

THE BOROUGH OF WATCHUNG
Planning Board
Reorganizational & Regular Meeting
January 19, 2021

OFFICIAL MINUTES
Adopted February 16, 2021

Chairwoman Tracee Schaefer called the Reorganizational and Regular Meeting to order at 7:00 p.m. Board members present were Mr. Al Ellis, Ms. Karen Pennett, Councilman Martino, Mayor Keith Balla, Mr. Donald Speeney, Ms. Ellen Spingler, Mr. Steve Pote, Mr. Paul Fiorilla, Mr. Troy Sims and Ms. Yvette Nora. Also present were Francis P. Linnus, Esq., Board Attorney, Mr. Fishinger, Board Engineer, Mr. Mark Healey, Board Planner and 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.

REORGANIZATION FOR 2021

OATH OF OFFICE

Tracee Schaefer, Class IV, was sworn in for a four year term ending 12/31/24.

Karen Pennett, Class II, was sworn in for a 3 year term ending 12/31/23

Councilman Pete Martino, Class III, was sworn in for a one year term ending 12/31/2021.

Mr. Pote, Class IV, was sworn in for a four year term ending 12/31/24.

Ms. Nora, Alt. #2, Class IV, was sworn in for a 2 year term ending 12/31/22.

ELECTION OF OFFICERS

Chairperson

On motion by Mr. Speeney, seconded by Mr. Ellis, the election of Tracee Schaefer to Chairwoman was accepted and based on the following roll call vote:

Roll Call:

Ayes: Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett,
Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr.
Sims, Ms. Nora and Chairwoman Schaefer

Nays:

Not Eligible:

Abstain:

Absent:

Vice-Chairperson

On motion by Ms. Spingler, seconded by Madam Chair, the election of Donald Speeney to Vice-Chairman was accepted and based on the following roll call vote:

Roll Call:

Ayes: Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett,
Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr.
Sims, Ms. Nora and Chairwoman Schaefer

Nays:

Not Eligible:

Abstain:

Absent:

Secretary

On motion by Mr. Speeney, seconded by Mr. Pote, the election of Ellen Spingler to Secretary was accepted and based on the following roll call vote:

Roll Call:

Ayes: Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett,
Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr.
Sims, Ms. Nora and Chairwoman Schaefer

Nays:

Not Eligible:

Abstain:

Absent:

RESOLUTIONS

Resolution PB 21-R1

Calendar of Regular Meetings

On motion by Chairwoman Schaefer, seconded by Mr. Speeney, the calendar of regular meeting dates for 2021 was accepted based on the following roll call vote:

Roll Call:

Ayes: Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett,
Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr.
Sims, Ms. Nora and Chairwoman Schaefer

Nays:

Not Eligible:

Abstain:

Absent:

Resolution PB 21-R2

Adoption of By-Laws

On motion by Chairwoman Schaefer, seconded by Ms. Pennett, the Board By-Laws for 2021 were accepted based on the following roll call vote:

Roll Call:

Ayes: Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett,
Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr.
Sims, Ms. Nora and Chairwoman Schaefer

Nays:

Not Eligible:

Abstain:

Absent:

Resolution PB 21-R3

Designation of Official Newspapers

On motion by Chairwoman Schaefer, seconded by Ms. Pennett, the official newspapers for 2021 were accepted based on the following roll call vote:

Roll Call:

Ayes: Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett,
Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr.
Sims, Ms. Nora and Chairwoman Schaefer

Nays:

Not Eligible:

Abstain:

Absent:

Resolution PB 21-R4
Appointment of Board Professionals

On motion by Chairwoman Schaefer, seconded by Mr. Speeney, the appointment of professionals for 2021 was accepted based on the following roll call vote:

Roll Call:

Ayes: Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett,
Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr.
Sims, Ms. Nora and Chairwoman Schaefer

Nays:

Not Eligible:

Abstain:

Absent:

The board professionals were sworn in to give testimony for the calendar year of 2021.

COMMITTEE APPOINTMENTS

Site Plan and Sub-division Committee:

Tracee Schaefer
Donald Speeney
Ellen Spingler
Troy Sims

County Planning Liason:

Tracee Schaefer
Donald Speeney
Al Ellis
Mayor Keith Balla

Ordinance Committee:

Tracee Schaefer
Donald Speeney
Pete Martino
Francis P. Linnus, Esq.

Environmental Committee:

Karen Pennett

Finance Committee:

Tracee Schaefer
Theresa Snyder

The Board adjourned to the regular meeting.

MINUTES

On motion by Ms. Spingler, seconded by Ms. Pennett, the minutes from December 14, 2020, Special Meeting, were accepted and carried on voice vote with Ms. Nora abstaining.

On motion by Ms. Spingler, seconded by Mr. Speeney, the minutes and transcript from December 15, 2020, Regular Meeting, were accepted and carried on voice vote with Ms. Nora abstaining.

EXECUTIVE SESSION

Resolution PB 21-R5

Litigation, Karka Investments Inc. and Phillips Properties Inc./Watchung affordable housing.

On motion by Mr. Pote, seconded by Mr. Speeney, the board entered executive session based on the following roll call vote:

Roll Call:

Ayes:	Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett, Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr. Sims, Ms. Nora and Chairwoman Schaefer
Nays:	
Not Eligible:	
Abstain:	
Absent:	

At the conclusion of the Executive Session, the Board closed the closed portion of the meeting, and Opened the Open portion of the meeting. There was a quorum to conduct business.

On motion by Mr. Speeney, seconded by Mr. Pote, the board directed Mr. Linnus to notify Mr. Coakley of a tentative settlement agreement for February 16, 2021 based on the following roll call vote:

Roll Call:

Ayes:	Ms. Spingler, Mr. Ellis, Councilman Martino, Ms. Pennett, Mayor Balla, Mr. Speeney, Mr. Pote, Mr. Fiorilla, Mr. Sims, Ms. Nora and Chairwoman Schaefer
Nays:	
Not Eligible:	
Abstain:	
Absent:	

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

100 UNION AVENUE

BLOCK: 7801 LOT: 1

REPRESENTED BY: Stephen F. Hehl, Esq.

BB ZONE

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 be 'TS' or 'Theresa Snyder', written in a cursive style.

Theresa Snyder
Board Clerk

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

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

TUESDAY, JANUARY 19, 2021
COMMENCING AT 7:00 P.M.
TRANSCRIPT OF PROCEEDINGS
VIRTUAL PUBLIC HEARING
BOARD MEMBERS PRESENT:
TRACEE SCHAEFER, CHAIRPERSON
KEITH S. BALLA, MAYOR
ALBERT ELLIS
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
JOSEPH FISHINGER, P.E., ACTING BOARD ENGINEER
MARK HEALEY, P.P., BOARD PLANNER
JOHN JAHR, P.E., BOARD TRAFFIC ENGINEER
THERESA SNYDER, BOARD SECRETARY

STENOGRAPHICALLY REPORTED BY:

ANGELA BUONANTUONO, CCR, RPR, License No. 30XI00233100
AB COURT REPORTING, LLC
Certified Court Reporters
26 Algonquin Terrace
Millstone Township, New Jersey 08535
Tel: (732)882-3590
angelabuonocsr@gmail.com

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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
BY: STEPHEN F. HEHL, ESQUIRE
370 Chestnut Street
Union, New Jersey 07083
T: (908) 687-7000
F: (908) 687-7028
Email: shehl@lawjw.com
--Counsel for the Applicant
BUTLER & BUTLER
BY: WILLIAM B. BUTLER, ESQUIRE
501 Lenox Avenue
Westfield, New Jersey 07090
T: (908)233-4400
F: (908)233-4465
Email: cb@butlerlawnj.com
--Counsel for the Objector, Weldon Materials, Inc.

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I N D E X

FOR THE OBJECTOR:

BOB WELDON PAGE

BY MR. BUTLER 10,22

BY MR. HEHL 16

ALEXANDER LAPATKA, P.E.

BY MR. BUTLER 24

BY MR. HEHL 61

E X H I B I T S

FOR THE OBJECTOR:

EXHIBIT DESCRIPTION PAGE

OW-5 Photograph of New Providence Road,
taken August 19, 2015

10

OW-6 Photograph of New Providence Road,
taken August 19, 2015

11

EXHIBITS NOT RETAINED BY REPORTER

4

1 CHAIRPERSON SCHAEFER: Can you please

2 call the next application.

3 MEMBER SPINGLER: Case Number PB19-02,

4 The Learning Experience, 100 Union Avenue, Block

5 7801, Lot 1, BB zone. Expiration 2/28/21.

6 CHAIRPERSON SCHAEFER: Thank you. So

7 before, Mr. Hehl, we begin, I just want to confirm

8 that, Yvette -- I'm going to get this right yet --

9 you did have the opportunity to read transcripts

10 and/or watch the videos for the Learning Experience?

11 MEMBER NORA: Yes.

12 CHAIRPERSON SCHAEFER: Mr. Hehl,

13 everybody is up to speed.

14 ATTORNEY HEHL: Great.

15 CHAIRPERSON SCHAEFER: And as you

16 remember, we left off with Mr. Hehl, who is the

17 counsel for the applicant. And he did finish his

18 presentation, if I'm not mistaken, to our board.
 19 And we're moving forward to presentation with the
 20 opposer, the witness for the opposer, Mr. Butler,
 21 who represents Weldon.
 22 But before we begin, Mr. Hehl, just in
 23 case, I know you were gracious enough to extend us
 24 through the end of February, just in case are you
 25 going to extend that again?
 5
 1 ATTORNEY HEHL: Yes.
 2 CHAIRPERSON SCHAEFER: Maybe until the
 3 end of April? I hope to get it done before then but
 4 to give us a safeguard.
 5 ATTORNEY HEHL: Yeah, I don't have a
 6 problem with that. Thank you.
 7 ATTORNEY LINNUS: Okay, Mr. Hehl, you
 8 will send a confirmatory letter that the time within
 9 the board has to act on this application is extended
 10 through April 30th, 2021?
 11 ATTORNEY HEHL: Yes, I will send that
 12 letter tomorrow to Theresa.
 13 CHAIRPERSON SCHAEFER: Thank you.
 14 ATTORNEY LINNUS: Thank you.
 15 CHAIRPERSON SCHAEFER: So what we're
 16 going to do is we're going to listen to Mr. Butler's
 17 witnesses and so forth. Then we're going to allow
 18 Mr. Hehl, who is the applicant's attorney to ask
 19 whatever questions he may have.
 20 I will then open it up to our planning
 21 board members to ask whatever questions we may have.
 22 I will then open it up to the public, if there is
 23 any public, that wishes to ask questions. And it
 24 would be questions only.
 25 And I will remind the public that if
 6
 1 they do have questions they are going to need to be
 2 on video and they're going to have to then tell us
 3 their name and address and so forth. We will need
 4 video on them.
 5 So with that said, Mr. Butler...
 6 ATTORNEY HEHL: Yes. And, Madam
 7 Chairwoman, Steve Hehl again. I just want to
 8 briefly say that, yeah, actually Mr. Butler had
 9 started his presentation with Mr. Lapatka and we
 10 were -- I'm not sure, I don't want to say halfway
 11 through, but he was in his testimony.
 12 And I do want to acknowledge also the
 13 January 18th, 2021 letter from Bright View
 14 Engineering, which Theresa was kind enough to send
 15 to us, so...
 16 CHAIRPERSON SCHAEFER: Yeah. Mr.
 17 Butler, I'm sure you saw it as well. Just you
 18 recognize that Bright View did review everything.
 19 They have been part of a lot of the meetings that we
 20 have had, and they are supporting our last
 21 engineer's opinion.
 22 So one question --
 23 ATTORNEY BUTLER: And also, Madam
 24 Chair --
 25 CHAIRPERSON SCHAEFER: Hold on one
 7

1 second. One second.
2 Mr. Hehl, did you ever get the info
3 that you wanted from Mr. Butler from our last
4 meeting?
5 ATTORNEY HEHL: Yes, I did. Thank you
6 very much.
7 CHAIRPERSON SCHAEFER: All right, Mr.
8 Butler, it's you.
9 ATTORNEY BUTLER: And also the board
10 was sent the same thing, basically it was the zoning
11 and land use ordinances of the borough that apply to
12 the water hazard issues presented by this
13 application and this site.
14 Now in December I started off with my
15 water hazard expert, Al Lapatka. I got about
16 halfway through him. And I had indicated to the
17 board that after we got through with Mr. Lapatka I
18 was going to call Hal Simoff, my traffic engineer.
19 And I was going to call Bob Weldon, the president of
20 Weldon Materials, Inc. And I was going to finish up
21 with Peter Steck. I'm changing that slightly.
22 I'm going to start off tonight with Bob
23 Weldon, who is going to give some background
24 regarding two pictures flooding -- showing flooding
25 on New Providence Road, OW-5 and OW-6. I'm putting
8
1 him on to lay a foundation for those pictures so
2 that Mr. Lapatka can testify regarding those
3 pictures and Exhibit OW-3, which we testified to in
4 December.
5 I'm only putting Mr. Weldon on for
6 limited purposes of laying the foundation for the
7 pictures. I'm going to call him back in a month or
8 two to get more testimony from him. But I thought
9 it appropriate that I lay some foundation for these
10 pictures before Mr. Lapatka started talking and
11 testifying to the board about it.
12 Is that procedure okay, Madam Chair?
13 CHAIRPERSON SCHAEFER: Absolutely.
14 But can you turn the picture?
15 UNIDENTIFIED SPEAKER: We have been
16 trying and we can't figure out how to --
17 CHAIRPERSON SCHAEFER: On the top
18 left-hand side, you see there's a -- there's like a
19 house. And to the left of that house is, I don't
20 know, like half a circle. Up, over to the left,
21 left of the picture. Go all the way to the left of
22 the picture. Take your cursor and go to the left of
23 the picture. Okay, go up above, next one over.
24 That should turn you.
25 UNIDENTIFIED SPEAKER: It does not.
9
1 CHAIRPERSON SCHAEFER: It does not?
2 THE WITNESS: We've been trying.
3 CHAIRPERSON SCHAEFER: Okay.
4 ATTORNEY BUTLER: Madam Chair, this is
5 Butler. We sent these pictures --
6 CHAIRPERSON SCHAEFER: I know.

7 ATTORNEY BUTLER: -- electronically
8 and we also sent them individually, 15 copies of the
9 pictures to the board.
10 CHAIRPERSON SCHAEFER: I'm worried
11 about any public that is out there that --
12 ATTORNEY BUTLER: I understand. The
13 best we can do is get that picture lopsided, the way
14 it's showing now.
15 CHAIRPERSON SCHAEFER: It's fine, Mr.
16 Butler. It's okay.
17 ATTORNEY BUTLER: It's okay?
18 CHAIRPERSON SCHAEFER: Yes.
19 ATTORNEY BUTLER: Thank you very much.
20 I wish I knew more about computers, but I don't.
21 I'm going to try to do the best I can. If I didn't
22 have these guys with me I wouldn't even be able to
23 participate.
24 With that, would somebody -- Mr.
25 Linnus, swear in Bob Weldon?
Weldon - Direct
10
1 ATTORNEY LINNUS: Bob, where are you?
2 MR. WELDON: I'm in Bill Butler's
3 office right next to Bill.
4 ATTORNEY LINNUS: Okay. Can you raise
5 your right hand, Bob.
6 Do you swear or affirm that the
7 testimony you are about to give in this matter will
8 be the truth, the whole truth, and nothing but the
9 truth, so help you God?
10 MR. WELDON: I do.
11 ATTORNEY LINNUS: Okay, you're sworn
12 in. Your witness, Mr. Butler.
13 ATTORNEY BUTLER: Thank you, Mr.
14 Linnus.
15 D I R E C T E X A M I N A T I O N
16 BY ATTORNEY BUTLER:
17 Q. Mr. Weldon, what is your association
18 with Weldon Materials, Inc., the objector to this
19 application?
20 A. I'm the president of Weldon Materials.
21 And my job entails running the operations, two stone
22 quarries, nine hot mix asphalt plants, and three
23 ready-mix concrete plants.
24 (Exhibit OW-5, Photograph of New
25 Providence Road, taken August 19, 2015, was
Weldon - Direct
11
1 marked.)
2 (Exhibit OW-6, Photograph of New
3 Providence Road, taken August 19, 2015, was
4 marked.)
5 BY ATTORNEY BUTLER:
6 Q. Now these pictures, you have seen these
7 before, OW-5 and OW-6; is that correct?
8 A. I have seen both of those pictures,
9 yes.

10 Q. Would you give me the background
11 regarding the taking of those pictures?
12 A. These pictures were taken in August
13 of 2015 after a rainstorm. And they're
14 about -- these pictures were taken about 100 yards
15 from my office, my old office, the scale house on
16 New Providence Road in Watchung.
17 And so my purchasing manager, Wayne
18 Bruseo, was with me. I asked Wayne to take these
19 pictures. And that's what we're looking at right
20 now.
21 Q. Okay. Now, were those pictures, OW-5
22 and OW-6 --
23 ATTORNEY LINNUS: Mr. Butler, Mr.
24 Butler, Mr. Butler, excuse me. What picture are we
25 seeing now, OW-5 or OW-6?
Weldon - Direct
12
1 ATTORNEY BUTLER: Both of them.
2 THE WITNESS: Does that say 5, Hal?
3 MR. SIMOFF: This is Number 5 that is
4 up right now.
5 ATTORNEY LINNUS: Okay.
6 ATTORNEY BUTLER: All the questions
7 for both pictures would be the same, they were taken
8 within minutes of one another.
9 Do you want me to talk about each
10 individual picture differently, Mr. Linnus?
11 ATTORNEY LINNUS: I think for purposes
12 of the hearing and for clarity you have what you're
13 identifying as OW-5 up there so maybe we should get
14 some testimony on OW-5.
15 ATTORNEY BUTLER: Okay, Thank you.
16 I'll do that.
17 BY ATTORNEY BUTLER:
18 Q. OW-5, you indicated that you asked this
19 Wayne to take that picture?
20 A. That's correct.
21 Q. And you were there on the site when
22 that picture was taken?
23 A. I was on the site, yes.
24 Q. And does the flooding condition on New
25 Providence Road as shown in the picture, did it
Weldon - Direct
13
1 actually represent what you observed when you were
2 at the site?
3 A. It accurately gets it. It was
4 actually even higher than that. This is when the
5 water had withdrawn a little bit. So it's accurate
6 but it was even higher than this at one point.
7 Q. Now, how can you tell that? Can you
8 look at the picture and know that when that picture
9 was taken the water is receding?
10 A. I saw it when it was higher than that.
11 And there's actually some debris on the picture that
12 you can see from where the water has receded that

13 has left some debris behind, but I saw it higher
14 than this.
15 (Exhibit OW-6, Photograph of New
16 Providence Road, taken August 19, 2015, was
17 marked.)
18 BY ATTORNEY BUTLER:
19 Q. Now, I would like to go to OW-6 and
20 basically I have the same question.
21 OW-6, that was a picture that was taken
22 under your request?
23 A. That's correct, yes.
24 Q. And who take the picture?
25 A. Wayne Bruseo, the same fellow.
Weldon - Direct
14
1 Q. Same fellow. And again, what was the
2 date of that picture?
3 A. August 19th of 2015.
4 Q. And were you on the site when that
5 picture was taken?
6 A. I was, yes.
7 Q. Does OW-6, the flooding on New
8 Providence Road, accurately show the flooding
9 condition as it existed when you were at the site?
10 A. Yes, it does accurately show the
11 existence.
12 Q. Okay. Now, let's go now, just for a
13 moment, go back to OW-5.
14 Mr. Lapatka had testimony in December
15 regarding an unnamed tributary which had 150 buffer
16 zone. Does the picture, OW-5, go where that unnamed
17 tributary is located?
18 A. Yes, it does. There is a grate, there
19 is two men standing, one in an orange hardhat and
20 the other a man in tan slacks. Just over the left
21 shoulder of the man in tan slacks there's a grate
22 and that grate leads to the unnamed tributary.
23 Q. Okay. So that would probably be --
24 it's off center. It's more towards the top of the
25 page. And it's a little bit to the right, off
Weldon - Direct
15
1 center right?
2 A. Correct, yes.
3 Q. Okay. Now I asked you the same
4 question regarding the grate associated with the
5 unnamed tributary. Does it show on OW-6?
6 A. OW-6 it's on the far right-hand side
7 of the picture. And it does show the grate, yes.
8 ATTORNEY BUTLER: Now that's my
9 foundation for the picture at this point.
10 And I would like to call Al Lapatka now
11 to continue his testimony.
12 CHAIRPERSON SCHAEFER: Before you go,
13 Mr. Weldon, may I ask a question?
14 THE WITNESS: Sure.
15 CHAIRPERSON SCHAEFER: I'm just trying

16 to get a little orientated here. Is Union Ave at
17 all in these pictures?
18 THE WITNESS: I cannot say Union Ave
19 in these pictures --
20 CHAIRPERSON SCHAEFER: I'm sorry?
21 THE WITNESS: I cannot say Union Ave
22 is in any of these pictures.
23 CHAIRPERSON SCHAEFER: Okay. Thank
24 you.
25 ATTORNEY LINNUS: Does Mr. Hehl have
Weldon - Cross
16
1 any questions before Mr. Weldon leaves the dais?
2 ATTORNEY HEHL: Yes, just very
3 briefly.
4 C R O S S E X A M I N A T I O N
5 BY ATTORNEY HEHL:
6 Q. It's hard to tell where this photograph
7 is on New Providence Road. Do we have any
8 indication where it's located?
9 A. Yes. So New Providence Road it's
10 opposite from the light going towards Bonnie Burn
11 Road, so it's about opposite direction from Bonnie
12 Burn.
13 CHAIRPERSON SCHAEFER: I have to stop
14 you for a moment. There's feedback coming.
15 Is there a phone line open in your
16 office, Mr. Butler, that you're using?
17 ATTORNEY BUTLER: Not that I know of,
18 Madam Chair.
19 CHAIRPERSON SCHAEFER: Okay, you're
20 fine. Let's try again, Mr. Weldon.
21 THE WITNESS: So it's going away.
22 From where our scale house is it's about 100 yards
23 farther away from Union Avenue from where our scale
24 house sits across from Union Avenue.
25 ATTORNEY BUTLER: Union Avenue is
Weldon - Cross
17
1 south of the picture; is that correct?
2 THE WITNESS: Very good, yeah.
3 ATTORNEY BUTLER: So the pictures are
4 looking south towards Union Avenue; is that correct?
5 THE WITNESS: The pictures are looking
6 towards Union Avenue.
7 ATTORNEY BUTLER: And the flow of the
8 water, is it going towards the south?
9 THE WITNESS: Yes, it is.
10 ATTORNEY BUTLER: Okay.
11 THE WITNESS: And towards Greenbrook.
12 ATTORNEY BUTLER: Any questions?
13 BY ATTORNEY HEHL:
14 Q. I want to see, perhaps someone can put
15 the cursor on it. You said it's about 200 yards
16 from Union Avenue. So where is that on New
17 Providence Road?
18 Over where that cursor is moving now?

19 A. Yes.
 20 Q. Okay.
 21 A. That's correct, where the cursor is.
 22 Q. All right. So you have two photos from
 23 five and a half/six years ago, on a site that is
 24 approximately 200 yards from the intersection of
 25 Union Avenue. And this is to show that the road
 Weldon - Cross
 18
 1 flooded that time?
 2 I'm just trying to understand what --
 3 A. That's correct, yes.
 4 Q. Okay.
 5 ATTORNEY HEHL: All right. That's it.
 6 ATTORNEY BUTLER: We will have other
 7 photographs regarding flooding but these are the
 8 ones that we're focusing on tonight.
 9 MEMBER SIMS: I have a question. I
 10 have a question.
 11 CHAIRPERSON SCHAEFER: Yes.
 12 MEMBER SIMS: My question is this photo
 13 is from 2015. How many times has the roadway
 14 flooded in the last 5 or 6 years to where we are
 15 now, the same way?
 16 THE WITNESS: The same way? My office
 17 isn't there anymore, my office is in Westfield. I
 18 moved a few years ago, so I'm not on the site every
 19 day.
 20 I do not know how many more times New
 21 Providence Road has flooded since this.
 22 MEMBER SIMS: Well, okay, another
 23 question.
 24 If you're not aware that it's flooded,
 25 has any flooding been impactful enough where it's
 Weldon
 19
 1 been a detriment to your business or the people
 2 coming in and out of the business that are driving
 3 the trucks in and out; have you been notified of
 4 that in the last five or six years in that specific
 5 spot, or no?
 6 THE WITNESS: Has it flooded so badly
 7 that we can't run our business?
 8 MEMBER SIMS: Basically, correct.
 9 THE WITNESS: Right. No, I would say
 10 it hasn't.
 11 MEMBER SIMS: Okay.
 12 CHAIRPERSON SCHAEFER: Other questions
 13 for Mr. Weldon?
 14 COUNCILMAN MARTINO: Well, Madam
 15 Chair, can I make a comment?
 16 CHAIRPERSON SCHAEFER: Who's talking?
 17 COUNCILMAN MARTINO: Councilman
 18 Martino.
 19 CHAIRPERSON SCHAEFER: Okay.
 20 COUNCILMAN MARTINO: If you look on
 21 this map you will see it looks like a utility pole

22 that's in that picture is on one of the maps. So
23 that will pretty much give everybody an idea. It's
24 just -- I guess it's just to the right of the blue
25 area, right there. Yeah, it looks like that's where
Weldon
20
1 the cursor is, it looks like that's the utility pole
2 in the picture. Because I believe there's a fire
3 hydrant there, too.
4 ATTORNEY LINNUS: Let the record
5 reflect that the Councilman is referring to OW-1
6 which is on display right now.
7 COUNCILMAN MARTINO: Thank you.
8 MEMBER PENNETT: Excuse me, Madam
9 Chair?
10 CHAIRPERSON SCHAEFER: Yes.
11 MEMBER PENNETT: A question. The
12 flooding that occurred back in 2015, the pictures,
13 did that stop all traffic on New Providence Road,
14 that they were not able to pass, or were they able
15 to pass, just slowly.
16 THE WITNESS: The police shut down the
17 road.
18 MEMBER PENNETT: The police did shut
19 down. Okay, thank you.
20 COUNCILMAN MARTINO: If I might again,
21 Madam Chair, through the chair; was there any other
22 issues on the site, any damages, anything that would
23 have stopped traffic, aside from the flow of water?
24 THE WITNESS: No, nothing on the site
25 would have -- would have stopped traffic.
Weldon
21
1 COUNCILMAN MARTINO: Okay. I'm just
2 trying to figure out, again, how the water overshot
3 that catch basin. Any ideas?
4 Was it clogged? Was there any work
5 done there after that to mitigate this from
6 happening again?
7 THE WITNESS: It was a lot of water.
8 There was flooding on Route 22. There was -- the
9 whole area was flooded. So, you know, the entire
10 Watchung Mountain Range was flooded.
11 MAYOR BALLA: Comment.
12 VICE-CHAIRMAN SPEENEY: Question.
13 CHAIRPERSON SCHAEFER: Wait a minute.
14 Mayor Balla had his hand first.
15 MAYOR BALLA: Yeah, that particular
16 day there was a 25-square mile section of Jersey
17 that dropped 4 to 8 inches of rain in three hours.
18 So to give, you know, some background there. All of
19 Route 22 was completely shut down because 4 to
20 8 inches of rain fell in three hours.
21 CHAIRPERSON SCHAEFER: Mr. Speeney?
22 VICE-CHAIRMAN SPEENEY: Yeah, a
23 question for Mr. Weldon.
24 THE WITNESS: Yes.

25 VICE-CHAIRMAN SPEENEY: Any of these
Weldon - Redirect
22
1 storms cause that wall to fall?
2 THE WITNESS: What wall?
3 VICE-CHAIRMAN SPEENEY: There's a wall
4 that was just near New Providence Road, I would say
5 probably 14 feet in maybe.
6 THE WITNESS: Oh, the block wall,
7 yeah. The block wall fell in this storm, yeah.
8 VICE-CHAIRMAN SPEENEY: Was that one
9 of these storms?
10 THE WITNESS: Yes, it was.
11 VICE-CHAIRMAN SPEENEY: And did that
12 block wall create any damage anywhere when it fell?
13 THE WITNESS: Yeah. It was -- it's
14 probably about 150 feet from New Providence Road.
15 So there wasn't any damage to the roadway but we had
16 damage on our property.
17 VICE-CHAIRMAN SPEENEY: Okay. All
18 right, thank you.
19 ATTORNEY BUTLER: Let me just
20 follow-up a question.
21 R E D I R E C T E X A M I N A T I O N
22 BY ATTORNEY BUTLER:
23 Q. This wall that you're talking about, is
24 it a retaining wall to hold back water?
25 A. Yes.
Weldon - Redirect
23
1 Q. Hold back water?
2 A. Well, there were -- it was holding
3 back some ground.
4 Q. It was holding back ground?
5 A. Right, yeah.
6 Q. It wasn't acting as a wall for a
7 detention, water detention basin?
8 A. No.
9 ATTORNEY BUTLER: Okay, I would like
10 to go to Al Lapatka, unless there's any other
11 questions of Mr. Weldon?
12 CHAIRPERSON SCHAEFER: Are there any
13 other questions?
14 Mr. Weldon, thank you.
15 THE WITNESS: Thanks.
16 ATTORNEY BUTLER: Now we'll be calling
17 him back next month or the month after.
18 ATTORNEY LINNUS: Mr. Butler, before
19 we proceed, the chair should open up to the public
20 any questions of Mr. Weldon in the event any public
21 would like to ask questions.
22 CHAIRPERSON SCHAEFER: Do we have any
23 public that would like to ask questions of this
24 witness of Mr. Butler's?
25 We don't.
Weldon - Redirect
24

1 Okay, thank you, Mr. Weldon.
 2 THE WITNESS: Thanks.
 3 CHAIRPERSON SCHAEFER: Okay, Mr.
 4 Butler.
 5 ATTORNEY BUTLER: Now Mr. Lapatka, you
 6 heard the testimony of Bob Weldon; did you not?
 7 MR. WELDON: Do you want to turn this
 8 around.
 9 MR. SIMOFF: That's what I'm thinking.
 10 MR. LAPATKA: Yes, I did.
 11 MR. WELDON: We're going to try to turn
 12 the speaker off.
 13 CHAIRPERSON SCHAEFER: Mr. Butler, who
 14 are you bringing on now?
 15 ATTORNEY BUTLER: I'm continuing with
 16 Al Lapatka, my hazard flood expert that I started
 17 off with last month.
 18 ATTORNEY LINNUS: All right. Mr.
 19 Lapatka, you understand you're still under oath; do
 20 you not understand that?
 21 MR. LAPATKA: I understand that.
 22 ATTORNEY LINNUS: Okay.
 23 D I R E C T E X A M I N A T I O N
 24 CONTINUED BY ATTORNEY BUTLER:
 25 Q. Now, Mr. Lapatka, you testified at
 Lapatka - Direct
 25
 1 length --
 2 ATTORNEY BUTLER: I'm still getting
 3 that echo, Madam Chair. We have two computers here,
 4 but we're trying to work with one. I beg your
 5 forgiveness.
 6 BY ATTORNEY BUTLER:
 7 Q. Mr. Lapatka, you heard the testimony of
 8 Mr. Weldon regarding OW-5 and OW-6; is that correct?
 9 A. Yes.
 10 Q. And you previously testified as to
 11 exhibits which we had colored to better explain the
 12 flood hazard area and the 100 riparian flood zones
 13 for both the Green Brook and the unnamed tributary
 14 to the Green Brook and --
 15 CHAIRPERSON SCHAEFER: Mr. Butler?
 16 You've got feedback going, Mr. Butler.
 17 Q. -- these two pictures, do they in any
 18 way relate, in your opinion, to what you have shown
 19 on OW-3?
 20 UNIDENTIFIED SPEAKER: Mute the mike.
 21 Q. You heard the question?
 22 A. Yes.
 23 UNIDENTIFIED SPEAKER: Use the mike.
 24 THE WITNESS: Okay, this should be
 25 better now.
 Lapatka - Direct
 26
 1 Yes, OW-3 is on the board. And I am
 2 going to focus on the bottom part there. It shows
 3 New Providence Road. And it generally shows the

4 area. And I'm circling with the cursor where the
5 pictures were taken.
6 Now I actually prepared OW-3 before I
7 even had those pictures, okay. I did not know about
8 them. The tributary to the Green Brook -- and this
9 might be a little repetitive from the last meeting
10 but it certainly ties into what Mr. Weldon was just
11 talking about.
12 The tributary to the Green Brook is
13 under DEP jurisdiction. It's floodplain as well as
14 having a riparian zone. The Green Brook tributary
15 is not what you would call a studied stream but it
16 is definitely under the jurisdiction of DEP. And
17 the DEP and FEMA just chose not to study that stream
18 as they do, you know, many of the smaller ones.
19 I ran some quick calculations on that
20 stream and if a flood study was done for that, the
21 water would overtop New Providence Road and it would
22 flow onto the site. So there is going to be more
23 floodplain on this site than is shown on the Site
24 Plan drawings. There is a floodplain associated
25 with Green Brook which the site plan drawings show,
Lapatka - Direct
27
1 but there is also one with New Providence Road which
2 the site plan drawings do not show.
3 Now DEP regulations require that the
4 applicant prepare their own flood study here because
5 it is unstudied and determine exactly the impact of
6 any flooding.
7 I have drawn some red arrows here,
8 okay, to show, you know, in part, where some of
9 those flood waters may go off the site. And all of
10 the floodplain regulations regarding how much fill
11 you can put in the floodplain, so and, so, would
12 apply to this Green Brook tributary just as the
13 Green Brook. But I think that that's a deficiency
14 in the plan that the tributary was not studied for
15 flooding.
16 Q. This unnamed tributary, you said it's a
17 regulated stream; did you not?
18 A. Yes.
19 Q. What is a regulated stream?
20 A. Well, it's regulated in the context
21 that the DEP regulations apply to it.
22 This Green Brook tributary is subject
23 to those regulations, just as the Green Brook itself
24 is. It's all subject to the same regulations.
25 Q. All right. And one of those
Lapatka - Direct
28
1 regulations in the unnamed tributary is the 150
2 riparian zone you showed on OW-1; is that correct?
3 A. Yes.
4 Q. Okay.
5 A. I'm going to put OW-1 on here.
6 Okay, so this -- you can just follow my

7 cursor. Here is the Green Brook tributary. Here is
8 150-foot measurement. And this is the riparian zone
9 that parallels the Green Brook tributary as it runs
10 through the site. It actually goes all the way to
11 Green Brook. Green Brook itself has 150-foot
12 riparian zone, which is this line here.

13 So they intercept at this point and,
14 you know, if you go up the page, they're overlapping
15 at that point.

16 Q. Originally the site plans did not show
17 a 150 riparian buffer zone to the unnamed tributary,
18 did it?

19 A. No. That was omitted on the original
20 submission. And the flood study, I think, is
21 omitted on the latest submission.

22 Q. And the latest submission still
23 continues to describe unnamed tributary as a ditch?

24 A. Yes.

25 Q. Did you consider this a ditch?

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1 A. No, this is a stream. A ditch is, I
2 guess, it's a softer-sounding word that, you know,
3 might indicate to some people that it's not
4 important. But the Green Brook tributary basically
5 carries all the same DEP restrictions as the Green
6 Brook does.

7 Q. Now the applicant's engineer testified
8 and introduced into evidence a Letter of
9 Interpretation regarding wetlands and buffers
10 associated wetlands from the DEP; did he not?

11 A. Yes.

12 Q. Now that Letter of Interpretation, is
13 that a permit to build anything?

14 A. No. It doesn't allow you to perform
15 any construction. It's not an approval of any
16 construction. It is basically a letter whereby the
17 DEP says that they concur with the location of the
18 wetlands line as it's shown on the map referenced in
19 that LOI.

20 Q. And you have no problem with where that
21 wetlands line is shown or its buffer, do you?

22 A. No. I'm drawing the -- running the
23 cursor along the wetlands line. And there's a
24 little wetlands line here. And this other green
25 line, okay, is the buffer line.

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1 Q. Now, when I was qualifying you as an
2 expert, you testified in the last 43 years you have
3 done flood hazard work with the DEP and local
4 municipalities regarding applications for
5 development; did you not?

6 A. Yes.

7 Q. Were any of those applications day care
8 centers?

9 A. Yes.

10 Q. How many -- approximately how many were
11 day care centers?

12 A. Probably around 15 or so.

13 Q. And you represented the applicant?

14 A. Correct.
15 Q. Now today I was sent a report dated
16 July 18th, under the signature of Aaron Schrager.
17 He is now the engineer for the planning board. And
18 he mirrored most of the comments of the prior
19 engineer. But he says almost verbatim in one area
20 -- I asked you about this area -- and I want to read
21 it to you.
22 Mr. Schrager says this on Page 3,
23 Paragraph 2 under general comments, he says this:
24 "We concur with the engineer's comments regarding
25 150 riparian buffer depicted on the provided site
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1 plans (Sheet 6A of 17). The applicant's engineer
2 shall review these plans. The indicated
3 compensation area-mitigation, and provide testimony
4 regarding the site plans adherence to NJDEP
5 regulations."
6 That sounds very similar to the -- to
7 the former engineer's report, right?
8 A. Yes.
9 Q. Did the applicant's engineer or any
10 witness on behalf of the applicant do what is
11 suggested by Mr. Schrager?
12 A. No. I think their testimony was
13 essentially that that issue would be addressed later
14 after the board passed on this application.
15 Q. Okay. Now, before I am going to go
16 into our local ordinances, I have to do the flood
17 control. And before I go into those ordinances is
18 there anything else you want to add to your
19 testimony?
20 A. No. I think when we go into these
21 ordinances we'll cover the rest of it.
22 Q. Okay.
23 ATTORNEY BUTLER: Bear with me, Madam
24 Chair. I'm looking for the letter that I wrote to
25 Mr. Hehl.
Lapatka - Direct
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1 BY ATTORNEY BUTLER:
2 Q. Okay. Land Development Ordinance
3 Section 28-203 defines critical areas. And here is
4 the definition: Wetlands, 100-year floodplain or
5 flood hazard areas, and lands with a topographic
6 slope 15 percent or greater.
7 In your professional opinion was this
8 site a critical area?
9 A. Yes.
10 Q. Why?
11 A. Because it has wetlands, floodplain
12 and there are probably some small areas over
13 15 percent, but not much.
14 Q. I would like to go to Land Development
15 Ordinance, Article 28-400, zoning district
16 regulations, General Zoning District Regulations,
17 Section 28-401, Subparagraph A. Now let me just

18 briefly read to you that statement.
 19 "Floodplain Development Restrictions.
 20 No structure or use shall be moved, added to,
 21 enlarged, and/or established, nor shall any fill be
 22 placed nor shall the elevation of any land be
 23 substantially changed, in the floodplain hazard area
 24 except in accordance with the Floodplain-Flood
 25 Hazard Ordinance..." And there's an asterisk there
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 33
 1 and it says, "See Chapter 22 for Flood Damage
 2 Prevention. And it says: "Flood Damage Prevention
 3 Ordinance of the Borough of Watchung or any other
 4 applicable statute or regulation."
 5 Does this application comply with the
 6 floodplain development restrictions in Subparagraph
 7 A I just read to you?
 8 A. No. There were basically -- there's
 9 basically fill being proposed in the floodplain
 10 without compensation. It's along the area adjacent
 11 to Union Ave. Union Avenue is actually proposed to
 12 be raised in elevation at one point as much as one
 13 and a half feet. And there's no -- and that's taken
 14 -- that's taking up existing floodplain. And
 15 there's no floodplain compensation for that area
 16 shown either.
 17 Now, if we were to go back to OW-3; I
 18 have these arrows drawn along New Providence Road
 19 and perpendicular to New Providence Road. And I
 20 believe that there will be floodplain in this area,
 21 too, and there may actually be fill placed in the
 22 floodplain without compensation.
 23 In order to determine that floodplain a
 24 flood study must be done. I did not do a -- you
 25 know, undertake a full flood study. And the DEP
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 1 regulations required that that flood study be done.
 2 I would think that this board should really know the
 3 results of that flood study before, you know, making
 4 any final determinations on this application. I
 5 think that's a big deficiency here.
 6 Q. All right. Mr. Lapatka, I would like
 7 to go over with you Borough of Watchung's ordinance
 8 Chapter XXII, entitled "Flood Damage Prevention."
 9 Are you familiar with that ordinance?
 10 A. Yes.
 11 Q. Okay. I'm going read through a couple
 12 of sections of the ordinance and I'm going to ask
 13 you your opinion and how those sections, whether
 14 they are violated, or compromised, or the
 15 information requested in that Flood Damage
 16 Prevention Ordinance has been provided.
 17 And I'm going to start off with Section

18 22-1, in particular 22-1.1, Statutory
19 Authorizations.
20 Here's what it says: "The Legislature
21 of... New Jersey has in N.J.S.A. 40:48-1, et seq.,
22 delegated the responsibility to local governmental
23 units to adopt regulations designed to promote
24 public health, safety and general welfare of its
25 citizenry. Therefore, the Mayor and Council of the
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1 Borough of...New Jersey does ordain as follows."
2 Ordinance 2/19.
3 So that section, the state legislature
4 has given the towns authority to regulate and
5 promote safety under our Flood Damage Prevention
6 Ordinance; is that correct?
7 A. Yes.
8 Q. Now Section 22-1.2 is entitled
9 "Findings of Facts," and it defines flood hazard
10 area, I'm going to read it to you, Subparagraph A
11 states: "The flood hazard areas of the Borough of
12 Watchung are subject to periodic inundation which
13 results in loss of life and property, health and
14 safety hazards, disruption of commerce and
15 governmental services, extraordinary public
16 expenditures for flood protection and relief, and
17 impairment of the tax base, and general welfare."
18 That definition of the flood hazard,
19 how would you relate that definition to this
20 application?
21 A. Well, let me go back to OW-1. And
22 this red line here, the cursor is on, is the flood
23 hazard line for Green Brook. I don't have a flood
24 hazard line for the tributary because a study has
25 not been done yet. All the areas to the left and to
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1 the top of that are in the flood hazard area. And
2 some of the proposed parking lot improvements and
3 the playground are also.
4 And I think there's probably other
5 sections in the code too, but in the context of this
6 proposed use, I think special consideration has to
7 be given to the floodplain. There are, I guess,
8 small children here and infants who really can't
9 help themselves and, you know, need a little extra
10 help.
11 Union Avenue, okay, was over-topped for
12 a flood hazard event. In other words the Green
13 Brook over-topped Union Avenue and had to be closed
14 down. And New Providence Road is subject of
15 flooding also and that road can be shut down.
16 So the floodplain here is an impediment
17 to access to the site during those flood events for
18 emergencies. In other words, cars can't get there,

19 so guardians can't get there, and emergency vehicles
20 may not be able to get there or at least would be
21 inhibited.

22 Q. Well the OW-1, there's a lot of
23 improvements within that flood hazard area; is there
24 not?

25 A. Yes, there's fill proposed in the
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1 flood hazard area.

2 Q. And how about parking?

3 A. And parking, yeah.

4 Q. How about ingress and egress?

5 A. Yes, the fill is proposed to be placed

6 so that the easterly driveway can be built as well

7 as those parking aisles and the parking spaces so

8 that land is being raised. And it's being raised by

9 the proposed playground also.

10 There's a basic DEP regulation that

11 says that you have to have a zero percent net fill

12 balancing on this site. So this plan shows only

13 fill being added in the floodplain but no

14 compensation areas.

15 Q. Go ahead.

16 A. That would tend to divert a small

17 degree to impact the flooding in the area

18 negligibly.

19 Q. All right. Now the riparian buffer

20 under the flood hazard associated with the unnamed

21 tributary, how does that affect the outdoor

22 playground?

23 A. Well the riparian zone encompasses

24 most of the proposed playground here, that's just

25 the gray shaded area that I'm drawing the cursor

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1 around. It also impacts a good portion of the

2 parking lot and the easterly driveway. I'm drawing

3 the cursor around that now.

4 Q. Okay. Continuing with our Flood Damage

5 Prevention Ordinance, I'm going to now read to you

6 22:1.3, statement of Purpose, and I quote: "It is

7 the purpose of this chapter to promote the public

8 health, safety and general welfare, to minimize

9 public and private losses through the flood

10 conditions in specific areas by provisions designed,

11 A, to protecting the live and health."

12 What's your position on that in

13 relation to this application?

14 A. Well I stated it somewhat before and

15 my comment was that because of the flooding and

16 potential shutdown of Union Avenue and New

17 Providence Road access to this site will be limited,

18 you know, during those flood events.

19 Q. All right.

20 Let me continue again with the flood

21 ordinance or Flood Damage Prevention Ordinance,

22 Section 22-3.5, Interpretation. It says, and I
23 quote: "In the interpretation and application of
24 this chapter, all provisions shall be: a,
25 considered as minimum requirements; b, liberally
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1 construed in favor of the governing body; and c,
2 deemed neither to limit nor repeal any other powers
3 granted under state statutes."

4 What does that section mean in relation
5 to this application?

6 A. Well it basically acknowledges that
7 the New Jersey NJDEP rules and regulations apply
8 here and should be followed. And it -- it appears
9 to give the planning board latitude in considering
10 how flooding will impact a site such as this,
11 particularly a site that has a critical use, a
12 critical use being individuals that cannot totally
13 take care of themselves. Certainly with regard to
14 the infants.

15 Q. All right. Now let me continue with
16 the flood ordinance.

17 22-4.3, Duties and Responsibilities of
18 the Administrator. "Duties of the Borough of
19 Watchung Engineer shall include, but not be limited
20 to: -- and I want to go down to Subparagraph B,
21 "...the Borough of Watchung Engineer shall obtain,
22 review, and reasonably utilize any base flood
23 elevation and floodway data available from a
24 Federal, State or other source, in order to
25 administer subsection 22-5.2a, Specific Standards,
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1 Residential, Construction, and subsection 22-5.2b,
2 Specific Standards, Nonresidential Construction."

3 Now, why is -- is that section relevant
4 at all to this application?

5 A. Yes, it is. And it basically says
6 that the borough engineer should refer to and use
7 all of the available flood studies where they exist,
8 such as the FEMA mapping, as well as the New Jersey
9 Department of Environmental Protection mapping,
10 which exists for Green Brook.

11 And I think it also includes the fact
12 that they should consider flooding of the Green
13 Brook tributary based on any flood studies or
14 drainage calculations that are presented for that.
15 And none have been presented for the Green Brook
16 tributary so we can't even evaluate the effect on
17 that, the effect of that flooding.

18 ATTORNEY BUTLER: Bear with me, Madam
19 Chair, for one moment.

20 Q. Now, you also have one of the
21 ordinances in Watchung, Chapter 28, Minimum
22 Development, 28-600 is entitled, "Development
23 Requirements and Standards." And Section 28-604 is
24 entitled, "Stormwater Management Plan Standards."

25 And there's a Sub A, Let me read it to you.

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1 Stormwater Management Plan Standards.

2 The Stormwater Management Plan shall be a written
3 description together with maps, diagrams, charts,
4 and data consistent with the purposes, policies and
5 requirements of these provisions which fully
6 indicates the necessary land treatment measures and
7 techniques including a schedule of implementation
8 and maintenance." And then they go on with about
9 ten different standards.

10 How is this section relevant to this
11 application?

12 A. Well basically the Stormwater
13 Management Plan is a comprehensive document. Part
14 of that document would be the site plan and another
15 part might be the drainage calculations. And the
16 plan would tie all of that together, indicate how it
17 should be built, what their considerations are, what
18 cautions you have to go through and after
19 construction what the maintenance requirements would
20 be.

21 A Stormwater Management Plan has not
22 been provided with this application so it's -- I
23 can't really comment on the individual requirements.

24 Q. The applicant never submitted a
25 Stormwater Management Plan?

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1 A. Correct.

2 Q. Notwithstanding Chapter 28?

3 A. Correct.

4 If I can go back to 22?

5 Q. Sure.

6 A. 22-4.4 basically says that: "Whenever
7 there is an application for approval of a
8 development pending before the Borough of Watchung
9 Planning Board or Board of Adjustment, that Board
10 shall hear and decide appeals and requests for
11 variances from the requirements of this chapter."
12 It further says, "In passing upon such
13 applications, the Borough of Watchung Planning Board
14 and Board of Adjustment, shall consider all
15 technical evaluations, all relative[sic] factors,
16 standards specified in other sections of this
17 chapter." And it basically is suggesting that the
18 planning board has a lot of latitude to consider how
19 this site functions, what are the ramifications of
20 it in addition to, say, the technical requirements
21 of a site plan design.

22 It also says that the board should
23 consider, "The availability of alternate[sic]
24 locations for the proposed use which are not subject
25 to flooding or erosion damage." And I'm not aware

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1 of any study of alternate locations that has been
2 presented to the board.
3 In addition, the board should
4 consider: "The safety of access to the property in
5 times of flood for ordinary and emergency vehicles."
6 And I spoke a little bit about that before, that the
7 -- during flooding access to this property is cut
8 off. And this code specifically says the board
9 should consider that. Certainly in light of the
10 proposed use, with small children and infants.
11 Q. All right. And I sent to Mr. Hehl,
12 listened to Madam Chair's suggestion, and I sent to
13 the planning board, Watchung Code Sections. Other
14 than the ones I have gone over with you tonight, and
15 I would like to go over them now, and I would like
16 to mention the section and what it requires. And,
17 again, whether it's been submitted, whether it
18 hasn't been submitted or if it's submitted, does it
19 violate this section of the Stormwater Control
20 Ordinance.
21 Are you ready?
22 A. Yes.
23 Q. Okay. Chapter 21-4.1 and 21-10,
24 Stormwater Maintenance Plan?
25 A. It has not been provided. 21-4.1
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1 says: "The development shall incorporate a
2 maintenance plan for the stormwater management
3 measures incorporated into the design of a major
4 development in accordance with Section 21-10."
5 "Development" is a specific term.
6 There's a definition in this ordinance for major
7 development. And it basically says, "Shall mean any
8 development that provides for ultimately disturbing
9 one or more acres of land and disturbance for the
10 purpose of this rule is the placement of impervious
11 surface or exposure and/or movement of soil or
12 bedrock or clearing, cutting or removing
13 vegetation."
14 Sheet 11 of 17 of the site plan, the
15 Erosion Control Plan, lists the disturbance as
16 0.98 acres. However Sheet 6A, where the
17 compensation area which would propose to remove
18 vegetation, disturbs another .51 acres. So the
19 erosion control sheet is a little bit misleading
20 with the amount of disturbance.
21 So the total disturbance is actually
22 the 0.98 plus .51, or 1.49 acres, making it a major
23 development.
24 21- -- you can ask the question.
25 Q. Continuing with the Stormwater Control
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1 Ordinance, Section 21-4.5, Non-struct -- what does
2 that mean, "non-struct"?
3 A. Well, non-structural design --

4 Q. Is that what it means, non-structural?
5 A. Non-structural.
6 Q. All right, I get it. I don't need any
7 of it. Non-structural design --
8 A. So --
9 Q. Go ahead.
10 A. -- the ordinance basically encourages
11 and says that opportunities for non-structural
12 stormwater management design should be looked into
13 and addressed. As far as I know it has not been
14 addressed.
15 A structural design would be
16 underground detention systems, underground concrete
17 chambers for water quality and other things like
18 that. Non-structural design would be swales, open
19 basins, vegetated filtering strips and the such.
20 And none of that has been provided on this plan, nor
21 has, I believe, it been studied.
22 And basically the reason it's not
23 provided on this plan, because every available
24 square foot that could be developed and even more
25 was proposed to be developed with pavement and
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1 buildings and things like that. So because of the
2 intensity of the development there's no room for the
3 non-structural items.
4 Q. Continuing with the Stormwater Control
5 Ordinance. 21-9.3. Sets forth checklist items.
6 A. Yes, there's several checklists.
7 Q. B is environmental site analysis. D is
8 land use source control plan. E is stormwater
9 facilities map. F is calculations soil reports.
10 A. They have not been provided and I
11 think an important one is the soils report. There
12 were certain assumptions that were evidently made in
13 designing the stormwater detention/retention system
14 and, in my opinion, I think that soil tests must be
15 done in order to determine whether or not that
16 system meets your regulations and the DEP
17 regulations. And the calculations or the report
18 would look at a few things, but two primary items.
19 One would be the porosity of the soil.
20 In other words, there's a porous system here that is
21 supposed to discharge water into the ground. Well,
22 in order to figure out how much water is going to be
23 discharged into the ground they would need to know
24 how porous the soil is for water infiltration.
25 The second thing that it would talk to
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1 would be the water table. The bottom of this
2 proposed system is, you know, based on the site
3 plan, is proposed to be at an elevation just above
4 the bottom of the Green Brook. And most likely it
5 would be in violation of the requirement that the
6 bottom of the system be at least two feet above the

7 water table.

8 And I think in a situation like this,
9 where the design is actually, you know, is pushing
10 things, is aggressive, that the soil test should be
11 done now and not later. If you do them -- if you
12 don't do them now and do them later, you can find
13 out that the system doesn't work.

14 Q. All right. Now, I'm going to leave the
15 Stormwater Control and I'm going to go to Chapter
16 24, Tree Preservation. 24-10, Tree Replacement and
17 Reforestation. Subparagraph A, "...trees removed
18 outside the perimeter of building envelope shall be
19 replaced on a 1-to-1 ratio."

20 Do you have any comments on whether
21 this application complies with that requirement?

22 A. Yes. Let me just find my place in my
23 notes.

24 The demolition plan, C200, states that
25 there are required to be 46 replacement trees. The
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1 landscape plan shows only 18 proposed replacement
2 trees.

3 Now, in addition to that, there are
4 other sections of the code that require certain
5 sight distances from the proposed driveways on Union
6 Avenue. And once those sight distance -- those
7 sight distances will require that additional
8 vegetation be removed. So in addition to the 46
9 trees, there's going to be more trees that have to
10 be taken down for the sight distance looking east on
11 Union Avenue.

12 And, in addition, the Watchung Code
13 also calls for a site triangle easement at the
14 intersection of New Providence Road and Union
15 Avenue. Well that will require more trees to be
16 taken down.

17 So the count is actually understated at
18 46. But even saying that, they're only providing 18
19 proposed trees.

20 There was prior testimony from the
21 applicant that this issue will be addressed later
22 when a DEP application is made because DEP has
23 jurisdiction. And Watchung has jurisdiction here
24 too. So there is actually dual jurisdiction and the
25 applicant needs to comply with both sets of
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1 regulations simultaneously and rather than, say,
2 kicking the can down the road.

3 And if they can't comply with the
4 Watchung regulation, then a variance has to be
5 requested for that. But just because DEP has
6 jurisdiction over a certain area, doesn't mean that
7 the planning board does not also have jurisdiction
8 there.

9 Q. Are you through with that?

10 A. Yes.
 11 Q. Okay. Development Requirements and
 12 Standards, as set forth in Article 28-600.
 13 28-602F, Easements. One, utility
 14 easements shall have a minimum width of 20 feet.
 15 Does the plan show --
 16 A. Well, they're not showing that they
 17 need an easement because the proposed sanitary sewer
 18 line leaves the site, crosses Union Avenue, and then
 19 heads easterly behind the curb of Union Avenue.
 20 But I think the intent here is that any
 21 of these utilities should have sufficient room
 22 around them to work on them to and to perform any
 23 maintenance repairs in the future.
 24 The sanitary sewer line that's running
 25 parallel to Union Avenue and on the far side of
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 1 Union Avenue, if you look at the plans you will see
 2 it actually runs underneath a line of utility poles.
 3 So, first of all, I don't think the utility company
 4 would ever go for that. And, you know, this
 5 planning board should not approve something like
 6 that. I don't really understand how something like
 7 that would work. And that just goes to demonstrate
 8 that the way things are proposed to be done on this
 9 plan, there's not enough room for that sanitary
 10 sewer.
 11 But also in Section 2 it says, "Where a
 12 site is traversed by a watercourse, drainageway,
 13 channel or stream, there shall be provided a
 14 conservation easement conforming substantially with
 15 the lines of such watercourse and of such width or
 16 construction, or both, as will be deemed adequate by
 17 the respective board," planning board here -- "for
 18 the purpose of guaranteeing the protection and
 19 continuance of such watercourse, drainageway,
 20 channel or stream." And that has not been provided.
 21 Q. No conservation easements along
 22 watercourses has been proposed by the applicant?
 23 A. It has not. And that easement would
 24 have to be deemed adequate by this board.
 25 Q. All right. Continuing 28-602H,
 Lapatka - Direct
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 1 Circulation Sytem Design. 7, "...sidewalks are
 2 required and shall be placed parallel to the
 3 street."
 4 A. There are no sidewalks proposed here.
 5 Q. Subparagraph 8 of the same section,
 6 pedestrian circulation systems to provide links
 7 between draining uses?
 8 A. There are none provided. And I think
 9 it would really be up to this board to determine
 10 where, you know, where any sidewalks should be
 11 provided.
 12 Q. Now, I think you might have answered

13 this, but in another cite, 28-604A, requires a
14 Stormwater Management Plan. Has the applicant
15 provided a Stormwater Management Plan?
16 A. No.
17 Q. Why is that important for the board to
18 know?
19 A. Well, this is a critical area as
20 defined in your codes. And I'm going to say if
21 there was ever an application, you know, in this
22 area, that should have a Stormwater Management Plan,
23 it should be this one. You have floodplain,
24 wetlands, buffer areas, riparian zones.
25 Q. Okay. Section 28-604, General
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1 Standards. Site plan and drainage calculations. Is
2 that a comment by you?
3 A. Yes.
4 Q. Would you read it to me.
5 A. The site plan and drainage
6 calculations do not adequately demonstrate that the
7 site design meets N.J.A.C. 7:8-5.2(a), NJDEP
8 stormwater design requirements for non-structural
9 groundwater recharge, water quality and stormwater
10 reductions.
11 And again some of the groundwater
12 recharge requirements go to -- or consider the water
13 table, which is not established because there were
14 no soil tests done.
15 Q. Utility Standards, Section 28-605,
16 Sewer and Water?
17 A. It says, "No subdivision or site plan
18 application shall be deemed complete unless the
19 property which is the subject of the proposed
20 subdivision or site plan application, is serviced by
21 septic system or sanitary sewer and well water or
22 public water. Applicants shall be required, as a
23 condition of completeness for all subdivision and
24 site plan applications, to obtain approval from the
25 Board of Health for a septic system and well water
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1 or obtain a public sanitary sewer and private[sic]
2 water utility certifications allocating capacity to
3 the property.
4 "A sanitary sewer capacity allocation
5 and connection or collection system extension
6 approval to serve the proposed development must be
7 obtained from the... governing body."
8 And it goes on past that. And to my
9 knowledge none of that has been done. So that
10 should all be done as part of a -- as part of this
11 site plan application. And in this case the sewer
12 situation is a little tricky also, as you don't have
13 sanitary sewers right out in the street. The sewer
14 is -- the sewage is proposed to be pumped easterly
15 on Union Avenue to the next municipality.

16 So they're basically saying that the
17 planning board should make sure that these utilities
18 are available for the proposed development.

19 Q. Now Section 28-606, Street,
20 Intersection, Sight Triangles, Curb, Sidewalks and
21 Driveway Standards.

22 Have you covered that yet tonight?

23 A. Basically I covered it. The sight
24 triangle easement is not provided.

25 There is some construction details
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1 about a concrete apron. That's really not that
2 important, but that's not provided.

3 Q. How about 28-607, Parking and Loading?

4 A. That says access -- B.4 says, "Access
5 to parking lots shall be designed so as not to
6 obstruct free flow of traffic."

7 When the trash enclosure gates are open
8 they will partially block the ingress drive, the
9 easterly driveway on Union. And they're not
10 supposed to be left open but things like that
11 commonly occur. All you have to do is drive around
12 in different parking lots and look at the dumpsters.

13 ATTORNEY BUTLER: Madam Chair, I'm
14 almost through with this line of questioning.

15 Q. Lighting, Section 28-608.

16 A. It's a minor point, but 7 says exposed
17 concrete light foundations not to exceed 2 feet,
18 they're showing 2 and a half feet.

19 I think that section also says that if
20 they're in the landscaped areas it should only
21 be -- I don't have it in front of me, but I believe
22 it was six inches high.

23 Q. Now, 28-609, Landscape and Shade Tree.

24 A. B-9 says, "...plant material shall not
25 interfere with underground utilities or stormwater
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1 management facilities." There's a -- it's not a
2 huge point, but there's a couple of trees proposed
3 to be located right on top of proposed drainage
4 pipes.

5 This may have been discussed before the
6 parking lot street frontage. Screening shall be a
7 minimum of five feet wide and four and a half is
8 proposed. I know that's a minor deficiency but, I
9 mean, if you are so close, why not just provide it?

10 G.3, says 5 percent of the interior
11 parking area shall be landscaped. The plan proposes
12 about 4.2 percent. And that's, I guess, primarily
13 due to some of the undersized landscape islands that
14 are proposed.

15 And then K.1 and 2 says street trees
16 are required no further than 40 feet on center.

17 With 433 feet of frontage, 11 trees would be
18 required and only two are proposed.

19 Q. Now, Mr. Lapatka, in your professional
20 opinion, knowing this site and knowing the
21 application, would it be your opinion that this
22 applicant should have gone and gotten approval from
23 New Jersey DEP before it got approval from the local
24 planning board?

25 A. Yes.

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1 Q. Why?

2 A. And the reason is because it is very
3 impacted by the DEP regulations. And, in my
4 opinion, they should have been applied to
5 simultaneously.

6 There are, you know, many projects
7 where the DEP regulation impact is more predictable
8 and measured and, yeah, there's many cases where you
9 can apply for that later, it really doesn't matter.
10 But here, I think, the DEP regulations are integral
11 to the design itself.

12 Q. Now, Mr. Lapatka, let's say, this board
13 in its wisdom granted this application. Let's just
14 assume that for a moment. What affect does that
15 have on the applicant when he goes to the DEP?

16 A. Well, that would tend to be a positive
17 effect for the application to DEP because there
18 would be the -- there would be the presumption that
19 the board reviewed all of these things in their
20 ordinances and found the application to be
21 satisfactory after reviewing all those things.
22 DEP is not going to be of the mindset
23 where they think the board is not willing on certain
24 things because they're under DEP jurisdiction.

25 Q. Again, if this application is

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1 permitted, how would the construction equipment and
2 the building of this project affect environmentally
3 critical areas?

4 A. Well, it would have to be -- let's
5 just say if it was approved, it would have to be a
6 construction limit fence along the line of
7 disturbance, basically the curbs. And all the
8 construction would have to take place within that.
9 So it would be -- I guess it would be pretty crowded
10 conditions.

11 Q. Now have I asked you whether the
12 draining system on the detention basin is adequate?

13 A. That's a tricky question because we
14 don't have the soil data, but I don't -- I don't
15 think that it's going to meet regulations when the
16 soil tests are done.

17 Q. Why are the soil tests so important to
18 this issue?

19 A. Well, what I have in mind is, first,
20 the water table, if the water table is too high it's
21 just not going to work, right? Okay. And there's

22 also an effect where some -- if there's not enough
23 dirt between the bottom of the system and the water
24 table, some pollutants enter -- are not filtered out
25 and they enter the groundwater.

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1 And the second thing is we don't know
2 how course the soil is. In other words, is the
3 system big enough? We just don't know.

4 Q. Now this is a permitted use; is it not?

5 A. Yes.

6 Q. It's a permitted use because the
7 Municipal Land Use Law says a day care center is
8 permitted in any nonresidential zone, right?

9 A. Yes.

10 Q. This day care center would be permitted
11 in the quarry, wouldn't it?

12 A. Yes.

13 Q. Okay. Now either the quarry or where
14 it's proposed, is there anything in the Municipal
15 Land Use Law that guides this board as to whether it
16 would permit 154 babies and 22 employees?

17 A. No, the intensity of the proposed
18 development is not spoken to from the State
19 regulations, they just say the use is permitted.
20 It's up to the board to determine if the -- I'll
21 call it the density proposed or the intensity of the
22 development in light of all their ordinances, is
23 appropriate. And the ordinances include a lot of
24 those things I went through about the environmental
25 things, you know, as well as the number of parking

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1 spaces and vehicular movements on-site, things like
2 that, as well as traffic.

3 So it's up to the board to determine
4 what density is appropriate for the site for this
5 particular use.

6 Q. And in your professional opinion --

7 ATTORNEY HEHL: Excuse me, a second.

8 Madam Chair and counsel, I have to object.

9 CHAIRPERSON SCHAEFER: Mr. Butler, Mr.

10 Butler. Hold on one second.

11 ATTORNEY HEHL: I'll defer to the
12 board's counsel. I mean this is now legal testimony
13 as to the standard. This isn't engineering or
14 environmental. This is what the board can rule on
15 as far as jurisdictional with respect to a permitted
16 use. And I don't think this witness has any
17 foundation to start ruling on matters like that.

18 ATTORNEY LINNUS: I agree with you,
19 Mr. Hehl. However, there is some testimony here
20 that the board may have to take into account revised
21 plans, et cetera, jurisdictional issues, potential
22 preemption issues. But you're absolutely correct,
23 the ultimate decision on this application rests
24 solely with the board based on the application and

25 the testimony and the evidence presented not on the
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1 opinion of an engineer as to the ultimate decision.

2 ATTORNEY HEHL: Thank you.

3 ATTORNEY BUTLER: But the engineer and

4 the planner assist the board in letting them know

5 about the environmental sensitivity of the site.

6 And, of course, all opinion testimony is to assist

7 the board, and that is what we're trying to do.

8 ATTORNEY LINNUS: Right. But the

9 legal interpretation of the statute is definitely a

10 legal issue.

11 ATTORNEY BUTLER: Okay. All right.

12 BY ATTORNEY BUTLER:

13 Q. Now Mr. Lapatka --

14 CHAIRPERSON SCHAEFER: Are you almost

15 done, Mr. Butler, with this witness?

16 ATTORNEY BUTLER: Huh?

17 CHAIRPERSON SCHAEFER: Are you almost

18 done with this particular --

19 ATTORNEY BUTLER: Yes. I was about to

20 ask my last question.

21 CHAIRPERSON SCHAEFER: Okay.

22 ATTORNEY BUTLER: Okay.

23 BY ATTORNEY BUTLER:

24 Q. Mr. Lapatka, do you have anything to

25 add that I have missed in my questioning of you?

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1 A. I don't think so, no.

2 ATTORNEY BUTLER: Madam Chair, at this

3 point I have no further questions of Mr. Lapatka. I

4 do reserve the right to call him back to redirect

5 depending upon -- or rebuttal testimony, depending

6 upon redirect called by Mr. Hehl.

7 CHAIRPERSON SCHAEFER: Okay. Thank

8 you. I'm going to open it up to Mr. Hehl, then I'll

9 open it up to the planning board members.

10 Go ahead, Mr. Hehl.

11 ATTORNEY HEHL: Great. Thank you very

12 much.

13 C R O S S E X A M I N A T I O N

14 BY ATTORNEY HEHL:

15 Q. And, Mr. Lapatka, I don't know, maybe

16 you missed it, but did you see the review letters

17 from Maser Consulting where they reviewed the

18 stormwater management report and did extensive

19 comments on that, which was then -- there was an

20 October 22nd, 2019, November 14th, 2019,

21 September 14th, 2020, and then incorporated into

22 Bright View Engineering review of January 18th,

23 2021?

24 A. I don't recall exactly which reports I

25 saw, okay, but I did see previous reports. And, you

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1 know, notwithstanding that, without the -- without
2 the proper soil test being done, I really can't
3 understand how you would accurately evaluate the
4 draining system.

5 Q. That's not my question.

6 My question was, that -- did you
7 recognize that the board professionals, initially
8 Maser and now Bright View, reviewed the stormwater
9 management studies that were submitted to the board
10 and that they also did -- I'm looking at these, the
11 comments are three to four pages long just on
12 stormwater management?

13 And I think it's offensive that you are
14 looking at this and commenting that for some reason
15 the applicant didn't submit that and the board
16 didn't consider these things.

17 So my question, again, is did you
18 recognize that detailed stormwater management was
19 submitted and then reviewed by the board
20 professionals?

21 A. Yes. And there's no mean to be
22 offensive, however sometimes when things are
23 reviewed certain items are missed. And I think the
24 soil test -- the soil testing is a critical thing
25 here.

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1 Q. Okay. And I only have a few questions
2 because we'll cover a lot of this on rebuttal
3 testimony when we recall our engineer, but you have
4 done childcare facilities, correct?

5 A. Yes.

6 Q. Okay. And you're aware that the state
7 Department of Children and Family Services needs to
8 license these facilities, correct?

9 A. Yes.

10 Q. And you are aware that, as a condition
11 of that, they need DEP approval in order to license
12 these facilities; is that correct?

13 A. Yes.

14 Q. Okay. And do you agree with the
15 comments in the Bright View report where --
16 ATTORNEY BUTLER: Which Bright View
17 report, Mr. Hehl?

18 ATTORNEY HEHL: I'm sorry, January
19 18th, 2021. This report.

20 Q. -- that this approval would be subject
21 to DEP approval of the applicant's proposed
22 mitigation, correct?

23 A. Of course it would be. And, in my
24 testimony, I was saying that these things also
25 effect the Watchung ordinances and the planning

Lapatka - Cross
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1 board should consider the Watchung Ordinances, too,
2 not just give up jurisdiction to DEP.

3 Q. And isn't that why they have

4 professionals that review that and guide the board
5 in these technical matters such as engineering and
6 likewise?

7 A. Yes.

8 Q. Great. I have no further questions at
9 this time.

10 ATTORNEY HEHL: Madam Chair and board
11 members and attorney, we'll cover this when we
12 recall our professionals.

13 I think this is a lot of technical
14 items that have been covered by the board
15 professionals in their reviews.

16 ATTORNEY LINNUS: Mr. Hehl, the
17 objector, through Mr. Lapatka, has raised certain
18 ordinances that do exist in the Borough of Watchung
19 and I think the board is entitled to hear from you,
20 not necessarily tonight, but as to whether you
21 recognize that those ordinances do have an impact on
22 the board's decision. And if so, are you prepared
23 to -- and you don't have to answer this
24 tonight -- to revise your plans accordingly to
25 either comply with the variance -- comply with the
Lapatka

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1 ordinances, if you believe they do apply, and if you
2 believe they do not apply, whether you believe that
3 the state regulations preempt or stop the Borough of
4 Watchung from enforcing these particular ordinances
5 in this particular application.

6 So I think we need to hear from you
7 tonight as to what the applicant's preliminary
8 position is in light of Mr. Lapatka's testimony.

9 ATTORNEY HEHL: Yeah, I can offer,
10 because we did get this letter ahead of time, many
11 of these items, they're, frankly, minor checklist
12 items, such as the number of trees that will be
13 planted and the like. But our professionals will be
14 prepared to ensure that we comply with all of
15 the -- all of the Watchung regulations. And if
16 waivers or -- I don't think they would be deemed
17 variances, I think there would be some design
18 waivers. Or as we indicated when we submitted this
19 to the board, the request to the board, we agreed
20 that we would be seeking preliminary approval only.
21 And certainly and is common place, that some of
22 these items would be conditions of a final approval
23 because our main thrust is to get our site plan
24 approved, and then follow up with again the
25 technical items, such as like a will-serve letter on
Lapatka

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1 utilities.

2 ATTORNEY LINNUS: Right. Well, I
3 haven't analyzed all of the ordinances that were
4 presented to the board tonight, but taking a
5 preliminary view of those ordinances it does appear
6 that the ordinances are in existence and based on

7 Mr. Lapatka's testimony, it would appear that, if
8 those ordinances apply, that variances need to be
9 requested and/or proven prior to your
10 obtaining -- your client obtaining any favorable
11 action on the preliminary site plan.
12 So once again, we need to know, the
13 board needs to know and I need to know what your
14 position is with respect to those ordinances and
15 with respect to any preemption argument that you
16 might be making.
17 It is absolutely true that the NJDEP
18 has jurisdiction over the elements of this
19 application, but they do not have jurisdiction over
20 the site plan. That is in the purview of the board
21 and, I am sure, you would agree with me on that.
22 ATTORNEY HEHL: Yeah. And again,
23 we'll review all of these and respond prior
24 -- certainly well in advance of the next hearing and
25 respond to each of those sections of the ordinance.
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1 ATTORNEY BUTLER: Wait a minute, Mr.
2 Hehl, you're going to call your witnesses after I
3 rest my objection?
4 ATTORNEY HEHL: Yeah. We'll respond
5 to these sections of the ordinance.
6 ATTORNEY BUTLER: Yeah. But I want to
7 get through with Mr. Weldon and I want to get
8 through with Hal Simoff and talk about, you know,
9 parking and other things, and then you can bring on
10 your redirect rebuttal.
11 ATTORNEY HEHL: Yes.
12 ATTORNEY LINNUS: But, Mr. Butler, Mr.
13 Hehl can direct the case the way he chooses to
14 direct the case. My observations are that it would
15 be wise for Mr. Hehl, in light of Mr. Lapatka's
16 testimony, to provide his legal position with
17 respect to the ordinances raised and whether they,
18 indeed, apply to this particular application.
19 And if they don't apply, I would like
20 to hear his arguments on whether the state
21 regulations preempt the enforcement or the
22 application of the ordinances that your expert
23 introduced to the board.
24 ATTORNEY BUTLER: Mr. Linnus, I don't
25 think you're saying it, correct me if I'm wrong,
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1 you're not saying Mr. Hehl is going to have an
2 opportunity to now to bring rebuttal witnesses as to
3 Mr. Lapatka before I finish my objection?
4 ATTORNEY LINNUS: I agree with you.
5 That's not the case. What I'm looking for --
6 ATTORNEY BUTLER: Okay.
7 ATTORNEY LINNUS: -- is a response from
8 the applicant's attorney to the testimony tonight.
9 And not in the form of rebuttal. He will have an

10 opportunity as you well know --
 11 ATTORNEY BUTLER: Absolutely.
 12 ATTORNEY LINNUS: -- after you
 13 conclude your objections, to provide whatever
 14 complete rebuttal testimony he thinks is necessary.
 15 ATTORNEY BUTLER: So at the next
 16 hearing we're going to have a legal argument on
 17 whether these sections we cited tonight are within
 18 the purview of the planning board; is that what
 19 you're saying, Mr. Linnus?
 20 ATTORNEY LINNUS: That's precisely
 21 what I'm saying is this board has to ultimately make
 22 a conclusion and make a determination as to whether
 23 to grant the preliminary site plan application. And
 24 if so, it has to be based on the ordinances and the
 25 Municipal Land Use Law.
 Lapatka
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 1 MEMBER FIORILLA: Ask a question?
 2 CHAIRPERSON SCHAEFER: One second. I
 3 want this resolved between Mr. Butler and Mr.
 4 Linnus.
 5 Mr. Butler, are you good?
 6 ATTORNEY BUTLER: Would you say that
 7 again? I'm a little hard of hearing, Madam.
 8 CHAIRPERSON SCHAEFER: No, I said --
 9 ATTORNEY LINNUS: The order of the --
 10 yeah, there's no issue, I believe, on the order of
 11 proceedings. You're entitled to complete your
 12 objector presentation. And then Mr. Hehl, if he,
 13 chooses, can provide rebuttal.
 14 That is separate and apart from what
 15 transpired tonight. Tonight your expert pointed out
 16 certain ordinances that may or may not apply to this
 17 particular application.
 18 I, as the board attorney, want to hear
 19 from Mr. Hehl and you as to whether the ordinances
 20 do apply. You've indicated that it's your position
 21 that they do. Perhaps Mr. Hehl has a preemption
 22 argument. But this board cannot make a decision
 23 unless they have the complete application and the
 24 complete set of facts set before them, including
 25 what laws apply to this particular application.
 Lapatka
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 1 So I have asked Mr. Hehl to present his
 2 position, his legal position. And he has indicated
 3 he would do so prior to the next hearing.
 4 ATTORNEY BUTLER: Okay, thank you.
 5 ATTORNEY LINNUS: That doesn't involve
 6 testimony at this point.
 7 ATTORNEY BUTLER: You've pointed that
 8 out. And I appreciate your clarifying that.
 9 CHAIRPERSON SCHAEFER: Okay.
 10 Paul, you had a question?
 11 MEMBER FIORILLA: Yeah. If there's an
 12 argument being made that they need to get approval

13 from the zoning board with a variance, who decides
 14 that as a question? Do we vote on that?
 15 ATTORNEY LINNUS: Well, first of all,
 16 if the ordinance applies, it's within the
 17 jurisdiction of this planning board. It has nothing
 18 to do with the zoning board.
 19 And the reason it doesn't have anything
 20 to do with the zoning board is because it is a
 21 permitted use. If it were not a permitted use than
 22 any variances for a non-permitted use would be
 23 decided by the board of adjustment.
 24 So the board of adjustment clearly,
 25 unequivocally has no jurisdiction over this
 Lapatka
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 1 application.
 2 MEMBER FIORILLA: I mean in some
 3 cases, if you need a variance, you know, like the
 4 other application that we had that got, you know --
 5 ATTORNEY LINNUS: Right. Totally
 6 different, Paul. Totally.
 7 MEMBER FIORILLA: Okay.
 8 CHAIRPERSON SCHAEFER: Any
 9 other -- any questions for Mr. Butler's witness
 10 based on the testimony tonight?
 11 Because I want to finish with him
 12 tonight. I'm not -- and, Mr. Butler -- well, first,
 13 anybody have questions before we move on?
 14 CHAIRPERSON SCHAEFER: Hold on. Mark
 15 Healey, and then back to you, Paul.
 16 Mark?
 17 BOARD PLANNER: I just need a little
 18 bit of clarification. Some of the testimony
 19 regarding the potential applicability of Chapter 22,
 20 so I would like to ask Mr. Lapatka perhaps to
 21 explain again on the map that you have there, you
 22 have what is outlined in what is in orange on my
 23 screen, which I believe is the 100-year floodplain,
 24 and then you have the red line which I think says
 25 flood hazard line.
 Lapatka
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 1 Can you explain what the difference is
 2 again? Just summarize what the difference is. And
 3 I believe, again, the orange was drawn on their plan
 4 and the red is something that you drew, I believe.
 5 And if you could explain again how you drew that?
 6 THE WITNESS: Sure.
 7 ATTORNEY LINNUS: For the record
 8 purposes -- excuse me, Mr. Lapatka, before you
 9 answer -- just for the record purposes, Mark, you're
 10 referring to OW-1; is that correct?
 11 BOARD PLANNER: Yes.
 12 ATTORNEY LINNUS: Okay.
 13 THE WITNESS: Okay. The orange line,
 14 I believe, is shown on the site plan. And that is
 15 the 100-year flood line from the FEMA flood study.

16 I believe it was dated 2007.
17 The red line is the flood hazard line,
18 okay. And that is the line that the DEP uses for
19 construction applications such as this. And the DEP
20 is the regulatory line for construction purposes and
21 granting permits for construction.
22 The orange line is essentially used
23 really only for flood insurance purposes. So the
24 red line is the applicable line.
25 Did that answer your question?
Lapatka
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1 BOARD PLANNER: Yeah, in part.
2 Because what I'm doing is, as you're describing
3 that, I do have Chapter 22 open and I'm trying to
4 find out, as you're giving your testimony, the
5 potential applicability of this ordinance.
6 And I see Section 22-3.2 and it's
7 saying the basis for establishing areas of special
8 flood hazard, and it references, I believe, the
9 flood insurance rate maps, 2007. Which you
10 mentioned FEMA, but are those the same maps?
11 THE WITNESS: Yes.
12 BOARD PLANNER: Okay.
13 THE WITNESS: So the ordinance
14 references that. And DEP uses that ordinance in
15 many instances and partly here -- I mean uses that
16 study, I should say, and they add one foot to that
17 number for the flood elevations. So the DEP --
18 BOARD PLANNER: Okay. That's the red?
19 THE WITNESS: The red, yeah.
20 BOARD PLANNER: Okay.
21 THE WITNESS: Now also, if you look at
22 22-3.5, Interpretation, it says that this ordinance
23 is a minimum requirement, okay, and does not limit
24 or repeal state statutes such as NJDEP rules. Going
25 further, the 22-4.3, I believe it says that all
Lapatka
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1 flood data should be reviewed.
2 So I guess, theoretically, if you look
3 at 22.3.2, you could say that that would be a
4 minimum standard. But the 100-year floodplain is
5 essentially used just for flood insurance purposes,
6 you know, whether or not you need flood insurance.
7 And it would also help determine the risk factor
8 when, you know, calculating the premium.
9 BOARD PLANNER: Okay. See the issue,
10 though, is -- and perhaps this ordinance is mixing
11 terms because in the definition section where it
12 defines areas of special flood hazard -- quote,
13 "shall mean the land in the floodplain within the
14 community subjected to a one percent or greater
15 chance of flooding in any given year," which
16 suggests to me that that is the 100-year floodplain.
17 THE WITNESS: Right. And they say
18 that that's the -- they go on to say that's the

19 minimum standard and that all flood data and all
20 flood studies should be referenced in reviewing an
21 application. I'm paraphrasing it.

22 BOARD PLANNER: Okay. So what I would
23 suggest, Madam Chair -- thank you for that
24 additional testimony. You know, I think we have to
25 hear from the applicant's perspective on this. And,
Lapatka

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1 you know, myself and the engineer can review
2 the -- you know, what is submitted and give our
3 opinions as to the potential applicability of this
4 ordinance.

5 And I would be involved because it
6 does, I think that section that they raised, 400 --
7 28-401A does basically reference Chapter 22 by
8 reference, so I think we do need --

9 CHAIRPERSON SCHAEFER: I agree with
10 you. And I was, at the end, was going to say I
11 would like you and our engineer to delve more into
12 the testimony that was given tonight.

13 Paul, you had a question?

14 MEMBER FIORILLA: Yeah. I think there
15 was certain testimony where there was a reference to
16 the road, the access being limited and the road
17 being shut down. Access limited to the site, I
18 think. How often has that happened over the last, I
19 don't know, three or five years? Do you have any
20 information on that?

21 THE WITNESS: I do not have that
22 information but our traffic engineer does, but he
23 can talk about that when he testifies.

24 CHAIRPERSON SCHAEFER: Karen? I can't
25 see who's raising their hand. Karen?

Lapatka

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1 VICE-CHAIRMAN SPEENEY: Relative to
2 OW-1 there is the transition area compensation
3 easement that has been drawn on this particular
4 plan. My question is, does that area that is black,
5 does that reduce the effective area of the site that
6 is being presented to us?

7 THE WITNESS: Well, I'm not going to
8 ask the question directly but that cross-hatched
9 area is essentially a conservation easement that was
10 established to the benefit of the state. And that
11 easement says that that area cannot be disturbed,
12 vegetation removed, and things like that.

13 What I find difficult here is that
14 this plan proposes to give that area away again to
15 DEP. It was given to -- or the state I should say.
16 It was given to the state as part of the application
17 for the multi-family housing development right on
18 the other side of Green Brook. The activities that
19 they did at the time, okay, evidently needed more
20 compensation area. So they had, you know, control
21 over this property to the extent that they could

22 grant this easement here.
23 So that easement was already given away
24 for conservation.
25 VICE-CHAIRMAN SPEENEY: But it's been
Lapatka
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1 given away once already.
2 THE WITNESS: Once only. This plan
3 proposes to give it away twice. Once more, I should
4 say.
5 CHAIRPERSON SCHAEFER: Well I think at
6 this stage I would like our engineer and Mark to
7 look at that more closely.
8 Mr. Hehl, you, I'm sure, will respond
9 in your rebuttal to that. But that's a great
10 question, Don.
11 So our engineer -- Bright View, please
12 look into it. Mark, please look into it.
13 Other questions?
14 VICE-CHAIRMAN SPEENEY: Excuse me. I
15 just want to also have an opinion from Mr. Linnus,
16 and I don't need it tonight, but if Mark and the
17 engineer are going to look into it, and you have an
18 opinion also, I would like you to chime in at that
19 time.
20 ATTORNEY LINNUS: Right. That is
21 precisely my question to Mr. Hehl on whether he
22 would be sending his legal viewpoint on the
23 applicability or non-applicability of the
24 ordinances. Certainly Mr. Butler could chime in
25 from a legal perspective. Yes.
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1 VICE-CHAIRMAN SPEENEY: Yes.
2 ATTORNEY LINNUS: So my opinion will
3 be delivered after I see what Mark has to say, what
4 our engineer has to say, what Mr. Hehl has to say
5 and what Mr. Butler has to say.
6 VICE-CHAIRMAN SPEENEY: Thank you.
7 CHAIRPERSON SCHAEFER: Any other
8 questions? I'm going to open it up to the public.
9 Anybody from the public have questions of the
10 testimony that was just given by the opposer?
11 Okay, I'm going to close the public
12 session.
13 Mr. Butler, I think we're going to end
14 it this evening. We have had a lot of draining
15 testimony. So the next -- our next hearing or our
16 next meeting in February we'll pick up where you
17 left off. And who would be your next witness that
18 you would be --
19 ATTORNEY BUTLER: Did you just ask me
20 a question, Madam?
21 CHAIRPERSON SCHAEFER: Yeah. I said
22 we're going to end it for this evening, okay.
23 ATTORNEY BUTLER: Yes, fine.
24 CHAIRPERSON SCHAEFER: We've had a lot
25 of testimony and it needs to be digested before we

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1 move on to your next witness.

2 So what I would like to know is in

3 February, when we come back, who will be your next
4 witness?

5 ATTORNEY BUTLER: My next witness will

6 be Hal Simoff, my traffic engineer.

7 CHAIRPERSON SCHAEFER: Okay.

8 ATTORNEY BUTLER: He has sent to

9 Theresa Snyder his report. And he's sent to her

10 seven or eight exhibits he's going to testify in

11 association with that report.

12 CHAIRPERSON SCHAEFER: Okay.

13 ATTORNEY BUTLER: And you should have

14 those documents.

15 CHAIRPERSON SCHAEFER: Okay.

16 BOARD SECRETARY: We do.

17 ATTORNEY BUTLER: I thought we might

18 get there tonight, and just to play cautious I made

19 sure they were sent the other day.

20 CHAIRPERSON SCHAEFER: Yes, we have

21 them. Thank you.

22 ATTORNEY BUTLER: Thank you.

23 CHAIRPERSON SCHAEFER: So with that

24 being said, Mr. Hehl, you're good? Next -- in

25 February -- next year February -- see, it's getting
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1 late -- we'll pick up where Mr. Butler has left off

2 with his next expert.

3 ATTORNEY HEHL: And that's

4 February 16th. Are we back to 7:30?

5 CHAIRPERSON SCHAEFER: Back to 7:30.

6 ATTORNEY HEHL: And I assume, Frank,

7 no further notice required?

8 ATTORNEY LINNUS: That's correct.

9 There will be a continuation of this public hearing

10 on this application to take place before this board

11 on February 16th at 7:30 p.m. that's when the

12 meeting starts.

13 This pronouncement is the pronouncement

14 to the public. There will be no requirement of any

15 additional notice by publication or service on

16 members of the public. You heard it tonight. You

17 are welcome back here on the 16th on this

18 application.

19 CHAIRPERSON SCHAEFER: Okay?

20 ATTORNEY BUTLER: Yes. Thank you.

21 And on behalf of Weldon and myself, Happy New Year

22 to everybody, including Mr. Hehl and his witnesses.

23 CHAIRPERSON SCHAEFER: Thank you. To

24 you as well, Mr. Butler and Mr. Weldon and your

25 witnesses.

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1 ATTORNEY HEHL: Thank you for the

2 board's time and consideration and the board

3 professionals. Have a great night.

4 CHAIRPERSON SCHAEFER: You, too.

5 I am going to open it up to the public
6 for any comments.
7 Hearing none, I look for a motion to
8 adjourn.
9 VICE-CHAIRMAN SPEENEY: So moved.
10 MEMBER PENNETT: Second.
11 CHAIRWOMAN SCHAEFER: Beautiful.
12 So we will reconvene next month,
13 February the 16th, at 7:30.
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15 (Hearing concluded at 10:07 p.m.)
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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
22

23 _____
24 Angela C. Buonantuono, CCR, RPR, CLR
25 NJ State Board of Court Reporting
License No. 30XI00233100
25 Dated: February 10, 2021

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