

**TOWN OF BETHLEHEM  
BOARD OF APPEALS  
December 1, 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

ABSENT: Mark Platel

Building Inspector

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

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

Mr. Platel is ill this evening, however the reason for the hearing has not been changed. If anyone desires a reading of Mr. Platel's reason please ask and we will do that. If not we'll just leave it as what was stated in the minutes of October 20<sup>th</sup>. Thank you.

CHAIRMAN HODOM: 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 for Appeal under Article XXIII, Board of Appeals, Section 128-99, Appeals of the

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

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 the premises Old Quarry Road, Feura Bush, New York 12067. 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. Because this is a continuation of a previous hearing and because the Board has also received the requested documentation from both the petitioner and the respondent, the procedure that we'll use this evening is hear any new presentation from the petitioner and any new presentation from the respondent. We will then entertain any new questions or comments from the audience that were not addressed or stated at the previous hearing. We will hear anyone desiring to speak in favor or in opposition to the appeal who has not previously stated their position. All comments and questions should be directed to the Board and must be to the issue of the hearing. Anyone desiring to speak will be allowed to do so, we just ask that you come up front, stand or sit close to the black microphone, it's for recording purposes only. Mr. Gerstman do you have any new information that you'd like to present this evening?

MR. GERSTMAN: Ms. Roberts from my office will be presenting.

MS. ROBERTS: Good evening, my name is Cheryl Roberts. I'm of counsel to the law office of Mark S. Gerstman. Mr. Gerstman is here with us tonight as are several members of the Fuera-Bethlehem Heights Alliance whom Mr. Gerstman and I have the privilege of representing in these matters before you. On behalf of the alliance we'd like to thank the Board for allowing us to come back here and talk about these issues and our appeal.

At the outset however I want to just request of the Board that we be given an additional 10-days to respond in writing to a November 27, 2004 letter from Ms. Moreau to the Board. We hadn't received this until just a few moments ago. Ms. Guastella was kind enough to give this to us so we hope that the Board would allow us to respond in writing to this.

CHAIRMAN HODOM: I don't think we have any problems with that. This is a response from the respondent to the petitioners requested documentation and they're asking for 10-additional days to make a response to that. Does the Board have any problem with that?

MR. BROOKINS: Wasn't this a response to their November 22<sup>nd</sup>?

CHAIRMAN HODOM: Yes.

MR. BROOKINS: Are we going to get into a response snowball throwing contest here?

CHAIRMAN HODOM: I think that the, well it's...

MR. BROOKINS: I thought that was seasonal.

CHAIRMAN HODOM: Let's discuss it.

MS. ROBERTS: We wouldn't anticipate going back and forth but there are a couple of items, legal issues that we would like to just brief you on and would like to have some time because it seems to us that some of the law is mis-stated so I'd like to have the opportunity to provide you in writing what we feel is a correction of the legal case law.

CHAIRMAN HODOM: Can we request then that your response will be strictly addressing legal issues?

MS. ROBERTS: Certainly, yeah and we can do it in 5-days even if 5-days is...

MR. SILLIMAN: There's no reason after tonight to hold a public hearing record open, you can just note that that additional response will be coming in.

CHAIRMAN HODOM: That's correct and if you can minimize the time, if 5-days is adequate for you then we would like to have it in 5-days. I mean normally when we close a hearing and if there's some new documentation coming in we will allow up to 5 or 7-days, 10-days is a little bit beyond our normal so if you can do it – is 5-days adequate?

MS. ROBERTS: That would be fine, you know if we had gotten it when you all did then we could have been prepared tonight. We appreciate it.

MR. SILLIMAN: Are you saying that you can get up something by December 6<sup>th</sup>, Monday?

MS. ROBERTS: Yes.

MR. SILLIMAN: Okay so that would be the date that's set.

CHAIRMAN HODOM: Thank you.

MRS. O'BRIEN: Could I ask that you specify which areas your in need of responding to because this seems to be responding to your letter?

MS. ROBERTS: On page 3, the paragraphs really – the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> paragraph, really the information of discussing the Orsi case and the Dolomite case.

MRS. O'BRIEN: Which you brought up in your...

MS. ROBERTS: Right but I think that they has been mischaracterized here so I would like the opportunity to respond in writing just on those two cases.

MS. MOREAU: Mr. Hodom?

CHAIRMAN HODOM: I think that would be fair Cheryl, sure.

MS. MOREAU: Can I please comment on that?

CHAIRMAN HODOM: Why don't you let them finish theirs and then if you want to comment on it you can comment on it.

MS. ROBERTS: Thank you.

MS. MOREAU: I was just speaking to the issue of letters going back and forth.

MS. ROBERTS: Thank you Mr. Chairman.

CHAIRMAN HODOM: Thank you.

MS. ROBERTS: You should have in front of you I think a letter that we hand delivered to your office and Cc'd Ms. Moreau dated November 22<sup>nd</sup>. I won't repeat what's in the letter but just to make 3 or so points to highlight a few of the key areas we wish to highlight.

First we learned at our last hearing that there's not just 1-parcel that the Frueh's own but in fact they own 7 distinct parcels that have their own tax I.D. number and that's significant because what we also learned is that mining never occurred on the parcel for which the Frueh's have now been given a permit through the D.E.C. Through testimony that we presented from Mr. Rubin through his aerial imagery and the affidavits and live testimony of some of the Feura Bush Bethlehem Alliance members, they all testified accurately that mining had not occurred on this parcel and in fact the Frueh's themselves admitted as much. On page 41 and 42 of the transcripts, I don't know that I have the official transcripts but what was available on the website, as those are numbered 41 and 42, Chris Frueh said that mining had not occurred on the specific site where the mine has been proposed in response to a question to Ms. O'Brien and that's significant because case law as we cited in our paper indicates that you can't just have mining going on, on 1-parcel and say that it applies to a separate parcel. It's a separate distinct tax parcel.

I think you all know very well the process of when someone comes before you for a Use Variance or an Area Variance or even a site plan approval, it's site specific; it's parcel specific. So we were not aware that actually there were 7-parcels, we thought it was just 1-parcel as actually Ms. Moreau and others have kind of described as in the transcript as well referring it at least initially as this 180-acre parcel. Well again as I've said and the map here shows, we provided you a smaller version of this map in the letter. The map if I can just indicate on the map, this is the parcel where the proposed mining to occur and we will leave you that map for the record if you'd like.

Given the fact that mining clearly did not occur on this particular parcel as has been admitted by the Frueh's, we think that the Zoning Board really has no choice but to

reverse the decision of the Building Inspector because mining did not occur on this parcel. Even if the ZBA would look at these adjacent parcels which again would be inappropriate but even if they would what we heard last time really I think only muddied the waters as far as whether material is actually mined from this site or not. We heard from the Frueh's on page 32 of the transcripts for example that material was routinely taken from their client's properties during an excavation project and then moved onto the Frueh's property. We heard at page 33 that they would take apart stone walls that looked like on their own property, that's not mining neither is taking – excavating property from someone else's and bringing it to their site, it's not mining. It may be taking rocks of the stonewall maybe some kind of scavenging but it's not mining.

Also making a logging road as was discussed on page 39 of the transcripts is really more of mining in aid of agricultural, which is specifically exempt from the definition of mining. So we again think that what the applicant or the respondent in this case presented to you in response to our presentation did nothing to really to refute what we said all along, which was that we don't think mining of any significance really occurred on this property, it was something else; it wasn't mining.

Finally even if you do consider the alleged mining activity's on these other adjacent parcels we think that you would have to exclude any of the materials that were mined in excessive of the D.E.C.'s 1000-ton limit and Mr. Brookin's were arguing in the alternative in this regard. I wanted to also clarify Mr. Rubin presented to you some numbers and Mr. Chairman you pointed out correctly and quickly that those numbers were in error. Mr. Rubin looked at his calculations again and as he pointed out in a letter that he sent also directly to you and which is included in the November 22<sup>nd</sup> letter that his program was inaccurate. He re-ran the numbers and under his scientific approach he determined that it appears the Frueh's have exceeded the 1000-ton limit during a 12-month period, but even if you don't take that approach we have had Jim Miller who is a long time retired D.O.T. employee familiar with excavation, blasting; he took a look at the numbers and ran them, again using an industry acceptable industry practice of estimating tonnage and he came up also with numbers that indicate that Frueh's have exceeded the 1000-ton limit so again we would suggest to you and urge to you that none of the mining if you're going to take a look at all these different parcels should be considered mining activity and we have Mr. Miller here tonight because I'm horrible at math so I would be happy to have Mr. Miller come up and explain to you the iterations – he went through 3 iterations with the numbers using a kind of a worst case and best case scenario on the amount of the material so he can explain that to you in more detail.

Finally I just want to just digress for a second on the Benza decision. Mining was not a permitted use in this Zone before the Benza decision. That was what the Benza decision was all about, not specifically mining but any uses that were not listed were not allowed. Mining was not listed; it still is not listed. It is not an allowable use now; it wasn't then. The only way it could be allowed is if the Building Inspector determined it was a pre-existing use. Clearly it was not a pre-existing use on this parcel, it simply was not and that was admitted to by the applicant so we would again urge that you overturn the Building Inspectors decision and we'd be happy to answer any questions you might

have. Thank you.

CHAIRMAN HODOM: Thank you. Ms. Moreau you had some questions that you wanted to raise?

MS. MOREAU: The first one, can you hear me?

CHAIRMAN HODOM: You'll have to speak a little louder.

MS. MOREAU: Is this not on?

CHAIRMAN HODOM: We don't have amplification. That's for recording purposes only.

MS. MOREAU: Oh you can hear me; okay I'm sorry. Mr. Hodom I didn't mean to interrupt you at the outset or Ms. Roberts, but the discussion was about how long do we continue to send paperwork back and forth and my understanding was that submissions or any new information was due 10-business days prior to this date tonight. I at that point, you know when I checked to see if any submissions had been made 10-business days, I didn't see any point in providing any new information at that stage. I know then that the Appellant submitted their paperwork on November 22<sup>nd</sup>, which I think wasn't 10-business days before but 10-days give or take.

Anyway my letter was a response to what they brought up in their new paperwork and I did not – that's why I didn't respond previously to that. They actually sited 2-cases in their November 22<sup>nd</sup> submission they sited the Orsi case, which is also referred to as the Benza case and they sited the Dolomite case and I responded to both of those cases in my letter of November 27<sup>th</sup> and I wanted to speak to those a little bit more specifically tonight because they do get into this issue about tax parcels and activity on parcels and that sort of thing. So I just wanted to clarify that – what ever the Board chooses to do of course is fine with me but I wouldn't want to see this go back and forth, you know continuously and of course you have an attorney who can check the cases as well. So that's my first point.

CHAIRMAN HODOM: Ms. Moreau we would offer you the same procedure if you wanted to respond tonight's hearing within 5-days, you would also be allowed to do so.

ATTORNEY SILLIMAN: But I think if I'm hearing it right the point is she would want to respond to their response.

CHAIRMAN HODOM: That's the point and I think had the petitioner received a copy of your response we wouldn't have had this request for an additional 5-days and I think it's fair to give them 5-days, we would also give you 5-days and then we would cut any kind of other correspondence off.

MS. MOREAU: Okay.

CHAIRMAN HODOM: Okay? Please proceed.

MS. MOREAU: Let me just speak to the new information that Ms. Roberts brings up but actually before I proceed, at the last hearing we had I believe submitted copies of additional letters from various builders who had purchased materials from our property on Old Quarry Road and I wanted to make sure you actually did have copies of those.

CHAIRMAN HODOM: Yes they were in the file.

MS. MOREAU: They were? Okay.

CHAIRMAN HODOM: Yes.

MS. MOREAU: Klersy, Cillis, etc.

CHAIRMAN HODOM: Yes.

MS. MOREAU: Okay just checking on that.

CHAIRMAN HODOM: Just to ensure that we received all of them Ms. Moreau we had one from Wagner, and Cillis, and Kersly and I really can't – Donald Krauzack?

MS. MOREAU: Right.

CHAIRMAN HODOM: Mike O'Brien, Tammy R., Diane Miller, Gordon Miller, Michael Mineau, Carol Vierath, Herbert VanAnden and Karin Giovannetti's and I believe that that was what handed to the Board at the last hearing.

MS. MOREAU: That's what I'm referring to.

CHAIRMAN HODOM: Fine.

MS. MOREAU: The question I think that's before the Board and has been from the very beginning is whether or not Mr. Platel, the Building Inspector had a rational basis for making the determination that he did. That determination was at the Frueh property had been actively mined prior to August 7, 2003 and that it therefore constituted a commercial or industrial use, which was permitted in the Rural Not Zoned area.

Now that phrase, commercial industrial uses, section 12-D of your zoning law under the category of permitted uses it is a permitted use. We're not dealing with a situation where we have a non-conforming use, two completely different animals. In fact the cases that are cited by the appellant, both the Orsi case and the Dolomite case deal with non-conforming use cases. The Orsi case, which you probably think about as the Waste Management case or the Benza decision dealt with a situation where Kevin Shea had actually made a determination that if a use wasn't listed in your zoning law that it

was therefore permitted and that was where the point of discussion took off.

That's not the same thing here, you had a local law that was made, which added section 12-D to your zoning law and said that any of those commercial industrial retail uses in existence prior to August 7, 2003 were permitted uses. They're under that category so of course there's all kinds of permitted uses prior to number 12-D. If you read the book it's right there in the Rural Not Zoned area that 12-D, I believe it's 12-D, that's the language that we're looking at. That's the language that Mark Platel – the law that he was following when he made his decision and the question is did he have a rational basis for making that decision and for his basis he cited that he had visited the Frueh property, that he looked at receipts and invoices showing sales of materials that came off of the Frueh property.

Of course he relied on the word of my clients that said this is what we've done, this is how long we've done it, these are the materials we've sold, these are copies of invoices and as we clarified at the last hearing, no not everything on that invoice is what we dug up and sold. We made a point of that to show you that we weren't just giving you invoices saying that we sold or dug up things that we didn't. We were specific about what came off of the Frueh land, what was excavated on Frueh property and was sold to various customers commercially.

Now the other case, the Dolomite case also is a non-conforming use situation, in Dolomite what happened and that case was from 1967. What happened in Dolomite was that we had someone, quarry owner who owned several parcels of property that were adjoining. Just as Ms. Roberts talks about adjoining parcels of property but what happened there was the Town in an effort to stop the mine from expanding passed a local law saying no mining, no quarrying. So that's not what happened in the Town of Bethlehem with the local law that created section 12-D of the permitted uses. In Bethlehem what happened in 2003, the end of 2003 is that use was created not taken away so the question is did the Frueh's mining activity on their properties, did that comprise of a commercial industrial activity that there wasn't mining and therefore did it occur prior to August 7, 2003 and would it then be a permitted use. That's what the basis of the Building Inspectors decision is.

Now we've heard several terms used tonight which actually have some meaning, one is parcel okay we'll talk about tax parcels. Ms. Roberts makes a point about zoning and tax map i.d. numbers and parcels as being an important feature in zoning. Well – and she also refers to the minutes, I have a copy of the minutes as well from the last meeting. She states how Chris Frueh made a statement that they didn't mine that parcel, those are her words. We didn't have to mine the 4.3-acre area, which D.E.C has permitted us to take in excessive of 1000-tons off of. We didn't actually have to put a shovel in the ground within the confines of that 4.3-acre area, which is the designated mine site permitted by D.E.C. The reason that's permitted by D.E.C. is because my clients want to take an excessive of 1000-ton and they want to blast and they want to do, you know something that D.E.C. has to have regulatory power over it and as you know D.E.C. as lead agent did regulate, did scrutinize and did issue a permit for that 4.3-acre area. That

4.3-acre area and Pete can you come here just to make sure. Pete where about (inaudible)

MR. FRUEH: We come through here and then come into here and part of the mine is on this property and then part of it is on that one.

MS. MOREAU: Okay.

MR. FRUEH: And also and as you - - they are all contiguous properties.

MS. MOREAU: This highlighted parcel, and by the way I want to also point out these properties are contiguous property, they are owned by Peter Frueh, one common owner – one owner adjoining parcels, contiguous parcels.

MS. ROBERTS: Can I just see where you're pointing?

MS. MOREAU: I'm pointing to this.

MS. ROBERTS: This is not Mr. Frueh's property.

MS. MOREAU: Yes it is Mr. Frueh's property.

MS. ROBERTS: Is that your property?

MR. FRUEH: It sure is.

MS. MOREAU: This is Mr. Frueh's property. He owned 2-parcels, the mine-site actually takes up a portion of each one of these parcels.

CHAIRMAN HODOM: Can you just designate what parcels you're referring to?

MS. MOREAU: The tax map number here – I'll use acreage on the tax map, 48.6 and then I believe this one is shown as 21.7, it's a little fuzzy. And when we submit our additional paperwork before the 6<sup>th</sup> we can also verify that for you and for the appellant.

MS. ROBERTS: Thank you.

MS. MOREAU: But anyway the zone, which the 4.3-acre site lies right in here and a portion of this parcel and of this parcel so it takes in a part of 2-parcels. I'm going to have my client actually clarify tonight that they had mined both of these parcels, both of these tax maps for the record if that's okay with you?

CHAIRMAN HODOM: That's fine.

MS. MOREAU: In fact I think now would be a good time just to have Chris, either one of you it doesn't matter to me, state for the record that you've mined these parcels and what materials came off of these.

ATTORNEY SILLIMAN: And by these you mean the 48.6 and the 21.7-acre parcels?

MS. MOREAU: Right.

CHAIRMAN HODOM: Just introduce yourself to us Chris.

MS. MOREAU: They already have invoices showing where rock came from.

MR. FRUEH: Right, okay.

MS. MOREAU: And I just wanted you to state – tie the two together basically.

MR. FRUEH: Okay. I'm Chris Frueh. We've taken materials off of every parcel of our property.

CHAIRMAN HODOM: Chris, just speak up a little bit if you can just so the people in the back can hear as well.

MR. FRUEH: Okay. Well we did a job – the Van Zetten job a few years back and we took rock this – the latest parcel that we purchased along Collabeck Road....

CHAIRMAN HODOM: Are you referring to the 48.6-acre parcel?

MR. FRUEH: I have notations of that somewhere in our D.E.C. stuff where there was 40-tons taken off of that.

CHAIRMAN HODOM: Okay, but that's the parcel that you're referring to?

MR. FRUEH: That came off the 48.6.

CHAIRMAN HODOM: Okay.

MR. FRUEH: Other materials that came off – I'm just trying to see how much, okay yeah the 48.6 also our garage is – lets see...

MS. MOREAU: This is Old Quarry Road.

MR. FRUEH: Okay. I know we processed topsoil in this part of that parcel. Is that part of this parcel, I'm confused.

MS. MOREAU: Okay.

MR. FRUEH: I don't know if this is all – I thought this was all one parcel. When we bought it was all one piece. I don't know why...

MS. MOREAU: That's okay. We can, obviously because the tax maps are a little confusing, we can in our submission make sure it's clear as to what parcels we're talking about and that you have a clear understanding of the fact that my clients have mined these parcels. They've mined all over their 180-acre property. In fact in the minutes we do state that that we have mined on the 180-acres. We never said specifically that we dug into that area that D.E.C. is – gave us the permit on. We don't have to, we've established the use on all of our contiguous lands. Not only through zoning common law practice but also at the time that the local law was enacted, which created section 12 defining the commercial industrial uses there was amply specific discussion about this particular issue. I have the minutes from that meeting.

CHAIRMAN HODOM: Was that part of the submittal from the petitioner?

MS. MOREAU: Yes.

CHAIRMAN HODOM: You're talking about the Town Board?

MS. MOREAU: Right, I think it's the same one. Actually it was September 10, 2003, I believe that was in the petitioners original submittal.

CHAIRMAN HODOM: It was.

MS. MOREAU: All right and the discussion that was had before the Town Board was part of the public hearing to add existing commercial, industrial, and retail uses to the list of permitted uses and there was discussion had between I think at least 1-member of the neighborhood group, Mr. Miller, James Miller, the Supervisor, the Town Attorney all part of the record at the time regarding this issue and the discussion about expansion of the use. And another person in the audience, a Mr. Jasinski actually asked about the parcels and the ownership. If a business, say it was located on 1-parcel and they wanted to expand their business onto their adjoining piece, would that be allowed? And Mr. Alessi responded that's correct, as long as there's common ownership and it's adjacent.

So from the very beginning the Frueh's were definitely operating under the guidance, if you will of the Town and knowing how they could proceed with their project and what in which it was happening here is they were going through all of the requirements that D.E.C. imposed on them as part of obtaining their permit and that took well over a year and as you can see this neighborhood group has been involved from the very beginning on both the zoning issue itself and on the D.E.C. permitting issue. So I just wanted to make that point that the mining activity occurred all over their properties, not just in one little spot but all over the place and what we have tried to show through the testimony of my clients, through the testimony of others that have either worked there that have purchased materials through various documents that they've submitted that my clients were in the business of excavating and extracting materials including topsoil, sand, rip-rap and stone from their property and selling it commercially.

The other thing I wanted to address was Mr. Rubins calculations. Now what's happened here is and Ms. Roberts makes a point of this again tonight, what she's saying is well our people say there's no evidence of mining. We didn't see anything; it wasn't there; they didn't mine. That's argument number one they made. Argument number two is but whoa they mine too much. They took more than a 1000-tons per year out of the place so if you ZBA decide you don't believe us on the first argument well maybe you'll believe on the second one and you'll find that our expert, experts, have showed that the frueh's were definitely illegal because they were over a 1000-tons. Now what do they base their quantification of the weight of materials on, well they site Mr. Ruben – Mr. Rubin sites several treatises on geology and weights of materials. Mr. Miller who's not – I do not believe you're an engineer sir, are you?

MR. MILLER: Do I have to respond to her?

MS. MOREAU: Are you a professional engineer?

CHAIRMAN HODOM: I'll ask you that Mr. Miller, are you an engineer?

MR. MILLER: I am retired engineer but not a professional engineer.

CHAIRMAN HODOM: Okay.

MR. MILLER: I am, however a certified technician, nationally certified for over 20-years.

CHAIRMAN HODOM: Thank you.

MS. MOREAU: Thank you. As you saw at the first hearing, Mr. Rubin, the argument that he tried to make was based on 2-points. One is aerial photography that showed no disturbance of the land from I believe 1985 to 2001 using aerial photographs that he did not personally take that were provided either through the geologic survey or wherever. A couple of things, one is it's not through his personal experience; two is after his last aerial photo that he references I believe is April 2001. After April 2001 we have provided invoices also showing that materials came off of Frueh's property after April of 2001 including rock from land near the mine site and that was VanZetten's – the invoice with VanZetten and there's also materials sold to Gottshall after that April 2001.

So we have shown that we have actively mined after the dates his photographs ceased. We have shown that we mined in a responsible manner because my clients have always reclaimed the land and brought it back to a natural condition and because Mr. Rubin could not find in aerial photographs evidence of disturbance from photos that he did not take, he is saying my clients did not mine the property. Then he goes on to say but wait a minute, once again if he did – but if they did just in case if they did our calculations show they are exceeding a 1000-tons. At the first hearing he went on and on about weight and then they supplied information on November 22<sup>nd</sup>, from Mr. Rubin again saying made a mistake my software package conversion system was incorrect

therefore I've redone my math and now I'm giving you the real story now I'm going to give you the truth.

I have 2-books here, they're not mine they're Pete's, Peter Frueh's books which – they contain all kinds of tables, Moving the Earth by Herbert Nichol's and Estimating Earth work Quantity's by Daniel Atchinson. Neither one of these is cited by Mr. Rubin in his November 22<sup>nd</sup> submission and if you look at the tables in here, they're not the same as the factors that Mr. Rubin uses. We don't know – first of all Mr. Rubin's not here tonight. He refers to cubic yards in his report, his first report I think and his second report, cubic yards. We don't know if they're loose cubic yards, we don't know if they're bank cubic yards, we don't if they're truck weight, we don't know what they are. So we can go on and on debating the weight. Is that your job to debate the weight of the materials they took off their property? I don't think so, I don't think that you were entrusted with that responsibility. In fact my clients were never charged with a violation on weight or taking too much material off their property by any agency including a municipality, including D.E.C., any police agency. They've never been charged and they certainly never been found to be violation. There's nothing that shows they're illegal. Their activity meets the definition of mining that is specified by D.E.C., which you already have in your documents which we went over the last time which Mr. Gerstman himself in his letter to the building department I believe then Kevin Shea back in September in 2003 refers to as the relevant inquiry, do they meet the D.E.C. definition of mining and that's in my papers. Anyway that's really – that's what the question is and I do not believe that they have shown that my clients have not done what they've said they've done and I certainly do not believe they have shown the Building Inspector to have acted irresponsibly or irrationally in making his decision and that is what they need to show.

They need to show that Mark Platel did not have a rational basis to make that decision. If you bear with me one minute. I just want to make one more point about illegality. Whenever you talk about zoning law and Towns and Building Inspectors, very often the Building Inspector is put in the position of having to make judgment calls, everyday he is. People do things with their property, they're not always in compliance and sometimes they don't realize it. A typical situation, I'll give you an example, a piece of property where someone is violating a junk ordinance. They come to the Building Inspector and they say we'd like a building permit or we would like to expand our business now or I'd like to put an addition on my house. Well the Building Inspector says I'm sorry I can't give you that permit because you're in violation, you're illegal.

So we're not going to reward your illegal behavior by giving you the permit. That's not what's happened here. No one's ever raised an issue with the Building Department that says Frueh's are violating the Town Law's out on that property on Old Quarry Road and now they want to expand their business so we shouldn't let them do that because they're illegal. That's never happened; in fact it's quite the opposite. They've been exemplary in how they conduct their business. So you can either flip a coin and choose which side of the argument that you want to take that the appellants are making, did they mine, not enough or did they mine too much? Or you can look at what my clients have

consistently said, it has not changed in spite of the microscopic attention that's paid to every word they've said. They're not lawyers obviously. Their comments in the minutes, the comments to the Building Inspector, their comments to everyone they deal with are consistently the same. They tell the truth, people that know them know it and I will be happy to provide any more elaboration, documentation prior to I believe December 6<sup>th</sup> as you've requested. Thank You.

MS. ROBERTS: Chairman Hodom can I respond to some of the points raised?

CHAIRMAN HODOM: Can you do that in your rebuttal by the 6<sup>th</sup>, I mean that's basically what we're talking about is it not? I don't want this be a protracted evening I mean if there's still some people in the audience that may have some questions or comments. You will have enough time to respond to the comments this evening in whatever writing you're going to present to this Board by the 6<sup>th</sup> of December. Is that adequate for you?

MS. ROBERTS: Except I'm just concerned since we won't have a transcript by then. Some of the things that were just said while they're still fresh in your mind, you know I'd like to....

CHAIRMAN HODOM: Okay go ahead.

MS. ROBERTS: Quickly respond to. I'll be very brief. First with respect to the Orsi decision, you know the issue is whether or not the use has been established and we feel like it hasn't been established. The Town Board certainly had the opportunity to make mining a use and in fact we submitted documentation in our last submission I think they're exhibits K and L that show their previous attorney Mr. Moore lobbied heavily to the Town Board to get mining specifically added to that language and the Town Board didn't. They certainly could have said mining is a use, a permitted use; they didn't. What they said is that you have to establish that is was a pre-existing use and we think that they haven't especially on this parcel, which is the parcel that's relevant.

And in fact Chris Frueh did say on page 42, Ms. O'Brien: Have you extracted any material at all from the site that D.E.C. has given you the permit for blasting? No we haven't, Mr. – Chris Frueh: No we haven't because we're in a process of permitting an area, you're not allowed to touch it so we have been chopping at the bit for 3-years now. Ms. O'Brien: But in the past before you and then she's cut off. No, Chris says it wasn't accessible. He say's it wasn't mined. The 40-tons I think he's referring to is actually material they got off the New Scotland road widening project which he also talks about on page 39 and he talks about getting off the Collabeck Road the material that went to the Van Zetten job so we've had no evidence, specific evidence that we can trace to show that there has been mining on that site and now we're getting tonight we're going to supplement the record, we're going to supplement the record on this part here. Really this Board is supposed to look at what was before the Building Inspector, not what's now being supplemented.

ATTORNEY SILLIMAN: But aren't you asking us to look at you're submitting to?

MS. ROBERTS: We're - - not with respect to this kind of stuff, no I think - - we've said from the beginning that you're to look at - as an appellate body to look at what was before...

ATTORNEY SILLIMAN: Mr. Platel.

MS. ROBERTS: Mr. Platel. And we think based on what was before him it was not a rational decision. It's unfair whether he realized these were different parcels and we can't tell from the receipts - one of the problems Mr. Rubin had and we all have is some of the receipts are in tons, some of them is in cubic yards, some of it is just a truck load. I mean part of the problem here is that their receipts were not specific; we were never given tax information. There really wasn't a very good body of information that was in the public record that would support this very important decision.

And with all due respect to Mr. Alessi, he's not the ZBA Attorney and his opinions really don't mean much to be relied upon in this situation. He's not the ZBA Attorney, he was the Town Attorney and the language is what matters not the legislative history that went into this back and forth dialog. If the Town Board wanted to enact something specific to mining they could have done so and there is ample evidence that Mr. Moore certainly tried very hard to get that in and failed.

And our information shows this parcel belongs to a Mr. Markel. We'd be happy to see some other deeds that different but it's news to us.

CHAIRMAN HODOM: Which parcel are you referring to?

MS. ROBERTS: This one between - - these are all pink is on the New Scotland side owned by the Frueh's according to our deed information. The yellow is on the Bethlehem side, Frueh property.

ATTORNEY SILLIMAN: Can you state the acreage of that parcel?

MS. ROBERTS: I believe it's 21.7-acres but we look forward to having that clarified, but at any rate the 40-tons referred to didn't come as far as we can tell and Chris Frueh's own statement from that parcel.

MR. GERSTMAN: I just - - by my own - - clarify in terms of the responses that are being authorized now be the Board to submit.

CHAIRMAN HODOM: Just introduce yourself Mr. Gerstman.

MR. GERSTMAN: My name is Mark Gerstman, I'm an attorney for the Fuera-Bethelhem Heights Alliance and I wanted to clarify in terms of this issue of what we are permitted to submit to you on or before December 6<sup>th</sup>. Initially we were talking about a

limitation on whether or not we were going to respond to the legal issues, 2 or 3 paragraphs on page 3 I think it was. It sounds now that what might be authorized for the Frueh's to submit is much broader than what was previously authorized and I want to clarify that.

ATTORNEY SILLIMAN: I think that you each can respond to the legal arguments as you originally wanted and each of you can respond to the arguments that were made here tonight for the first time. What I would ask both of you to do also is serve each other with copies.

MR. GERSTMAN: Absolutely. Thank you.

MR. BROOKINS: I don't know if you're prepared to – I was hoping that Mr. Rubin would be here to comment on his adjustments and recalculations. I don't know if you're prepared to address any of these or Ms. Roberts?

MS. ROBERTS: I don't think either one of us have the math skills to address that particular – that document but I think the point I wanted to make earlier was that evening setting this aside and because I think that it is based on kind of a theoretical, scientific approach. Using the numbers that Mr. Miller which were based as his charts indicate on industry, you know accepted manuals it appears that there was on all the parcels an exceedance of the 1000-ton limit and Mr. Miller can certainly talk about it and he certainly as his resume indicates has a long history in this area but I don't think we can talk about the numbers. Would you like Mr. Miller to come up?

MR. BROOKINS: Well I don't want Mr. Miller to comment on Mr. Rubin's material but obviously you felt it was important to your case to submit this and this is a correction on his prior estimates and calculations. One of the things that I – and he failed to mention this, I took a look at some of his sources and particularly his Kolaski, Scharz and Tubbs source was for the Pacific northwest and clearly in the publication it mentioned that that was the source of his material for writing.

Additionally he mentions – made a very specific note in the paper that it was an original resource or research, he did not do original research. It was based on both secondary published and unpublished sources so he wasn't even writing what he did. It was just – potentially a theoretical paper except the title suggests Geotechnical Properties of Geologic Materials, which sounds very specific to our particular issue.

In addition to that in the preface he mentions that all of his work and all of the work over that Mr. Frueh has and without presuming to Mr. Miller's work, all the work I think would fall under the general comments that Mr. Kolaski mentions that all of these theoretical assumptions and estimates are no substitute “no substitute, for site specific laboratory and field information” of which we have none. And lastly he also mentions in his article as a limitation that only about 2/3 of the cases actually fall within the ranges that he's given. So we've got a lot of sloppiness frankly and this is a correction of his prior report. So we're building a case or you're building a case on a lot of assumptions of

weight, but each one of them is different and as far as I'm concerned each one of them flawed. So I was hoping that he would be here to comment on these and I did want you folks to have an opportunity to respond.

MR. GERSTMAN: Could I briefly respond? First in terms of the issue of the threshold Ms. Moreau suggested that we're – you know you could flip a coin in terms of which argument. The point that's being made here is that there is in fact no specific evidence of mining of extraction of material from the parcel in question, that there's just like you heard just tonight they're relying on 48-tons or so, 40-tons that were taken from a road widening project, admittedly from a road widening project and relying upon that. So the primary case that we are making is no evidence of mining in the parcel in question.

We were given these invoices just like you were given these invoices and they were essentially non-specific, general estimations of materials that were taken. And we looked at it and said that's strange, it appears that if they want to rely upon this information and we're not verifying at this point the accuracy of it, they're submitting it, but if you want to rely upon this information as to showing that there's in fact extraction we believe that it shows that there was an excessive of 1000-ton threshold. Now Mr. Rubin admittedly made a mistake the first time he was here, there's no argument there. He has come up with theoretical evaluation because nobody was there. It's the best we do, in addition Mr. Miller who has years of experience in this area has done his evaluation based upon industrial standards.

So based upon the 2-documents we believe we have supported that, if you want to believe the documents submitted by the Frueh's not by us that they exceeded the threshold and they should not be entitled to benefit from any illegal mining activity that took place on the property. Why weren't there violation charges by D.E.C.? This is the first information that has been disclosed that there may have been a violation. Nobody got - - D.E.C. wasn't given this information prior to their getting a permit. In fact the information about the logging road, they said – we said they were illegally mining on that property. They said no we're not, we're constructing a logging road. That wasn't mining. Well it seems to me that the flipping of the coin is the Frueh's, not ours. I hope I've answered your question and I'm sorry Mr. Rubin is not here to answer it directly, but we were relying essentially upon those arguments.

ATTORNEY SILLIMAN: Ms. Moreau when you make your submittal can you clarify the ownership of that 21.7-acre parcel and if it is owned by your clients, when they purchased it. Thank you.

MS. MOREAU: Okay.

MR. FRUEH: I can do it right now for you.

ATTORNEY SILLIMAN: I'm sorry?

MR. FRUEH: I can do it right now for you.

ATTORNEY SILLIMAN: Okay.

MR. FRUEH: That parcel was all part of this parcel. These 2-parcels stayed together as one unit. Now they've gone and put out the New Scotland side, well they failed to come over here and do the Bethlehem side and if you don't believe that Mr. Trion is right in the back there and he owns the adjoining pieces here and he will verify it. So don't even talk to me, talk to Mr. Trion.

MRS. O'BRIEN: When was that parcel purchased including New Scotland?

MR. FRUEH: I don't know, 5-years – whatever.

CHAIRMAN HODOM: Ms. Moreau can clarify that in the response. Is there anyone that has any questions who was not here at the last hearing or would like to make any comments who was not here at the last hearing? Yes sir, just come up here and identify yourself if you would and give us your address.

MR. YOUNGS: Yeah my name is Bill Young's and I live on 4 Holbrook Way in Delmar; I'm a Bethlehem resident and have over 30-years mining experience and I was here at the Board meeting where Chris Frueh had stated as he had stated that you couldn't mine the area that was going to be permitted to be blasted. Well to keep it simple stupid, you can't mine if you don't blast it; you can't dig it, it's rock. You can mine other materials; gravel, sand, dirt; those can be mined. So what Chris said was exactly right, the small portion that was to be permitted to be blasted couldn't be mined because it hadn't been blasted; it's simple. So I think what Chris said was exactly right, but that doesn't mean the whole parcel needed to be blasted because it's not all rock. I think that has to be identified in what's saying here. The other thing as a resident it's named Quarry Road for a reason, you know?

CHAIRMAN HODOM: Thank you.

MR. YOUNGS: Oh, by the way one more comment. With my 30-years of experience you can keep it simple stupid as well by going to the D.E.C. and they give rock densities, which can be converted in solid and broken. This limestone is 2.25-tons to the yard and you can go to Calahan and you can go to D.E.C. or you can go to the Empire State – the old - - which is now New York State construction materials; puts out a booklet on all the geology specific to New York, it's 2.25-tons to the yard.

CHAIRMAN HODOM: Thank you. Yes sir?

MR. MILLER: I'm James Miller. I just wanted to thank this gentleman here for saying 2.25-tons per cubic yard, which essentially doubles my numbers as tons.

CHAIRMAN HODOM: He's talking about limestone?

MR. MILLER: Yes.

CHAIRMAN HODOM: Is there anyone else who would like to have a comment or has any questions? Any other questions from the Board members?

MR. BROOKINS: Just maybe one follow up to Mr. Miller. To what do you attribute the 100-percent variance between your numbers and his?

MR. MILLER: Let me give a little short historical thing on this. I was asked a couple months ago to look at these numbers and convert the cubic yards to tonnage. Being a retired, you know and certifications and experience and all this stuff in the construction industry and design and whatever roadway projects and babysitting if you will, construction projects as inspectors; building inspector, engineer in charge, etc.,etc. I agreed to that so my problem was to come up with a factor for the conversion and I agree with Ms. Moreau – you pick up a manual here it say's something, you pick up a manual there it's say's something, you go to as Mr. Rubin did, in a theoretical situation something else comes up and they're all different. If you have 10-sources the 10-sources have 10-values. So I was left up to try to determine what would be the practice in the area for conversion. When, at least within state work, quote, unquote state work, a contractor if he needs stone he needs x-number of cubic yards of stone because that's in the contract documents. The supplier has to take that cubic yards and convert it into tons because they sell it per ton, not by cubic yard, not a volume but a weight. So I got the numbers from one of the suppliers in the area and the factors that you see at the heading up there are the numbers that I was given and that's the basis of my calculation and then it's a simple multiplication. Cubic yards times the factor gives tons, it's just that simple. Did I answer your question?

MR. BROOKINS: In a manner of speaking I guess the answer buried in your discussion is the factor was the supplier?

MR. MILLER: That is from the supplier.

MR. BROOKINS: The supplier provided a factor...

MR. MILLER: Right.

MR. BROOKINS: You applied the factor and that's how your numbers come up different?

MR. MILLER: You are correct.

MR. BROOKINS: Okay. Have you ever in your experience used or examined any of the shale, topsoil, riprap or fill from the Frueh property?

MR. MILLER: No I have not.

MR. BROOKINS: Okay, have you been on their property in your capacity tonight?

MR. MILLER: No. The property is posted; I am subject to arrest and fine and whatever and like that and my integrity I feel is much higher than most people than you'll ever know. My reputation in the construction industry in this area, state projects wise with a contractor, is very high. So if anybody questions my integrity they should probably question they're own integrity.

MR. BROOKINS: Well I guess that would refer to – apply to all of us as well?

MR. MILLER: No, I'm not – one specific as I saw something that briefly earlier that kind of ticked me off a little bit and I just wanted to be on record saying that.

MR. BROOKINS: One of our roles is to try to sift through these...

MR. MILLER: I realize.

MR. BROOKINS: This data and it is substantial and there is a considerable variance in it.

MR. MILLER: Yes there is and once again as I said earlier whatever source – if you have 10-sources, the 10-sources all have a different thing so I went to what was considered or what I'm considering the industry standard or the industry wide factor.

MS. ROBERTS: But Jim do you want to explain that on top of that you then took kind of 3-different approaches?

MR. MILLER: Yes, there was one entry in there that had to do with fill and it's a double asterisks, it just said fill. I took one approach that said shale and limestone, I averaged the 2-factors together for shale and limestone because it did not say what kind of fill it was and came up with a number. Another instance was I averaged shale, limestone, and topsoil / clay fill and used that averaged factor in the calculation and I believe the third one was just the soil – topsoil and clay fill factor. Each one shows greater than 1000-tons for the dates that are highlighted; yeah you have the highlighted ones. And if I am correct, Ag. And Markets extraction of materials for sale is 12 contiguous months, it's not 1-calender year it's 12-continous months. This happens to be 1-calender year as well so in 2002 more than 1000-tons of material was taken from somewhere on their properties.

CHAIRMAN HODOM: Based on your calculations?

MR. MILLER: Based on my calculations and one other thing on my observation of things, Ms. Moreau is saying the 4.3-acre site. Mr. Gerstman and Ms. Roberts is saying the parcel, lets not - - just take that into account, not the site but the parcel as per whatever the court decisions that you have in front of you. Is there anything else Mr. Brookins?

MR. BROOKINS: As long as we were speaking about the assumptions or estimates that you made. You also made and this is asterisk number 1 and well it's a minor factor I want to be clear on the record that asterisk number 1 was for 1-load as specified on the trip ticket. You made an estimate or a judgment that a truckload was 20-tons and gave it full credit.

MR. MILLER: Right.

MR. BROOKINS: Now heavy rock if it's compacted would be 20-tons, if it's loose large boulders it could be considerable less than that?

MR. MILLER: It could also be 20-tons. I mean that is the legal load New York vehicle and traffic law for a 10-wheel dump truck, in other words 2-wheels, steering axel and duels. It does not factor into this 1000-tons at all.

MR. BROOKINS: No it's not a major component but I did want to be on the record on how you arrived at that.

MR. MILLER: I wanted to make sure that it was, you know there also that's why I have a single asterisk there.

MR. BROOKINS: Thank you.

MR. FRUEH: Chris Frueh again. I just wanted to respond to how we come up with our yardage and tonnage. Many of the materials that we sell, topsoil, rock, shale, when we – like for instance the Town of Bethlehem, we bid the topsoil for the Town of Bethlehem. In the Town bid one the questions that's asked is method of measurement and the method of measurement that we put on our bid says truck, which means when you take topsoil in it's state in the ground it's a state of 85-percent, typically that's what natural ground conditions are and then when you take and extract that soil and then you put – we're also required to process this material so we put it through a screening plant therefore it gets fluffed and it goes into the truck loose and a lot of times it may swell up to possibly 40-percent so that cubic yardage is a loose cubic yard and it's not a bank cubic yard. So as a bank cubic yard like I believe where Bill Youngs was coming with his rock yardage referring to the state that a bank cubic yard because as a blaster he gets paid by the ton so he figures the area that he blasted and he gets paid for that tonnage. That's how they get paid so I just wanted to clarify that when you're talking yardage I agree with Mr. Brookin's that it's - - there's so many factors I mean if it rained, a lot of times we've gone down to Callahan's to get stone and the water is just pouring out of the stone, in fact we did it this week and when you put the box in the air the water's just gushing out the tailgate.

A lot of times you'll see out of a quarry site when the materials that wet you'll see the roads wet for a quarter of a mile down the road because the waters just pouring out of the gate. You could possibly be paying for a couple tons of water and the person who's

purchasing at time is actually getting shorted on their tonnage because the waters in it and that's just a fact. There's nothing we can do about that, but most of our materials we can't get off our property when it's wet because of the access. When we have topsoil our topsoil area gets too wet, that's why and also in our bid it says weather permitting. Some of the rock that we've sold, we have tonnage weights on them and you may be how we got tonnage when we don't own a scale. Well we do work with BOC Gasses which is our neighbor and they have a scale and we have permission from them to use their scale because we plow their lot; we salt their lot; we apply our salt by the ton and they permit us to use their scale during the winter to measure our tonnage on our salter. So I just wanted to clarify a few of those things just to get it out and if you've got any questions I'd be glad to answer them.

CHAIRMAN HODOM: Mr. Frueh, just one question that I have. Do you currently and have you in the past have certified scales that you would weigh the truck and then weigh the loaded truck or do you strictly work out of cubic yards in most instances?

MR. FRUEH: The majority of the time it's cubic yards.

CHAIRMAN HODOM: So you have no method of measuring total tonnage on your property?

MR. FRUEH: Not on our property.

CHAIRMAN HODOM: And you've never had that process?

MR. FRUEH: I've never had a weigh station.

CHAIRMAN HODOM: The only time that you've used the tonnage method is when you use – what was it BOC or...

MR. FRUEH: BOC Gas, it used to be Airco, they're across the street from our location.

CHAIRMAN HODOM: Okay.

MR. FRUEH: Or when we purchase from other quarry's that have a scale like they sell their stone by the ton. We had a job site where we needed this rock and we extracted it for the sole purpose of this job, we had it in mind for that and own a hydraulic breaker on an excavator, we sized it all to a specific size. If you need to see the rock and you want to get a sample of it to verify it came from our property. I did a job – it's called Great View Terrace up off of Swift Road, you can visibly see it right from the road. Pete Van Zetten used to be the Highway Superintendent for the Town of New Scotland, he would verify that he knows for sure that it came from our property. I asked if he would do a letter and he said he would but I didn't want to – I didn't want to do it because he's elderly and I just didn't want to get him – I didn't want to push it that far, I didn't think we needed to. I can produce that if I need to.

ATTORNEY SILLIMAN: Approximately when was that?

MR. FRUEH: I believe that was 2002. There are – and I believe that is one of the invoices we submitted.

CHAIRMAN HODOM: Thank you Mr. Frueh. Is there anyone else that have any questions or comments? Board's all set? Hearing no further questions or comments; we'll declare the hearing closed. We do have 62-days to make a determination in this matter and we request that any further comments or rebuttals be to us by December 6<sup>th</sup>.

MS. ROBERTS: 62-days from the December 6<sup>th</sup> date then?

CHAIRMAN HODOM: I'm sorry?

MS. ROBERTS: Would it be 62-days from the December 6<sup>th</sup> date or from tonight.

CHAIRMAN HODOM: I'm going to say tonight.

ATTORNEY SILLIMAN: We're closing the hearing today.

CHAIRMAN HODOM: Thank you all very much.

Hearing closed 8:55 p.m.

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On a motion made by Mrs. O'Brien, seconded by Mr. Wiggand, and unanimously carried by the Board, the minutes of the November 17, 2004, meeting were approved.

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

Meeting Adjourned: 9:30 p.m.

Respectfully submitted,

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Secretary