

TOWN BOARD
MAY 22, 2002

A regular meeting of the Town Board of the Town of Bethlehem was held on the above date at the Town Hall, 445 Delaware Avenue, Delmar, NY. The meeting was called to order by the Supervisor at 7:30 p.m.

PRESENT: Sheila Fuller, Supervisor
George Lenhardt, Councilman
Doris M. Davis, Councilman
Daniel G. Plummer, Councilman
Thomas Marcelle, Councilman
Catherine T. Picarazzi, Deputy Town Clerk
Robert J. Alessi, Esq., Town Attorney

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Supervisor Fuller welcomed everyone to a regular meeting of the Bethlehem Town Board and invited them to join in the pledge of allegiance.

The Supervisor presented a proclamation to Barbara A. Asprien upon her retirement from Town of Bethlehem service. She thanked Barbara for her many years of service to three Town Supervisors. The proclamation declared May 31, 2002 Barbara Asprien Day in the Town of Bethlehem.

The first item on the agenda was a request from Nigro Companies for amendment to the Building Project Approval pertaining to extension of time frames for Bethlehem Town Center, Route 9W, Glenmont. Supervisor Fuller noted Mr. Nigro requested this item be withdrawn from the Board agenda.

The next item was a request pertaining to Waldenmaier Planned Residence Development, Elsmere Avenue, Delmar, for referral to Planning Board regarding Building Project Approval. Supervisor Fuller noted Mr. Rosen was in attendance if there was any questions, however, this was a referral to the Planning Board.

The motion was made by Mrs. Davis and seconded by Mr. Marcelle to forward the application of Waldenmaier Planned Residence Development, Elsmere Avenue, Delmar to the Planning Board for review and recommendation pertaining to Building Project Approval. The motion was passed by the following vote:

Ayes: Mrs. Fuller, Mr. Lenhardt, Mrs. Davis, Mr. Plummer, Mr. Marcelle.
Noes: None.

The next item was a request from the Safer/Breath Group for discussion of a temporary moratorium on development in the Rural Districts Unzoned Areas.

SUPERVISOR FULLER: Before we begin any discussion what I would like to do is ask Mr. Kevin Shea, who I did see here earlier, if he would come forward since some of the questions seems to be with his interpretation. Kevin, if you'll go through exactly what the interpretation is so that everyone here can hear it. Can you hear me in the back of the room?

AUDIENCE: Indicated yes.

MR. SHEA: Can you all hear? I have kind of a loud voice. I was asked to make an interpretation or a determination in regards to Waste Management. We put together and that was submitted to the Town Clerk's office. Some of the information that's been coming across my desk in regards to an appeal, I'd like to clarify one thing that may put some of your minds at ease. I would like to clarify the intent of the determination on Waste Management in very simple language.

The maintenance and storage facility would be a permitted use in Rural Not Zoned. Only a submission of a building permit would be required. The site plan would not be required. The administration and professional offices would require a site plan approval by the Planning Board and is subject to a complete site plan process. The combining of the 2 uses on the same site constitute a site plan approval by the Planning Board. Therefore, in my opinion, the Waste Management project would be subject to a complete site plan review process. I can't fathom the entire site would not be subject to the complete and entire process. I've never seen a new project segmented out because one part was permitted and another part was not. I apologize for any inconvenience that the Memorandum dated April 24, 2002 may have caused. I know that people have called and asked me but the interpretation is there. Right now there has been some submission for appeal. You know, if I can answer some questions, I'd be more than happy to. Okay, there's no questions.

SUPERVISOR FULLER: Okay. Thank you, Kevin. Now I know that members of the Safer/Breath group came in and met with me and asked for the opportunity to have this on the agenda. And, I would ask if there is a spokesperson or if it's your attorney or who, someone would like to come forward.

GENTLEMAN: Like Mark Gertzman to come up and address the Board.

SUPERVISOR FULLER: Thank you, Mark. This by the way really is not a public hearing. This is for the Town Board to acknowledge the request that, you, the residents, have asked us to place on this Town Board agenda. We will certainly entertain any comments, questions you have but I would ask that we stick with... right now... we'll have Mr. Gertzman address the Board. Thank you.

MR. GERTZMAN: First, I'd like to thank the Town Board for placing this item on the agenda. I represent the Safer/Breath group. A group of citizens who have begun to participate in the environmental and site plan review process.

COUNCILMAN LENHARDT: Excuse me, Mr. Gertzman, there's people that can't hear you. Can you use the silver mike, please? That's the one.

MR. GERTZMAN: Thank you. Let me start again. It never hurts to thank the Town Board twice for the opportunity to be on the agenda and to address the issues that you have agreed to hear today. I became involved with the Safer/Breath group because of their concerns about the impacts to their community by the proposed Waste Management operational facility. Let me first also acknowledge that the Planning Board has extended every courtesy to our group and to me in representing them before the Board. And, I also appreciate Mr. Shea's courtesy in addressing some of the issues we've had on the appeal that we filed today. Actually we filed it Monday but we didn't have the right forms, so we refiled it today and I believe that's squared away. So, we do, again, appreciate the courtesy that has been extended to us and we feel that we have been able to participate in the process fully to protect the interest of the community.

Mr. Shea issued a determination as you know on referral from the Planning Board concerning an interpretation of your zoning code. We submitted... we had the opportunity to submit our analysis of the code, as did Waste Management. We basically feel that, with all due respect to Mr. Shea, he turned the zoning code on its head. He basically determined that the uses that were listed were... were uses that had to go through site plan review and the uses that were not listed were essentially as of right, uses as you just heard. Taken that to its logical next step, it presents that community in southern... the Town of Bethlehem with the prospect that very significant industrial, commercial uses can be sited there without the opportunity for site plan review, without the opportunity for environmental review. This is, obviously, very significant concern for people who have invested in their homes, invested in a life in this Town and expected that their... those qualities... those values that they invested in... the reasons that they moved to this community are now threatened. They expected that the zoning would have protected those concerns.

Now, the title of the zoning code in question says Rural Not Zoned. What does that mean? That's the big issue that needs to be decided. We've brought that to the Zoning Board of Appeals. Of course, we can't anticipate what the outcome will be there. The Planning Board has initiated a SEQR process. We, of course, can't anticipate what the outcome will be there. That's why we're here asking the Town Board to do what we think is the right thing in addressing this very critical land use issue for that community. We believe that what the Town Board can and should do in this circumstance is to place this community on equal footing with the rest of the Town of Bethlehem. Essentially what Mr. Shea's ruling did was to take that part of the community and take it outside the structure of the zoning code that's applicable in the rest of the Town. In the rest of the Town, the uses, the permitted uses, the special uses, and the as-of-right uses are listed. In this part of the Town, the opposite is true. We believe that that's not the intent... that was not the intent of the Town Board when it enacted the zoning code and we believe, of course, that it should be reversed by the Zoning Board of Appeals. But, we don't feel that this important an issue should be left to the Zoning Board of Appeals. We believe this important issue for this community, should be addressed by this Town.

Now, there might be some concern about the legality of a moratorium and I, of course, would not want to advise you on the legality, that's up to your Town Attorney to tell you whether what I say is accurate or not. I submit to you though that consistent with the Supreme Court of the United States decision – maybe last week or two weeks ago -- which uphold a moratorium which was designed to protect environmental values in Lake Tahoe – I realize that there are some different values... Town of Bethlehem/Lake Tahoe but none-the-less, the Court of Appeals in this State has upheld the right of a town, as part of its zoning process to impose a moratorium in order to develop a comprehensive zoning law to address issues like this – the health, safety and welfare of its residents. The Department of State, in fact, has put out a publication which, I believe, we've provided to the Town Board dated January 1999 which goes through the legal process that's appropriate for a Town Board to enact a moratorium. Moratoria have been upheld by the Court of Appeals and some, of course, have been overturned by the Court of Appeals.

Primarily the ones that have been overturned, address issues where they were too long, proper procedures were not followed by the Town Board in enacting the moratoria, there was a conflict with State statute which wasn't addressed by the Town Board in enacting the moratorium. None-the-less, the message is that there is clear authority for a Town Board to enact a moratorium to address the concerns that we've brought here today. Clearly those issues have to be... be substantiated and justified by the Town Board and the Town Board has to follow the lawful procedures to get there.

The next questions, of course, might be whether or not the Town Board of the Town would be putting itself in jeopardy in terms of a liability from a lawsuit by Waste Management. My first response to that is, it doesn't matter whether there is a lawsuit filed, it matters what the right thing to do for the residents is. Second question, however, should be answered is to how the legal issues could be addressed. In New York State, and I believe Mr. Alessi would advise you to this effect, we operate under what's called a vested rights rule where there has to be substantial expenditure and substantial and construction undertaken before a developer in this circumstance could obtain the benefit... could establish liability against the Town Board for imposing a moratorium. At this point, Waste Management is just beginning the environmental review process. They have not, obviously, begun construction, nor have they expended substantial money towards the construction of the project. They couldn't do that, obviously, so based upon the case law in New York State, I would submit to you that the Town would not be liable in this circumstance to Waste Management for what would be called a taking, as a result of a moratorium under these circumstances.

Moratorium essentially would be a short-term zoning. It would be a zoning that would last possibly 6 months to a year pending the time when the Town Board

would develop a plan for this particular area and zoning ordinance that reflects the community's concerns. We would also submit that the Town Board could exempt, for instance, residential development from such a moratorium. We believe that this is not... this approach would not adversely affect landowners in the community. In fact, we believe that ultimately the landowners would be benefited by this kind of comprehensive zoning in the community that's been essentially beneficial throughout the Town. And, we submit that this is an appropriate step for the Town Board to take.

I understand that there are some members of the group that wanted to make statements today. I understand that I am their representative and attorney and this is not a public hearing. I would respectfully request the opportunity to have several members of the group have the opportunity to talk to you and talk to the Board on this issue.

COUNCILMAN PLUMMER: Can I just ask you one question, please?

MR. GERTZMAN: Yes.

COUNCILMAN PLUMMER: Can you repeat the criteria that you cited that was used by the New York courts to determine at what point there was liability? You made reference to the fact they're not that far along in the process.

MR. GERTZMAN: Yes, it is my understanding that in order to establish liability, there would have to be an approval granted and then after the approval granted there would have to be substantial monies expended towards the construction and, in fact, construction begun.

COUNCILMAN PLUMMER: Approval granted in this case by, let's say, the Planning Board.

MR. GERTZMAN: Yes. By the Planning Board, by potentially other Town agencies that would be involved in reviewing this. This, in fact, the Town Board itself may have some jurisdiction over this.

COUNCILMAN PLUMMER: And, then the actual expenditure by the company.

MR. GERTZMAN: Yes.

COUNCILMAN PLUMMER: Okay.

MR. GERTZMAN: That's my understanding. Again, I... sure Mr. Alessi will advise you on this issue. Are there any other questions that I can answer or...?

COUNCILMAN MARCELLE: Just to clear up something, I will let Mr. Alessi... but when you say liability, you're talking in liability under what theory of law? Under a takings clause or...?

MR. GERTZMAN: Yea... Yes. Yea, I believe that the Town would otherwise be protected in its exercise of either police powers or the zoning authority.

COUNCILMAN MARCELLE: Again, I will let Mr. Alessi but I thought the vesting part went to whether or not you could see conjunctive and declaratory relief. In other words, once they were vested by the expenditure of some certain or, you know, significant assets then the moratorium would be ineffective. Absent that, the moratorium would be effective, that's something... I think but again, I'll subject to Mr. Alessi... want to make sure what you're saying. I thought that was something separate and aside from a takings clause issue under Fifth Amendment but I just want to make sure I understand what you're saying. I know Mr. Alessi will address that afterwards.

MR. GERTZMAN: Thank you, with all due respect, I believe, the issue of takings is tied very closely to the issue of vested rights and that those elements must be met in order for a takings claim to be established. The issue of whether or not the Town otherwise has authority to exercise interim zoning in the form of a moratorium, I believe, is well established under New York State law and provided that the procedures are followed, I don't believe the Town... I mean, anybody can get sued anytime. I'm a lawyer, I have to concede that that's the case. But, I don't believe the Town would... in fact, if it followed the procedures and established a rational basis for taking that action would be subject to successful Article 78 challenge or declaratory judgment challenge. Yes, Mr. Alessi is your Counsel, I'm sure he can advise you.

Are there any other questions that you want me to address or want members of the community to address concerning the issues before this Board today?

SUPERVISOR FULLER: I think what I would like to do is have the residents that area a part of your group that wish to speak. If they would come forward and then I will get to you in a little bit and Mr. Alessi will speak as well. But, I think people that are here if they would like to come forward.

MR. GERTZMAN: Thank you very much.

MR. FOURIER: My name is Marcus Fourier. I live at 1412 River Road in Selkirk, New York. I'd just like to say that the people from the Town are not irrational. They just want the same things that people all over this Town have. Same protection under the law, afforded the same rights, that's all we are asking for. That's all we want. There has been a lot of talk about Waste Management and the fact of the matter is is that Kevin Shea's decision on our zoning is what really brings us here tonight with this moratorium request. It's not Waste Management. Waste Management is an issue but the broader issue is is that this community will change forever based on the determination that Mr. Shea made. So, we're asking that we have a moratorium and the Town Board consider the zoning for Selkirk. And, that's all I have to say. Thank you.

SUPERVISOR FULLER: Thank you, Marcus. Is there someone else from the Safer/Breath group that wish to speak?

MR. CARODA: My name is Dominick Caroda. I live at 1408 River Road and I want to echo Marcus Fourier's comments. But, more importantly, I...

LADY: Get closer to the microphone please.

MR. CARODA: ...that better? I urge the Town Board to do what is right here. I think what Marcus said is that we are not irrational people. We're looking for the same protection under the law as the remainder of the Town. At this point, if you live in the rural not zoned district, I'm a taxpayer in that district, I'm not afforded the same rights as those people living in Delmar per se. So, there's been discussion of which way this is going to go. Is the Town Board going to do what is right for the citizens? Is one Town Board member going to just act on their own and be a leader or are they going to wait to see the way the wind blows? We ask each one of you, we urge you to treat all of your citizens of Bethlehem the same. That's all I have to say. Thank you.

SUPERVISOR FULLER: Thank you, Dominick. Okay, I will call on Mr. Alessi. Sorry.

GENTLEMAN:

TOWN ATTORNEY ALESSI: What I wanted to do is to first make sure that everyone understands what Mr. Shea just said tonight because when I heard Mr. Gertzman speak, I'm not so sure he understands what Mr. Shea just said. But, I

want to ask Mr. Gertzman a few questions to make sure that I am correct about that.

Mr. Gertzman, is it your understanding that based upon what Mr. Shea just said tonight that the Planning Board... under his interpretation, that the Planning Board does not have jurisdiction to review all aspects including the administration and non-administration under site plan approval. I'd like to know what your understanding is of that because there... that's important.

MR. GERTZMAN: It's our understanding that the Planning Board has ... jurisdiction to address the entire project under site plan review and under SEQR, yes.

TOWN ATTORNEY ALESSI: That wasn't my question. My question was what do you understand Mr. Shea's interpretation to be on that topic?

MR. GERTZMAN: Understand it to be the way you have stated, that they will be exercising jurisdiction to undertake the site plan review and... through the site plan review process and SEQR.

TOWN ATTORNEY ALESSI: And, that is for both the administrative aspect of it... the administration offices, as well as, the non-administration which is the trucking and the terminal, etc. That's the way you read his interpretation.

MR. GERTZMAN: As he has explained it... yes... that's it.

TOWN ATTORNEY ALESSI: All right. So, what is it then that you're appealing? And, again, this is not the body that entertains the appeal. It's inappropriate. This Board does not have jurisdiction, as you know, to address those issues. That is for the Zoning Board of Appeals. But, I read the appeal that were filed and I would like to know and it would be helpful to the Board... what aspect of Mr. Shea's determination it is that you are appealing?

MR. GERTZMAN: We are appealing the aspect of his determination which states that the maintenance and... vehicle maintenance center is an as of right use. Essentially he said that the Planning Board would have jurisdiction over both aspects of this project. However, he has also stated and established, I think, clearly that those uses not listed in the site plan... for the site plan review process in the Rural Not Zoned District are essentially as-of-right uses.

TOWN ATTORNEY ALESSI: When you say as-of-right, it's as-of-right subject to site plan approval by the Planning Board. People just can't... and I want to make sure that I'm clear what your interpretation is... as-of-right means somebody can go in and get a building permit without any review. That's not what you're really meaning. You're meaning as-of-right subject to a Planning Board site plan review process.

MR. GERTZMAN: In this circumstance under the application that is currently before the Planning Board, I would agree that Mr. Shea has said that the entire project must undergo Planning Board review, however, he has also said that that component of the project which is essentially not the office building, is an as-of-right use for which a building permit would otherwise be the only approval that would be required by the Town before that construction could take place.

TOWN ATTORNEY ALESSI: All right. I just wanted it clear that... because I have heard and I've read in the appeals that have been filed that people have understood it to mean that the non-administrative aspects of that are not subject to Planning Board jurisdiction and I've heard that from several people as well. And, I just want to clarify that that is not his determination and I understand that you understand that as well.

MR. GERTZMAN: Yea.

TOWN ATTORNEY ALESSI: All right. Another question I have for you is, you have written and I was provided with a copy, I didn't get it directly, but I was provided with a copy of what appears to be an email from you that says 'the Supreme Court of the United States ruled recently 2 or 3 weeks ago, it was April 23rd, in a case that everybody was watching very closely that government had the right to impose a moratorium in order to develop environmental and land use regulation'. Is that really your position that a government body has the right to impose a moratorium or is it that whether you can impose a moratorium depends upon the facts and circumstances in a given area?

MR. GERTZMAN: Absolutely the right of Town Boards such as this to impose a moratorium on development in a particular area depends on the facts and circumstances.

TOWN ATTORNEY ALESSI: Okay.

MR. GERTZMAN: The authority... the authority on space, however, has been repeatedly upheld.

TOWN ATTORNEY ALESSI: Right. And no one disputes the fact that in the abstract, moratoria are legal. Nobody disputes in the abstract that if the duration is reasonable the moratoria can be valid. So, that is not disputed but I think that it is important also to... to know that what the Tahoe's Sierra Preservation decision said, and that is the one that I assume you are referring to, is the question before the Supreme Court was not... the Court didn't hold that government had the right to issue a moratoria in all instances and I'm just going to read the very language of the Court said 'in our view the answer to the abstract question whether a temporary moratorium affects a taking is neither yes always nor no never. The answer depends upon the particular circumstances of the case. Resisting the temptation to adopt what amounts to per se rules in either direction'. So, the first premise is that this decision doesn't stand for the proposition that moratoria are legal. It stands for the proposition that that question can't be answered without applying the particular facts and circumstances of the case.

The final question I had to ask for... of you Mr. Gertzman was when you talked about vested rights. You did not address property right interests and my final question is, do you view a property right analysis the same way as a vested right analysis?

MR. GERTZMAN: In what way are you referring to the property rights analysis? Talking... are you talking about, in this circumstance, Waste Management's option to purchase the property and how a moratorium might affect that option? I'm not quite sure I understand the question.

TOWN ATTORNEY ALESSI: Okay but let me just ask this, in your synopsis I didn't read you to be addressing a property right interest when you went through your analysis? You just addressed the vested right interest. I just want to make sure I understand that because I didn't read anything about a property interest in what you wrote.

MR. GERTZMAN: I was addressing the issue of no. 1 whether or not there is authority clearly depending on facts and circumstances that are attentive to each individual case to adopt a moratorium. I think we both agree that this Town Board has that authority depending on the facts and circumstances that it finds or doesn't find to exist in this community. So, I think that we're in agreement on that.

The second issue is whether or not this Town Board would be subject to a takings claim if it imposed a moratorium. That issue is one of vested rights analysis to determine whether or not there is, in fact, a takings that has been affected by a moratorium. I think under these circumstances, Waste Management would be hard pressed to assert that it was entitled to establish a takings...

TOWN ATTORNEY ALESSI: I'm sorry to interrupt you but we covered that area, my question was just limited to whether you addressed property interest in your paragraph here and I didn't read it there but I wanted to make sure I wasn't missing anything.

MR. GERTZMAN: I'm not sure I did either. I believe that was an email to potentially one of my clients...

TOWN ATTORNEY ALESSI: Right.

MR. GERTZMAN: ...that was handed to one of the Town Board members.

TOWN ATTORNEY ALESSI: It's not in here but I just wanted to make sure that there wasn't some words in here that was intended to address property rights.

MR. GERTZMAN: If there are other questions, however, that the Board...

TOWN ATTORNEY ALESSI: Right.

MR. GERTZMAN: ...would like us to address, we would be glad to.

TOWN ATTORNEY ALESSI: Thank you, Mr. Gertzman. You've answered my questions well.

MR. GERTZMAN: Thank you.

TOWN ATTORNEY ALESSI: I'd like to then go into the analysis that several people have mentioned my name here to go through the analysis. And, let me start with, first of all the proposition that there are existing processes going on in this Town. There is a Planning Board process, which I am sure, everyone is well aware of and there are appeals from the Building Inspector to the Zoning Board of Appeals. The law in New York is very clear, is that the Town Board cannot intercede in those areas. That's inappropriate, that's illegal. He Town Board does have the ability to entertain what is requested here tonight with regard to a moratoria. So, if you don't hear comments about the Building Inspector's decision, about the Planning Board, that is because it's illegal and inappropriate for the Town Board to be interceding in that area.

With regard to this issue, as this Town Board well knows, I have defended this Town I in the very type of litigation that has been discussed as a hypothetical here. I defended the Town in a \$50 million lawsuit where a developer sued the Town on some very similar issues. So, to the extent anyone thinks this is a mere hypothetical, it's not. And, as a matter of fact in that lawsuit, the request was that the damages of \$50 million be paid not just by the Town coffers but the individual Town Board members were sued individually and for 2 years or so, they had to live with the question of whether or not they were going to have to have a lawsuit and the Planning Board members were sued individually, as to whether they were going to have to pay that out of their pockets. We were fortunate in that we won that lawsuit in Federal court. And, I can tell you there were many issues raised in addition to vested rights that came up in that lawsuit.

So, the issue we are talking about and the concern and the risk is not merely hypothetical or abstract or unlikely. The other point to be made in the beginning is that, as you heard myself and Mr. Gertzman having a colloquy about, there is no law that says moratoria are legal. They just say that you can have a moratoria but whether or not it is legal is going to depend upon the facts and circumstances of the case. Now, the real question is, what are those facts and circumstances? What is it that the courts look at?

And, my job and role as a Town Attorney and the old ... of the Town official is to advise the Town Board on its legal risks to identify them, to give the likelihood

they might come to fruition and to advise them as to what the consequences are if they come to fruition. My duty under the Town Law is not just to the Town Board, it's to the taxpayers and the citizens as a whole. So, while I certainly recognize and appreciate the interest of Waste Management. I appreciate the interest of the community group, my role is really an objective one.

With regard to the criteria that you look at in this particular situation, the leading case on this is not the Tahoe case but it's the Penn Central case. And, I can tell you that the U.S. Supreme Court has said that what you look at requires a careful examination and weighing of all of the relevant circumstances. So, let's assume, hypothetically, that the moratorium were to be accepted. That, as I understand the purpose of the moratorium, is to stop the Waste Management project, to not have further review to have their be a zone change and that there be a zone change that essentially would mean that Waste Management is not going to be permitted to have the use under the zoning code. That that's the change. So, I go in jettison from that hypothetical and say what are the legal risks to the Town and to the Town Board members individually. And, what the U.S. Supreme Court has said is you look at the circumstances including the good faith of the Town Board in enacting something like this. They say look at the investment expectations of the applicant, here Waste Management, and what the court has said and courts have said repeatedly is that if you're going to do something that's going to address the community as a whole that's one thing but if you're going to do something that's going to affect an applicant then that is quite another. And, while a court would make its own judgment, it is fairly clear to me that the impetus for this and it's been fairly stated by everybody is to really affect the Waste Management proposal. And, that's... there can be veneers put on it but that really is the effect of what would be happening. And, the courts have addressed that specifically and said that that's when your liability increases significantly. And, there are numerous cases that go to that effect. So, I think that that is important for the Board to understand that in the Lake Tahoe case that Mr. Gertzman had referred to, in that case, there had been comprehensive planning that had been going on for decades but this was already a heavily regulated area. So that there are significant distinctions between that case and the particular case here.

We, and I have looked into this and have not understood before Waste Management came in, for there to be any significant movement for their to be zoning in this area of the Town. I know there have been certain Board Members that have expressed historically a desire to have that happen but it would be difficult for me under this circumstance to say to a court in defense of the Town that this is something that is being done because there is a concern beyond Waste Management. And, I understand and I heard that people feel that there is a need for zoning in this area. That is a question separate and apart from whether or not there needs to be zoning and we're going to stop Waste Management here and change the zoning to stop them from coming in. That to me are 2 separate and legal questions. Very legitimate concern easily legal if the Town Board, in their judgment, is to say we will rezone... we'll have a temporary moratorium., we will rezone but if you're going to say Waste Management then gets halted. That's different than to say Waste Management is exempted because they're already in the process. I look at the legal risks between those 2 choices to be vastly different.

I wanted to also address so much of what has been stated that vested rights is the issue and that if you take vested rights and say... and I agree with Mr. Gertzman to this extent... that vested rights generally mean somebody has gotten a permit and they've taken action in furtherance of the permit, generally in New York law put a foundation in the ground and/or expended substantial amounts of money. But, that's not really where the cases get litigated. Where the cases get litigated is whether or not the applicant had a property interest. Not the vested right and there's case after case and I've defended them. I'm defending them now in my private capacity as to whether the applicant has a property interest. And if the applicant has a property interest – and I know this is a bit legal but I've got to give the legal advice and I'll be happy to answer any questions – the issue is really here whether there is a property interest. And, there are aspects of Waste Management's

proposal that they could do, under the Building Inspectors current interpretation, they could do as of right. And, under all the cases in the Second Circuit that addressed this, they have... they can argue that they have a property interest. So, that question gets answered much differently than vested rights and if the Town is to change the zoning and have a moratorium to affect the property interest of Waste Management, they could have a lawsuit right now not having to go through the process. And, that is a whole different analysis. I've litigated that probably 5 times in the last 5 years on that issue.

Now, the damages would not just be a... how much is the value of the property. The damages could be the following, any consequential damages meaning Waste Management's inability to build, lost profits, etc. And, there is case, after case, after case that established this type of damages. Also, it's not just those dollars, the individual members of the Town Board and the Planning Board could be sued to account for those and they could be sued for punitive damages in addition to actual damages. In the Gladstone litigation that I referred to earlier, \$50 million, is exactly what that applicant did against the Town of Bethlehem. So, I appreciate the fact that anybody can sue and that doesn't concern us. We have... in this Town have been through many lawsuits. What concerns me are lawsuits that have a potential for a likelihood of success. So, my duty is to inform the Town Board and the Town citizens as what the risks are. And, I want to be very clear about what all of them are and I appreciate the fact that Mr. Gertzman has an interest and a duty to represent his clients. He views the world a certain way but I can tell you from experience litigating these cases that there are other issues that really have to be addressed here. So, my advice with regard to the Town Board and to all the citizens is that there are serious risks here. Can they be overcome? Perhaps, depends upon the facts and the circumstances. My question becomes is it a risk that needs to be taken now given that there is an appeal to the Zoning Board of Appeals. The Zoning Board of Appeals could view it differently than Mr. Shea. There is a process going on before the Planning Board. The Planning Board's decision could be to approve this project or it could be to disapprove this project. And, I say to myself, one of the questions I have to address to the Town Board is is this a risk that needs to be taken at this time. I understand what the community groups position is. I understand it very clearly but it's a question in my mind as to whether the Board needs to take that risk at this time. But, that will be the judgment of the Town Board.

My recommendation to the Town Board and I want to be very clear about this is that the legal risk that they would take in this instance with an application that is pending with a group that has pretty much said that they want this to be changed to affect Waste Management, with the fact that not only is the Town Board not had any activity for a larger plan that they've been talking about, moreover they have had various events where people have said to them, and I was there when I was Planning Board attorney, many residents in this area of the Town historically have said, we don't want zoning. And, I know there are people who very much do want it and there may be some Town Board members but there has not been, by this Town Board, action to zone. As a matter of fact, Rural Not Zoned, is very much a demonstration that the Town Board and, supposedly in response to what the public had wanted, has not zoned certain areas of the southern end of Town. Maybe that's time to be changed and that is an issue for the Town Board to resolve.

But, I say to the Town Board and I say to the taxpayers of the Town of Bethlehem, this is a legal risk that is not insignificant if we are to tonight to take on a moratorium and to proceed along a change... a zone change to go against Waste Management in this regard. And, I underscore again, the point that there are other processes going on that may or may not come to the result that the community groups have spoken about.

Let me finally conclude on two points, there is precedent for dealing with the very request that is here. We had an interim development law back in the late 1980s and there was a concern about development in single family residences and this Town Board passed a law that said we are going to limit the approval – to I think it was –

to 25 lots in that time period. And, that's the most anybody is going to get. But, there was a safety clause in there to address the very legal issues we're talking about tonight. It drew a line and it said people who had reached a certain part in the process were exempt and, again, the reason for that was because of the concern about the risk to the taxpayers of this Town about lawsuits should... should there be lawsuits and people claim that they had been affected.

So, I want to just conclude by saying that while it is ultimately the Town Board's judgment. It is not the Town Attorney's judgment. That my legal recommendation to them is that there are significant legal risks from doing this now and that while those legal risks may be overcome and it may succeed in court, they may not. And, the question becomes whether there are other processes in the Town that will be addressing this and whether those should be addressed first before this issue is taken on, if it is taken on at all.

So, wanted to set the legal context with regard to this matter and would be happy to entertain any questions by the Board.

SUPERVISOR FULLER: If I can take a minute to give Mr. Stockli his opportunity to speak.

MR. STOCKLI: Thank you. I'm John Stockli. I represent Waste Management and from the legal analysis perspective and, frankly, I don't have much to add, you stole some of my thunder. But, I would point out that we have been involved in the process of review with the Planning Board. We've been very open. We've been very patient and we understand the level of environmental review we'll go through. We expect it. We are willing to undergo it and we have been and we know what the process will entail. Part of that right now happens to be this appeal to the ZBA. We haven't seen the papers yet. I understand that you did get them to me or will shortly and we'll certainly address that. But, we have put a lot of effort into the project. We have expended significant amounts of money gearing up for the environmental review process that, we believe, will occur here. And, in addition, to the legal concerns that Mr. Alessi noted, there is just a fundamental fairness issue of changing the rules in the middle of the game.

Everyone has rights. We have rights under the zoning law. Breath has rights as well. You have rights to question what we put forward and we look forward to that input so that we can come up with the project if there are concerns. We will consider the concerns and we'll try to work towards something that does work for everybody. We're not going to agree on every point. It's pretty clear but I think it is equally clear that this proposed moratorium was designed to thwart our project. I think some of the best evidence of that was the grim reaper in the parking lot before we came in tonight and the group that sent it forward.

So, I really don't have much more to add to Mr. Alessi's legal analysis other than to say that we're prepared to go forward with the full review of the project. We're not trying to take any shortcuts. We understand it will probably take some time but we look forward to moving through the process that the Town has. We do understand the Building Inspector's decision and interpretation and the Planning Board's interpretation with regard to the site plan review of the project and the SEQR review which will consist of the elements of the project together. We understand that and we're prepared to move forward with that review.

Thank you.

SUPERVISOR FULLER: Okay. You have questions of?

MR. GERTZMAN: I would like to respond to some of the questions that Mr. Alessi raised in his discussion of the legal aspects of it.

SUPERVISOR FULLER: I wasn't aware that he raised questions.

TOWN ATTORNEY ALESSI: That's fine.

SUPERVISOR FULLER: Go ahead. At some point, the Town Board does have to discuss this.

MR. GERTZMAN: I understand.

SUPERVISOR FULLER: Go ahead.

MR. GERTZMAN: As you, Mr. Alessi, gave a very thoughtful and deliberate discussion of some of the legal issues. Couple things I'd like to point out, 1. the issue of why now? The interpretation of the zoning law, there are 2 different interpretations obviously – one is that this was the maintenance and vehicle maintenance and shop is not a permitted use. It was not a use that was in any way authorized in this particular zone and the reason that a moratorium or a zoning initiative is warranted here is exactly as a result of Mr. Shea's decision. So, there is a reason why things have changed now as opposed to prior to Mr. Shea's decision. That's one of the reasons that the community didn't come to the Town Board previously because they were certainly waiting for the result that they anticipated would be issued. The other aspect of this is understanding Mr. Alessi's distinction between the 2 processes. One of the recommendations that we would have is that those 2 investigations could take place – that the Town Board, as far as I understand, obviously is not going to waive a magic wand and either enact a moratorium or, in fact, change the zoning. But, in fact, those require certain procedures to be initiated to examine the legal issues, the facts and the circumstances, what property rights might be affected by granting this... by going forward now and we would recommend that these are worth exploring at this time in order to see what the possibilities are in the future. We do not want to be in a position down the road where there has been a substantial expenditure of time and effort by Waste Management in an area, we believe, was not previously authorized under the Town zoning law which would then put the Town in a worse position than it's in today. Thank you. I again appreciate it.

COUNCILMAN MARCELLE: Quick question.

MR. GERTZMAN: Yes.

COUNCILMAN MARCELLE: Is it your client's position that Waste Management should be included or excluded under this moratorium?

MR. GERTZMAN: They certainly would want Waste Management to be included in the moratorium.

COUNCILMAN MARCELLE: So, it's more than just about the zoning then really. I mean it's really...

MR. GERTZMAN: It's both.

COUNCILMAN MARCELLE: It's both, okay.

MR. GERTZMAN: It's the thing that prompts the issue that provides impetus to the initiative, of course, is the application plus the reversal as we perceive it by Mr. Shea and the current zoning. Now, resident... Rural Not Zoned can mean a lot of things. We don't believe, for instance, the standard that applied to the rest of the Town... some of...

COUNCILMAN MARCELLE: If I can just cut you off, I mean, but as I understand it from listening to Mr. Shea, that and also my conversations... my understanding with the Planning Board is that this entire Waste Management project is going through the Planning Board and SEQR review.

MR. GERTZMAN: I think that's correct.

COUNCILMAN MARCELLE: If that's the case and they're already in the pipeline, why do you need a moratorium to address future issues of zoning against Waste Management. In other words, with respect to Waste Management the most important thing, it seems to me, is that they abide by the process of SEQR and make sure the negative impacts on the community are explained and if there's mitigation, they have to mitigate. If they can't, they can't do the project. But, once they have that in the pipeline for Waste Management, how does the zoning determination affect anything Waste Management would do. Why put a moratorium on Waste Management if your concern is zoning?

MR. GERTZMAN: To restore the status quo prior to Mr. Shea's opinion that at least certain uses in that zone are now as-of-right uses and to... the status quo prior to his ruling was that there are permitted uses that have to go through site plan review. Anything not listed in the code becomes an as-of-right use...

COUNCILMAN MARCELLE: Yea, but his ruling doesn't affect Waste Management, does it?

MR. GERTZMAN: It affects Waste Management... future uses for that community. It potentially affects Waste Management...

COUNCILMAN MARCELLE: Okay.

MR. GERTZMAN: ...as we move forward in the process. I don't know what Waste Management's approach is going to be to its project later on.

COUNCILMAN MARCELLE: Right.

MR. GERTZMAN: I don't know also what other options might be coming down the road for that community.

COUNCILMAN MARCELLE: Right.

MR. GERTZMAN: But, other options...

COUNCILMAN MARCELLE: But, other... I'm sorry, let me... but, we're talking about other options. We're looking forward now perspective and we're saying, well we're not... well we've got this ruling and the next guy down the pike could take this ruling and put up some horrible facility that would jeopardize the health and safety of the residents without going through proper SEQR review. If that's what you're worried about – and it's a legitimate concern about... -- that is separate and distinct about whether Waste Management should be included in it. Because Waste Management under Mr. Shea's ruling and under the interpretation of the Planning Board, is going through the Planning Board. They can't just build as of right right now. It's what I heard Mr. Alessi say, what I heard Mr. Shea say and my understanding from the Planning Board as well. So, it just seems to me, if your legitimate concern is zoning and going forward with not Waste Management, this interpretation could affect someone else, that you are asking really for a blunt object or a blunt instrument, when a more precise tool is needed here.

TOWN ATTORNEY ALESSI: If I could just follow-up Mr. Marcelle, what is it about the existing process... the Planning Board that is inadequate? Because if the zoning code is changed and people have to go through site plan review, that's the very process that Waste Management is going through now. So, my question is, what do you believe is inadequate about the existing process? Because if you change the zoning code and future uses – hypothetical uses you are talking about – then become subject to site plan approval, it puts them right where Waste Management is which is what Mr. Marcelle's point is. But, I would like to know what you believe is inadequate about the planning review process that has occurred in this Town for years and will occur for Waste Management and that's to the response to some of the people who have said we want just what other people in the

Town have. I'm having a little difficulty understanding why the process that everybody else has to go through in Delmar, Slingerlands, whatever in site plan, that Waste Management is going through, what is... what more do you want than that process and the corollary is what's inadequate about the existing process?

MR. GERTZMAN: The process is fine for those uses which are authorized uses within a particular district. For those uses which are and should be prohibited in a residential zone or in a rural zone or a light industrial zone, those uses should not be authorized and should not go through the environmental review process at all. They should not be allowed to begin the process because they have been determined by the Town Board to be incompatible with the classification that the Town has chosen for that particular district. You certainly wouldn't suggest – I'm not saying that this is a residential zone – but you certainly wouldn't suggest that the Waste Management operational facility ought to go through a site plan review process in a residential zone. So, what's inadequate about the process is that there's an initial determination that at least part of what Waste Management proposes here is potentially an acceptable use. It's our interpretation that... it's our view that the interpretation that Mr. Shea advanced turned that on its head and, therefore, we are starting out with a process that really ought not to get beyond a review of the office building. The office building that they are proposing is, as I understand it, a permitted use subject to site plan review in that district. Well, let's go through the process for the office building. That's not what's happening here so, again, I agree that the environmental review process is a very important aspect of what the Town is doing. I believe that the Waste Management process will go through from what I understand a full environmental review and also we will have a chance to go to the Zoning Board of Appeals.

To go back to Mr. Marcelle's question, I think it absolutely legitimate question – why is this... the situation? In part that's my answer. In part the answer is that what's happened as a result of Mr. Shea's ruling is that many uses which I don't believe the Town Board, this or its predecessor Town Boards, envisioned would be appropriate for that location or, in fact, intentionally as a right uses. You would not want to be living, as far as and I presume to answer this question... you would not want to be living in a situation where heavy industrial uses can be placed next to your homes with just a building permit. And, that's what this community is facing. Now, if this community is made equal to, as Mr. Corada said, and put in a position similar to the residents in the entire Town, that would not be authorized.

I heard Mr. Alessi say that there potential to move forward, and I agree with this, with 2 processes. I heard him say very clearly that he thought there was significant legal risk associated with one but not necessarily with the other. That is the zoning process. I request that on behalf of the citizens that this be... this determination which has opened the door in this community, turned the zoning on its head and made it disparate from every other district in the Town be looked at very critically. I request that the Town Board, and again thank you very much for this opportunity, the Town Board look at the issue of initiating zoning to restore rational land use in this community which hopefully will not have an adverse impact on any of the land owners in that community and 2. examine what the potential risks are, weighing all the facts and circumstances, of initiating a moratorium in order to get to that zoning.

As Mr. Alessi said, you don't necessarily need both going together but we believe that this is such a critical issue for this community that the Town ought to seriously consider doing them both. Again, I don't put myself in your spot to have to advise a client to place themselves in the unfortunate situation which apparently they were in recently with respect to such a horrendous lawsuit. So, I appreciate your situation and your recommendation as well. Again, thank you very much. I understand you have a tremendous amount of business to get through tonight. Thank you for the opportunity.

TOWN ATTORNEY ALESSI: Thank you, Mr. Gertzman.

SUPERVISOR FULLER: Thank you, Mr. Gertzman. Do the Board Members have questions of any of the attorneys, all of the attorneys?

COUNCILMAN DAVIS: I have one question, and I don't know what the meaning of the answer would be, maybe Mr. Stockli you know.

COUNCILMAN LENHARDT: They can't hear you.

COUNCILMAN DAVIS: Does Waste Management currently own this property?

MR. STOCKLI: We currently have an option on the property.

COUNCILMAN DAVIS: You don't own it?

MR. STOCKLI: We have an option on it.

COUNCILMAN DAVIS: Okay, does that have any impact at all, Bob, on our decision making here tonight?

TOWN ATTORNEY ALESSI: It has and in the end it does not. From a legal analysis, and I won't belabor it, it affects the vested right interest but it does not affect the property rights analysis.

SUPERVISOR FULLER: I have a question on, have you looked at other sites in the Town of Bethlehem?

MR. STOCKLI: For this project?

SUPERVISOR FULLER: For this project for Waste Management?

MR. STOCKLI: I don't believe we have.

SUPERVISOR FULLER: This was the only one.

MR. STOCKLI: There are, from time-to-time, throughout the process people have said, gee maybe this or that but there's nothing that we've looked at thoroughly. This is really the site that... it... for several reasons it's not from the site – transportation and lack of impact business, being right off the Thruway you minimize the through truck traffic by being able to access the Thruway directly.

SUPERVISOR FULLER: Okay, thank you. Did you have a question?

COUNCILMAN MARCELLE: No, when you are ready for comments.

COUNCILMAN LENHARDT: I have one slight technical question. In order for this Board to address moratorium or any other local law, we must have a public hearing, I believe. Is that true, Mr. Alessi.

MR. ALESSI: That's correct, Mr. Lenhardt.

COUNCILMAN PLUMMER: I'll just make a statement. I would be supportive of...

AUDIENCE: Can't hear.

COUNCILMAN PLUMMER: I'm sorry. I would be supportive of a temporary moratorium in concept to rezone the area that is not right now... the rural areas that are not, however, I would not be supportive of having it affect the process that is going on right now with Waste Management because of the risk that our Town Attorney has outlined. I think we have to sit here and have to consider the impact to all the taxpayers in the Town.

However, I will go back to my initial statement, I do think it is important that we sit down, we re-look at LUMAC. The Rural Landowners have come forward, they were here about a year ago with a proposal as to what to do with the land in the areas that you are mentioning and I think we should roll up our sleeves and start to work towards zoning that area.

So, that would be my position right now.

SUPERVISOR FULLER: Thank you, Dan. Doris.

COUNCILMAN DAVIS: Mr. Reed had a question.

MR. REED: If I may and nothing to drag this out. I'm glad I got back from a trip... you know, Bob, I love you but I don't know how long you've been around and maybe you are aware of this and we talk about not having taken any action on this unzoned land. This is the first meeting that I've come to and look at all my friends. To that end, there have been 2 truck stops and a pig farm in the past 35 years that have just raised hell with that local area. So, to make a comment about there hasn't been an outcry. The outcry, quite frankly, or the breaking of the threshold will be when one of these projects, in effect, that for whatever reason someone may object to -- I really don't care about the name of the proposal or what it is -- but there hasn't been that straw that broke the camel's back.

And, for those of you that may not have a history on the Board and you go back to the Bert Kohinke days and you go back to Harold L. Williams, there's some real definitive reasons that land was left unzoned. And, it may have to do with some interests that those individuals may have had. And, it's not fair because they are dead and gone and they did great jobs, just like you guys are doing and you gals are doing. But, the reality is, until one of these goes through there's no real straw that breaks the camel's back in order to create this initiative to change the zoning. I applaud your efforts now and even though it is happening on your watch, you may have to bear the brunt of this, it's a tough decision. I applaud the notion of LUMAC. I applaud the notion of master planning and that's how we get past issues like this. Thanks for your time.

SUPERVISOR FULLER: Thank you.

TOWN ATTORNEY ALESSI: Mr. Reed, thank you. High regards for you also. I just wanted to be clear on what I said. I didn't say there was not an outcry. I didn't say there wasn't activity by the public. I said that this Town Board has not had recent activity to rezone that area and that's what a court will look at. They won't look at what the community has done and I agree with you and am very much aware of what the community has done. I was Planning Board attorney when UNICAL came around. I sat through that very much aware of it. So, I am aware of the community's feelings but a court will look at what activity the Town Board has had and to me, I don't offer any advice at this point with regard to looking at zoning in the southern end of Town with Waste Management excluded. To me, I see very little legal risk to that at all. What concerns me and what I see the legal risk for is zoning change that's going to affect an application that has already in the pipeline. So, I just wanted to be clear on that point and I appreciate your comments.

MR. JASINSKI: My name is Bob Jasinski. I should say I had some friends in this area. I'm not going to address Waste Management at all. I don't... I've stayed away from it. I haven't gone to the meetings, it's a local thing, as far as, I am concerned. But, you are dealing with a moratorium on all the unzoned area which takes in quite a bit beyond the village of Selkirk itself. You're going across 9W. You're going over around the railroad tracks. You're going to South Albany. You're going South Bethlehem. You're swinging up into Creble Road and areas like this. I'm not happy to hear words like residential is okay but businesses we don't want. And, I think if you go back in the records, one of the lawyers

mentioned that. That we want to be against... we can let residential in but we're not going to let business in.

There's words like community. Now, community can be used many ways. I mean is this just a section which... I agree they've got a problem. I agree it has to be addressed one way or the other. But, I hate to see it be enlarged on the rest of the unzoned areas and to have a moratorium put in is going to hurt many, many people. I mean, you have businesses down in the other section... west of the Route 9W and they have to be considered. So, that's all and as I say, I had friends but I probably don't. Thank you.

SUPERVISOR FULLER: Thank you. Board Members, questions?

COUNCILMAN MARCELLE: I defer to the seniors, as in tenure. The senior tenure.

SUPERVISOR FULLER: I think, Tom, you need to go first now. This other senior isn't happy either, Doris.

COUNCILMAN DAVIS: I'm overwhelmed by your graciousness.

COUNCILMAN MARCELLE: Tenure was a key word that was omitted from there.

COUNCILMAN DAVIS: Thank you but I will remember it. I hope that the residents generally understand that I have been consistently sympathetic to their concerns and their situation. I think they know that. I've been supportive of rezoning and I'm on record as having serious concerns about the unzoned land in our Town and it's potentially negative impact on landowners. As I've stated publicly at Town Board meetings in the past when zoning has been a discussed issued. Having grown up in the Catskills, I know very, very well what the serious, serious consequences of unzoned land can be. It's not pleasant. It's unfair and I don't want and I haven't wanted to see that for our community.

We need protections for residents who live in our rural unzoned areas, however, in this case the request for a moratorium -- which is a request for a moratorium -- while I've listened carefully to the residents -- I've read the emails, I've listened carefully in all the phone conversations -- while I have listened carefully to everyone out there, I've also listened careful to Mr. Alessi's input, as well as, the input of other environmental attorneys. I understand that there are significant legal risks. I've been there. I'm one of the Planning Board Members, as is George Lenhardt, who was actually sued individually for a significant amount of money and it was not a pleasant thought to have to go to bed at night worrying about whether we would have that home to live in if the lawsuit was successful against us. It's not a pleasant thought for any of us and I don't wish it on other Board Members to have to go through that and I don't think George does either, to tell you the truth. I don't want others to have that experience.

Waste Management is proceeding through the SEQR process at the Planning Board level. Residents have filed the appeal that we've heard about at the Zoning Board level and I think it's necessary and prudent for these processes to move forward. Rather than place the Town, taxpayers, residents, individual Board Members and legal... at legal and financial risk, I think that we really at this point have to reserve any decision on a moratorium as it applies to Waste Management at this time. I think we do have to -- I agree with Dan -- we do have to look at zoning and I think it is very critical that we do that as soon as possible but a moratorium that applies to Waste Management, I don't feel at this point I can support because of its legal consequences... potential consequences and I apologize to you out there is you are disappointed in me but I can't do this to other Board Members and to the Town, not now. But, I will support zoning changes and I think we need to proceed as quickly as we can.

SUPERVISOR FULLER: Thank you, Doris. Young man.

COUNCILMAN MARCELLE: Well, to me there seems to be 2 legitimate issues raised here tonight. One was clarified at the outset that Waste Management should go through the full Planning Board and SEQR review. And, I understand there was a concern that this project could be phased in and the most objectionable part not go through an environmental review. So, after having called around and found out what the situation was I was greatly relieved to hear that today.

I think though there is a separate and distinct issue with respect to zoning and I've talked to a number of people down in the southern part of Town and I'm all for zoning the south end. I think... and I'm going to talk to Pat Reed for a second, I think historically it hasn't been a great clamor for the residents to have zoning. It has been a fight down there and, before I ever served on this Board, there was a bitter dispute in this Town with respect to LUMAC and whether the property interests of the large landowners would be affected by that plan. I think a simple zoning code would solve probably most of it and we could do it if we put our heads together on a relative short basis for that type of thing to be done. And, I'm all for it and I would encourage the Board to act upon that swiftly.

Now, with respect to the moratorium, I think it is the wrong tool to use here. I... I appreciate the citizens saying, look it's not about Waste Management but the truth is, it is about Waste Management. It's about utilizing the most effective means to stop it. And, that's your option but it's not appropriate to slam a moratorium on them for a number of reasons. One, I'm not so worry I guess... let me say this... about a lawsuit per se but I did take an oath to uphold and defend the Constitution of this State and United States. And, I believe, if we adopted a moratorium what we would be basically doing is singling out Waste Management and trying to stop them and, I believe that's unconstitutional. I don't think it turns on vested or not vested in the property. For example, we couldn't tell Waste Management a rezoning. The only thing you could grow on that land is daisy – make it a daisy farm. And, even though they weren't vested they still would have lost the most... you know, the economic use of their property. So, I don't think in good conscience and in accordance with my oath that I can impose this moratorium that would affect Waste Management.

Second, I'm also concerned aside from the Waste Management issue, the larger issue of what messages we would send to the business community. And, I'm not talking about the merits of this project of Waste Management. That will stand or fall under the appropriate review. But, if we send a message to the business community, if you come in here, we'll circumvent the process. We'll change the rules on you. We'll be unfair and pull the rug out to you after you've invested your time, your talent and your money and I think that's going to lead to a discouragement of business. Business that we need to expand our tax base. I would love to see Waste Management move into the Bethlehem Central School District.

AUDIENCE: We would too.

COUNCILMAN MARCELLE: But, as a matter of principal, it would send the wrong message, I think, to the community that we're going to seek to develop...

MR. GERTZMAN: What about the community that lives here now? What about us?

COUNCILMAN MARCELLE: That's what I am saying, we have a planning process. We have environmental review and that's an important part. And, that was the first part of what I said, is that this is not escaping review. We don't have a situation where everyone is shutting their eyes, or holding ears, or clapping their... gagging their mouth and not saying anything about Waste Management. We have a process. We have a Planning Board that are going to listen to the impact upon the residents. That's the purpose. If you were to sit here and tell me

and I've talked to people, that Waste Management was going to escape environmental review, I'd be on a whole... a different act.

MR. GERTZMAN: They are escaping the zoning process. That's what they are escaping. You are going to review them with SEQR but they've escaped the zoning to begin with.

COUNCILMAN MARCELLE: Right, well...

MR. GERTZMAN: Kevin Shea has created a giant loophole for them to jump through.

COUNCILMAN MARCELLE: Well, as I said, the impact on the residents is done through the environmental review and that's what I'm concerned about. And, I think given those factors, I'm going to oppose a moratorium but I will work with anyone and all the Board Members as quickly as possible to establish a zoning code for the south end of Town.

COUNCILMAN LENHARDT: Can the senior member now speak?

SUPERVISOR FULLER: I'm senior.

COUNCILMAN MARCELLE: I would have deferred to you too, George.

SUPERVISOR FULLER: Well, I get to go last.

COUNCILMAN LENHARDT: I'm not going to address Waste Management per se. However, I will address the subject of zoning for the entire Town and also add credence to what Mr. Reed said.

Before I start, I was as Doris indicated, sued for \$50 million in punitive damages after the fact. The Planning Board had been already served individually with papers as a result of being appointed to the Planning Board after the fact, I subsequently was given papers for something I had nothing to do with and, yes, that was a harrowing experience. Fortunately we were successful in our defense.

COUNCILMAN DAVIS: Thanks to Mr. Alessi.

COUNCILMAN LENHARDT: Thanks to Mr. Alessi.

And, earlier in the discussion Mr. Alessi indicated there were Board members or members that had been trying to push for zoning, especially the rural unzoned areas of Town for a long time. I'm going to quote some time frames and I'm sure Mr. Putney will dispute maybe the years involved in this but I'm going to go into the history of this particular process. We had moratoriums before regarding 25 lots, regarding the size of lots during the time period that LUMAC was deliberating and approximately 13 years ago, I believe, LUMAC was formed. That's the Land Use Management Advisory Committee. It was created to develop a comprehensive land use plan for our Town. The process took approximately 8 years and the final plan was accepted by the Town Board as a planning reference resource in 1997. Subsequent to the final acceptance by this Board, a committee was composed of Town officials, including myself, and rural landowners to address what the rural landowners felt were deficiencies in the LUMAC report. The Committee met 9 times over the course of 2 years and then the Town Board was presented a final report recommending modifications to the LUMAC proposal on October 11, 2000. We had a buy-in at this point from the rural landowners. I felt and I was assured by the representatives that the majority of the rural landowners and the majority of the Town was on board with the plan we had.

The current recommendation for the particular area under question right now down by Exit 22 was contained in the LUMAC report and I have confirmed with the representatives from the rural landowners that they did not object to this particular

classification was to zone that area office park, research and development. Now, this is not a code that we have in our present code, it would have to be identified legally and then adopted by the Board and so on and so forth. However, I just want to read the most appropriate uses include: administrative, professional or governmental offices where such use does not include the retailing, wholesaling or warehousing a product on the premises and/or outdoor storage of materials or equipment; industrial or scientific research design and/or development laboratories devoted to research, product development and testing, engineering and/or sales development, medical, dental or radiological laboratories; duly licensed training, business or vocational schools; conference and meeting facilities. And, it goes on to say uses which may be appropriate under certain conditions include indoor health or recreation club; standard restaurants excluding fast food; nursery schools or day care centers; temporary lodgings when designed and constructed as part of a larger integrated development project and primary for the benefit of employees; libraries, museums and art galleries; agricultural and related uses, underlined. That addresses the particular zone you are interested in.

Our plans that we have on record right now, address the recommendations for zoning the rural areas of the Town and I wholeheartedly support and request that the Town move forward with doing the rezoning exclusive of Waste Management. I am not addressing Waste Management. They're here, we have to deal with them with the processes that exist.

SUPERVISOR FULLER: Thank you, George.

Now, it's my turn. This can be either be good or bad. I have met with the residents, of and on, and most recently with representatives of the Safer/Breath group and when I was approached with the request for moratorium I did say right up front that this could go on an agenda. I did not know if it would be a problem but really it would depend on advice from our Town Attorney which we've all heard at the same time tonight. That is not the only reason for me to be opposed to the moratorium. I think there is a much bigger picture out here that we need to pay attention to and that's called the zoning issue. And, Mr. Putney, I just saw for the first time. This was an issue on the Town Board many, many years ago and I was a member of the Town Board at the time. We discussed LUMAC every meeting. We also had representatives who came in in the final hours and they were called the farmers, the agricultural property owners, the large landowners. And, they felt that they had not been represented on the LUMAC committee and felt that we should not move forward. I asked them to be involved and work with representatives of the LUMAC committee which some joined in -- Mr. Putney being one of them. In the end, the large landowners, farmers, agricultural landowners went away happy that this was going to be only a planning guide and there were many people present at the time that are here this evening that were involved in this process and that's why the area never went any further, as far as, zoning. To take a look at the zoning, I don't have a problem with it at all, that can be done. But, we all need to be together on the zoning and what's best for the entire community. The LUMAC plan really had zero impact on the Town of Bethlehem. The majority of the Town of Bethlehem was not impacted by what was in the LUMAC guide. The people that were affected by it then, are the very same people sitting here this evening. You were the ones whose land was being zoned conservation zone. And, you were the people that also said, this is my inheritance for my family, for my grandchildren and how unfair of the government to tell me what I can or can't do with my land. And, as I sit here tonight, I'm thinking the same thing only we've come a long way. It's been quite a few years. What has happened in our community. It's in an unzoned area and I can understand where each and every one of you are coming from with the concerns that you have. But, please understand that there is a process in place and that we are the Town Board Members that certainly have heard you loud and clear and have received your emails and I have forwarded everything to the Town Board so that we are responsive to you, our residents, and exactly what it is you are looking for and you are looking mainly for the zoning for the southern end of Town for your protection in the future.

The moratorium, on advice of Counsel, I cannot go forward with but I am still here and so are the Town Board. We are more than willing to take a look at this zoning but I would ask that you be patient as we go through this. The Planning Board are the ones that have this before them. It's under their jurisdiction. The Zoning Board, the Town Board is the only one that does not have it under their jurisdiction under the law. But, don't view this as a night where we are opposed to the rezoning question. We are opposed to the moratorium. I am still available to meet with anyone. You are more than welcome to come in. I've learned, just as you have learned this evening, what can and can't be done. And, on a very minor note, I also was part of the lawsuit but then I was a Town Board Member and it was probably my first year in office. And, that was pretty frightening to know that I was about to lose my home and here I am came in for public service. Had no idea how serious this could be. I have to say to you, I still don't... still do not want to lose my home but that is not the real priority for this. I think we need to do what is right and what's right for the entire community. And, there is a process already in place that we need to go through to protect all of us. So, I thank you.

Is there anyone who would like to speak to the Board before we move on to the agenda?

GENTLEMAN: Got several questions. 1. Since Waste Management has plans in front of the various agencies to develop 25 of their 150 acres or so, does that mean that if we change the zoning after they've got this far in the process, does that mean that a zoning change would apply to the remainder of that 150 acres or are they exempt because they have a contract on the entire 144/150 acres? 2. I just don't understand... I just understood that there is also contract on the old Unical property the street and since they have a contract on that property, does any change in the zoning that the Town proposes apply to that or are we stuck with whatever they want to do? 3. Could you explain what happened with Unical and why they were denied or what the process was or what happened there? Because I think that by having Mr. Shea's opinion now it might open the Town up to someone coming back and saying, you're being inconsistent, why didn't you interpret things that way back then and what liability does the Town have either on the Unical proposal or other proposals that might have been applied to the different unzoned areas.

And, the last thing I want to say is that I've heard several times from Waste Management that they're our friends. That they want to work with us. And, we're here coming to the Board with a concern and I think that if Waste Management can be taken at their word, I don't see how the Town would ever get sued because they want to work with us. And, we're here saying what we want so why is there this worry about being sued? Actually that brings the other thought to mind – can someone explain what a SLAPP suit is and what the status of those type of suits are now?

Thanks.

SUPERVISOR FULLER: Would you like to address the legal response?

TOWN ATTORNEY ALESSI: I always like the one question questions better. Let me respond to as many of your questions as I can and if there are some that I have omitted, please feel free to say so.

Let me address Unical. As I stated, I was the Planning Board Attorney when Unical came in. Unical was not denied. Unical withdrew its application. So, I just want to be factually correct about that.

Secondly, with regard to the issue of Waste Management you asked a couple of questions. You asked, 1. you know, they've got for the 25 acres but what about the rest of the 100 acres. That is a hypothetical that would require a lot more facts to answer. Have to know what it is they are proposing, etc. There was a specific request before the Board tonight, a specific set of circumstances that I addressed. And, I will not send off an opinion without giving it some consideration. So, let's

just suffice it to say that that situation hasn't arisen. There is no law that requires Waste Management to put forth a proposal on land that they don't have a proposal on. There's a case in the Town of Guilderland that's a leading case in the whole State on that issue. So, there's nothing we can do to make them come up with a plan. That's very clear in the law but if they do come up with a plan, I'd be... first of all if it's before the Planning Board, that is not my role to say for the Planning Board counsel and so I'd respectfully refer you to Planning Board counsel. The law is pretty clear in New York. There is a case called matter of Compo that says that Board's have to respect their jurisdictional lines and can't intercede into others.

With respect to your question about what's a SLAPP suit? What's the status of those? Basically what SLAPP suits are, and I've litigated those as well, is when a member of the public or a group comes up and says at a public hearing or starts a lawsuit and says we don't approve of this project and what happens is – let's say they are unsuccessful and the developer/applicant later sues those individuals or that group and requests damages from them. The suit by the developer back against the citizens is what is called the SLAPP suit and it's an acronym that it's not important what the acronym means but it's SLAPP and what happens is New York passed a law and it's in the New York McKinney's Civil Rights Law section. It basically says that the citizens can turn around and sue the developer for suing them and get damages. And, for a number of years, the law proceeded in that way until the Second Circuit Court of Appeals came down with an opinion that said, wait a minute, the developer and the applicants have First Amendment rights too and that, therefore, that law has to be interpreted in a certain way and they basically allowed developers to sue back in certain circumstances. It wasn't the mass prohibition that the SLAPP suit in the New York Civil Rights law had alluded to in some state court decisions.

So, I hope I've addressed all your questions, sir and if I haven't, please don't be shy to come up and say I asked this question and you didn't address that one.

SUPERVISOR FULLER: Yea.

MR. SATIN: I'm Maurice Satin. I live at 922 River Road and while I'm at some distance from this proposed project, I do have the privilege of driving River Road, Route 144, back and forth to Albany every day to go to work and I think it raises an issue for me that's broader than this particular moratorium or Waste Management project. You asked us to have faith in a process that has turned River Road and the shore of the Hudson in the Town of Bethlehem into largely an industrial area which is in many spots quite polluted with a few enclaves left of the rural nature and the kinds of river front we might want for our posterity. It seems to me that this is not just a River Road issue, it is a Town of Bethlehem issue. I would not like in 20 years to have to build a bridge over the industrial wasteland that we've created along the river like the City of Albany is currently doing so that our citizens can access the river any place but Henry Hudson Park. I would ask in stepping back and looking at the process and asking citizens to believe in a process that has produced that that we reexamine that process and see if there isn't something... and we need your help. You're our leaders, we need you to intercede on behalf of all the citizens of Bethlehem so that we might have the residual of a riverfront of a very beautiful area that we might want to maintain for those who come after us.

Thank you.

SUPERVISOR FULLER: Thank you. You didn't run fast enough, stay right here.

MR. SHAFER: Now Mr. Alessi, while I applaud the Town's position on moratorium for adult venues and probably because it was going to impact the more populated, non-Selkirk end portions of Town, can you identify why a moratorium for adult venues is appropriate but a moratorium for this project is not?

TOWN ATTORNEY ALESSI: Sure, be happy to. Let me be clear on what I said tonight. What I said was that a moratorium that would include... moratorium and

zone changes that would include Waste Management would put the Town at risk. I did not say that a moratorium that would exclude Waste Management would put the Town at significant legal risk.

Now, let me get to your question. There were no applications for adult uses pending at the time the Town Board undertook the review of the issue and when the Town Board enacted the moratorium. So, my position with regard to the legality of that is exactly the same as it is here tonight. Moratoria, legal, moratoria that exclude Waste Management for this area, small legal risk to the Town and adult use, same exact situation. Same opinion because there were no applicants in the process requesting an adult use in the Town.

MR. SHAFER: Okay. My second question dealing with segmentation, there is concern that the project certainly as currently scaled has concerns about what's going to be done with the rest of the project. With respect to segmentation, can we get it as part of the ultimate project that there is a commitment that for the remaining portion of the project, certain things can't be done? Those things being a dump, a transfer station so again, while we are not trying to get them to identify what their going to do in the future, can we get them to make the commitment what they won't do in the future?

TOWN ATTORNEY ALESSI: I would say that what can be required and what cannot be required in the site plan approval is an issue in the exclusive jurisdiction of the Planning Board and the Planning Board counsel will give counsel to the Planning Board on that particular issue. Legitimate question, understand the basis for it, but it would be inappropriate for me to intercede in their area on that issue. I have my own thoughts. I have my own views but again, it's inappropriate as Town Attorney for me to intercede in an area that's clearly the Planning Board and clearly the Planning Board counsel. And, it may be that Waste Management put to that question may have an answer regardless of what the legal requirements are.

MR. SHAFER: My third and last question...

MR. STOCKLI: Excuse me... we repeated said that we will not put a transfer station or a landfill there. We can keep saying it. I just want it to be clear to the people that have taken the time to come here tonight.

TOWN ATTORNEY ALESSI: I appreciate that and I just... I really don't want to have this Board intercede into an issue. We want people to be able to talk and Mr. Stockli to be able to talk, however, that's really an issue for the Planning Board and its counsel.

MR. SHAFER: My third and last question is, I've heard at the different forums that the Town is not in compliance because it's not completely zoned. Can you address that issue and by rural unzoned, from what my non-legal education is, is it's not a zone, so we are not in compliance with the Town being fully zoned?

TOWN ATTORNEY ALESSI: I don't agree with that conclusion at all. I understand the argument. I understand under Town Law 261 and 263 that there has been an argument made that the fact that "it's not zoned" is illegal. I will say that I don't agree with the factual/legal conclusion that that area is not zoned. It is zoned, it's a Rural Not Zoned designation. So, I loose the logic right from the beginning. For example, there are uses in that district that have to go for site plan approval. My judgment is that's a form of zoning. There are things that can occur and can't occur. So, I loose the logic from the very beginning on that particular issue but even aside from that. There are many communities and it doesn't make it right or wrong, other than Bethlehem, where there's no zoning at all in parts of their town and you've heard the Supervisor give the historical rendition of why that's the case. But, I will conclude on that one, just by saying, I respect the opinions of others but respectfully come to a different conclusion on that.

MR. SHAFER: Thank you.

MR. SARANCO: Richard Saranco, 67 Maple Avenue. Like to inform our neighbors that we'll be selling our house. Matter of fact we have sold it. We sold it to the Indian Point Nuclear Power Authority... All right. The house is going to be demolished, however, because we are on 2 acres of land and it will not be subdivided and it's not one of the 32 itemized list on zoning, it will not need to go to the Planning Board. They'll be filing a building application but just a courtesy to let you know, that that will be built in the future. No big deal. They'll also be putting a hog farm outside too while they're at it to grow some animals. Thank you very much.

SUPERVISOR FULLER: Is there anyone else? Would you like to end on that note? We will... We thank you, Mr. Gertzman, Mr. Stockli and above all else, Mr. Alessi, our very own Town Attorney.

MR. GERTZMAN: I'd like to thank the Town Board for giving us the time tonight to talk to you about our issues of very deep concern. Thank you very much for your courtesy.

The following item was a request from Nan Lanahan, Administrator, Parks and Recreation Department, for approval of appointment of seasonal personnel.

The motion was made by Mr. Plummer and seconded by Mrs. Davis to approve the appointment of seasonal personnel as listed in the Memorandum dated May 22, 2002 at the titles and salaries listed as requested by Administrator, Nan Lanahan, Parks and Recreation Department. The motion was passed by the following vote:

Ayes: Mrs. Fuller, Mr. Lenhardt, Mrs. Davis, Mr. Plummer, Mr. Marcelle.
Noes: None.

The next item was a request from Commissioner of Public Works, Bruce Secor, for approval of award of bid for Repairs to the Town Hall/Lower Roof Area.

The motion was made by Mr. Lenhardt and seconded by Mr. Marcelle to approve the award of bid for Repairs to Town Hall Lower Roof Area to Skyway Roofing, Inc., Albany, New York at the bid price submitted and as requested by Bruce Secor, Commissioner of Public Works. The motion was passed by the following vote:

Ayes: Mrs. Fuller, Mr. Lenhardt, Mrs. Davis, Mr. Plummer, Mr. Marcelle.
Noes: None.

The next item was a request from Bruce Secor, Commissioner of Public Works, for approval of award of bid for PAC Coagulant for the Water Purification Plant.

The motion was made by Mrs. Davis and seconded by Mr. Marcelle to approve the award of bid for PAC Coagulant for the Water Purification Plant to Westwood Chemical Corporation, Middletown, New York at the bid price submitted and as requested by Commissioner of Public Works, Bruce Secor. The motion was passed by the following vote:

Ayes: Mrs. Fuller, Mr. Lenhardt, Mrs. Davis, Mr. Plummer, Mr. Marcelle.
Noes: None.

The next item was a request from Chief of Police, Richard LaChappelle, for approval of appointment of Police Officer, effective May 25, 2002 at an annual

salary of \$34,263. Supervisor Fuller said this item was removed from the agenda at the request of Chief Lachappelle.

The next item was to acknowledge receipt of the 2001 Annual Franchise Fee from Mid-Hudson Cablevision, Inc. in the amount of \$235.21.

The next item was to approve the Town Board minutes of April 24, 2002 and May 8, 2002.

The motion was made by Mr. Plummer and seconded by Mr. Marcelle to approve the minutes of the meetings of April 24, 2002 and May 8, 2002 as submitted. The motion was passed by the following vote:

Ayes: Mrs. Fuller, Mr. Lenhardt, Mrs. Davis, Mr. Plummer, Mr. Marcelle.
Noes: None.

The following item was a request from the Supervisor to change the Town Board meeting date from June 12 to June 11, 2002 at 7:30 p.m.

The motion was made by Mr. Lenhardt and seconded by Mr. Plummer to approve changing the Town Board meeting date from June 12 to June 11, 2002 at 7:30 p.m. The motion was passed by the following vote:

Ayes: Mrs. Fuller, Mr. Lenhardt, Mrs. Davis, Mr. Plummer, Mr. Marcelle.
Noes: None.

Supervisor Fuller noted there was a settlement with the Police Department for a new 3 year contract and Councilman Lenhardt was at the table with Counsel, Michael Smith. She said as of Friday afternoon it was a Memorandum of Agreement and Monday the police union voted. She further noted the details are in the salary only, asking Councilman Lenhardt to give some information. Councilman Lenhardt said he does not have any numbers in front of him. The Supervisor said it was for 3 percent in January, and 2 percent in July for 3 years, indicating it was for 2001, 2002 and 2003. Question arose as to the years and therefore, this will be verified. The Supervisor said there is nothing in writing yet, noting it needs to be typed up.

The motion was made by Mr. Lenhardt and seconded by Mrs. Davis to approve the Settlement Agreement with the Town of Bethlehem Police Union. The motion was passed by the following vote:

Ayes: Mrs. Fuller, Mr. Lenhardt, Mrs. Davis, Mr. Plummer, Mr. Marcelle.
Noes: None.

Supervisor Fuller said the attorneys signed the Memorandum of Agreement on Friday and it was voted on by the police on Monday night. Councilman Marcelle extended his thanks to Councilman Lenhardt for all his hard work and said he knows it was a labor to work through this. Councilman Lenhardt said the Police Department was very professional in their approach to the negotiations and he appreciated their position.

Supervisor Fuller asked if anyone wished to address the Board. No one spoke.

The motion was made by Mrs. Davis and seconded by Mr. Lenhardt to adjourn the regular Town Board meeting at 9:25 p.m. The motion was carried by the following vote:

Ayes: Mrs. Fuller, Mr. Lenhardt, Mrs. Davis, Mr. Plummer, Mr. Marcelle.

Noes: None.

Absent: None.

Deputy Town Clerk