

**BOROUGH OF WOODLAND PARK
BOARD OF ADJUSTMENT MINUTES
REORGANIZATION**

January 24, 2010

MEETING CALLED TO ORDER AT 7:35 P.M. by Mayor Lepore.

OPEN PUBLIC MEETING LAW: THIS MEETING IS CALLED TO ORDER PURSUANT TO THE NEW JERSEY OPEN PUBLIC MEETING LAW, AND AS STATED IN NOTICES OF THE TIME, PLACE AND DATE PUBLICIZED IN ACCORDANCE WITH THE STATUTE. IT WAS INCLUDED IN A LIST OF MEETINGS FORWARDED TO THE HERALD NEWS AND THE RECORD AS REQUIRED NOTICES. IN ADDITION, THIS LIST HAS BEEN POSTED IN A PUBLIC PLACE BY THE BOROUGH CLERK, AND A COPY OF THIS HAS BEEN FILED IN HIS OFFICE FOR PUBLIC INSPECTION. PROPER NOTICE HAVING BEEN GIVEN, THIS MEETING IS CALLED TO ORDER AND THE CLERK IS DIRECTED TO INCLUDE THIS STATEMENT IN THE MINUTES OF THE MEETING.

MEMBERS IN ATTENDANCE: RUSSEL JUZDAN, JOE PASCRELL, PHILIP DICRISTINA, GIANNI INTILI, TRACY KALLERT, RUTH PATTERSON, TONY ORLANDO, AND VINNIE DECESARE

ALSO PRESENT – JOHN FIORELLO, BOARD ATTORNEY
TOM SOLFARO, BOARD ENGINEER
BOB PERRY, BOARD PLANNER

FLAG SALUTE

A motion to approve the minutes of the November 29, 2010 special meeting was made by Ms. Patterson, second by Mr. Orlando and approved.

REORGANIZATON

Mayor Lepore thanked all the Board members, past and present, for their service to the Board.

A motion to appoint Mr. John Fiorello as Board Attorney was made by Ms. Patterson, second by Ms. Kallert and approved.

A motion to appoint Mr. Solfaro of Neglia Engineering as Board Engineer was made by Mr. Intili, second by Ms. Patterson and approved.

A motion to appoint Mr. Perry of Remington Vernick as Board Planner was made by Mr. Intili, second by Ms. Kallert and approved.

A motion to appoint Ms. Kallert as Chairperson was made by Mr. Decesare, second by Ms. Patterson and approved.

A motion to appoint Mr. Juzdan as Vice Chairperson was made by Ms. Patterson, second by Ms. Kallert and approved.

Mayor Lepore swore in Ms. Kallert, Mr. Juzdan, Mr. Fiorello, Mr. Solfaro and Mr. Perry.

Ms. Kallert asked for a motion to approve and publish the list of meeting dates. A motion was made by Ms. Patterson, second by Mr. Juzdan and approved.

ORDER OF BUSINESS

Chairwoman Kallert asked the Board to review the Report of Approvals and Denials for 2010 in order to be prepared at the next meeting to discuss and make recommendations to the Planning Board and Governing Body.

DOCKET # 10-03 – QUICK CHEK – BROWERTOWN RD. – BLOCK 122 LOT 10 & 10.02 – PRELIMINARY/FINAL SITE PLAN – USE VARIANCE – BULK VARIANCES

Mr. Azrak, attorney for applicant, stated he was ready to start his cross examination of Mr. Ney, the objector's traffic expert. Mr. Ney has been previously sworn but since it is a new year and a new Board Mr. Fiorello swore in Mr. Ney. Mr. Fiorello said if the new members were to vote they would have to review all of the tapes to be eligible. He noted for the members that Mr. Ney was the objector's traffic expert who testified under direct examination and is now going to be cross examined.

Mr. Azrak asked when the assignment was given by Levco what he was told were their objections. Mr. Ney said they contacted him by phone and advised him there was a proposal to construct a gas and go type of facility and he had a concern about the impact on his property. He wanted Mr. Ney to review the proposal and let him know if he should object to it. Mr. Azrak asked if he gave any specific reasons about Levco's driveways. Mr. Ney said there was no comment about Levco's driveways. Mr. Ney has worked for WaWa stores once in South Jersey in 1973 and has never represented Quick Chek. He has never worked with Sheets. He does not recall every opposing a Quick Chek or WaWa store. The WaWa store did not have a gas component. He has worked on Exxon, Hess, Crown and Mobil's with gas and goes. He thought he had done between a dozen and two dozen of those type of sites. In the industry a gas and go is different from a WaWa or Quick Chek. He was still doing work on Exxon in 2005 on a service station in Stafford Township. The facility had a C-store as well as pumps. He never submitted a written report to Mr. Corradino or the Levco owners. He thought there were two main entrances to the Levco site because the one on Route 46 can only accept westbound traffic. He is not sure which is the heaviest of the two entrances. He has not done a traffic count of either driveway so he is not prepared to say which is the heaviest or if they are being impacted by the proposed Quick Chek driveway. Mr. Azrak asked if he ever testified on a site with the same kind of characteristics as this site. Mr. Ney said he can not say that he has but disagreed with the terminology. He

felt the Levco center is not a major regional shopping center and at best either a small community or large neighborhood shopping center. A regional center is characterized by two main anchors generally in the range of 350,000 to 1,000,000 sq. ft. and this site is nowhere near that. Mr. Ney said he has never testified to a site that has all of the characteristics that this one has. Mr. Corradino objected and asked relevancy of the questions. He felt they are questions relevant to a planner. Mr. Azrak said this is foundation and he needs to know what his knowledge is. Mr. Corradino said he has been accepted as an expert in traffic. Mr. Ney said he felt he answered it but if you describe the site he can say obviously he has never seen a site with all of the exact same characteristics anywhere else.

Mr. Azrak asked if he agreed the county controls Browertown Rd. Mr. Corradino objected and said this Board has jurisdiction over the road when it comes to traffic and its impact. Mr. Azrak withdrew the question. He asked if Mr. Ney was aware that the county approved the application. Mr. Ney said yes. He did not testify at the county meeting but there was a representative from his office present. Mr. Azrak asked if he was aware the Fire Dept. was satisfied with the proposal. Mr. Ney said he has not seen the Fire report. Mr. Azrak said he would represent that the report is in the file and they have no problem with the circulation plan. Mr. Ney said he does not know if that is the case. Mr. Azrak said he was just letting him know because he did not know. Mr. Azrak asked if he knew that the Soil Conservation District approved the plan. Mr. Ney said he does not know what this has to do with his testimony. He was not aware they approved the plan. Mr. Azrak asked if he has reviewed the Board engineer's reports. Mr. Corradino asked if they were comments to the traffic. Mr. Fiorello asked what the relevancy was to traffic on whether the Board engineer has made comments or reports. Mr. Azrak said he is tailoring it only to the issues the Board Engineer raised in regard to traffic. Mr. Ney said he did not see the relevancy of Soil Conservation to traffic. Mr. Azrak said they do not have to banter. Mr. Corradino objected to the conduct toward his witness. Mr. Azrak said he is merely instructing the witness to answer the question he posed. Mr. Fiorello said if he did not believe he is answering the question he should make his comments to Mr. Fiorello and he will direct him to answer. Mr. Ney said he has read the engineer's report and agreed with comments relative to traffic. He agreed with the concept but felt it would be difficult to restrict the driveways to right in and right out only. Mr. Azrak asked if there was a permitted use on the site if the county would still restrict the left turn out. Mr. Ney said it would depend on the use and he was surprised that the county did what they did. Mr. Azrak asked if he would agree that permitted uses such as pharmaceuticals would have delivery trucks that are tractor trailers as well. Mr. Ney said yes they may. He has represented facilities such as Walgreen's and CVS and is aware they use tractor trailers but there are also neighborhood pharmacies that do not.

Mr. Ney said with regard to the DOT no access line that prohibits any encroachment on the ramp, the county only has jurisdiction over 25' of the frontage of the property and the state has jurisdiction over the rest. He said Mr. Azrak's client was paid for his access. Mr. Azrak said his client was not paid. Mr. Ney said the owner of the property was paid for the restriction of access. Mr. Azrak asked if he agrees that Quick Chek was not part of that no access. Mr. Ney said yes. Mr. Azrak asked if he agreed with the Board Engineer's comment that site access is ultimately under the jurisdiction of Passaic County. Mr. Ney

said he does not agree. Mr. Azrak asked if he disagreed with the engineer. Mr. Corradino objected. Mr. Azrak asked to handle the witness and Mr. Corradino could handle on recross. Mr. Corradino stated he resented Mr. Azrak's remark that he is coaching his witness. Mr. Fiorello said to stop now, the question has been answered and they should move on.

Mr. Azrak asked if the application meets the parking requirement of the Borough Ordinance. Mr. Ney said he believes it does but he did not review the Borough Ordinance with respect to parking. He can't state that the drive aisles meet the Borough requirements. He reviewed site circulation but has not compared the plan to the ordinance. He believes that has been done by the consultants for the Board. Mr. Ney said there a lot of standards and it is difficult to say what ITE standards are, they have recommended regulations but are not adopted like the state regulations. Mr. Ney said he relies on trip generation from the Institute of Traffic Engineers unless he has localized data he may use in specific cases. The trip generation study is a recommended standard by the DOT in any application for access made on a state highway. There are categories for uses in regard to trip generation. Mr. Azrak asked if he disagrees with all the county professionals that analyzed this application. Mr. Corradino asked which professionals. Mr. Azrak said the county engineer, planner, traffic engineer and their staff. Mr. Corradino objected because he is a traffic expert. Mr. Fiorello asked Mr. Azrak to limit question to traffic experts. Mr. Ney said he agrees the county approved the plan but he has seen no finding of facts in the resolution to agree or disagree with. Mr. Ney said he doesn't have the exhibits submitted to the county but if Mr. Azrak represents they are the same traffic exhibits he would say yes he agrees with them. Mr. Azrak asked if there was a letter of objection written to the county for Levco. Mr. Ney said he did not know and the only thing he did for the county was the same exhibit as he submitted here. He did not present that to the county. He did not prepare or present the county with any traffic reports.

Mr. Azrak asked if tractor trailers back up. Mr. Ney said yes they do. He said there has been no testimony that attendants at Quick Chek do anything with the trucks. He is aware that C-stores that have gas have canopies and trucks travel on concrete pads but did not think the gas trailers have to travel under the canopy. Most canopies are designed to permit a truck to go underneath.

Mr. Azrak referred Mr. Ney's exhibit O-11 & O-12. Exhibit O-12 A & B shows a WB50 truck turning movement around the site. The exhibit was made by Bohler and also utilized by their traffic engineer. He drew a red line around showing the movement to clarify where the trucks were traveling. He did not do a separate exhibit to depict 12 A & B. He utilized the Bohler site plan for O-11 where he is showing a truck on Browertown Rd. The area where he is showing the truck movement has been approved by the county. If they turned to exhibit O-11B again he is showing the movement of a truck coming out of the site. Mr. Azrak asked if the area depicted is the area already approved by the county. Mr. Ney asked which area. Mr. Azrak withdrew the question. Mr. Azrak asked if the turning movement showing from the site out was drawn by Mr. Ney. Mr. Ney said that was correct. Mr. Azrak said the county roadway is the approval they have received for turning movements at that location. Mr. Ney the roadway has been approved as shown on the plan. Mr. Azrak asked if he used the turning movement that Bohler drew or if he drew his own turning

movement. Mr. Ney said he drew it the way it is suppose to happen. He said the exhibit shows a WB50 making a right turn out of the driveway. Mr. Azrak said when Bohler did it they utilized more of the driveway space. Mr. Ney said that is an interesting way to phrase it. What Bohler's plan shows and what he tried to demonstrate is that their truck is actually driving on the left side or the entry side of the driveway making the right turn out and that is the difference between their plan and his plan. Mr. Azrak said they needed to know and bring it to the Board's attention that when he drew it he had the WB50 come out the exit way. Mr. Ney said that is how you exit. Mr. Azrak said the truck actually makes the movement out the driveway except for what he had colored in red. Mr. Ney said physically it makes it but through his testimony the portion in red is in the northbound lane of Browertown Rd. and all of the area in gray except for a small portion is actually in the left turn lane before it can get to the throughway. Mr. Azrak asked if it makes the movement. Mr. Ney said if no one is in the way it does.

Mr. Azrak asked if Mr. Ney completed any traffic counts on Browertown Rd. Mr. Ney said no. Mr. Azrak asked if to come to a conclusion he used Mr. Olivo's counts. As to the queuing at the driveway yes he used his counts, data and calculations. Mr. Azrak said he is not here to tell the Board that any of his counts are incorrect. Mr. Ney said he trusts Mr. Olivo's representation.

Mr. Azrak asked in regard to the entrance way and exit he commented on queuing. Queuing is if there is too much traffic on Browertown Rd. the cars back up on the site. Mr. Ney said queuing is just a representation of how long any traffic light will queue when the light is red. The queuing he used was the calculations that indicated the number of vehicles that are stacked with each phase of the light. Mr. Azrak said as the cars are stacking on Browertown Rd. up to their driveway that driveway area that he testified to in queuing is controlled by the county. Mr. Ney said after the 100' point it is. Mr. Azrak said the queuing affects the site because it is in front of the driveway. Mr. Ney said that was correct. Mr. Azrak said the queuing is county controlled. Mr. Ney said at the area at the driveway after the 100' it is. Mr. Azrak said he understands the DOT controls the no access but he is talking about the driveway because the queuing based on his testimony affects the site in front of the driveway and the queuing is county controlled. Mr. Ney said it is not. Mr. Azrak withdrew the question and rephrased. He said the driveway itself from the no access going north is controlled by the county. Mr. Ney said in terms of access jurisdiction and speed limit yes. Mr. Azrak said the county approved it knowing if there was a queuing they were satisfied with it. Mr. Ney said he could not answer that. Mr. Corradino objected and felt it was important because he is asking his expert about county control. He thought the Board was cognizant about the fact that regardless of what the county did on their application is not exclusively binding on this Board. If this Board finds there are traffic problems that are created as his expert has testified it does not in any way stop this Board from denying this application. They are not bound by the county. Mr. Fiorello said that is an argument that can be made in summation. He felt Mr. Ney had answered the question. Mr. Ney agreed. Mr. Fiorello noted that when Mr. Azrak sums up he can make any response he wants to make. He just told Mr. Corradino that this is not the time for argument. He asked and answered. Mr. Azrak said he was worried about prejudicial statements.

Mr. Azrak asked if Mr. Ney thought the mountable curb would not work. Mr. Ney felt they would not be a deterrent. He has used them himself but not in a driveway. He has gone on record as against them and if you want to stop left turns you should put a median down the middle of the road. Mr. Azrak asked if he remembered working on a site in Cherry Hill in 1995 it was an Exxon site. Mr. Azrak said he had a mountable curb there. Mr. Ney asked if he had a plan he could look at. Mr. Azrak said he did and would put it into evidence later. Mr. Corradino objected and asked he be shown the plan. The plan was marked A-18. Mr. Ney identified the plan as the Exxon Mobil they spoke about. He could not tell if it was the plan for the Cherry Hill site. Mr. Azrak asked if he remembered working on a site in Toms River on Hopper Ave. Mr. Ney said it was Hooper Ave. Mr. Intili asked if we were contemplating going through a list of sites that the expert has worked on. He did not see the relevance to this site. Mr. Fiorello said the relevance is to attack the testimony that going over a curb is not good and supposedly he has design mountable curbs in the past for other sites. Mr. Intili said he may use a mountable curb for a particular issue at a particular site which may have nothing to do with this site. Mr. Fiorello said the issue is if in the past he has ever designed mountable curbs. Mr. Azrak asked to finish his question. He asked about the Hooper Ave. site. Mr. Ney did not remember. Mr. Azrak asked if he worked on a Camden site. Mr. Ney said no. Mr. Azrak asked if he worked on Lakewood. Mr. Ney said he did. He has done over 200 Exxon and he should not think he would remember them all. Mr. Azrak said in those 200 Exxon's he has utilized mountable curbs to restrict left hand turn movements. Mr. Ney said they were full curbs. He did not want them to confuse two things, his office also designed Exxon and he was not involved in the engineering design. He was involved in the traffic studies that were associated with them. He did not draw the plan but if there is a traffic study associated with it that would have been prepared by him or under his supervision. Mr. Azrak asked if there were mountable curbs restricting the left turn movement he did not say in his report that you recommend not to use that because they don't work. Mr. Ney said first of all you would have to have the site plan that demonstrates the height of the curb. The normal curb is 6" in height and that is not classified as mountable. This proposed curb is 2 to 3 inches high. A 6" curb is mountable if someone hits it by accident. He would like to see the engineering plan to see if they are mountable. Mr. Azrak asked if the county approved the mountable curb. Mr. Ney said he did not know and thought they had not given final approval yet. Mr. Azrak said they had conditional approval but the one condition has nothing to do with a mountable curb. Mr. Ney asked if it was one of the conditions. Mr. Azrak said no. Mr. Ney did not think the mountable curb was there in the original application. Mr. Ney said he is not trying to be argumentative but the original plans did not have that curb and it was the county that recommended no left turn and that an island be put in. The applicant may have resubmitted the plan but he did not know if the county acted on it yet. Mr. Azrak asked if it was his memory that the county noted they wanted to have that triangular island in that location. Mr. Ney said he does not have the county report but did not think it was that specific. Mr. Azrak asked if the Borough engineer had no problem with the curb. Mr. Ney said he would have to ask the engineer. Mr. Azrak asked if his report stated he did not want the mountable curb. Mr. Ney said he did not recall.

Mr. Azrak asked if he was familiar with Browertown Rd. Mr. Ney said it depended on the area he was talking about. Mr. Azrak asked if he was familiar with Andrews Ave. Mr. Ney

said he was not. Mr. Azrak said driving north past the Levco driveway Andrews would be the first left. Mr. Ney said he was not familiar with it. Mr. Azrak asked if it would surprise him that there are tractor trailers in and out every day on Andrews. Mr. Ney said he had no reason to doubt him. Mr. Azrak said it would be the same answer if he told him tractor trailers utilize Andrews every day. Mr. Ney said he has not personally observed any tractor trailers turning anywhere. The only place he has seen one or two is at his client's driveway. Mr. Azrak asked if he was aware there is no left turn bay lane at Andrews. Mr. Ney said there is none beyond the site except for the left turn into the shopping center. Mr. Azrak asked if he was familiar with Acme Plastics. Mr. Ney said yes. Mr. Azrak asked if he knew they had a loading bay that comes directly out onto Browertown Rd. Mr. Ney said he vaguely remembers there is access there. Mr. Azrak asked if he would assume that tractor trailers come back and forth there. Mr. Ney said he hasn't seen them.

Mr. Azrak asked if he knew what the county requirements are for the driveway. Mr. Ney said he would not know without looking at the site plan and subdivision resolution. He did not review that in conjunction with this application. Mr. Azrak asked if he could tell them what the Borough requirements are for the driveway. Mr. Ney said he has made that statement a long time ago that he did not make a comparison of the Borough ordinance against the site plan. He did not know off the top of his head what the requirements were for radius by the county or the borough. He could not commit to memory all of the standards. Mr. Azrak said he would not ask him to but when you are testifying and making recommendations to the Board he would think that he would look at them. Mr. Ney said he did not care where you put the island you are not going to get a truck in and out of here the way it should be designed. Mr. Azrak asked if he did not care about the design of the driveway. Mr. Ney said he absolutely does and it stinks. Mr. Corradino objected and asked that he let him answer the question. Mr. Fiorello asked him to answer. Mr. Ney said he did answer. The court reporter read back the answer.

Mr. Azrak asked he used to work for Schoor DePalma. Mr. Ney said yes. Mr. Azrak asked if he was a partner in that firm when they were indicted for bribes to the county sewerage authority in 2002. Mr. Corradino objected. He asked the relevancy. Mr. Fiorello said it was irrelevant and asked them to move on. Mr. Azrak said it goes to credibility. Mr. Fiorello said it is irrelevant unless Mr. Azrak can show this man was indicted. Mr. Azrak said he has not had a chance. Mr. Fiorello said to ask him if he was indicted. Mr. Azrak asked if he was part of that indictment. Mr. Ney said he was not and Mr. Christie found no one in the firm guilty. Mr. Azrak asked if Schoor DePalma changed there name a little after that to CMX. Mr. Ney said yes and now CMX is out of business.

Mr. Azrak asked if he had any independent counts of the nighttime traffic crossing their site at Browertown Rd. Mr. Ney said he did not. Mr. Fiorello said he testified that he did not make any traffic counts. Mr. Azrak asked if Mr. Ney read the traffic report and specifically growth rate. Mr. Ney said he read it but did not see the growth rate section. Mr. Azrak said on page 97 of the transcript Mr. Ney indicated that when you design the left turn lane you accommodate the cars you anticipate. Mr. Ney said that was correct. Mr. Azrak asked if he agreed that the left hand turn lane was under the jurisdiction of the county. Mr. Ney said he thought it was under the state in this instance because it is in the state jurisdiction. Mr.

Azrak asked if he was saying that the left turn lane that is in front of the driveway is not in county jurisdiction. Mr. Ney said part of the submission was a letter from the DOT approving modifications to the striping. Mr. Azrak said he also testified that you should anticipate the traffic going into the left hand turn bay. He asked if he was familiar with the bank having a left turn bay. Mr. Ney said yes. It accommodates about two cars. Mr. Azrak asked if there is more than 2 cars in that lane it would be his opinion that you should not have that lane. Mr. Ney said no. It is not his opinion you should not have a left turn lane but that you should have adequate length. Mr. Azrak asked if 3 or 4 cars want to go into the bank from that lane you should not have that lane because it was not accommodating. Mr. Ney said he did not do an analysis of that bank's lane. He pointed out that Mr. Azrak's client is requiring the lane at the bank to be shortened so they can get a 25' lane into their place. They have already shortened a vehicle queuing out of that lane. He has not done an analysis and does not know if it will be adequate or not. Mr. Azrak said he did not study it. Mr. Ney said he did not.

Mr. Azrak referred to the transcript where he referenced an occasional trailer movement out of the site where he says it is not a solvable one because as the applicant has indicated the DOT restricts the driveway location from the Browertown interchange so a larger radius cannot be put on the curve to eliminate and it is a feature of the property. Mr. Fiorello asked what the question was. Mr. Azrak asked, yet the county approved it. Mr. Ney said the county approved it but he doesn't know why they approved it and thought it may be a legal requirement. Mr. Azrak asked if he was aware that Quick Chek as a family owned business can control the deliveries of the tractor trailers. Mr. Ney believed that was testified to but he thinks he is very clear he is not debating the sincerity of the applicant but he has simply testified that in his experience that reality is often violated because of business reasons. Mr. Azrak said he testified that a tanker is going to make the drop whether you like it or not. Mr. Ney said no and what he said was that he did not feel that from a business perspective because the Quick Chek testimony was they were expanding the gas operation and that they intend to. When you have a tractor trailer sit there why would you have that expensive truck sit there all day because you don't want to deliver. He felt the reality was that you intend to deliver at off hours but in reality at times you will have them made in peak or daily traffic conditions. Mr. Ney said if the Board grants the variance it runs with the land, so if Quick Chek doesn't make it there another business could come in and have deliveries at any time. Mr. Azrak asked if his experience was with Mobil/Exxon and those companies he told them he represented. Mr. Ney said one of his clients was a McDonald's. Mr. Azrak asked if he knew all Quick Chek stores were run by a family owned business. Mr. Ney said he did not know. Mr. Azrak asked if it would change his opinion if they put in the resolution that those movements of the trailers are restricted between 10:00 p.m. & 6:00 a.m. Mr. Ney asked who is going to enforce it. He said it would not change his opinion. Mr. Fiorello said he stated it would not change his opinion. He said Mr. Azrak said he has been questioning the witness for an hour and half and was starting to repeat himself. He asked him to move on.

Mr. Azrak said part of his testimony was that he complained about sight distance. Mr. Ney said if that is the way he would like to put it but he simply mentioned there was a sight restriction. Mr. Azrak said he would use his words and said the sight distance issue he raised was because of the possibility of left turns out. Mr. Azrak said he did not testify at

the county. Mr. Fiorello stated he has testified at least 5 times that he counted that he did not testify at the county. Mr. Azrak said he would move on. Mr. Fiorello said this is a smart Board and they understand when he says he did not testify at the county. Ms. Kallert stated the Board understands he did not testify and there were no reports. Mr. Azrak said what book he is referring to with regard to the sight distance. Mr. Ney said American Association of State Highway Officials Design Manual and specific tables from it. There are obviously two sight triangles and he is referring to the left sight triangle. Mr. Azrak asked about a 1978 Ocean County case that Mr. Ney referenced in testimony which was a law division case. Mr. Azrak asked if he was familiar with the difference between a law division case and an appellate division case. Mr. Corradino objected. Mr. Fiorello said that is a legal question and he is not a lawyer. Mr. Fiorello said the appellate division decision is precedent but a law division decision is not precedent or binding. Mr. Azrak asked if he knew that case was before a Planning Board and not a Board of Adjustment. Mr. Corradino objected. He felt he was going into matters of law. He stated his witness is a traffic expert. Mr. Fiorello asked the relevancy. Mr. Azrak said Mr. Ney testified about the case and he is now asking him about it. He is not asking legal questions but he needs to know whether he understands what the factual case was about. Mr. Fiorello said both attorneys tend to argue instead of just entering an objection. He asked Mr. Ney whether he knew whether it was a Planning Board or Board of Adjustment. Mr. Ney believed it was a Planning Board but not completely sure. Mr. Azrak asked in that case if it was concerning a left turn movement out of the site. Mr. Ney said he is not familiar with that aspect. He did not read the case but quoted from Cox. Mr. Azrak said he would represent that it was. Mr. Fiorello said he is testifying and if he wanted to testify they would swear him in. Mr. Azrak asked if they were proposing a left turn. Mr. Ney said they are proposing a left turn in and not proposing a left turn out. Mr. Azrak asked if he was familiar with the fact that after that case was over the Planning Board approved the site and the court approved it as well. Mr. Ney felt that aspect has nothing to do with this case and the aspect he made in bringing it up was with a permitted use the Planning Board has a right to deny an application if the access is unsafe. This is a statement out of Cox. Mr. Azrak felt it was a legal opinion. Mr. Corradino objected. Mr. Fiorello said the question was asked and answered and told them to move on.

Mr. Azrak submitted a Jurisdictional Limit Route 46 Browertown Rd interchange DOT map which was marked A-19. He showed Mr. Ney the map. He pointed out a legend in the right corner that shows hash marks and asked if he was familiar with them. Mr. Ney said he was. Mr. Azrak showed him where he says the county does not have jurisdiction of the left turn bay and asked if he would change his mind. Mr. Fiorello asked what area he was talking about. Mr. Azrak said Mr. Ney has testified that the left turn bay lane is not in the jurisdiction of the county but of the DOT and he was asking him if the map says it is under the county jurisdiction. Mr. Ney said the plan shows that Browertown Rd. is under the jurisdiction for maintenance and control by the County of Passaic with the exception of the 100' no access line. In other words between the curb line and the right of way that line is neither hashed or X'd so that line is still DOT jurisdiction as it relates to that area but the pavement seems to be under county jurisdiction. Mr. Azrak said what he identified had nothing to do with the roadway. Mr. Ney said the applicant's traffic engineer submitted the paperwork to the DOT to get approval for the left turn lane. There would be no reason to

solicit approval from the DOT if it was county jurisdiction. Mr. Ney agreed that the pavement was under the county jurisdiction.

BREAK – Call to order 9:15. Roll call. Ms. Kallert asked they wrap up by 10:15 or 10:30. Mr. Corradino asked if they would be scheduled for the next meeting. Mr. Azrak asked about a special meeting. Ms. Kallert said they tried to schedule special meetings and they did not happen. The application will be scheduled for the next regular meeting and the Board will be hearing two bulk variance applications before them. The Board Secretary said the next meeting is scheduled for 2/28/11 at 7:30 p.m.

Mr. Corradino asked about the county Planning Board meetings and if Mr. Ney or a representative appeared and testified about traffic at that meeting. Mr. Ney said no one made a formal appearance. Mr. Corradino asked if as far as he is aware that the county has not received any of this evidence or testimony that this Board has heard. Mr. Ney said as far as his testimony they have not.

Mr. Corradino referred to Exhibit O-11. He asked Mr. Ney to discuss the difference. Mr. Azrak objected because they have done it before. Mr. Corradino said he brought it up on cross. Mr. Fiorello asked what specifically he was going to ask about. Mr. Corradino said the difference in the drawings in and out of the site. Mr. Fiorello said they heard it. Mr. Corradino said he wants the Board to see where the differences are. Mr. Fiorello said they heard his testimony about the differences. He asked Mr. Ney to be quick. Mr. Ney said simply the major difference is the use of the driveway on the exit maneuver and typically you design a driveway for someone to keep right and the vehicle he has shown is on the right side of the driveway causing it to cross over into the northbound lane. Mr. Fiorello said they heard that already. Mr. Ney said the plan that the applicant has showed the exit maneuver is made on the left side of the driveway which reduces the amount of encroachment in the northbound lane. Mr. Corradino asked if the pattern of exiting for trucks is that they are exiting on the entrance lane leaving the site. Mr. Ney said it was. Mr. Corradino asked if as they exit the site they are going into the northbound lane on Browertown Rd. Mr. Ney said primarily they enter into the left turn lane in and just a small portion if any of the truck into the northbound lane because by exiting the driveway on the entry side you create a large radius for the left turn out. Mr. Corradino asked it was his opinion that it was an unsafe traffic pattern. Mr. Ney said he indicated in his opinion he has never seen a design that contemplates exiting on the wrong side of the driveway. Mr. Corradino asked about the triangular island at the entrance to the site. He asked if it would in any way restrict a left hand turn. Mr. Azrak said it has been asked and answered both in direct and cross. Mr. Fiorello agreed and sustained the objection.

Mr. Azrak said he was asked by Mr. Corradino that no one appeared from his office at the county and that was incorrect. Mr. Fiorello said it was not the question. Mr. Azrak thought it should be read back because he wrote it down exactly. Mr. Fiorello said they know he was there because he asked it 3 or 4 times before. Mr. Fiorello asked if he was there. Mr. Ney said he was not but he did have a representative there and what he said was there was no formal presentation made by them. Mr. Azrak said as a result of the representative being there no one asked him to give a presentation. Mr. Fiorello said they have been over

that before. The Board knows they were there but no one made a report and no one testified. Mr. Fiorello asked the Board if they all heard it and they agreed they did. A discussion followed regarding the objection. Ms. Kallert stated the Board has heard Mr. Ney say he was not at the county but he did have a representative there. Mr. Fiorello added they did hear he made no report or testimony to the county.

Mr. Intili asked Mr. Ney about mentioning the type of use and impact of traffic. He asked about dining facilities and if they were included in any traffic study or parking requirements. Mr. Ney said he did not look at the parking but it was done by the Board engineer and he could ask him. He stated his point had to do with the Institute of Transportation Engineers Trip Generation Book that was used to estimate the traffic and his point was the model used in that book which enables them to prepare estimates for service stations with a C-store does not include a model that has dining facilities. It is somewhat different and as he said factual he can not tell them whether that means more or not but he would think that is the nature of what the applicant is doing he should present the Board some feeling whether it will need more parking or generate more traffic. He has nothing either way to base his opinion on but it would be logical for them to present the information. He simply raised a question as to whether the numbers are as accurate as they should be.

Mr. Juzdan asked about the curb that is trying to prohibit the left hand turn and if there is an optimal height to that curb that would prohibit. Mr. Ney said the standard sidewalk curbing is 6" and highway curbing is upward of 8". The problem here is a compounding, one is you have to have a level across the sidewalk this isn't a curb where the grade of the parking lot is the same grade as the street. The parking lot is some 6" or more where it meets the sidewalk higher than the street. So you have to have a level area in the area where the sidewalk crosses. It would be almost impossible to get a 6" curb in and you have to raise it up. You would have a real conflict with the sidewalk. The problem is if it's a 6" curb it would discourage the trucks from getting in and the reason its low is to allow the trucks to crossover.

PUBLIC OPEN – Questions to Mr. Ney – PUBLIC CLOSED

Robert J. Konowich, Garden State Property Maintenance, was sworn in. Mr. Konowich stated he was hired to maintain Levco's shopping center and has worked for them for 17 + years. They provide landscaping, security, snow plowing and almost everything that has to be done to all of the outside facilities of the shopping center. He stated he took photographs of the flooding on the site. Mr. Corradino showed him the photos that were previously marked O-7, O-8 & O-9. Mr. Konowich said the photos were taken by him on the dates marked. The photos depict the flooding conditions on the date the photos were taken. Mr. Corradino moved the photos into evidence.

Edward Kolling, planner for Levco, was sworn in. He stated his qualifications and was accepted as an expert. He was retained to testify as an expert in planning. Mr. Kolling's curriculum vitae was marked O-13.

Mr. Corradino asked what he was retained by Levco to do. Mr. Kolling said he was asked to look at the application documents, the planning report, at the surrounding area and the zoning ordinance and come up with an opinion to determine whether he felt there were sufficient facts to support the granting of a use variance. He did not prepare a written report but they have gone over some notes in Mr. Corradino's office to familiarize both him and Mr. Corradino what his findings were. Mr. Kolling said he thought the Board was very aware of what a use variance is. A use variance is where an applicant is seeking to put a use where it is not permitted in a particular district. It is his opinion that a use variance is absolutely required in this case. The requirement of proofs for an applicant seeking a use variance is the positive criteria and the negative criteria. In terms of the positive criteria you usually refer to as special reasons. Special reasons can be met by something that is inherently beneficial like hospitals and schools. Even an inherently beneficial use some things are higher up on the totem pole than others. For instance hospitals are but in some cases a doctor's office or clinic could be considered inherently beneficial if the area is underserved with medical facilities. He reviewed the applicant's planner report and her opinion is based on the fact there were special reasons that satisfy the requirements on the positive criteria for a use variance. There is a negative criteria which has to be satisfied also and with those criteria you look at if there will be a substantial detriment to the intent and purpose of the zone plan and will the granting of the variance to permit a certain use in a district substantially alter the zone or have a detrimental impact on the application of the zoning ordinance. He has, at Mr. Corradino's direction reviewed the applicant's planner report and her testimony as transcribed. He has also reviewed the application. Based on that review he felt that the applicant has not met the requirements necessary to grant a use variance. Mr. Kolling stated there are ways that the special reasons or positive criteria are met by inherently beneficial use and in this case it obviously is not, it's a gas station. In this case you have to show the use is going to promote the public welfare because the site is particularly suited for the use. There is a two prong approach there. Any use can provide some amount of benefit or convenience if you need gas you pull in there. You also have to show that the site is particularly suited for that. Also similar to an inherently beneficial use you have to show that there is some kind of need for this. Mr. Corradino asked if there was a need for this use. Mr. Kolling said when he visited the site he immediately saw to the west there was a Lukoil Station right there and a Valero station across the street with a convenience store, there are a Gulf & Shell station on McBride. Further down on McBride there is another gas station and on Squirrelwood Rd. there is another Lukoil. There are also many stations up and down Route 46 in close proximity as well as places where you buy food products. He stated based on the submissions any one coming out of the site cannot make a left hand turn. In order for this site to benefit the neighbors they would need access in and out. A neighbor who resides in the condo complex or lives across the street would go to the site and complete their purchase but they can no longer go back into their neighborhood unless they go down Route 46 or through Little Falls. Mr. Kolling said they are trying to strike a fine line saying it's unique because it's close proximity to the highway yet it has accessibility from the local road system thus getting to it without going on the highway. However because of its location being at the edge of the town and because you can't make a left you do have to go on the highway or go well into Little Falls and find a place to turn around. Those things called out for making this site unique in his opinion it makes this site unsuited for this use.

Mr. Corradino asked to go to the negative criteria. He asked if there can't be an impact on the zoning law and it can't be a detriment to the public welfare. Mr. Kolling said there cannot be a substantial detriment. Mr. Corradino asked him to assume the fact is accurate and true that this site creates an unsafe and dangerous traffic pattern. Mr. Azrak objected to the form of the question. Mr. Fiorello said it was not a question. Mr. Azrak said the witness should testify instead of Mr. Corradino. Mr. Corradino asked Mr. Kolling to assume this site creates an unsafe and a dangerous traffic pattern from a planning point of view if it would be an aspect to consider as a detriment to the public good in his opinion. Mr. Kolling said it would go to the negative criteria in terms of the detriment to the general welfare. Mr. Corradino asked him to assume that this would create an increase in flooding in the area and asked if that would also be considered a detriment to the public good. Mr. Kolling said it would absolutely. The applicant is seeking a use variance because he changed something that was zoned not to be. The original zone that the property was in was the Highway Commercial zone and that zone had in it as one of the permitted uses this exact situation where a gas station was permitted. The town took it upon themselves for reasons they thought was beneficial to the citizenry of the town to change the zone. Mr. Azrak objected to what the town believed. Mr. Fiorello asked him to finish the question. Mr. Corradino asked the question again. Mr. Kolling agreed the gas station was a permitted use in the Highway Commercial zone. Mr. Corradino said that for some reason the zone was changed from Highway Commercial to Neighborhood Commercial. Mr. Kolling agreed. Mr. Corradino said that zone did not include gas stations. Mr. Kolling agreed. In this case they not only failed to include it but specifically prohibited it. Mr. Kolling said from a planning prospective most of the time ordinances are written that if it is not expressly permitted it is prohibited and sometimes you look at something like that and feel it just slipped by. In this case, however, if you look at this ordinance that changed the Highway Commercial to Neighborhood Commercial not only did it change the name of the zone, not only did it exclude service stations from the permitted uses, it then went on to specifically prohibited service stations. So if you look at those steps he is led to believe there was a conscious and informed decision to restrict service stations from this area. Mr. Corradino asked if a proposed gas station here would be contrary to the intent of the zoning law. Mr. Kolling said it would appear to him to be completely contrary to the intent and purpose of the zone plan. He agreed as a result of his review of all information submitted in regard to planning there is nothing that indicates a need for this type of use. If you look at the positive criteria there is not a substantial need or any need at all for this use. You would also have to show the site is particularly suited for the use and in his opinion it is not particularly suited. Most of the frontage is inaccessibility and in fact in order to gain access to and from this site you have to use 15' of the adjoining property where there is a joint easement. So that certainly limits accessibility. The shape of the site may make it particularly unsuited because of the traffic circulation that Mr. Ney testified to. The size and looking at Quick Chek's own criteria this site is under 1.1 acres and their own criteria calls for 2 acres. The criteria calls for a minimum 300' frontage and here there is 15' of usable frontage. Access is limited and has to be restricted at least in terms of the egress. If you look at all these things and as a service station you can't use ground water detention as testified by Mr. Reeves makes this site particularly unsuitable. Then you need to reconcile the exclusion of the use from the zone, the enhanced level of proof. As they just pointed out the town made a conscious decision to exclude it and he did not see any way to reconcile the elimination of the use from

the zone and permitting it there. It all goes to the negative criteria in terms of the general welfare and negative impact on the intent of purpose of the zoning law.

Mr. Kolling referred to the applicant's planner's report. He stated the planner was calling out how the purposes of the MLUL are being promoted. The planner sets forth that the gasoline service facility is a retail business for the sale of gasoline only, the convenience store and gasoline sales uses are generally defined as retail business uses and are appropriate for the subject site. They will serve the local population providing the residents with the option to purchase typical convenience type goods as well as gasoline without leaving the neighborhood or accessing a major highway namely Route 46. Mr. Kolling said he does not agree with that statement because he thinks these same services are being provided at an adequate level in the community. He agreed the neighborhood in the area is not being serviced or is it convenient for them because they have to go all around to get back to their homes. Mr. Azrak objected that Mr. Corradino was testifying at this time. Mr. Fiorello told him to ask the question and do not lead him. Mr. Corradino said it was his understanding that he can ask leading questions in front of this board. The rules of evidence do not preclude that before a zoning board. He rephrased the question and asked if he agreed it was not convenient to the neighborhood. Mr. Kolling thought they were trying to strike a fine line but thought it falls apart because although it is adjacent to a Highway Commercial zone and on a county road the convenience of access and egress is limited and restricted based on the limitation of the left hand turn lanes so the whole basis for this argument falls apart. The planner sets forth there are special reasons because it provides light, air and open space. Mr. Kolling thought this was a very limited application for this argument because almost any use you could put there could provide light, air and open space. The planner sets forth the Borough contains 3 local gas stations located in the northern and northeastern part of the Borough. These stations do not provide the classic convenience store service for the surrounding neighborhoods and are located outside of this neighborhood's general sphere of influence. Mr. Kolling said as he discussed the limitation on left hand turns and the difficulties with ingress and egress really run contrary to what is being discussed here. In this case he would say there is not sufficient space on this lot for these uses even in Quick Chek's own criteria. He is saying this is not an appropriate location because of the inability to make left hand turns coming out and the impacts on turning movements and that sort of thing. Even from the environmental prospective the fact that this use can not rely on ground water recharge as a way to reducing run off which means to him it is not in an appropriate location. Mr. Corradino said it would seem this site and the uses they are trying to establish would result in an inconvenience since the neighborhood has no access once its gets to the site to get back without accessing Route 46 and asked if he agreed. Mr. Kolling said almost all of the Borough is to the north of the site on Browertown and in order to go back to the north you have to make some kind of convoluted traffic movements. Based on his analysis of the expert's report and testimony in his opinion this application has not met any of the proofs for the positive criteria in terms of promoting the general welfare, particular suitability or in being able to reconcile the admission of this use with granting of the variance and it fails in terms of the substantial detriment to the intent and purpose to the zone plan, as well as the substantial detriment to the general welfare. He felt on any level he did not think the use variance can be approved.

Mr. Azrak asked if they could stop and start fresh at the next meeting. Mr. Fiorello said there is another 10 minutes. Mr. Intili asked if they went to 11:00. Chairwoman Kallert asked if the Board would like to continue to 10:15 p.m. Mr. Corradino had no objection to Mr. Azrak continuing at the next meeting. Mr. Decesare asked if this was the last witness. Mr. Corradino said yes. Application will be carried until 2/18/11.

Mr. Fiorello asked the Board engineer to report on any recommendations that were not addressed by the applicant. Mr. Perry, Board Planner, said they have followed the criteria. Mr. Fiorello said it would only be in regard to the Board Engineer. Mr. Solfaro will prepare a summary for the Board.

Chairwoman Kallert stated there will be a special meeting before the regular meeting on February 28, 2011 in order for the Board to attend a tutorial.

A motion to adjourn was made by Ms. Patterson, second by Ms. Kallert. All in favor. Meeting adjourned.