AMENDED MINUTES

NOVEMBER 18, 2014

PLANNING BOARD **LONG HILL TOWNSHIP**

CALL TO ORDER AND STATEMENT OF COMPLIANCE
Chairwoman Dapkins called the meeting to order at 7:35 P.M. She then read the following statement: Adequate notice of this meeting has been provided by posting a copy of the public meeting dates on the municipal bulletin board, by sending a copy to the Courier News and Echoes Sentinel and by filing a copy with the Municipal Clerk, all in January, 2014.

MEETING CUT-OFF
Chairwoman Dapkins read the following statement: Announcement was made that as a matter of procedure, it was the intention of the Planning Board not to continue any matter past 10:30 P.M. at any Regular or Special Meeting of the Board unless a motion was passed by the members present to extend the meeting to a later specified cut-off time.

CELL PHONES AND PAGERS
Chairwoman Dapkins read the following statement: All in attendance are requested to turn off cell phones and pagers as they interfere with the court room taping mechanism.

PLEDGE OF ALLEGIANCE

ROLL CALL
On a call of the roll, the following were present:

Suzanne Dapkins, Vice-Chairman
Brendan Rae, Mayor's Designee
Ashish Moholkar, Member
Guy Roshto, Member
Gregory Aroneo, Member
Timothy Wallisch, Member
David Hands, 1st Alternate

Excused**:**

Guy Piserchia, Mayor
J. Alan Pfeil, Chairman

Kevin O'Brien, Bd. Planner
Thomas Lemanowicz, Bd. Engineer
Dan Bernstein, Bd. Attorney
Cynthia Kiefer, Bd. Secretary

Ms. Kiefer advised Chairwoman Dapkins that she had a quorum and could proceed.

EXECUTIVE SESSION - It was determined that there was no need to hold an executive session.

PUBLIC QUESTIONS OR COMMENT PERIOD
Chairwoman Dapkins opened the meeting to questions or comments not pertaining to topics not on the agenda for that evening. Seeing none, she closed the meeting to the public.

PUBLIC HEARING (cont'd)
RESTORE MEYERSVILLE LLC
596 Meyersville Road
Block 14701, Lot 27

#14-01P
Prelim/Final Site Plan
Dev. Permit

Present for the Applicant: W. Kaufman (applicant)
John J. Delaney, Attorney for the Applicant
Christian M. Kastrud, Engineer for the Applicant

Present for Opposition: Gerard J. Legato, Attorney for Concerned Citizens of Meyersville

Chairwoman Dapkins noted that at the last meeting, they had closed the meeting to questions and were accepting comments only. She asked for those who had not already given comments but wanted to, to make their comment at this time. Arthur Brown wanted to make a comment however Chairwoman Dapkins told him that she wanted to hear from those who had not had an opportunity at the meeting first.

Fritz A. Kielblock, 24 Home Street, Meyersville, was sworn in by the court reporter. He commented this proposed building would not only impact him but all the neighbors.

Helena Tielmann, 795 Meyersville Road, Meyersville, was sworn in by the court reporter. She noted that she owned the property directly next door to the subject property. She expressed concerns that she wanted made conditions of

any approval. First, she wanted the grading revised to redirect runoff towards the northwest corner of the property. Additionally, she wanted permanent rip rap around the spillway to prevent erosion. Finally, she requested that the existing fence around the property be replaced.

Karen Sankus, 486 Meyersville Road, Meyersville, was sworn in by the court reporter. She expressed several concerns about the proposed project including traffic, noise, environmental impact and impact to the community as a whole.

Mr. Delaney objected during Ms. Sankus' comments on grounds that this Board did not have the power to consider noise and he noted that he had a case from the appellate division.

Mr. Bernstein said that that may be true however as a resident, she had a right to be heard. He noted that Mr. Delaney would have an opportunity during his legal summation at the end of the case to address the issues raised and he allowed the resident to continue.

Mr. Delaney noted that he did not want his silence to be construed as acquiescence.

Ms. Sankus continued discussing her concerns. In addition to her original concerns, she noted that since it would be a tax exempt organization, the township would be losing tax revenue.

Mr. Delaney again objected on the grounds that it was irrelevant.

Mr. Bernstein stated that the Board would hear him during his summation and appreciated the fact that he was objecting however he was going to allow Ms. Sankus finish her comments.

Ms. Sankus stated that she was aware that the Board was not allowed to vote on that matter however she noted that someone else from Westfield had said it last time and she wanted to correct the record for the general public that they were currently getting tax benefits from this property and they would not in the future under this proposal.

Ms. Sankus also referred to the Master Plan as it pertained to Meyersville. She felt that the building was too big to be in harmony with the area.

Mr. Delaney objected citing two cases.

Ms. Sankus continued to express concern that this was not in the Master Plan for Meyersville. She asked the Board to say no to the proposal.

Chairwoman Dapkins asked if there was anyone else who wished to make a comment.

Arthur Brown, 479 Meyersville Road, Meyersville, (previously sworn in) reminded the Board of their responsibility to the township. He also spoke against approval of the application.

Mr. Delaney objected and noted that some of Mr. Brown's comments referred to the previous application.

Mr. Bernstein advised Mr. Brown that since this was a separate application, the Board would not consider what took place during that previous hearing. He told Mr. Brown that he could continue the thrust of his comments however.

Mr. Brown continued with comments pertaining to issues with the ordinance permitting the proposed use and noise.

Mr. Delaney objected on both counts.

Mr. Bernstein noted the objections and advised Mr. Brown to continue.

Mr. Brown continued discussing noise and previous proposals by the applicant. He asked the Planning Board to vote against the application.

Chairwoman Dapkins asked if there was anyone else who wished to speak.

Mr. Delaney felt that it was his understanding that they were going to limit the comments to one per person. He noted that Elaine Zindel, who stepped up to the podium had already spoken.

Mr. Bernstein asked Mrs. Zindel if she could complete her comments in five (5) minutes.

Elaine Zindel, 317 Meyersville Road, Meyersville, (previously sworn in) said that she could do so and also noted that she had been in the middle of her comments at the end of the last meeting. She questioned the number of parking spaces for the "future likely use" of the proposed volleyball facility. She quoted Walker Parking Consultants' 2004 article in "Parking Professional Magazine" which recommended 92 parking spaces including a 10% operating cushion for a 12,000 square foot building. She also quoted the "Institute for Transportation Engineers Parking Generation Third Edition"—

Mr. Delaney interrupted and objected to the appropriateness of the comments.

Mr. Bernstein noted that the "Institute for Transportation Engineers" was a recognized body just as the Moskowitz book was. He felt that since it was a recognized authority, Mrs. Zindel could quote that.

Elaine Zindel explained that it was a compilation of traffic information by land use. She noted that during peak demand times for health club facilities, 8.2 spaces per 1000 square feet were required. She felt that given the available parking for the proposed building, the complex had no future as a fully functioning health club/fitness center or volleyball facility. She discussed future concerns based on lack of parking and noise issues.

Mr. Delaney raised an objection.

Elaine Zindel suggested that the Planning Board should have hired its own acoustical engineer to evaluate the potential noise issues. She felt that the applicant had not met the burden of proof required by Ordinance 144.6. She also voiced concern over who would enforce zoning violations.

Ed Zindel, 317 Meyersville Road, Meyersville, (previously sworn in) asked the Planning Board to vote against the application. He noted that 38 years ago, the Planning Board faced a similar situation in Copper Springs which he felt resulted in an "unsightly blemish in a scenic country road and has for nearly four decades been an enforcement nightmare that township officials have been powerless to resolve." He felt that this facility should be relegated to industrial areas as had been done in 48 other towns. He noted that Copper Springs was the only such facility that had been placed in a Conservation Zone and residential area. He asked the board members to understand the precedent that had been set by those other 48 towns before making a decision. He said that the building would be out of scale and out of character with the hamlet and fail to comply with the goals of the Master Plan, the purpose of the Meyersville Hamlet District Zone, and the Standards of Smart Growth. In summary, he said that the approval of "volleybarn" would be a blunder on the order of Copper Springs which would forever compromise the character and streetscape of the historic hamlet, degrade the quality of life that nearby residents now enjoy, and reward those who would corrupt township ordinances in an attempt to enable their application.

Chairwoman Dapkins closed this portion of the hearing to the public. She advised Mr. Legato to proceed with his presentation.

Mr. Delaney noted that he had read Mr. Legato's book and knew he would have multiple objections however he stated that he would reserve his objections until his closing statement.

Mr. Legato, attorney with **The Legato Law Firm LLC**, Somerville, NJ and attorney for "Concerned Citizens of Meyersville", thanked the board members and the members of the community for their participation in this process. He said that the folks in Meyersville were in general not against development. They understand that this property has to be cleaned up and developed. They recognize that they have this "little gem" down there in Meyersville called the Meyersville Hamlet and they don't want their little hamlet imposed upon by an enormous building the size of the new Walgreens in Stirling. Their point was that structures of that size don't belong in the Meyersville Hamlet Zone. If the board members voted against this, it would not have to be the end for Mr. Kaufman's endeavors. The "Concerned Citizens of Meyersville" would be willing to work with him and to consider alternatives to this application in hopes that he would work with them in the future and come back with something far more reasonable than a 13,000 foot volleyball center that pushed the envelope of what is allowable right exactly to the edge, maybe over the edge, especially next to the Great Swamp.

Mr. Legato said that he hoped that the board members would look simply at the plain language of the law. He discussed whether or not it was an approved use and the parking issues that had come up in the past. He then referred to **Exhibit C-4**, Tab No. 1, Section 120 "Zone Districts and Use Regulations." He requested that they turn to the bottom of the second page where he had highlighted Section 122.11 "M-H Meyersville Hamlet Zone." He read, "The purpose of the M-H Meyersville Hamlet District Zone was to preserve a quiet, peaceful and unrushed corner of Long Hill. The hamlet of Meyersville serves as a gateway to the Great Swamp National Wildlife Refuge, a major recreational asset and a defining feature of the rural essence of Long Hill Township." This was a little bit of what he meant when he said that they have a "gem" down there in Long Hill Township and that "gem" was known as Meyersville. It was a segue between the Great Swamp and the rest of the township. It was a unique little corner pocket of Long Hill Township that did not exist anywhere else.

Mr. Legato then referred to "B. Permitted Primary Uses" and noted that there was only one (1) use of the nine (9) listed that seemed to arguably make some sense in the context of this application and that was "Retail Services" which included barber shops and hair salons; health clubs; fitness centers; and studios. He noted that nowhere in there was there recreation or recreation facility.

Mr. Legato then referred to Section 123.1 which said, "Except when this Ordinance permits the approving authority to approve a use which, in the opinion of the approving authority, was substantially similar to those primary uses in a particular zone, all uses not specifically permitted by the Ordinance are expressly prohibited." He said that by plain English language, if "recreation facility" was not listed in the list of approved uses and not similar enough to another use that was permitted, then it was specifically and expressly prohibited. If this was a recreational facility, it was expressly prohibited. He said that the folks that wrote the ordinance understood the words "recreational facility" and they used it in three (3) other parts of the ordinance: as a primary use in the township's recreational park area, in the multi-family section, and in the senior citizen section. It was not as if they forgot to use the phrase or accidently left it out—they put it in when they wanted to put it in. Somebody left it out of this section and one can infer from that that it was a specifically prohibited use. He noted that Copper Springs was there by use variance. The only conclusion that can be drawn was if the primary use of this facility was recreational, it was not allowed in the

Meyersville Zone or any other zone in the township unless it was senior citizens, public parks, or multi-family. The ordinance made no provision for it.

Mr. Legato said the first application #13-07P, which was located in Tab 1, had been voted down by the Planning Board. He referred the board members to the "Proposed Use" section of the application. "Indoor recreation, health club, fitness training center" was filled in by the applicant. He then referred the board members to Tab 3, "Minutes of the October 8, 2013 Meeting," during which the three (3) proposed uses for this application were discussed. At the bottom of the second page of the minutes, he lighted the sentence, "She stated it was not a health club. There was no equipment other than jump ropes and ladders used for conditioning and speed and agility, but no heavy weights." and said that it was testimony by Ms. Mottern, the proposed tenant and operator of the facility. On page 5, he highlighted, "Mr. Hoffman stated that the application filed for this matter described the proposed use as being '…an indoor recreation/health club/fitness training center.'" and asked Ms. Mottern if any those labels applied to this facility. She replied that "…a health club would not be her intended use. It would be recreational and training."

Mr. Legato noted the next highlighted sentence on the page which asked if Ms. Mottern considered it a fitness center. She replied, "…no but that would depend on what that term meant. To her, a health club/fitness center meant exercise equipment and treadmills."

Mr. Legato then moved to the highlighted sentences on page 7 which stated that Mr. Delaney had asked Mr. Kaufman if anything in Ms. Mottern's statements was inaccurate and Mr. Kaufman answered no. He noted that Mr. Kaufman said that he had looked at the Master Plan which supported recreation in the Meyersville Hamlet. Mr. Kaufman "…apologized for the confusion caused by listing multiple uses in the application. He stated he took the words 'fitness,' 'health club,' and 'recreation' directly from the ordinance." Mr. Legato said that that statement was simply wrong because there was nothing in the Master Plan that said the Meyersville Hamlet Zone encouraged recreation. There was a lot that said it was next to the Great Swamp which was incredibly important to the township's recreation.

Mr. Bernstein said that Mr. Legato had raised a conflict issue and Mr. Bernstein had suggested to the Board that that chairman not sit because of a ***potential,*** not an actual conflict. He noticed that that chairman sat during the October 8, 2013 meeting. Mr. Bernstein asked Mr. Legato if it was his opinion that because the chairman did not vote at the first hearing that there was no taint or conflict with respect to the first hearing or was it Mr. Legato's opinion that there was a taint or was it Mr. Legato's opinion that the Board could consider what happened at the first hearing (there was clarification at that point that Mr. Bernstein was referring to J. Alan Pfeil) tainted because Chairman Pfeil was there.

Mr. Legato said that in his opinion, he felt that the ***potential*** conflict of interest threatened the integrity of the whole process not just the vote. Given that, he said that he did feel that it was tainted however in dealing with that problem, he felt that they had "cobbled" together a possible solution to it. At the time he had said that he was happy to participate in that solution since he could not think of any other way to tackle the problem and that was to have a second abbreviated hearing in the absence of the chairman from all of the previous witnesses. He noted that they had not had all of the previous witnesses, specifically Ms. Mottern, at the second one. He felt there was no recourse for him but to go back and check her only testimony which was given and put that in front of the board members.

Mr. Bernstein asked if Mr. Legato felt that that was improper.

Mr. Legato said that he did not think it was improper.

Mr. Bernstein said, given that, the applicant could ask the board members to refer back to other witnesses as well.

Mr. Legato agreed with that. He noted that he had not agreed this would solve the whole problem and reserved the right to appeal in the event that "we wind up going further with this thing."

Mr. Bernstein said that it seemed to him that if Mr. Legato felt that it was appropriate to cite testimony from Round One, he was almost acknowledging that it was relevant.

Mr. Legato said that he did feel the testimony was relevant. The fact that he felt that the general hearing was compromised did not mean that the testimony did not happen. That was the testimony that he was quoting in this exhibit. He felt that he had been assured by Mr. Bernstein that the Board would not ignore that kind of testimony simply because it came in Application One or Two.

Mr. Legato referred to Tab 11 and noted that the first application (#13-07P) included in this section was the one that the board members had voted down. It was three (3) pages long. He said that in the second application (#14-01P) included in the section, he felt that the applicant realized that he had made a fairly serious mistake in the first application. In the first application Mr. Kaufman listed recreation, health club and fitness training center as the proposed uses. Mr. Legato noted that Ms. Mottern had stated that "we're not any of those" so the only one left standing was recreation and training center primarily for the use of volleyball. The only use left standing in that case was recreation. At that time, the opposition was beginning to challenge that and the second application came through under proposed use, "Fitness center" plain and simple which was an approved use in this zone. Recreation was not.

Mr. Legato referred to the last page in Tab 11 and noted that on the same day, February 28, 2014, Mr. Kaufman also sent an application up to the Morris County Planning Board for Land Development Review and listed the proposed use as recreation. He felt that testimony by Mr. Kaufman would have cleared this up by this point in the hearings

however, in his opinion, Mr. Kaufman's testimony had not been clear at all. He felt he had not gotten a clear answer from Mr. Kaufman with respect to the primary use of this application and that it had been too ambiguous.

Mr. Legato said that there could not be a facility which was recreational in that zone. It would only work if it was a fitness center and he questioned whether it was a fitness center and suggested they look at what the law for guidance. He referred to Tab 6 which was an excerpt ***not*** from the actual ordinance but from a ***proposed*** township ordinance. He included it because he felt it was such a concise and clear definition of exactly what they were dealing with—a recreational facility, commercial. It was defined in the ***proposed*** statute as: "A recreational facility operated as a business and open to the public for a fee. A Commercial recreation facility was a principal use that consists of land areas and buildings used for the following: passive and/or active recreational activities, court games, aquatic games, field sports, playgrounds, summer camps, youth and adult training for sports and recreational activities etc. etc." He noted that this was not in the ordinance. It was proposed and discussed here. If it was already covered by the "ubiquitous fitness center" it would not be needed because "fitness center" covered everything. He said that "fitness center" meant any sports activity that would make one more fit and said that that was a reasonable paraphrase of the interpretation that Mr. Kaufman gave in his explanation.

Mr. Legato said that so far, it looked like a recreation center to him. He then asked if it was a fitness center. He noted that the ordinance did not provide a definition for "fitness center." It said that it was an approved use but it did not define it. He said that there had to be a working definition of "fitness center" otherwise the Board could not make the decision as to whether or not this was a fitness center. A working definition had to be adopted and then they could decide if the proposed use fit. He noted that there was no definition for "fitness center" in the dictionary. He suggested using common sense and then said that he thought of treadmills and exercise equipment, not a volleyball court. He then suggested using the statutory definition of "health club" and referred to Tab 2 and said that the State of New Jersey had defined "health club" as "…an establishment which devotes or will devote 40% or more of its square footage to providing services or facilities for the preservation, maintenance, encouragement or development of physical fitness or physical well-being." He said that that did not sound like a volleyball court and continued to read, "…The terms includes an establishment designated as 'reducing salon,' 'health spa,' 'spa,' 'exercise gym,' 'health studio,' 'health club,' or by other terms of similar import." He submitted to the board members that "terms of similar import" would be "fitness center."

Mr. Legato referred the board members to the regulations which further define what a health club was in Section (Board) on the second page of Tab 2. "The term 'health club' shall not include a single focus establishment/facility that was devoted to the development of one particular physical skill, or activity or enjoyment of one specific sport." He stated that they were talking about a volleyball court for the specific enjoyment of volleyball and it was definitely not considered in the statute as a health club. So he was indebted to the State of New Jersey for providing some guidance as to what a fitness center/health club was and it was not volleyball.

Mr. Legato felt that the most compelling argument can be made by looking back into how did this legislation arise—how did "fitness center" become part of the Meyersville Hamlet approved uses. He referred to Tab 5 which included the 2008 minutes for September and October. He told the board members that there was huge discussion about Ordinance 236-08 which was the ordinance that amended the existing ordinance to allow a fitness center. He said it was done not specifically he presumed to accommodate the fitness center on Elm Street but that certainly was a thought and part of the discussion in the minutes. They were trying to put a real fitness center with treadmills and weights and things on Elm Street and to do that they had to change the ordinance and they did that with Ordinance 236-08. During those discussions, Mr. O'Brien said that one way to define it (page 3 of the minutes of September 23, 2008) would be to look at "The Latest Book of Development Definitions." In it, he said that a health club was defined and a fitness center was defined as a health club. A health club was defined as "…an establishment that provides facilities for aerobic exercises, running jogging, exercise equipment, game courts, swimming facilities and saunas, showers, massage rooms and lockers." He stated that the Planning Board rejected this definition and said that it was far too expansive. Instead they adopted a very limited definition which was found in a letter from Mr. O'Brien regarding fitness center (Tab 5). He said that all this discussion boiled down to the Planning Board in 2008 asking Mr. O'Brien to write a note to the Township Committee regarding this proposed ordinance and "let them know that we would like to keep the 'fitness center,' remove the words 'health clubs' and put in the definition of fitness center which says 'an establishment that provides facilities and instruction in aerobic and other exercises which may have exercise equipment and showers and/or locker facilities." He said that they had deliberately taken out "court games" because "nobody wants a bowling alley in Long Hill Township." He added that nobody wanted an indoor basketball field (sic) or indoor soccer field or indoor volleyball court. Mr. O'Brien wrote the note to the Township Committee and for whatever reason, the ordinance was adopted without a definition. If they had included this definition, this application would not qualify because no court games would be allowed. He said that they had to adopt a working definition of what a fitness center was before the board members could decide if this was a fitness center.

Mr. Legato said that board members could use the common sense definition or the statutory definition of fitness center provided by the State of New Jersey or the definition ***as proposed*** by this Planning Board five (5) years ago that somehow got dropped which did not mean that it was not the intent of the legislation. He felt that it was the intent of the legislation to provide a very limited definition. Under any of those definitions, this would not be a fitness center. It would be a recreation center, according to Mr. Legato. He said that if the application were to be approved, it would need a use variance because recreation center was not an allowed use.

Mr. Legato then discussed parking. He said that if this was a recreation use, as he felt the board members would have to conclude that the facility would still need a variance. If it was not a recreation use and it was a fitness center, the applicant would need a parking variance. Parking requirements for all zones were found in Section 151.1(c) (Tab 10). On the second page, "open space and recreation" uses require "as determined by the approving authority."

However, if the Board decided that it was a recreational facility, it would require a use variance. If it was a fitness center, he said the recreation requirement was no longer applicable and the board members would have to move to "retail sales, trade and service." That use would require one (1) space for every 200 square feet of floor area. The next question would be "Was this a retail service use?" He said, "Of course it is." All they had to do was look at the statute which said (Tab 7 page 3), "Retail Service Use—those businesses that primarily provide a service, rather than a product, to individuals, businesses and other organizations, including, but not limited to, personal services, repair shops, studios, amusement and recreational services, and health, education and social services, and museums and galleries." He said that clearly this fit this application. To further emphasize that, he referred to Tab 8, page 3, "B. Permitted Primary Uses," No. 2 which said, "Retail service uses, including barber shops and hair salons; health clubs; fitness centers; and studios." He said this was the law defining fitness centers as retail service uses. Therefore, if the Board decided that this was a fitness center, there had to be one (1) space for every 200 square feet which meant about 65 spaces and there only about 40. There would have to be a "big" variance. He asked what excuse the board members would find to give that "big" variance and how would they explain to the next applicant who came up there and said, "I'm not quite a retail service use and I'm not quite a—I'm scheduled so therefore people will not be coming in and out as they please, they will be coming in and out when I say so and therefore I am not a retail service use." Why wouldn't they get the variance when this applicant did? He felt that the applicant had an impossible position. If Mr. Kaufman said it was a recreational facility, he had an unapproved use. If he said it was a fitness center, he had to get a variance for parking.

Mr. Legato said that one thing the Board could not say because it would make no sense, was that for the purposes of parking, it was a recreational use and for the purposes of use, it was a fitness center. For the purposes of parking, if it was called recreational, no variance would be required. For the purposes of use, if it was called a fitness center, no use variance would be required. He said that was what Mr. Kaufman was asking the Board to do and this was something that the Board could not do.

Mr. Legato discussed porous pavement. He had pictures that Ed Zindel had taken and asked Mr. Zindel to come up to authenticate them.

Mr. Bernstein asked Mr. Legato to show the pictures to Mr. Delaney before the Board saw them. He also asked Mr. Zindel to authenticate that he did take them and when he took them. Mr. Bernstein reminded Mr. Zindel that he was still under oath.

Mr. Legato agreed to show the pictures to Mr. Delaney first.

Ms. Kiefer marked the photos into evidence as **Exhibits C-5a, C-5b, C-5c, C-5d, C-5e,** and **C-5f.**

Mr. Zindel said he recognized the six (6) pictures and that he was the one who had taken them. He said that they were taken at the PNC Bank following a one-half (½) inch rain storm and showed water collection over the surface which had been deemed to be porous asphalt. He noted that the date, November 16, 2014, was written on the back of each picture. In response to Mr. Legato's question, Mr. Zindel said that it was a true and accurate representation of what he had seen at the PNC Bank parking lot that day.

Mr. Bernstein asked if Mr. Legato was introducing the pictures to say that porous pavement was not always porous.

Mr. Legato said he was introducing the pictures because to him they were persuasive. He did not want to make any expert comments about it since he was not an expert. He wanted the Board to see them.

Mr. Delaney did not have any objection to the Board seeing the pictures.

Mr. Legato noted that the PNC parking lot was cited by the Mr. Lemanowicz as the one place in town where there was porous pavement and he wanted to show the Board how that pavement was doing some ten (10) or eleven (11) years later. He noted that one pictures showed that a lot of surface had been plowed up. The next showed that it had been patched presumably with regular hot patch, although he was not sure, and no longer porous.

Mr. Bernstein asked if Mr. Legato was saying that the pavement was improperly patched.

Mr. Legato said that he presumed it was a regular hot patch of" impermeable" material.

Mr. Bernstein said therefore, if it was "non-permeable" material, it would have added to the ponding.

Mr. Legato said he believed that nobody asked from PNC how they should go about paving this.

Mr. Bernstein said that problem was that Mr. Legato did not know whether it was done properly to start with.

Mr. Legato agreed that that was true. He then referred to more views of what happened when it was plowed. The last picture had a rubber duck on it showing the water that accumulates after a mild rain. He noted that the duck was floating on about one-half (½) inch of water. He said the water did not go right through; it sat on the surface.

Mr. Bernstein asked how long after the rain were the photos taken.

Mr. Legato said that he did not know.

Mr. Bernstein said that the point was that there was so much information missing, the Board could look at it, however it had almost no—how much rain, was it installed properly—but he did not want to say that the exhibits could not be introduced.

Comm. Roshto said that he thought he had heard in the testimony that this type of pavement was immediate so in terms of time, it would not matter.

Mr. Bernstein noted that it had been patched and it was not known whether it was patched properly.

Comm. Roshto said that he took the comment from the applicant's engineer that "immediate" meant "immediately."

Mr. Bernstein said that he did not think it was strong evidence however the Board could gather whatever it wanted from it.

Mr. Legato said that this application was approved in 2003 at 57.5% of impervious coverage however they got 100% credit for using porous pavement and with that credit, it got brought back to 40%. He said it had been approved with conditions in the resolution such as: it had to be vacuumed and steam cleaned twice a year and a report had to be submitted twice a year to the Township Engineer and the Township Committee for stormwater management inspection. He noted that there was a manual that instructed them as to what and when to do that. He said that there should be at least 20 stormwater management reports according to the resolution and there were five (5) on file. The last one was dated 2005 or 2006.

Mr. Legato then discussed Copper Springs. He said that it started as an approval by variance for swimming and tennis. It morphed into soccer and birthday parties and eventually there were a lot of complaints. Only because of the complaints was an inspection done by the construction officer. Mr. Legato said that things that depend on inspections in the future don't work very well. If the Board decided that they could solve all the problems of this application with very very specific conditions in a resolution, they would not have solved them because nobody had good enforcement. He noted that Copper Springs was not well enforced and eventually ended up in court. The judge instructed the two sides to work it out but in the meantime, "Copper Springs do what you've been doing." He said that the way the Township Committee was working it out was by "looking to pass that very definition of 'recreation' that you looked at before which was not now in the ordinance but might be in the ordinance as an accommodation to Copper Springs." He said that things were supposed to happen that never did such as inspections and very narrowly drawn resolutions wind up in the future as being essentially unenforceable.

Mr. Legato said that they had to consider the future when the volleyball rage would no longer be a rage and economically this facility could not be sustained. If it was approved under a broad "fitness center," the next one in could make it a real fitness center with treadmills and exercise equipment or indoor soccer or bowling alleys or anything that fit. These were things that one would not like to see in Meyersville. Every time the issue of the future had been raised, it had been said that the new applicant would have to come back to the Planning Board and he would have to explain why his new application was good or it would not be approved. He asked how the Board would explain to the applicant that when it was originally approved, there were only about 2/3 of the parking spaces that were required because it was thought that it was going to be a volleyball center. The new application would be a real fitness center and people would be leaving their cars there and they would not fit. The new owner would ask what he was going to do with this 13,000 square foot building that had been empty for six (6) months and losing money. What would they tell the court if the new owner decided to take them to court because it had been approved as a fitness center and he was putting in a fitness center? He noted in the unedited version of Mr. Bernstein's resolution, it said "…this facility does not have enough parking for almost any alternative use…" He said that line was edited out in the final version but he thought it was an excellent point since he felt it did not have adequate parking not only for this center but for the "real" fitness center yet to come when volleyball goes out of vogue.

Mr. Legato closed by stating that the citizens had made far more eloquent comments than any of the professionals. He singled out two by the Kielblocks: "The people in Meyersville deserve better than this." The second comment was: "I notice that all the people that spoke in favor of this application don't live here." He said that those that did live there were depending on the Board to "help preserve their little gem" and to do so with authentic reference to the letter of the law.

Chairwoman Dapkins stated that the Board would take a ten (10) minute recess at 9:05 p.m.

R E C E S S

The meeting was called back into session at 9:23 p.m.

Mr. Legato noted that he would follow the same protocol during Mr. Delaney's summation and hold any objections until the end.

Mr. Delaney began by stating that this application was clearly a permitted use. He added that it was a low impact use. It was not a tournament center or a gin mill or a go go bar or some horrible use that would generate horrific amounts of traffic. He quoted Mayor Piserchia in his yearly statement in January as saying, "We must finally address the longstanding commitment from this Committee and past committees, the shortage of active recreation facilities for our residents." (sic) and felt that this was a "golden opportunity" to implement what the Mayor had talked about.

Mr. Delaney said the first issue, which had been raised belatedly, was whether or not a use variance was required. He felt that it should not even be considered because it was too late. New Jersey Statute 40:55D-72 outlined the procedure that must be taken in an appeal which had not been done for either this application or the previous application. The process lied with the Zoning Board, not the Planning Board. He advised the board members to discuss this process with Mr. Bernstein during their deliberations.

Mr. Delaney added that there was a practical aspect to this. The application was not a MacDonald's in a residential neighborhood which would be clear. This was an application that made sense and belonged here. He suggested they look at the DePetro v. the Township of Wayne Planning Board and quoted, "We find as an initial matter that Plaintiff's challenge to the interpretation of a zoning ordinance raised within a proceeding in the Planning Board to approve a site plan was statutorily unauthorized. The functions of a municipal Planning Board are enumerated and legislatively limited…They do not include the resolution of a challenge to the interpretation of an ordinance such as brought by plaintiffs. If plaintiffs sought a determination as to whether the use proposed by the applicant was permitted in a "B" zone, they should have filed a request for interpretation with the Board of Adjustment and established a record in that forum. …They did not do so. In that sense, we find that the plaintiffs lacked standing to appear before the Planning Board, because the issues that plaintiffs sought to raise there were beyond that Board's statutory jurisdiction." He said that even if the board members wanted to consider whether a use variance would be appropriate, he submitted that it was an appropriate use. Mr. Kaufman had testified concerning the definitions. There were no clear definitions provided for health club and fitness center in the ordinance however he noted that if one looked at the planner's manuals that Mr. O'Brien spoke about, Moskowitz, this application fell within the definition of a fitness center. He pointed out that even in Mr. Legato's book, it talked about Item 9 in the ordinance which said, "Any other use in the opinion of the approving authority primarily intended to serve a village business purpose or which in the opinion of the approving authority was substantially similar to those identified in the subsection." He added that Mr. Legato had discussed what had happened in the past and what should have been done and what wasn't done. He noted that that could not be taken into consideration because one had to look at what the applicant was allowed to rely upon. The applicant, in good faith, made his application, put forward his proofs in both the previous six (6) hearings and these five (5) hearings and the time had come to say that this was clearly a permitted use. He noted that when Mr. Legato talked about the definition of a health club, it was in the context of licensing health clubs under the Consumer Affairs Statute, not in a zoning context. If you look at the zoning context, there was clearly a definition that was permitted and a definition that made sense.

Mr. Delaney asked the board members not to even consider the use issue however if they did want to consider it, they should come to the conclusion that this application was very close and similar to other definitions.

Mr. Delaney noted that parking had been raised as an issue. He said that the board members had heard testimony from the applicant's traffic engineer, Karl Pehnke, who was a very well respected traffic engineer. He told the board members how the parking numbers exceeded the standards by a large margin. The figures were confirmed by Mr. Kaufman who was an architect but also had personal experience of over two (2) years and 50 plus site visits. He also noted that some of the board members had visited the Flemington site. Mr. Pehnke said that only 24 spaces would be required for this use. Originally 43 were proposed and subsequently, the applicant proposed 42. Late in the game and in an effort to put yet another hurdle in front of what Mr. Delaney felt was clearly a legitimate application, Mr. Legato was trying to say that a parking variance was required because this was a retail sales trade and service. That would require one (1) space for every 200 square feet of floor space under zoning section 151.1C. He said that above that were Open Space and Recreation and he felt that clearly this was recreation in a generic sense and the board members had the authority under the ordinance to determine what the appropriate number of parking spaces would be. Based on the testimony of the professional and Mr. Kaufman, parking was not an issue. He said it was a girls volleyball center, not a retail sales trade and service. He asked the board members not to overbuild the parking.

Mr. Delaney said that the issue of permeable pavement had been raised. He noted that they had started with 57% coverage and with 100% credit for the permeable pavement; it would come down to 33%. Based on Mr. Lemanowicz's report, the applicant's engineer's comments, and the professionals, he felt that the Board should give 100% credit on this because it would encourage people to use permeable pavement. Mr. Legato tried to "tar and feather" the applicant with the ""sins of PNC Bank" who had not filed reports or maintained the pavement properly. He felt the pictures were very very speculative. He also felt it was unfair to "tar and feather" the applicant with the sins of Copper Springs. He reiterated that with 100% credit, there would be a reduction in coverage from 57% to 33% which was significant.

Mr. Lemanowicz interrupted Mr. Delaney's summation to point out that in his engineering report on porous pavement, he had not "in any way, shape, or form" recommended 100%.

Mr. Delaney concurred with that. He noted that when he read Mr. Lemanowicz's second report, he did not know what Mr. Lemanowicz was recommending. Mr. Delaney said that the professionals out in the field as well as the applicant's own professionals felt that 100% was appropriate. The Board would have to make a decision as to what would be appropriate.

Mr. Delaney noted that Mr. Kaufman had shown patience and respect for the process. He designed a beautiful building based on comments from the public, professionals and board members. Mr. Delaney felt it conformed to the ordinance. He asked the board members to address the fact that they did not like this building and did not believe it was harmonious. He did not believe that under the law that they were allowed to zone aesthetics. They could discuss engineering issues and variances but in terms of zoning aesthetics, it was clear as stated in the Sheston Oil Co., Inc. v.Borough of Avalon Planning Board, "No authority was cited in the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., or in decisional law for the final condition imposed by defendant planning board:

aesthetic compliance with the neighborhood." In this decision, rejecting aesthetic standards in a site plan ordinance Morristown Rd. Assoc. v. Mayor of Bernardsville, 163 N.J. Super. 58, 67 (Law Div. 1978) was cited. He stated that discussions of aesthetics or size were inappropriate. He felt that the applicant had done the best that he could but the law doesn't allow zoning of aesthetics.

Mr. Delaney said that Mr. Kaufman had provided a low impact use that was appropriate for the hamlet. It would bring children into the neighborhood, provide a direct economic benefit to the local businesses and upgrade a very difficult lot that had environmental problems. The building would be the clean-up which would be a very positive thing. He felt that they had worked closely with the township's professionals and implemented or agreed to implement practically every engineering and planning comment that was given. They had worked with the engineer hired by a neighbor to appease their concerns regarding potential stormwater runoff. The plans had been reviewed by an independent engineer hired by the Great Swamp Watershed Association to ensure that the project would not negatively impact that valuable resource. Karl Pehnke testified clearly that only 24 spaces were required and clearly the plans exceeded that number. It would not be appropriate to deny the application and consider a use variance. The township police department in a report to the Board discussed how this was a low impact permitted use and would provide a physical outlet for children. The report also said that it would enhance the business community and support the Mayor's stated desire to make recreation a priority in Long Hill Township.

Mr. Delaney discussed the many comments on noise. He felt it was a "parade of horrors" and cited the case of Jack Pedowitz Enterprises v. Township of Branchburg. He said that it clearly stood for the proposition that this board did not have the power to deny a site plan application because of noise. The power resided with the governing body of the municipality to do enforcement. He said it was not fair for Mr. Legato to "tar and feather" his client with the sins of Copper Springs which was different than this application. At Copper Springs there was outdoor recreation with a lot of people. This application was inside. He suggested that the board members ask Mr. Bernstein if they could knock the application down for noise and he felt that the law was very clear: there was a permitted use and if there was a problem with the noise, it must comply with the governing body.

Mr. Delaney said that in both his reports, Mr. O'Brien discussed "a planning board's authority in reviewing an application for site plan approval was limited to determining whether the development plan conformed to the zoning ordinance and the applicable provisions of the site plan ordinance. Since the use, when a site plan was being considered by a planning board was always a permitted use, in most cases the Board must grant site plan approval and where appropriate waivers and exceptions from the ordinance provisions." Mr. Delaney felt that the Board's job was to look at the site plan and delineate the appropriate conditions to deal with any issues that come up.

Mr. Delaney stated that he did not envy Comm. Roshto's position because it was never easy for a politician to sit up there with a lot of people objecting. He asked him to look at the application in a context that was appropriate; not what the people were saying they didn't like; not that they don't want it in their neighborhood. He felt that he should look at it in the context of what the law required. In that context, the law was clear that the site plan should be done.

In reference to Mr. Bernstein's comments on conflict of interest, Mr. Delaney asked the board members to be sure that they had no conflicts of interest and that they look at the application in a fair way. He said that Mr. Kaufman had come in for six (6) nights with three (3) diminimus C-Variances. The parking in the front was not acceptable so he changed it. He modified the coverages issues and changed the look of the building. Mr. Delaney asked the board members to review the facts, use common sense logic, understand the intent of the ordinances and see the efforts that have been made over the past 18 months. He asked them to approve the application for the betterment of the community in the long term and he thanked them for their efforts.

Mr. Bernstein asked if Mr. Legato had any objections to what was said, not the legal argument. He felt that if he got into legal arguments, Mr. Delaney would have the last word as the attorney representing the applicant.

Mr. Legato said that the Mayor's comments as to shortage of recreation were hearsay and should not be admissible in this forum unless the Mayor was present and available for cross-examination.

Secondly, he said that the statute did provide a process for correcting a use variance, however, Mr. Legato felt it did not lead to the conclusion that Mr. Delaney took. Mr. Delaney said it was too late and although Mr. Legato did not want to make any arguments about that, he wanted to point out that that was an opinion and had nothing to do with the law. He noted that he had submitted a five (5) page brief on why it was not only okay for the Planning Board to decide a use, it was incumbent upon them to decide whether a use was appropriate or not specifically because they were not allowed to pass judgment and approve an application unless the use was okay. He noted that over the phone, he and Mr. Bernstein had agreed that this Board had to decide whether this use was okay or not. They could not just pass it up because it was too late to question it.

Mr. Legato said that he was upset that Mr. Delaney had brought economic benefit up for the first time because that had been a subject that he had objected to any number of times when Mr. Legato had tried to bring up the issue of economics. Mr. Legato's position was that Mr. Delaney had opened up the door on that subject and he wanted to make a comment.

Mr. Bernstein said that that was a "throw-away" comment. He felt it wasn't something that was going to sway the Board one way or the other because then they would get into an argument of "yes, it's relevant/it's not relevant." He felt that Mr. Legato's other comments were legal arguments and legitimate, but he felt that was going a little far.

Mr. Legato said, for the record, that Mr. Delaney has indicated that there was substantial economic development to this applicant and he objected to not being able to put his own thoughts and ideas on the record regarding that.

Mr. Bernstein said that the Board had been generous in listening to the attorneys and the public. There had to be a stop so that the Board could deliberate. That was the line.

Mr. Legato said, finally, he objected to Mr. Delaney's comment that he had "tarred and feathered" Mr. Delaney's client. He felt that he had been most respectful to all the people in the room and resented being accused of doing that.

Mr. Bernstein asked Mr. Delaney if he had one or two minutes of comments.

Mr. Delaney said that he had no further questions or comments.

Chairwoman Dapkins closed this portion of the meeting to the public and asked Mr. O'Brien about his report of November 13, 2014. She noted that there were some open items that required review such as parking requirements, design waivers, impervious coverage, façade designs, construction in Meyersville, and the Morris County Planning Board Site Plan Report.

Comm. Roshto wanted to respond to a statement because he was singled out by Mr. Delaney by name. He assured Mr. Delaney that he took this matter very seriously and nothing about this was political to him. He deliberated based on the facts presented to him. He added that he was not running next year and subsequently would not be on the Township Committee so he had even less of an issue with politics. Comm. Roshto then said that he was unsure as to why Mr. Delaney singled him out since there were other people on this Board that were also on the Township Committee.

Mr. Delaney said that he did not know that and that he hoped the same comments applied to them as well.

Chairwoman Dapkins said that she would like to start the deliberations as to what the board members thought about the application.

Mr. Hands asked for clear direction from Mr. Bernstein as to what the direction of the attorney would be.

Mr. Bernstein said that one of the most difficult issues was the issue of use. Under 40:55d-70(a), if someone disagreed with the decision of the Zoning Officer, he had 20 days to file an appeal with the Zoning Board of Adjustment. There were six (6) hearings on Restore Meyersville I (#13-07P) and the appeal wasn't filed. There were four (4) or five (5) hearings on this application and an appeal wasn't filed. That bothered him on the interpretation. On the other side, he agreed with Mr. Legato that the application was somewhat ambiguous—it didn't say "volleyball facility" however everyone knew after the first meeting that it was a volleyball facility. He disagreed with Mr. Delaney on whether or not a Planning Board had jurisdiction to act and he noted that in Cox, 2014 version, page 130, "The need for Planning Board interpretation was particularly relevant where, depending upon the interpretation, the Board's jurisdiction may be involved. Where, however, an objector objects to the interpretation made by the Planning Board in taking jurisdiction, the appropriate municipal forum was the Zoning Board." He felt that the issue should have been raised before today since there had been at least ten (10) hearings. He added that if the Board found that it was an egregious interpretation—if it were a close case he would say not to reverse the Zoning Officer since they had had at least ten (10) hearings and the appropriate procedure would have been to go before the Zoning Board of Adjustment—the Board could make the decision to send it to the Zoning Board of Adjustment however, the Board would have to find that it was clear-cut abuse. He felt it was a harder burden at this stage of the proceedings than if it had been done appropriately within 20 days.

Comm. Roshto said that when an application comes before the Zoning Officer that says "fitness center" and when the ordinances are not exactly clear on what that was and the Planning Board has to make a decision on what the definition was, how could they expect the Zoning Officer to take anything but the application in front of him. He felt that the application was very sparse in any other information related to the use and made a decision whether it was a permitted use—he agreed with Mr. Delaney in that that "ship had sailed" and the time had passed. He questioned whether the application in front of this Board should have even been in front of this Board if the board members agree that it wasn't a fitness center.

Mr. Bernstein said that the original application used the word "volleybarn" although that was not the term now used.

Comm. Roshto said that every application stood on its own merit and he was trying *not* to consider what a previous application said. He noted that there had been agreement between the two (2) attorneys that the board members were to consider only that information given from a few meetings ago forward and he had taken that seriously. He was surprised to hear about previous testimony. He felt there was substantial weight that Planning Board needed to consider in terms of whether "fitness center" was what this has been represented to be to the board members.

Mr. Bernstein said that there was the first application, the second application, and the last three (3) meetings which were the three (3) meetings that the board members should consider. At some point before the end of the hearing, this should have been brought up and decided preferably before the Board of Adjustment which was the appropriate authority—

Mr. Aroneo interrupted and said that he did bring that up and the Board never deliberated it. He thought it was during the first of the three (3) meetings.

Comm. Roshto added that the issue was raised by Mr. Delaney himself at the very beginning of the first of the three (3) meetings.

Mr. Bernstein felt that it was late and that it was brought up at the end of the last public hearing however he said that if the Planning Board felt that it was an egregious decision by the Zoning Officer and that there was no way one could interpret it as being permitted, the Board would make that determination.

Comm. Roshto said when they talked about whether it was a permitted use, he agreed that the "ship had sailed" on that. He said that the ***proposed*** use was a "fitness center" and that was what the Zoning Officer's decision was based on as well as the 20 day appeal policy. But all the testimony had been trying to change it from a "fitness center" to "recreation." He asked if the application was originally submitted as a "fitness center" and it was being discussed as possibly something other than that, shouldn't the Board say that there was an error in the application from the definition of what a "fitness center" was.

Mr. Bernstein said he did not like the fact that the applicant called it a "fitness center" when really it was a volleyball recreational facility however if one referred to the Moskowitz book as the Zoning Officer did, one of the things in a health club are courts.

Mr. Aroneo said that regular fitness centers such as health clubs also have courts. Typically they are squash courts or racquetball courts.

Mr. Hands said that because of the uncertainty or clarity of the use later on in the application, he looked for equivalents to what this proposed site was because of the uncertainty of how it should be interpreted. He looked at sites that were designed for three (3) or four (4) volleyball centers across the country and noted that the first four (4) or five (5) listed on Google were located in industrial zones and by railway tracks. They were in New York, New Jersey, and Georgia. For him, because of the lack of certainty on the wording and the understanding of what it was actually meant, he had to look elsewhere to see what other towns may have thought about that type of application, building and use. On Google Earth, he noted that the first four (4) or five (5) were located somewhere that was not Meyersville or a hamlet. They were located in railway track, an industrial zone, an office park, or something that was not here. He felt that even the sister facility in Flemington was on a busy road outside of what could be considered a town center or hamlet region.

Mr. Aroneo felt that that was a great point. He felt that they would get to the issue of how the Board could apply the context of the Master Plan and the designation of Meyersville Hamlet but he liked what Mr. Hands had said. The Township Committee at the time took the extraordinary step to designate Meyersville as a hamlet and he felt that it would be fair and reasonable that any ambiguity would be resolved in favor of protecting and honoring that designation.

Comm. Roshto said that he would like to hear from the board members.

Mr. Moholkar said that his only comment was that if one looked at the way it was defined and said it was a "fitness center", 122.11(b)2, permitted use "Retail service use including …health clubs, fitness centers…", or equivalent use, this would have to be looked at as a "retail service." If that was the case, it should be looked at as a "retail service" throughout the entire ordinance, not in one section and something else in another. He felt it was either parking for retail or parking for recreation. In his opinion, if an interpretation or definition was being used in an ordinance, it could not be changed half way through if it was already defined in another section. In this case, in the parking section it was defined as "retail use." From that perspective, it could not be half and half. It would have to be retail.

Chairwoman Dapkins asked if Mr. Moholkar was saying it was a permitted use.

Mr. Moholkar said that he was not stating that he agreed and was waiting for further deliberations. But if the Board decided it was a permitted use as a "fitness center" as defined then it should be a fitness center everywhere in the ordinance, not just in the permitted use but not in the parking. It had to be consistent if it was already defined as service.

Comm. Roshto felt that a fitness center was a permitted use and that was what the applicant applied for. It came before this board correctly because as a fitness center, it was permitted. The moment it was discussed as "recreation," it was no longer a permitted use therefore the board members could not have a discussion about those parts of the ordinance that were related to recreation if the Board moved forward with this application as a fitness center. He agreed with Mr. Moholkar.

Mr. Moholkar reiterated that it had to be consistently reviewed. If it was recreation and not a fitness center, it was not a permitted use.

Mr. Wallisch said that this continued to be a conundrum. As far as the permitted use, the Board went through the first six (6) meetings and at the end, the board members voted to deny approval of the application. In essence, the same application came back, smaller and with no variances. At that time, the Board knew exactly what the intended use was and did not say that it was not a permitted use. The Board continued on with the process of reviewing it for the next five (5) meetings. He felt that at that point the Board implicitly said that it was a permitted use. He went on further to ask that, if it was a permitted use, were there variances involved? If there were none, he felt that he had no legal right to say no. He believed that because of how the Board had proceeded, it was a permitted use. If there was an appeal to the Zoning Board that it was not a permitted use, that would be completely different but that had not taken place for the last year-and-a-half.

Chairwoman Dapkins said that at the first hearing of the first application, she had asked Barry Hoffman, Board Attorney, if it was a permitted use and he answered that it was. No one else questioned it and the Board proceeded to review the first hearing, the second one, and then this one.

Comm. Roshto said that he, too, had asked Mr. Hoffman the same question because he was confused as to why the first application was being heard by this Board since it said "indoor recreation" on the application.

Mr. Aroneo asked, "So it's a permitted use as what?"

Mr. Moholkar answered that it was a permitted use as a fitness center based on the implicit "non-denial" of it as a fitness center.

Comm. Roshto agreed that the application in front of the Board was a permitted use as a fitness center. He felt that the testimony presented was ***not*** a fitness center. He felt it was a single use recreational facility.

Mr. Hands asked who bore responsibility to launch that appeal while the Board was going through that process.

Mr. Bernstein answered that the appeal would come from an objector from the public.

Mr. Hands asked if they had not explicitly made that request, would that imply that they agreed with the use. He asked if the board members were allowed to discuss that during deliberations.

Mr. Bernstein said that that was a difficult question that both he and the Board were wrestling with at this stage. He would have preferred that it had happened at an earlier stage.

Mr. Aroneo asked if it was too late to put that to a vote.

Mr. Bernstein said that it would be a higher standard at this point but he did not think it was too late.

Dr. Rae asked if they could pose the question as to whether it was a permitted use and conduct a poll. If it was, they could move on to the next vote.

Mr. Aroneo agreed.

Mr. Hands said that they needed to clarify if it was a permitted use. Was it a fitness center in an area where fitness centers were permitted or was it a permitted use of a volleybarn as part of a fitness center?

Mr. Bernstein said it was not that clear cut because the ordinance said "or similar use." Was this a "similar use?" That was something that the Board had to decide.

Comm. Roshto said that the question for the Board was whether the recreation facility that was presented to the Board was substantially similar to a fitness center as was listed on the application. He then motioned based on that statement.

Chairwoman Dapkins clarified that if the board members voted yes, they felt that it was substantially similar.

Mr. Aroneo seconded that motion.

Mr. Lemanowicz interrupted stating that in Mr. Legato's package, Item 1 indicated that a "retail service use" was a permitted primary use under 122.11(b)2. In Item 7, the definition of "retail service use" included "recreational services" which tied the recreation service to the retail service which was a permitted use.

Chairwoman Dapkins read the definition of "retail service use" as quoted in Mr. Legato's booklet as "those businesses that primarily provide a service, rather than a product, to individuals, businesses **and** other organizations, including, but not limited to, personal services, repair shops, studios, amusement **and** recreational services, **and** health, education **and** social services, **and** museums **and** galleries."

Comm. Roshto disagreed with Mr. Lemanowicz's interpretation. He felt that when he read the recreational services of the retail services definition, it was not a description of a use but a type of activity. He did not agree that this retail service use was consistent with the retail service use in (b)2.

Mr. Aroneo asked that the motion be repeated.

Comm. Roshto said that if the vote was affirmative, it meant that a recreational center was substantially similar to the permitted uses.

A **ROLL CALL VOTE** was taken. Those in Favor: Dr. Rae, Mr. Wallisch, Chairwoman Dapkins. Those Opposed: Mr. Aroneo, Mr. Moholkar, Comm. Roshto, Mr. Hands. Abstained: None. The motion to consider that a recreational center was substantially similar to a fitness center was defeated by a vote of 4-3.

Mr. Bernstein suggested, for the second vote that the board members consider whether the proposed use was a fitness center or a health club since they were both permitted.

Mr. Moholkar said, "So moved."

Mr. Aroneo said that in other words, they would be voting on whether or not it was a permitted use.

Mr. Bernstein said that first they had voted on "substantially similar" which was a different type of permitted use. Now they would be voting on whether it was a fitness center or a health club.

Comm. Roshto said that the application was for a fitness center however he felt that the testimony presented was for a recreation center. He wanted to know from the board members was whether or not they agreed with what he just said.

Chairwoman Dapkins asked what if the board members felt it was both.

Comm. Roshto said that they had just voted 4-3 to say that they were not substantially similar.

Mr. Bernstein wanted to know if the motion was that it was or isn't a fitness center.

There was discussion between the board members and Mr. Bernstein as to how to phrase the motion for the next vote.

Mr. Moholkar asked the board professionals for their opinions.

Mr. O'Brien answered that a "fitness center" was defined in the Moskowitz book which was a book used as a reference as a "health club." It did not have its own separate definition. A "health club" was defined as an "establishment that provides facilities for aerobic exercises, running and jogging, exercise equipment, game courts, swimming facilities, and saunas, showers, massage rooms and lockers."

Dr. Rae asked if the Board voted that it was not a fitness center, would that mean that the Zoning Official erred and it was egregious. Was it so egregious that it must be corrected at this very late stage?

Mr. Bernstein answered that that was correct.

Comm. Roshto posed an alternative. He said that perhaps the question could be formed as to whether or not the Board would like to proceed with the application being defined as a fitness center.

Mr. Bernstein said that they could say a "fitness center or health club" because there seemed to be a little difference between the two.

There was discussion between the board members about this.

Comm. Roshto said that he felt the Board had three (3) options: First, the board members could look at this as a fitness center and judge it by the ordinances related to a fitness center; second, they could look at this as a recreational facility and judge it by the ordinances of a recreational facility; third, they could do both—sometimes use the ordinances for recreational and sometimes for fitness center.

There was further discussion amongst the board members as to how to proceed.

Comm. Roshto said that he was unaware that Mr. Moholkar had made a motion.

Mr. Moholkar said that he had moved in response to Mr. Bernstein's statement.

Mr. Bernstein then said that it would be either a fitness center or a health club. A "yes" would mean it was and a "no" would mean it isn't.

Comm. Roshto asked for a second. Mr. Wallisch seconded.

There was deliberation amongst the board members. Mr. Aroneo asked for clarification from Mr. Bernstein.

Mr. Bernstein said that he was not asking the board members to make a distinction between fitness center and health club. He referred to the definitions that Mr. O'Brien had read from the Moskowitz book. He felt it was either "one or the other" or "not one or the other." Was it one of the two? If the board members said no, then it was not a permitted use.

Mr. Hands asked if they voted no, which would be two different votes, would that be considered egregious in terms that it would go back to the Zoning Officer.

Mr. Bernstein said that they would have to find that it was an egregious decision of the Zoning Officer and that it wasn't a close call.

Mr. Hands asked if the two (2) votes would equate to that decision.

Mr. Bernstein said yes, that would be correct.

Comm. Roshto said that he did not believe the Zoning Officer made an egregious decision because the application presented to him said "fitness center" and he did exactly what would be expected. It wasn't until it got to the Planning Board that the board members learned that it was something else and the time had already passed. His problem with this vote was that if he voted one way, it meant that he thought the Zoning Officer made an egregious decision and if he voted the other way—

Mr. Bernstein said that by the second time around, he assumed that everyone knew what the application was for. The Zoning Officer knew by the second time around what the application was all about as did everyone.

Mr. Hands asked if the Zoning Officer would have taken the resolution for the first application into consideration.

Chairwoman Dapkins said that this was a separate application.

Mr. Wallisch said that at this point, if it was a fitness center/health club, it was a permitted use. If the board members did not believe it was one of those two, it was not a permitted. In essence, they were voting on whether or not this was a permitted use.

A **ROLL CALL VOTE** was taken. Those in Favor: Mr. Moholkar, Dr. Rae, Mr. Wallisch, Chairwoman Dapkins. Those Opposed: Mr. Aroneo, Comm. Roshto, Mr. Hands. Abstained: None. The motion to consider this application was a fitness center/health club and hence a permitted use was approved by a vote of 4-3.

Mr. Bernstein said that the next topic for deliberation was whether there was conforming parking or non-conforming parking.

Mr. Moholkar said that based on the last vote, it was non-conforming because it was a retail service. The board members had decided by that vote that it was not recreation so it had to be retail service which required one (1) space for each 200 square feet.

Chairwoman Dapkins asked Mr. Lemanowicz how many parking spaces would be required based on that.

Mr. Lemanowicz answered, for discussion purposes, just over 60.

Comm. Roshto said that based on the testimony that he had heard, 60 seemed to be too much.

Mr. Bernstein said that the applicant had used a "catch all" in all the variances and reliefs so the Board had some discretion because of the notice and the testimony. Mr. Pehnke had testified that 24 were needed. Mr. Bernstein said that keyed into the discussion the Mr. Lemanowicz had about what was the conforming number of parking spaces and would there be any credit for the—

Comm. Roshto interrupted and said that the ordinances were very clear on this subject. He asked how the Board could decide anything but that.

Mr. Bernstein said the Board would have to consider it on a variance basis. He asked Mr. Lemanowicz to give him a number if the Board did not give any credit for the pervious pavement.

Mr. Lemanowicz answered 68 spaces.

Mr. Bernstein asked what the conforming number of parking spaces was with zero credit for the pervious pavement.

Mr. Lemanowicz said, assuming the entire pavement was considered coverage, based on the plans March 26, 2014 where there was no pervious pavement and the parking was behind the building, there were 33 total spaces provided. That was 39.9% impervious coverage where 40% was permitted.

Mr. Bernstein said that if the Board were to find 33 spaces were adequate or that a variance was warranted, relief could be granted.

Chairwoman Dapkins asked for a motion to extend the meeting to 11:00 p.m. Dr. Rae motioned and Mr. Moholkar seconded. A **VOICE VOTE** was taken and the motion to extend the meeting to 11:00 p.m. was approved unanimously.

Comm. Roshto said that at this point, according to Mr. Bernstein, parking would be considered as a variance.

Mr. Delaney said that there had not been a vote specifically with respect to the argument that the applicant made that the word "recreation" should apply here and give the Board open authority. There was an inference.

Mr. Bernstein asked if Mr. Delaney was seeking a vote as to whether or not the ordinance required five (5) parking spaces per 1000.

Mr. Delaney said that that was correct since it might determine where they went as far as variance relief.

Mr. Delaney said that the applicant hoped that it would be within the authority of the approving body to make the determination with the generic word "recreation."

There was further discussion between the board members and the attorneys.

Mr. Bernstein clarified that the vote would be whether the parking would be five (5) per 1000 as the ordinance suggested and as Mr. Legato had indicated since it was a fitness center.

Mr. Delaney asked if the board members wanted to hear from their planner. Dr. Rae agreed. Chairwoman Dapkins asked Mr. O'Brien if he felt 68 spaces was overkill.

Mr. O'Brien said that given the testimony that was on the record, he said it would seem to be. He added that there were two ways to look at this. The first way was if this was a fitness center, as the Board has defined it, the ordinance clearly stated that it was allowed in this zone as a retail service use which included "…health clubs, fitness centers…" However, it could also be seen as a recreational use because a fitness center/health club was recreational in nature. If the board members wished to look upon it under a larger definition of "recreation" they could use the authority given them in the ordinance to calculate the parking spaces that would be required.

Mr. Legato asked if there hadn't already been a vote on that very question.

The board members answered no.

Mr. Aroneo said that before they took a vote, he wanted to comment. He said that this went to what Miss Schmidt had said previously about the applicant having it both ways. He motioned to vote on that.

Mr. Moholkar said that if they were going to base the question on the ordinance, the question should be whether they were going to determine parking based on retail service or open space/recreation. He further clarified that the question should ask if the Board was going to determine the parking based on retail service.

Chairwoman Dapkins said that that would be 68 spaces.

Mr. Aroneo asked if the Board voted for retail services, what would be the recourse for the applicant.

Mr. Bernstein said that that could be sorted out at this meeting because the applicant had used the "catch all" phrase in the notice.

Mr. Moholkar said the motion was to vote whether to treat this as a retail service use to identify the parking requirements. Dr. Rae seconded the motion. Mr. Moholkar confirmed with the board members that a "yes" vote meant that they would use the retail service use. The only recourse at that point would be a variance.

A **ROLL CALL VOTE** was taken. Those in Favor: Mr. Aroneo, Mr. Moholkar, Mr. Wallisch, Mr. Hands, Comm. Roshto. Those Opposed: Dr. Rae, Chairwoman Dapkins. Abstained: None. The motion to consider whether the application should be treated as a "retail service use" to identify parking requirements was approved by a vote of 5-2.

The board members then discussed what credit, if any, would be given for the porous pavement.

Mr. Bernstein said that the ordinance stated that the Board could give credit but it did not have to give credit. It was optional.

Comm. Roshto made a motion that the Board not allow any credit for this application. Mr. Moholkar seconded the motion.

Dr. Rae asked Mr. Lemanowicz to discuss the documents that he had provided on the subject of porous pavement.

Mr. Lemanowicz said that when the porous pavement issue first came up, he met with the applicant's engineer on September 22, 2014 and discussed possible interpretations of the ordinance. Mr. Lemanowicz indicated that there was a number thrown around of 40% and if the applicant could substantiate that number, he would go with it. At the next meeting, there was no substantiation and the Board asked him to research that number since the applicant failed to provide it. In his memo, Mr. Lemanowicz noted that there were a number of different sources. The porosity, which was the amount of voids in the material, ranged from 10% to 25%. The average was about 18%. He was not suggesting the average; it was just a number that could be used if someone wanted to use the average. That was based on his belief that the intention of the ordinance was that the porosity was a percentage. One could do the math for the percentage of coverage and there would be things that matched. He reiterated that there had been no technical information received from the applicant as far as how it should be computed. The applicant indicated that he wanted 100%. The reference made to the PNC Bank application, in Mr. Lemanowicz's opinion, did not support 100% because it said in the resolution that "…the proposed lot coverage while in excess of the 40% allowed under the ordinance…" If that resolution was written counting the porous pavement as 100% credit, it would have been in conformance with the ordinance and the resolution would not say that it was in excess. He felt that the PNC Bank did not acknowledge it because the section of the ordinance was not there. He added that it was unclear because it was uncertain as to when the section of the ordinance was created. There was one section that came in after this but it was meant to copy a section that was already in the ordinance and he was unsure as to what date that came into being. He stated that in any case, the PNC Bank resolution did not reference the section of the ordinance with respect to getting credit for lot coverage for porous pavement.

Mr. Lemanowicz said that porous pavement was a method of stormwater control. Lot coverage was a bulk requirement based on what the municipality wanted for aesthetics. The two were difficult to match. There were occasions when porous pavement would be ignored during stormwater design. There were situations to do that when run off was being computed. That was not what was being done here. In this case, porous pavement which was a drainage method was being compared to lot coverage which was a bulk aesthetic. He reiterated that the two were very difficult to put the two together to find out what exactly was meant by that section. He researched some of the Planning Board minutes of those meetings where the "matching" ordinance (2007) was being discussed, *not* the original one. In the May 8, 2007 minutes, Mr. Hoffman had issue with this section because he felt it was unclear and Mr. Hamilton had issue with it because he felt it implied that one could pave lot line to lot line but it was passed. He stated once again that the resolution for PNC did not appear to acknowledge the similar section that the 2007 section was trying to match. He did not feel that the applicant provided any information to support the 100% credit that he was asking for.

In answer to Dr. Rae's question, Mr. Lemanowicz further explained that lot coverage was what the zoning regulation wanted to allow as "not green." If there was porous pavement in a drainage design, it would be possible that all of it would be discounted depending on the design. That would be for stormwater runoff which was where a lot of comments about porous pavement came from. The ordinance did not discuss how to deal with porous pavement in drainage design; it discussed how to deal with porous pavement in determining how much landscaping should be on the property. The two don't work well. Porous pavement appeared as coverage and lot coverage limitations were set because the municipality wanted to set how much of a lot they wanted to be "not green."

Mr. O'Brien added that all of those standards work together-- the setback standards, the building coverage standards, the lot coverage standards, height standards—to limit the amount of development that can occur on a lot. The one exception that had been granted in Section 151 was one that was given to the Board to consider whether or not to give a credit for porous pavement in a particular application much like what was done in PNC but not to compare.

Dr. Rae said that if the board members were to deliberate that question, what factors should be considered.

Mr. Lemanowicz said that there was a degree of perviousness that no one had been able to define and the ordinance wanted the Board to apply that degree of perviousness to percent of lot coverage. He had not been able to find any way to correlate them.

Comm. Roshto said, with the motion currently in front of the Board, that question was irrelevant because the motion he had made was that there would be no credit. It was then irrelevant to discuss partial credit. He had posed the motion this way because of exactly what Mr. Lemanowicz had articulated. It was about lot coverage and the applicant was looking to increase the lot coverage and build more than he would have been otherwise allowed by taking advantage of what Comm. Roshto considered to be a loop hole. He continued by saying that loop hole was about aesthetics and lot coverage, not about stormwater management. The applicant's engineer discussed 100% and 40% and confused Comm. Roshto which was why he asked Mr. Lemanowicz to research the issue. From that, Comm. Roshto concluded that they did not have a good handle on this from a lot coverage perspective. With stormwater, the applicant had provided a viable alternative with a basin. The application was a good idea of how to get rid of the basin and replace it with this other solution. The ordinance was not about stormwater management and nothing he had heard in testimony had told him what number to pick. That was why Comm. Roshto felt that they should not pick a number because it would be a random choice.

Mr. Hands added that given the fact that this was an environmentally sensitive area, he wanted to be cautious about it.

Dr. Rae asked what the void space would be if it was grass. Would there be greater void space for the water to penetrate in a grassy meadow or was this manmade material somehow that much more porous.

Mr. Lemanowicz said that there was testimony that stated with this material, a garden hose could be used and there would be no puddles at all in a new condition. It would have to be maintained. This material was advertised to say that water would pass through it essentially immediately based on proper design, installation and maintenance.

Dr. Rae said presuming that all those were present, water would pass right through. Would it be just as good if it were grass or what was there now?

Mr. Lemanowicz said that from the online information and the manufacturer's information, it would go through the asphalt faster than it would go through grass except in a place where it was all sand. In this area, he felt it would go through the asphalt faster.

Dr. Rae said that that undercut the uncontrolled runoff.

Mr. Lemanowicz said that all the water would go through the asphalt and into a stone storage area underneath the asphalt. It was not relying on speculation to empty that. It would go through an outlet control structure with a specific size orifice and it would be allowed to bleed out slowly which was how the control was taken care of. That was why it was not ignored for stormwater. If the whole structure was set up with enough stone storage, the groundwater elevation was right, the soils were right, and all of the water was infiltrated, the whole area would be counted as zero from a stormwater management perspective since the water would never leave the site. That was not how this was designed. It was designed to catch the water and hold it while it leaked out slowly. There was discharge.

Dr. Rae said that some credit should be given.

Mr. Lemanowicz said that if this lot was completely paved with standard impervious asphalt, there would be inlets at the end. If everything fell into a basin at the end, it would still go into the underground system. It would still work. He didn't see how giving credit to allow more apparent lot coverage because porous asphalt was being used would work. If one stood in front of a development that had porous pavement and in front of one that did not, one could not tell the difference. He was still trying to determine why, if porous pavement was being used, the applicant would be allowed to pave more.

Mr. Aroneo said that, as Comm. Roshto had said, it would be an arbitrary number anyway.

Mr. Lemanowicz said that this entire discussion supported the original motion.

Mr. Aroneo said that there would be no way to quantify that at this hearing.

Chairwoman Dapkins asked Comm. Roshto to repeat the motion.

Comm. Roshto said that the motion was to not allow any credit for lot coverage based on the fact that this was a pervious material.

Mr. Moholkar indicated that he had seconded that motion.

A **ROLL CALL VOTE** was taken. Those in Favor: Mr. Aroneo, Mr. Moholkar, Mr. Hands, Comm. Roshto. Those Opposed: Dr. Rae, Mr. Wallisch. Chairwoman Dapkins. Abstained: None. The motion to deny any credit for the use of pervious material in this application was approved by a vote of 4-3.

Dr. Rae moved to extend the meeting to 11:30 p.m. Mr. Moholkar seconded the motion. A **VOICE VOTE** was taken and the motion was passed unanimously.

Mr. Wallisch asked how many spaces would be allowed in order to stay under the 40% lot coverage.

Mr. Lemanowicz referred to the March plans and said 33 spaces would give 39.9% coverage where 40% was permitted.

Mr. Wallisch asked if the next step would be to motion that a variance be given to permit this with only 33 spaces versus 68.

Mr. Hands asked how the site plan report from Morris County would impact this discussion.

Mr. O'Brien said that that was a question that he had posed and the applicant had not answered.

Mr. Hands asked if it impacted lot coverage.

Mr. Lemanowicz said that lot coverage was a local ordinance and he did not see where the county would get involved with it unless there was an excess in lot coverage that created more runoff that went into their system.

Mr. Hands said that according to Morris County, the plan needed to be modified. He asked how that would change the plan.

Mr. Delaney answered that the applicant had a meeting scheduled with the County to work on any of their requirements. He felt that this could be a condition of the application.

Mr. Bernstein said the Board wanted to see if the county approval would impact coverage in parking.

Mr. Hands wanted to know if there would be an impact that would change the number of available spaces.

Mr. O'Brien said there was no county approval at this time. Approval was pending a number of revisions which were listed in their letter of November 6, 2014. They were technical comments and requirements. He did not know how they would affect the entire application which was why he had raised the question.

Chairwoman Dapkins asked Mr. Delaney if the applicant would agree with the report.

Mr. Delaney said that they would work with the County and that they had a meeting on the 25th.

Mr. Hands asked how anything in the letter would impact this application. Would it alter anything that the board members would need to consider?

Mr. Kastrud answered that he did not anticipate any changes from the November 6, 2014 letter from Morris County to change anything within the interior design of the lot. They had asked for a couple of grades, site triangles, things happening out on the county road.

Mr. Wallisch motioned that a variance be given to limit the parking to 33 spots to stay underneath the 40% lot coverage.

Dr. Rae seconded that motion.

Mr. Bernstein clarified that the motion would be to approve a variance for the 33 spaces for this particular use.

Comm. Roshto asked Mr. Lemanowicz what the total lot coverage was for 33 spaces.

Mr. Lemanowicz answered that, based on the March 26 plans which showed the impervious parking lot, the coverage was 39.9% with 33 spaces and that included two (2) handicapped spaces. He did not believe that anything else as far as sidewalks and such had changed since then.

Mr. O'Brien said that the latest revision was dated September 29, 2014 and was for 39.3% impervious lot coverage which assumed a reduction for porous surface. He asked Mr. Kastrud how many parking spaces were included in that 39.3%.

Mr. Kastrud answered that the current proposal was for 41 spaces.

Mr. Wallisch asked how many parking spots could fit on the property and still be under 40%.

Mr. Kastrud answered 33 spaces.

Mr. Delaney addressed Chairwoman Dapkins and said that the applicant had a question about Section 151.5 on banking of parking. He asked how that might play into all of this.

Mr. O'Brien answered that Section 151.5 discussed banking of parking and off street loading requirements. It went on to say "If any applicant can clearly demonstrate to the approving authority that because of the nature of the proposed operation or use, the parking and or loading requirements of this section are unnecessary or excessive. The approving authority shall have the power to approve a site plan showing less paved parking or loading area than was required by this section. That would require landscaped area to be set aside." That would mean that the applicant would have to propose a conforming amount of parking on a conforming amount of lot area and say that he did not think that all those spaces were needed. Rather than pave or cover 40% of the lot, he would like to bank a certain number of spaces for the future and only pave 30%, for example, of the lot so that they could be used in the future if a future need was shown. Typically boards retain jurisdiction over that and look at it at a set period in the future or let the applicant come back to the Board at some point in the future to say that they needed more parking. Banking of parking would not be allowed if the application was over lot coverage.

Mr. Lemanowicz said that lot coverage would have to be calculated with the banked parking.

Mr. Moholkar said that it was still a retail use for a fitness center. At any point there would be a building of about 13,000 square feet with the possibility of doing something else. The only way to get more than 33 spots to hit that retail number for fitness or health center of 68 spots would require the applicant to add additional pavement and require a variance to increase lot coverage. Essentially, it would end up with a largely paved area sitting next to a wildlife refuge. He felt it was a bad idea because down the road it would have to be paved in order to allow someone to use it as retail space.

Comm. Roshto asked Mr. O'Brien to remind the Board what the burden was for a variance.

Mr. O'Brien said that this would be a bulk variance because it came from Section 151 which was the parking requirements. The applicant must show that there was a hardship based on the size, shape or topography of the land or that the proposed site plan was a better planning alternative for the site. The benefits must outweigh the detriments. In addition, the applicant must show that the negative criteria had been met and that there would be no negative impact upon the neighborhood or the community at large.

Mr. Moholkar said that the board members should discuss whether the good outweighed the bad before they voted.

Mr. Bernstein said that a C-2 Variance said that there was a promotion of the purposes of the Land Use Laws in 40:55D-2 and that the benefits of the promotion substantially outweighed any detriments. The other was the shape, size, or topo of the land. These were the things to be discussed under a C-1 Hardship or a C-2 Promotion of the Purpose.

Comm. Roshto said that the one concern that he had was expansion. He was concerned about what would happen later on. His fear was that one day the volleybarn would change into something else and the township would be faced with a question as to whether it was okay for a number of parking spaces. The argument would be that any applicant would have to come back to the Board to discuss this issue. So many numbers had been given for parking spaces that the board members would have to pick a seemingly random number for parking. He noted that there had been numbers in the 20's, 30's, 40's and even 68 which he felt was ridiculously high for any use on this property. He did not believe that the applicant had proven the burden of 33 parking spaces.

Mr. Wallisch asked, legally, how much could the Board consider what could happen in the future versus what was in the application currently in front of them.

Mr. Bernstein said that it was a gray area. There was a dichotomy between what the courts said and the real world.

Mr. Aroneo asked if Mr. Bernstein could weigh in on the "benefits substantially outweighing the detriments." He said that they had heard about the detriments mostly from the neighbors and they had heard the applicant's proposed benefit that it would help the community. He did not agree with that because it was not a public volleyball facility. Were the board members supposed to take all that testimony and weigh that in their minds?

Mr. Bernstein answered that that was correct.

Mr. Wallisch noted that this was a property with a collection of trash for many many years with asbestos in the ground which was leeching out of the property.

Dr. Rae felt that if they thought too much about the future, they would end up doing nothing because there could be all kinds of wild scenarios as to what could happen and how the present application would not be suitable. He felt that they should look at what was in front of them and the benefits that that would provide.

Mr. Hands said that this would be a big building that would last a long time.

Dr. Rae said that it could be a volleyball barn for the next 50 years or the next 10. They just didn't know. He felt that they should make a decision based on where they were.

Mr. Moholkar still could not see how they could vote until they decided whether it was beneficial or not.

Comm. Roshto said that each board member had to decide. He said the point he was trying to make was that the burden was on the applicant to prove. To pick the number 33 just because it was just under the lot coverage was as random as anything else. He felt no satisfactory proof had been made.

Mr. Wallisch said that the applicant had started with 24 and increased the number because the Board had requested more spots.

Chairwoman Dapkins stated that a motion had been made and seconded. A **ROLL CALL VOTE** was taken. Those in Favor: Dr. Rae, Mr. Wallisch, Chairwoman Dapkins. Those Opposed: Mr. Aroneo, Mr. Moholkar, Mr. Hands, Comm. Roshto. Abstained: None. The motion to grant a variance for the number of parking spaces was denied by a vote of 4-3.

Chairwoman Dapkins noted that there other items in Mr. O'Brien's memo for discussion: the façade design, the look of the shutters and windows, and the expansive blank walls that are prohibited.

Mr. O'Brien said that his intention in listing those was to give the Board discussion items as they reviewed the site plan and deliberated as to whether or not to approve that site plan. He advised that the board members could discuss each individually or fold them into one general discussion.

Mr. Bernstein noted that at this point, the Board could say that basically the application had been denied for insufficient parking. There was no need to consider the balance. He reiterated that the use was permitted but not the parking.

Comm. Roshto made a motion to deny the application on the grounds of what was previously discussed. Mr. Moholkar seconded the motion.

A **ROLL CALL VOTE** was taken. Those in Favor: Mr. Aroneo, Mr. Moholkar, Mr. Hands, Comm. Roshto. Those Opposed: Dr. Rae, Mr. Wallisch, Chairwoman Dapkins. Abstained: None. The motion to deny the application was approved by a vote of 4-3.

Mr. Wallisch motioned to adjourn the meeting. Mr. Moholkar seconded. A **VOICE VOTE** was taken. The meeting was adjourned at 11:25 p.m. by unanimous vote.

_____
CYNTHIA KIEFER
Planning and Zoning Secretary

_____
Date