

SEPTEMBER 13, 2016 MINUTES
OAKLAND BOARD OF ADJUSTMENT
OAKLAND COUNCIL CHAMBERS - 7:00 P.M.
PUBLIC HEARING

Pursuant to Chapter 231, Public Law 1975 Open Public Meetings Act, adequate notice of this meeting has been provided by:

- *Adoption of an annual schedule of meetings.
- *Posting a copy of same at Borough Hall.
- *Forwarding a copy of same to the Record.
- *Mailing a copy to any person requesting same.

FLAG SALUTE, MEETING OPENED AT 8:10 P.M.

ROLL CALL: Present: Mrs. Steele, Messrs. Ackerly, Bremer, Chadwick, Smid, Wegman, Schneeweiss and Chairman Lepre.
Absent: Ms. White

Also in attendance were Mr. Matthew Cavaliere, Board Attorney, Steve Lydon, Burgis Associates and Rebecca Mejia, Boswell Engineering.

MEMORIALIZATION OF RESOLUTION:

1. Neafsy - 45 Seminole Avenue, block 4806, Lot 35. Approval for a front, side and rear yard setback.

Eligible voters: Messrs. Ackerly, Chadwick, Smid, Wegman, Schneeweiss and Chairman Lepre.

Motioned by Mr. Wegman and seconded by Mr. Smid, to memorialize the above resolution of approval.

Roll Call Vote: Ayes: Messrs. Ackerly, Chadwick, Smid, Wegman, Schneeweiss and Chairman Lepre.
Nays: None
Abstain: None
Absent: None

1. Ahern-14 Yale Way, Block 4911, Lot 8. Approval for a front yard setback.

Eligible voters: Messrs. Ackerly, Chadwick, Smid, Wegman, Schneeweiss and Chairman Lepre.

Motioned by Mr. Smid and seconded by Mr. Schneeweiss, to memorialize the above resolution of approval.

Roll Call Vote: Ayes: Messrs. Ackerly, Chadwick, Smid, Wegman, Schneeweiss and
Chairman Lepre.
Nays: None
Abstain: None
Absent: None

PAYMENT OF BILLS:

Motioned by Mr. Bremer and seconded by Mr. Schneeweiss, to approve the payment of bills subject to the availability of funds was voted unanimously by the Board.

APPROVAL OF MINUTES:

Motioned by Mr. Schneeweiss and seconded by Mr. Chadwick, to approve the June 20, 2016 minutes was voted unanimously by the Board.

Motioned by Mr. Wegman and seconded by Mr. Smid, to approve the August 9, 2016 minutes was voted unanimously by the Board.

PUBLIC MEETING BEGINS AT 7:00 p.m.:

2. Guru Nanak Mission, Inc. – 138 Bauer Drive, Block 3603, Lot 2. Continued public hearing for a use variance.

Mr. Kenneth Porro, Esq. on behalf of the opposing property owners Mulhern Belting, Royal Master Grinders, Alpha Tools and Captive Fastener came before the Board. He called his witness Dennis Dupatowaa an employee with Mulhern Belting. Mr. Dupatowaa was sworn in and testified that he is the Vice President of Operations for Mulhern Belting located at 148 Bauer Drive for 28 years. He is responsible for all production and pricing of material for the company. He was asked to recall meetings with the applicant.

Mr. Dupatowaa explained that he met Guldeep Sethi four times and his first encounter was when Mr. Sethi came in to introduce himself. He came in November 2015 to talk to the owner, Mike Mulhern to discuss his intentions. A few weeks later he and Mike Mulhern met with Mr. Sethi to discuss the details of what was being proposed including a residence within the building. Mr. Mulhern and he did not agree with what was being proposed since this is not a residential area. The conversation went on and Mr. Sethi asked them both how this could be worked out.

Mr. Porro questioned if there was discussion concerning why the residency was required at the site. Mr. Dupatowaa responded that one of their first meetings Mr. Sethi informed them that they could take the "holy book" off site, which would not be a favorable option and eliminate the residency. During that discussion, it was mentioned that they may be able to have a security guard or a night watchman remain at the site. He expressed that all discussions were professional and polite.

Mrs. Meryl Gonchar cross-examined the Mr. Dupatowaa. Mrs. Gonchar confirmed the dates they met with the applicant. Mr. Dupatowaa responded that he does not remember the exact dates but he believes it was in October, November 2015 and March 2016. Mrs. Gonchar pointed out that Mr. Dupatowaa testified that there were four meetings. Mr. Dupatowaa responded that he believes there were two meetings in November. Mrs. Gonchar questioned if Mr. Dupatowaa remembered the exact conversation between he and Mr. Sethi at the last meeting. Mr. Dupatowaa responded that he did not.

Mrs. Gonchar confirmed that Mr. Dupatowaa was an employee and not part owner of Mulhern Belting. He responded that he is an employee. Mrs. Gonchar questioned why he was present at these meetings. Mr. Dupatowaa responded that Mr. Mulhern invited him to be a part of the meeting. She had no further questions. Chairman Lepre asked if there were any questions from the Board and seeing none requested a motion to open the meeting to the public.

Motioned by Mr. Smid and seconded by Mr. Wegman, to open the meeting to the public regarding matters concerning the testimony of Mr. Dupatowaa was voted unanimously by the Board.

No comments.

Motioned by Mr. Wegman and seconded by Mr. Chadwick, to close the meeting to the public regarding matters concerning the testimony of Mr. Dupatowaa was voted unanimously by the Board.

Mr. Porro introduced his final witness, Ms. Bridgette Bogart, 648 Godwin Avenue, Midland Park, New Jersey to be sworn in and testify as a professional planner on behalf of the opposing property owners. She offered her credentials and the Board accepted her qualifications as a licensed New Jersey planner. Ms. Bogart informed the Board that she was a planner for Burgis Associates for 12 years and four years ago started her own company. Mrs. Gonchar expressed that there may be a conflict if Ms. Bogart has ever had to represent this Board. She responded that she may have sat in as a substitute planner for this Board years ago for one or two meetings. The Board responded having no knowledge of Ms. Bogart ever substituting for the Board Planner.

Ms. Bogart explained that she was hired by the opposing property owners to review the application in comparison to the Borough's land use zoning codes and the master plan. She has been present at all the meetings except for one where a substitute from her office attended and she reviewed the notes.

Her analysis involved two things from a planning perspective. First, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which affects the Boards analysis and decision for this case. Secondly, she will point out how this affects the Borough's code and how it needs to be addressed.

Addressing RLUIPA first, Ms. Bogart explained that this act exempts most religious groups from local zoning rules unless a community can show a compelling need to impose restrictions. The applicant's planner testified that it needs to be an "overwhelming compelling governmental interest" which she noted that the word "overwhelming" was nowhere to be found within the act. The act states that it needs to be a "compelling governmental interest". Specifically it says that no government shall impose or implement land use regulations, in a manner, that imposes substantial burden on religious exercise of a person, including assembly or institution, unless a government demonstrates that the imposition or burden on that person's assembly or institution, is (A) furtherance of an impelling governmental interest and (B) the least restrictive means in furthering that governmental impelling interest. An impelling governmental interest would be defined as the goals of the Borough's master plan. She informed the Board that the goals of zoning and the master plan are an important governmental interest.

Ms. Bogart reminded the Board that the applicant's planner stated that the only time you can take economics into consideration in an application is if it is referenced in the master plan. She read goal number 5 in the master plan 2008 Reexamination Report which says, "to provide for economic development resulting in a fully diverse economic face by encouraging commercial and high quality office research and development patterns which will optimize the cost benefit and cost revenue impact to the Borough while recognizing the need to encourage development in strategic areas, specifically along the highway system of Interstate 287 and Route 208". The Board needs to consider that goal 5, in the master plan, indicates this zone was meant to specifically create a diverse economic base for the community.

Further, the master plan 2008 Reexamination Report goes into more detail of the economic base. Since the 1980's, select locations of the Borough were sought to spur the construction of large scale office development. Due to a number of reasons and variety of economic conditions, such as the lack of necessary infrastructure due to no sewers, competition of other communities and market issues, this goal of establishing a large scale office development remained unfulfilled. The goal of creating a fully diverse economic base retains its validity. The need to comprehend the dynamics of what is fully diverse and sustainable, The Borough needs to assure that the local economic foundation necessary is in place in order to attract and support the municipality's economy. It not only establishes it as a goal in the master plan, but goes into further detail that back in 2008 the Borough needs to maintain the economic base of the municipality. These are important goals set forth in the Borough's master plan which is an important "governmental compelling interests" as set forth in RLUIPA.

With regards to the zoning ordinance, 59-43, the purpose of the article's intent is to regulate land uses within the zoning district, secure safety and prohibit incompatible land uses such as this an

industrial district where the applicant is proposing a residence. A residential use is the opposite of an industrial use, from a planning perspective, which she provided testimony when discussing the Letter of Interpretation whether a use variance was required.

Ms. Bogart reviewed a few more sections of RLUIPA. She reminded the Board that the applicant's planner testified that you cannot restrict religious practice because you do not like what is being proposed. She informed the Board that her client is not opposed to the practice of religion but to the proposed use which is not permitted and how this use fits into the IP-Industrial zone. She advised that the Board concentrate on the use variance aspect of this application with regards to the residence being proposed in the IP-Industrial zone.

Accompanying the uses permitted in the IP-Industrial Park are 18-wheelers, manufacturing import and export, land uses that will have an impact on the residence component being proposed. She reviewed the permitted uses for the IP-Industrial Park as being business office, corporate office, commercial printing shops, research laboratory, testing laboratory, warehouse storage and solar energy systems. She advised that the Board should refer to the regulations of the zoning ordinance, permitted uses and goals of the master plan as well as to consider the RLUIPA analysis when reviewing the application.

Ms. Bogart continued to read the next portion of RLUIPA. In the act it says, that a government or a board cannot impose regulations on religious institutions as opposed to any other uses in the municipality, which means there should be no individualized review of an application. All site plan applications should be reviewed with the same process used for all other uses and all other applicants. More importantly when reviewing this application, the NJDEP and septic system approval is important to note, because all septic and sewer issues have a substantial planning component for all Oakland's reviews. She questioned why the applicant would purchase the property with a septic system that could not accommodate the proposed kitchen which is a substantial component to the religious practices as testified. The applicant has testified that the kitchen is required and that the meals are a necessity to the religious practices.

The applicant's planner states, under RLUIPA terms, you have to accept the application as presented. Ms. Bogart expressed that this is not true, RLUIPA allows you to review a site plan application in accordance to your zoning ordinances as long as you are not giving it an individualized review, separate and apart from any other use. She believes that the Board is reviewing this from a site plan perspective. The Borough zoning regulations are in place for a reason. For instance, the septic issues which poses a real planning concern for the town, the Board has a right to consider this issue with the proposed application.

The last part of RLUIPA leads into your municipal zoning regulations. The town has to ensure that there is equal opportunity to locate a house of worship within the municipality. She informed that within the Borough of Oakland, there are 23 zoning districts and 7 of them allow for houses of worship. She prepared a map specifying the zones that allow houses of worship. Mr. Porro entered this as an exhibit.

OM-7 Zoning Map showing zones permitting houses of worship colored in gray.

Ms. Bogart described the exhibit as Oakland's zoning map highlighting all areas where houses of worship are permitted in gray. The exhibit proves that the Borough does not exclude but permits religious assembly units in approximately 50 % of the municipality. The IP-Industrial zone does not permit houses of worship nor does it permit residential housing.

Ms. Bogart's last point is that the proposed site is opposite and the use which requires a commercial kitchen, an essential component to the practice, which is not permitted because of the septic issues. She stressed that this site is not appropriate for a house of worship with these required religious practices. These are the issues the Board will need to review for this application.

Mr. Porro questioned the planning concepts for site suitability. Ms. Bogart responded that site suitability is an inherently beneficial use with a septic system, a key component to the planning analysis that needs to be addressed during this review. Mr. Porro questioned if the inherently beneficial factor is inclusive to itself for granting a use variance for a house of worship. Ms. Bogart responded with an inherently beneficial use, there will be things that the Board will have to review to determine whether this is appropriate for the location and the proposal is appropriate for the municipality. They also have to address the negative criteria.

The applicant's planner submitted a report dated September 21, 2015 reviewing the negative criteria and in the review it says, you have to take into consideration the impact on the surrounding area and identify any detrimental effect. The result of this analysis indicated that there is no substantial detriment imposed on the neighborhood by granting the variance for the proposed inherently beneficial use. She expressed that the report does not go into identifying any detrimental effect so it is believed that the applicant's planner is leaving it up to the Board to decide. She agrees it is up to the Board to review and identify detrimental effects to the neighborhood and to determine if anything could be imposed on the application that will minimize those detrimental effects.

Secondly, in the report it states that there is no impairment to the zoning ordinance by granting the variance. She explained that Mr. Ochab indicates in his review that in the 2000 master plan, it describes the site as light industrial which is true. Fifteen years ago the master plan indicates that this IP-Industrial Park has been growing and expanding slowly over the years and forms a very significant part of the Borough's light industrial corporate office tax base. However, current economic patterns and conditions have changed the ability to retain industrial uses in the IP-Industrial Park. Presently, there are six buildings in the IP-Industrial Park that are fully or partially vacant and seeking tenants. In Mr. Ochab's report, it is indicated that the Board is allowed to consider economic impacts within the municipality if mentioned in the master plan and she reminded the Board once again that it is in the master plan. In the 2008 master plan Reexamination Report there is a specific goal with regards to economics and it goes into detail

about those economics. She advised that when reviewing this substantial impact to your master plan, the Board will need to consider the impact and economic goals.

In summary, RLUIPA does indicate that religious institutions, as land uses, are given special consideration but does not give them a blanket approval. The Board has a right to review this application with consideration to the master plan and the zoning ordinances goals and objectives. She does not believe that the negative criteria was fully met with regard to the testimony and recommends that the Board review this application carefully to ensure that they are doing the best for the municipality based upon the goals of master plan and regulations of the Borough's zoning ordinance. Ms. Bogart reminded that when reviewing the use variance, the Board should review how it is consistent or detrimental to the master plan.

Mrs. Gonchar cross-examined Ms. Bogart. Mrs. Gonchar questioned the significance of the shaded zoning map and what other examinations were conducted other than reviewing the ordinance. Ms. Bogart responded that she read the ordinance and looked at the permitted uses which was the basis for the map. The gray shading on the zoning map is an overtone to existing zoning which identifies all zones that permit houses of worship. Mrs. Gonchar questioned if Ms. Bogart had the Board's planner check for accuracy that the shaded zoning map reflects the zones that permits houses of worship. Ms. Bogart responded that this was not needed.

Mrs. Gonchar questioned the purpose of the exhibit since the shaded areas do not reflect the proposed site of the use variance on an inherently beneficial use. Ms. Bogart responded that the exhibit demonstrates where houses of worship are permitted since part of the testimony and application referenced that a municipality cannot restrict religious practices because they do not like what is being proposed. Her testimony concerning RLUIPA and preparing the exhibit was to show that the municipality does not exclude or limit religious institutions.

Mrs. Gonchar questioned if any of the gray area in the exhibit was located within the Highlands Planning or Preservation Area. Ms. Bogart responded that she did not do that calculation. Mrs. Gonchar questioned if there were a flood plain within the gray area of the exhibit. Ms. Bogart responded that she did not research that.

Mrs. Gonchar questioned if Ms. Bogart was aware that there are various provisions under RLUIPA, such as sub A and sub B, of actions that can be brought under one without being brought under the others and the proofs are different. Ms. Bogart responded that she is aware.

Mrs. Gonchar questioned if this application was guided under MLUL. Ms. Bogart responded yes it is. Mrs. Gonchar questioned if Ms. Bogart's argument was that an economic justification for a restriction could overcome a RLUIPA claim. Ms. Bogart responded no, but economics do come into play with this application because of the goals set forth by the Borough's master plan also indicated by Mr. Ochab. Mrs. Gonchar questioned if a RLUIPA claim could be overcome by a board's goals of their master plan to generate income or establish an economic base. Mr. Porro objected. Ms. Bogart responded that the master plan speaks about the economic goals and the

struggle and how it is being developed specific to this zone and area. Mrs. Gonchar requested Ms. Bogart source of reference. Ms. Bogart responded that she is referencing the 2008 master plan Reexamination Report. She read a portion of the report that referenced the spur of the development of large scale office buildings. The goal of creating a fully diverse sustainable economic base retains its validity which is important to this application. Mrs. Gonchar verified they are specifically referring to the IP-Industrial Park when it talks about economic base and large scale office development. Ms. Bogart responded that it does not refer to the specific property it refers to a fully diverse and substantially economic base. A discussion ensued concerning whether or not the IP-Industrial Park was the specific property or zone the master plan is referring to. Ms. Bogart expressed that the economic base the master plan is referring to is specific to the office industrial zones of the municipality. Mrs. Gonchar verified that the section does not mention industrial zone. Ms. Bogart responded that it does not.

Mrs. Gonchar questioned if Ms. Bogart believed a tax exemption situation could be considered an economic justification. Ms. Bogart responded that she does not think that is a planning analysis. Mrs. Gonchar questioned if Ms. Bogart's testimony was that this is an incompatible use with other uses existing in the zone. Ms. Bogart responded yes, it is residential vs industrial. Mrs. Gonchar expressed that this is not an application for a residential use, this is an application for a house of worship which proposes an accessory residence. She questioned if Ms. Bogart's testimony is limited to evaluating the accessory residence being proposed or the house of worship. Mr. Porro responded that they believe the application needs to separate use variances, one for the residence and one for the house of worship. Ms. Bogart agreed with Mr. Porro. Mrs. Gonchar does not agree. Mr. Cavaliere interjected that the Board has not made a determination on that subject. Mrs. Gonchar questioned Ms. Bogart if her testimony is limited to the one residence use for the house of worship. Ms. Bogart responded no and she explained according to the zoning code, houses of worship are generally permitted or permitted as a conditional use in the residential districts and she believes that houses of worship are a contrast to the permitted uses in the industrial zones. Her testimony is not limited to the residence or the house of worship use, both or combination.

Mrs. Gonchar questioned if the shaded areas signified permitted or conditional uses for houses of worship. Ms. Bogart responded that the entire gray shaded area signifies both permitted and conditional uses. Mrs. Gonchar questioned if Ms. Bogart could distinguish between conditional and permitted uses in the shaded area. Ms. Bogart responded that she could not. Mrs. Gonchar questioned the minimum lot area required for a conditional use of a house of worship. Ms. Bogart responded that she did not know. Mrs. Gonchar informed her that a 3 acre minimum is needed for a conditional use of a house of worship and questioned Ms. Bogart if she could identify any parcels of that size on her exhibit. Ms. Bogart responded that she could not identify those parcels.

Mrs. Gonchar referred to the testimony of the client's realtor and questioned if any of the available houses of worship listed for sale were located in Oakland. Ms. Bogart was not sure.

Mrs. Gonchar referenced Ms. Bogart's testimony concerning incompatible uses in the IP-Industrial Park. She questioned Ms. Bogart if she was the planner hired for The Children's Therapy Center located at 123 Bauer Drive before the Board in 2014. Ms. Bogart responded that she was the hired planner for that application. Mrs. Gonchar questioned the use of that application. Ms. Bogart responded that it is a school for special needs children. Mrs. Gonchar questioned if that application was for a permitted use. Ms. Bogart responded that the application was not a permitted use, it required a use variance.

Mrs. Gonchar requested that Ms. Bogart read zoning ordinance 59-49 into the record. She reminded Ms. Bogart that this was the subject when they requested a Letter of Interpretation pointing out that conditional uses are permitted in RA-1, RA-2 and RA-3 Residential zones and permitted use in all other zones. Ms. Bogart read the ordinance. A discussion ensued between Ms. Gonchar and Mr. Porro whether schools are permitted in the three residential zones as a conditional use. Mrs. Gonchar questioned if the school she represented and the house of worship share the same contrast. Ms. Bogart responded that she did not review the specifics between the two uses.

Mrs. Gonchar questioned if there was a need for a special needs facility in the area. Ms. Bogart responded that there was a need. Mrs. Gonchar questioned if Ms. Bogart's testimony was that the zoning ordinance and master plan should be updated to reflect the economic trend affecting industrial districts in the area. Ms. Bogart responded yes. Mrs. Gonchar questioned if that statement was in conjunction with a use variance application for the IP-Industrial zone. Ms. Bogart responded during that application, she was stressing the goals of the master plan, the same economic goals mentioned this evening. Mrs. Gonchar questioned if the special needs school is tax exempt property. Ms. Bogart responded that she was not sure. Mrs. Gonchar confirmed that Ms. Bogart made no inquiry into whether or not the property was tax exempt property and how this could impact the Borough's master plan in terms of generating income. Ms. Bogart responded that she did not.

Mrs. Gonchar referred to the minutes of October 14, 2014 for Children's Therapy Center and questioned if it was her exhibit entered showing vacant buildings and for sale signs within the IP-Industrial Park. Ms. Bogart responded yes she did. Mrs. Gonchar referenced a statement in the minutes stating that Ms. Bogart testified that the exhibits reflected a lack of demand for the type of industrial uses meant for those spaces. Ms. Bogart responded that she did not remember saying that. Mrs. Gonchar questioned what led her to the discussion that the ordinance and master plan should be updated to reflect the change in economic demand. Ms. Bogart responded this was true several years ago but not today. Mrs. Gonchar informed Ms. Bogart that their appraiser testifying for the applicant came to the same conclusion in 2014 that there was reduced demand and more vacancies in the IP-Industrial zone. She went on to say that Ms. Bogart's testimony included the comparison of The Children's Therapy Center application to other uses in the IP-Industrial Park and a trend towards schools.

Mrs. Gonchar questioned if Ms. Bogart created a similar map or study of the master plan showing the Board zones where schools are permitted as a conditional use. Ms. Bogart responded during her testimony for that application, she looked up the specifics of the use and felt that the school use was suited for that site and focused on the planning analysis of that site. She continued that since schools are not subject to RLUIPA, the exhibit presented tonight was to show the Board that the Borough can consider permitted locations for houses of worship. Schools do not have to go through the analysis associated with RLUIP so the same exhibit for the school would have been irrelevant.

Mrs. Gonchar questioned if septic approval would come from this Board. Ms. Bogart was not sure. Mrs. Gonchar questioned if it was her testimony that the applicant would need to go to the DEP for septic approval. Ms. Bogart responded that her testimony was that the applicant would need to go to DEP for approval to expand their septic. Mrs. Gonchar reminded Ms. Bogart that the school she testified for also had to go to DEP to get approval of an expansion to their septic. Ms. Bogart responded that she was aware and that there was a few nights of testimony regarding the expansion of the school's septic. She explained that the site for the school was particularly suited because their argument was that the occupants would not need to utilize the bathrooms creating less of a strain on the septic. However, they did end up getting it approved and expanded the septic because the septic is based on the number of occupants not the characteristics of the applicants. Mrs. Gonchar questioned whether Ms. Bogart was aware that it was not definite that the applicant would have to expand the septic and would be determined at a future date. Mr. Porro objected, stating that he believes it has been determined due to the testimony regarding the commercial kitchen. Mrs. Gonchar informed the Board that their septic expert advised them that they would go to DEP but were not certain that the applicant would require the expansion. She explained that any DEP approvals would be a condition under the MLUL. A discussion ensued between Mrs. Gonchar and Ms. Bogart concerning if DEP approval would be needed to operate a commercial kitchen at the site. Mrs. Gonchar expressed that is true but they still would be able to operate the house of worship. Ms. Bogart responded that her testimony was that the kitchen and serving food is a key component to the house of worship being proposed.

Mrs. Gonchar referred to Ms. Bogart's testimony in regard to Mr. Ochab's, the applicant's planner, report dated September 21, 2015 concerning the detrimental impact would be left to the Board to determine. Ms. Bogart responded that the report does not indicate detrimental impact and most applications leave it to the Board to determine. Mrs. Gonchar questioned if planners usually testify last in a hearing. Ms. Bogart responded that this is correct. Mrs. Gonchar informed Ms. Bogart that if no detrimental impact was mentioned in Mr. Ochab's report, it could also mean there are none. Ms. Bogart responded that his report did not mention there was no detrimental impact.

Mrs. Gonchar questioned the definition of the Borough's ordinance on an accessory and had Ms. Bogart read ordinance 59-44 into the record. Mrs. Gonchar recited the definition of an accessory as being customarily, clearly, incidental or subordinate to the principle building. Mrs.

Gonchar questioned Ms. Bogart if she is familiar with case law pertaining to accessory uses with regard to houses of worship. Ms. Bogart responded that she is not familiar with any case law identifying what constitutes accessory uses in connection with a house of worship. Mrs. Gonchar questioned if Ms. Bogart would characterize a rectory or parsonage an accessory use to a church. Ms. Bogart responded yes. Mrs. Gonchar questioned the same for a day care center in a church. Ms. Bogart responded there seems to be an evolving nature for houses of worship and uses that are starting to be typical but not necessarily. Mrs. Gonchar questioned Ms. Bogart if the priest's apartment within the principle house of worship building would be considered a separate use or a principle use. Mr. Porro objected. He clarified that their objection is the three bedroom, two full bathrooms which is not a standard or customary use for a house of worship. Mrs. Gonchar responded that she was questioning Ms. Bogart from a planning perspective and did not ask the number of bedrooms in a rectory when she identified that as an accessory use. Mrs. Gonchar questioned if she thought the apartment for the priest and his family is viewed as an additional use variance. Ms. Bogart responded that from a planning perspective, as proposed, she believes it is a separate use. Mrs. Gonchar questioned if this is different from a rectory in a church, one is an accessory and one is principle use. Ms. Bogart responded that it is the way it is proposed, three bedrooms make a larger impact then if it were an accessory apartment for one person. Mrs. Gonchar questioned if it is Ms. Bogart's testimony that this is a three bedroom use, and impairs its characterization as an accessory use to a principle use. Mr. Porro objected. Ms. Bogart responded that there are different impacts with a three bedroom unit versus a one bedroom unit according to Impact Analysis study set forth by Rutgers. Mrs. Gonchar explained she was not asking about impact but characterization as an accessory use. Ms. Bogart responded that impacts are directly related to whether it is a principle use or an accessory use. Accessory uses are incidental to a principle use and the principle use has that impact and accessory uses associated with that have minimal impact and are ancillary to what is permitted on site. Impacts can and their extent are a direct correlation to whether they are an ancillary accessory or principle uses. Mrs. Gonchar had no further questions.

Chairman Lepre asked Mr. Lydon if he had any questions. Mr. Lydon responded that he had no questions at this time. Chairman Lepre entertained a motion to open the meeting to the public.

Motioned by Mr. Schneeweiss and seconded by Mr. Smid, to open the meeting to the public regarding matters concerning the testimony of Ms. Bogart was voted unanimously by the Board.

No comments.

Motioned by Mr. Schneeweiss and seconded by Mr. Smid, to close the meeting to the public regarding matters concerning the testimony of Ms. Bogart was voted unanimously by the Board.

Mr. Cavaliere referred to RLUIPA and read a portion of the rules. "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person including a religious assembly or institution unless the government demonstrated that imposition of the burden on the person, assembly or institution is in

furtherance of a government interest". He understands this as, municipalities may not use land use regulations to prevent or impinge upon religious exercises or religious rights unless it is in furtherance to a government interest.

Mr. Cavaliere questioned Ms. Bogart the specific government interest in Oakland that will prevent this application from being granted. Ms. Bogart responded that she read the same statement in the beginning of her testimony to inform the Board that they can impose land use regulations on religious institutions as long as it is not a substantial burden. The governmental interests being referenced could apply to the Borough's goals of the zoning ordinance and the master plan which talk about the separation of uses and identifying the different districts such as the industrial and residential zones. All the districts shown in her exhibit identify where houses of worship are permitted in Oakland. The goals of the master plan refers to the industrial park as an economic base and this being a tax exempt use can be defined as detrimental to the Borough's master plan goals for this district. This combined with permitted uses and the fact that houses of worship are permitted in the other districts, is going against the Borough's goals of the zoning ordinance and master plan. Mr. Cavaliere confirmed that Ms. Bogart's testimony was that Oakland's industrial park was created for the purpose of creating an economic base to better improve the municipality and the continuation of that park as an economic base, is a compelling interest which the municipality may rely upon in an RLUIPA analysis. Ms. Bogart responded that that is what she testified. Mr. Cavaliere questioned how this relates to part B which talks about least restricted means of furthering the compelling interest. Ms. Bogart responded that this is what she meant by her exhibit. The Borough only identifies certain areas as economic bases to the municipality and fifty percent of the municipality, where houses of worship are permitted, are not identified as an economic base.

Mr. Cavaliere requested that the permitted use area shaded in gray in Ms. Bogart's exhibit OM-7, be outlined in magic marker.

Exhibit OM-7A, a revised exhibit of OM-7 outlining the permitted areas for a house of worship.

Mr. Porro informed the Board that after the last meeting he put together a list of items, authorized by his client, of concerns about the application and provided a letter to the Chairman which he marked into evidence.

Exhibit OM-8, Settlement document without prejudice.

Mr. Cavaliere explained that in Wayne there is a church, Lady of the Valley, combined with a school. On the side of the school and church was a rectory which at various times, had a few priests living there. There were three bedrooms in the rectory, and he questioned if Ms. Bogart would be considered this an accessory use. Ms. Bogart responded she was no familiar with this use and does not know the specifics whether it was a permitted use or not. He questioned if a school and/or a rectory would be considered an accessory used to the church. Ms. Bogart responded again it depends on the use and the size of the church. She explained that it has to

do with sizes of the church, school and rectory and the impact to the other uses. Mr. Cavalier questioned if this is determined by a square foot analysis of the building, size of church, school and/or rectory versus each other. Ms. Bogart responded this is usually determined by square foot by patrons combine by daily operations combined with the number of seats, size of building and size of the lot. It's a number of things. Mr. Cavalier questioned if it is a numerical analysis. Ms. Bogart responded it is an impact analysis.

Mr. Porro questioned Ms. Bogart how does the Borough go about changing the IP zone to permit houses of worship. Ms. Bogart responded that a planner is hired your planner because houses of worship are an evolving use that usually offer gyms, day care and banquet facilities. Years ago houses of worship were just a church and now they have ancillary uses. The applicant would require a full planning analysis. Mr. Porro questioned if the applicant would need to request a zone change from Mayor and Council and make application to the Planning Board. Ms. Bogart responded if the ordinance is in place, the applicant would go to the governing body and they would refer the applicant to the Planning Board for planning analysis. Mr. Porro questioned if this applicant ever petitioned the governing body for the zone change. This Bogart responded she did not know.

Mr. Porro questioned if the applicant put a condition of land-use approval prior to closing on the property. Ms. Bogart responded she did not know. Mr. Porro referenced exhibit OM –8 and questioned when balancing negative criteria, would the house of worship address it by minimizing outdoor activity, the kitchen use, play areas, and general site limitations. Ms. Bogart responded that the letter entered as an exhibit OM– 8, points out the negative analysis that the Board needs to go through identifying any detrimental impact to the surrounding area and seeing if there is any conditions they can minimize.

Mrs. Gonchar cross examined. She questioned if Ms. Bogart was aware of federal law that does not allow the consideration of economic impacts as justification for compelling state interest. Ms. Bogart responded that Mr. Ochab testimony indicated that it can only be considered when it's mentioned in the master plan. Mrs. Gonchar questioned if Ms. Bogart did any independent research on RLUIPA law which overrides the burden. Ms. Bogart responded that she did not review economic policies under RLUIPA. Mrs. Gonchar questioned if she believed that whatever a municipality puts in their master plan is a compelling governmental interest. Ms. Bogart responded she believes when a municipality identify specific goals and objectives in their master plan, it remains in the master plan document for numerous years and is based in their zoning ordinance she considers this a compelling interest.

Mrs. Gonchar requested that Mr. Sethi have an opportunity to comment on the testimony of the planner and give his last statement. Mr. Smid recommended that the Board take a five-minute break and continue with the residential application and go back to the testimony of Mr. Sethi. Chairman Lepre agreed.

2. Russell- 73 Franklin Avenue, Block 4401, Lot 13. Continued public hearing for a 6-foot

fence in the front yard.

Mr. Cavaliere reminded the applicant that they were previously sworn and remain under oath. They agreed.

Chairman Lepre advised the Board that revised plans were submitted. The application was originally for a solid 6-foot fence in the front yard setback and the revised plans show that the applicant now proposes a 5-foot vinyl fence in the same location with 1-foot of lattice added to the top.

Mr. Smid questioned why the applicant could not agree to the required 50% open fence. Mr. Russell responded that the road they live on, Franklin Avenue, is heavily traveled and the solid fence would suppress the noise better than a 50% open fence. Mr. Smid questioned if the fence that exists was there when they bought the house. The applicant responded that is was. Mr. Smid questioned the purpose for not continuing with the same type of fence. Mr. Russell responded that it would not give him the privacy for family gatherings and where his daughter plays. The existing fence is in an area that the family does not use and the noise does not impact that area like it does the front.

Mr. Wegman expressed that he is not convinced of a hardship being presented. He explained that the house will still be exposed directly to the road where he believed the applicant would want to cut down the noise. The fence on the other side is beautiful and a similar fence would still give you the privacy and protection. He does not see a hardship with having the required 4 foot fence 50% open to match the other side.

Mr. Russell reminded the Board that a half a mile from his property on Franklin Avenue are two separate houses that have the exact same fence that he is proposing. These are the same fences in that vicinity. Whether the property owners required variances or not, he does not believe this sets a precedence when proposing the same style and same height fence. Chairman Lepre informed the applicant that each application heard before this Board is based on its own merits and detriment and the Board does not consider "setting a precedence" when making a decision. The applicant expressed that he believes that the fence is not uncommon for that area.

A discussion ensued concerning the location of the other fences. Mr. Schneeweiss questioned the applicant if the fences he is referencing are in the front yard setback. Mr. Russell responded that he believes the fences are.

Mr. Cavalier questioned Mr. Russell if any thought was given of what was requested by the Board at the last meeting concerning landscape. He questioned if he had considered the plan to do plantings along the street side of a 50% open 4-foot fence that would mitigate the visual and sound impact. The proposal would be off to the right and to put a similar type shrubbery that is there now every foot and a half along that portion of the fence. Chairman Lepre questioned if

the applicant is proposing to do or think about adding landscaping. Mr. Russell responded that it is not part of the application but would consider it.

Chairman Lepre expressed to the Mr. Russell that they are suggesting these things to help the application present itself favorably to the Board. Chairman Lepre questioned if the applicant would agree to adding landscaping in order for an approval. Mr. Russell responded he would but he does not know the procedure of what would dictate the type of landscaping he plants. Mr. Cavalier expressed to the applicant that this would be a consideration for the Board. He suggested Chairman Lepre entertain a motion subject to the condition suggested for additional plantings with the width distance apart for each planting and type of planting. In addition, the applicant should be requested to submit a landscape plan.

Chairman Lepre questioned the length of the post on the fence. The applicant responded 8-feet. Chairman Lepre explained that the applicant would be required to add landscaping of plantings at least 2-feet high and 2 plantings per fence panel. Mr. Cavalier questioned if the applicant is considering other colors for the fence. The applicant responded they are keep it white like the existing fence. Chairman Lepre entertained a motion to open the meeting to the public.

Motioned by Mr. Wegman and seconded by Mr. Bremer, to open the meeting to the public regarding matters concerning the Russell application was voted unanimously by the Board.

No comments.

Motioned by Mr. Wegman and seconded by Mr. Bremer, to close the meeting to the public regarding matters concerning the Russell application was voted unanimously by the Board.

Motioned by Mr. Smid and seconded by Mr. Schneeweiss, to deny the application due to the applicant not considering the 50% open requirement for a fence.

Roll call: Ayes: Mrs. Steele Messrs., Chadwick, Ackerly, Smid, Wegman, Schneeweiss, and
 Chairman Lepre.
 Nays: None
 Abstain: None
 Absent: None

Chairman Lepre informed the applicant that the application has been denied but they can re-form their proposal and reapply or the applicant could stick to the required setbacks and fence requirements and not come before the Board again.

Guru Nanak Temple continues.

Mr. Sethi was reminded that he was still under oath. Mr. Sethi gave his closing statement. He expressed that he would like to clarify some things from the beginning of this application, during all the testimony and the closing comments. He expressed some negative and positive assumptions of who he is and his religion.

His position in the church is to educate and inform. Their board of trustees advised him to meet with the neighboring property owner to initiate a meeting and see where the other person stands. There were negotiable points and nonnegotiable points. He expressed that Mr. Mulhern remembers the conversation a little different than he did. Mr. Sethi questioned what could he do make this more favorable for Mr. Mulhern and gave some suggestions. Mr. Mulhern was very nice but stern on the fact that he was not in favor of the house of worship and would oppose any type of church. Mr. Sethi went on to talk about the schools in the industrial park and Mr. Mulhern expressed that he did not think that the schools belong in the industrial park either.

They began to talk about the residence and Mr. Mulhern did not agree that anybody should be in the industrial park at night. Mr. Sethi questioned if any of the businesses in the industrial park had security people staying overnight and reminded Mr. Mulhern's that his testimony was that some of the businesses in the industrial park are open 24 hours. He continued that that is when the topic on the security guard began. Mr. Mulhern told Mr. Sethi that no one had security guards overnight. They went back-and-forth with Mr. Mulhern on ideas and suggestions to make this more favorable.

Mr. Sethi feels that they are trying to question the credibility of his testimony and he is the only one that has testified three times before the board. They do need the priest and his family on the premises that has never changed and he expressed that he has been consistent throughout the whole application. The holy book needs to stay on the premises as well as the priest and his family 24 hours seven days a week. That is the need of the Sikh temple. He explained that they alleviated the fears of one of the other objector represented by Mrs. Rubright and they no longer oppose of the temple. A discussion ensued concerning testimony of a possible objector. Mr. Porro objected stating that the objector had an opportunity to testify but did not so therefore it would be hearsay. It is not part of the record. Mr. Cavaliere explained that courts adhere strictly to hearsay regulations and boards are more liberal however, he recommended that Mr. Sethi leave the particulars of the conversation out of his testimony.

Mr. Sethi gave background on the search of the house of worship. They searched for two months and did not use a real estate agent which began back in August 2014. They were looking for a 15 to 20,000 square-foot building with at least 100 parking spaces available because they don't want to inconvenience any of the neighboring properties with overflow parking.

They used many real estate agents and saw many potential spaces but none of them fit their needs. Eight months later in April 2015, they signed a contract but before they signed they did go to the zoning department in Oakland and were told that it was a conditional use and that they would have to go before the planning board. Mr. Porro objected. Mr. Sethi continued that

seeing the other approved uses in the industrial park, they felt comfortable taking that risk. They consulted Mr. Cascio and later purchased the property. Later Mr. Cascio discovered that there was confusion in the ordinance and the application needed to go before the zoning board.

We are asking for very specific permission of the residence for a specific purpose and it is not unusual for house of worship to have a residence for their priest which is our request. We will continue to have respectful relationships with our neighbors and in a few months, I think they will realize whatever stereotypes they have will not be true. This is a house of worship and our neighbors are our friends and he considers Mr. Mulhern his friend and we will live and learn from each other. He concluded. No cross examine from Mr. Porro. Chairman Lepre asked if there were any questions from the Board.

Mr. Smid questioned if the applicant specifically looked at buildings or properties. Mr. Sethi responded that they were looking for buildings.

Mr. Chadwick questioned Mr. Sethi's recollection of his testimony and it being consistent all three times he testified concerning the residency. Mr. Chadwick recalls that he questioned Mr. Sethi in the beginning of the application if the residency was absolutely necessary. He questions this because in all his personal and professional experience with houses of worship, a parsonage or a rectory was never in the facility. He reminded Mr. Sethi when he asked him if the residence was absolutely necessary Mr. Chadwick said Mr. Sethi's response was, "it's preferable but not essential". Mr. Sethi did not recall saying that since during the 48 hour reading and tending the holy book someone needs to be present at all times. He expressed that there would be no reason for him to answer in that manner. He explained that the question may have been general for all Sikh temples and he said some of the temples in the most remote areas do not have 24 hour presence. He explained that in those instances the book is locked up for the week. They have no choice since they only have 30 congregants and one service on Sunday.

Chairman Lepre referenced a letter dated July 8, 2016 from Suzanne Rubright, Esq. which discusses their withdrawing their objection with a series of conditions requested that the Guru Nanak Temple are in agreement with these conditions. He questioned if the applicant and counsel are in agreement with these conditions and if this could be put into the record as a closing to the contents of the letter. Mr. Sethi responded that he has agreed to her conditions.

Motioned by Mr. Schneeweiss and seconded by Mr. Smid, to open the meeting to the public regarding comments concerning the testimony of Mr. Sethi was voted unanimously by the Board.

No comments.

Motioned by Mr. Wegman and seconded by Mr. Chadwick, to close the meeting to the public regarding comments concerning the testimony of Mr. Sethi was voted unanimously by the Board.

GENERAL COMMENTS FROM THE PUBLIC:

Motioned by Mr. Wegman and seconded by Mr. Schneeweiss, to open the meeting to the public regarding general comments from the public was voted unanimously by the Board.

Mr. Joseph Sudol, 18 Powhatan Path, explained that he has been a resident of Bergen County all his life and a resident of Oakland since 1986. He is a catholic and attended Don Bosco High School. His purpose for attending the meeting is on behalf of his business colleague, Harmjit Sidu whom he has known since 1998.

He joined Mr. Sidu about 8 years after he began his business in material science and the sensor business providing assistance and sales support. He worked with Mr. Sidu for approximately 20 years and watched how he worked with a diverse population of people in his business expressing that he is a generous person which he believes is part of his belief system. After two manufacturing plants employed by 130 people, some large company acquired them where we still participate.

Through the years he has witness Mr. Sidu and his family while attending social events where all different faiths were present and impressed with his generosity and caring towards employees and colleague of the company. The company with employees of all different faiths and ethnic backgrounds were included when the company was sold and a large portion of money was set aside to be allocated amongst all employees, roughly 50% of their salaries. He expressed that he is not here to testify on behalf of the religion, the temple or the zoning however, he does feel the utilization of the building is appropriate and hope this works out for them.

Motioned by Mr. Smid and seconded by Mr. Schneeweiss, to close the meeting to the public regarding general comments from the public was voted unanimously by the Board.

Board Planner, Steve Lydon was sworn in from Burgis Associates, Inc., 25 Westwood Avenue in Westwood, New Jersey. He explained that he has attended all the meetings but one where a colleague of his covered for him. He has written many reports on this application and most done in the very beginning. He stands behind what he wrote and does not believe it would be beneficial to go over them.

He suggested that he give a brief description of the property, the development proposal, the approval the applicant is seeking, go through a SECA balancing test and finally offer the Board his recommendation for this application.

The subject property is a large lot of 130,000 square feet approximately 3 acres on the east side of Bauer Drive in the IP-Industrial Park. There is an existing building of about 24,000 square feet with a footprint of just over 19,582 square feet. The existing parking offers approximately 101 spaces, there is a loading zones and a freestanding sign located in the front yard.

The development proposal has evolved and is an adapted reuse where the applicant seeks to reconfigure the original building footprint with minimal modifications to the exterior. The only proposed modifications will involve an expansion of one story foyer. The applicant seeks to convert the use and transform the building into a house of worship, increase the on-site parking to 108 spaces, eliminating the loading doors, retain the freestanding sign but change the message and upgrading the septic system if determined necessary.

At the beginning of this application, this Board spent one or two nights to determine what kind of application and what kind of approvals would be necessary. It was determined by the Board that the site plan application would require a D – 1 variance in order to convert the property into a house of worship along with minor bulk variances such as light post being placed in the 75-foot buffer adjacent to the rear lot line.

Along with a use variance the board understands that a houses of worship is an inherently beneficial use which there has been no question of that. Inherently beneficial uses satisfy the positive criteria simply by being qualified as inherently beneficial according to New Jersey case law. With terms to the negative criteria, the board has heard a number of times about certain case law that puts regulations on boards how to review and inherently beneficial use. Case law most popular in this matter is Sica case which has laid out a roadmap for zoning board's when acting on inherently beneficial uses. The system is done by ranking inherently beneficial uses with houses of worship ranking among the highest.

Sica case law also identifies the detrimental effects created if the variance is granted. Mr. Lydon expressed that he does believe that there would be some detrimental impact if this application were approved as follows:

- Potential stress on existing septic system.
- Deviation from the Borough's master plan recommendation concerning this industrial park.
- Introduction of another institutional use into the industrial park, the diversion of 3 more acres and 1 more building to a non-industrial use.
- Introduction of a residential use into the non-residential industrial park.
- Additional detrimental effects might potentially be generated if house of worship is approved.

The Board should examine conditions that might be attached to an approval to mitigate detrimental effects generated if the house of worship is approved.

Mr. Lydon expressed that the Board might want to consider the following conditions contingent to an approval:

- Approval be for a house of worship and a single apartment and all other uses are prohibited.

- The rear yard buffer area that is currently turf, shall be replanted with shrubs and trees as necessary. A landscape plan shall be submitted to the Board engineer for review.
- Installation of a solid masonry wall along the northerly side lot line. The wall shall begin 50-feet from the front property line and end 75-feet from the rear property line. The wall shall be no less than 4-feet and no more than 6-feet in height. At a minimum, the bottom 3-feet of the wall shall be masonry and above 3-feet, a fence design is acceptable.
- A stipulation that vehicles will be parked only on paved surfaces in delineated parking spaces.
- Oversized vehicles (buses) will not be used to bring congregants to scheduled, repeating services.
- The site driveway shall be relocated from the north side of the property opposite Potash Road to the southern side of property. The area of the property where the driveway is currently located shall be re-vegetated. Replacement curbing shall be installed along Bauer Drive in the location of the former driveway throat. Revised plans depicting the wall and driveway relocation and restoration work shall be provided to the Board and reviewed by the Board engineer.
- To reduce pedestrian activity in the existing front yard, concrete walkway parallel with the building shall be removed as a public safety measure.
- Number of bedrooms/sleeping quarters in the building might be a concern of the Board. If this is the case, the Board might want to further consider potential modifications to proposed apartment. He stated for the record, he believes that part of the application is not a principle use requiring a second use variance. He believes that there are many instances where houses of worship include the living quarters for priest and he sees it as ancillary and accessory to a religious use.
- Installation of a commercial kitchen will not occur until an upgraded septic system is installed and approved or determination is made by the appropriate governmental official that the commercial kitchen can be installed without the need for an upgraded septic system.
- Prior to commencement of construction of the commercial kitchen, the applicant shall secure all necessary permits, including but not limited to Board of Health and Fire Prevention. Commercial kitchen shall not be used until a Certificate of Occupancy or a Certificate of Approval is issued by the Oakland Construction Department.
- Consistent with the Trustee's testimony, mission activities are and shall be limited to the interior of the building.
- Approval subject to implementing the modifications as detailed on the plans and specifications and as agreed to during the hearing. With regards to an occupancy limit, he suggested that the Board not impose a limitation on occupancy for the house of worship. He informed the Board that the subject of occupancy is outside of their jurisdiction and should be dealt with by the Construction Official.

However, the Board can limit the parking be limited to the parking lot to regulate the occupancy.

- Relief from any of the enumerated conditions can only be achieved by securing amended approval from the Board of Adjustment at a duly noticed public hearing.

Mr. Lydon explained to the Board that after balancing the recommendations given of the potential detriments he listed, he believes that this is an application that merits approval. Mr. Cavaliere questioned if Mr. Lydon had anything to add with consideration to RLUIPA. Mr. Lydon responded that he has a contrary opinion to RLUIPA. He explained that RLUIPA was drafted and implemented at a federal level to deal with states not like New Jersey where MLUL exists as well as developed case law informing us how to deal with inherently beneficial uses. He believes that Sica law is an appropriate way to deal with the application.

Board Engineer, Rebecca Mejia, followed up with outstanding engineering items. She informed the Board that there was mention of a revised site plan showing:

- The shower removed from the second story bathroom (per Mr. Sethi's testimony on June 14, 2016).
- Phase plan showing kitchen area vacant and part of Phase 2 until all approvals and septic issues have been resolved from the DEP and municipal level (as per testimony on April 12, 2016).
- Fence on the northerly and southerly property line where lighting is spilling over and exceeding the .1 foot candles (as per testimony March 22, 2016).
- Chain link fence to protect CT cabinet at the entrance (as per testimony March 22, 2016).

Boswell will require a revised site plan before any building permits are issued if this application is approved. The resolution should also have a clause that the kitchen/dining area will NOT be used as congregant seating for a service. Services cannot occur in this space and the applicant did indicate for the record several times that the dining area would not be used in this fashion so they should have no issues with the condition.

Mr. Porro gave his closing statement. He thanked the Board for their patience and professionalism. This is not a decision based upon the religion but a decision based upon whether or not a house of worship should be permitted in the IP-Industrial zone.

He believes that the Board Planner addressed this topic well in the sense of the Sica standard which deals with the positive and negative criteria. Unfortunately, it was the applicant's choice not have a condition of approval clause in their purchase contract as well as go to the governing body seeking a zone change. In addition, a 2,400 square foot apartment with three bedrooms and two bathrooms will become a standard for the Board moving forward for any other property owner in the IP-Industrial zone. A property owner could request a one bedroom apartment for

security working a 24-hour shift. He informed that Mr. Lydon has concerns with introducing zone changes outside the master plan.

Mr. Porro expressed that there has been inconsistent testimony on the residence. There was testimony that it is preferred but not essential to include a residence. Mr. Sethi is not a priest but a trustee of the board and it may have been helpful to hear testimony from the priest of the temple. He believes that it is preferable to have the holy book on site but testimony was given that the book could be taken off site.

He expressed his client is realistic in balancing what is before the Board and if the house of worship is going to be permitted, they would like to join in on the conditions of the Board Planner and conditions of the adjacent neighbor set forth by Susan Rubright, Esq. with Brach & Eichler in her letter dated July 8, 2016 (see attachment). Her letter also points out the concerns of having a residence within the IP-Industrial zone. Mr. Porro expressed that they propose that a caretaker or security guard could be on site.

Mr. Porro offered, without prejudice, conditions to help mitigate his client's concerns as follows:

- There shall be no residential housing permitted at the building, but a caretaker/security guard is permissible. Thereby the holy book is protected and this would be a fair and reasonable compromise under Sica standards.
- No full shower shall be installed at the building. Since there is no residential living at the building, full showers are not necessary. However, they would agree, as a compromise, to one full shower at the facility for a caretaker.
- No outdoor events or activities shall be permitted in the parking lot, except for site temporary parking or staging for interior events.
- No commercial kitchen shall be installed, except as to a reasonable kitchen to address the needs of the House of Worship community. The size being proposed is needs to be reduced in order to balance negative criteria.
- There shall be no outdoor play area.
- Applicant shall investigate if the property ingress/egress driveway can be moved to the southern portion of the property for overall site public health and safety access. Mr. Porro explained that this condition has already been mentioned by the Board professionals and leaves that in their hands.
- My clients shall be named as additional insured to applicant's insurance liability policy, if the site access remains at its current location.
- Applicant shall not materially change the outside building façade or expand the building footprint beyond the Board's approved plans. The building should remain in conformity with the IP-Industrial zone at hand.
- Applicant's main walkway entrance shall not provide access from Bauer Drive, as this would create a "choke point," where 3 driveways and 2 roads meet.
- There shall be no sidewalks on Bauer Drive.

- There shall not be more than one event at the site at any one time, for example no wedding shall take place while a separate and distinct religious ceremony is occurring.
- There shall be no events Monday through Thursday during normal industrial park business hours, 7:00 a.m. to 6:00 p.m. Events over weekend shall not begin before 5:00 p.m. on Friday.
- A greenery buffer barrier of planting shall be established between 148 and 138 Bauer Drive. The type of trees/bushes shall be year round evergreens as per the Board engineer.
- Property shall maintain dumpster trash/rubbish garbage removal. There shall be no curbside garbage pick-up.
- There shall be a firm two hundred fifty (250) maximum building occupancy limit as represented. There should be a number established and this will address traffic concerns.
- Property and building lighting shields shall be installed as per Board engineer.
- The property signage shall remain as existing with only the front yard free standing sign. There shall be no building signage.
- No livestock shall be housed or presented as part of an event celebration in any capacity at the property.
- Penalty for a violation of the above terms and conditions, along with any other Board condition, shall be a NJAC occupancy violation as determined by the Oakland Building Inspector. The Building Inspector shall have the absolute right of property & building access without prior notice or threat of trespass violation. Applicant shall have the right to appeal any occupancy violation summons as per the Laws of the State of New Jersey. Mr. Porro believes this is the law and should be included in the resolution so that there is no misunderstanding and appease his client.
- Any other condition reasonably set by the Oakland Board of Adjustment.
- The Board Resolution shall be filed with the Court Clerk as a property title document.

This concludes Mr. Porro's closing statement. He expressed that it is always a difficult decision for boards to make when zoning by variance. This decision should be made by the master plan initiated by the town.

Mrs. Gonchar indicated that they have not agreed yet to all conditions.

Mrs. Gonchar gave her closing statement. She explained when seeking a use variance pursuant to N.J.S.A. 40:55D-70d, it is required to demonstrate that the proposed use promotes public welfare because the site is particularly suited to the proposed use. In addition, it is needed to demonstrate the negative criteria; that the relief can be granted without substantial detriment to the public good and that the granting of the variance will not substantially impair the intent and purpose of the zone plan and the zoning ordinance.

Where an application presents a “d” variance with regard to an inherently beneficial use, the standard is different. The positive criteria, “advancing the public welfare” does not require demonstration of particular site suitability because part of what makes the use inherently beneficial is its enhancement of the public welfare.

She cited *Sica v Board of Adjustment of the Township of Wall, NJ* (1992) that the court held negative criteria, with regard to “d(1)” variances, and was not applicable to use variances for inherently beneficial uses finding that this was meant to be applicable only to commercial (or non-inherently beneficial) uses.

Mrs. Gonchar explained that Sica court relied upon the concurring opinion of Justice Hall in the *Roman Catholic Dioceses of Newark v. Borough Ho-Ho-Kus*, which explained why imposition of reasonable restrictions was a better outcome than rejection of needed regional facilities such as the church at issue in that case stating:

Regional or, for that matter, local institutions generally recognized as serving the public welfare are too important to be prevented from locating on available, appropriate sites, subject to reasonable qualifications and safeguards, by the imposition of exclusionary or unnecessarily onerous municipal legislation enacted for the sake of preserving the established or proposed character of a community or some portion of it . . . or to further some other equally indefensible parochial interest. And, of course, if one municipality can so act, all can, with the result that needed and desirable institutions end up with no suitable place to locate. Id. at 223.

The Sica court relied upon Justice Hall’s reasoning and went on to evaluate whether, even in the context of inherently beneficial uses, the relationship between the resulting benefits and burdens of the granting of a variance should be considered. The New Jersey Supreme Court found such a balancing implicit and also found that any detriment resulting from the inherently beneficial use is not adequate to justify denial of a use variance, only where the detriment is substantial. Most of the cases relied upon in Sica, and presented circumstances where inherently beneficial uses, institutional in nature, were proposed to be located in residential zones. Therefore, the court went through the following analysis:

- First the Board should identify the public interest at stake since some uses are more compelling than others;
- The Board should identify the potential detrimental effects that may ensue from the grant of the variance.

Among those potential detriments that the court looked at were increase in traffic or “some tendency to impair residential character, utility or value which will usually attend any non-residential use in a residential zone.” The Board may then attempt to reduce or minimize the potential detrimental effect by imposing reasonable conditions on the use and, therefore, the weight accorded the adverse effect should be reduced by the anticipated effect of those conditions.

The Board should weigh the positive and negative criteria and determine whether on balance the grant of the variance would cause a substantial detriment to the public good. This balancing, while properly making it more difficult for municipalities to exclude inherently beneficial uses, permits such exclusion when the negative impact of the use is significant. It also preserves the right of a municipality to impose appropriate conditions upon such uses.

Mrs. Gonchar explained a Sica case involving a head trauma center. It was denied by the municipality and the court found the use met a legitimate public need, it would be an appropriate location and that the facility should be available to New Jersey residents. Importantly to know, this is a non-residential use in a residential zone and some of the things they considered are equally implacable with this application and the proofs they made.

In the head trauma center case, reviewed the building setback and design to determine that the building was not intrusive in its location and there would be no traffic problems or any decrease in value to surrounding properties.

The second legislative scheme that must be considered RLUIPA. RLUIPA has been described as the latest of a long-running congressional efforts to accord religious exercise heightened protection from government-imposed burden consistent with Supreme Court precedent. This is an effort to see the free exercise clause of the Constitution effectuated. Section 2-42 U.S.C. §2000cc is divided into two subparts, (a) and (b), which relate to the land use section of the statute. The first, (a), is the substantial burdens provision, and (b) is the discrimination and exclusions provision. Sub (a) reads as follows:

(1) General Rule – No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

Mrs. Gonchar explained that there is federal case law about the maintenance of property tax revenue is a potentially pre-textual bases for decision making that appears to be a

specific target of RLUIPA. If a city's interest in maintaining property tax levels constitute a compelling government interest, the most significant provision of RLUIPA would be largely moot as the decision to deny a religious assembly group of land could almost always be justified on that basis, *Elsinor Christian Center v. City of Elsinor, California*, 2003. She explained that items raised in this case pointed to justifiable compelling interests, in fact, there is federal case law that says that is not the case.

She shared another RLUIPA decision involving *Grace Church of North County v. City of San Diego* with United States District Court, Southern District of California on November 26, 2008. In this case defendants contend that local government had a compelling interest in forcing its zoning and planning regulations, particularly when it is enforcing those regulations with the purpose of protecting industrial land for industrial use. The reasons for denial was Grace Church's request for a ten year conditional use permit (CUP). First the court concludes that preservation and industrial land for industrial uses does not constitute a compelling interest according to RLUIPA even if preservation and industrial lands constituted as important interest. The government bears the burden to show a compelling interest in imposing burden on religious exercise is not a compelling interest in general.

(2) Scope of Application – This section applies in any case in which

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Mrs. Gonchar informed the Board that their use variance would fall within being an individualized assessment of the application of the regulation on a particular parcel of land. The alternative means for finding a violation under RLUIPA which can be found absent the substantial burden.

(b) discrimination and exclusion

(1) Equal Terms – No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a non-religious assembly or institution.

(2) Non-Discrimination – No government shall impose or implement a land use regulation that discriminates against assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and Limits – No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies

from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

It should be noted that under the Equal Terms provision, a plaintiff need not demonstrate that the unequal treatment imposed a “substantial burden” on its exercise of religion comparable to the requirement under the Substantial Burdens provision.

When examining the proofs necessary to establish a violation of the Equal Terms provision in the Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3rd Cir. 2007), the Court stated:

When a government permits secular exemptions to an otherwise generally applicable government regulation, the free exercise clause requires that the government accord equal treatment to religion-based claims for exemption that would have a similar impact on the protected interests. (at 265).

Mrs. Gonchar informed the Board that with their circumstance, a religious institution in an industrial zone has to be evaluated in the same manner, for example, a tax exempt school in the same zone that has no religious affiliation should be evaluated.

Thus the District Court was correct in holding that the relevant analysis under the Equal Terms provision of RLUIPA must take into account the challenged regulation’s objectives: a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose. There is no need, however, for the religious institution to show that there exists a secular comparator that performs the same functions.

The testimony of Mr. Sethi provided the Board with information regarding the Sikh religion (the 5th largest religion in the world) and as we have heard a number of times in the course of the interpretation that preceded the use variance, Mr. Sethi’s first introduction and more recently his second discussion (followed by the reiteration of that testimony as a result of the problem with the tape), the Sikh religion is an independent monotheistic religion.

He has described the desire of this new congregation to be formed as an offshoot of the Glen Rock congregation which has grown rather large and the desire to create a new “modern” congregation which is anticipated to start out with perhaps 70 families drawn from surrounding communities as far as Westchester County in New York, and to grow throughout Bergen county over time, to a few hundred families.

He has also explained some aspects of the religion, particularly as they relate to the physical requirements of a Sikh temple. As he discussed, when providing information regarding the history of this ancient religion, the religion was led by its high priests, called Gurus, and the teachings of those Gurus are now maintained in the Holy Book which is viewed as the

personification of those teachers and their teachings and treated with the reverence that would be given to a priest or the equivalent, perhaps of Christ and his disciples, in the Christian religion.

As a result, religious worship is centered on the Book and the teachings of the Book, and the Book is treated with great reverence and its care is the responsibility of the priest or other religiously trained caretaker, literally to care for the Book. There are ceremonies which surround taking the Book out daily and putting it, in essence, to bed at the end of the day. As a result, the priest is resident in the temple in order to allow the proper care of the Book and implementation of the ceremonies necessary to perform them with the deference accorded to the holy Book and to be present to minister to the congregation. The religion is egalitarian and treats men and women the same; it is embracing of other beliefs and faiths, and does not teach that only followers of this faith will find their place in the afterlife. It prohibits alcohol and drugs. It is a family-oriented religion and priests are encouraged to have families.

Services are held Friday night and on Sundays and the services are conducted in a prayer room. The holy Book is in a place of honor at the front of the room, on a raised platform where the priest also sits and the congregants sit cross-legged, generally on the floor, with some chairs for older people or those who are not able to sit cross-legged on the floor and there is little in the way of furniture. There are no pews as one might find in a church or synagogue, and the room is generally an open space that facilitates the prayer service with aisles adequate to allow congregants to move through the room, to go to their space to sit, to go up to the Book to receive blessings and generally move through the space.

Part of the celebration of the prayer service on Fridays and Sundays is a communal vegetarian meal prepared at the temple and served by members of the congregation to each other. The meal will be served in a separate dining room where again there is little furniture and the members sit cross-legged on the floor. There is usually more space between rows to allow for people to serve as was demonstrated on one of the exhibits presented by the architect. The meal takes place after the service as a further engagement in community. Therefore, a second large space is incorporated in the temple, along with a kitchen, required so that the meal can be prepared and the members can move from the prayer room to the dining room after services conclude and they may partake of their meal. Volunteers, also members of the congregation, will clear and clean up the kitchen and prepare it for the next service.

The congregants will come from surrounding communities both in and around Oakland and other communities in the area and Mr. Sethi has identified those communities where they anticipate their congregants will reside. As set forth in the testimony, there is a growing Sikh community and one temple currently serves a large, some might say overly large, congregation in Glen Rock. Members will be drawn from an area encompassing much of north Jersey and from adjoining portions of Westchester County, New York.

To accommodate the practices of the Sikh faith, it is desirable to have adequate space to accommodate the prayer service, the meal, areas of comfort for visiting priests or guest, or

people coming after work who wish to cleanse themselves before they participate in prayer, a separate space where a practice called the “48-hour reading” can take place. As Mr. Sethi explained, this is a continuous reading of the holy book over the course of 48 hours either in celebration, in recognition where a celebrant, a mourner or an honoree can read along with other members of the family or community in 2-hour increments, with the priest or an assistant priest accompanying them, as well as a residence for the priest and priest’s family.

Because of the manner in which the observances and prayers are undertaken, and the anticipated size of the congregation, when Mr. Sethi and the new Board members commenced their efforts to locate a home for their temple, they sought a large existing building with adequate parking because congregants will not likely walk but will drive more substantial distances within a broad region to participate in the services. Therefore, adequate parking and adequate square footage was necessary to fulfill the needs of the congregation and its practice. As our planner, Mr. Ochab, discussed during his testimony, houses of worship have changed in character and size in recent years and this need for larger building space and substantial parking is not unique to the Sikh faith or Sikh temples. Where a church or synagogue traditionally would have been located in a residential area, it tended to be smaller in size and serve a more local congregation drawn largely from the neighborhood. Because of this, parking was not a critical issue, nor was the size of the parcel, the consequent traffic or the other impacts that now characterize the relationship between houses of worship and surrounding residential neighborhoods.

The property is located in the IP Industrial Park zone. The Board will recall that we presented an application for an interpretation of Section 59-49 and related provisions because we believe that the language of that section makes it clear that “houses of worship” with “accessory buildings” are permitted uses in all zones and are permitted conditional uses in certain of the less intense or low density residential uses. The Board has decided otherwise and therefore determined that the temple is not a permitted use in this zone. We have reserved our rights with regard to the Board’s decision in that regard and believe that the proofs submitted in support of the use variance actually support our position on the interpretation. (Note the strange language regarding permitted uses in the IP zone which is found in the section dealing with prohibited uses in the IP zone.)

The property is a 3-acre parcel which, coincidentally, is the acreage required for a house of worship where it is a permitted conditional use, and it is improved with approximately 20,000 square feet building, approximately 15,000 on one floor and a partial second story of 5,000 square feet. There are over 100 parking spaces existing and the exterior of the building, which has previously been used most recently for predominantly office use is proposed to remain as it currently exists with the exception of the addition of a vestibule which will be located, as we described, in the “L” portion of the building with the entrance door oriented towards the rear of the property.

The property adjoins Franklin Lakes and it adjoins a single-family residential zone in that community, which is an existing condition. There is a (slightly under) 75-foot buffer which separates the zone in Oakland Borough from the residential zone in Franklin Lakes and as the Board may recall, we propose no change to that buffer with the exception of a slight encroachment where a few light stations are proposed to be set at the edge of the parking lot pavement, slightly into the buffer to allow the lighting to be provided, angled down, into the applicant's lot and away from that residential zone or other neighbors. However, this is the only thing the applicant has proposed to change, they have heard conditions and recommendations this evening that additional landscaping or plantings placed in the buffer which the applicant will consider.

The property is surrounded on one side by a building used, it appears, predominately for office-type uses by a utility company and owned by Bauer Drive Associates, and on the other side an industrial use that was described to you in detail by Mr. Mulhern.

Across the street is a school for special needs children which, at its capacity, will serve about 100 children each of whom will have a teacher assigned to them for a total of about 200+ daily occupants. That approval, by the Board's interpretation of its Ordinance also required a use variance.

The school includes parking as well as an outdoor playground and obtained approvals 2015 for reconstruction of its septic system. According to the Board's minutes of hearings of that application, that approved use will contribute 35-40 small vans in the morning peak hours along with additional traffic generated by teachers and other staff coming to the school during the a.m. peak hours. A review of the Borough records indicates, and as we testified, numerous use variances already have been granted in this industrial park in this zone. The school across the street that was approved in 2014, which approval was amended in the summer of 2015, was the third school to be approved in the park. While no use variance was required for two day care centers, use variances were granted for a physical therapy facility, a dance facility, a gymnastics or sports training facility, that we are aware of.

It has been pointed out (by objecting neighbors who did not object to the school across the street that was in at least as close proximity) that the house of worship will be a tax exempt. So is the school across the street or it will be, according to its website, and at least one of the other schools in the park is also tax exempt. The tax exempt nature of the use is not a legitimate consideration and the revenue generated by a use is not a relevant zoning/planning consideration. This is no different than case law which prohibits limiting the number of children in a development by restricting the number of bedrooms to keep school costs down and that has been ruled impermissible. Other federal and state cases have found the revenue generating impact to be irrelevant or impermissible – lest most inherently beneficial uses could be prohibited on that basis. It would under mind the purpose of RLUIPA if a Board's desire to generate income from its property would be the basis to overrule the import of RLUIPA because

that would be viewed as a compelling interest. The courts have said that is not an appropriate evaluation. It would be equally abhorrent to the law to decide, arbitrarily, that a particular house of worship is “the tipping point” regarding the number of permissible tax exempt properties in a town, after a number of equally tax exempt non-religious uses have been approved.

The Board has heard the testimony of the applicant’s engineer, Calisto Bertin, who described the current condition of the building, the adequacy of the utilities necessary to serve the building. He also described the likely needed upgrade to the existing septic system, in large part due to the inclusion of the kitchen to serve the congregation’s meals. We have advised the Board that discussions with the septic expert retained by the applicant indicate that enlargement or reconstruction of the septic may not be necessary but obviously until we have our DEP approval and we are not making representations in that regard but advising after Mr. Bertin testified, further information by their hired expert raised questions to the need of the expansion. Certainly any approval the Board granted, we would expect that this would be a condition of DEP approval of the septic as well as any local approvals that are required from the Board of Health and as indicated, they would not use the kitchen on the premises until that issue was resolved. As indicated, the applicant has agreed to have meals catered until whatever work was determined and undertaken by DEP. Along with that condition, they would provide phasing on the building of the septic.

Mr. Bertin also discussed the parking at the site, the manner in which it was calculated, which has been confirmed by the Board’s own expert that the parking does meet the requirements. He has also addressed the proposed fence, installation of lighting, and the enclosure of the dumpster which the applicant will provide on the proposed plans.

We presented the testimony of Jasvinder Arjani, an expert in architecture, who described the layout of the building, proposed changes to the interior necessary to provide adequate area for the different aspects of prayer and meals and other services provided to the congregation. He identified where the residence will be located within the building, and what will be located on the second floor. Mrs. Gonchar informed the Board that Mr. Ochab misspoke referring to the 12,000 square foot apartment and expressed that it is not as elaborate as that. The existing space on the second floor is currently designated for storage, since we have no specific use for it at the moment. There was a full bathroom proposed and have represented on the record that contingent to approval, the shower will be removed leaving a half bath. It was not the applicant’s intention to use the additional space as a residence and the bathroom was proposed as a convenience to avoid having to do additional construction at a future date in conjunction with a study or an office.

We have also presented the testimony of our traffic consultant, Joe Staiger, who made clear that the proposed use, with its services on Friday night and Sunday and with only light mid-week use would have significantly less of an impact on the volume of traffic in the park and at the

intersection with Long Hill than the previous use of the building or the other permitted uses in the zone which are likely to be coincident with traffic generated by the other uses in the park. That is Monday-Friday, during regular business hours, with peak travel time in the AM between 7 and 9, and the PM between 4 and 6. In fact, Mr. Staiger's testimony was to the effect that the traffic that would be generated by the temple would be generated at times of lowest traffic use in the park. Therefore, there will be no negative impact on traffic if the requested variance is granted. You will recall that Mr. Staiger testified that he reviewed the traffic report of the school across the street that was granted a use variance by this Board in 2014 and used some of that information in preparing his testimony. That report indicated a definite impact on a.m. peak hour traffic and yet, the use variance for that use was granted without objection from the current objectors.

We had testimony from an appraiser, William Steinhart, MAI, who indicated that this is a somewhat unusual circumstance from a valuation perspective. He indicated that he would more likely be called upon to evaluate the impact of a use variance where the proposed use is permitted in a "lower" zoned area (industrial) is proposed in a higher use area, such a residential zone, where there is a possibility of a diminution in the value of surrounding uses. In fact that was the circumstance that the Sica Court envisioned. Here, he indicated that it would be difficult to establish any likely diminution in value to surrounding properties, not only because the proposed house of worship is a higher use, vis a vie, industrial uses if you look at the spectrum of uses as residential being the upper end and industrial being at the lower end, but also because with the absence of any visible change to the exterior of the existing building or the layout of the site, other than the face of the inconspicuous sign at the front of the building, someone driving along Bauer Drive in the park would not be able to discern that there was anything unique or different about this building, particularly during the work week when you would normally expect to see the greatest activity – the time when the temple would have the lowest activity. He testified that there would be almost no way to know that the building was being used for other than a use permitted in the zone. Based upon this and his other testimony, he indicated that there was no basis to suggest that there would be any negative impact on the value of surrounding properties, or that it would make other space in the park less desirable for industrial uses. Mr. Steinhart provided evidence regarding the relatively high levels of vacancies for industrial uses in the county and the region, circumstances that appear to be reflected in the park as commented upon by Ms. Bogart in her testimony before this Board in connection with the school and as noted by the Board in connection with applications for other use variance in the park over the past 4 or 5 years.

The expert planner, Mr. Ochab, testified that the Sikh temple is a recognized house of worship entitled to be treated as an inherently beneficial use. He indicated that this industrial park is an appropriate location for a house of worship and that similar locations are becoming more common as sites for such uses. He noted that where houses of worship historically were more neighborhood oriented and it was not usual for people to walk to their local church or

synagogue, currently there is movement away from the smaller, traditional local houses of worship and houses of worship are more regional in nature, often larger in physical size and in terms of the congregations that they serve, people are more likely to travel a greater distance to attend modern houses of worship, and consequently, such facilities require more parking for larger facilities. This trend results in traffic and parking demands that are more likely to create a conflict with, and have a negative impact upon, the residential zones where such uses traditionally were permitted. He indicated that there is a trend for houses of worship to move into commercial or industrial areas and Mr. Ochab identified three or four such locations, all in Bergen County, where houses of worship were located in industrial parks or zones.

We ask that the Board take judicial notice that in fact there are other locations where houses of worship are located in industrial zones. For anybody that has travelled along the Garden State Parkway near exit 124 northbound, there is a very large evangelical church, the location of which was confirmed by Mr. Larson, the planner for Bauer Drive Associates.

Mr. Ochab considered the testimony of Mr. Sethi, the architect, the engineer and the traffic consultant and determined that there would be no negative impact in terms of traffic because the proposed use would generate less traffic and less impactful traffic, meaning in terms of the peak hours, than a permitted use using the same space. Because this is an existing building, at some point the building would be occupied with some use and that use, if permitted, would tend to contribute traffic during the AM and/or PM peak hours in and around the park. Such a use would likely put additional traffic on the development and surrounding roads which would compete with any truck traffic in the park and with the buses from the numerous schools as well as drop off and pick up by parents at the schools and daycare centers.

He also indicated that there would be no physical negative impacts - no pollution, no odors, no dust or other particulates and no noise impacts. This is particularly true since the applicant has represented (and agreed as a condition in its settlement with Bauer Drive Associates) that there would be no outside religious ceremonies or parades taking place.

The testimony established that there would be no impacts that would negatively affect neighboring properties; in the adjacent residential zone, the adjoining industrial uses or the school across the street. He also testified that there is arguably a negative impact from having substantial vacancies in the park, particularly if those vacancies remain for long periods of time. This was also discussed by the appraiser as posing a potential risk to property values. Given the number of non-permitted uses in the park, it would appear that there may be diminishing demand for the permitted uses – a circumstance testified to by the planner who testified for the objector this evening but in support of the school in 2014. The lower demand for these older, industrial spaces, particularly where they are not immediately adjacent to or immediately accessible to highways has been recognized as part of the justification for other use variances previously granted in the park along with the trend towards institutional uses moving into

vacancies in industrial parks such as this. This trend was also noted in the draft Master Plan reexamination report prepared by your planner.

Mr. Ochab testified that given there already has been some change in the character of the industrial park as a result of the Board's previous approval of other institutional uses including schools, and that the grant of this requested variance is not significant enough to have any transcendental effect upon the park or the character of the park.

The examination of other available properties presented by Mr. Porro on behalf of his clients have, if anything, demonstrates that there are no other sites in a very broad region which have the characteristics required by the temple. His witness was not able to identify a single developed site of a size and with the parking required by my client – and not one of the inadequate sites he did identify was in Oakland. There is also something almost arrogant in suggesting that the Sikh temple, with its own particular needs regarding the manner in which this faith practices should be able to contort itself to fit into the physical attributes of other houses of worship so that any vacant church or other house of worship should be adequate or that the Sikhs should make themselves fit into that type of facility, even if it is 1/10th the required size or has no parking. Many of those sites were half an acre or less, had no or minimal parking, were small buildings with inadequate floor area, even the one or two properties that they comprised indicated 5,000 square feet (a quarter of what our site is and a third of our parameters when looking for sites) that 5,000 square feet was on two or three floors or in a basement and therefore inadequate to meet the requirements of this congregation.

The testimony presented establishes that the apartment which will serve as the residence only for the priest and his family as an accessory use as that term is defined in your ordinance and as has been defined in NJ case law. The residence, included as an apartment within the building, is no different from the rectory that one might find in connection with a Christian church. The residence is necessary for the priest to perform his functions and for the free exercise of this faith. In connection with an application she was asked to work on, a mosque in East Brunswick, the only two matters on the agenda that evening was under old business a proposed site plan with variances for construction of a two-story church with a first floor assembly and second floor pastors apartment and the enlargement of the mosque with an apartment for the Eman of the mosque.

Under the ordinance, the term accessory when applied to a building, structure or use means customarily clearly incidental or subordinate to the principal building, structure or use and located on the same lot with such principal building, structure or use. An accessory use flows from the principal use and may be implied even if the ordinance does not specify. Case law recognizes that some things are just accessory and incidental even if the ordinance does not specifically identify it. Here in terms of its use, its relation to the principle use we are not seeking approval for an apartment that can be rented out to third parties, it is not an apartment

proposed to be used by other congregants it is being requested to be used by the priest, the religious caretaker of the holy book and his family. So the possibility of a broader use and not being ancillary or accessory to the house of worship, is not a possibility in condition to that affect, is what the applicant is asking for. We believe it meets the definition of accessory and do not believe that the number of bedrooms alters that in fact at 1,200 square feet compared to a 20,000 square foot building, it is not a second principle but in terms of size it is accessory and ancillary. There is an obvious relation between a principle and accessory use.

The lack of familiarity with this particular religion does not make this accessory use any less accessory than the residence of a catholic priest attached to or on the same lot with a church or cathedral. This is clearly an accessory use normally incidental to the principal house of worship use. It should be noted that the case law in NJ most often analyzes such uses as day care centers, shelter for the homeless, in determining the scope of accessory uses for houses of worship because the priest or minister's residence is so commonly accepted as to appear a given. The objectors have failed in their efforts to raise questions regarding the need for the priest's residence. They have not presented any credible testimony, nor could they, to dispute the role of the priest as it relates to the care of the holy Book. The objector does not get to determine how people practice their faith and certainly the Board would not, nor could it, base a judgment upon what is necessary for a congregation to practice their faith.

Mrs. Gonchar expressed that all the testimony she identified in the first prong makes it clear that the grant of the variance will not result in any substantial detriment to the public good. In fact, we have demonstrated that there will be no detriment at all. The proposed use will generate less traffic at peak hours, will not create any noise or physical impacts and our appraiser testified that there will not be a diminution on property values in the park, including the adjoining properties. The land use law does not allow us to ignore uses in an adjoining municipality which needs to be taken into account and recognize that this property is surrounded by residential uses.

The concerns of the neighboring property regarding the value was not substantiated by any expert testimony to support their fears. Mrs. Gonchar expressed that it was unfortunate that some of the objectors play on prejudices concerning the events taking place at another Sikh temple creating an unflattering picture of the faith.

Second prong of the negative criteria is reconciling the proposed use with the intent and purpose of the ordinance and the master plan. As has been noted by Mr. Ochab, zoning is most often reactive rather than proactive. Therefore, it is not uncommon for trends to be identifiable long before zoning ordinances are updated to reflect these trends and changes. The record notes that the current zoning of the IP Park dates back to the late 1970's and the section of the ordinance dealing with houses of worship show amendments in the late 1980's. The phenomenon regarding the change in the nature of churches, from smaller neighborhood

churches to larger, regional facilities is a trend that has gained momentum more recently and it is not surprising that this and other towns have not caught up.

Mrs. Gonchar requested the Board cite footnote 11 in Medici that she previously referred to. This case in the context to commercial use in a “d-1” variances requires enhanced proof for the reconciling of the ordinance with the proposed use. However, the supreme courts said where there are uses, there are exceptions to the case which can be proved. If a use is not permitted in a zone, this does not mean it should be excluded if it cannot be reconciled it with the ordinance or the master plan. But the courts noted, sometimes there are uses that did not exist when the zoning was adopted or the governing body were not mindful of this when they adopted the ordinance. She suggested that this may be the same case with this application. It may have made sense back in the 1970’s not to permit a small house of worship in the industrial zone and keep them in the residential zones because it was meant to serve a small neighborhood.

RLUIPA cases occurring now with resistance at the local level because of the impacts of these houses of worship on residential neighborhoods causing traffic and parking problems on neighboring homes. That is why this location, as seen throughout New Jersey, is better suited for this new version of houses of worship which tend to be larger. But now there are charter schools and specialized schools which a few received approval by the Board to locate in the industrial zone because of space and parking requirement and is equally appropriate that the Board grant this application for a “d-1” variance. Furthermore, there is no justification to distinguish between these two uses both religious and educational tax exempt sites would not live up to RLUIPA scrutiny.

This has been identified as an inherently beneficial use and the Board planner has agreed of high value. In terms of negative impact, she would like to address suggestions given by the Board planner. She did not agree that all the items listed in their conditions would be addressed or necessarily cause negative impacts as the statute requires must be identified to put into the balance. The applicant has agreed to a number of the conditions which they believe mitigate the concerns of their neighbors. Although, they do not agree that these conditions would create substantial negative impacts. It would be suggested that this is the appropriate use for the location and it is necessary to have the residence as part of this application. There may be Sikh temples that do not have what its religion requires but this does not mean you can exclude that or put a burden on the practice of religion by making that kind of judgment here.

As per the testimony of Ms. Bogart concerning her exhibit showing all locations where houses of worship are permitted, Ms. Gonchar expressed that more often these locations have a negative impact. Also, with concerns for income generation, no matter where the house of worship goes, it would still be tax exempt.

She referenced one of the conditions the Board planner suggested with regard to the location of the driveway. There was no expert testimony to substantiate that request. The layout of the

existing driveway that was either approved by this Board or the Planning Board had the benefit of expert testimony before making a decision where the driveway should go. She sees no difference with the vehicles leaving the house of worship by way of this driveway from the vehicles leaving that office space previously occupied. In addition, there was no testimony of accidents or incidents and Mrs. Gonchar believes this does not justify the relocation of a driveway. The neighboring property can apply to the Board and relocate their driveway if this is an issue.

Mrs. Gonchar expressed that her client would respect conditions imposed by the Board and has testified to the occupancy limit and therefore imposing more limits would be inappropriate. She continued that they would look into the additional buffering, installation of a masonry wall being requested but this is the first time they are hearing about the wall so they will need to discuss this. With regards to over-sized vehicles, they never testified to that and noted this would be singling out the house of worship when there are three schools with students being bused in the industrial park. In addition, they would examine the request removing the sidewalk in front of their building. She expressed appreciation of Steve Lydon's acknowledgement that this is an accessory use and have discussed in full detail the commercial kitchen which will be guided by DEP and municipality regulations. They have testified to parking limits and would not use another lot unless they return back to the Board for their approval.

Mrs. Gonchar requested that the Board grant approval to her client. She suggests there have been no proofs to support unfounded fears and believes they have met their burden of proof that under the MLUL as well as RLUIPA with the circumstances here in view of the uses in the industrial park, the evolution of the park and the acknowledgment that this is an inherently beneficial use which the applicant has been able to substantiate that there would be no negative impact and this application should be approved with the priest's apartment.

NEW BUSINESS:

None

OLD BUSINESS:

None

MEETING ADJOURNED:

Motioned by Mr. Schneeweiss and seconded by Mrs. Steele, to adjourn the meeting concluding at 11:30 p.m. was voted unanimously by the Board.

Respectfully submitted by,

Kathlyn Gurney, Board Secretary

*Next meeting is October 4, 2016 beginning at 7:00 p.m.