

SPECIAL MEETING

Lebanon Township Planning Board
Municipal Bldg 530 West Hill Road Glen Gardner, N.J.

July 23, 2012

The 861st Meeting of the Lebanon Township Planning Board was called to order at 7:05 p.m. by Chairman Gary MacQueen. Present: Mr. Milkowski, Mr. Schmidt, Ms. Bleck, 1st Alternate Laul, 2nd Alternate Skidmore, Attorney Gallina, Planner Bolan and Engineer Risse. **Excused:** Mr. Rich, Mr. Gerlich, Mr. Piasecki, Mr. Weiler, and Mr. Wunder.

In compliance with the "Open Public Meetings Act" notice is hereby given that the Lebanon Township Planning Board will hold a Special Meeting at the Woodglen School (Performing Arts Room) on Monday July 23, 2012 at 7:00 p.m. to hear the continuation of a Public Hearing on the Gen Psych Application. Notice of this meeting was published in the Hunterdon Review on July 11, 2012 and copies of the agenda were faxed to the Hunterdon Review, Hunterdon County Democrat, Express Times, Courier News, Star Ledger and posted on the bulletin board in the Municipal Building on July 17, 2012.

Chairman MacQueen asked for a moment of silence for those who lost their lives in Aurora, Colorado.

ANNOUCEMENT:

The Planning Board will meet on Tuesday July 31, 2012 at 7:00 at the Woodglen School to hear the continuation of the application on Gen Psych.

FYI: Letter to Highland Council from Planner Bolan re: Wastewater Management Plan

Planner Bolan said they just needed a response from the Township prior to submitting it to the D.E.P. The Highlands Council has been working on these plans for the Highland Communities.

UNFINISHED BUSINESS:

Gen Psych, P.C.
1065 Highway 22 West
Suite 3D
Bridgewater, N.J. 08807

Block #43 Lot #1.01
Route 513 & Trimmer Road I5

CONTINUATION OF A PUBLIC HEARING

Conditional Use/Site Plan/Variance

Chairman MacQueen said at the last meeting we finished with Planner Madden being questioned by the Board and our Professionals. Tonight will be the applicant's Attorney who will have the opportunity to asked questions of the testimony given.

Attorney Tubman asked Planner Madden at the last meeting if he identified two primary sources the NAICS Code and the Moskowitz & Lindbloom Survey. Attorney Tubman had the following items were marked into evidence: **A23-A33**. During the questioning of Planner Madden, Attorney Tubman referred to each exhibit starting with **A23**-North American Industry Classification System dated 2007. Attorney Tubman said at the last hearing Planner Madden had referred to the NAICS. Planner Madden said that is correct. Attorney Tubman noted that it used to be called the Standard Industrial Code and was asked by Planner Bolan what the purpose of the Industry Classification System. Attorney Tubman said she has an excerpt from the NAICS page marked as exhibit A23 from 2007 and it has not been updated since. On page marked 99 there is a text that is captioned frequently as questions about Economic Classification and at the last meeting Planner Bolan asked the purpose of the classification system. Attorney Tubman read the excerpt. Attorney Caldwell objected. Attorney Tubman informed Attorney Gallina there is a follow up question. Attorney Tubman referred to the next page 26 and asked Planner Madden what the caption is on the table. Planner Madden said it says 2007 NAICS United States Structure. Attorney Tubman continued with her questions of Planner Madden and asked about Sector 62. Planner Madden said Health Care & Social Assistant. Attorney Tubman then referred to the page 9 contents and asked questions regarding the information on that page. Attorney Tubman then asked Planner Madden to go to page 811 and then to 826 in sub-sector 622 and asked Planner Madden about the subsections and went through each one reading the definitions.

Attorney Tubman referred to **A24**-Latest Illustrated Book of Development Definitions, newest expanded additions by Harvey Moskowitz & Carl Lindbloom. When Attorney Tubman referred to a section in book, Attorney Caldwell objected to what Attorney Tubman was referring too. Attorney Tubman stated she had a question for Planner Madden and asked him to go to page 194 where hospitals are defined and read the definitions. Attorney Tubman questioned him on those definitions. Attorney Tubman referred to **A25**-Lebanon Township Ordinance Section 400-4 Definitions. Attorney Tubman had Planner Madden read the definition of Institutional & Public Uses. Next was **A26**-Latest Illustrated Book of Development Definitions dated 2004 by Harvey Moskowitz & Carl Lindbloom. Attorney Tubman referred to page Xii in the Introduction to the book and asked Planner Madden to read it into the record. Attorney Tubman asked if this text was just for New Jersey or was it a general planning document for the whole country. Planner Madden said it is intended as a guide for the whole country. Attorney Tubman asked if he had consulted with Attorney Caldwell and referred to enabling acts of court decisions to formulate his opinion as to whether a residential substance abuse treatment facility is an

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institutional use. Attorney Caldwell objected to the question and instructed Planner Madden not to answer. Attorney Tubman said she didn't ask what was discussed but did he discuss it. Attorney Caldwell said it is the same thing. Attorney Tubman moved to her next question, referring to the State Enabling Acts and Court Decisions. Attorney Tubman referred to **A27**-N.J. Statutes, 2012 Compact Edition Statutes Titled 18A-29. referring to the first page of the Statute, N.J. Statute 26:2G 37 and Chapter 2H and asked Planner Madden for the name of this chapter. Planner Madden said "Health Care Facilities, Health Care Facilities Planning Act". Attorney Tubman noted it is N.J.S.A. 26H-2 Attorney Tubman referred to **A28**-NJ Statutes 2011 Compact Edition Residential Health Care Facilities Titles 30-39. Attorney Tubman referred to Subtitle 7 Private Institutions and to Sub-Chapter 11A-1 captioned "Residential Health Care Facilities". Planner Madden was asked to read the definition into the record. Attorney Tubman referred to **A29**-NJ Administrative Code Title 8 and asked Planner Madden to read the section under G. Then referred to Chapter 43G "Hospital Licensing". Attorney Tubman referred to Planner Moskowitz enabling statutes and asked Planner Madden if he knew of the enabling statutes for inclusion, exclusion or the definition of residential substance abuse treatment facilities. Planner Madden said no.

Attorney Tubman referred to **A30** a case entitled "Board of Adjustment of the City of Orange which is entitled Scerbo vs Board of Adjustment of City of Orange. It is 121N.J. Super .378. Attorney Tubman asked Planner Madden to go to page 384 and read the definition. Attorney Caldwell objected for lack of relevance. Attorney Gallina said Attorney Tubman is only referring to a Superior Court case that appears to have ruled on a similar issue and the question is proper. Planner Madden referred to "Nonprofit Institutions" and was asked to read the definition. Attorney Tubman asked if that ordinance was more restrictive than the adopted Lebanon Township Ordinance and does it allow for profit institutions. Planner Madden said no because it is limited to non-profit. Attorney Tubman referred to the court's dictum on page 4. Attorney Caldwell objected and Attorney Gallina noted Attorney Tubman was referring to a legal opinion. Attorney Caldwell said Attorney Tubman was referring to a "dictum" which is nothing more than a musing of a particular judge or group of judges as to what might be additional thought. Attorney Gallina responded stating the question is proper. Attorney Tubman said it supports the original report and that it calls a "proposed residential narcotic rehabilitation and treatment center" and asked Planner Madden to continue reading from that point. Planner Madden said the proposed residential narcotic rehabilitation and treatment center is a "hospital" and qualifies as an "institutional" use under the terms of the ordinance. Planner Madden went on to say "The parties concede that D.A.R.E. is governed by the provisions of N.J.S.A. 26:2G-21. The statute defines the term "narcotic and drug abuse treatment center" as used in the legislation to mean any establishment, facility or institution, public or private, whether operated for profit or not, which primarily offers or purports to offer, maintain or operate facilities for the residential or outpatient diagnosis, care, treatment or rehabilitation of two or more nonrelated individuals who are patients as defined herein excluding, any hospital or mental hospital otherwise licensed by Title 30 of the revised Statutes.

Attorney Tubman asked Planner Madden if the court concluded that a residential narcotics/residential treatment facility is both a hospital and an institutional use under a more restrictive ordinance than Lebanon Township's. Planner Madden said he didn't know since he hadn't read the content. Attorney Tubman asked Chairman MacQueen if they could take a break so Planner Madden could read the decision by the court. Chairman MacQueen announced that the board will take a recess at this time 7:45 p.m.

When the board reconvened at 7:58 p.m. Attorney Tubman continued with her questioning of Planner Madden. Planner Madden said from reading the document, it supports the contention that this should be a Board of Adjustment case. Attorney Tubman said under the old planning act when applications were bounced from board to board, but the determination was that the use was both a hospital and an institution. Planner Madden said yes that is what it appears. Attorney Tubman referred to next exhibit **A33**. Attorney Caldwell objected since they haven't had the chance to review the exhibit. Attorney Tubman said it was offered for the very limited purpose of Section 7 which is brief. Attorney Tubman referred to her next exhibit **A31**-Lebanon Township definition section for Conditional Uses and referring to Section 400-11A. Attorney Tubman read into the record the definition of Conditional Use and asked Planner Madden if at the last hearing he spoke to the validity of this introduction to the ordinance. Planner Madden said yes. Planner Madden said he provided testimony that indicated this particular use would substantially impair the use and enjoyment of the surrounding properties and substantially impairs the character of the surrounding area and a substantial adverse effect on the surrounding properties. Attorney Tubman said isn't that a D Variance. Attorney Caldwell answered yes and said this is the position that was taken that the application belongs before the Board of Adjustment. Attorney Gallina interjected stating that the question was for Planner Madden. Attorney Tubman concurred.

Attorney Tubman said this was why she introduced A33 as an exhibit. **A33**-case called Lincoln Heights Association vs Township of Cranford Planning Board. Attorney Tubman said this is 314 N.J. Super 366 from a 1998 decision under the current MLUL. In Section 7 it addresses a section of the Township Ordinance which appeared to require a Conditional Use Application to prove negative criteria which the court concludes was invalid. Attorney Tubman continued to question Planner Madden on Exhibit A33. During the questions, Attorney Tubman referred to the application before the board and said is it not the applicant's burden and the burden was emphasized at the last meeting to show this proposed use meets the conditions of the conditional use and solely those conditions. Planner Madden responded and said there is another provision and that is you have to get Site Plan approval. Attorney Tubman said yes but before Site Plan approval, you need to meet lot size, lot coverage, setbacks and the criteria of the Conditional Use

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Standards. Planner Madden said whether or not this meets the institutional use criteria that's why we are here. Attorney Tubman said that is a different issue. Planner Madden said that is one of the issues. Attorney Tubman said institutional and public uses require a minimum lot area of 5 acres, correct. Planner Madden said yes. Attorney Tubman asked Planner Madden if he agreed that we have to meet the conditional use conditions only. Planner Madden said yes very minimal conditions. Attorney Tubman asked Planner Madden if he agreed that the court did not apply and did not require the Board to consider the negative criteria. Planner Madden told Attorney Tubman that she was referring to negative criteria and that he talked about the Site Plan and the appropriateness. Attorney Tubman said that wasn't her question. The question was do you agree that we have to meet the conditional use conditions only. When Planner Madden responded, Attorney Tubman said again that was not her question and stated didn't the court say that the negative criteria are inapplicable for conditional use. Planner Madden said yes. Attorney Tubman said she needed to get two more exhibits marked into evidence.

At this point, Attorney Tubman referred to Exhibit **A34**-Fallone Properties vs Bethlehem Township Planning Board. In this case which was decided by the Appellate Division 2004 which stands for the proposition that a Township and its boards are in the position to interpret their own ordinances. It stands for the proposition that a Planning Board may interpret its own ordinance. Attorney Tubman referred to testimony by Planner Madden which stated "to find an interpretation of the ordinance you first go to the Zoning Officer", Planner Madden said yes. Attorney Tubman asked where that is stated in the MLUL the obligation to go to the Zoning Officer. Planner Madden said he found it in the Lebanon Township Ordinance. Attorney Tubman asked again, where is it in the MLUL that the applicant must go to the Board of Adjustment and cannot go to the Planning Board. Planner Madden said he didn't recall. During the questioning, Attorney Caldwell objected. Attorney Gallina said Attorney Tubman is asking Planner Madden where it states in the MLUL or the Lebanon Township Ordinance that you have to go to the Zoning Officer before going to the board. Chairman MacQueen said he would like to here Planner Madden's response to the question. Planner Madden noted 40:55D-70 "the Board of Adjustment shall have the power to hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance. The discussion on this subject continued. Attorney Tubman then asked if it was the responsibility of the Zoning Officer to examine all applications for permits and that the Zoning Officer is the person who must be approached if there is no underlying site plan or subdivision. Planner Madden said no, that it was his understanding that the Zoning Officer examines all applications. Attorney Tubman asked if it was the obligation of the Zoning Officer to look at an application once it has been filed. Planner Madden's did not respond to Attorney Tubman's question. Attorney Tubman again asked if it was the obligation to go to the Zoning Officer before filing an application. Planner Madden said he didn't know whether or not you are obligation to go to the Zoning Officer first.

At this point Attorney Tubman referred to **A32**-Superior Court of New Jersey Law Division, Ambielli vs Township of Lebanon Planning Board and Gen Psych and referred to the certification by Planner Madden which states "Although in my experience the Planning Board does from time to time need to interpret the provisions of an ordinance and in this particular instance it is my opinion that the Planning Board would be compelled to take extensive testimony at the Board level". Planner Madden said it talks about interpreting the provisions of an ordinance. Attorney Tubman asked "does it not assume that the Planning Board can interpret its ordinances". Attorney Caldwell objected. Attorney Gallina said Attorney Tubman is trying to narrow the language to the Planning Board and clarifying that the Planning Board can interpret an ordinance. Attorney Tubman referenced two components, one is the Planning Board can interpret it's ordinance and second if it is significant there must be testimony before a Planning Board and that is the question for Planner Madden. Attorney Caldwell objected. Chairman MacQueen said he would like to hear the answer. Planner Madden said the Planning Board has from time to time the need to interpret the provisions of an ordinance.

Attorney Tubman referred to her last exhibit **A35**-DePetro vs Township of Wayne Planning Board which is an Appellate Division case that was decided in February 2004. Attorney Tubman said this is a case that the Planning Board very clearly interpreted the ordinance. Attorney Caldwell asked if the board could take another recess in order for Planner Madden to familiarize himself with the case. Chairman MacQueen announced that the board will take a recess at this time 8:45 p.m. When the board reconvened at 9:00 p.m. Attorney Tubman asked questions of Planner Madden of the court case. During the questioning, Attorney Tubman asked Planner Madden if the Planning Board not the Board of Adjustment made a determination that the use was permitted in the zone. Planner Madden said yes. Attorney Tubman asked if there was anything in the MLUL or the Lebanon Township ordinance that takes the power of N.J.S.A. 40:55D-70b to interpret the ordinance and transfer that to the Planning Board from the Board of Adjustment. Planner Madden said no.

Attorney Tubman asked if the Zoning Officer gave an erroneous determination that the use was permitted, does that create jurisdiction in the Planning Board or would the Planning Board's jurisdiction decision be overturned on appeal. Attorney Caldwell objected to the question. Attorney Gallina said the question is permitted. Attorney Tubman continued with her questions of Planner Madden. Attorney Tubman then referred to the court decision regarding the Gen Psych application. Attorney Caldwell said Judge Buchsbaum sent them to the Planning Board denying their order to show cause by saying there was an

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adequate administrative remedy and allowed these proceedings to go forward. Attorney Caldwell said Judge Buchsbaum was wrong and misapplied this case. Attorney Tubman said the court concluded that the powers in a proceeding before a Planning Board to approve a site plan and the objectors did not have the statutory authorization to pursue an interpretation. Attorney Caldwell objected to questions asked by Attorney Tubman. Attorney Gallina said the context of the question was if Planner Madden or one of the objectors sought an interpretation of the ordinance. Attorney Tubman said the objectors are attempting to parse terms giving part of the definition under the NAICS Code or part of the definition under Moskowitz and is so confused, is this a hospital, a residential substance treatment use or does it belong attached to a hospital. Attorney Tubman said they did not seek interpretation by Planning Board who did not feel an interpretation was needed otherwise the applicant would not have been there. Attorney Tubman said the question and portion she is addressing in the DePetro case is that it was upheld by the Appellate Division that if the objectors felt that there was a question of interpretation they should have taken it to the Board of Adjustment. Attorney Gallina said the objectors did go to Superior Court and the court ruled that their application was premature and there was no evidence of irreparable harm.

Chairman MacQueen said what he has gathered is that the objectors could have gone to the Board of Adjustment for an interpretation even though we are here. Attorney Tubman said that is correct. Attorney Tubman said they did not seek an interpretation because they did not believe they needed one. At this time, there was discussion back and forth between, Attorney Gallina, Attorney Tubman and Attorney Caldwell. Attorney Tubman said she has concluded her questioning of Planner Madden. Chairman MacQueen opened the hearing to the public for questions of Planner Madden. The following people asked many questions of Planner Madden: Neil Grossman Vernoy Road, Anthony Casale Boulder Field Road and Lisa Falkenstern Ravine Road. At the conclusion of the public questions, Attorney Caldwell asked to redirect and stated it will take more than 10 minutes and asked since this application is being carried to the July 31st date, said he would like to start his redirect at that time. Planner Madden said he wasn't available for the July 31st date. Chairman MacQueen asked how long will his redirect actually take. Attorney Caldwell said at least 20 minutes or so. Chairman MacQueen asked Attorney Tubman how long her questioning will take. Her response was two minutes.

Attorney Caldwell began his redirect of Planner Madden referencing the NAICS, Section 62, Health Care and Social Assistance and asked Planner Madden if he has brought with him a complete copy of Section 62. Planner Madden said yes at the request of Mr. Skidmore. Planner Madden noted that NAICS is a classification system for establishments which can be defined as single physical location where business is conducted or where services or industrial operations are performed. Planner Madden said these codes and the organizational system they relate to are used by many professionals. Attorney Caldwell asked Planner Madden to read in Section entitled "Sector as a Whole" and asked him to read the two sentences beginning with "The industries in this sector are arranged". Attorney Caldwell then directed him to page 645 and asked him to read from "Titled 623220 – Residential Mental Health and Substance Abuse Facilities" specifically the main section of that description. Planner Madden stated "This industry comprises establishments primarily engaged in providing residential care and treatment for patients with mental health and substance abuse illnesses. These establishments provide room, board, supervision and counseling services. Although medical services may be available at these establishments, they are incidental to the counseling, mental rehabilitation and support services offered and they generally provide a wide range of social services in addition to counseling". Attorney Caldwell referred back to the Lebanon Township Ordinances and asked Planner Madden if there is a definition for a residential treatment facility. Planner Madden said no. Attorney Caldwell then asked if there was a definition for a hospital. Planner Madden said no. Attorney Caldwell then asked if there was a definition for a public or quasi-public use. Planner Madden said he didn't think so.

Attorney Caldwell asked Planner Madden what extent the disparity between the type of use that is being discussed in a case and the use that is being proposed here and the impact does it have in his opinion. Planner Madden said it is irrelevant to this board decision on this application. Attorney Caldwell asked Planner Madden to read what the State Legislature has said the informal review of a concept plan means. Attorney Caldwell then asked Planner Madden to read the definition from MLUL 40:55D-72. Attorney Caldwell went over Appeals to the Board of Adjustment, the definition of MLUL 40:55D-3 Application for Development. Attorney Caldwell then referred to the NJ Register. Planner Madden said it is a publication of administrative rescissions, additions, corrections. Attorney Caldwell referred to Volume 43, Issue 17 issued on September 6, 2011 and asked Planner Madden what the bold print references. Planner Madden said "Licensure of Residential Substance Abuse Disorders Treatment Facilities". Attorney Caldwell asked if there was a statutory authority that is being predicated. Planner Madden said yes and cited N.J.S.A. 26:2BB-5 through 6, 26:2B-7 and in particular 26:2B-14. Planner Madden quoted "Manual of Standards for Licensure of Residential Substance Abuse Treatment Facilities was adopted November 15, 1999 and expired November 15, 2004. Even though the rules expired, the standards and procedures in the former rules have continued to be used and constitute the current requirement and standards for Licensure of Residential Substance Abuse Disorders Treatment Facilities in New Jersey". Attorney Caldwell asked if this is different than a hospital. Planner Madden said yes. Attorney Caldwell directed Planner Madden to page 20 and asked him to read the definition regarding residential substance use disorders and treatment facility or program. Planner Madden said a "Residential Substance Abuse Disorders Treatment Facility or program means a facility or a distinct part a facility that provides care for the treatment of substance use disorders for 24 or more consecutive hours to two or more clients who are not related". The term Residential Substance Abuse Disorders Treatment Facility is a facility that provides Residential Substance

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Abuse Disorders Treatment Services to adolescents, women with dependent children and adult males and/or females. These facilities include half-way houses, extended care facilities, long-term residential facilities and short-term residential facilities which also includes hospital-based and non-hospital based detoxification through a structured recover environment involving professionals clinical services. At the conclusion of Attorney Caldwell's redirect, Chairman MacQueen asked Attorney Tubman if she had questions. Attorney Tubman noted that Planner Madden testified that this facility can be used for any purpose consistent with its certification and asked if he was suggesting that pursuant to this site plan approval the applicant can change the use from that represented to the Board and memorialized in the resolution. Planner Madden said they can do anything that a residential substance abuse facility allows within the confines of the building and site plan. Attorney Tubman asked Planner Madden if he was suggesting that they could hold AA meetings and represent to the Board that there would be no counseling other than for patients. Planner Madden said once you have established there is a conditional use they are free to do all the activities that are defined under what they got the approval for. Attorney Tubman said if the approval is based on representation that there would be this particular use, outpatient use and there would be no more than 13 beds and the activities would be as described in testimony and memorialized in a resolution, then are you saying that the site plan and the conditional use approval is trumped by a State licensure. Planner Madden said it's trumped by a State license if it falls within the conditional use and if the Board agrees with your definition of being a conditional use. Planner Madden also said they can not add to the building, parking lot unless they come back to the Planning Board for a site plan approval. Planner Madden said just because you are going to limit it, then in his opinion it does mean anything. If they can operate within the State definition and they have agreed that they are a hospital then they are allowed to do anything with that residential substance abuse facility, they can do a whole realm of things.

At the conclusion of Attorney Tubman's questions, Attorney Gallina asked if Attorney Tubman plans on bringing back her Planner for the next meeting. Attorney Tubman said that the board's Planner & Engineer would like to see plan revisions since there were a number of details testified to and a number of questions raised by the board's professionals. Attorney Tubman said yes she would be bringing back Planner Slauch for the next meeting. Attorney Caldwell asked if there has been any correspondence from the board's professionals since he has not seen anything recently. Attorney Caldwell said if there is anything new from the board professionals, they would like to opportunity to review it before the next meeting. Attorney Tubman said what was requested was a list of conditions from the board's professionals and thought that Engineer Risse may have a list from what was in the minutes. Engineer Risse said yes. Attorney Tubman said she will fax the list over to Attorney Caldwell's office within the next day or two.

At this time, Chairman MacQueen announced that this hearing will be continued on July 31, 2012 at 7:00 p.m. at the Woodglen School.

PRESENTATION OF BILLS & REPORT:

a. Michael Bolan, PP	\$2,087.40
b. Bayer/Risse, Engr.	\$2,000.00
Total:	\$4,087.40

Motion by Ms. Bleck and seconded by Mr. Skidmore to approve the bills as presented. Unanimously approved.

CORRESPONDENCE:

- a. NJLM Articles on COAH 7/3/12 & 7/9/12
- b. AHPNJ Article on COAH 7/7/2012 & 7/14/12
- c. NJPO Article on COAH 7/16/12
- d. NJPO Newsletter

Being no further business to come before the board, nor comments from the public, motion by Ms. Bleck and seconded by Mr. Skidmore to adjourn the meeting at 10:30 p.m. Unanimously approved.

CHAIRMAN GARY MACQUEEN

GAIL W. GLASHOFF, PLANNING BOARD CLERK