

**TOWN OF BETHLEHEM
BOARD OF APPEALS
October 20, 2004**

A regular meeting of the Board of Appeals, of the Town of Bethlehem, Albany County, New York was held on the above date at the Town Offices, 445 Delaware Avenue, Delmar, New York. Michael Hodom, Chairman, presiding.

PRESENT: Michael Hodom
Robert Wiggand
Marjory O'Brien
Gilbert Brookins
Leonard Micelli

Keith Silliman Assistant Town Attorney
Michael Moore Attorney to the Board

Mark Platel Building Inspector

Chairman Hodom called the meeting to order at 7:30 p.m.

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Good evening Ladies and Gentlemen. This is a regular meeting of the Board of Appeals for the Town of Bethlehem. Welcome to all of you. The first order of business this evening is a public hearing for an appeal under Article XXIII, Board of Appeals, Section 128-99, Appeals, requested by Feura Bethlehem Heights Alliance for property at Old Quarry Road, Feura Bush, New York. The Applicant wishes to appeal a determination of the Building Inspectors decision to allow mining in a Rural District Not Zoned.

CHAIRMAN HODOM: Mr. Platel, would you give us the reason for the hearing, please?

MR. PLATEL: Yes, Mr. Chairman. The applicant is appealing the decision of the Building Inspector that there was a mining operation being conducted on the properties of Peter Frueh prior to August 7, 2003 making the use a permitted use a stipulated in Chapter 128 of the Code of the Town of Bethlehem, Article VI, Permitted Uses, Section 128-23, A (12) (d).

The decision was based on a site visit that was conducted in May of 2004 and invoices that were presented to James Potter, the Town Attorney and Myself on August 12, 2004. As I stated in my letter dated August 12, 2004 after visiting the site and reviewing the invoices I determined that the site has been actively mined prior to the August 7, 2004 date making this a permitted use.

For an official copy of the minutes, please visit the Town Hall, 445 Delaware Avenue, Delmar, NY or call 439-4955.

CHAIRMAN HODOM: Thank you, Mark. Ms. Guastella, would you please read the official call of the meeting?

Notice of Public Hearing. Notice is hereby given that the Board of Appeals of the Town on Bethlehem, Albany County, New York will hold a public hearing on, Wednesday October 20, 2004 at 7:30 p.m. at the Town Offices 445 Delaware Avenue, Delmar, New York to for Appeal under Article XXIII, Board of Appeals, Section 128-99, Appeals of the Code of the Town of Bethlehem for an appeal of the determination of the Building Inspectors decision to mining in a Rural District Not Zoned at premises Old Quarry Road, Feura Bush, New York. Michael C. Hodom, Chairman, Board of Appeals. Attached to this Notice is notarized proof of its publication in the October 13, 2004 edition of the Spotlight, official paper of the Town of Bethlehem. All persons listed in the petition as owning property within 200 feet of the premises in question were notified by mail at least five days prior to this hearing.

CHAIRMAN HODOM: Thank you, Karen. The procedure that we use this evening; we'll hear the Petitioners presentation, and then we'll hear the respondents presentation; we'll entertain any questions or comments from the audience; we'll hear anyone wishing to speak in favor of or anyone desiring to speak in opposition to the petitioner or the Respondent. All comments and questions should be directed to the Board and must be to the issue for the hearing this evening, which is a determination of the building inspectors decision to allow mining in a Rural District Not Zoned. Anyone wishing to speak will be allowed to do so, we just request that you come up, stand or sit close to the black microphone, it's for recording purposes only. Mr. Realbuter will be recording the hearing on his personal recorder. Mr. Gerstman please introduce yourself and your association with the Applicant.

MR. GERSTMAN: Thank you Chairman Hodom. My name is Mark Gerstman; I represent the Feura Bethlehem Heights Alliance in connection with the appeal that is being heard tonight. With me tonight is Cheryl Roberts of law firm of Mark Gerstman, Mr. Paul Rubin from Hydro-Quest and various members of the Feura Bethlehem Heights Alliance who would like to present evidence to the Board tonight. Thank you members of the Board for holding this hearing and giving us an opportunity to present evidence in connection with this appeal. Fundamentally we would like to – we believe we can that not withstanding Mr. Platel's determination. The alleged mining at the site in fact was not – it does not qualify as a pre-existing use to confer status on the operation or the land use sufficient to allow it to continue under section 128-23 of the Town Code.

Tonight we would like to present Mr. Rubin's expert opinion concerning the activities of the mine in the first instance. After that we would like to have members of the community who are most familiar with this mine – I sorry, this property; present their affidavits concerning whether or not any extraction of minerals has taken place on that property and then I would like to summarize our submission to you tonight concerning

the legal aspects of the determination that Mr. Platel has made and the appeal.

I've submitted to the Zoning Board of Appeals copies of letters – of a letter dated October 20, 2004 with exhibits A through L concerning various issues that were raised by Mr. Platel's determination. We have submitted here a copy of our notice of appeal; we've submitted as well Mr. Platel's determination, an affidavit of Susan Morrison and as well as affidavits from many of the residents of the community. We've also submitted as part of the record Mr. Platel's handwritten notes that we believe were taken as a result of a meeting that was held on site on August 12th, 2004. We've also submitted copies of letters to the Town Board concerning the proposed law when it was being considered by the Town Board, which essentially provided some grandfathering to pre-existing land uses in the Rural Not Zoned District and we'll get into that a little bit further. We've also submitted to the Board copies of the receipts, which we obtained as a result of our foil request. We believe those are the receipts that are relied upon by Mr. Platel in making his determination. Exhibit H is Mr. Rubin's expert analysis of the activities on the site and there are several other letters submitted which establish the nature of the activities on the site.

We've also submitted for the record letters from Mr. Moore who I believe has previously served as council to the applicant in this situation and we understand that, for the record he has recused himself from appearing before the Zoning Board of Appeals, but we also understand that he continues to represent the applicant in it's prosecution of it's permit application before DEC. That permit has now been issued by DEC as far as I understand. So before I – like to now ask Mr. Rubin to come forward and present his expert analysis of the activities that have taken place at this site in connection primarily with the receipts that Mr. Platel reviewed in making his determination. Mr. Rubin?

MR. RUBIN: Thank you Mark. My name is Paul Rubin, R-U-B-I-N, and I represent the firm Hydro-Quest. I'm here tonight on behalf of the Feura Bethlehem Heights Alliance and I'm a geologist with 23-years experience with geology, hydrology and also in photo-geometric interpretation, that is looking at aerial photos and assessing what has gone on in different points in time because aerial are solid documentation of what occurred at that point in time that a photograph was taken. So I've used aerial photos in an effort to document what's gone on at the site through time for the years that I was able to obtain aerial photography. Basically what I do is I use an instrument called a mirror-stereoscope and for different years that there are photographs that are available I take a look at two at the same time and using this instrument called a mirror-stereoscope I can look at these images at the same time and the area that I'm examining it sort of pops up in 3-dimension due to something called parallax and then using the stereoscope and very high caliber binoculars I can look at an area that appears even the size of 1-milimeter on a photo and see it in great detail. So what I've done is I obtained different aerial photos that were available through time and analyzed those to see what I could learn about what activities were going on in this particular site.

Before I discuss that I should probably say that I am pretty familiar with the geology of this area. I've been studying the karst geology and the bedrock geology of this

area probably for at least 20-years. Particularly because I'm interested in the karst geology of limestone formation, the caves and things like that so I'm familiar – very familiar with the geology. I've published major papers on the geology of this area. I've taken out geologists on field trips into this area, not quite onto the site itself but in the same ridge, the same geologic setting. So I'm very familiar with what the geology should look like and some of the natures of - - nature of the rock units themselves, which gives me an advantage when looking at the aerial photos and that I can interpret what's there knowing something of the geology from my own experience.

CHAIRMAN HODOM: Could you just explain to us where you obtained the aerial photos from as well?

MR. RUBIN: Through a number of different sources that have been taken through time. Some of them I think come from the US Geological survey. One of the most recent one's, for example, which is not in stereo but the most recent one I used is something I obtained through the New York State geographic information system and that comes through the - - New York State office of cyber security and critical info structure coordination, okay, and this takes a look at the land with a 30-centimeter resolution, extremely high resolution and photo imagery. Some of the other photos have scales that are a little smaller scale but yet with the help of this instrument, the stereoscope and binoculars I'm able to see extreme detail, which you couldn't see with a naked eye otherwise.

So perhaps before I go into my overall conclusions it might be worthwhile if I go through just briefly each year of photography that I looked at and what I see on the photos as it relates specifically to 2-components, one the site itself that's proposed for the mining that 4.6-acre square box on the applicants map and then some of the surrounding lands to see what I can see. I should also say regarding that little square of 4.6-acres that the applicant would like to mine, well I'm pretty familiar with it and having been on that site at different points in time over probably the last 20-years, every once in a while looking at some of the karst geology so I'm pretty familiar with it.

Let me go through some of the photographs and what is visible on them. The first photos that I looked at were from March 16th, 1985 and that was color infrared photography. Basically what I see in that photograph is no disturbance that's evident on any of the Frueh lands there that planned limestone mining site is undisturbed, there's no access road present leading up onto the ridge. There's a large sinkhole that's visible and the tree cover up with the proposed site is – the power line is absent. Basically there's no visible evidence of mining within the 4-point acre limit of mined area.

I should say so we're clear on the understanding that in the foreground off of County Route 2, we have a topsoil coverage geologically over the shale's – black shale's. As you move up slope you get to part of the Helderburg limestone sequence where you have the bedrock limestone so on the lower portions of the applicants site there is no limestone present so you have to go up higher and eventually the applicant has made a road now that's present that does go up into that area and that becomes important and we get into our discussion of the – some of the receipts that report of have sold riprap, okay

riprap is a large block of rock typically limestone in our area. Something that solid can be used perhaps for stream stabilization or road stabilization, something of that order as opposed to limestone which would stay together in a cohesive mass you couldn't, for example use the black shale's that underlie the soils of the lower sloped field because they're brittle. They're what's called friable geologically. They fall apart, they're not capable of staying together and this will be critical in our assessment of the receipts as we go on with this discussion.

So March 16, 1985; no evidence of any mining on the upland site or on the lower area as well; no evidence of any disturbance. Okay that was color infrared photography, I also examined from the same date, 1985, black and white photography and this shows exactly the same thing; no evidence of onsite disturbance either at the proposed mining site or down below. The next set of photos that I had available are dated April 27, 1987. These are color infrared photography photos; again the planned limestone-mining site is undisturbed. There's no access present leading onto the ridge, the power line is absent and again within that 4.6-acre limit of mine area that's proposed, no evidence of mining and no road leading up to it. So there's no way that we could've gotten riprap at that point in time.

The next set of photos that I available to me were dated April 20, 1994. This is color infrared photography. Here again the planned limestone-mining site was undisturbed. There is no access road leading up to site so that you could possibly get large scale riprap, which we see in some of the receipts we'll talk about shortly. We see the broad sinkhole present in the proposed site area, which is part of - - topography and underground drainage system. Again no evidence of mining, however there is some evidence of disturbance down slope of the proposed mining site again on the Freuh property. What we see in the photo is a dark, probably a shale covered road - 2-roads, one that leads to a building and another that leads off to a rectangular disturbed area, which appears black on the aerial photos. Black is a color tone indicative of the underlying black shale's. The applicant has in the photograph - you can see he has removed a certain amount of topsoil such that we can have exposure to the black shale's below. Roughly that rectangular - the exposed black shale measure on the order of about 120-feet by about 40-feet crudely. All right, so that's indicated again by the color tone now all I can say is that it is an area of disturbance. I would also comment that the color tone, the black shale is the same color tone that we see visible on a roadway that leads up to this disturbed rectangular area and similarly to a building that's also on the site. So it's certainly possible because the size of the disturbed area is relatively is relatively small that perhaps the applicants motive was simply to obtain shale to pave his roads, maybe it's unclear. So we do see disturbance and again that's not in the area where this application is applied for.

The next photo years I looked at was 1995 on May 7th and specific again color infrared photography and again the planned limestone-mining site is undisturbed. There's no access road leading onto the ridge, the power is now present and there is no evidence visible of mining within the 4.6-acre limit of mine area. There is some disturbance visible on the photo however. There's a - - adjacent to where the black shale rectangle was

visible in 1994, now the applicant has clearly pushed some of the topsoil that was present over that rectangle area so that there is either no visible shale present there or else very small and so now clearly the applicant has gone to some measures of covering over what disturbed black shale area or was. I can only surmise that perhaps the applicant wished to return the field to cultivation or some sort of agricultural activity. The area that was disturbed at this point in time roughly measured maybe about 130-feet by 120-feet; relatively small area and again it appeared to be disturbed to cover over that small black shale area. So again, whatever the disturbance was for the black shale it's use was limited and apparently then completed.

The last photo that I looked at was not in stereo, but rather the one I mentioned earlier from the New York State office of cyber security and critical infrastructure coordination with the 60-centimeter resolution. That showed that the planned limestone-mining site was still undisturbed at that point in time. No access road was present leading up onto the ridge such that the applicant could possibly by the year 2001 have taken off any limestone riprap, which you would get from the upland part of his property.

MRS. O'BRIEN: What is the date of that photo?

MR. RUBIN: April 2001. So at this point in time there's no visible evidence of mining within the 4.6-acre limit of mine area. So that's the most recent photo that I have that's visible to me, however I have been on the site. I was there on June 15th, the year 2003. The applicant at this time was extending his road upward and reached the mine site and at that date I saw that the applicant had not removed any bedrock but had cleared some trees, moved some soil around; had taken some of the soil and trees and had shoved them into a very large broad sinkhole that was present on the site. But clearly as of June 15, 2003 there was no evidence of any mining within the 4.6-acre proposed mine site. So any claims of material removal for that proposed mine area prior to these dates would be unfounded in terms of limestone material.

Now looking at some of the records I see in particular I want to cite a few of them here. There's one record dated September 29, 2000, there's a record that reports that there was one load of riprap removed from the site on this date. Now remember having just gone through the photographs we know that there was no access road up to that site at this point in time. We have no means to get up to the upper limestone area that one would normally expect to be used for riprap. So basically it's virtually impossible for the applicant to have removed this riprap that we see in this September 29, 2000 invoice. Again, just reiterate if we had shale as proposed riprap that would fall apart; it would be unsuitable for use as riprap. So thus it is likely that an error has been made relative to the source of this material. Similarly another report that we have to review here indicates that 210-tons of riprap were removed from the site on December 9, 2002. Similarly this should be questioned because again the applicant had no means of getting up to the limestone at this state so no access road was present. So it is likely that this riprap from the December 9, 2002 originated elsewhere and this is important because this is part of the supporting documentation that the applicant has given us to show some sort of mining activity from this property.

Let me address another situation. There's another report that has been provided to us dated September 22, 1997. This report indicates that 306-yards of shale were removed from the Frueh property on this date. I don't have aerial photos from this year so I didn't - - I couldn't say that I reviewed photographs, however lets assume that the report is accurate for a moment and that in fact there was 306-yards of shale removed. Well an important component of shale in terms of the mineralogy is shale is made up to a large degree of quartz, okay, a pretty resistant type rock if it's just that so making a reasonable assessment using quartz as a basis, if we look at what's called a specific gravity something like the density of the rock. The specific gravity of quartz is 2.65 grams per cubic centimeter which would equate to about 3.82-tons per cubic yard. So if we just do the multiplication using this reasonable assessment for silica or quartz of 2.65-grams per cubic centimeter then we find that the applicant probably has removed just shy of about 1200-tons of shale on the September 22, 1997 date. This is significant, the reason it's significant if because you are required through DEC, when you're mining in excess of 1000-tons of rock within a 12-month period to have a permit. So I guess we would say that logically it follows that the applicant has performed mining without a permit and also an illegal activity. So this invoice which would then have surpassed the threshold of mining without a permit is now being presented to this Board in a way basically to use it; to grandfather in his mining activities through the use of an illegal activity.

So in conclusion some or all of the material relied upon to assert that Frueh's planned mining activities are part of an ongoing site enterprise require careful scrutiny. Furthermore no material was removed from the proposed mine area prior to at least June 15, 2003. Some of the material reported to have been removed from the site could not have originated from the planned mine site. The Building Inspectors decision that mining occurred prior to August 7, 2003 based on the material relied upon to make this decision should be reversed. Thank you.

CHAIRMAN HODOM: Thank you Mr. Rubin. Is that something that are in these documents?

MR. RUBIN: Exhibit H.

CHAIRMAN HODOM: H, all right. Thank you very much.

MR. BROOKINS: I have a couple of questions.

MR. RUBIN: Sure.

MR. BROOKINS: You didn't take any of the aerial photographs?

MR. RUBIN: No.

MR. BROOKINS: Okay. There were at least two and potentially three mediums, infrared, black and white, and for lack of a better term digital, and some estimates, excuse

me of photo scales that apparently are all over the place. Is there, with your technology, any correction or opportunity for variability's in equipment, photographic equipment; lens type, operator, competence, wind, weather, film speed? How do all of those things factor in?

MR. RUBIN: Okay first the photos are – when site runs are done, whatever area, usually they're done under a very perfect conditions. Ideally no cloud cover, depending what you're looking at you would want if you're looking at the geology for example you wouldn't want to take the photos during the time of maximum vegetation so that you could see the topography without tree, deciduous leaf cover. The planes are flown as level as possible with what's called as little crab and drift, tilting of the plane.

A great effort is made to get these photographs so that they can be used with stereo equipment so you can use that third dimension. That's a great thing about viewing 2-photographs at once is through this factor called parallax it imparts a vertical exaggeration roughly 3-times what's normal so the normal exaggeration as if you were flying looking at it from a plane above which really helps the photo interpretation.

If there's a great depression for a mined area hole or something you can see it much better. Obviously the scale of photo would influence how well you could see the particular feature for example the 1994 photograph that shows that area – big rectangular area of disturbed shale, okay that's very clear. There's actually no problem at all seeing it with my binocular enhanced mirror stereoscope. However if I were to show you the photos that I have right here in an envelope and show you that little area it would appear – you could barely pick it out because it's about 1-milimeter across so you really – it's not the kind of thing you look at with a naked eye. You really need the specialized equipment and it's very useful to have stereo pairs so you can see that resolution very carefully.

MR. BROOKINS: You mentioned that you were on site only once, June of 2003?

MR. RUBIN: I had been there other times in the past dating back 20-years or so.

MR. BROOKINS: Okay. Most recently 2003?

MR. RUBIN: Most recently, June 15th yes.

MR. BROOKINS: And you made some estimates as to the volume, the tonnage based on the specific gravity of quartz based on your interpretation that the shale was heavily quartz...

MR. RUBIN: Rich.

MR. BROOKINS: Rich. Why didn't you simply make or develop a specific gravity for the shale itself?

MR. RUBIN: Well shale isn't a mineral. Specific gravities are given for specific minerals because shale is not a single mineral; it's a composite. Shale's not being pure quartz have a certain amount of smaller size fraction material, silts and clays, which may be quartz rich as well. So because there's so much quartz in it I think the quartz's are reasonable.

MR. BROOKINS: But as the composition of the shale changes it might better be reflected by taking percentages or approximations of the various minerals and the specific gravity of the various minerals; come up with a composite specific gravity and then use that to make a judgment as to the tonnage. Would that make sense?

MR. RUBIN: Absolutely you could do that. You'd have to send it away for very specific mineralogic composition and analysis.

MR. BROOKINS: I understand.

MR. RUBIN: So in the absence of that I think quartz is a very reasonable surrogate.

MR. BROOKINS: You also had, and I would just like to make note on the record as an expert opinion in geology, that expert opinion does not extend to speculating on the motives of the Frueh's in terms of why they did certain kinds of things at what time?

MR. RUBIN: No it doesn't.

MR. BROOKINS: Okay, thank you.

CHAIRMAN HODOM: Are those photo's – are you going to submit them on the record to the Board?

MR. RUBIN: I'll tell you what I'll do, I'll Xerox one of each years photos in color and maybe I'll draw a circle around it so you can look at it but it won't look like much to you because the area in question is so small without the equipment that I use it's virtually impossible to see anything with the exception of one year, that's the most recent year 2001 which we can blow up because that is a digital GIS based photo.

CHAIRMAN HODOM: Okay if you would please. Any other question for Mr. Rubin from the Board?

ATTORNEY SILLIMAN: By when do you think you could submit those photos?

MR. RUBIN: Within a week, but again it won't appear like much to you.

MR. GERSTMAN: We could submit those photographs by next Wednesday.

MR. RUBIN: Sure. I'll give you a color Xerox with a circle with a circle to show you where the site was.

CHAIRMAN HODOM: Are there other identifying data on the photos themselves that would correspond to your comments this evening?

MR. RUBIN: I'm not sure what you mean by that.

CHAIRMAN HODOM: Well photo frames 225 through 112?

MR. RUBIN: Oh, frame numbers yes, yes the frame numbers are on there so for each year I'll give you one frame year. It has a frame number and the year, the date.

CHAIRMAN HODOM: And how is the area identified, the Frueh property?

MR. RUBIN: It's not identified on the photo. You would have to look at the photo with a map to – or be familiar with the area to know exactly that this is the spot you're looking at. I'll put a circle around the general vicinity so you'll know roughly where to look, but you won't see much, it's so small.

CHAIRMAN HODOM: And you'll also submit a map of the Frueh property indicating where each one of these photos were taken, is that what you're suggesting to do?

MR. RUBIN: All of the photos are of the same area; they're just taken at different points in time.

CHAIRMAN HODOM: I guess the reference I'm trying to make is that proof that it is the Frueh property that we're looking at.

MR. RUBIN: You'll see the roads on there.

CHAIRMAN HODOM: Okay, but are they identified, identifiable roads?

MR. RUBIN: Yeah.

CHAIRMAN HODOM: Route numbers and so forth.

MR. RUBIN: We don't show the Route numbers; it's just a photo as if it were...

CHAIRMAN HODOM: Can you reference it back to something that's more specific than just the photo?

MR. RUBIN: Sure, I'll make a copy photo and I'll label that Route 102 so you know where you are.

CHAIRMAN HODOM: Okay. Typically in an aerial photo isn't it identifiable by terrain and landmarks, roads?

MR. RUBIN: You can see everything, you can see all the houses, you can see the fields, you can see the trees, you can see everything.

CHAIRMAN HODOM: Fine.

MR. RUBIN: Would you like to see one? I have them right here.

CHAIRMAN HODOM: Not right now. I would just like to keep it going, we're already in the process.

MR. RUBIN: Okay.

CHAIRMAN HODOM: Any other questions from the Board. Thank you Mr. Rubin.

MR. GERSTMAN: I just want to emphasize if I could in response to Mr. Brookins question concerning the specific gravity and I don't want to - - I certainly want Mr. Rubin to answer the question directly but I believe what he was saying and what I'd like to the record to reflect is that the use of quartz as a surrogate to determine specific gravity and evaluate the tons per cubic yards is a reasonable approach and not having an actual sample and taking the sample and using that sample for further evaluation in June 2003 we wouldn't have anticipated that we would have needed to evaluate cubic ton - a cubic yard versus tons in order to rebut Mr. Freuh's submissions to Mr. Platel. Basically what we have done now is to go back and evaluate the 6-invoices that have been submitted for which Mr. Platel has made notes and for which we have now received copies to identify why they shouldn't and can't be used by Mr. Platel and shouldn't have been used by Mr. Platel and can't be used by this Board to establish that there's a pre-existing mining use. Before I proceed I'd like now to ask Susan Morrison to and the residents in the community to come forward and identify that they have submitted affidavits for the record, that they will attest to the veracity of what they've submitted on those affidavits are submitted as exhibit, I believe exhibit C. Thank you.

MRS. MORRISON: I'm Susan Morrison; I live at 340 Collabeck Road. First I'd like to note paragraph 2 of my affidavit the date states September 3, 2004. That's incorrect; that should be probably on or about August 15, 2004.

CHAIRMAN HODOM: You have one specifically in here?

MRS. MORRISON: Yes, yes.

CHAIRMAN HODOM: Okay.

MS. ROBERTS: It's exhibit F.

CHAIRMAN HODOM: And that correction was again?

MRS. MORRISON: It should be on or about August 15, 2004.

CHAIRMAN HODOM: And that's in paragraph 2?

MRS. MORRISON: Paragraph 2 of my affidavit. Yes sir.

CHAIRMAN HODOM: Thank you. Or paragraph 3?

MRS. MORRISON: No, paragraph 3 appears to be correct.

CHAIRMAN HODOM: Okay.

ATTORNEY SILLIMAN: Could you give me that correction again please?

MRS. MORRISON: Yup, paragraph 2 says on September 3rd, it should be on or about August 15th.

ATTORNEY SILLIMAN: Okay.

MRS. MORRISON: In response to the materials that had been foiled from the Town of Bethlehem, Mr. Miller from the alliance had gone to pick the records up from Mr. Platel and called and said all we got was a sheet of paper with some notations on it and 3- receipts at which point I called Mr. Platel and asked him, you know was there a survey map, you know do you have copies of the invoices, etc. and he did not. He was able to identify some of the areas, one was obviously the logging road or the access road to the mine and one that he brought up was on Collabeck Road he said just up by your house.

Over the last couple of years I'd heard rumors about what had happened with this one section of road that had been narrow so I called the highway superintendent of the Town of New Scotland and I said I'd like to know what the truth is; I'd like to know what happened there and the way he described it and it's in the affidavit is that the Town of New Scotland as a courtesy before they widen a road contact adjoining landowners and one of the adjoining landowners was Mr. Frueh and Mr. Frueh volunteered to give the Town a hand. It's a beneficial situation for everyone and they had indicated to Mr. Platel that that was an area that the Frueh's had mined when in fact it was something that the Town of New Scotland had hired flagmen and staff, etc. to widen the road. When the Town of New Scotland was done widening the road, they were done, there was I believe – well there was topsoil that the Town of New Scotland helped the Frueh's – they delivered it onto your property or something and then there were rocks left over. The Town of New Scotland did not want the rocks so they left them with the Frueh's to do with what they wanted because they have a way of crushing them, breaking them up. There is a letter attached from the highway superintendent that supports that – attached to my affidavit.

CHAIRMAN HODOM: Okay.

MRS. MORRISON: Thank you.

MRS. HALEY: My name is Carol Haley. I've lived in the area for over 34-years and I'd like to say that I have never seen any excavating on the Frueh property as long as I lived here. I signed an affidavit on the 16th I believe in November, 2003 - - handed in to the Board.

CHAIRMAN HODOM: Thank you.

MRS. GALLOGLY: Hi, my name's Toni Gallogly. I live at 207 Old Quarry Road in Feura Bush. I've been there around 7-years and had not seen any mining up on that - on Pete Frueh's property and I signed an affidavit on November the 8, 2003.

CHAIRMAN HODOM: Thank you.

MR. SNYDER: Hi my name is Mike Snyder. I live at 219 Old Quarry Road; I've been there 12-years and never seen any mining going on.

CHAIRMAN HODOM: Thank you Mike.

MRS. DEARSTYNE: Hi my name is Shirley Dearstyne, I live at 235 Old Quarry Road; I've lived there for 60-years - a couple days beyond that and I signed an affidavit to the effect that I've never seen anything going on there on November 8, 190 - - 2003, sorry can't read straight.

CHAIRMAN HODOM: Thank you.

MR MILLER: My name's James Miller. I've lived at 313 Old Quarry Road for a little over 16-years and in that time I did not witness any kind of mining or whatever. The only thing that I ever have witnessed was agricultural pursuits, plowing planting, harvesting, that kind of thing.

CHAIRMAN HODOM: Thank you Mr. Miller.

MR. REALBUTER: Hi, I'm Fred Realbuter with the Audubon Society of New York and I have been with the organization for 5-years and I have also queried all of the employees at the Auto Bond Society of New York from the time that we've been there for the last 14-years and there is no record or no one has any knowledge of any mining going on at the property.

CHAIRMAN HODOM: Where is this Auto Bond Society located?

MR. REALBUTER: Oh, I'm sorry we're located at 46 Rarick Road, just the backside of the property.

CHAIRMAN HODOM: Thank you.

MR. MCDOWEL: My name is Gavin McDowel. I live on 100 Collabeck Road; I've never seen any mine going on; about 40-years there.

CHAIRMAN HODOM: Thank you very much.

MR. GERSTMAN: There are approximately 25-affidavits submitted along with our letter of October 20th, which we've submitted to you tonight which attests to essentially the same set of circumstances that there has not been any mining activity at the site during the period that the residents have lived there and observed activities up and down the roads surrounding this property. Let the record also reflect that I have given a copy of our October 20th letter to Ms. Moreau tonight.

As a result of Judge Benza's decision concerning the uses, which were permitted in the Rural Not Zoned District but the Town Board amended it's Town Zoning Code to allow land uses, which existed on or before August 7, 2003 to continue provided that they could establish that they were existing on or before that date, that they were legally established. As you recall Judge Benza's decision, which was affirmed by the appellate division held that in fact the Rural Not Zoned District prohibited the uses, which were not enumerated in that section. Mining is not an enumerated use and therefore under today's code and under the prior code it is an illegal use. The amendment that the Town Board passed was designed essentially to protect the existing land uses, which had been started under the assumption by the Town and the landowners that those uses were authorized. We understand the need to protect those land uses, which were legitimately established prior to the effective date of the law. As you recall that challenge was to a proposal by Waste Management to construct a facility, which was contended to be not in accordance with the Rural Not Zoned District zone authorization.

Again, the amendment was design for very limited purpose, not to put those legitimate ongoing businesses's in jeopardy as a result of Judge Benza's ruling. However if the activity is demonstrated to be illegal, it is not authorized to receive any of the benefits that the Town Board essentially conferred upon existing uses in the Rural Not Zoned District. It's certainly is not intended to allow business's to either significantly expand their operations or to start uses which are not otherwise permitted and we believe that under the circumstance presented to you and under the evidence you've heard today, what we have for review is a situation where there is not a pre-existing mining operation at that site. That at best there were sporadic incidental activities going on associated with other types of activities like agricultural or logging and that in fact the evidence submitted doesn't in way carry the burden that's required to be shown by the Frueh's that mining was an existing use.

We believe that the Zoning Board of Appeals must look at this in terms of existing land uses, not sporadic activities, which might have been carried out on a site. Even if the extraction records, which were presented to Mr. Platel, are verified, are true, which again we have some concerns with. It's not enough to establish that there's a mine, a pre-existing at that site. Let's take a look at the record upon which Mr. Platel relied in making his determination, and again we submit to you that as an appellate review, as an appellate

entity you're required to look at the record upon which Mr. Platel relied in making his determination. That what we are doing here today is submitting evidence, which challenges the veracity and the liability of that evidence and therefore undermines the determination as not being supported by substantial evidence.

As Mr. Rubin attested the first invoice relied upon by Mr. Platel was May 13, 1994, 42-yards of shale were removed in 94'. According to Mr. Rubin's evaluation, that area was covered up, evidence in - - essentially to abandon any extraction that took place at that time. Again, was it a mine? Was there mining going on at that time with the removal of the 64-yards of clay. It's difficult to say that it was mining, it was a 1-isolated instance of removal of some yards of clay, I'm sorry 42-yards of shale if that is to be believed. The next instance of alleged extraction of natural resources or minerals is in August 30, 1996, 64-yards of clay were allegedly removed. We have no evidence at this point to contest that it wasn't removed, however as a result of the lack of credibility concerning the other submissions that were made to Mr. Platel we believe that the entire upon which Mr. Platel relied is suspect. September 22, 1997, you heard Mr. Rubin attest that essentially based upon his expert calculations, Mr. Platel - - the Frueh's removed greater than 1,000-tons of minerals in 12 consecutive months and that was done without a DEC permit. As a result that activity is an illegal activity and under the law of vested rights and nonconforming use and we believe that those laws should be applied here. The Frueh's should not be able to benefit from allegedly establishing land use based upon an illegal activity. I think it's consistent with well settled zoning law that illegal activities do not confer benefit on those seeking to establish themselves as a pre-existing land use for purchase of either non-conforming or substantially - or vested rights.

We also have heard from Susan Morrison that in connection with materials that were removed, I believe it was December 9, 2002 that that in fact was not material taken from the Frueh property that was proposed to be used for the mine. It was taken in connection with the New Scotland road maintenance project. We submit to you and we believe that that's confirmed by the Frueh's former attorney that activities for removal of essentially like result and removal of mineral resources that are incidental to other activities like constructing a logging road or road maintenance or agricultural activities don't constitute mining. And we refer you to the Department of Environmental Conservation regulations and statues for guidance as to - as to that issue.

The Town itself, the Town code itself does not define mining, does not define what a mine is so we suggest to you that the place to look for guidance in that issue is the Department of Environmental Conservation regulations. We believe Mr. Moore, the - again the prior attorney for the Frueh's has in fact referred to the DEC regulations as guidance in trying to persuade the Town Board to act in a certain way with respect to the zoning amendments. Now we also believe that the next invoice that's relied upon by Mr. Platel, September 22, 2003 is directly related to the road construction that took place both in the fall of 2002 and as Mr. Rubin stated continued through 2003. We believe that in creating the road there were materials that were stockpiled and those were taken off the site and ultimately sold. That activity does not constitute mining under the DEC regulations.

We believe also a common sense approach to determining what mining, whether this in fact is mining has to exclude those, excuse me, those activities because they were incidental to other activities. We have 6-instances, alleged instances of removal of material. We don't believe that at this point the Board should be looking beyond the record relied upon by Mr. Platel as an appellate body. There was no examination of business records, essentially in order to verify whether or not these materials, some of these materials could have been purchased at other sites and resold. It would be essential to look at the business records of the Frueh's to determine whether they were buying and selling materials that has not been done. It would be essential to look at sales tax records or sales tax exemption requests in order to determine whether or not the sales took place, whether this material was sold for re-sale, whether it was purchased from somebody else. That was not done. Many of the invoices don't have references to cancelled checks or the dates that the materials were paid for by the alleged clients. We have a very skimpy record, which is being relied upon by the Frueh's and has been relied upon by Mr. Platel to support a claim that this is an existing land use.

Now a determination that this land use in fact pre-existed August 7, 2003 carries with it great consequences for the community. There will be an ongoing mining operation if this is allowed to stand, very different from the activity that has gone on previously. In fact you can almost use the analogy of somebody who gets paid a couple of dollars by some neighbors to do oil change for their neighbors and then decides he wants to establish a Jiffy Lube or a gasoline retail station. They're both the same type, nature of the same activity. They're vastly different in terms of the consequences impacts to the community and the nature of the operation. We believe that this record does not support authorization of this type activity in that community and we believe that there's no evidence in the record that would support that at this point.

Indeed the letter of Mr. Moore, which is submitted along with our letter tonight dated July 29, 2003, refers to a one-time removal of rock in connection with the construction of that logging road. It's an amazing feat that you can construct this logging that leads right up to the proposed mine site. In addition there's – Mr. Moore represents that there is no evidence of disturbance of the site. This is further confirmed by a report submitted to the Department of Environmental Conservation by the Applicant and it's a report dated February 6, 2003 concerning an investigation into cultural resources. It was prepared by Arch Tech, A-R-C-H, T-E-C-H. We will submit copies or excerpts from the record if the zoning board doesn't have it already, but in that report in connection with a survey of archeological resources, there's no reference to disturbances on the site that essentially equivalent to a mining operation. In fact one would suspect that experts in the area of archeology and cultural resource investigation would be very sensitive to that issue since – if their sites already disturbed there's less of a reason why one has to do a cultural resource investigation. There's no reference to any disturbance that took place, on the contrary, it seems very apparent that other than some access roads and maybe some logging that's taking place the site was pretty much undisturbed.

CHAIRMAN HODOM: You will provide the information to us?

MR. GERSTMAN: Yes.

CHAIRMAN HODOM: Thank you.

MR. GERSTMAN: We also assert that the – that none of the invoices that were relied upon by Mr. Platel reflect that there was a disturbance outside the life of mined area that's now permitted by DEC and what does that mean, there's a plus or minus 5-acre area that has been identified by DEC as the permitted area, other than this road leading up to that there has been no disturbance in that area. We believe that that's very relevant to determining whether or not there's a pre-existing use at this site. It certainly has not been within this area and that's – we believe that that's critical. Even if you went beyond the invoices that have been relied upon by Mr. Platel, which we believe is inappropriate in the nature of the review that you're doing.

We have 2-instances where the Frueh's by their own records indicate that they have violated DEC's regulatory requirements. Mr. Rubin has already stated that in 1997 base upon his calculations the threshold of a 1,000-tons of removed from the site in any 12-consecutive months has been exceeded. We also refer you to invoices that again, we're not going to submit them for the record at this point unless they're going to be part of your record and review. From 2002 we believe they're part of a foil, part of documents that have been dropped off by the applicant. We don't know whether you'll include them as part of the record at this point for purchase of your appellate review of Mr. Platel's decision. If they are included, they demonstrate that 1700-tons or so – 1,800-tons was removed during the 12-consecutive months of 2002. That represents a violation of the Environmental Conservation Law; it's an illegal activity and cannot be taken into account by the Zoning Board of Appeals to establish whether or not a legitimate pre-existing business was operating. It also contradicts Mr. Moore's statement that no mining has taken place on this site that exceeds the DEC threshold, 1000-tons in any 12-consecutive month period. So either the receipts are not credible, they're in error or there has been a violation of the DEC regulations. In either case they can't be considered.

ATTORNEY SILLIMAN: Mr. Gerstman in exhibit G, you submitted some receipts. Did you submit only the six that were referred to in Mr. Platel's notes?

MR. GERSTMAN: That's correct.

CHAIRMAN HODOM: You did submit more than that in your exhibit G. I think you submitted the...

MR. GERSTMAN: Yes, the note from I believe - - wrote was attached to the front of those receipts, there were more submitted by the applicant then we have included in our record unless we didn't take them out of your copy.

CHAIRMAN HODOM: There are more than 6-reciopts in this file.

MR. GERSTMAN: You know what there might be because there were also receipts concerning of....

CHAIRMAN HODOM: No, these are mineral receipts...

MR. GERSTMAN: They are? Okay.

CHAIRMAN HODOM: And these receipts were requested by me of Mr. Frueh in response to your request that this Board subpoena documents from the Frueh's. We didn't feel the subpoena was a requirement, I made a personal call; they provided the information, but they are in here.

MS. ROBERTS: Well then you have the only copy that has them all in there.

MR. GERSTMAN: For purposes of your review we believe your appellate review should not include anything beyond the six if they're necessary in terms of - - if you decide that you want to go beyond the six that have been relied upon by Mr. Platel, they're in there for your review.

CHAIRMAN HODOM: Thank you.

MR. GERSTMAN: We also had issued a subpoena to Mr. Frueh to bring records and arguably those – there's a limitation that those are the records essentially it satisfied the subpoena. We haven't heard from Mr. Frueh or his attorney at this point whether or not they have produced documents in response to the subpoena.

CHAIRMAN HODOM: I guess I'm the lucky one aren't I?

MR. GERSTMAN: You hit the jackpot as it were.

MS. ROBERTS: You have all of those. I think it's a matter of whether they're on the record or not.

MR. GERSTMAN: Let me suggest also that the role of this Board by a statute is to interpret the Town Code. The Town Board engaged in various discussions concerning whether or not to enact the law – held at least 2-public hearings concerning the law before it enacted those. I appeared at those and suggested that the – that the appropriate way to review whether or not a business was pre-existing on or before August 7th was as a non-conforming use. There was some dialog back and forth between the former Town attorney and myself. I argued essentially that what had happened as a result as Judge Benza's decision was that all of the uses that are not enumerated in the Town Code had become illegal uses. The Town Board in it's wisdom said we're not going to obviously effect those, we're going to allow those to exist provided that they existed on that date, but there's no indication in the legislation itself, in the town amendment itself whether or not it should that these activities should be treated as non-conforming uses or not. We argue that that's the appropriate way for this Board to review this uses and essentially

Judge Benza's decision created non-conforming uses of any uses that existed prior to his decision, which were not enumerated in the Town Code. The Town Board did not legalize the uses. The Town Board essentially said that those uses will be allowed to continue notwithstanding that the zoning as a result of Judge Benza's decision has been changed. So essentially it's the equivalent to a non-conforming use. There's a body of law on non-conforming and I'm sure your council will advise you on them; I'm sure what you have experience on in hearing determinations prior to this one concerning non-conforming uses in the Town of Bethlehem and basically the question is whether or not the use was regularly carried on by the landowner prior to the date that it became illegal. That is did the use actually exist on or before the date of the enactment, in this case it would be Judge Benza's decision.

It would certainly be unfair to adjacent properties as well as inconsistent with the goals of zoning to allow non-conforming uses to - - that have been dormant to either resurface and become more active or to expand their operations. As you know the law frowns upon the continuation of non-conforming uses. We believe that in order to establish that there is a essentially a vested interest here that the non-conforming uses must have been or the prior use must have been substantial and substantial enough to create a vested right in the use. That is it's both undertaken and there have been substantial expenditures toward that goal.

It's very important to take a look at the financial investment in a pre-existing use to determine whether or not there are vested rights. We believe in this case there's no evidence that there has been a substantial expenditure in and prior to Judge Benza's decision in establishing a mining operation. At best there were intermittent extractions of various minerals but we believe actually happened was that there were minerals removed in connection with and incidental to other activities.

And then finally the use in order to be a non-conforming use must be the primary use, not incidental. Again going back to the issue as to whether or not the uses that took place on the site were in connection with road construction, agricultural activities as suggested by Mr. Moore to the DEC and to the Town Board or any other activities. We believe that's consistent with the DEC guidance, the DEC regulations, which we believe this Board should look to in deciding how to interpret the information that's been presented to you by the Frueh's and also by us tonight.

The issue of whether or not this is a pre-existing use is very vital to the community as you can see there are many members of the community because they are concerned with the impacts that this mine will have on their quality of life. That's not necessarily an issue that you're going to be dealing with, you're going to be dealing with a strict issue of whether or not the facts and the law support that this site was a pre-existing mine. We believe that the facts and the evidence do not in any way support that result. We believe that if you look at the evidence as we have and examine each of the receipts and invoices that have been submitted and relied upon by Mr. Platel that there is no support for the determination that this is a pre-existing at that location and we believe that our appeal should be granted. Thank you very much for the opportunity to speak to you tonight and

I'm sorry to have taken as much time as I have. Thank you.

CHAIRMAN HODOM: Just one question. You had mentioned I think it was 1800-ton of mine materials in 2002?

MR. GERSTMAN: Yes.

CHAIRMAN HODOM: How did you arrive at that?

MR. GERSTMAN: Well I relied on our trusty hydro geologist to do some calculations and I guess that would be an appropriate time for Mr. Rubin to supplement his statement to give you the calculations. I can hardly add and subtract. Mr. Rubin why don't we - - this is going to be a - we'll do a duet. In your records Chairman Hodom and not in anybody else's records you will find invoice 7471 - I actually want to go back before that. You'll find invoice 7205 billed to the estate of Jane Gottschalk, there are 2-circles on various volumes that were identified I believe to have come from this location. One is 82-yards of topsoil and one is 232-yards of fill. You're on Mr. Rubin.

CHAIRMAN HODOM: 7205, is that what this is?

MR. GERSTMAN: Yes. The date is, I'm sorry, January 31, 2002 of the invoice and the date of the action is January 18, 2002. Why don't you explain how you...

MR. RUBIN: The number that Mr. Gerstman presented to the Board was a quickly derived number to give us a handle tonight on what the total tonnage might have been from a number of different soil and fill samples recognizing as one of the Board members has asked previously that we don't have a very specific mineralogic breakdown of shale of shale or in this case of the soils, okay. We have - - in the absence of that and admittedly a rapid, crude estimate of what the total tonnage might be here. We have made an assumption that where as if we had quartz we would have - - a very quartz rich shale for example, we might end up with about something of the order of 3.82 tons per yard and we have made the assumption that because we don't have the mineralogic breakdown of the soil that it certainly might not all be quartz and that we might not really have a weight on the order of 3.83-tons per cubic yard for our quick back of the envelope calculation. We used the number 3, 3-tons per cubic yard to come up with an estimate of what the total tonnage of the sample all taken from within a 12-month period in the year 2002.

MR. GERSTMAN: Let me go through the rest of the invoices and then you can ask the question as well. The next invoice is...

CHAIRMAN HODOM: Why don't we stay at 7205.

MR. GERSTMAN: Okay, that's fine.

CHAIRMAN HODOM: Are you referring to all the materials shown on that invoice, the

topsoil, the sand, the ROB gravel, the number 2 stone and fill? Is that part of your calculation?

MR. GERSTMAN: No, we were just referring to the two that were circled.

CHAIRMAN HODOM: The 82-yards of topsoil and the 232-yards of fill?

MR. GERSTMAN: Yes.

CHAIRMAN HODOM: Okay.

MR. RUBIN: It's not a reduction in the value of using the specific gravity that's lower should be very reasonable. I didn't want to give you the wrong idea although we didn't have the mineralogic breakdown specifically of specific gravity for each different component of the fill or whatever we had. Backing off to 3-tons per cubic yard for our envelope estimate I think that's probably more than reasonable. If anything it's probably very conservative so if anything the number that Mark provide is probably extremely conservative. So if we had a mineralogic breakdown I suspect the number would be higher.

CHAIRMAN HODOM: 3-tons per cubic yard?

MR. RUBIN: Was our number we used for our estimate, yes.

CHAIRMAN HODOM: You're over 200-pounds per cubic foot, is that what you're saying?

MR. RUBIN: Yes.

CHAIRMAN HODOM: Okay. It seems pretty excessive I mean concrete is 150-pounds per cubic foot.

MR. RUBIN: Now we're talking about this is tons, the numbers I gave you were...

CHAIRMAN HODOM: You gave me 3-tons per cubic yard.

MR. RUBIN: Per cubic yard, right.

CHAIRMAN HODOM: So if I divide the 6000-pounds, which is 3-tons.

MR. RUBIN: A cubic yard would be what 9....

CHAIRMAN HODOM: 27-cubic feet.

MR. RUBIN: 3 times 3 times 3, 27 right.

CHAIRMAN HODOM: Now divide the 27 into 6000, I'm coming up with 200-plus pounds per cubic foot.

MR. RUBIN: Okay.

CHAIRMAN HODOM: That I think is somewhat excessive based on concrete being roughly 150-pounds per cubic foot.

MR. RUBIN: Well even if it were so our...

CHAIRMAN HODOM: I'm not trying to be argumentative I just wanted to find out how you came up with 1800...

MR. RUBIN: Okay let me point out that even if we were off a bit and admittedly this was a quick number tonight.

CHAIRMAN HODOM: Okay.

MR. RUBIN: You're so far in excess of the threshold of 1000-tons in a 12-month period that we have so much room for error even if we had the mineralogic breakdown that you're almost certainly going to exceed that threshold.

CHAIRMAN HODOM: Well I guess that's why I'm asking you how you arrived at the 1800-ton for 2002 and I had one invoice that you're referring to, which is 7205 and that includes 82-cubic yards of topsoil and 232-yards of fill.

MR. RUBIN: For all of the - - again this was a quick calculation. We used 3-tons per cubic yard as our number to go against the invoices. Granted if we sat down other than tonight and had some mineralogic breakdown, we could probably refine it. Even this way it'd be almost twice the threshold to make the mining activity illegal.

CHAIRMAN HODOM: Let me ask you a different way then. Please give me the invoices that you were using to arrive at your calculations.

MR. GERSTMAN: And again we've received these documents thanks to the Zoning Board of Appeals. We received after October 14th at some point.

CHAIRMAN HODOM: Right.

MR. GERSTMAN: So Mr. Rubin has just gotten a chance to see them today. We will be glad to provide you with additional information concerning this by, again next Wednesday. The invoices that we have are 7371 and the date of the work is June 14, 2002. Invoice 7471, the work is dated September 24, 2002 and then there are 3-invoices dated August 14th, August 15th, and October 28, 2002 and those are actually identified in terms of tons.

CHAIRMAN HODOM: Is there an invoice number on that?

MR. GERSTMAN: Not really.

CHAIRMAN HODOM: If you could provide us how you arrived at your calculations.

MR. RUBIN: We will refine it but having just saw it tonight for the first time.

CHAIRMAN HODOM: Okay.

MR. RUBIN: Does that answer all your questions?

ATTORNEY SILLIMAN: So we're going to hold the record of the hearing open for a week until next Wednesday for 2-submittals from you, one on the calc. and one on the products. Thank you.

MR. BROOKINS: On page 9 of your October 20th letter, 2nd paragraph from the bottom you make reference to the level of mining activity on the Frueh's property over a 10-year period and we're kind of betwixed and between because in one case you're arguing that they've exceeded the DEC threshold and on the other hand you're saying that this mining operation was so minimal that it didn't rise to the level of mining. I'm not quite sure where we are on that but I have a question. Because you mentioned that DEC does not consider mining – to regulate as or consider mining rising to that level. The DEC, correct me if I'm wrong does not set a standard of excellence or performance or efficiency, they don't suggest that the Frueh's or anyone else has to be good at what they do, they just, you know they may be particularly bad at mining and that may account for the sporadic activity. Would that be a fair assessment?

MR. GERSTMAN: I would say the DEC does not require somebody that has a mining permit to extract certain amount of minerals every year, however if there's less than certain amount extracted the DEC considers the mine as abandoned. If there's no activity for instance I believe a 1-year period they consider the mine abandoned so that's to answer your one question. The other, maybe I haven't made it clear and let me – I apologize if that's the case. We don't believe that the invoices demonstrate that there has been a substantial mining operation at that location. In fact we believe that we have established that many of the invoices submitted support their claim that it's a pre-existing use lack credibility that they - - not to be relied upon by Mr. Platel or by this Board absent much more evidence as we've suggested.

That being said there's a couple ways to look at this, one is the way we have suggested, but even if you look at as – look at the invoices as submitted as credible what we see here is that the Frueh's have essentially admitted that they have violated the Environmental Conservation law. Now we do need to go back and look at the 2002 extraction, the invoices to make sure that in fact our calculations support that result. We believe they do, you know we tried to use conservative numbers. I put Mr. Rubin on the spot and said give some numbers here and we will provide you with additional

information on that.

So we're arguing in the alternative to some extent Mr. Brookins to say A, there's not enough evidence here to say it's a pre-existing use, B, if you look at the invoices much of the activity that is relied upon is associated with other activities therefore it doesn't constitute per say according the DEC regulations and guidance and according to the law of non-conforming and C, if take the invoices as credible they've essentially conceded that they've violated the Environmental Conservation Law. I'll remind you that 1000-tons is really not that much material to be removed so we believe that that's likely been for 2-years. Did I answer the question?

MR. BROOKINS: Yes, thank you.

MR. GERSTMAN: Any other questions I can answer? Thank you again for the opportunity.

CHAIRMAN HODOM: Are you finished with your presentation?

MR. GERSTMAN: Yes, I think so.

CHAIRMAN HODOM: I'm just going to make a statement here because I think we will not close the hearing this evening. There's a lot of information that was submitted this evening that we'll need some time to review and go through and it'll give you some time to provide us the other information and give us time to look at that and I'd like to have anybody else who has any questions this evening to be able to comment.

ATTORNEY SILLIMAN: So our intent is to hold the record open for the week?

CHAIRMAN HODOM: No the intent is to hold the record open until, at this point in time, a day uncertain.

ATTORNEY SILLIMAN: Okay.

CHAIRMAN HODOM: Until we have all the documents that we're requesting and then we'll set a continuation date, perhaps we can do it tonight depending on how soon we get the information. Mr. Frueh you have the microphone or your representative.

MS. MOREAU: Well I'm trying to figure how to proceed in somewhat a timely manner here.

ATTORNEY SILLIMAN: Could I ask you a couple of questions?

MS. MOREAU: Sure.

ATTORNEY SILLIMAN: First of all I need your name.

MS. MOREAU: Karen Moreau.

ATTORNEY SILLIMAN: And you represent to Frueh's?

MS. MOREAU: Yes I do.

ATTORNEY SILLIMAN: And they recently received a permit from DEC to conduct mining at the site?

MS. MOREAU: Yes they have. After a lengthy review process in which the Feura Bethlehem Heights Alliance was very involved.

ATTORNEY SILLIMAN: Have the Frueh's been found in violation of the Environmental Conservation Law for illegal mining activities at the site?

MS. MOREAU: No they have not. In fact the questions regarding the legality of their activities were raised by the attorney for the neighborhood or Bethlehem Alliance over a year ago when Kevin Shea was the Building Inspector. There's correspondence in the file with respect to discussions about the logging road and such a road being in violation and other disturbance activities by the Frueh's being in violation so this issue was brought to the attention to the DEC as well as the Town over a year ago. There were no fines issued, no proceedings were brought against the Frueh's. That's not to suggest that a very thorough review was not had by the DEC, experts for both the Frueh's and for the neighborhood were heard. A public hearing was held in this Town hall back in January with respect to the mine permit. So this has been an on-going process, some of the things that you heard tonight were raised before. The zoning issue was raised before and it was addressed by DEC in the permitting process.

ATTORNEY SILLIMAN: Part of their way of addressing it though was to seek an opinion from this Town of whether or not this was a permitted use, is that correct?

MS. MOREAU: That's correct.

CHAIRMAN HODOM: Start where you'd like to start.

MS. MOREAU: Well I'll start with making - - I guess the way I'd like to proceed is that I'd like a brief statement to try to narrow the issue and I'd like the Board to hear from Peter K. Frueh who is the owner of the property and we do have other - we have letters from various residents and persons who have purchased materials from the Frueh's from that site that we can supply to the Board tonight as part of the record.

To begin I think what the issue is here, very specifically is whether mining occurred on the Frueh property prior to August 7, 2003, that is the question and there is no definition as you know in the Bethlehem Town Code. There is no definition frankly for mining in some of the planning documents that various Town's use. And I think one

of the reasons why there is no definition is because the Department of Environmental Conservation really does have priority, if you will with respect to regulating mining and as you know it is a highly regulated activity under many circumstances. The definition that we are using and the one that we have available is the one that is provided in the Environmental Conservation Law and I believe you have a copy of that definition.

CHAIRMAN HODOM: Yes.

MS. MOREAU: Specifically mining means the extraction of over burden and minerals from the earth and the preparation and processing of minerals including activities or process's or parts there of for the extraction or minerals from the original location and the preparation watching, cleaning, crushing, stockpiling or other processing of minerals at the mine location so as to make them suitable for commercial, industrial, or construction use exclusive of manufacturing processes at the mine location; the removal of such materials through sale or exchange or for commercial, industrial or municipal use and the disposition or over burden, tailings and waste at the mine location. It also says that mining shall not include the excavation, removal and disposition of minerals from construction projects, exclusive of the creation of water bodies, or excavations in aid of agricultural activities. Now that is the definition that we are using with respect and when you break that definition down it refers to minerals including a variety of substances including topsoil, sand, fill, gravel, stone, various types of stone.

No we did not come here tonight with a geologist in order to substantiate the specimens that were taken from the property. What we have is a situation, I guess I would classify it as if it walks like a duck and quacks like a duck, it's a duck. I mean we have an excavation contractor who's been in the business of excavation, which is mining. Excavation is mining, digging and selling; selling those materials that you extract from the property. It means that we have to be in a business doing that and that can be done in the scope of their business and that is what they have done for years.

You will hear from Mr. Frueh directly because I believe that you should hear directly from the owner and the operator. You are also welcome to hear from people who have taken the materials off the site, people that purchased the materials and - - I mean that basically is the kind of information that we provided. It's true that we sat down with the Building Inspector at their request with respect to providing information. We showed documents to the Building Inspector and Town Attorney. Mr. Platel took notes on that at the meeting. One of the reasons why we did not make copies of documents at that time is just to protect the privacy of my client. We were not involved in any proceeding, any legal proceeding, any litigation. We were simply asking for an interpretation of the law. Now when we talk about what is the interpretation of the law, well lets focus a little bit on this August 7, 2003 date and the law as we view it and it's not as if we're the only people in the category who view it this way. I'm going to refer to correspondence actually from Mr. Platel, Mr. Marcuccio because it does summarize specifically what is in the law whether you look at that law on line, you know Town of Bethlehem.org or you get the book out or you ask the Building Inspector. That law is the same and simply...

ATTORNEY SILLIMAN: Give us a reference to the letter; I know we have it here.

MS. MOREAU: It's Article VI, Permitted Uses, and again it's called permitted uses, Chapter 128-23, Rural Districts Not Zoned, A (12)(D), it's the Town of Bethlehem. That is the law in this Town with respect to what can occur in the Rural Districts Not Zoned and it's called permitted uses. It's not called non-conforming uses; it's not called uses by special permit. All commercial or industrial uses that were in existence as of August 7, 2003. The question then becomes was this a commercial use in existence at that time? Was it an industrial use in existence as a - - of that time? What is the use? The use is mining in conjunction with excavation by an excavation contractor. This is not Karen Moreau homeowner saying I'm going to mine; you know soil off of my property and sell it. I'm not in that business. This is someone who's in the business.

So then we get into a lot of discussion here tonight about the record and whether the record is credible and whether it's consistent and whether it's sporadic and whether the numbers add up. Well what you've heard so far tonight is you've heard from a geologist, Mr. Rubin, who was involved in the whole process on behalf of the neighborhood association in fighting the mining permit in the purview of DEC. So he's been involved all along on their behalf. We've had our own experts to, which DEC has reviewed and obviously they've issued the permit. What I'm getting at here is that - - and what I heard tonight, the English language is interesting. I can only surmise, perhaps, it appears to be, based on aerial photos taken from some archive somewhere, perhaps a site visit June 15, 2003, which I don't believe was authorized. So, you know we've heard a lot of speculation from an expert. Now I was not aware that an expert was going to submit a report on this basis and I understand we'll have an opportunity to respond to that type of discussion, but you've heard a lot of speculation and you've heard attacks on the credibility of these invoices.

You've heard the attorney for the other side say, well we don't know because we haven't seen their entire business what was actually taken off that site and sold. What about other materials that could have come from elsewhere, well you don't see the Frueh's saying in those invoices that the gravel came from their site. We did not suggest gravel came from their site because it doesn't. Certain types of materials that they sell do not come from their site. The materials that you see on the invoices came from their site and they were taken from the site in order to facilitate their business. It's like if you're a farmer and you grow your product and you sell it, you make the profit from the beginning to the end. If you're excavation contractor and you own a large piece of property and now we're talking about not just the 4.7-mine site. We're talking about 180-acres of land of which the site of the mine is just a small part of but what I'm getting at here is if you have an opportunity to take something that comes off of your property and sell it commercially, it's just logic that you're going to do that. And when you talk about credibility, well they haven't suggested that they're selling anything else other than what they can actually take from their property.

There was an awful lot of focus on riprap tonight and obviously riprap is rock. I'll let Mr. Frueh talk more about some of those specifics and you may have specific

questions for him. Frankly I consider him an expert; I consider him an expert in excavation and he will be the first to tell you also with excavation there's uncertainty, I mean uncertainty in sometimes what you're going to find in the ground. You often have to find a different way to go about something when you encounter a big obstacle, but in no way have their activities been done to fool this Board or the Building Inspector or anyone else. They are who they are; this is what they do. They have a longstanding reputation doing exactly that and I think you almost have to defer to what they say occurred there. I mean until this actually became the focus of so much attention why would people be paying attention to what happens on 180-acres of Frueh's property. Why would the neighbors be looking to see what's going on there for years?

Now there are a number of people that have spoken tonight who have said I have not seen any evidence. If you look at their affidavits you will see language to that affect. I have not seen any evidence. The fact that they haven't seen certain things either means A, they just didn't see it or B, they did see it but don't want to admit to it because it's not in their best interest or C, it could just mean that it's there but it just never came into their view. Now and number of these people live in scattered areas along the - - Rarick Road I guess is where the Audubon Society is, I mean that's only approximate to just a small portion of this property. When I talk about the property I'm talking about 180-acres upon which all kinds of mining activities have taken place.

The other question I don't know the answer to is when these affidavits were made, what kind of definition were these people given. When people, you know there's a number of lay people out there unless they read Environmental Conservation Law, they might think that mining means, oh when you have Callahan doing something or you know Blue Circle Atlantic, if you have blasting, if you have huge quarries so Mr. Gerstman made an analogy, earlier about someone who changes oil in their garage versus Jiffy Lube. Well I would suggest and I know the context in which he made the analogy was talking about pre-existing uses but I would suggest that someone who does oil changes out of their home for a fee is in business if they do that commercially and they have the authority to do so. No different than if someone is a franchise or a big business, small business versus big business, that's not really - it's immaterial. The point is that they were there; they were conducting mining, mining includes a variety of activities under the definition. You have no definition in Town Law; the one that we are using is the DEC's definition.

Just a couple things to make sure I didn't miss anything and I hope you'll allow me to bring some things if I do. I don't know what quartz weighs, I really don't. I'm not suggesting that, you know there's anything wrong with what Mr. Rubin is doing here tonight. I mean how can anyone sit here and make a determination as to what quartz weighs. There's all kinds of quartz; I do know that. I've done rock collections when I was a kid; I scurried around the woods looking for things. I don't know what some of the minerals weigh. I do know that minerals - - I do know a lot about soil because I comes from an agricultural background and there's all kinds of weight in soil depending on the component of that soil, whether you have clay or you have sand; tremendous differences. We don't know; we don't have the material in front of us that was sold to these people

but the fact is it was sold. And the fact is that people will say it that way; purchased by them and the fact is that people will say it came from the Frueh's property. You know you've heard a lot of focus on that 4.7-acre mine site which is the site and the area that was in the purview of DEC permit for blasting rock, but what I'm saying and I know that is part of your law is that the use of the property – all of Frueh's property is what counts here, not just that specific site. So I would appreciate if you would keep some of those things in mind, I'd like you to hear from Mr. Frueh and we do have other people that can substantiate what the invoices have shown.

One thing that Mr. Gerstman did not bring up which was shown to Mr. Platel and he has in his record was the equipment that was purchased by the Frueh's in order to crush rock and to screen topsoil, there's several receipts there. The Building Inspector and the Town Attorney were insistent on obtaining copies of those to show the commercial nature of the activity to show that these people are invested in what they do. These are not 100-dollar purchases from Home Depot; these are 30,000-dollar machines, 100,000-dollar machines. My clients have already invested over a quarter of a million dollars in equipment for this project. This is serious stuff, they obviously have a lot invested; it's substantial. This isn't incidental and I would at least just like you consider some of those things when you're determining whether or not this makes sense and you make sense out of this, from a common sense point of view, does this make sense. I would like Mr. Frueh to speak.

CHAIRMAN HODOM: Ms. Moreau just before you finish up you made reference to a letter that Mr. Platel had written to Mr. Marcuccio from DEC.

MS. MOREAU: Right.

CHAIRMAN HODOM: Do you have the date of that letter?

MS. MOREAU: Yes I do. It's August 12, 2004.

CHAIRMAN HODOM: Okay. You also made some references, unless I misunderstood you that all the materials that are shown on Peter K. Frueh, Incorporated, invoices are extraction from their property, did I misunderstand that?

MS. MOREAU: No, the point I was trying to make there was that the Frueh's are not making things up, in other words there are materials on those invoices you will see such as gravel, which does not come from Frueh's. We only circled the materials that came from the property.

CHAIRMAN HODOM: Okay. So in the invoices that you provided the Board, the items that are circled are what you're saying is was mined from the property?

MS. MOREAU: Right. The law also does not state that there has to be; you know obviously there's an issue here about tonnage and legality of what was extracted and sold. When you're established – I mean we're talking about something that's a permitted

use here. We're not talking about, and this is important, we're not talking about a non-conforming use situation that's different than when you have a permitted use. When you have a non-conforming use you have a situation where you talk about degrees of business, degrees of expansion. The fact of the matter is that they were there and they were consistently extracting materials throughout the course of the ownership and operation of their business there. There's no minimum – you're not going to be able to look up and see that okay if they took so much material out every year for how many years that equates to substantial evidence. There's not going to be any formula to follow here and I'm assuming when Board's such as yours convene and deliberate that you consider – it's a balancing. You consider the credibility, you consider the motives, you consider what they've been doing and not just saying and I would at this point if you were ready I'd like to hear from Mr. Frueh.

CHAIRMAN HODOM: Any Board member have any questions for Ms. Moreau?

MR. BROOKINS: Just to sum up and to clarify, on the invoices you're suggesting that the circled items are those under question. That those things such as sand, number 2 stone, bank run gravel and the like are things that the Frueh's stockpile, warehouse and then use to serve their clients?

MS. MOREAU: No and Peter can correct but it's generally they either stockpile and then truck or they actually took from other producers so for example some types of crusher run would come from elsewhere, right?

MR. FRUEH: Right.

MS. MOREAU: They can speak more to the specifics for that.

MR. BROOKINS: Thank you.

CHAIRMAN HODOM: Mr. Frueh? You can just switch seats if you like. Just introduce yourself to us.

MR. FRUEH: Peter Frueh, Peter Frueh Construction. What would you like to know?

CHAIRMAN HODOM: Well why don't you tell us a little bit about your operation, how long you've been in business.

MR. FRUEH: Well I started in business with 500-dollars I borrowed from my brother back in the early 60's so we had nothing and I built my business by hard work; 16, 18-hours a day. I mean you can ask my wife, she never saw me and my kids never saw me. I was always working so I'm really a workaholic, but I needed to work to support my family. I did not intend to grow like I did but God blessed us and we did and as your family comes back into it with you, you have to expand.

My son is in the business; my son-in-law; my grandchildren are in it; my wife; my

daughter-in-law, they're all in the business and you have to produce so to produce you have to expand and with times the way they are and the purchasing of stone from Callahan Industry's as we've done in the past and their hard way of getting stone. Our trucks go down there and sit for a half an hour, 45-minutes waiting to get loaded. We decided to take our own stone because you just afford with the trucks sitting there and men standing on the job waiting for it. So this is why we pursued the mining permit on the property. We have taken materials and been very cautious about not over doing the mining criteria of the 1000-ton. The 3.8-ton per cubic yard is so far fetched that I can't believe he even said it because sand is like 1.3 and I believe crusher run is like 1.5 or 1.6 and those are your heavier soils. Now maybe he's talking about bank-cubic yards, well bank-cubic yards expand when you loosen them up, so that's where I feel that comes from.

We've extracted topsoil's off the property; we have mixed topsoil's with manures, a lot of those people that sit here and sign those affidavits I was really quite shocked that they did because right along West Yard - - Old Quarry Road I had big piles of manure brought in - - that I brought in from LaGrange's farm, stripped the topsoil off the fields that are clear that are growing and mixed it with the manures and sold it and I've been doing that for years. I used to mix soils at my other shop on Route 32 right along the road on Matices's property. So I've done this for years and years and the neighbors that have spoke out, a lot of them have that soil; my soils on their property. Some of the receipts you have the topsoil from my property is on their property. So you really just got to go up and check their soils.

MS. MOREAU: And Peter with respect to that issue one of affidavits that's in your submission – can you hear me?

CHAIRMAN HODOM: As long as she can pick it up.

MS. MOREAU: Okay, all right. One of the affidavits that's in your submission, but I don't believe the people actually stood up tonight to put it officially on the record but it is in your submission; the appeal by Mr. Gerstman. There's an affidavit from the Billetts and like the other affidavits they are saying that they saw no evidence of mining on the Frueh property. What I wanted to do is connect that to the estate of Jane Gottschalk invoice that you have because the estate of Jane Gottschalk invoice and I'll give you the date, it's dated 6/14/02; estate of Jane Gottschalk and also there's 1/18/02 I think you may have that. Jane Gottschalk was a relative of the Billetts and I believe and Mr. Frueh can speak to this that they actually were the ones that when she died received the materials off of the Frueh property to repair their septic system.

So that's why when I spoke about I'm not sure all of the neighbors really understood what mining meant, they may not have understood that that is mining, the taking of that material and which was topsoil and clay fill and they may have assumed that mining meant rocks. So you know, I just want to clarify that for the Board that there may be a misunderstanding of some kind but that is – the Billetts who sign affidavits saying that no mining occurred are the ones that received that material. Peter is that – did

I say that correctly?

MR. FRUEH: Yup, you said that right. Can I interest you in anything else? I don't really know what to tell you.

CHAIRMAN HODOM: I'd like you to speak to the issue at hand is when did you start your business, when did you start your mining?

MR. FRUEH: Back in 62' I believe I started in business after I got out of the service, or 63', somewhere in there and incorporated in the 70's and that's been my business. I mean at one time we used to get sand out of Rappaso's and gravel out of the Goldies pit or Callahan's pit down there and then the Beuro mine came in and put mining regulations in so we closed them up and then that kind of changed my nature of business for a while. We got away from being able to run our loaders into the pits and get it and then finally you would find other places that you could extract a little here and a little there and you grabbed what you could and then when you got on housing projects, then you're not subject to DEC so you can toll whatever soils you need or whatever overload – access material off and you don't need a mining permit so you can truck whatever you need. And when you needed materials from your own property for a small job or whatever rather than running off somewhere else you would take it from yourself. Shale - - there's a shale pit behind my house which we were taking shale out of and then I got close to my water line for my well and we kind of stopped there and my fence is up above so – but I excavated the whole back hill out there and I did intend to take more out but we haven't really needed the shale because we have the other materials so I haven't taken any I don't think in a couple of years, I don't remember.

ATTORNEY SILLIMAN: Other materials, you've taken clay?

MR. FRUEH: Clay, we've taken clay, we've taken topsoil – mainly topsoil and mixed it but topsoil's - - we took a lot of material out in front of my shop and that went to the Town landfill in Clarksville because we had the contract for several years and my son tipped the truck over in the field next door taking a load out to the...

MR. FRUEH, JR.: Thanks dad.

MR. FRUEH: And we had a wrecker come in and pick it up and put it in the garage and we went to Florida and I didn't look at it until we came back, but that came right off from in front of the shop – in fact you know they talked about the geological survey, when they came down and were doing the geological survey's they were very interested when he got to the front of my shop because there was like a 10-foot hole in front that I had been taking dirt out of and you could see the stratus because they call where we are like Albany and you could see the sand strata, the gravel stratus and all those stratus. So they sent back and one of the - I don't know what you call them, but big shots came down from that archeology thing and I went out to him and he explained the whole – showed it all to me and I was quite interested because you know I didn't realize, you know you were digging this stuff out but you didn't realize all those different stratus has the shore

line they called it; wash the stuff in, but that's what we are in is down at that part of the property is like Albany.

CHAIRMAN HODOM: Were the materials shown on the various invoices that you provided to the Board on October 14th, the shale and the clay and the fill and the topsoil, heavy rock? Were they all mined and removed from your property and sold to...

MR. FRUEH: Anything that's got the circles on it came from our property.

CHAIRMAN HODOM: Okay. And you own this property?

MR. FRUEH: I own it all.

CHAIRMAN HODOM: And how large of a property is it?

MR. FRUEH: Somewhere around 180-acres.

CHAIRMAN HODOM: Have you been mining rock out of there as well?

MR. FRUEH: We have taken rock, yes. We have other receipts with us for more rock that we took. You know rock is not just lime rock; rock is cobble rock. We've removed stonewalls from people that want rock. We still got some piles of stone – of rock sitting on the property. When you want a particular rock, well we'll get you the rock. A lot of people use it for landscaping in fact if you go to, is it Blessing and....

MR. FRUEH, JR.: Krumkill Road.

MR. FRUEH: Blessing and Krumkill and you come out of that little road, those people I did their house and they wanted boulders for their front lawn because the cars were coming up onto their lawn. Well it's very evident to see, I put them there in the 80's I think but they've got trees part blocked by them but those are my rocks.

CHAIRMAN HODOM: There's been some issues raised regarding the DEC permit that apparently has recently been issued. How much of the property, the 180-acres or whatever it was, does that encompass?

MR. FRUEH: Just 4, 4.3-acres is the mine and they wanted the road because they wanted to consider that part of the road so that made it 5.3, but it's just a small portion of the property.

CHAIRMAN HODOM: And where is that situated on your property, give us some boundaries?

MR. FRUEH: Well it's – the power lines boarder it on one road; Collabeck road on the other and Old Quarry on the other; it's in between power lines.

CHAIRMAN HODOM: So where would Old Quarry Road be, would that be south, east...

MR. FRUEH: West, I mean east, east, east of it.

CHAIRMAN HODOM: East? So what would be...

MR. FRUEH: West is Collabek, south is power lines, north is power lines or more of my property.

CHAIRMAN HODOM: Okay. I think you probably mentioned this earlier but I don't have the specific time in my mind that – how long have you been removing the overburden, either the topsoil or the shale or the gravel prior to August of 2003?

MR. FRUEH: Really ever since I've been on the property, 27-years, 25-years. We took a bunch down to Brauer Ecological, what do you call it? Down by the water department, they have that college Brauer; Cortland College has a thing. We put topsoil in on their septic system and everything in the back there behind their log cabin building in there. That was back in the 70's or 80's, somewhere in there, 80's I guess. So I mean, you know it dates way back and that topsoil all came from me.

CHAIRMAN HODOM: Have you or Peter K. Frueh, Inc. prepared and processed minerals from the mine property or properties that were – that's in appeal this evening?

MR. FRUEH: The mine site itself?

CHAIRMAN HODOM: Yes.

MR. FRUEH: The little 4-acres?

CHAIRMAN HODOM: Well no, your entire site.

MR. FRUEH: Oh, my entire site.

CHAIRMAN HODOM: Yes.

MR. FRUEH: The 180-acres.

CHAIRMAN HODOM: Have you processed any materials there?

MR. FRUEH: As far as crushed it, we have screened; we've had screening plants.

CHAIRMAN HODOM: That's a processing process, okay. What have you screened?

MR. FRUEH: Well we screened topsoil. I'm trying to think what else, basically topsoil is what we've screened off that property.

MS. MOREAU: Excuse me; here are your receipts for the power screening plant and the day. If you would read the date and the cost of that equipment and also the dates on the other invoices, what they are and the cost of the equipment; what they were for.

MR. FRUEH: Well back in 96' I think you've got a copy or Mark's got a copy of a screening plant we bought back in 96'. That's for screening stone and gravel and then topsoil so we wouldn't buy it just to park it in the yard.

MS. MOREAU: And how much was that Peter?

MR. FRUEH: That one there was used and I bought that for 30,750-dollars. And then I bought an x-tec triple screen...

CHAIRMAN HODOM: Which invoice were you referring to there, is that the Southern Columbia?

MR. FRUEH: Southern Columbia, yup. That's power screening, that's a screening plant.

CHAIRMAN HODOM: Okay.

MR. FRUEH: And then I bought in 2002 a portable crusher and there's your crusher for 134,000-dollars, rock blaster for 7,000-dollars. Those two are mine things.

CHAIRMAN HODOM: Where were they purchased from?

MR. FRUEH: Those were bought at auction from Petrowsky, do you see that.

CHAIRMAN HODOM: Yes.

MR. BROOKINS: The date doesn't come out real well on my copy, but is it 2002 or 2003?

MR. FRUEH: 2002.

MR. BROOKINS: Thank you.

MR. FRUEH: And then I bought a turbo-screen, which is - - got the topsoil shredder in it and everything and that I bought in 2003, April of 2003 well actually I bought it before that but that's when the bill came for 109,000-dollars, yeah 109,000-dollars.

CHAIRMAN HODOM: Do we have that invoice?

MR. FRUEH: I believe so, that came from Upstate Screening.

CHAIRMAN HODOM: Okay, yes. And what was that used for?

MR. FRUEH: That's for screening topsoil's, sand, stone, gravel, whatever but it has the topsoil screener – topsoil shredded in it for taking care of the sod and heavier materials that are – or clay materials that you want to break up. If you want to mix manure and stuff, it mixes it up better.

CHAIRMAN HODOM: And when you process, when you extract the materials and process them, what do you do with them?

MR. FRUEH: Stockpile them and sell them or process them and take them right out. We have the Town of Bethlehem bid on topsoil, which we've been screening topsoil over – right now even and we've had it in past years the topsoil bid for the Town. We've had the topsoil bid for the Town of New Scotland and they bid it, you know when they want it, we bid it if we have it. If we've got enough ready if it's rotted down or whatever, when I pushed it up from the field or whatever and you've got to let it rot down if it's got roots and stuff in it and then you've got to screen that out you see or we rototill it, you know and rototill a big section and take a certain amount off and then seed down the rest.

CHAIRMAN HODOM: It's ultimately processed and then it's sold....

MR. FRUEH: Processed.

CHAIRMAN HODOM: To commercial business's, residences?

MR. FRUEH: Yes.

CHAIRMAN HODOM: Construction businesses?

MR. FRUEH: Right.

CHAIRMAN HODOM: Okay.

MS. MOREAU: With respect to this question about processing topsoil and what - it then being sold. There's been statements that have been made tonight that you really are just excavating and processing in an incidental way in conjunction with your agricultural activities. What you're talking about with respect to your screening and your processing and your trucking and you selling. Do you do any agricultural on your property?

MR. FRUEH: Oh yeah. I plant crops; I take hay off; I sell straw; I have draft horses and I plow with them to and I cut hay and stuff with them to so I don't like grass growing under my feet, so I keep going.

MS. MOREAU: I just wanted the Board to know that you do agriculture in addition to your main business which is excavation and processing and selling of your materials. Is that an accurate statement?

MR. FRUEH: Exactly. Now some of the materials that, you know we bring in for the Town or you know we do import some of the topsoil to but we do mix our own with some to. So, you know I showed you some piles that were out there in the field that were rotting down and it will go down to be mixed in with the other piles and processed.

CHAIRMAN HODOM: Would you consider that normal procedure for anyone who's processing materials is to strip the topsoil, put it piles, let it rot, mix it with other materials to make it finer or whatever you do with it...

MR. FRUEH: Yeah.

CHAIRMAN HODOM: Is that standard procedure?

MR. FRUEH: That's a pretty standard procedure. You strip it up because you've got to get the sod to rot down or whatever. It's gotta get out of the, you know if you've got root in it, you want it to rot down and then you run it through the screen to take whatever didn't rot down out and then if the soil is not really – say it's more of a sandy loom and they want a clay loom well then you'd mix some of my clays in with the sandier loom that I might have brought in. I might not had enough; it might have been too sandy for somebody so we'd take some of our clay topsoil and mix it on in there and then you'd sell it as a heavier soil.

CHAIRMAN HODOM: Are you still extracting shale from the property

MR. FRUEH: I haven't taken any shale because we've been running with the rock and going with the mining permit we just kind of backed off on doing everything so that we didn't have anybody saying oh they're mining, you know, but I mean we've taken top soil off yes, we have during the process of the mining - or the process but we have not, you know we've been very cautious about not going over our 1000-ton and we've also been very cautious about not overloading our trucks. We don't run overloaded down the roads like a lot of the competitors do and that's one of the reasons I really can't compete with Callahan and don't intend to is because I do not intend to carry the loads that they carry.

CHAIRMAN HODOM: What, if you know this answer, what is your anticipated volume of mine materials on an annual basis?

MR. FRUEH: That I think you'd have to ask my son because I really – the business part I really don't, my son does. I go in every morning at 6:30, 7:00, I'm there to harass him and he runs the business.

CHAIRMAN HODOM: All right. Is Chris going to speak this evening?

MS. MOREAU: Yes, Chris is going to speak.

MR. FRUEH: Do you want Chris?

CHAIRMAN HODOM: If you're finished, fine.

MR. FRUEH: I'm finished; I didn't really have anything to say really.

MR. BROOKINS: One quick question that relates to the aerial photography conclusions or statements and there were over a period of 18 – 17 or 18-years, 2001, several instances where there was noted that there was no field as vegetative – appears overgrown; not recently cultivated. If you were to strip off some topsoil, take some rock, redistribute the topsoil, what would be in your estimation the re-vegetation and recovery on your parcel?

MR. FRUEH, JR.: I can have grass growing or I can have seed growing in a week.

MR. BROOKINS: Okay.

MR. FRUEH, JR.: I can have green growing in 1-week.

MR. BROOKINS: But obviously annual grass-seed comes up very quickly and it would be very obvious that that was done, but to return it to what was typically there before.

MR. FRUEH: Well if they took so many pictures of my property before then they should have realized that that property wooded and I've been clearing that property for 27-years. I've been clearing the property for 27-years and anyone who even hunts can attest that you could not even see from my shop to my locker business and you couldn't even walk through there it was so heavy. The hill behind my house was all heavily treed and wooded so what he's seen on his photography I don't believe. He saw too much because there was a lot of trees. There were apple orchards that we took out, there were – there's junk pine, there's all kinds of stuff that we have taken out of that property.

MR. BROOKINS: But certainly within, would you say it's reasonable that within a 7-year period that any mining and excavation that was done and you sound like you're a good steward of the land so you would have returned it and it would have re-establish itself so that in an aerial photo analysis that may not be picked up.

MR. FRUEH: Right because you can come right down to the property right now and see the seeding's in fields that I've seeded this fall, the seedings I seeded this spring and took off the straw and now that it's re-seeded you can see fields that were heavily grown with brush that he had to have on his thing if they knew anything that are now all grass fields and seeded fields. That's why I question the photography because and my neighbor can attest to how – how many fields that I have cleared over a period of years and my other neighbors know it to.

MR. BROOKINS: Thank you.

MR. FRUEH, JR.: My name is Chris Frueh. I live at 339 Collabeck Road. I manage the family business at 117 Old Quarry Road. Getting back on a few of the issues that came

up, there was mention of a letter from the Town of New Scotland as to what happened on Collabeck Road and the suggestions that were made were inaccurate. The Town had been approaching my father several times to say that they wanted to - - the property line went to the edge of the road so the Town came to him to request permission to take dirt off his property. In doing so my father said well, I'd rather you didn't do that. There are some trees and some rocks that we need for things of our own ventures and we would prefer to load the dirt ourselves. Therefore my father donated the machine and the Town in getting that service to provide safety on the road and getting a free machine they offered to donate the trucks to haul fill to any location that we requested. So we had them - there were areas on the farm where we stripped topsoil up and filled with this fill. In doing so we acquired many large rocks that we needed for a job and we piled in this area that we had excavated. So the area that we filled was for a staging area down near the barnyard to just create more flat area for some of our equipment, some of our needs and the topsoil that was there was extracted and sold to - some of that material went - that's where material for the estate of Jane Gottschalk for her septic system came from. The rocks that were left on Collabeck Road - we brought up a hydraulic hammer on an excavator; we sized them for a job that we had; the Vansenton job up in the Town of New Scotland, it's called Great View Terrace. We brought that rock there to - which is evident if you drive up there you'll notice that there's a pond on the left side of the road and we had to stabilize the bank with that road so that was the purpose in taking that rock. In taking that rock we came up short a couple loads and we took it off the - off the log road to finish the job. So that was the purpose of taking those 2-loads that were mentioned off the log road.

CHAIRMAN HODOM: What is the log road?

MR. FRUEH, JR.: The one that they're saying never - - the road that goes up to the mine site.

CHAIRMAN HODOM: Okay.

MR. FRUEH, JR.: Let's see, I'm trying to remember what else I wanted to clarify.

MS. MOREAU: Did you address the riprap?

MR. FRUEH, JR.: That was the riprap. Over the course - I've been working there ever since I was a kid. I grew up in the business, didn't really picture myself doing it. I actually worked for our surveyor for 9-months before I really got - - I worked with the business before but when I got out of school I didn't think it was what I wanted to do so I worked with Richard Elliot and his daughter Cindy Elliot. I worked there for 9-months and then my father told me it was time to get busy so I wound up driving a truck for him for a little while there and that's the first year I believe it was the first year I had my truck license when we had the bid for covering the New Scotland landfill during the wintertime. So we were excavating fill out of the rear of our building if you come off of West Yard Road, which is in front of the office area. I went up the road with a load of dirt and I tipped it over in front of the neighbor's house.

CHAIRMAN HODOM: What years are you talking about?

MR. FRUEH, JR.: I'm saying probably '82; I would guess that was the year that I had that little stunt.

CHAIRMAN HODOM: But that was the time you were taking shale out of the back of where your building is?

MR. FRUEH, JR.: And we were hauling clay out of the front of our – at our building area there and covering the New Scotland landfill during the wintertime.

CHAIRMAN HODOM: Have you submitted any documentation to that affect?

MR. FRUEH, JR.: For New Scotland?

CHAIRMAN HODOM: Yes.

MR. FRUEH, JR.: No, just in writing that you know there were areas that we have brought materials to in the past. I believe that we submitted to that effect, didn't we?

MS. MOREAU: We have some invoices from New Scotland here.

MR. FRUEH, JR.: Oh, those are just topsoil jobs that have been over the years.

MS. MOREAU: They were not related to that job?

MR. FRUEH, JR.: No, this was back when the landfill was in operation and they were looking for contractors to bid covering the landfill in the wintertime, but I go back to that time period and over the course of the past 20 – let's see, I had my license since I was 18, so that would be 23-years. It's been a - - it's been something I've done throughout the whole course of those years is extract materials off our property; haul them to job sites. When I got involved operating equipment I – sometimes I'd load it; haul it; place it. It's just – I used to do a lot more operating; I don't do as much now, but I still jump in the truck and deliver a load when we need it. The processing equipment; I've been involved in processing materials on the property; goes way back to when we were on Route 32 my father used to put me on a tractor with a rototiller sometimes mixing sand and manure, but on the properties we've filled areas where the areas we filled we would never bury the topsoil, we would strip it up and save it for the purpose of selling. As my father said sometimes it would have to rot down because you'd have a lot of roots in it or you'd have sod or it would just be too wet. The purpose of piling it would be for it to dry out because when you process, the material needs to be dry in order to be efficient at processing because if it's wet it clogs the equipment up and it's really a tough job to do if you have wet material.

CHAIRMAN HODOM: Is all your property contiguous?

MR. FRUEH, JR.: Correct.

CHAIRMAN HODOM: It is? So that area where you're looking to extract the limestone is part of the contiguous land that you own?

MR. FRUEH, JR.: Yes. I can also attest that there are several of the neighbors that we have delivered materials to off our property, so – to speak out against the affidavits. I would have to say that there are several of them that are inaccurate.

CHAIRMAN HODOM: Do you have any documentation that...

MR. FRUEH, JR.: I'll state again, Jane Gottschalk, I mean we did the work there and the Billetts were the ones that authorized that work so they signed an affidavit. We also worked on their house back in – I believe they built their house, I believe it was 1990 and you know those receipts are – I don't have those receipts in my hand anymore. Those days are - - You only have to save your receipts for 7-years so I don't have those, but - - yeah, I had Mark Wagner who lived across the street, I've sold him material over the years. I have neighbors that have written that they have purchased materials and I have – I have businessmen that we have business relationships, you know builders that we have business relationships with that have attested to the fact that they've purchased these materials and know that they came from our property.

CHAIRMAN HODOM: Is that something that you want to put on the record?

MR. FRUEH, JR.: Yes, I'll do that.

MS. MOREAU: Give that person a copy and then that's for the Board.

MR. FRUEH, JR.: Okay. Oh, I get all of these Okay, they're all lumped together I'm sorry.

MS. MOREAU: That is for the Board.

MR. FRUEH, JR.: Okay.

MS. MOREAU: Is it necessary for us to verbally enter those into the record?

CHAIRMAN HODOM: They're on the record.

MRS. O'BRIEN: Have you extracted any materials at all from the site that DEC has given you the permit for blasting?

MR. FRUEH, JR.: No we haven't because we're in a process of permitting an area, you're not allowed to touch it so we've been chomping at the bit for 3-years now.

MRS. O'BRIEN: But in the past before you...

MR. FRUEH, JR.: No, it wasn't assessable.

MR. BROOKINS: Question, the – would it be reasonable to assume – many of the affidavits essentially suggest that you folks have been doing some re-grading, moving some topsoil around, certainly not in a engaged in any mining or any heavy equipment activity. There were several people had mentioned agricultural uses that they've either seen or are familiar with – would it be reasonable to purchase a 134,000-thousand dollar portable horizontal rock crusher for that kind of and that level of business operation?

MR. FRUEH, JR.: No we never anticipated to have such opposition so we purchased that crusher in anticipation of crushing rock. The only thing we've done with that crusher at this point is recycle concrete. That's a business that's taken off now and so we've done it once where we've recycled concrete and so we do sell recycled concrete to.

MR. BROOKINS: And it'd probably be also reasonable to assume that you bought that because you had some history with your own property of mining or excavating rock, shale....

MR. FRUEH, JR.: That's – yes, I mean that's...

MR. BROOKINS: You have to have a reasonable presumption that there's going - - it's going to generate some revenue.

MR. FRUEH, JR.: Yeah, we've been hurting her for a few years because we really anticipated working this equipment so when we wound up taking so long we expected – we were told when DEC came out and visited our site for the first time, they got so excited about it they said that we'd probably have a permit within 4-months and so we had applied for a permit, I don't remember what year it was, but we applied and we got incomplete application so then another year went by because we had so many things that we had to fill out; so many extra things that we had to do to satisfy DEC. In that process when we finally completed it a year later and submitted it to them they gave us notice of complete application, which therefore made it where we had to advertise the fact that DEC had given us a negative declaration which means there's no environmental impact on the area.

Now, we got accused of being sneaky and cheat – you know the neighbors were accusing us of being sneaky and all this type of stuff and that created – that created a lot of opposition and the next thing we knew we were tied up and had to get an attorney involved and it just became a very lengthy process. The one thing I had a problem with is that they really tried to smear our name because the neighbors that were accusing us of being sneaky and all that I had had in my office a year prior; showed them plans; explained to them what we wanted to do; said any time you want to go on this site I'd be glad to take you for a walk; tell you what we're going to do and the remark was if you're okay with it I'm okay with it and that was out of Tony Billetts' mouth. Other's I mentioned it to, I just - - and I've also approached neighbors and said, you know I want

to be you're neighbor if you want to talk about it I'd be glad to talk to you about it but no, everything's got to be done through an attorney so basically I've haven't really been speaking to the neighbors about issues all along because it became an attorney issue.

Recently we got the mining permit, a few questions came up about our - - we have a water protocol we have to do, which is to check the turbidity in the water to make sure that when we blast we don't interrupt somebody's water. If we do that the DEC as the lead agency on the whole thing, they'll do an investigation. DEC has us like this. We have to do whatever they tell us to do. So for people to get so out of control, they have some access agreement they want taken care of to try to slow things down again. We've addressed that at this point. I have hired a hydrologist that did an extensive study point specific on our property to determine where the water goes, if it's going to impact wells; DEC was in agreement with it. Paul Rubin here was the one that did the hydrology report for the Town back when they were reviewing LUMAC type things and his was a broad overview of the area. He never point specific was never on my property doing a point specific survey.

Tonight I find out – at least this is what he's telling me is that he trespassed on our property. I can't believe that they took the liberty of doing that when we have posted signs and gates up but I guess they do what they have to do. I still want to be their neighbors; I want to do the neighborly thing; I've always been the neighborly businessman. My father has gone up and buried horses for the neighbors for nothing. I've gone to Susan Morrison's property for nothing and towed a guy who delivered firewood who went over the back bank in a snowstorm at 7:30 at night; pulled him up the hill. That was just a neighborly thing to do so I'm just miffed that they would never want to sit down and talk to me. I've gone to their front door; I talked to her husband; I said my door is wide open; I said anytime – when I have a problem with any of my neighbors, I go knock on the door and I said I talk about it. I don't call the cops; I don't get an attorney; I don't go nuts, but...

CHAIRMAN HODOM: We're getting a little off the subject.

MR. FRUEH, JR.: I just get going and I get heated up, you know?

CHAIRMAN HODOM: Well I wanted to un-heat you. Why don't we just take a 5-minute break?

Hearing reassumed 10:05 p.m.

CHAIRMAN HODOM: Go ahead Chris.

MR. FRUEH, JR.: There's one thing I needed to clarify that I made an error on. That road that goes up to the mine site, that always was a logging road. I used to hunt on that, what we did to it is we widened it because we needed to make it assessable for tractor trailers, but it was always a logging road up through there. There were trees that we had cleared trails through there for logging purposes, but I now that our neighbor, Gerry

Tryon, he has pictures that show the place when it was totally cleared. At one time it was potato field, but as the years go by this – I don't know what kind of growth you want to call it, 50-year growth I guess you would say but 50-years ago that whole place was just nothing but clear. You could see the escarpment from Delmar and that's probably true for the case of the whole escarpment. Another thing I want to add is in Bethlehem there are, I believe there's at least 4-mines in the Town of Bethlehem that are on Rural Not Zoned lands. There was a quarry down the road half a mile where they blasted there for many years. Callahan purchased that operation; I believe it was from Albany Stone Products or something to that affect.

UNIDENTIFIED MAN: Albany Stone and Gravel.

MR. FRUEH, JR.: Albany Stone and Gravel? Okay. And then you have the Malloy Gravel Bank down on Rupert Road, you have – Callahan has a gravel bank there now or the Town has a gravel bank. The dump used to be a gravel bank, so I just wanted to state that because it's something that's been a use in the Rural Not Zoned area so we're not doing anything out of the character of that area and really our boundary for our property is – we're pretty much bounded by industrial because we have all the industry down there; the railroad, GE owns Corning. Our business would be considered industry, we only process materials – when they reinstated our zoning they said all existing commercial industry and retail and I remember the Town attorney stating that he felt that we fell under all three of these categories. When the neighbors brought that up as an issue on the zoning – when the Board voted on it and – let's see, I think that pretty much clears my head. Any questions?

CHAIRMAN HODOM: No, not right now. Thank you.

MS. MOREAU: Can we just have three more people; very brief statements.

CHAIRMAN HODOM: Okay, please?

MS. MOREAU: John?

CHAIRMAN HODOM: Just introduce yourself to us and give us your address if you would.

MR. NEARY: Sure. My name is John Neary, I live in Ravena, New York; I own and operate Neary Builders, a construction company that my father started in 1945. The Frueh's have been doing work for us since 1984, 20-years now and I've been to their site several times and have purchased materials that I know for a fact have come from that property; been processed on that property and just want to come and let you all know that. They asked me to come and speak on their behalf and I was happy to do it. I've know Chris and his father to be, you know very hard working and very honest – very honest people, the most honest people I think that work for me in the last 20-years. They're very, very good at what they do.

On all of my projects they've always taken the rules, the local codes and environmental issues on my projects. We're first and foremost with them so I'm sure when it comes to what they do on their own property and in dealing with their own property and their neighbors that they're going to do and nothing but be honest and upfront. That being said I came here tonight to speak for them because I believe, you know what they're trying to do is - - they're doing what they're doing because they're very efficient at what they do; they're very, very good at what they do in the excavating business and having this mine and crushing this rock is what they see – they need to do to be more efficient and serve the people they work for better so that's why I came here tonight.

CHAIRMAN HODOM: Thank you.

MR. CONSTANTINE: My name is Michael Constantine and I am the son-in law of Peter Frueh.

CHAIRMAN HODOM: Your address Mike?

MR. CONSTANTINE: 254 Beaver Damn Road, Selkirk. I've been working for my father-in-law for 20-years. My first job as I started was making topsoil as he said, processing it, making it so we could sell to the jobs that I brought it to that I trucked the jobs to that I placed it on the jobs and we got paid for our hard work. All our work that we do is hard work I mean that's how we make our living and it's not that we regret that it's just the way we make our living and we're proud of what we do. We have an extending family that is working with us, my son, my wife, my sister-in law; we all work together and that's how we make our living and make our family survive so that's all I have to say.

CHAIRMAN HODOM: Thank you.

MR. SNYDER: My name is Brian Snyder; I live at 68 Old Quarry Road. I started working for Peter February 9, 1983 and I've been with him ever since. I to have mined the materials, I've driven the trucks, I've run the bulldozers, I've done it all and you know to say that there's no evidence of mining you'd have to be blind. That's all I have to say, thank you.

CHAIRMAN HODOM: Thank you.

MS. MOREAU: Just to rap up, a point of clarification one of the issues certainly that was raised was the legality of the activities that the Frueh's were doing on the property with respect to mining in excess of 1,000-tons of material per year. That was raised by Mr. Rubin and Mr. Gerstman and there was some crude calculations made tonight which I really am not – I don't know about those calculations but what I do know and what I do want to clarify to the Board is that 1,000-ton per year limit per parcel. It's per taxable parcel and the Frueh's own 7-taxable parcels. You can take a 1,000-tons per parcel, that's over 7,000-tons on the whole 180-acres. So I do want to make sure the Board's aware of

that and also the geologist made some points about certain materials can't come from the same area. He talked about shale and topsoil, you know you don't get topsoil out of a shale-bank basically so references to different types of material that add up to, you know 1800-tons or whatever it was. These materials are coming from different parts of the entire Frueh property. So I think that the Board should be aware of that.

And finally I haven't seen the aerial photos that Mr. Rubin is basing his expert opinion on, but the only aerial photos that I have any experience with, other than having, you know your own property photo for your own personal, you know satisfaction is when for example they do photography for soil districts and things like that and usually it's done during the winter months when there are no leaves on the trees so that you get a better view of what's there. So when you talk about issues such as disturbance and whether you can see grass growing and whether you can see foliage and things like that I think certainly it depends on the time of year. Again I haven't seen the photos; I don't think the Board has seen the photos yet but just kind of a practical common sense point of view. And finally with respect to these aerial photos, the Frueh's have 7-parcels and I don't know if Mr. Rubin is focusing just on the small area where the crushed limestone mine is going to be, which is 4.7-acres on a larger parcel. I have no idea of what the boundaries of his expert testimony are. So I'm sure when you're looking at those photos and you're going to be looking into this further you'll be having those same questions.

It's interesting that what we have here really tonight is I think it's analogous to a cottage industry. You hear all the time about people, when they talk about land use and what makes for a good community. They talk about things like local people in business and supporting local business, talk about sustainable businesses, sustainable agricultural for example having farms where they produce their own topsoil and they put that back into the land and they grow their crops and then the local community is the customer base. You're talking about a very local economy; well the Frueh's are an example of really a cottage industry. They have a property, which is actually somewhat unique and very amendable to the types of things that they're doing. They have a property where they can do mining; they have a property where they can conduct a business. They're in, frankly an industrial area of the Town of Bethlehem.

There's mixed uses there as one who visually drives up there can see, including agriculture, which you know their the green space that you see from GE when you look up on that hill and you see Peter's farm so you see agriculture and you also see homes, but it is called Old Quarry Road for a reason where they're located. Being able to be a small mine is very difficult today, most of the mining of most aggregate is done by large corporations, very often foreign corporations so we do have a home-grown business here and you have people that you heard tonight about their character, about their honest and I'm sure the Board will consider all of that. Thank you.

CHAIRMAN HODOM: Thank you. Is there anyone here who hasn't spoken that would like to speak to the issue? Yes sir?

MR. CROUNSE: My name's Mark Crouse. I'm just sitting here listening to everything

I heard and it seems to me that if all these neighbors haven't heard him do all this work all these years, he's done a great job, you know of keeping the noise factor down.

CHAIRMAN HODOM: Thank you.

MS. JASINSKI: Hi, Linda Jasinski. I looked up on DEC's website today and there are 6-active mining permits in the South Bethlehem area. Two of them belong to the Town of Bethlehem, there's topsoil, clay, there's gravel, stone. I know the one Bethlehem site is clay. They actually haven't been taking the clay off in the last few years but they had to do a whole bunch of environmental stuff to fix that up to keep their permit active. So apparently you don't need to be actually taking it off to have an active permit, so I can't see how you can say it's not a permitted use down when you've got all these other people doing it. It's an area that, you know is industrial like, although it's Rural Not Zoned, you know the Frueh's are working it. I've gone by their house for years and years; I've watched that shale bank going back behind the house. I imagine that they're mining it, I don't know what else you would do with it if you were going to, you know sell it. You can see a change there.

CHAIRMAN HODOM: Thank you very much. Yes sir?

MR. WALDENMAIER: Hi my name's Mike Waldenmaier and I've been listening to this tonight and I've known the Frueh's for a long time and I know when it used to be an orchard and I saw Pete when he took that orchard out and what they just said about trying to keep local businesses in this Town and this is a big thing. We've been going to all these comprehensive Board meeting and we're talking about how wonderful the Delmar is and it's nice to have the small businesses and we don't want to big boxes. Well here's an opportunity to keep a business in this Town is going to have to buy everything from the Callahans and it's just so ironic that the Spotlight this week – I got it today is says buy local it makes good sense. I would like to buy my stuff off of them. Thank you.

CHAIRMAN HODOM: Thank you. We're going to adjourn the hearing to a date uncertain; once we get the documentations that we've asked for. Any Board members have any further questions from either party right now.

MR. WIGGAND: No I think everything has been covered.

CHAIRMAN HODOM: Okay. If either party has any other information that you want to provide please give it to us at least a week to 10-days ahead of time, I mean it's nice to get the information but we need it to review it so we can at least approach the hearing in a comprehensive and intelligent manner.

ATTORNEY SILLIMAN: I would set a date by which you want submittals from them. You don't need to set a date for us to reconvene but a date to submit the material.

CHAIRMAN HODOM: Well I think Mr. Gerstman said he could have everything to us within a week's time.

ATTORNEY SILLIMAN: By next Wednesday?

CHAIRMAN HODOM: Is that fair or...

MR. GERSTMAN: We'd be glad to submit the 3-additional documents. We talked briefly about the opportunity to do some rebuttal and we'd like to submit a written rebuttal to some of the things we've heard today and if the hearing is going to be reconvened to a future date I would agree that we could submit something a week in advance of the hearing date. Would that be fair to the Board?

ATTORNEY SILLIMAN: Yes that would be fair; we just have to take that into account.

CHAIRMAN HODOM: I'd really like it 10-days or better. We're busy this time of year and I'd like to have the Board have enough opportunity to review the information ahead of the hearing.

ATTORNEY SILLIMAN: How soon do you think?

CHAIRMAN HODOM: 2-weeks? What's our next hearing?

MS. GUASTELLA: November 3rd.

CHAIRMAN HODOM: Is it open?

MS. GUASTELLA: No, we're booked we've got 3-public hearings scheduled.

CHAIRMAN HODOM: What's the next open date after that.

MS. GUASTELLA: November 20th.

ATTORNEY SILLIMAN: Not good for me, I'm out of Town. So that means you're into December. You meet the first and third?

CHAIRMAN HODOM: First and third, yes.

ATTORNEY SILLIMAN: Let's do it here.

CHAIRMAN HODOM: December 1st? Why don't we establish a reconvening date of December, which will be the first Wednesday in December, that being the case at least 10-days prior to that date. Is that agreeable to both parties?

MR. GERSTMAN: Yes.

On a motion made by Chairman Hodom, seconded by Mr. Wiggand, and unanimously carried by the Board the Hearing will be continued on December 1, 2004 at 7:30 p.m.

CHAIRMAN HODOM: Thank you all very much.

Hearing Adjourned 10:25 p.m.

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The next order of business this evening is a public hearing for a Variance under Article XVII, Rear yards, Section 128-79 A (2), Required Depths for property at 3 Maewin Drive, Delmar, New York 12054 requested by Rita Gavin. The Applicant wishes to construct an addition, which will encroach into the Rear Yard Setback requirement at premises 3 Maewin Drive, Glenmont, New York.

CHAIRMAN HODOM: Mr. Platel, please give us the reason for the hearing.

MR. PLATEL: Yes, Mr. Chairman. The Applicant is seeking an area Variance in order to construct an 8-foot by 10-foot addition to the existing main structure that will encroach into the rear yard setback. The existing structure has a rear setback of 12.2-feet, which is a pre-existing non-conforming condition. However the new 80-square foot addition, which will have a rear yard setback 12-feet will be 13-feet shy of the 25-foot required for new construction as required in an "AB" Residence District. The existing main structure is currently occupied as a single-family dwelling.

CHAIRMAN HODOM: Thank you, Mark. Ms. Guastella, please read the official call of the hearing.

Notice of Public Hearing. Notice is hereby given that the Board of Appeals, Albany county, Town of Bethlehem will hold a public hearing on Wednesday October 20, 2004 at 7:45 p.m. at the Town Offices, 445 Delaware Avenue, Delmar, New York to take action on application of Rita Gavin for Variance under Article XVII, Rear Yards, Section 128-79 A (2), Required Depths of the Code of the Town of Bethlehem for construction of an addition, which will encroach into the Rear Yard setback requirement at premises 3 Maewin Drive, Glenmont, New York. Michael C. Hodom, Chairman, Board of Appeals. Attached to this Notice is notarized proof of its publication in the October 13, 2004 edition of the Spotlight, official paper of the Town of Bethlehem. All persons listed in the petition as owning property within 200 feet of the premises in question were notified by mail at least five days prior to this hearing.

CHAIRMAN HODOM: Thank you, Karen. We'll use the same procedure that we used earlier this evening; we'll hear your presentation and we'll entertain any questions or comments from the audience. Mark are you going to be making the presentation?

MR. CROUNSE: I am.

CHAIRMAN HODOM: Just introduce for us.

MR. CROUNSE: I'm Mark Crouse; I'm the builder. We're just adding to the side of the house that's basically the same setback from the rear lot line, there's like a 6-inch difference. The lot's plenty wide it's just that she doesn't – she has her washer/dryer in the basement and she assesses it by a bilco door. The only real affordable place is to put it where the plumbing exists which is on the bathroom and that happens to be the location where we propose to do addition. It's on the right side of the house.

CHAIRMAN HODOM: And so the existing laundry room is in the basement, but the only access to the laundry room is from the exterior?

MR. CROUNSE: She has to go outside and down.

CHAIRMAN HODOM: Do you have fun doing that during the wintertime?

MS. GAVIN: In the snow when it's 5-degrees.

MR. CROUNSE: It's just a simple gable end structure.

CHAIRMAN HODOM: Mark are you able to match the architectural features of the house with the new addition? It looks like it had new siding on it recently.

MR. CROUNSE: Right we're going to match the siding; match the soffit, fascia, window detail.

CHAIRMAN HODOM: Have you, Ms. Gavin discussed this addition with your neighbors?

MS. GAVIN: Yes with most of them, yeah. Two of them I believe sent letters in and then there are two other's – made statements and the others said they had on objection. One or two of them asked me if I wanted them to come tonight and I didn't think it was necessary, I'm glad they didn't.

MR. CROUNSE: It would have slowed the process down.

CHAIRMAN HODOM: Well we don't many nights like that but it happens on occasion. What time frame are you looking at to commence and complete construction if the Board were to approve your application?

MR. CROUNSE: As soon as the ink is dried.

CHAIRMAN HODOM: Okay. You want to beat the winter weather I take it?

MS. GAVIN: Yes.

MR. CROUNSE: Yes.

CHAIRMAN HODOM: Any other questions from the Board?

MR. WIGGAND: I visited the site today and I could see that you have a need for something like this, sincerely. The only thing is Mark, Len and I were guessing on the side property line, how far from that new addition to that to the property line? I think that must be about 20-feet from the existing building isn't it?

MR. CROUNSE: At least because it goes over within 5-feet of that other house.

MS. GAVIN: Yeah.

MR. WIGGAND: I was a little bit...

MS. GAVIN: It was 24 or 25-feet from the current so if it goes out 8-feet...

MR. WIGGAND: Okay. So then we can assume that there's 8-feet off that 24-feet so we've got 16-feet there at least.

MS. GAVIN: Yeah.

CHAIRMAN HODOM: The plot plan shows 24.8-feet.

MR. WIGGAND: Is that what it is?

CHAIRMAN HODOM: From the easterly side of the house to the property line.

MR. PLATEL: 15.8-feet.

MR. WIGGAND: Oh, you've got it right here. Okay, we've got it. Thank you.

MR. CROUNSE: Yeah the lot's all-wide – it's just the house is built way to the back of the property.

CHAIRMAN HODOM: Basically the house is non-conforming currently.

MS. GAVIN: Right.

MR. CROUNSE: Right.

CHAIRMAN HODOM: So the addition would meet the...

MS. GAVIN: But it's been there for 50-years.

MR. CROUNSE: It's been non-conforming for 50-years.

MR. WIGGAND: And one other question, that fence that's in the rear – that is your property line in the rear, is it not?

MS. GAVIN: Yes.

MR. WIGGAND: The one that's on the rear of your building? That is the property line.

MS. GAVIN: Yeah.

MR. WIGGAND: Okay. I wasn't sure if you owned something behind that.

MS. GAVIN: No.

CHAIRMAN HODOM: Any other questions from the Board?

MR. MICELLI: I don't have any.

CHAIRMAN HODOM: Any questions or comments from the audience? Hearing no further questions or comments we'll declare the hearing closed and notify you in a timely manner. Thank you for being so patient.

MS. GAVIN: Thank you.

Hearing closed 10:34 p.m.

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The next order of business was a discussion of the previous public hearing held in the matter of William and Ellen Van Valkenburg for Variance under Article XII, Percent of Lot Occupancy, Section 128-50, Single Family Dwellings and Article XVIII, Rear Yards, Section 128-79, Required Depths to construct two additions, which will exceed the allowable percentage of lot occupancy and encroach into the rear yard setback requirement at premises 18 Werner Avenue, Delmar, New York. The following points were brought up by the Board members: The Applicant was deferred back to the Planning Board to request relief for the rear yard setback requirement as set forth by the Planning Board and the City of Albany Water Board. The request was denied by the Planning Board. Based on the current submittal on the lot occupancy and the setback encroachments, the Board denies the application. On a motion made by Chairman Hodom, seconded by Mr. Wiggand, and unanimously carried by the Board, the Board directed Attorney Moore to prepare a proposed resolution denying the Variance, for

presentation at the next Board meeting on November 3, 2004.

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The next order of business was a discussion of the previous public hearing held in the matter of Rita Gavin for Variance under Article XVII, Rear Yards, Section 128-79 A (2), Required Depths for the construction of an addition, which will encroach into the rear yard setback requirement at premises 3 Maewin Drive, Glenmont, New York. The following points were brought up by the Board members: The proposed addition will be for a laundry room. Currently the applicants' washer and dryer are in the basement with the only access being a bilco door on the exterior of the house. The lot is currently non-conforming. The proposed addition will not affect the character of the neighborhood. On a motion made by Mr. Micelli, seconded by Mrs. O'Brien, and unanimously carried by the Board, the Board directed Attorney Moore to prepare a proposed resolution granting the Variance, for presentation at the next Board meeting on November 3, 2004.

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The next order of business was to consider the proposed resolution of Kathryn and William Jones, 92 Brockley Drive, Delmar, New York.

The following proposed resolution was presented by Attorney Moore for the Board's consideration.

RESOLUTION

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WHEREAS, an application has been filed with the Zoning Board of Appeals of the Town of Bethlehem, Albany County, New York ("the Board") seeking a Variance under Article XII, Percent of Lot Occupancy, Section 128-50, Single Family Dwellings, requested by Kathryn and William Jones ("Applicants") for property at 92 Brockley Drive, Delmar, New York; and,

WHEREAS, the Board of Appeals, acting on said application, duly advertised in the Spotlight and sent written notice to all persons listed in the petition as owning property within 200 feet of the premises in question and held a public hearing on said application at the Town Hall, 445 Delaware Avenue, Delmar, New York on September 15 and October 6, 2004; and,

WHEREAS, Members of the Board are familiar with the area in which the proposed construction is to be done and the specific site of same; and,

WHEREAS, all those who desired to be heard were heard and their testimony duly recorded at the above hearing; now therefore,

BE IT RESOLVED, that the Board of Appeals makes the following Findings of Fact and Conclusions of Law in this matter:

FINDINGS OF FACT

The Applicants are proposing to construct a 636-square foot garage and breezeway addition to the existing 1,249.3-square foot main structure that will create a total main structure of 1,885.3-square feet. This will exceed the 1,575-square feet that are allowed for the main structure by 310.3-square feet. The lot occupancy will be 17.96-percent, which is 2.96 over the 15-percent allowable.

The structure is currently occupied as a single-family dwelling and is located in an "AA" Residence Zone.

The Applicants' original proposal would have required a variance of 3 feet from the front yard setback requirements of the Town Code. At the September 15 public hearing, the Applicants agreed to modify their plans to eliminate the need for the front yard setback variance.

The Applicants' proposal would also encroach into a Town drainage easement on the property by approximately 3 feet. By memo dated September 20, 2004, the Town Department of Public Works advised the Board that it has reviewed the Applicants' proposal and has no objection to this encroachment, which will not interfere with the operation of the easement.

Applicants have no garage at their home at present, and own two cars.

The garage and breezeway are proposed to enhance the Applicants' comfort and safety. Mr. Jones suffered a broken wrist last year. Mrs. Jones has a handicapping condition (muscular dystrophy), which affects her mobility. Having the garage and breezeway will enable the Jones' to enter and exit their home and their cars safely during the winter months, without concern for snow and ice.

Applicants testified that other homes in the neighborhood have breezeways connected to garages.

Applicants testified that the connecting breezeway enhances the appearance of the home, providing extra living space and connecting the home to the garage in a visually attractive manner.

At the hearing, Applicants provided written statements from five of their neighbors supporting the proposed garage/breezeway addition.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, this Board concludes that the Applicants should be granted the requested variance.

The Board has determined that the requested variance will be a benefit both to the Applicants and to the neighborhood, and will improve the appearance and utility of the Applicants' home.

The benefit sought by the Applicants cannot be achieved by some method other than a variance.

The requested variance is minimal, and is the minimum variance that is necessary and adequate to the Applicants' needs, while still preserving the character of the neighborhood.

The alleged difficulty necessitating the requested variance has not been created by the Applicants.

Accordingly, the Board grants the Applicants' request for a Variance to replace the existing porch with the new living space on the following conditions:

1. The project will be constructed in conformity with the testimony before the Board and the documents submitted to it;
2. The Applicants shall match the new garage/breezeway addition as nearly as possible with the existing siding and roofing on the house; and
3. The proposed project will be constructed within two years of the date of this resolution.

October 20, 2004

Michael C. Hodom
Chairman
Board of Appeals

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Mr. \ made a motion that the Resolution be adopted, Mr. \ seconded the motion and it passed by the following vote:

| YES | NO | ABSENT | ABSTAINING |
|--|------|--------|------------|
| Michael Hodom Robert J. Wiggand Gilbert Brookins Marjory O'Brien Leonard Micelli | None | None | None |

(Resolution filed with the Clerk of the Town of Bethlehem on October 21, 2004.)

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On a motion made by Mr. Wiggand, seconded by Mr. Brookins, and unanimously carried by the Board, the minutes of the October 6, 2004, meeting were approved.

The meeting was adjourned on a motion made by Mrs. O'Brien, seconded by Mr. Wiggand and unanimously carried by the Board.

Meeting Adjourned: 11:05 p.m.

Respectfully submitted,

Secretary