.

4 VICE-CHAIRMAN SPEENEY: I have a  
5 question, a question of attorney.

6 There's a document that I'm interested  
7 in that I would like to get on the record, and I  
8 realize it's late in the hearing but I just

9 discovered -- re-discovered this document recently.  
 10 So I will identify the document and maybe Mr. Linnus  
 11 can tell me what steps to take next.  
 12 But basically, the Green Brook Flood  
 13 Control Commission and Army Corps of Engineers  
 14 generated a report back in '80s, '90s, and  
 15 subsequent to that report was another report, an  
 16 analysis, that was given on the flood control  
 17 alternatives. And what I would like to do is have  
 18 the -- the screening analysis done, the flood  
 19 control alternatives entered into the record and --  
 20 because there's a couple of things I want to quote  
 21 in here.  
 22 CHAIRPERSON SCHAEFER: Frank?  
 23 ATTORNEY LINNUS: Well, in -- you  
 24 certainly can mark it as -- as an exhibit but in  
 25 fairness to the -- the attorneys we do have an  
 14  
 1 applicant's attorney here and we do have an  
 2 objector's attorney and we do have the public here.  
 3 I think they're going to have an opportunity to  
 4 address whatever that document is.  
 5 VICE-CHAIRMAN SPEENEY: Yeah, they  
 6 should. I would expect that.  
 7 ATTORNEY LINNUS: Not only they  
 8 should, they -- that's necessary. So I -- you can  
 9 identify the document as PB-1 and can we circulate  
 10 it to the attorneys? Do you have a way of doing  
 11 that, Mr. Speeney?  
 12 (Exhibit PB-1, Report from Green Brook  
 13 Flood Control Project prepared by U.S. Army  
 14 Corps of Engineers, dated January, 2001, was  
 15 marked.)  
 16 VICE-CHAIRMAN SPEENEY: Tonight? Not  
 17 tonight.  
 18 ATTORNEY HEHL: This is Steve Hehl  
 19 again on behalf of the applicant. I mean, here it  
 20 is, we're at what is, hopefully, the final night of  
 21 the hearing and hearing about some -- some document  
 22 that sounds like it's decades old and there's --  
 23 VICE-CHAIRMAN SPEENEY: You're right.  
 24 ATTORNEY HEHL: -- and there's  
 25 extensive testimony that has been presented by the  
 15  
 1 applicant, by the objector, by the professionals, by  
 2 the board professionals, board engineer, prior board  
 3 engineer, the board planner.  
 4 And frankly, as you're probably all  
 5 aware, we did receive today and we -- and then we  
 6 submitted it to the board, the DEP determination  
 7 with respect to the tributary being less than  
 8 50 acres. I -- it's just a bit perplexing and  
 9 troubling, hearing about some, again, 10-, 20-,  
 10 30-year-old drainage report when there's been  
 11 extensive study and we know it's not going to be --  
 12 VICE-CHAIRMAN SPEENEY: Okay, what --  
 13 what it is, it's not -- it is 20 years old. And it  
 14 is not a drainage report. What it is is an analysis  
 15 of the flood control alternatives proposed by Army  
 16 Corps of Engineers relative to the Green Brook flood  
 17 control. And, in particular, it's -- this is about  
 18 the upper basin screening analysis. So I really  
 19 don't want to go into the minutia of this report but

20 there are some highlights that I would like to get  
 21 on the record.  
 22 ATTORNEY HEHL: Again, I, frankly, at  
 23 this -- at this stage of the proceedings, I would  
 24 note my objection and leave it to -- to the board to  
 25 comment.  
 16  
 1 ATTORNEY LINNUS: All right. Mr. Hehl  
 2 noted -- noted his objection. Mr. Speeney, again,  
 3 it's at a very late stage of the hearing. If you  
 4 would like to introduce that as a PB exhibit over  
 5 the objection of -- of Mr. Hehl, that preserves his  
 6 right to object to -- to it when it comes to court,  
 7 if it does -- if this application does go to court.  
 8 So it's up to you; do you want to offer  
 9 that as an exhibit?  
 10 ATTORNEY BUTLER: Mr. Linnus, can Bill  
 11 Butler be heard on behalf of objector, Weldon?  
 12 ATTORNEY LINNUS: Certainly.  
 13 ATTORNEY BUTLER: Thank you, Mr.  
 14 Linnus. Basically I'll defer to Mr. Speeney. If  
 15 Mr. Speeney thinks that something's important, and I  
 16 don't know whether it helps or hurts me or not, but  
 17 if he wants it, I'm for it. But I think it's up to  
 18 the board to decide this issue. But I'm certainly  
 19 not going to -- a member like Mr. Speeney, object to  
 20 anything he wants to do.  
 21 CHAIRPERSON SCHAEFER: Frank?  
 22 ATTORNEY LINNUS: Okay. Don, once  
 23 again, you can identify the document and mark it as  
 24 PB-1. I don't know where else it's going to go. I  
 25 don't know whether the board wants to -- to hear  
 17  
 1 what's in that document. So I suggest that you mark  
 2 it and -- and identify it, and then we'll ask the  
 3 board whether they want to hear the -- the contents  
 4 of that document. And then we'll be able to make --  
 5 then there will be a determination as to whether  
 6 it's relevant and we'll proceed on that basis.  
 7 VICE-CHAIRMAN SPEENEY: Okay. I  
 8 would -- I would then put it into the record and  
 9 indicate that this report is the Screening Analysis  
 10 of the flood control alternatives for the upper  
 11 portion of the Green Brook subbasin, river basin,  
 12 Green Brook flood control project. U.S. Army Corps  
 13 of Engineers, New York district, January 2001.  
 14 ATTORNEY LINNUS: Did you say 2001,  
 15 Don?  
 16 VICE-CHAIRMAN SPEENEY: Yes, I did.  
 17 CHAIRPERSON SCHAEFER: Does this, Don,  
 18 have to do with the -- when we -- when the subject  
 19 came up of whether it was the 15 acres or 50  
 20 acre --  
 21 VICE-CHAIRMAN SPEENEY: No. First of  
 22 all, this is -- the reason I want to do this is, no  
 23 detail, in terms of the kind of stuff that you just  
 24 mentioned. It's really -- I would like to highlight  
 25 what is in the Table of Contents. And then let it  
 18  
 1 go at that.

2 ATTORNEY LINNUS: All right. Well,  
3 first of all, is the board -- I think we ought to  
4 take a vote as a board. Is the board interested in  
5 hearing a study that was conducted in 2001? That's  
6 a question through the chair to the board.  
7 MEMBER FIORILLA: Don, can you just  
8 very briefly explain why you're doing this and what  
9 the relevance is?  
10 VICE-CHAIRMAN SPEENEY: It -- it's  
11 subject matter that has not been mentioned at all in  
12 this particular application and said subject matter  
13 includes Weldon Quarry, includes New Providence  
14 Road, includes Seeley's Pond and basically  
15 alternatives that are being looked at in this  
16 document include No-Build for flood control.  
17 CHAIRPERSON SCHAEFER: I'm going to  
18 ask our -- our engineer. Are you aware of any type  
19 of document, Rick, and if you are, what is your --  
20 your feedback on it?  
21 BOARD ENGINEER: So there are a few  
22 different studies that I'm vaguely aware of in  
23 regards to the Green Brook that have been  
24 commissioned by different sources over the past  
25 several decades because obviously Green Brook, in  
19  
1 its totality, has some issues going back as far as  
2 Bound Brook.  
3 So what I would caution anyone is, of  
4 course, these reports have value, they are done  
5 professionally. They are done and prepared by  
6 organizations, like the Army Corps of Engineers, who  
7 are -- who know what they're doing. But these are  
8 reports. They are not legislation, they are not  
9 things that residents/boards/municipalities have to  
10 necessarily abide by. They're review reports. So  
11 that's -- that would be my -- my overall feeling.  
12 We have to follow rules and -- and laws  
13 that are in place and -- as a board and as  
14 professionals.  
15 ATTORNEY LINNUS: And Rick, let me ask  
16 you a question, Rick. This -- this report that Don  
17 is referring to was apparently drafted and filed  
18 in -- in the year 2000. Is that too remote, in your  
19 opinion, for this board to consider in this  
20 particular application, in the context of -- of what  
21 your knowledge of this report might contain?  
22 BOARD ENGINEER: No, not -- not  
23 necessarily. You can have reports that were -- that  
24 are several decades old that still have validity and  
25 still have value. The question is, you know, can  
20  
1 you use that as a -- as a decision-maker to not  
2 follow a legislative law or not. And you get into  
3 a -- and I'm not trying to play an attorney today,  
4 so could there be validity in a -- in a two-decade  
5 or three-decade -- yes, sure. Because  
6 there's -- there can always be some value, some --  
7 some small bit of information. The question is, you  
8 know, is it something that -- that the board will  
9 use to make a decision and -- and, you know, that's

10 tough -- tough to gauge.  
 11 CHAIRPERSON SCHAEFER: Is this  
 12 something, Rick, that you have -- have looked into  
 13 in supplying your report to this board? And it's  
 14 not supplied?  
 15 BOARD ENGINEER: Honestly, no, because  
 16 we have to look at what are the rules? Not --  
 17 because, you know, anyone can commission necessarily  
 18 a report and say, hey, we should do this, we should  
 19 do that. You know, here are some different ideas,  
 20 municipalities should consider reducing the amount  
 21 of water flowing, you know, that they send to the  
 22 Green Brook or -- or, you know, residents should  
 23 consider doing this with their stormwater. So we --  
 24 we would not consult a study of that type of nature  
 25 to prepare a report.  
 21  
 1 CHAIRPERSON SCHAEFER: Don, why this  
 2 late hour? We -- we've have been hearing this  
 3 application now for a year, literally, why now,  
 4 after we've gone through and finished all the  
 5 testimony?  
 6 VICE-CHAIRMAN SPEENEY: Well, what --  
 7 what happened was, I was reviewing -- I was  
 8 reviewing my records for this particular application  
 9 and in -- in my records was this report. And it's  
 10 a -- I don't really want to get into the minutia of  
 11 the report at all. It's just some high-level  
 12 concepts that I think, you know, folks should be  
 13 made aware of.  
 14 CHAIRPERSON SCHAEFER: Well,  
 15 my personal -- well, before I give my spiel, can I  
 16 get -- Karen?  
 17 MEMBER PENNETT: I would like to see  
 18 what the report says. It's data, it's going to all  
 19 be factual data. Some of it -- some of it may be  
 20 outdated but some of it still may be relevant. And,  
 21 you know, the environment today is declining  
 22 quickly, and maybe if we follow some of the  
 23 suggestions that were made many years ago, things  
 24 would not be as bad as they are today. And it's not  
 25 going to hurt to hear it.  
 22  
 1 And if everybody understands, you know,  
 2 the age of it, exactly what it is, it should not,  
 3 you know, influence anyone, you know -- you know,  
 4 the wrong way, so. But I would like to hear the  
 5 data to see what it says.  
 6 MEMBER FIORILLA: But is there any  
 7 data? I mean, it doesn't sound like he's talking  
 8 about giving us data. It sounds like he's just  
 9 talking about reading the title of some report.  
 10 CHAIRPERSON SCHAEFER: I agree with  
 11 you, Paul, but I'm going to go person-by-person. So  
 12 my next one will be Steve Pote, your comment?  
 13 MEMBER POTE: I think at this point, I  
 14 obviously can't judge whether it's of use or not. I  
 15 think a quick run-through the -- the Table of  
 16 Contents, quick run-through, like, within two  
 17 minutes, just to see what's there. But from my

18 standpoint there's a lot of other related  
 19 information that has been presented and I feel that  
 20 I have got a pretty good understanding of -- of  
 21 what's -- what is going on with regards to the  
 22 floodwaters, et cetera.  
 23 I'd say, read through that for two  
 24 minutes and unless there's something that is  
 25 astronomically important, I'd say, let's move on.  
 23  
 1 CHAIRPERSON SCHAEFER: Okay. Ellen  
 2 Spingler?  
 3 MEMBER SPINGLER: I would agree with  
 4 Steve and say that I would like to hear the major  
 5 points that Don wants to make. I also am concerned  
 6 that, who would refute this report? Is there  
 7 another side that we're not hearing?  
 8 So let's listen to the major points,  
 9 and other than that...  
 10 CHAIRPERSON SCHAEFER: Thank you  
 11 Yvette?  
 12 MEMBER NORA: Yeah, I do agree that  
 13 it's at a late stage. This review has been going on  
 14 for a long time already. We rely on the engineers  
 15 to provide us with the data and we have been  
 16 presented with both sides already, but if this  
 17 information is unique and it's going to contribute,  
 18 I do agree with Mr. Pote and Mr. -- Ms. Spingler,  
 19 you know, to get a brief synopsis, if it's relevant.  
 20 CHAIRPERSON SCHAEFER: Thank you.  
 21 Paul?  
 22 MEMBER FIORILLA: Well, I'm for  
 23 hearing, you know, any relevant information. My  
 24 concern is that we're just going to get a very  
 25 truncated summary of something and it's not going to  
 24  
 1 really help us understand anything of value.  
 2 The author of this report is not  
 3 available to testify so, you know, I don't know how  
 4 it's going to help us put this application in  
 5 context.  
 6 CHAIRPERSON SCHAEFER: So do you say  
 7 no to the report or are you agreeing with what Ellen  
 8 and Yvette have said?  
 9 MEMBER FIORILLA: I guess I'm curious  
 10 as to what it's about and so I'm -- I'm happy to  
 11 hear it. And I even asked the question before, you  
 12 know, like a summary of what it's about.  
 13 You know, from a legal point of view, I  
 14 don't know what, you know, relevance that has, you  
 15 know, as far as our duties as a planning board, and  
 16 I'm a little worried about that. But, you know,  
 17 I'm -- I'm all for hearing the summary so I know  
 18 what this is about.  
 19 CHAIRPERSON SCHAEFER: Mayor Balla?  
 20 MAYOR BALLA: My opinion is that if  
 21 none of the professionals brought this report out  
 22 and the relevance during this hearing, I mean, I  
 23 don't have the expertise to know so if the  
 24 professionals didn't think it was worth bringing out  
 25 to discuss during this hearing, I don't see why we

25

1 bring it out then.

2 CHAIRPERSON SCHAEFER: Thank you.

3 Mr. -- Councilman Martino?

4 COUNCILMAN MARTINO: Okay. I have

5 a quick question. I believe, I was -- the only part

6 of the Seritage site I was part of was the -- the

7 medical building that's being built right now.

8 Was this brought up during that review?

9 CHAIRPERSON SCHAEFER: The Army Corps

10 of Engineers? No.

11 COUNCILMAN MARTINO: Okay. Now I'm --

12 I'm trying to compare, you know, I'm looking at

13 these sites, they both abut to the Green Brook.

14 They're both in the flood plain. I find it hard to

15 believe why we would single out one site and -- as

16 opposed to, you know, anything that abutted this --

17 this brook.

18 So, you know, you know, I'm torn by

19 this also and I'm -- I'm sort of agreeing with the

20 mayor that a lot of people spent a lot of time

21 researching this, and how the document did not come

22 to the surface, is concerning to me on that. And

23 again, if it's not legislation, if it's not part of

24 a ongoing plan because I know there's a lot of work

25 that has been going on with regards to the Green

26

1 Brook Flood Commission on the lower area, I mean,

2 are we really going to hold up progression on this

3 project for something that is -- has no legal

4 authority?

5 So, you know -- I'm all for hearing a

6 quick synopsis of what's included with this. But,

7 you know, I have a hard time, you know, singling out

8 one site and you let an entire site that is probably

9 five times the size of this with a heck of a lot

10 more environmental impact to the Green Brook go

11 without even -- even thinking about it then.

12 So I'm sort of like, let's keep moving

13 along with this. But if the majority of the

14 committee wants to go for a quick synopsis, I'm --

15 I'm for it. I have got a couple of hours to sit

16 here.

17 CHAIRPERSON SCHAEFER: Troy?

18 MEMBER SIMS: My opinion is basically

19 that we -- we have the objector and The Learning

20 Experience representation along with our own

21 representation as far as our professionals. And

22 none of them sought to use this particular study to

23 bring any light or any information in it.

24 If there's any information,

25 specifically, that he wants to point out and bring

27

1 to our attention that he thinks is relevant, I

2 believe we can do it. But just to go through the

3 entire report just as additional information, none

4 of the people involved that have -- that have any

5 stakes in this decided to use it, so I think it

6 could be possibly just a waste of our time at this

7 point. We have been going at it for a long time.

8 So unless there's something specific  
9 that he wants to point out or say, hey, this is here  
10 and this is relevant to rebut or enforce the  
11 position or a point that Mr. Butler or Mr. Hehl has  
12 taken, or even our own attorney or engineers, I  
13 don't -- I don't see the point.  
14 CHAIRPERSON SCHAEFER: Okay. Thank  
15 you.  
16 Frank, what do you say?  
17 ATTORNEY LINNUS: Well again, I will  
18 go back to we have -- we have some information  
19 that -- the hearing is still open. We have some  
20 information that one of the board members would like  
21 to get on the record. I have asked that board  
22 member, Mr. Speeney, specifically, to mark it PB-1  
23 and identify it.  
24 We have had some discussion. Mr. Hehl  
25 certainly was in his rights to object to it at this  
28  
1 late stage in the proceedings, then went into the  
2 exercise as to whether it has any relevance to these  
3 proceedings.  
4 It seems that there's a -- I threw it  
5 open to the board and I continue to throw it open to  
6 the board whether they want to go further with this.  
7 And it seems that a majority of the board, although  
8 you should take a vote on it, would like to hear the  
9 Table of Contents and then make a decision at that  
10 point whether the board would like to entertain the  
11 information in full in the -- in the report that --  
12 that Don is referring to, but I want to caution the  
13 board that this absolutely, absolutely opens the  
14 hearing.  
15 This document would then have to be  
16 marked officially and sent to the attorneys and they  
17 would have an opportunity at the next meeting to  
18 have their professionals review it and provide  
19 whatever information they would like to give to the  
20 board. So at this stage of the proceedings, Madam  
21 Chair, I think we would ask for a vote as to whether  
22 they want Mr. Speeney to go forward with the  
23 recitation of Table of Contents.  
24 ATTORNEY HEHL: Just again for the  
25 record, Madam Chair, I mean, it's at the -- the last  
29  
1 minute. And frankly, I was going to indicate that  
2 other than identifying the letter we got today from  
3 the DEP that, frankly, we weren't going to put on  
4 rebuttal.  
5 And now to have a board member bring in  
6 documentation that apparently -- again, I just renew  
7 our objection. I think it's highly -- for you to  
8 have this come up at what was targeted to be the  
9 last hearing, and then present a report that is over  
10 20 years -- it's over 20 years old and, as Mr.  
11 Matias indicated, it's -- this project is going to  
12 be subject to the DEP review and approval. It's  
13 subject to the Department of Child Care Services.  
14 It's a permitted -- minor variance. And now to have  
15 this come up at the last minute, again troubling.  
16 And I renew my objection.  
17 CHAIRPERSON SCHAEFER: Thank you,

18 Mr. Hehl.  
 19 My input on this is that, listening to  
 20 what Mr. Matias's input was, and it's not something  
 21 that our professionals are actually looking at to  
 22 make their recommendations or reports based off of,  
 23 the fact that we have been here for a year -- I  
 24 understand, Don has just found it in his file -- I  
 25 am not truly in favor of continuing on and  
 30  
 1 continuing on and continuing on because of a report  
 2 that is 20 years old. But that's my opinion.  
 3 But I am going to seek a motion  
 4 allowing Don to read the Table of Contents.  
 5 Do I have a motion?  
 6 MEMBER PENNETT: So moved.  
 7 CHAIRPERSON SCHAEFER: Thank you,  
 8 Karen.  
 9 Do we have a second?  
 10 VICE-CHAIRMAN SPEENEY: I'll second.  
 11 CHAIRPERSON SCHAEFER: Thank you, Don.  
 12 Is this a roll-call or is the --  
 13 ATTORNEY LINNUS: It's a roll-call.  
 14 CHAIRPERSON SCHAEFER: Okay.  
 15 BOARD CLERK: Ms. Spingler?  
 16 MEMBER SPINGLER: Yes.  
 17 MEMBER PENNETT: You might want to  
 18 remind people to -- to turn on their mics.  
 19 CHAIRPERSON SCHAEFER: Yes.  
 20 Everybody, turn on their mics.  
 21 BOARD CLERK: Councilman Martino?  
 22 COUNCILMAN MARTINO: No.  
 23 BOARD CLERK: Ms. Pennett?  
 24 MEMBER PENNETT: Yes.  
 25 BOARD CLERK: Mayor Balla?  
 31  
 1 MAYOR BALLA: No.  
 2 BOARD CLERK: Mr. Speeney?  
 3 VICE-CHAIRMAN SPEENEY: Yes.  
 4 BOARD CLERK: Mr. Pote?  
 5 MEMBER POTE: Yes.  
 6 BOARD CLERK: Mr. Fiorilla?  
 7 MEMBER FIORILLA: No.  
 8 BOARD CLERK: Mr. Sims?  
 9 MEMBER SIMS: No.  
 10 BOARD CLERK: Ms. Nora?  
 11 MEMBER NORA: Yes.  
 12 BOARD CLERK: Madam Chair?  
 13 CHAIRPERSON SCHAEFER: No. I'm sorry,  
 14 Don.  
 15 BOARD CLERK: That's five yes, five  
 16 no.  
 17 VICE-CHAIRMAN SWEENEY: How could you  
 18 have ten votes when it's a nine-member board.  
 19 BOARD CLERK: If Mr. Ellis --  
 20 CHAIRPERSON SCHAEFER: Yeah, we have  
 21 nine voting members.  
 22 ATTORNEY LINNUS: Yeah, I would  
 23 suggest that you use the nine voting members and Ms.  
 24 Nora not -- not have a voice in this preliminary  
 25 motion.  
 32  
 1 Again, this is not a motion to have the  
 2 document introduced and circulated and postponed to

3 the next hearing. This is merely to have the Table  
4 of Contents read.  
5 BOARD CLERK: Okay. So Ms. Nora's  
6 vote would not count. Mr. Ellis is not here. So we  
7 have four yes and five no.  
8 ATTORNEY LINNUS: It's defeated.  
9 CHAIRPERSON SCHAEFER: Okay.  
10 ATTORNEY LINNUS: And we proceed  
11 without, without the report.  
12 CHAIRPERSON SCHAEFER: Okay. Sorry,  
13 Don, I just -- at this late stage, is my reasoning.  
14 We have been through this for...  
15 VICE-CHAIRMAN SPEENEY: I guess I'm  
16 remiss for not digging this up earlier. And I think  
17 the -- the concept of all the experts that were  
18 looking at this project, none of the experts ever  
19 mentioned Green Brook flood control work. So I can  
20 accept the decision of the board.  
21 CHAIRPERSON SCHAEFER: All right.  
22 Thank you, Don.  
23 VICE-CHAIRMAN SPEENEY: All right.  
24 CHAIRPERSON SCHAEFER: Okay. So back  
25 to Mr. Hehl, we're going to go now to your rebuttal.  
33  
1 ATTORNEY HEHL: Yeah. Thank you,  
2 Madam Chair.  
3 As I had mentioned before, we feel that  
4 when we put in our case -- you know, there's a lot  
5 of background, sorry, that it's pretty hard to hear.  
6 CHAIRPERSON SCHAEFER: Yeah, I don't  
7 know who -- I know it's not me.  
8 Don, can you mute, please?  
9 ATTORNEY HEHL: Thank you, Don.  
10 Yes, we, in our team and our  
11 presentation, we feel that we've -- we've covered  
12 all of the relevant aspects of this -- of this  
13 application. I would touch on items during my -- my  
14 summation. But we feel that our witnesses set forth  
15 all of the justifications for the site plan  
16 approval. We have modified it to a preliminary site  
17 plan approval only. And we feel that, frankly, at  
18 the last, I believe, two hearings, that the board  
19 professionals, both engineering, traffic and  
20 planning reported --  
21 ATTORNEY LINNUS: Mr. Hehl, excuse me.  
22 Mr. Hehl, excuse me. I don't mean to interrupt you  
23 but it sounds like you're going into a -- a  
24 summation here. I thought --  
25 ATTORNEY HEHL: No, I was --  
34  
1 ATTORNEY LINNUS: -- it was your  
2 intention -- I thought it was your intention in  
3 rebuttal to introduce what we all received today,  
4 which was this DEP document. And I suspect that in  
5 order, if you want to get that on the record, you --  
6 you should have your engineer testify with respect  
7 to that document after you mark it.  
8 ATTORNEY HEHL: Yes, that's correct.  
9 And I was indicating that we didn't plan to present  
10 any other witnesses other than what I did want to do

11 is call upon one of our engineers. I don't think  
 12 he's testified before at this hearing, Rob Freud,  
 13 who this -- this letter was directed to, to identify  
 14 it, and so --  
 15 And I guess we -- Theresa, I'm not sure  
 16 which exhibit we're up to.  
 17 ATTORNEY LINNUS: Theresa, what  
 18 exhibit are we up to; do you know?  
 19 BOARD CLERK: No, I don't know off  
 20 hand.  
 21 ATTORNEY LINNUS: Okay.  
 22 ATTORNEY HEHL: Well, we can mark it  
 23 with -- as A-1 with today's date and then we can  
 24 re- --  
 25 ATTORNEY LINNUS: Well, do we have the  
 35  
 1 May 18th transcript?  
 2 ATTORNEY HEHL: Yeah, that should  
 3 identify them.  
 4 ATTORNEY LINNUS: That should identify  
 5 the last exhibit, perhaps.  
 6 ATTORNEY BUTLER: Madam Chair, excuse  
 7 me. This is Bill Butler. I never got a copy of  
 8 this DEP document. I know Steve only got it today  
 9 apparently, right?  
 10 ATTORNEY HEHL: Yeah, we sent it. You  
 11 were copied on it.  
 12 BOARD CLERK: Yeah, I emailed it to  
 13 you today.  
 14 ATTORNEY BUTLER: You did? All right.  
 15 Well, my secretary was off today. I didn't get it.  
 16 I'm sorry.  
 17 And the other -- the other question I  
 18 had was, Mr. Hehl, other than going over this DEP  
 19 document, do you have any other rebuttal witnesses?  
 20 ATTORNEY HEHL: No, we don't believe  
 21 so, unless the board had questions and wanted us to  
 22 recall people.  
 23 ATTORNEY BUTLER: So then after that,  
 24 you and I can get into our summations?  
 25 ATTORNEY HEHL: I think the procedure  
 36  
 1 was the board was going to have time for comments or  
 2 questions and then we would do summations, but  
 3 I'll defer --  
 4 CHAIRPERSON SCHAEFER: What I said was --  
 5 ATTORNEY LINNUS: Mr. Butler, we  
 6 have to -- we have to invite the public, after the  
 7 case is over, to provide whatever comments the  
 8 public would like to make with respect to this  
 9 particular application.  
 10 Right now Mr. -- procedurally, Mr. Hehl  
 11 is in rebuttal. And he has indicated he would like  
 12 to introduce one more witness, and that witness  
 13 would be Rob Freud. And he has not been sworn in  
 14 yet.  
 15 So if he's available and you want to  
 16 proceed, Mr. Hehl, let's swear him in.  
 17 ATTORNEY HEHL: Okay. Great.  
 18 CHAIRPERSON SCHAEFER: Before that  
 19 goes, before that, Mr. Butler, I just want you to

20 note, I'm repeating what I said in the beginning,  
 21 that Mr. Hehl gets to do his rebuttal. We're then  
 22 going to allow any questions or comments from the  
 23 planning board members and professionals. We're  
 24 going to open it up to the public. And then we're  
 25 going to go into your summations to your closing  
 37  
 1 arguments.  
 2 Okay?  
 3 ATTORNEY BUTLER: Yes. The only thing  
 4 I want to make sure is that Mr. Hehl and I do our  
 5 summations at the same session.  
 6 CHAIRPERSON SCHAEFER: Well, as soon  
 7 as we can move --  
 8 ATTORNEY BUTLER: Because I don't  
 9 think it would be fair for me to do my summation and  
 10 then him do his next month when you vote so -- so I  
 11 would hope that Steve and I could do our summations  
 12 tonight and --  
 13 CHAIRPERSON SCHAEFER: Okay. So let's  
 14 move on and --  
 15 ATTORNEY BUTLER: -- then you can vote  
 16 on it next week or tonight.  
 17 CHAIRPERSON SCHAEFER: Let's move on  
 18 and this way he can do what he needs to do.  
 19 Mr. Hehl.  
 20 ATTORNEY HEHL: Okay, great. So, I --  
 21 ATTORNEY LINNUS: Mr. Freud, do you  
 22 want to raise your right hand, sir, please? Do you  
 23 swear or affirm that the testimony you are about to  
 24 give, will be the truth, the whole truth, and  
 25 nothing but the truth?  
 Freud - Direct  
 38  
 1 ROBERT FREUD: Yes, I do.  
 2 ATTORNEY LINNUS: Okay. You want to  
 3 state your name for the record please and -- and  
 4 business address. And then I will turn you over to  
 5 Mr. Hehl.  
 6 ROBERT FREUD: Sure. Robert Freud, F  
 7 as in Frank, r-e-u-d. Professional address is  
 8 Dynamic Engineering, 1904 Main Street, Lake Como,  
 9 New Jersey.  
 10 ATTORNEY LINNUS: All right. Your  
 11 witness, Mr. Hehl.  
 12 ATTORNEY HEHL: Thank you very much.  
 13  
 14 E X A M I N A T I O N  
 15  
 16 BY ATTORNEY HEHL:  
 17 Q. Mr. Freud, if you could please give the  
 18 board the benefit of your work, educational  
 19 experience, your area of expertise, licenses you  
 20 hold, and whether you have been qualified as an  
 21 expert before boards or courts in the state of New  
 22 Jersey.  
 23 A. Certainly. I have a bachelor of  
 24 science degree in civil engineering from Lehigh  
 25 University. I've been practicing civil engineering  
 Freud - Direct  
 39  
 1 and land development design for well over 20 years,  
 2 primarily in the State of New Jersey, where I have a

3 professional engineering license. However, I'm also  
 4 licensed in several states throughout the northeast.  
 5 I have testified before over 100  
 6 municipalities, both planning and zoning. I'm not  
 7 sure if I have been in Watchung before. But the  
 8 majority of my work is land development applications  
 9 with a particular focus on more complex floodplain  
 10 management projects and projects that involve NJDEP  
 11 review and approval.  
 12 ATTORNEY LINNUS: Is your license  
 13 current, Mr. Freud?  
 14 THE WITNESS: It is, yes.  
 15 ATTORNEY LINNUS: Is your license --  
 16 okay.  
 17 CHAIRPERSON SCHAEFER: I think we can  
 18 accept him, Frank.  
 19 ATTORNEY LINNUS: Yes, you can accept  
 20 his qualifications.  
 21 ATTORNEY HEHL: Great. Thank you very  
 22 much, Frank.  
 23 BY ATTORNEY HEHL:  
 24 Q. Mr. Freud, we've introduced to the  
 25 board -- and I think we still have to identify it  
 Freud - Direct  
 40  
 1 and we'll provide an exhibit number -- but a letter  
 2 that you received today.  
 3 If you could, please, give the board a  
 4 little background on this, on this letter, and the  
 5 intent and purpose?  
 6 A. Certainly. So a little background and  
 7 my connection to this application, I worked for the  
 8 owner of the property in 2009 securing the DEP  
 9 approvals at that time for the project -- for the  
 10 car wash project at that time. Obviously, you have  
 11 heard plenty of testimony about what's happened  
 12 since and that those have lapsed during the  
 13 application. I have listened to many of the  
 14 hearings. There's been a lot of discussion about  
 15 DEP's jurisdiction over this project. And so in  
 16 order to help facilitate a smoother review of DEP's  
 17 jurisdiction we submitted what is called a Request  
 18 for an Applicability Determination, where we  
 19 submitted documentation to the state for their  
 20 review and determination of several things,  
 21 primarily which is of the Green Brook, which we know  
 22 is a studied stream and, therefore, has a flood  
 23 plain applicable to it but, as was discussed many  
 24 times during this application, the unnamed tributary  
 25 that comes off of the Green Brook through the  
 Freud - Direct  
 41  
 1 property and whether or not that has jurisdiction.  
 2 So we submitted a request to the DEP in  
 3 advance of our full plans and applications but we  
 4 submitted for the applicability determination. And  
 5 what was issued in a June 7th letter, received in  
 6 the mail today, is a letter from Dennis Contois, the  
 7 supervising engineer in the engineering section.  
 8 And his -- the paragraph titled "Decision" states,  
 9 "The unnamed tributary has a drainage area of less

10 than 50 acres. The unnamed tributary has a riparian  
 11 zone associated with it. Since this site is located  
 12 in the flood hazard area of the Green Brook, a flood  
 13 hazard area verification will be required."  
 14 ATTORNEY LINNUS: Mr. Freud, before we  
 15 go any further, do you have that document and do you  
 16 have the ability to show it to the board and the  
 17 public at this point? Can you share that?  
 18 THE WITNESS: As in on my screen?  
 19 ATTORNEY LINNUS: Yes.  
 20 CHAIRPERSON SCHAEFER: Yes.  
 21 ATTORNEY LINNUS: Then we'll -- then  
 22 we'll ask you to identify it. And we don't have an  
 23 exhibit number but we'll -- we'll figure that out  
 24 later. It could be an A exhibit.  
 25 THE WITNESS: Okay. Do I have --  
 Freud - Direct  
 42  
 1 ATTORNEY HEHL: I think A-6 is next up  
 2 there.  
 3 THE WITNESS: Okay. So okay. Let me  
 4 know if that works.  
 5 CHAIRPERSON SCHAEFER: You'll have to  
 6 just scroll it down.  
 7 THE WITNESS: Okay. So State of New  
 8 Jersey Flood Hazard Area Applicability  
 9 Determination, Flood Hazard Area Control Act Rules.  
 10 N.J.A.C. 7:13-5.1. Letter dated, June 7th, 2021.  
 11 Specific to unnamed tributary to Green Brook within  
 12 Lot 1 of Block 78.01 in Watchung Borough, Somerset  
 13 County. And then the Decision, which is the  
 14 paragraph I just read, confirms that the unnamed  
 15 tributary has a drainage area of less than 50 acres,  
 16 as was discussed at -- many times during this  
 17 application. What that means is that there is no  
 18 specific flood plain associated with that area.  
 19 It does have a riparian zone because it  
 20 is a channel and that is identified on the plans  
 21 that have been prepared by the applicant's engineer.  
 22 BY ATTORNEY HEHL:  
 23 Q. Okay. And so this, as you have  
 24 indicated, addresses those -- those questions that  
 25 came up at the previous hearings regarding -- and I  
 Freud - Direct  
 43  
 1 I think Mr. Matias had asked that perhaps there would  
 2 be an inquiry as to the, for lack of a better  
 3 phrase, disparity between what was asserted by the  
 4 objector and asserted by the applicant.  
 5 A. That's correct. In my opinion, and I  
 6 think what was discussed previously is the DEP would  
 7 be the arbiter of whether or not they have  
 8 jurisdiction over that in capacity of a flood hazard  
 9 area and in capacity of riparian zone. And that's  
 10 the purpose of this applicability determination is  
 11 to clarify that. And this will be the basis for our  
 12 applications to the DEP moving forward.  
 13 Q. Great, thank you.  
 14 ATTORNEY HEHL: And by the way, I just  
 15 got a text, I believe this is actually A-14, but

16 we'll confirm that by checking the transcript.

17 So I have no further questions at this

18 time of Mr. Freud.

19 (Exhibit A-14, State of New Jersey

20 Flood Hazard Area Applicability Determination

21 letter, dated June 7th, 2021, is marked.)

22 CHAIRPERSON SCHAEFER: Do any of our

23 professionals have questions for him?

24 BOARD ENGINEER: I'll jump in. And

25 it's really more a couple of comments for the

Freud - Direct

44

1 benefit of the board, as opposed to questions, but

2 related obviously, to this matter.

3 I believe it might have been two or

4 three meetings ago where we were discussing the

5 specific acreage of the -- of the drainage area to

6 this tributary. I believe that this --

7 ATTORNEY LINNUS: Rick, you're the

8 person speaking at this point, correct?

9 BOARD ENGINEER: Yes. Yes. Yes. I

10 apologize.

11 I believe the disparity on one side was

12 20 acres and on the other side it was 80 acres. I

13 felt that it was somewhere in between, I think this

14 makes complete sense and -- and obviously defines it

15 and answers the question as to the true size of the

16 tributary.

17 I think it also sheds light on a couple

18 of other things. One, this is not a requirement

19 that the applicant is bound to perform. This would

20 have been done as part of -- and I believe I had

21 submitted this on several different occasions this

22 would have been reviewed by DEP when they formally

23 submit their final application. They went ahead

24 and -- and got this ahead of time, which I think

25 is -- has value. And it shows that there is a level

Freud - Direct

45

1 of communication between the applicant and DEP.

2 So not necessarily questions for

3 Mr. Freud but comments for the benefit of the board.

4 Thank you.

5 CHAIRPERSON SCHAEFER: Thank you,

6 Rick. Anyone else have comments or -- actually, is

7 everybody okay with it so we can take it down? Can

8 we take this down, please? Thank you.

9 Anybody else have any comments or

10 questions?

11 ATTORNEY BUTLER: All right, when the

12 board is through, Bill Butler has a couple

13 questions.

14 CHAIRPERSON SCHAEFER: Karen?

15 MEMBER PENNETT: Tracee, I have a

16 couple of questions, but it's not in regard to what

17 we were just talking about it. They're other --

18 some general questions.

19 I don't know if I should ask them at

20 this time or a later time?

21 CHAIRPERSON SCHAEFER: No, go ahead.

22 MEMBER PENNETT: Okay. I was  
 23 reviewing some things. I don't know if I have  
 24 already asked these questions or not. We have been  
 25 through so much with the wetlands and so forth. A  
 Freud - Direct  
 46  
 1 while ago a operations manual of The Learning  
 2 Experience was submitted and I'm just curious, most  
 3 of the times it says, like, a regularly scheduled  
 4 inspections of facilities should be performed by  
 5 quality inspectors.  
 6 There's a lot of "should be"s. Why  
 7 wouldn't they be "would be"s?  
 8 ATTORNEY LINNUS: All right, Karen, I  
 9 think -- I think that question is appropriate but  
 10 not for this witness.  
 11 MEMBER PENNETT: Okay. Yeah, and I  
 12 know it wasn't for this witness. I just have been  
 13 trying to ask this. It's always been about wetlands  
 14 so I thought -- that's why I asked Tracee when to  
 15 bring this in. Okay, I can hold it off for later.  
 16 ATTORNEY LINNUS: The hearing is still  
 17 open, Mr. Hehl. I hope he has a witness here to --  
 18 to respond to your question, but that question will  
 19 not be answered by this witness.  
 20 MEMBER PENNETT: Right. I thought we  
 21 were moving on, I'm sorry.  
 22 ATTORNEY LINNUS: Okay.  
 23 CHAIRPERSON SCHAEFER: Frank, no one  
 24 had other questions for Mr. Freud.  
 25 ATTORNEY LINNUS: How about the  
 Freud - Cross  
 47  
 1 public?  
 2 CHAIRPERSON SCHAEFER: Does the public  
 3 have any questions for -- for Mr. Freud?  
 4 ATTORNEY BUTLER: Bill Butler does, as  
 5 I indicated before, Madam Chair.  
 6 CHAIRPERSON SCHAEFER: Yeah, you did.  
 7 Go ahead.  
 8 ATTORNEY BUTLER: Yeah, I only have a  
 9 couple of questions.  
 10  
 11 E X A M I N A T I O N  
 12  
 13 BY ATTORNEY BUTLER:  
 14 Q. Were these calculations that determine  
 15 that the tributary reign in under 50 acres, was this  
 16 done by the applicant, or was it done by the DEP or  
 17 a combination of the both?  
 18 A. The calculations were done by  
 19 personnel in my office under my direction and  
 20 submitted to DEP for their verifications. That's  
 21 the standard process for an applicability  
 22 determination, is to provide the DEP with data that  
 23 they then review and verify.  
 24 Q. Okay. Now is that review, is that  
 25 appealable?  
 Freud - Cross  
 48

1 A. I'm not certain.  
 2 ATTORNEY BUTLER: I have no further  
 3 questions.  
 4 CHAIRPERSON SCHAEFER: We have no  
 5 further questions or comments for this witness?  
 6 ATTORNEY LINNUS: Except for the  
 7 public; you should throw it to the public.  
 8 CHAIRPERSON SCHAEFER: I asked the  
 9 public and the public did not respond.  
 10 ATTORNEY LINNUS: Okay. Did not hear  
 11 that, Madam Chair.  
 12 CHAIRPERSON SCHAEFER: That's okay.  
 13 Can we now have Karen ask her questions?  
 14 ATTORNEY LINNUS: Absolutely.  
 15 MEMBER PENNETT: Okay. Yeah, so I  
 16 don't -- we might have gone through this before, as  
 17 I said, but in the operations manual a lot of the  
 18 times, you know, you say, should be performed. And  
 19 in certain cases I can understand that. But in a  
 20 case for regularly scheduled inspections of the  
 21 facility, "should be performed by qualified  
 22 inspectors." I would think that would be, will be  
 23 done by qualified inspectors.  
 24 ATTORNEY HEHL: If you would like, I  
 25 can -- I see Mr. Gesario is on the screen. If we  
 49  
 1 could have him respond to that?  
 2 And Gerry, you have been previously  
 3 sworn and qualified and your licenses are still in  
 4 full force and effect.  
 5 GERRY GESARIO: Yes, it is.  
 6 ATTORNEY HEHL: Okay. If you could  
 7 please answer the question?  
 8 GERRY GESARIO: I can try. Yeah, I  
 9 could. This is referring to the -- the  
 10 stormwater -- the operations and maintenance manual?  
 11 MEMBER PENNETT: It just said  
 12 operations manual of The Learning Experience. And  
 13 it went on about, you know, many different things  
 14 about the trash, disposal sites, pesticides,  
 15 different inspections, and so forth.  
 16 GERARD GESARIO: Title, the  
 17 stormwater?  
 18 MEMBER PENNETT: It just said  
 19 Operations Manual of The Learning Experience.  
 20 CHAIRPERSON SCHAEFER: Not stormwater,  
 21 it's your operating manual.  
 22 ATTORNEY LINNUS: All right. Who  
 23 prepared that, Karen?  
 24 MEMBER PENNETT: I'm not sure. Oh, it  
 25 just says, Jarmel Architects and Engineers, Inc.,  
 50  
 1 it's at the bottom, Jarmel Kizel Architects and  
 2 Engineers, Inc.  
 3 GERARD GESARIO: That was -- so I'm  
 4 guessing, this is the stormwater document? There  
 5 should be a cover sheet on it.  
 6 MEMBER PENNETT: I didn't -- I didn't  
 7 print out the cover sheet so I -- just Operations  
 8 Manual for The Learning Experience. I can try to  
 9 dig it out. I wouldn't -- I am not going to be able  
 10 to find it tonight, but I can probably dig it out.  
 11 CHAIRPERSON SCHAEFER: Yeah, we need

12 to move on, Karen. What's your next question?  
 13 MEMBER PENNETT: Okay. Tracee, what  
 14 did you -- wait, Tracee, what did you say?  
 15 CHAIRPERSON SCHAEFER: I said, what's  
 16 your next question?  
 17 MEMBER PENNETT: About the maintenance  
 18 of, you know, your trees and the shrubbery and the  
 19 plantings around. Who will be doing your gardening  
 20 maintenance? And are they going to be using  
 21 pesticides?  
 22 And if so, are they going to be organic  
 23 or -- how are you going to be doing --  
 24 CHAIRPERSON SCHAEFER: That was  
 25 already answered.  
 51  
 1 MEMBER PENNETT: Oh, was it? Okay.  
 2 CHAIRPERSON SCHAEFER: You had  
 3 requested. Actually, what you said was, you wanted  
 4 to ban the fertilizers but you were going to supply  
 5 what they should not be using.  
 6 MEMBER PENNETT: Okay. Yeah we did,  
 7 the DDT. Okay. I could -- I could not remember  
 8 after everything that has been going through.  
 9 Okay, thank you.  
 10 CHAIRPERSON SCHAEFER: That's it?  
 11 MEMBER PENNETT: Yeah, that was it.  
 12 CHAIRPERSON SCHAEFER: Okay. Anybody  
 13 else have any questions or comments?  
 14 COUNCILMAN MARTINO: Madam Chair?  
 15 CHAIRPERSON SCHAEFER: Who's speaking?  
 16 COUNCILMAN MARTINO: Councilman  
 17 Martino.  
 18 CHAIRPERSON SCHAEFER: Yes.  
 19 COUNCILMAN MARTINO: Mr. Hehl, just a  
 20 couple of quick questions. I know we discussed  
 21 installation of a fire hydrant in that location. I  
 22 just want to double-check. I haven't seen any  
 23 follow-up on that. I haven't seen that on any  
 24 documents.  
 25 I just want to make sure, because there  
 52  
 1 is a lack of fire suppression, of water in that  
 2 area, I just want to make sure that we get one on  
 3 that site.  
 4 CHAIRPERSON SCHAEFER: Councilman  
 5 Martino, I'm going to stop you. That also was  
 6 agreed upon with the location of where you wanted  
 7 it. Okay?  
 8 COUNCILMAN MARTINO: And where --  
 9 CHAIRPERSON SCHAEFER: It's going to  
 10 be -- it's going to be in the conditions.  
 11 COUNCILMAN MARTINO: And the location  
 12 was discussed? I'm sorry.  
 13 CHAIRPERSON SCHAEFER: Yeah. You  
 14 asked for the location. I'll tell you it in a  
 15 second, unless Mr. Hehl knows it off the top of his  
 16 head.  
 17 ATTORNEY HEHL: I don't recall  
 18 exactly, but I do recall the conversation and  
 19 identified it.  
 20 Gerry, do you happen to know?  
 21 CHAIRPERSON SCHAEFER: I have it right  
 22 here.

23 ATTORNEY HEHL: Great. Thank you,  
 24 Madam Chair.  
 25 CHAIRPERSON SCHAEFER: Everybody  
 53  
 1 agreed to locate it near the drive closest to the  
 2 building. That was your request, Mr. Martino.  
 3 COUNCILMAN MARTINO: Right. Okay,  
 4 that's fine.  
 5 And then the other -- the other  
 6 question I have is, is the sidewalk situation.  
 7 CHAIRPERSON SCHAEFER: They already  
 8 conceded that they would be putting a sidewalk in if  
 9 you want it. I'm just trying to move this along.  
 10 COUNCILMAN MARTINO: Because I also  
 11 heard in the last couple of meetings that -- that  
 12 they would be happy to also donate into the sidewalk  
 13 fund. So where are we with that?  
 14 ATTORNEY HEHL: Whatever the board and  
 15 the board professionals request.  
 16 COUNCILMAN MARTINO: Well, the only --  
 17 the only thing is, again, I will give you my, just a  
 18 quick, due to the evacuation of the building in an  
 19 emergency and the amount of children that are there  
 20 and my extensive years of doing fire drills with --  
 21 with adolescents, that's how they leave the site.  
 22 So again, I will request it. And I  
 23 guess it's up to the board if they want to agree  
 24 with me. That's -- that's all I have.  
 25 Thank you.  
 54  
 1 CHAIRPERSON SCHAEFER: That would be  
 2 part of the conditions of the resolution if we move  
 3 forward to a vote for this application.  
 4 But yeah, you know, they have agreed.  
 5 COUNCILMAN MARTINO: Okay. Thank you.  
 6 CHAIRPERSON SCHAEFER: Okay. Anyone  
 7 else?  
 8 Okay, so now we're going to go to  
 9 closing arguments.  
 10 ATTORNEY LINNUS: Madam Chair, excuse  
 11 me. Before we do that, you do have to open it up to  
 12 the public for comments.  
 13 CHAIRPERSON SCHAEFER: Okay.  
 14 ATTORNEY LINNUS: Not questions,  
 15 comments.  
 16 CHAIRPERSON SCHAEFER: Got it.  
 17 Anyone here from the public that has  
 18 any comments to make?  
 19 Okay, hearing none, I'm going to close  
 20 that public portion.  
 21 And we're going to start with closing  
 22 argument, right, Frank?  
 23 ATTORNEY LINNUS: That's correct.  
 24 CHAIRPERSON SCHAEFER: Okay.  
 25 ATTORNEY LINNUS: Mr. Butler.  
 55  
 1 ATTORNEY BUTLER: Thank you, Madam  
 2 Chair. Just to give you a heads up, my summary is  
 3 going to be divided into three different parts. The  
 4 first part is the site plan and the surrounding  
 5 area. The second part is going to be variances and  
 6 the waivers. And the third part is going to be  
 7 about the critical areas and the Chapter 22 and

8 the -- the position of the board that they're going  
 9 to expect the DEP to handle Chapter 22.  
 10 And those are the three areas. I will  
 11 be as quick as possible. I have a lot of stuff. I  
 12 have to apologize, but there's been ten hearings  
 13 here. I would like to get through tonight and I  
 14 would like Steve to get through tonight. I don't  
 15 care whether you vote tonight but I would just like  
 16 us to get through at the same time. Thank you,  
 17 Madam Chair.  
 18 The first thing I would like to talk  
 19 about is the use. The use, as we all know, is a  
 20 permitted use pursuant to the Municipal Land Use  
 21 Law. And that is 40:556-66.6, that permits a  
 22 daycare center in a non-residential zone. This is a  
 23 non-residential zone. However what the Municipal  
 24 Land Use Law, I have in my hand, does not  
 25 necessarily permit is 154 students and -- and 42  
 56  
 1 employees. That has to pass site plan scrutiny.  
 2 And that has to do with the site plan, the site, and  
 3 the surrounding areas. Otherwise somebody could  
 4 apply for 1,000 toddlers to use that site and -- and  
 5 I don't think that would be appropriate.  
 6 So just because it's a permitted use,  
 7 it's not permitted for 154 students. I would like  
 8 to make that clear. And -- and I am also fully  
 9 aware -- and if I'm not, I'm sure Mark Healey will  
 10 point it out to me -- in our local ordinance,  
 11 28-40152 it says this, "Family daycare homes and  
 12 child care centers, as such terms are defined in the  
 13 MLUL, shall be permitted in the borough in  
 14 accordance with the requirements of the MLUL."  
 15 Now as far as I'm concerned that's just  
 16 surplusage. That means absolutely nothing. This  
 17 application is no stronger or no weaker, with or  
 18 without what I just read from our local municipal  
 19 ordinance, because the Municipal Land Use Law would  
 20 control. But again, it does not permit 154  
 21 students.  
 22 Now we are going to talk about --  
 23 during this hearing we will be talking about traffic  
 24 and -- and Mr. Hehl in memos each of us sent to Mr.  
 25 Linnus talked about the Dunkin' Donuts. The Dunkin'  
 57  
 1 Donuts case is -- it was an Appellate division per  
 2 curiam case. It's a 1984 case. It's found at 193  
 3 N.J. Super. 514. And -- and it says two things  
 4 about traffic. The first thing it says about  
 5 traffic, and I'm going to read it to you and that's  
 6 on Page 515. We're talking about a permitted use  
 7 here for Dunkin' Donuts.  
 8 "A planning board shall consider  
 9 off-site traffic flow and safety in reviewing  
 10 proposals for vehicular ingress to and egress  
 11 from a site."  
 12 Now I'm going to talk to you a little  
 13 later about a -- a plan by Hal Simoff, OW-22, which  
 14 shows complete gridlock on Union Avenue because you  
 15 can't get in and you can't get out. And the  
 16 gridlock goes into New Providence Road. Well, that

17 has to do with ingress and egress, okay?  
 18 Now Mr. Hehl is relying upon this  
 19 section that I'm going to read and that's also on  
 20 Page 515:  
 21 "But the authority to prohibit or limit  
 22 usage generating traffic into already  
 23 congested streets or streets with a high rate  
 24 of access is an exercise of zoning power  
 25 invested in the municipal governing body."  
 58  
 1 Okay? Now, I say this section I just  
 2 read, you know, which Mr. Hehl relies upon, is not  
 3 at all relevant to this application because this  
 4 town did not specifically permit a specific use in a  
 5 specific zone with dimensional requirements so we  
 6 knew what we were getting. Okay? This was done by  
 7 Trenton. All right. And then Trenton has --  
 8 universally has permitted daycare centers in  
 9 residential areas, okay? And they don't know  
 10 anything about traffic, especially in this  
 11 particular area. Okay? They have no expertise.  
 12 So the local expertise is not there.  
 13 And that is notwithstanding the fact that our -- our  
 14 zoning ordinance incorporates the MLUL, it doesn't  
 15 even mention residential zones, it just said,  
 16 whatever the MLUL said, we adopt. And that's the  
 17 law anyway. So I'm going to ask that my traffic  
 18 documents be submitted into evidence.  
 19 All right. Mr. Simoff, my traffic  
 20 engineer, has done traffic counts and so has  
 21 Elizabeth Dolan on the intersection of New  
 22 Providence Road and Union Avenue. And both of them  
 23 come up with F. Now, Ms. Dolan did not  
 24 include -- she had it as a T intersection. And, of  
 25 course, the quarry is there and the main exit is,  
 59  
 1 there, so it's a four intersection. In any event,  
 2 in any event, Mr. -- excuse me for one moment. In  
 3 OW-9, he has the delay time at this intersection  
 4 143 seconds. For anybody that is on Union Avenue  
 5 and wants to make a right into New Providence Road,  
 6 now this is in the peak hour morning, okay, it will  
 7 take 143 seconds.  
 8 So having 143 seconds, the next thing  
 9 he did was he drafted OW-22.  
 10 Now, Madam Chair, these documents have  
 11 already been put on the screen when they were  
 12 testified to. I know Theresa sent all the documents  
 13 to the board members. I want to move this along  
 14 just as much as you do. I don't think we should  
 15 have to put the documents that Steve and I are going  
 16 to refer to on the screen again. Would you agree  
 17 with that.  
 18 ATTORNEY LINNUS: That's up to you,  
 19 Mr. Butler. It's up to Mr. Hehl when he presents  
 20 his closing argument. The board is not going to  
 21 prohibit you from doing that if that's what you  
 22 would like to do.  
 23 ATTORNEY BUTLER: All right. Let  
 24 me -- let me put up OW-22. And I'm not going to put

25 up many documents. This might be the only one.  
 60  
 1 OW-22, please. This is being done by  
 2 Hal Simoff.  
 3 BOARD CLERK: Is Hal Simoff putting it  
 4 up?  
 5 HAL SIMOFF: I'm going to try.  
 6 Theresa, can you put up OW-22?  
 7 BOARD CLERK: Yes, give me a moment,  
 8 please.  
 9 ATTORNEY BUTLER: Thank you, Theresa,  
 10 as usual. Sorry for the delay.  
 11 CHAIRPERSON SCHAEFER: Can you take  
 12 down what you have up there, Mr. Butler?  
 13 ATTORNEY BUTLER: No. I can't see  
 14 anything, can you?  
 15 CHAIRPERSON SCHAEFER: You have the  
 16 "Install Go to Meeting" on the screen.  
 17 There you go.  
 18 BOARD CLERK: Okay. You have to stop  
 19 sharing your screen so I can share mine.  
 20 (WHEREUPON, a discussion was had  
 21 regarding technical issues.)  
 22 ATTORNEY BUTLER: We got it. We got  
 23 it, Madam Chair.  
 24 Okay, now let me talk about this OW-22  
 25 and the 243 seconds delays. Look at what that does  
 61  
 1 to the ingress and the egress of the site. And  
 2 there's an ingress and egress. If one is towards  
 3 the (technical interference) and that's an in and  
 4 out. And then there's one towards the west and  
 5 that's just an out, okay?  
 6 The blue cars are -- are going in a  
 7 westerly direction, and you can see the gridlock.  
 8 Okay? The red cars off the site are coming from  
 9 Union Avenue and making a left or right onto Union  
 10 Avenue and trying to get into the site, okay? Now,  
 11 allowing courtesy gaps for that, if there's going to  
 12 be courtesy gaps. And this also extends to back up  
 13 on New Providence Road, as you will see cars 8 and  
 14 9, okay.  
 15 Now on-site it shows the -- the people  
 16 can't get out of either site by their cars. It's  
 17 just completely gridlocked with the existing traffic  
 18 and the generation of the -- the traffic will be  
 19 generated by the day care center. That in and of  
 20 itself, I think, should cause a denial of this  
 21 application. That's a powerful exhibit.  
 22 Now, if you can go to OW-12. And I am  
 23 not going to ask you to put on that on the screen,  
 24 but OW-12, I will remind you, and you probably have  
 25 a copy of it, it shows a truck coming from Route 22,  
 62  
 1 making a right onto the -- the entrance and exit,  
 2 which is the eastern entrance and exit. It's a  
 3 30-foot truck, okay. That truck interferes with  
 4 cars that are stopped, trying to get out of the in  
 5 and out ingress and egress. That truck also  
 6 interferes with cars that are parked, meaning it's

7 going right over spaces. If there's cars, that --  
8 that truck can't go anywhere, okay. And that  
9 continues on throughout the site and until he tries  
10 to exit out.  
11 So the on-site of the 30-foot truck,  
12 it -- it makes this internal circulation impossible  
13 and dangerous. Don't forget, we're talking about  
14 six-week-old kids up to six-year-old kids, right?  
15 This is another fatal defect in and of itself that  
16 could cause a -- cause a denial of this application.  
17 Now, Mr. Hehl has written a letter to  
18 the board, dated March 10th, 2021, in which he says,  
19 "You will only have trucks that come to our site  
20 that are Federal Express or UPS and that are 23-feet  
21 long." Good luck. Call up Federal Express. Call  
22 up UPS and say you want a small truck. You will  
23 never get it. You will never get it, okay. And if  
24 you have your 30-foot truck, that's what you're  
25 going to get.

63

1 Now OW-14A shows what happens when a  
2 car parks and wants to leave, okay. It's OW-14A and  
3 I'm not going to put it up on the screen, you have  
4 it. But it shows that the car parked in the  
5 northerly portion of the parking lot has to go in  
6 reverse 35 feet to make a U-turn exit. In my humble  
7 opinion, and as testified by Mr. Simoff, that's  
8 dangerous, again, with the population that this is  
9 going to serve to have a truck that has to go in  
10 reverse for 35 feet.

11 Now OW-14B shows the truck backing up  
12 again, but now it doesn't want to go to the west  
13 exit, it wants to go to the east exit, which goes in  
14 and out. In that case, the truck has to back up  
15 55 feet. Again it's dangerous. This is poor  
16 circulation planning. This is a bad site plan.  
17 Now let's talk about, if I may, let me  
18 talk about -- let's talk about the number of parking  
19 spaces. That's a variance, okay? Mr. Simoff  
20 indicates that the population at this day care  
21 center is going to serve, that you're required to  
22 have approximately 154 parking spaces, all right.  
23 154 parking spaces. Now in our ordinance, it does  
24 not say how many parking spaces are required for a  
25 day care center nor does it have anything similar to

64  
1 a day care center.

2 Our ordinance goes on and says you have  
3 to use industry standards to determine parking and  
4 that's exactly what Mr. Simoff did. What did he do?  
5 He -- he used the ITE, International Traffic  
6 Engineers to -- to determine how many parking spaces  
7 were needed, okay. That's in OW-8. This is a -- it  
8 says 52 spaces. This is an ITE publication. It's  
9 predicated upon 39 studies, not four like your  
10 expert used, okay. And it indicates with a  
11 percentile of 15 percent that 52 would be required.  
12 If you knocked out the 52 percent, at least 42  
13 spaces would be required.  
14 Now again, that's predicated upon

15 national standards which our ordinance requires.  
 16 Your expert went to four spaces which was done by an  
 17 engineering firm that in the past has been used by  
 18 The Learning Experience. In fact, The Learning  
 19 Experience had an application in Morris Township.  
 20 They used four locations. And your expert used that  
 21 expert to give you consulting advice.  
 22 Now to me that's a conflict. How could  
 23 you use The Learning Experience? The Learning  
 24 Experience is the de facto applicant here. You are  
 25 the ones that are going -- that are going to buy  
 65  
 1 this thing. They're going to lease it. They're  
 2 going to act as a franchisor, okay? And to use  
 3 their expert to determine parking for this  
 4 application, to me is highly inappropriate and  
 5 unprofessional. And I don't mind saying it.  
 6 Now, Mr. Simoff also did a OPRA request  
 7 from the Scotch Plains Police Department and the  
 8 question was, how many times over the last three  
 9 years was Route 22 closed because of flooding? The  
 10 answer came back, 12. Now, when he introduced that  
 11 there were a couple of board members that said,  
 12 well, wait a minute, this flooding wasn't near Union  
 13 Avenue, it was more up near Bonnie Burn Road. I  
 14 submit to you that it's only practical sense that if  
 15 Bonnie Burn Road is flooded, then Union Avenue is  
 16 flooded. And they're not going to let you go to get  
 17 on Route 22 to get to Union Avenue if a quarter of a  
 18 mile up the road it's flooded. So Route 22 floods  
 19 and it floods badly and -- and the OPRA request  
 20 shows that.  
 21 Mr. Simoff also did an OPRA request  
 22 from the DOT regarding accidents at the intersection  
 23 down the block of Bonnie Burn Road and New  
 24 Providence Road. And he averages over three years,  
 25 35 traffic accidents a year. That's a dangerous  
 66  
 1 intersection. That, again, is in the neighborhood  
 2 of this proposed day care center.  
 3 Bob Weldon showed us pictures that he  
 4 had taken and they were marked OW-5 and OW-6 and it  
 5 shows flooding on New Providence Road, near the end  
 6 of the storm. You can see where the water is  
 7 receding because you can see the pebbles on the  
 8 road, okay? And that is important. When I get to  
 9 Chapter 22 you're going to see why it's more  
 10 important because New Providence Road is 105 feet  
 11 and the grade level of the building of the proposed  
 12 day care center is 100 feet.  
 13 So, as we all know, water goes down.  
 14 New Providence Road is five feet higher than the day  
 15 care center. That's dangerous. And by the way, Hal  
 16 Simoff's OPRA request show Route 22 flooded on both  
 17 sides, going in the easterly direction and the  
 18 westerly direction.  
 19 Also, while we're talking about Bob  
 20 Weldon, we don't want you to think that Weldon is  
 21 trying to prevent anything to happen in their  
 22 neighborhood, okay? We're a heavy industrial use.

23 We have been there since 1892, but we're not pigs.  
24 When the same applicant -- were owned by the same  
25 people -- applied for a car wash and a lube center  
67

1 in '07, I went to every meeting and I did not object  
2 to the application. They needed a use variance at  
3 the time because it was in the quarry zone. The  
4 only thing we wanted, we wanted some shrubbery to  
5 sort of act as a buffer between the quarry and these  
6 newly washed cars.

7 The DEP knocked that out and made some  
8 changes, so they had to go back to the board of  
9 adjustment. And they were approved again July 17th,  
10 '08. I was there again, didn't object at all.

11 In fact, the requirements that the DEP  
12 wanted didn't permit shrubbery to go on Lot 1, there  
13 wasn't enough room. So we volunteered and Bob  
14 testified to this, Bob Weldon, that we volunteered  
15 that we would let them put their shrubbery on our  
16 Lot 2, which was next door, okay? And I don't know  
17 why the car wash wasn't built. But there has been  
18 no testimony as to it, okay? It's not that you are  
19 zoning this thing into sterility, or your -- it's  
20 into sterility because the site plan because on two  
21 occasions that they were approved for a -- a car  
22 wash and a lube center.

23 Now, there's a conservation easement.

24 I did a -- I did a search. If -- if you look at  
25 OW-1, which is a exhibit of Mr. Simoff -- I'm sorry,  
68

1 Mr. Lapatka, you'll, see that -- and Mr. Speeney  
2 asked about that, it's colored in black, it's a  
3 conservation easement. And it's right smack in the  
4 area on Page 6A but the application used for  
5 mitigation, he wants to mitigate. He understands  
6 that he's building where he can't build, and in all  
7 sincerity, this lot is two degrees above a swamp.  
8 If you look at it, it's surrounded by water. It's  
9 got wetlands over -- all over the place. It has got  
10 delineated wetlands. It also has 150 riparian zone  
11 which the applicant's engineer says still apply,  
12 even though the DEP says that, it doesn't flow  
13 50 acres, the tributary, we're going to take  
14 exception to that. We are going to fight that.  
15 We've got numbers that show different. So that's  
16 not the end of that issue.

17 So if you take -- if you take the  
18 riparian associated with the Green Brook, 150 feet  
19 and the riparian associated with the tributary, you  
20 lose basically the whole site but the building. You  
21 lose it all. And that's why you're going to make  
22 this condition. I think you're probably going to  
23 grant this from the impressions I get. And, you  
24 know, you're the experts. You're the board. I'm  
25 the attorney. I have an axe to grind. I have a  
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1 client. I want to win, just like Mr. Hehl. But --  
2 but if you do that, I'm sure the DEP is not going to  
3 let them remediate where there's already a  
4 conservation easement. So I just want to throw that

5 out at you now.  
 6 Now, I would like to talk about the  
 7 variances, okay? There's a five-foot parking  
 8 setback. You have to be set back 20 feet from the  
 9 right-of-way. There's six spaces that are -- that  
 10 are five feet within the right-of-way. The traffic  
 11 engineer -- or excuse me, the planner for the  
 12 applicant admitted when I said Union Avenue is a  
 13 heavily traveled road, it's a connector between New  
 14 Providence Road and Route 22, heavily traveled.  
 15 That the reason why isn't the reason why, I said,  
 16 that it has to be set back 20 feet instead of five  
 17 feet, safety? He said safety? He said, no, it was  
 18 for esthetics, to make it look nice and make it look  
 19 better.  
 20 And he didn't rely upon hardship. He  
 21 said he's not relying upon hardship. Well he knows  
 22 he can't rely upon hardship because if he relied  
 23 upon hardship, that's economic hardship. The reason  
 24 why he wants those six spaces there is because if he  
 25 has got to move them back, he loses other spaces and  
 70  
 1 he's got to make a smaller building and he's going  
 2 to make less money. That's not the reason to grant  
 3 a variance.  
 4 He admitted he wasn't relying upon  
 5 hardship, he was relying upon the contour of the  
 6 property. The contour of the property does not  
 7 prevent him from moving those spaces back 20 feet  
 8 where they're supposed to be moved back.  
 9 I have already discussed the parking  
 10 regarding the 31 spaces the applicant proposes and  
 11 Hal Simoff's 52 spaces.  
 12 Ms. Dolan, the traffic engineer, thinks  
 13 29 spaces. Mr. Fishinger, Joe, I'm sorry, you  
 14 say -- you say 19 are enough. There's 154 students.  
 15 There's 22 employees. That's 176 people. And your  
 16 consultant, who is a traffic engineer -- Joe is a  
 17 traffic engineer, and a nice guy, I have met him on  
 18 another case -- I can't believe he comes up with 19  
 19 parking spaces, but he does. And as I indicated  
 20 before when he came up with his parking he relied  
 21 upon Stonefield Engineering, which was the expert  
 22 for The Learning Experience.  
 23 And also, another problem I have with  
 24 Joe's approach, when he did the parking, he relied  
 25 upon the size of the building. The ITE sets forth  
 71  
 1 how many parking places you should have for day care  
 2 centers and all kinds of uses. And one of the --  
 3 the ITE used by Mr. Simoff used the number of  
 4 babies, toddlers, whatever you want to call them,  
 5 six weeks old to six years old, whatever you want to  
 6 call them. He used the number of babies or  
 7 toddlers, that's the ITE that Hal Simoff used. Joe  
 8 did not use that. Joe used the size of the  
 9 building. Now what does the size of the building  
 10 have to do with the number of parking places? The  
 11 number of parking places has to do with the people  
 12 that are going to use the site, not the size of the

13 building.  
 14 Now, there's no loading space. That's  
 15 a variance. There's absolutely no testimony at all  
 16 -- none, none -- why they should be able to build  
 17 this thing without a loading space. I didn't hear a  
 18 thing. How can you grant a variance when there's no  
 19 testimony on it? You just can't say that they're  
 20 entitled to a variance. So that -- that's got to  
 21 fail.  
 22 Waivers, you have got to prove  
 23 waivers. They asked for a lot of waivers. You have  
 24 to prove hardship for a waiver. A lot of lawyers  
 25 think waivers are automatic. A lot of planning  
 72  
 1 board members think that. That's not the case,  
 2 that's not the case. That's in Section 40:55D-51.  
 3 OW-34, you must prove hardship. It's in Peter  
 4 Steck's report.  
 5 Now, there are -- in OW-21, Mr. Lapatka  
 6 has set forth 12 requirements of our zoning  
 7 ordinance that should be on the plans, that aren't  
 8 on the plans. They're not on the plans at all. And  
 9 I'm just going to point out to you a -- four of the  
 10 significant things that aren't on the plan and that  
 11 you can't analyze this application without it.  
 12 Okay?  
 13 One of the things is the Environmental  
 14 Site Analysis. That's found in Section 21-93. It's  
 15 for the site. They didn't do an Environmental Site  
 16 Analysis for the site. The section I cited requires  
 17 it. Why not? They don't want to find what's there.  
 18 Remember Cook's Pond that was filled in, God knows  
 19 when it was filled in. It was there '29, '30, '49  
 20 and then it disappears, okay? I hope the drums or  
 21 anything -- oil drums or anything else are not in  
 22 there, but why hasn't that been determined by an  
 23 Environmental Site Analysis and our section requires  
 24 it?  
 25 Our ordinance also requires a soils  
 73  
 1 report, which the applicant never did. That's  
 2 Section 21-9.3F. That affects drainage. A soils  
 3 report. They don't give you a soils report. They  
 4 don't give you any reason why.  
 5 A conservation easement. Section  
 6 28-602F2 requires a conservation easement along all  
 7 watercourses. Well, here you have the tributary and  
 8 you have the Green Brook. Our ordinance, as I  
 9 cited, says that you have to get a conservation  
 10 easement. They didn't -- they didn't offer to give  
 11 you a conservation easement. They don't show a  
 12 conservation easement on the plan. That's another  
 13 way in which it's -- now one of the most important  
 14 things.  
 15 And the last thing I want to talk about  
 16 which they don't have in the plan, is the Stormwater  
 17 Management Plan, they got elements of it. They have

18 this pro forma maintenance thing that -- that  
19 anybody can get for about \$350. But that's not a  
20 Stormwater Management Plan. And that's required  
21 under Section 28-604A.

22 Now these are four major things that  
23 are not in the plan. That in and of itself could  
24 require a denial of this application.

25 Now, let me get to -- let me get to  
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1 the -- the water regulations regarding this site.  
2 First of all, in our ordinance, 28-203, it defines  
3 critical areas. That's a red flag, a critical area.  
4 Critical areas, wetlands, 100-year floodplain or  
5 flood hazard areas. That's what it says a critical  
6 area is. This is obviously a critical area.

7 Now -- now, we have an ordinance. It's  
8 called Chapter 22, okay? And it's -- it's our flood  
9 damage prevention ordinance. And the professionals  
10 and Mr. Hehl say, we're going to comply with that.  
11 We're going to comply with that. How are you going  
12 to comply with that?

13 First of all, I was just told tonight  
14 that the tributary and -- and that's where we want  
15 you to do Chapter 52. Chapter 52 has a flood hazard  
16 line which is a 100-year storm. That's not the DEP  
17 flood hazard line. The DEP flood hazard line is a  
18 foot bigger, okay? Here is the difference, here is  
19 the difference, it's important. Under the DEP flood  
20 hazard line you can do things, you can mitigate  
21 like -- like they want to do on Page 68. But you  
22 can't do any of that. You can't do a thing if -- if  
23 you're within the 100-year flood storm. And that's  
24 the Chapter 22 standard. Mr. Healey said it was.  
25 Mr. Healy deferred to the engineer as to the  
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1 applicability of it, but both the engineer and Mr.  
2 Healy said that Chapter 22 was relevant to the  
3 application.

4 Now if you are within the floodplain,  
5 if you're within -- if you're within the 100-year  
6 storm, let's call it the flood development  
7 restriction, Section 28-401A says this -- and this  
8 is important, this is -- you can't -- these are your  
9 ordinances. You can't ask the DEP to apply your  
10 ordinances because they won't do it. And nor should  
11 they do it, this is up to you. If you are in the  
12 100-year floodplain and there's been no studies, so  
13 we don't know the extent of the floodplain as it  
14 applies to the tributary, it says, "No structure or  
15 use shall be moved, added to, enlarged or  
16 established nor shall any fill be placed, nor shall  
17 the elevation of any land be substantially changed  
18 in the flood hazard area except in accordance with  
19 the flood hazard ordinance," which is Chapter 22,  
20 the flood hazard prevention ordinance. Okay? So  
21 that's a -- now it continues -- the flood damage

22 prevention ordinance that you have, that was passed  
23 pursuant to statute. Section 22-1.1 says this:  
24 "The legislature of the State of New Jersey has in  
25 N.J.S.A. 40:48-1 et seq, delegated the  
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1 responsibility to local government units to adopt  
2 regulations designed to promote health, safety, and  
3 general welfare of the citizenry. Therefore, the  
4 Mayor and Council of the Borough of Watchung of New  
5 Jersey, does hereby ordain as follows" and it adopts  
6 the flood prevention ordinance.

7 Now you're kicking the can down the  
8 road. You are expecting the DEP to do what you're  
9 supposed to do, in all due respect. In all due  
10 respect. This is the 100-year storm and you have  
11 got to calculate it. And the applicant should have  
12 been made to calculate it so you will know he can't  
13 do anything in it. You don't know the extent of it.  
14 You don't know whether it's in the outdoor  
15 playground area. You don't know whether it's going  
16 to be where soil is going to be disturbed to build  
17 this day care center. You don't know that. And it  
18 also says, if the applicant doesn't do it you can  
19 ask the engineer to do it. And you didn't ask the  
20 engineer to do it. And you've heard this before,  
21 but everybody says, oh, the DEP will do it. The DEP  
22 won't touch it. They don't care about Chapter 22.  
23 They only care about their flood hazard line. And  
24 the 50-acre rule, now that they say that there's no  
25 50-acre rule, we know they're not going to touch the  
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1 tributary. I mean, I can turn that around like I'm  
2 doing and say, if the tributary doesn't drain  
3 50 acres, well then you're not going to find out  
4 anything about it from the DEP. You've got to do  
5 it. And I will tell you, it might -- in all due  
6 respect, it would be reversible error not to ask  
7 this applicant to do the stormwater 100-year flood  
8 associated with the tributary.

9 Again, continuing with the flood damage  
10 prevention, Findings of Fact, "The flood hazard area  
11 of the Borough of Watchung are subject to periodic  
12 inundation which results in loss of life or  
13 property." That's important.

14 As Section 22-1.3 the purpose says, "To  
15 protect human life." Don't forget we have little  
16 babies we're talking about putting in here.  
17 Now, so -- so you don't have that  
18 important piece of information, and the DEP isn't  
19 going to do it for you. They're not going to do it  
20 for you because apparently they're taking the  
21 position that the tributary doesn't -- that 50 acres  
22 doesn't flow into it. And they won't do it anyway  
23 because they don't care about the 100-year storm.  
24 What they care about is the 100-year storm plus a  
25 foot, and that's all they'll do. They won't do the  
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1 100-year storm so you will never know.  
2 Now this is also important regarding

3 flooding from New Providence Road onto the site. As  
4 I indicated earlier, New Providence Road is five  
5 feet higher than the -- than the grade of the day  
6 care center. Water goes down. Everybody knows  
7 that.  
8 Now I'm just going to -- I'm almost  
9 through Madam -- Madam Chair. I'm rushing through.  
10 You can tell I'm rushing through. I know you want  
11 to get through. I know Mr. Hehl wants to get  
12 through. I respect him and I respect the fact the  
13 way he put in this case. He knows that. I have  
14 known him for 40 years. I knew his father before  
15 him. Right?  
16 Okay. Now let me just read, on this  
17 Chapter 22, let me just read part of the transcript  
18 of Mr. Lapatka, and I said -- I'm almost through --  
19 okay, the first thing I'm going to read starts at  
20 page -- this is when he testified, March 16th, 2021,  
21 Page 70, Line 9. And -- and the first citation ends  
22 on Line 6, Page 71.  
23 Here is what he says, Mr. Lapatka,  
24 "Let's see. Section 28-401(A)" -- already read you  
25 that -- "basically says" -- and Mr. Butler read it  
79  
1 before. I'm not going to read it again. But it  
2 basically says you cannot -- "you cannot place  
3 fill" -- "you cannot place fill in the flood hazard  
4 area. And the flood hazard area in that context is  
5 referring to the 100-year floodplain."  
6 That's what Mr. Healy says and he's  
7 right. And it's right in the ordinance. It says  
8 the floodplain for Chapter 22 is the 100-year storm.  
9 It's not the DEP floodplain.  
10 He continues, Mr. Lapatka. "Now, there  
11 was testimony that because the flood elevation that  
12 DEP uses is higher and the floodplain is larger that  
13 the DEP regulations supersede all of the Watchung  
14 codes in that regard, and I disagree with that.  
15 "The Watchung code, in certain aspects,  
16 is actually more restrictive. Okay? For instance,  
17 in the 100-year floodplain, it says fill shall not  
18 be placed. The DEP regulations will say in the  
19 flood hazard area, which is a greater area, the fill  
20 has to be balanced out."  
21 So you can put fill in one place and  
22 take it out another place. You can't do that under  
23 Chapter 22, your ordinance.  
24 Then he goes on and says, "And for this  
25 particular project, the Watchung ordinance in that  
80  
1 respect is actually more restrictive. That's -- one  
2 caveat, I'm assuming that there is actually a viable  
3 plan for flood storage compensation."  
4 All right, now, I got two more quotes.  
5 On Page 72, Line 20 to Page 74 Line 12, Mr. Lapatka  
6 says this. "Okay. I spoke before about the  
7 drainage area of the -- of the tributary. I believe  
8 it's over 50 acres which would, under DEP  
9 requirements, say that you would have to -- you  
10 would have to prepare a flood study for it. Now,

11 let's forget about DEP requirements; let's talk  
 12 about Watchung.  
 13 "Watchung analyzes the 150-year storm.  
 14 And there is no minimum -- there is no minimum  
 15 drainage area under which you don't have to do a  
 16 drainage calculation for, you know -- for that  
 17 stream. Okay? Theoretically, it could be one acre,  
 18 and you would still have to do it."  
 19 He continues on Page(sic) 11: "I may  
 20 have said -- I may have said this before -- I'm not  
 21 quite sure -- but my analysis indicates that the  
 22 water will overtop the road and will flow onto the  
 23 proposed day care center project. Now, I don't -- I  
 24 don't know exactly how much that's going to be  
 25 because a study's not been done. I haven't done an  
 81  
 1 exact study, but I want to point out that the floor  
 2 level or the floor elevation of the proposed  
 3 building is about 5 feet lower than New Providence  
 4 Road.  
 5 "So, you know, to me, it is an issue,  
 6 and I think it's something that really should be  
 7 explored to make sure that we don't create a  
 8 problem. There were photos shown before that the  
 9 road floods and, you know, someone made the comment,  
 10 well, it doesn't happen very often or it's very  
 11 rare, but we're talking about a 100-year storm  
 12 here..." -- that's your code, that's what it refers  
 13 to. "So you have to protect against these things  
 14 for a 100-year storm..."  
 15 He concludes -- "certainly, in light of  
 16 the occupancy" -- meaning the kids -- "of the  
 17 occupants that you're going to have in this  
 18 building, you're going to -- you're going to have,  
 19 you know, basically infants and young children."  
 20 One more quote and then I have one  
 21 other thing to say and I'm through. Now I'm going  
 22 to -- I'm going to read, again we're continuing with  
 23 the March 16th, 2021, and it's on Page 106, Line 19  
 24 to 107, Line 4. Here is what he says: "One  
 25 comment. Is that forget about the flood hazard area  
 82  
 1 in the DEP regulations. Watchung's own code says  
 2 that fill cannot be placed in the floodplain.  
 3 "So if you don't calculate the  
 4 floodplain for the tributary, you don't know if fill  
 5 is being placed in it or not. And the 50-acre  
 6 question is irrelevant. In the context of the  
 7 Watchung code they don't cite the 50 acres. So the  
 8 Watchung code is actually more restrictive in that  
 9 regard."  
 10 Now the final thing I have to say is on  
 11 taxes. I wrote a letter to Theresa Snyder,  
 12 June 3rd, 2021, and I copied Frank Linnus. And I  
 13 copied Steve Hehl, and here is what I said about  
 14 taxes: "It is generally conceded that a planning  
 15 board or board of adjustment cannot grant approval  
 16 predicated upon the increased taxes that would  
 17 accrue to the town from the build-out of that  
 18 approval." You can't do it to make more money for

19 the town.  
20 This is clearly stated in Cox on  
21 zoning, edition 2021, Page 1010, 46-8 which states  
22 the following, and I quote: "Grant and denial of  
23 variances and other approvals also has an effect on  
24 the value of land and, therefore, on taxation. In  
25 this regard it should be emphasized that increase in  
83  
1 the value of land and the related increase in tax  
2 revenues are not a valid reason for the grant of a  
3 variance or other approval."  
4 So you can't predicate it upon taxes,  
5 that you might get some more money because you put  
6 this thing up. And that goes without saying, but  
7 that's the law.  
8 Madam Chair, at this point I conclude  
9 my summation. Thank you for your patience and thank  
10 you, board members, for their patience.  
11 CHAIRPERSON SCHAEFER: Thank you, Mr.  
12 Butler. Mr. Hehl?  
13 ATTORNEY HEHL: Yes. First of all,  
14 again, I would like to thank the board and the board  
15 professionals for your -- the time that you've  
16 spent, it's close to a year or even over a year that  
17 we have been pursuing this application. Again, I  
18 would like to thank all of you.  
19 I would like to note that, again, as  
20 the board is well aware, we have modified our  
21 application to seek only preliminary site plan  
22 approval with the variances. Any approval of this  
23 board would be subject to DEP approval, childcare  
24 services approval ultimately and compliance with any  
25 and all of the comments that have been made by the  
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1 board professionals.  
2 And again, as has been indicated and  
3 acknowledged by not only the board professionals,  
4 the board and Mr. Butler and his client, this is a  
5 permitted use, not only under the ordinances from  
6 the township but under the Municipal Land Use Law.  
7 And I thought, even though it's permitted under the  
8 ordinance, I thought referencing a few sections from  
9 the law that was adopted back in 1991 where the  
10 legislature cites that "The need for high-quality  
11 child care is of vital importance. Not only does  
12 the availability of child care allow parents the  
13 peace of mind to pursue their careers and lead an  
14 active, productive, professional lives, but also the  
15 necessity, given the high cost of living in this  
16 state, and the ever-increasing need for families to  
17 bring home two incomes just to get by."  
18 And again, this is a -- permitted in  
19 the zone, but I thought that that goes to the reason  
20 that the legislature adopted the -- the statute  
21 that permits child care in all nonresidential zones.  
22 So focusing on that, there are only two  
23 variances associated with this application. The  
24 first being, the lot frontage along New Providence  
25 Road. And that's an existing addition that's not  
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1 being exacerbated by this application. And the  
2 second is the parking lot setback from Union. And  
3 again, there was -- I'm not going to go through all  
4 of the testimony but there was clearly planning and  
5 practical justifications for those.  
6 We do not believe, and I think it's  
7 supported by the ordinances and the testimony, that  
8 we need a parking variance. I'll touch on that in a  
9 minute. And also loading based upon the nature of  
10 the use, loading space. So from your professional  
11 reviews it's not required, but we did provide  
12 testimony that any such loading or unloading would  
13 be done off hours.

14 Now, just touching upon the witnesses,  
15 it goes back such a long time but I know that Mr.  
16 Jarmel testified when we were in person, so it's a  
17 while ago, but Mathew Jarmel, licensed architect and  
18 M.B.A. He provided not only an overview of the  
19 architectural design, a beautifully laid out  
20 building, an attractive building for this corner,  
21 but the operational testimony based upon his  
22 experience designing, owning and operating child  
23 care centers. And he also confirmed that any  
24 approval is subject to the Department of Child  
25 Services and the New Jersey DEP.

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1 Gerry Gesario, who you heard again  
2 from tonight, professional engineer, well  
3 recognized, addressed all of the site issues. And,  
4 in fact, it's important to note that throughout this  
5 process the application has changed and the plans  
6 have changed in response to comments from the board  
7 and the board professionals so we -- we received  
8 comments, we made revisions and submitted those  
9 revisions to the board.

10 So Mr. Gesario addressed site  
11 circulation, lighting, drainage, landscaping and the  
12 like. We also had the testimony of -- of Elizabeth  
13 Dolan. And Betsy testified, again, adequacy of site  
14 circulation, parking and the like.

15 And I know it was a question raised a  
16 while back and I'll touch on this also, that the  
17 fire department acknowledged that there was adequate  
18 site circulation for safety. And the board  
19 requested that and that was taken care of with the  
20 fire department.

21 And then Creigh Rahenkamp, our  
22 professional planner, again confirmed that this is a  
23 permitted use in the zone and provided clear  
24 justification for the two variances that we're  
25 seeking.

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1 So that's an overview of the witnesses  
2 that testified. And their testimony was supported  
3 and endorsed by the board professionals.  
4 Now again, I will touch on with respect  
5 to parking. Again, the ordinance does not specify  
6 an amount. The statute indicates that parking is  
7 not required but clearly the testimony, not only the  
8 operational testimony from Mr. Jarmel, the testimony

9 from Ms. Dolan, but also the support of Bright View,  
10 Messrs. Jahr and Fishinger, support the findings  
11 based upon data that they collected. I know Mr.  
12 Butler criticized their methodology, and we think  
13 their methodology is -- is very sound and supporting  
14 of the adequacy of the parking.

15 It was interesting to note at the last  
16 hearing, Mr. Weldon objected, and it wasn't an  
17 objection of safety, it was, well, I think this --  
18 this permitted use is going to generate traffic  
19 which is going to interfere with my business. And I  
20 think questions were asked at that time, well, does  
21 that mean you can object to any permitted use just  
22 if you think it's going to impact your business? I  
23 think that the board has to recognize that that was  
24 his claim. He claimed, I've got a business here and  
25 I think that this child care center is going to  
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1 generate traffic which will impact my business.

2 Well, that's certainly not a valid objection to a  
3 permitted use in that zone.

4 And then to cite the flooding, and I --

5 I know that we talked about this, talking about an  
6 event that -- that occurred a decade ago when there  
7 was massive rain. I think they said we got -- how  
8 much rain? Like, a month's worth of rain in two  
9 hours that caused flooding out on Route 22. And,  
10 frankly, there was no testimony nor any photographs  
11 provided to show that that flooding occurred  
12 on-site.

13 And even talking about off-site, I  
14 mean, you've heard Mr. Simoff, I'm not going to get  
15 into the legal part. Clearly, his challenge of  
16 the -- and I've never heard this interpretation  
17 that, if you're looking for a variance that the  
18 Dunkin' Donuts case doesn't apply. And also citing  
19 to traffic incidents at New Providence and Bonnie  
20 Burn as opposed to when he was questioned numerous  
21 times, well, what about Union and New Providence,  
22 and had no data for that.

23 And then the issue with respect to the  
24 tributary. Thankfully, Mr. Freud went forward and  
25 got the data and the response from the DEP, which  
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1 was submitted today with the June 7th, 2021, letter,  
2 confirming that the tributary does not drain more  
3 than 50 acres. Not that we are still not going to  
4 be required to obtain proper DEP approval, which is  
5 a requirement to get our -- our child care license.

6 And there's been so much made of  
7 Chapter 22, and the applicant indicated on numerous  
8 occasions over this year and -- and your board  
9 engineer confirmed, that we are not seeking relief  
10 from Chapter 22. That's not relief that we're  
11 seeking. And that's part of what we submitted.  
12 And again, just in general, we feel  
13 that the applicant's professionals that testified  
14 were supported by your own board engineers with  
15 respect to engineering, planning, and traffic. And  
16 that again, we feel that the -- the variances,

17 again, the two variances that we seek in connection  
 18 with this permitted use are supported by the  
 19 testimony, again not only of the board professionals  
 20 but in support of your board, the board, our  
 21 professionals and the board professionals.  
 22 And again, I re-emphasize that we are  
 23 only seeking preliminary approval. And that  
 24 preliminary approval is your site plan approval for  
 25 this permitted use. As the legislature recognized  
 90  
 1 and your own ordinance recognizes, this is a vital  
 2 use. Child care is an important vital use.  
 3 The borough has chosen to have this area zoned to  
 4 permit that use. And again, clear justification has  
 5 been provided for those variances and we feel that  
 6 any of the -- the issues that have been raised with  
 7 respect to drainage, flooding and the like, will  
 8 certainly be addressed by requiring DEP approval.  
 9 And again throughout this process and  
 10 this is where additional documentation, their  
 11 question, well you don't have a stormwater  
 12 maintenance manual; well, that was supplied and  
 13 submitted to the board. Any of the other requests  
 14 of the board were responded to.  
 15 So for all of these reasons, we feel  
 16 that the application for preliminary site plan  
 17 approval should be granted by this board and that  
 18 the two, what we consider to be minor variances,  
 19 which were supported by testimony from the applicant  
 20 and the applicant's professionals and endorsed by  
 21 your board professionals should be granted.  
 22 And again, after a year of these cases,  
 23 we truly appreciate the board's time and attention  
 24 to this matter. We appreciate the comments from the  
 25 public and we also appreciate the board  
 91  
 1 professionals. So thank you all for your time and  
 2 attention and look forward to the board moving  
 3 forward positively on this request.  
 4 Thank you.  
 5 CHAIRPERSON SCHAEFER: Thank you,  
 6 Mr. Hehl. Do we have any questions or comments from  
 7 our planning board members or professionals?  
 8 Any questions from public or comments?  
 9 Okay. So since we have until the end of July to act  
 10 on this, I think it's a good idea if I make a motion  
 11 to have Frank draft a list of conditions, proposed  
 12 conditions for our review, if we were to move  
 13 forward in approving or disapproving.  
 14 So I just think it's important to see  
 15 what all the conditions would be for this  
 16 application so that we can, taking into account the  
 17 closing arguments and all the testimony that has  
 18 been given to us over the course of time, know where  
 19 -- where we stand and in order to make an  
 20 intelligent decision.  
 21 So what I would like to do is seek a  
 22 motion directing Frank to prepare proposed  
 23 conditions, in the event we move to a preliminary --  
 24 preliminarily approve this application at our July

25 meeting.  
92  
1 MEMBER SPINGLER: So moved.  
2 CHAIRPERSON SCHAEFER: Thank you,  
3 Ellen. Second?  
4 MEMBER FIORILLA: Second.  
5 CHAIRPERSON SCHAEFER: All in favor  
6 say, aye.  
7 BOARD MEMBERS IN UNISON: Aye.  
8 CHAIRPERSON SCHAEFER: Anyone opposed?  
9 Anyone not voting? Okay.  
10 So what we're going to do is we're  
11 going to have Frank draft a list. He will circulate  
12 it through Theresa to all of us so that we can  
13 review it and we'll know how to comment or not  
14 comment or what have you at our July meeting, and  
15 we're prepared to vote one way or the other in our  
16 July regular meeting.  
17 Frank?  
18 ATTORNEY LINNUS: Yes, I just want to  
19 point out to the board that I will do -- I will  
20 prepare the conditions and circulate it to Theresa,  
21 as the Chair had indicated. But I want to caution  
22 the board not to discuss the conditions until you  
23 get to the hearing which is going to take place in  
24 July. You're not to discuss those conditions with  
25 anyone. You certainly can review them.  
93  
1 I would also ask that the board review  
2 the transcripts of these -- of the hearings because  
3 it's important to guide -- and, fortunately we do  
4 have the transcripts, thanks to Mr. Hehl --  
5 fortunately we do have the transcripts. So if  
6 there's anything that the board is concerned about  
7 that is in the transcript or want to raise any  
8 additional proposed conditions, if you choose to  
9 approve the application, I think we have that good  
10 opportunity, the board does, to review the  
11 transcripts of the proceedings.  
12 So with those two caveats I would be  
13 happy to prepare the conditions and send them over  
14 to Theresa for circulation.  
15 CHAIRPERSON SCHAEFER: Okay. Frank,  
16 you have your marching orders for that.  
17 I thank Mr. Hehl. I thank Mr. Butler.  
18 I thank --  
19 ATTORNEY LINNUS: Now, Madam  
20 Chairperson, I heard at the beginning of the  
21 hearing, I don't know if it was correct or not, but  
22 that the -- I thought the date of decision was  
23 June 30th. Is it July 31st? And I would like  
24 confirmation of that.  
25 CHAIRPERSON SCHAEFER: They extended  
94  
1 it to the end of July, as per the transcripts from  
2 our last meeting.  
3 ATTORNEY LINNUS: Can we reiterate  
4 that, Mr. Hehl, for the record?  
5 ATTORNEY HEHL: Yeah, no problem, the  
6 end of July.  
7 ATTORNEY LINNUS: Okay.  
8 CHAIRPERSON SCHAEFER: Okay. So I  
9 think that's it. And I look forward to seeing you

10 next month.  
11 For any of the public that is here,  
12 please note that this will be continued until our  
13 July 20th meeting, I believe, and there will be a  
14 vote.  
15 ATTORNEY LINNUS: And it will be --  
16 will it be conducted virtually, Madam Chair?  
17 CHAIRPERSON SCHAEFER: Theresa?  
18 BOARD CLERK: As far as I know, yes.  
19 ATTORNEY LINNUS: Okay. With that --  
20 and will it begin at 7:30?  
21 CHAIRPERSON SCHAEFER: It will begin  
22 at 7:30. Our regular meeting will begin at 7:30.  
23 ATTORNEY LINNUS: Okay. So for the  
24 purposes of the public, this pronouncement is the  
25 continuation of the public hearing on this matter to  
95  
1 take place on July --  
2 CHAIRPERSON SCHAEFER: 20th.  
3 BOARD CLERK: 20th.  
4 ATTORNEY LINNUS: -- July 20th at  
5 7:30. And the meeting will be conducted virtually.  
6 This is your pronouncement. You will get no further  
7 notice. Some of you check the website.  
8 CHAIRPERSON SCHAEFER: We still have a  
9 little bit more. Planning board members, don't  
10 leave me. But thank you --  
11 ATTORNEY LINNUS: And I would ask that  
12 the planning board members who want to vote on this,  
13 make sure you read the transcripts or listen to  
14 the -- watch the videos or listen to the audio so  
15 you can be eligible to vote.  
16 CHAIRPERSON SCHAEFER: Thank you.  
17 Okay, we're going to move on.  
18 As you know, we -- thank you, Mr. Hehl.  
19 Thank you, Mr. Butler.  
20  
21 (Application adjourned at 9:42 p.m.)  
22  
23  
24  
25  
96

# 1 C E R T I F I C A T E

2  
3 I, ANGELA C. BUONANTUONO, a Notary Public  
4 and Certified Court Reporter of the State of New  
5 Jersey and Registered Professional Reporter, do  
6 hereby certify that prior to the commencement, the  
7 witness was duly sworn to testify the truth, the  
8 whole truth and nothing but the truth.  
9 I DO FURTHER CERTIFY that the foregoing is a  
10 true and accurate transcript of the deposition as  
11 taken stenographically by and before me at the time,  
12 place and on the date hereinbefore set forth.  
13 I DO FURTHER CERTIFY that I am neither a  
14 relative, nor employee, nor attorney, nor counsel of  
15 any of the parties to this action, and that I am  
16 neither a relative, nor employee of such attorney or  
17 counsel, and that I am not financially interested in  
18 the action.  
19  
20

21

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23 Angela C. Buonantuono, CCR, RPR, CLR

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