

OGDEN ZONING BOARD OF APPEALS
January 7, 2010

Members Present

Duane Fregoe, Chairman
Tom Hall
Mark Irwin
Corey McAtee
Mark Young
Kristen Zale

Members Absent

Noelle Burley

Others Present

Jack Crooks, Building Inspector
Angella O'Hara, Secretary
Gay Lenhard, Town Supervisor

Bridget Field, Esq., Zoning Board Attorney
Dan Schum, Esq., Town Attorney

Jim Liebow
Jeremiah Clifford
Douglas Brown
Glyn Schultz
J. Serwacki
Dave Feeney
B. Feschor
Tammy Maier
Peter Pallmann
Robert Baldino
Ed Grant
Ken Pratt
Dale Murphy
Tom Frisch
David Walton
Joseph Scheib
Jason DiPonzio
Sandi Rogers
Delores Webb
George Brocious
Erik Grimm
Maria Gentito
Dennis Pickering
Kathleen Kelly
Jillian Kelly
Margaret Nolan
Brian Ricotta
Bill Barlow
Marshall Crafts
Frank Rakoski
Lori Faul
Irene Cavallero
Rich Francis
James Foos

Mary Lou Clifford
Geoffrey Brown
Jeff Brown
Kris Schultz
Joyce Lobene
Craig Byham
Rick Maier
Jammie Shulenburg
Victoria Wahl
Barbara Pratt
Stephen Grant
Joe Inzanna
Steve Pabozzi
Margaret & Chuck Povelate
Brian Galland
Dave Holtz
Paul Webb
Nancy Hennewan
Bob Wallace
Mark Baker
Dick Turner
George Johnson
Sherie Pickering
Dennis Kelly
Kathlyn Kelly
Jim Case
Jane Munding
Gary Parker
Doug Foster
George Goettelman
Cindy Pray
Dawn Cummings
John Krywy
Heather Butterman

James DiNapoli
Kathy Davis
Kenneth Unger
Jean Braun
Jacob Toal
Laura Meyer
Joseph Frasini
Gary Inzana
Spencer Read
Eula Serrino
Carl Roy
Sandy LaBrie
Robert Santana
Beverly Fresch
Florence Giannovola
Linda Donohoe
Carol Coburn
Jerold Okolowicz
Kathy Hartwig
Eric Zielinski
Randy Reiber
James Powell
Chris Burley

Sam Gingello
Denny Marra
C. Seil
Doris Toal
David Meyer
Romalo Agostinelli
Ann Inzana
George Marron
Mary Rapp
Randy Smith
Ray Russell
Mary Abou-Eid
Cynthia Fresch
Robert Costello
David VanGraafeiland
James Donohoe
Tom Coburn
Barb Jaruis
Brad Hartwig
Marie Bianchi
Jim Locicero
Tom Uschold

The Ogden Zoning Board of Appeals was called to order at 7:02PM.

This meeting was published in the Sunday December 27, 2009 edition of the Suburban News.

I. PLEDGE OF ALLEGIANCE

II. PUBLIC HEARING

1. Appeal of Jane & Gordon Munding, for property located at 18 Whittier Road, Rochester, NY 14624, for an Conditional Use Permit for an In-Law Apartment (750 sq. ft.), whereas, the conditional permit is permitted with approval from the Zoning Board of Appeals, pursuant to Chapter 210-28.D(9) in an R-1 Residential District. *Tax Acct. #132.02-3-21*

Mr. Jane & Gordon Munding presented this application.

Mr. Munding: We are trying to build an in-law apartment at my son's house. You should have the plans.

Mr. Fregoe: You say your son's house. He lives there or you live there?

Mr. Munding: He lives there with his family.

Mr. Fregoe: And the apartment will be for?

Mr. Munding: For us.

Mr. Fregoe: Usually I have the homeowner wanting to get a place for the in-laws.

Mr. McAtee: So the addition is a 2-story addition but the in-law area is confined strictly to the second floor.

Mr. Munding: Yes.

Mr. Fregoe: This is sitting above the garage so the main part of the home is not getting affecting too much.

Mr. Munding: Correct.

Audience Comments

Mr. Fregoe asked for audience comments.

Mr. Fregoe: I guess one of the concerns we have on this board with the in-law apartments is when these houses change hands and the next owners want to come in and they see two separate entities. Now they want to rent this as a 2-family. It usually gets the neighbors nervous. We are concerned about this and we have to hope that people will deal with this respectfully and honestly. We do have some stipulations for in-law apartments and I will share them with you. One of the restrictions is that the applicant’s attorney will need to contact our Zoning Board Attorney and prepare a declaration of restrictions to be recorded at the Monroe County Clerks Office along with the deed to the subject property just to stipulate that it is an in-law apartment and it should not be used as a 2-family. Other than that I do not have any issues with it. He has some good screening along the one side with a lot of trees.

Mr. McAtee: The addition is not out of character with other structures in the neighborhood.

Mr. Fregoe: We are not asking for a variances for setbacks so that is a good thing.

Mr. Hall: I am fine with it.

RESOLUTION #1A

Introduced by Mr. Young

Seconded by Mr. Irwin

That the Board classify the application of **Jane & Gordon Munding, 18 Whittier Road, Rochester, NY 14624, as a Type II SEQR Action.**

Ayes: Fregoe, Hall, Irwin, McAtee, Young, Zale

Nays: None

Absent: Burley

RESOLUTION #1B

Introduced by Mr. Fregoe

Seconded by Mr. Hall

That the Appeal of Jane & Gordon Munding, for property located at 18 Whittier Road, Rochester, NY 14624, for an Conditional Use Permit for an In-Law Apartment (500 sq. ft.), be granted approval with the following conditions:

- That the area designated as an in-law apartment is not intended to be rented for income property at any time or at future transfer of title;
- That the use of the in-law apartment is restricted to the owner of record and their blood relatives;
- That the applicant's attorney contact the Zoning Board of Appeals Attorney to prepare a *Declaration of Restrictions* to be recorded in the Monroe County Clerk's Office, along with the deed to the subject property;
- That the addition be constructed and installed to professional standards and well maintained;
- That the exterior material of the addition match the existing structure;
- That a building permit be obtained from the Building Department prior to commencing construction.

Vote of the Board

Ayes: Fregoe, Hall, Irwin, McAtee, Young, Zale

Nays: None

Absent: Burley

2. Application of Gary Inzana, 286 Gillett Road, Spencerport, NY 14559 to appeal the Code Enforcement Officers determination that the proposed waste transfer station at 23 Turner Drive is a permitted use in the Light Industrial ("LI") Zoning District, whereas the Zoning Board of Appeals shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of this chapter. Such appeal may be taken by any person aggrieved by an officer, department, board or bureau of the Town. This, pursuant to Chapter §210-99 of the Code of the Town of Ogden. *Tax Acct. #087.04-1-28*

Mr. Fregoe: Before we proceed further with this appeal tonight I would like to clarify a few points and explain the ground rules for tonight's hearing. The code enforcement officer for the Town of Ogden made a determination that the proposed waste transfer station was a permitted use in a light industrial district per the Town of Ogden code. Personal opinion or public sentiments are immaterial to that determination. The determination by the code enforcement officer must rely on the code and his best determination of the code. Mr. Gary Inzana has taken exception to that determination and has filed an appeal to have that determination reviewed by this Zoning Board. Both sides will present arguments as to why the proposed waste transfer station is a permitted use and why it is not a permitted use as it pertains to the code of the Town of Ogden. After opening arguments there will be an opportunity for public comment. I want to make it perfectly clear to all in attendance tonight that this Board will only listen to arguments for or against the determination made by the code enforcement officer relative to the light industrial code. We cannot and will not listen to arguments that pertain to your like or dislike of the proposed waste transfer station on Turner Drive. These arguments are not relevant to tonight's proceedings. These arguments will have a place and time at a future Board meeting as this approval process continues.

Mr. Jack Crooks, Code Enforcement Officer of the Town of Ogden, read into the record a letter he prepared regarding his determination. (see file for letter)

Further Mr. Chairman, as I am a principal in this hearing, I believe the ethical path to follow is to recuse myself. It would be improper for me to sit at this desk and advise or interpret for this Board as is normal process. Good luck in the challenge you are about to undertake.

Mr. DiPonzio has some additional information that he presented to the Board (see file).

Mr. DiPonzio: As was explained this is a request for interpretation of the determination of the Building Inspector that the proposed solid waste transfer facility on Turner Drive is a permitted use in a light industrial zoning district. On behalf of Mr. Inzana we submit that it is not. In the initial submission before the Board we cited a case called *Iza Land Management vs. The Zoning Board of Appeals for the Town of Clifton Park*. In that case it talked about, in upholding the determination that a similar proposed use was not a permitted use in a light industrial zoning district. The Board properly considered the reasonable anticipated impacts that brought that particular use far outside the regulatory criteria for use of property in such a zone. According to the Building Inspector's determination there are two primary factors on which he bases it on. Number 1, is that the solid waste transfer station is in fact a commercial storage use. We submit that it is not. Also the other argument put forth by the Building Inspector is that based on performance standards in the light industrial zoning district that provide for facilities for the storage of solid waste shall be adequately screened. We submit that that is not adequate in order to provide a specifically permitted use in this zoning district.

In my handout that I just handed up there are several exhibits. First I think it is important for the Board to focus on is what is going to be going on in a proposed solid waste transfer station. Is it just storage of garbage? We submit that it is not. It is actually an industrial process. The industrial process involves the unloading of refuse from garbage trucks into this facility. Often times it is compacted. It may be dumped directly into large tractor-trailer trucks. It may be put into bails, it may be put into logs and then it is put into larger trucks and hauled off for ultimate disposal. According to exhibit A on that I have attached a manual published by the United States Environmental Protection Agency (EPA) and if we look at page 2 past the table of contents, in the first paragraph it talks about in its simplest form a transfer station is a facility with a designated receiving area where waste collection vehicles discharge their loads. The waste is often compacted, then loaded into larger vehicles. Usually transfer trailers, for long haul shipment to a final disposal site, typically a landfill or a waste to energy plant or composting facility. No long-term storage of waste occurs at a transfer station. Waste is quickly consolidated and loaded into a larger vehicle and moved off site usually in a matter of hours. So according to the EPA which basically has federal jurisdiction over these types of uses the description is that it is an industrial process. The waste is processed; it is packaged so that it can then be hauled off in more fuel-efficient vehicles for ultimate disposal.

The other interesting portion of that manual appears on page 26 of Exhibit A. It provides diagrams of actual different technologies of waste transfer stations. It shows where there can be direct dumping of the garbage into larger tractor-trailers. It shows where there may be some search pits where the garbage can later be compacted into smaller units for the ultimate transport. So basically it is an industrial process that is going on in there. It is not necessarily commercial storage.

The other point with respect to commercial storage is that performance standards do not typically permit a solid waste transfer station. If you think about it every single residential, commercial and industrial use in any municipality is going to generate solid waste. It is just a matter of fact. We all have our homes that generate food waste that we throw out every week. Depending on the type of business the waste generated by that business is going to be different. What the performance standards provide, and anticipate in the light industrial zoning district we have different types of business that generate larger amounts of waste based on the number of employees or the process that is involved. They are going to have facilities for the storage of that

solid waste. Those facilities could be dumpsters and those performance standards just provides for the adequate screening of that. So that it cannot be viewed from the road or adjoining residential districts, things of that nature. It does not envision that there would be a proposed use where the use would be the commercial processing of solid waste for ultimate transport to other places. The other factor that underlies that area too is the fact that under the town code section 163, it talks about solid waste for all the uses within the Town of Ogden. If we look specifically at 163-5 it talks about storage of refuse. Under A.1, this applies to every single use in the Town of Ogden, No persons shall accumulate or permit the accumulation of refuse upon any premises owned or occupied by them except for the purpose of collection which shall normally occur at intervals not less frequent than once every seven days except for holidays etc. According to section 163 of the Ogden Town Code no one is permitted to store refuse but for the purpose of collection. This envisions that the refuse you generate you have to have it collected and hauled off your property every week. It does not envision that you can have this facility for the processing of consolidating solid waste from other areas for ultimate transport to a landfill or other such place.

Eventually if we were to interpret the performance standard in a light industrial zoning district as permitting the storage of solid waste, that would fly right in the face of section 163-5 of the code. That would in effect be an ambiguous interpretation that you have these two conflicting provisions. Basically we have one provision that gives a blanket, you cannot store refuse in the Town of Ogden but for the purpose of collection. Then they say in a light industrial zoning district because we have this design standard, well sure, you can go ahead and store solid waste inside. We would submit that it is not storage it is an industrial process.

Other portions that are attached to the submission that I handed out talk about the master plan for the Town of Ogden that was updated back in 1991. If we look at exhibit C on the second page, it talks about industrial development. The master plan goes on to state that the industrial designation on the land use plan is intended to provide areas, which may provide additional local employment opportunities. Ogden does not presently allow heavy or nuisance industry. The master plan endorses the continuation of this policy only accommodating light or limited industrial development, which is compatible with the suburban character of the eastern part of the Town. The intent is to provide locations for industrial related uses which add to the tax base yet will not adversely effect neighboring buildings or land and will not be detrimental to the health, safety, welfare or property values of surrounding areas. That is in harmony with the stated purpose of the limited industrial zoning district. That the permitted uses shall be compatible with the surrounding uses and shall not be detrimental to the health, safety and welfare. It is submitted that a solid waste transfer station is in fact a nuisance use.

The State has all kind of regulations about it to try to control those nuisances. Talking about the standard in the eyes of land management case from Clifton Park these are reasonably anticipated impacts. From this use reasonably anticipated impacts include truck traffic. According to the EPA manual which is sited in the materials we are not only going to have the garbage dumpster coming in and intervals throughout the day creating traffic surges depending on the volume, but once they have dumped their loads and those loads have been consolidated we are going to have the giant tractor trailer trucks coming in to pick up those loads and take them off site. That is a reasonably anticipated impact. We have solid waste and that is going to generate odors. There are ways to control that but the fact remains that if we left those doors open out in the hot sun, there are going to be some odors. It is a known fact that if you do not have your garbage cans covered in your own yards the squirrels are going to get at them. We have a large amount of vectors, which are squirrels, birds, and insects. They are defined as animals that can potentially carry disease-causing organisms. The DEC does have regulations that provide for the control of

that but that is a reasonably anticipated impact. We have the noise from the trucks, we have all of these reasonably anticipated impacts. Even though they can be mitigated these bring them beyond the scope of a light industrial use and classify it more as a heavy industrial use. This is not permitted in a light industrial zoning district.

Other items that I want to bring to the Board's attention is in exhibit B in addition to the Clifton Park case, a similar, almost identical issue came up in the Town of Brighton back in 1995. This is the last page of exhibit B, according to that reported case from the 4th department which is the appellate court that sits over Monroe County, all we have is the Judgment affirmed. We were able to get copies of the decision from Monroe County Supreme Court. Justice Bergman back in 1996, upheld an interpretation by the Town of Brighton Zoning Board of Appeals with respect to a transfer station for the consolidation and transfer of construction and demolition debris. Now the proposal by Suburban includes both construction and demolition debris as well as municipal solid waste. Arguably it could be more intensive than the use proposed out in Brighton. With municipal solid waste you are dealing with what is called putrescible items, which are items that can decay, and cause odor, those type of things. According to the findings of fact in the Town of Brighton which is on the first page of exhibit B the Town of Brighton found that the purpose and intent enumerated under their code is to provide an appropriate location for manufacturing and processing and assembly activities as well as wholesale and warehouse activities and related supporting activities which will not have an unreasonable adverse impact on surrounding land uses. Very similar to the standards of the Town of Ogden. If we go further and look at the finding from the Town of Brighton that the proposed use was not specifically permitted and rather involved a heavier industrial process. That is in the second paragraph of the findings of the Town of Brighton and in the third finding on the second page of exhibit B.

Eventually they found that it was a process it was not just the storage of construction and demolition debris. It is a process of grinding this up and consolidating it up to haul off. That is an industrial process not permitted under their code. Similarly here we have a process that is not permitted under our code.

The other point is when you look at other municipalities here in Monroe County; I would like to draw your attention to the Town of Riga. A portion of the Town of Riga's code is attached as exhibit D. In the Town of Riga where you have the Millseat Landfill in the general industrial zoning district. The purpose of the general industrial zoning district in the Town of Riga is to provide for the establishment of heavier industrial uses essential to the development of a balanced economic base in an industrial environment and to regulate such industrial development so that it will not be detrimental or hazardous to the surrounding community and the citizens thereof. If we look down under special permit uses, which is section C on the second page, subparagraph 4, a special permit use in the general industrial zoning district in Riga. A recycling center or facilities, composting facilities, landfills and any other solid waste facility as may be defined by part 60 of the New York Code rules and regulations. That would be a solid waste transfer station as would be proposed on Turner Drive. In the Town of Riga we have a special permit use in a heavier zoning district.

In the City of Rochester, arguably the Town of Riga is much more similar to the Town of Ogden, than the City because you have a mix of rural and residential areas along with light industrial uses. In the City of Rochester in their M-1 zoning district which is to provide for a broad base of industrial uses in a much more urban environment. Special permit uses, looking at the second page of exhibit E, under the special permitted uses we have under subdivision K, waste stations subject to the additional specifications for specified uses in section 120-155. In the City they have special permit uses and then they regulate it even further as far as distances from residential

spaces or district boundary lines, even to what streets the trucks can use. What we have here is we have a heavier industrial use that is being proposed but no heavy industry district within the town.

Finally the final exhibit is an expert opinion from Robert Pogal who is a senior real property appraiser with over 40 years experience appraising real-estate in this area. I have a letter and it describes that as part of his business he has to consider what permitted uses are on properties that he is appraising. He is familiar with different zoning codes throughout different municipalities in Monroe County. The difference between a light industrial zoning district and a heavy industrial zoning district takes into special criteria such as heavy truck traffic, noise and odors. He is familiar with the solid waste transfer station and it is his understanding that significant truck traffic as well as the potential for odors and other nuisances that are associated with the use and it is his opinion that it would not be consistent with the light industrial zoning district in any of the municipalities in Monroe County as well as the Town of Ogden.

Essentially Board members it is our position that we do not have commercial storage we have a heavy industrial process being proposed. It serves a purpose in the community, however because it is a heavy industrial process it should only be permitted in certain zoning districts. Light industrial zoning district that encompasses Turner Drive and its close proximity to residences on Gillette Road and Big Ridge Road. Essentially the intent of the light industrial zoning district was to allow industries that were more compatible with the surrounding neighborhoods. Because of the potential impacts that are associated with this use and based on other precedent of other municipalities we would submit that it is not a permitted use and the determination should be issued as such.

Do you have any questions for me?

Mr. Young: You would agree that the Town of Riga code and Town of Brighton code are not identical to the Town of Ogden, correct?

Mr. DiPonzio: No code is ever identical.

Mr. Young: So the decisions made in those towns, we do not have to follow those they are just to help us maneuver in this instance?

Mr. DiPonzio: The Town of Brighton, because that was reviewed by Monroe County Supreme Court and that was reviewed by the appellate division 4th department which is the appellate court that presides over Monroe County. That would provide binding authority. That would be my position. The construction and demolition debris processing facility is also defined under section 360 of the regulations of the DEC. It falls under the same category of the solid waste transfer station. There is also a construction and demolition component for the suburban proposal over on Turner Drive. I think that one provides some binding authority on the Board in order to find that it is not a permitted use. The Riga Code does provide some persuasive authority. It is a similar Town and is similar in character and this is what they do out there and we should consider doing out here in Ogden.

Mr. Fregoe: I do not have any questions for you right now because I think you addressed everything that I read over the last couple weeks, so thank you.

Mr. Fregoe: We were presented a lot of information before this meeting tonight and I just want to mention it all for the record. (all the following are in the file)

- 1) Letter from Chamberlin D' Amanda dated December 16, 2009
- 2) Letter sent via fax received December 9, 2009 by Lori Stone, Esq.
- 3) Letter Dated December 8, 2009 from Gary Inzana
- 4) Letter and packet Dated December 8, 2009 from Jason DiPonzio, PC
- 5) Letter and packet Dated December 7, 2009 from Jason DiPonzio, PC
- 6) Letter from Jack Crooks, Code Enforcement Officer
- 7) Letter from Dan Schum, Esq. dated December 17, 2009

Mr. George Marron: I am here on behalf of Suburban Disposal in opposition to Mr. Inzana's application to overturn Mr. Crooks determination. As we just heard the Chairman just noted that our letter of December 16th as part of the record. I will not go through that letter in its entirety just want to note as part of the record and in effect it is somewhat supportive of Mr. Schum's position. I will let Mr. Schum address a number of the issues in interpreting the law.

I will take this opportunity to respond to the items Mr. DiPonzio addressed and the new items he presented this evening.

One of the new issues that was raised tonight was the notion that Suburban's proposed transfer station constitutes a heavy industrial process, or some type of process. I would submit that this next description is the process at any storage warehouse. Materials are brought in on a truck, materials are unloaded onto the floor, materials are moved for logistical purposes and then they are put onto another truck and leave the storage facility. That could be a US Postal Service warehouse; it could be a Fedex or UPS. Materials are dropped off on the floor of this facility, trucks back in, doors are shut, materials are dropped off, moved to the back of the facility so they can be loaded onto a truck and the materials are removed. It is no different than any other storage warehouse. There is no grinding.

Mr. Fregoe: If we are going to get through this process tonight we have to be civil about it. The person that has the microphone should be given every respect possible. If you have comments you must retain those comments. We do not want to get into a laughing or shouting match. The public will have the opportunity to talk specifically about the code issues tonight.

Mr. Marron: Second issue the EPA materials that were submitted; the issue of EPA vs. DEC. New York DEC has jurisdiction over transfer stations. The EPA does not. It is NYS rules. There is a strict NYS DEC permitting process. That process does not allow for a transfer station to be a public nuisance. All these issues, that it is going to be a nuisance, there is a presumption that this is a nuisance. The NYS DEC process will not issue the permit if it is a nuisance. The building is designed to comply with the permitting process and to comply with the NYS DEC rules. It is designed so that it is not a nuisance. In addition all of these nuisance issues are proper before the Planning Board. I know that this is suppose to be a narrowly tailored argument here but because these other issues are raised I feel that I need to address them in this forum. The Planning Board and the NYS DEC are the proper venue for dealing with nuisance and traffic control, fencing, and operations.

The other issue under section 163-5 of the code, which indicated that refuse is not to be accumulated except for collection. I submit to you what other thing does a transfer station do other than accumulate refuse for collection on a daily basis. It is collected and removed on a daily basis. That code provision does not preclude the interpretation of Mr. Crooks in any way. They do not accumulate refuse or solid waste for any purpose other than collection.

One other issue is the master plan. I believe that the master plan was last updated in 2002 and finalized in January of 2003. Under the master plan the properties that are adjacent to the subject site are slated to become industrial properties, not residential. Under the master plan the property south of those properties and across Spencerport Road are slated to be light industrial. The Town in the comprehensive plan has made a determination that this is suppose to be an industrial corridor on Spencerport Road and coming up to Turner Drive. The Town has already made that decision. All these issues about extra traffic and what is going on up and down these streets and this nuisance factor has already been decided. In fact I think it would be hard pressed to actually put a residential development in that property because of the nature of the comprehensive plan. It would be against the current zoning.

Now, relative to the interpretation of the law. In these cases, especially the eyes of land management case are both distinguishable factually and concessive and good for the interpretation for this case. Factually the Clifton Park statute provided for storage of manufacturing materials. The Town of Ogden statute provides for commercial storage and does not say what gets stored or what cannot be stored. There is nothing in the code that says solid waste cannot be stored. The Clifton Park code said only manufacturing materials can be stored. So when that court interpreted that statute that court said well your code is very narrowly tailored. It talks about storage of manufacturing material only, therefore you cannot have a transfer station. In this case we have a general statute that says commercial storage. Further in that statute we have a provision that provides for facilities for solid waste storage. Therefore under general statutory interpretation there is no exclusion of solid waste management. Further down in the code solid waste management facilities are addressed. A facility for solid waste management is a commercial storage establishment under the code.

The Ogden statute clearly contemplates commercial storage in a wide-ranging definition without a definition of what can be stored. As long as the facility use is not a nuisance. By the way a nuisance by definition is excessive dust, excessive traffic, excessive by statute. It does not say we think it is a nuisance. Under the permitting process we are not allowed to be excessive in any way shape or form. We are not even allowed to be a nuisance. The statute contemplates facilities for the storage of solid waste management in its performance standards. Accordingly, provided that Suburban's proposal meets the performance standards, the facility for storage of solid waste is a use within the light industrial commercial district.

Mr. Fregoe: You had mentioned early on about this waste. It would be a transfer, it is coming in and it is leaving that day.

Mr. Marron: Ideally.

Mr. Fregoe: There may be weather conditions or stipulations that prohibit that. We talk about a transfer station in and out relatively quick. Can you clarify some definitions of that quick transfer as opposed to a storage facility? Can you help me understand those better?

Mr. Marron: I think I can distinguish between daily storage or hourly storage is no different than as I addressed before, UPS hub or Fedex hub. I do not think anyone would argue in fact you would not be before the Zoning Board if Fedex wanted to have a storage facility there. You could not come before this Board saying there is going to be a lot more traffic coming down the road. Those materials can go into that warehouse, they are dropped off at 7am and they can be out again at 11 on the next truck. That is still a warehouse and commercial storage. I think that is the distinguishing factor. I would say there is no temporal time frame or time limitation on the extent of storage.

Mr. Young: Is it your position that the code allows it because what you are proposing is a commercial storage facility?

Mr. Marron: Yes, the building is a commercial storage facility.

Mr. Young: You are classifying the building as a commercial storage facility and the code allows for commercial storage. We should allow it because that is what you are calling it.

Mr. Marron: Yes, and that is the function of the facility.

Mr. Young: I know that in your letter there was a couple of reasons that you gave but is that your main thrust?

Mr. Marron: That would be the main argument. I would say that the other issues addressed in my letter are certainly still relevant.

Mr. Young: So your argument that performance standards allow for solid waste to be stored is that another argument or is that buttress your commercial storage argument.

Mr. Marron: I think that buttresses the commercial storage argument. I would submit that it is really a two-pronged argument. The first is that it says commercial storage and there is nothing in the code that says solid waste cannot be stored. There is nothing prohibiting it. If you are interpreting the statute in reasonable terms then you say what is going to be stored here. If the issue that this is a nuisance comes up how is that going to be addressed? If it is a nuisance then the code says that if it is excessive you cannot have that use. I believe that is addressed through the NYS DEC permitting process and in the design of the building. On the other side of it I think if you read the statute and then read further into the statute the question of whether a commercial storage facility for solid waste is prohibited. When you read further into the statute and get to the performance standard and it talks about a commercial solid waste or a facility for the storage of solid waste. I think when you get to that language that clearly indicates that it is contemplated.

Mr. Young: You would agree that the performance standard relates back to what is permitted. Correct? Although it is permitted you still have to meet the performance standards. It does not work backwards.

Mr. Marron: Correct.

Mr. Young: What is your position with the fact that commercial storage facilities are not defined under the code? How should we define it?

Mr. Marron: If they are not defined under the code I think you have to interpret it as the Board sees reasonable fit. I do not think you can. There is no definition therefore it must be within reasonable standards.

Mr. Young: What reasonable standards.

Mr. Marron: That is up to the Board. I would submit that this facility conducts commercial storage and moves materials, just like any other commercial storage facility. The real issue and the concern is that this is a nuisance.

Mr. Young: That is a separate issue. First we have to get by whether to permit it, correct?

Mr. Marron: Correct.

Mr. Young: And wouldn't we have to look at the lack of definition of commercial storage. Wouldn't we have to look at the spirit of what the code meant for light industrial district?

Mr. Marron: I am not sure you can find the spirit in any legislative history. There is none on when commercial storage establishments were put into the code. We have researched that. It was just inserted at a Town Board meeting without any history. I am not sure you can look at drafter's notes as to what commercial storage establishment means.

Mr. Young: We look at what the intent was and it pretty much lays out what the intent was in the first paragraph, correct?

Mr. Marron: I do not think the first paragraph of this statute lays out the intent of commercial storage establishment. It lays out the intent of the uses permitted in a light industrial district. I think that the intent of the uses in a light industrial district are, light industries that do not create a nuisance, to paraphrase. Provided that the proposed use does not create a nuisance than the commercial storage should be allowed.

Mr. Young: So if the Board finds that under our interpretation of commercial storage, a waste transfer station does not fall under that, then wouldn't it be your position that it is not allowed under light industrial.

Mr. Marron: It would be my position that that would be an error in interpreting the statute because in the performance standards the drafters wrote facilities for the storage of solid waste are to be built and operated in conformance with Health Department laws and DEC laws. Therefore that was a contemplated use.

Mr. Young: They would need facilities for the storage of solid waste that is generated from the manufacturing process that are allowed and permitted.

Mr. Marron: It does not say that.

Mr. Young: That is statutory construction. You look towards what is allowed and look at performance standards of what is allowed.

Mr. Marron: Yes.

Mr. Schum: I appear here tonight as Town Attorney, it is my duty to appear as Town Attorney in support of the official decisions that are made by officials of the Town of Ogden, from time to time. Very honestly in almost 40 years of being a Town Attorney this is the first time I have ever appeared before the Zoning Board of Appeals. It is just as new for me as it is for you. Coincidentally the question of this Board acting as a quasi judicial board in reviewing the decision of the Code Enforcement Officer is to my knowledge the first time this has occurred in the Town of Ogden in over 40 years.

I am going to go through what I think to be the relevant issues. With all due respect to counsel who have spoken before me I have to go back to the Chairman's introduction at the beginning of this meeting. The sole purpose of this meeting is to review the decision and determination of the

Code Enforcement Officer. Upon the application of Suburban Disposal to apply to establish a transfer station in a light industrial district in the Town of Ogden. That is the sole purpose of the review before this Board. In due respect I do not care what Riga's ordinance says or what the City of Rochester does or what the Town of Brighton might have done with an ordinance that may or may not be on all fours with Ogden. I am concerned with Ogden's ordinance and Ogden's Code Enforcement Officer and how he applied that ordinance to the application that was applied before him. You as the Board of Appeals are charged with that same duty. You are sitting in the shoes of the Code Enforcement Officer this evening. You are given the authority under our Town of Ogden code to make any decision or determination that he could have made if he were to make that decision. The same as if you were he. You are also saddled with the code as we have it. You cannot go outside the scope of that code nor could he. You can not impose your own feelings or predispositions about any underlying application and very honestly all the discussions that have taken place tonight even by the attorneys about what this transfer station is and what this transfer station isn't, were not before the Code Enforcement Officer when he made this decision. He had an application. He was not there to determine whether or not something was going to be or not going to be excessive. That is a determination to be made by a Board upon application and hearing. The case mentioned in the Town of Brighton was decided after a public hearing about the underlying application itself. It was not a code interpretation by a Code Enforcement Officer, there was testimony taken, there was evidence, there was engineering, there was plans, there were all kinds of discussion. That has not yet taken place. The Code Enforcement Officer was given an application to conduct certain activity within a zone of the code. He looked at the code and he had to make a determination. That is his job; he is required to do that by law.

Starting off, in the intent provision of the light industrial code, I want to call attention to the fact that all of the uses within the light industrial zone should be appropriately sited such as in light industrial parks. That is the stated purpose within the light industrial code. Where is this proposal, it is in light industrial park. That is one of the only light industrial parks in the town. I would submit that the proposal, having been made to be located in a light industrial zone meets the spirit and intent of the code in a light industrial district. Uses should be appropriately sited such as in industrial parks.

Next, the discussion concerns permitted uses and under subsection 10 of section 210-34.B, commercial storage establishments are a permitted use. We have discussed this at some length but I would like to go through what I call a common sense approach to the analysis of that language. What is storage? It is not defined, we know that. It was brought up by certain members of the Board already. I think a general rule of statutory construction is that you have to give the plain and everyday meaning to the words and phrases in the statute if they are not otherwise defined. To me, I sat down and thought about it and said what is storage? It is the bringing or placing of something in a location for a period of time. Whether you store your cleaning products under the sink or you store your linens in the closet or if you put your lawn and garden equipment in a storage shed. You have taken something and you have placed it in a location for a period of time. It appears not to be permanent because storage has the intidigue of it that you are going to, at some point of time, take it away from that area. It is placed there for a period of time. To me that is what storage means. I do not think that is an unreasonable decision or interpretation of what storage is. I think it is the plain and everyday language that most people would apply to storage. Words do need to be given their everyday meaning. It is interesting that our light industrial code also uses the word storage, in a number of different instances. It says for example that we cannot store detonable materials in a light industrial zone. Explosives for example are prohibited. It says no storage of detonable materials can be conducted in a light industrial zone. It clearly impacts the fact and gives importance to the fact that storage is an

intended use in the zone. It also says that you cannot store radioactive gases, liquids or solids, another prohibited use. Another storage use that is strictly prohibited, the word storage is used in this code more than once. Commercial storage facilities are expressly permitted, provided that they do not have detonable material or radioactive liquid, gasses or solids. Interestingly enough there is already a storage facility in Ogden Industrial Isle. It is used by BOCES, they bring pencils and papers, all kinds of school supplies down Turner Drive, they place them in a storage facility and they come periodically and take them away. They use it for storage. It is a commercial storage facility. That is an example of what a storage facility is. You have asked what a storage facility is and can we give some idea of what it was intended. There is one that was developed in the Town of Ogden under this code. I submit that this gives this Board, and should give this Board, a clear idea of what a storage facility is.

The Code Enforcement Officer cannot base his decision of a permitted use vs. a non-permitted use upon the nature of what is purposed to be stored. We have heard much discussion tonight about the fact that a transfer station is dealing with solid waste. That it is not good, it is bad. So consequently the Code Enforcement Officer should interpret that as something that is not allowed. He is not allowed to do that. He is not allowed to make those judgmental decisions about good and bad. Some people may think that a UPS facility is a terrible facility. They have 40 trucks going out in the morning, they have 40 more coming in at noon and 40 more at 2:00 and 40 more at 5:00. People do not like all those trucks. Other people might think it is a great idea. The Code Enforcement Officer remember, we are here to decide whether or not he made a rational decision based on the information that was submitted to him. Not whether he thought it was good or bad, but whether the decision was rational based on what he was given. He looks at the code, he says you cannot store flammable materials, You cannot store explosives, but you can store solid waste and a storage facility is a permitted use. I do not know whether they are going to meet the performance standards but if they can maybe they can get their permit. If they cannot then they have not met the excessive requirements of the performance standards and under the code they would then be a non-permitted use.

The Town of Clifton Park case that was cited by the proponents is clearly distinguishable. Their code as was mentioned by counsel, a limited storage, warehousing or distribution of manufactured products only. On that basis, the court upon review said a storage facility in this case, is limited to manufacturing products. A transfer station is not a manufactured product. So, consequently we cannot have a storage facility. In that case the Code Enforcement Officer determined that on his initial application, denied the application to go before the Planning Board and the court upheld it saying; "hey, you know what, he was right." "A transfer station does not deal with manufactured products." Also under the Clifton Park case, there were no performance standards similar to those in the Town of Ogden Code. There was no mention of storage of solid waste what so ever in their Code. The aggrieved party here; Mr. Inzana and his council, is asking the Code Enforcement Officer or this Board to find and determine based solely on the application that the use or process or activity would result or cause dissemination of excessive amounts of gas, noise, odors, glare, vibration, or any other nuisance to adjoining buildings or property. How possibly could the Code Enforcement Officer determine whether or not, what is proposed to be used there is excessive or not? There is no way, based on the application. None whatsoever until a full and complete hearing is had, if there is a hearing, if there is an application and evidence presented. There is no way that the Code Enforcement Officer can determine what is excessive and what is not excessive. So again, we are going back to what did he have in front of him, what was his duty by law and how did he discharge that duty? It has nothing to do with the underlying merits. Again, something that the aggrieved party has said, "that the use may be detrimental to the health, welfare and safety of the residents of the surrounding area." That is a conclusionary statement that could not possibly be determined, nor by this Board and if you could not do it

tonight, how could the Code Enforcement Officer do it three weeks ago when he looked at this application. There is no way that you could make those factual determinations upon the application itself. It is not his duty to guess or surmise about what possibly could be, what might not be, what the EPA or DEC says could happen, might not happen, might be, might not be. That is beyond the scope of his job and very honestly beyond the scope of your ability and his ability to make a determination at this point in time. Interestingly the aggrieved party is asking on page six of their initial submission, that this Zoning Board issue an advisory opinion that this application requires a Use Variance. I submit to you, that neither this Board nor the Code Enforcement Officer has the authority to make that decision. All this Board and the Code Enforcement Officer have the authority to do is to determine whether or not to accept the application based on the Code that is here and the application that is presented. Once that decision is made, that is all that can be done. If I applied for a 6' fence and the Code Enforcement Officer says you cannot have it, it is only 4' in that zone and I disagree, I have two choices. I can appeal, just like this appeal is happening tonight, decision, or I can appeal for a his variance from that decision. He cannot tell me that I cannot put up a 6' high fence. If I put it up in derogation of his denial of my building permit, I would be in court. That is another area for another time.

The purpose of that is, you as the Board have the same powers that he has under section 210-99 of the Code. You are in his shoes, but you are constrained by the same rules that he was constrained by. He cannot render advisory opinions and he can only act on the application as made to him. Lastly, the standards that this Board must use in reviewing, the Code Enforcement Officer's decision...you are acting as a Quasi Judicial Board in this capacity. Unlike your Area Variances or your Use Variances which you are use to hearing all the time, you do not have the right to split the baby. You do not have the right to ask the guy to move his garage 4' instead of 6'. That is not the purpose of this review. This review you are coked with a black robe. You are the judges. You are the people who are going to review and determine whether or not the Code Enforcement Officer's decision was proper or not proper, but was it unreasonable or irrational. Was it unreasonable or irrational? Or stated another way, was the determination arbitrary and capricious, or affected by an area of law? The Board is bound to apply to this standard. Unless the Board can find factually that the decision of the Code Enforcement Officer was clearly unreasonable or was not based on any rational interpretation of the Code, or was otherwise arbitrary or capricious, this Board must uphold the decision and deny the appeal. That is the standard for review. You are here as a Quasi Judicial Board, acting in a review capacity. Any decision of this Board that relies in whole or in part upon the opinions of the subsequent matters relating to the application, would clearly be arbitrary and capricious and in violation of your duties to act in a Quasi Judicial capacity. Are there any questions from the Board?

Mr. Fregoe: Anyone? No? There are none at this time. Thank you. I know there are a number of people here that would probably like to speak tonight. Again, I will just reiterate, we are talking about a determination based on the Code of Ogden. To stand up here and tell me that you are going to dislike this or not like this...I cannot even tell you whether I dislike it our like it right now. I do not have all the information myself. It is easy to keep that out of my mind because I do not have that information. I do have the Code information. I do have the determination made by the Building Department and we will review that accordingly. I will open it up for public comment at this time. If anyone would like to come up and speak in reference to the Code or this issue please raise your hand. Gary, please come up and the gentleman that is in the third row, we will get you next.

Mr. Inzana: 286 Gillett Rd: Hi, I am Gary Inzana, 286 Gillett Road. I am here with my family. We have lived on Gillett Road in harmony with Turner Drive for 30 years. This is the first thing

that has come down through the pike that really seems to be a non-permitted use and an inappropriate use. I want to touch on a few things that the attorney said. Regarding the last statement, as far as it is your job to determine if this is a permitted use or not, I understand that is why you are here. If it was a rash judgment on the part of the Building Inspector... from my understanding, the application was submitted on one day and either later that day or the next day the hearing was set up for a public hearing for a preliminary and a final site plan approval. Now, this application is not for a shoe store, or a donut shop. This is for an intensive use and I would think that would raise a red flag and the Building Inspector would want to do a lot more study and get some more feedback from experienced people to see where this proposal was going to go. Instead, not even a preliminary approval was applied for, but a preliminary and final was applied for. So as far as being an unreasonable determination, we certainly feel that it was. The Code as Mr. Schum said, we are all saddled with it. Thankfully, we are all saddled with it. We are saddled with it, so is Suburban Disposal and so is the Code Enforcement Officer. It is a very larger Code and it is very encompassing. A lot of things that pertain to this project are not in the Light Industrial District. You have to research the Code to find a lot of problems and issues with this proposal. By definition, they are calling it a refuse transfer station. They are not calling it a storage station. It is quite a stretch to say that it is going to be a storage warehouse station, when they are calling it a transfer station. Going back to the intent of the Code, which Mr. Schum read. He read a little bit of it, but the first paragraph of the intent of the Code said it is to provide suitable areas for facilities with proper relationship to other land uses. Industrial uses should have characteristics, which are compatible with the rural suburban character of the town and should be appropriately sited. They should not cause a nuisance to other adjacent property owners or land. All the property there is zoned R-1. Across the street on Gillett Road it is zoned Senior Citizen. The Chamberlain D'Amada attorney makes reference that the master plan calls for further industrial development in that area. He is completely incorrect in saying that all the other land surrounding it is zoned Light Industrial. Everything on the north side of the property in the master plan is zoned Residential R-1 as it is now. Our particular property, which is kind of interesting, they said nobody would build any homes there. Well, we have submitted to the Town a Planning Board submission, which is on hold, to put a sub development on our property that adjoins this site. I have a copy of the plan here. Our property is zoned R-1, it was for farming. In the master plan it remains R-1, it does not have any use in the master plan for further Light Industrial use. Furthermore, across the road on Spencerport Road as you are aware, they are having a senior citizen development going up which is quite a large property. We seriously doubt, once this is built, that the property across the street would be zoned Light Industrial. It would be suitable for a residential use and I do not think the senior citizens and the R-1 neighbors that would be moving into these fairly expensive homes would be interested in seeing an industrial site across the street from them. The idea that these materials are unloaded and it is being used, as a warehouse is to a common sense person it does not add up. These materials are being dumped. They are not being unloaded, they are just being dumped and they are being reloaded onto other trucks to be moved out. The nuisance issues of the site, I will not get into all of them now and I know other people might want to talk about that. The reason it is important to talk about the nuisance issues, even though you might say those are Planning Board issues, but our Code specifically prevents uses that are a nuisance in the Light Industrial District adjoining Residential. So, a lot of the nuisance issues would be pertinent in the Zoning Boards decision. As far as the master plan, even in 1991, they realized that they had to be careful with what they allowed into a Light Industrial District. Eighteen years ago, our new updated master plan I think follows the same idea. But, eighteen years ago, it is interesting; they were very concerned about what was going to happen. When Turner Drive was put in, in 1969, there was a lot of controversy. Even back then, people did not want it. However, it got kind of pushed through. There was a lot of discussion and concern then about what might happen on Turner Drive and they were assured at the time that it would be a very clean industrial park. Some of the conditions

back from 1969 have not been adhered to. There was suppose to be a 600' long by 50' wide set of pine trees or similar boarder on the south side of Turner Drive that is not there now and I do not think that it was ever put in. I had a letter that I was going to submit to you regarding quite a bit of the other Code issues with this site. If you do not mind, I will go over a few of them. Because as I said, if you just look at the Light Industrial District it is not complete in what you have to look at with this facility. The solid waste law 163-2, said the purpose of this chapter is to provide for the management of town wide basis of all solid waste generated within the Town of Ogden and regulation of the storage collection and disposition of solid waste generated within the Town of Ogden. So if you are going to talk about storing the waste, that is all well and good, but you are going talk to about the waste that is stored in the Town of Ogden, not waste that is coming in from other parts of New York State. As you know, the law does not permit a truck to stand overnight with garbage in it. Obviously, if there are certain times when the storage facility needs to have the garbage in it overnight as the Grimm's have mention in their article that would not be permitted per Town Code. The proposal says that they plan to pile up and gather a 20' high pile by a 60' high width of refuse or garbage. In Code 165-5A(1), it states that no person shall accumulate or permit the accumulation of refuge on any premise. Also they say, that words commonly used in the dictionary shall be used in this Code. According to that, accumulate is to gather up or store as something that is accumulated, which is not permitted. Based on section 210-34A and 210-34F(12), the intent of the Code is clearly for a weekly pick up of garbage and that garbage shall be shielded and stored and picked up at least once a week. The intent of that part of the Code was not to turn the facility into a refuge garbage storage hauling station. There are many other issues with this property in terms of the zoning Code. I understand that, that is not a part of today's proceeding. The example that I would like to use is if you have a small property, maybe a .25 acre lot that is zoned for high-rise residential buildings and someone wants to come in and put a 20 story building up and they say "well it is zoned for it" and yet the Town would say "well you do not have the room to do that". This site has a lot of problems to satisfy hardly any of the performance Codes because of the size of the site. I will give you a copy of this letter in the future and I thank you for your time.

Mr. Fregoe: Thank you. Gary, if I could ask one question here? I have a partial map of this area here that was handed to us by the Town. I see the address 286, which is your lot. Behind it there is an address of 2560. Is that your piece of property?

Mr. Inzana: Yes, 2560 is our piece of property.

Mr. Fregoe: And what about the next one to the east?

Mr. Inzana: The next one to the east is Vince Laganna. That is not our property.

Mr. Fregoe: That is still R-1 there?

Mr. Inzana: That is all R-1. Our property is still shown as R-1 in the master plan.

Mr. Fregoe: Your property at 2560 runs all the way to 31 then right? It is kind of cut off on my map.

Mr. Inzana: It runs from Route 31 all the way back to the Turner Drive site.

Mr. Fregoe: Ok, thank you.

Ms. O'Hara: Mr. Chairman if I may? Gary, may I make a copy of that letter, that way it can become an official copy for the file?

Mr. Inzana: Yes. I guess one other thing, the people on Hickory Hollow ended up giving me this petition. I am not sure if I should submit this to you or not regarding...

Mr. Fregoe: Why don't you submit it to the Town and they will copy us in on it, once they get it on file.

Mr. Inzana: Thank you.

Mr. Fregoe: Thank you Gary. Yes, the gentleman in the jacket.

Kenny Unger: 2771 Spencerport Road: I do not know who owns Suburban Disposal, I do not use the service, but his company and his employees work in my neighborhood. I do not particularly know if this is the right venue, but I think this is going to work. I do not like how they are being treated. A man is trying to grow his business, asking to expand and operate in a legal manner.

Mr. Fregoe: Yes, I think this is the wrong venue tonight for that conversation unfortunately.

Mr. Unger: No, hold on one second. If you would, please give me a few minutes.

Mr. Fregoe: Ok.

Mr. Unger: When all this is controlled by our Town Government which you have explained and I am all in agreement that your decision is going to determine whether or not this moves on. I have had dealings with zoning. I had an office complex put up across the street from my house that was approved by this Zoning Board. I was not happy about it. But, the man that proposed it and built it, did it in a legal manner and went through the proper channels and that is ok, I can live with that. I see the man who owns Suburban Disposal using his rights to go ahead and go through the process but when I see my neighbors posting their name and their competitors prices. That is not zoning, that is just bad manners.

Mr. Young: You do agree that that Suburban Disposals petition fits with a light industrial use.

Mr. Unger: That is a decision that you folks are going to make. They are being painted as doing something wrong or illegal. They are doing something that is their right to do.

Mr. Young: Absolutely and I want to make the point I do not join the red sign club. I am going to let the process take its course.

Mr. Fregoe: We are trying to give it that due process.

Mr. Unger: I do know one thing though the process of having an office complex built in a R-1 district across from my house, which I was not happy about, but it was done in a legal manner. I was explaining about it to a friend after the fact and he said a good story about a quote from a famous architect, If you buy a property for the view make sure you buy the view.

Mr. Frank Rakowski: 501 Washington Street: I sympathize with the Board you are in a tough spot. I do not know the code in detail but I have heard a lot of the discussion and it sounds like the key things you need to be addressing. It is unfortunate and sounds like our code does not call

out exactly, transfer stations as commercial storage. It sounds like it is a little more general and that is why we are in the spot we are in. I think as Mr. Schum said, we need to apply some common sense. Commercial storage definition, as Mr. Inzana said, is he storing it or is it processing? I think you need to look at that. I am not sure if the application said that but if it says a refuse transfer station as suggests conveyors and sorting, it sounds like a process not just storage and maybe your decision is based on that. Performance standards are in the code, so it sounds like you can consider nuisance somewhat in your determination. I guess the other one is the idea of storage. Is it just storage or processing? I think another thing that has been brought up is this light industrial use vs. industrial uses. Where is the break point? The number of trucks or the amount of processing? That is not called out in the code so you need to take that into consideration. I think the Board needs to apply some judgment in deciding if something is allowed or not. The transfer station is not called out and storage is, and performance standards are. Light and heavy traffic is so you need to consider all those in your decision.

Mr. Hall: Aren't most of those issues, issues for the Planning Board and have no bearing on this particular issue.

Mr. Fregoe: Yes that is correct. We just do not have sufficient information to know how many trucks are being pulled in and out. We cannot make our determination on that because we just do not have it. All we have is an application and a code and we have to give our best interpretation of that code for that application. Whatever decision is made there are other Boards that this will go to. I am confident that this is not the last step in this process. Again we are dealing with a code issue. This is not the final step of the process. There will be a time for a lot of these other comments and concerns that you have. We do have to understand the operation and I think that will play out either before another Board or another Court. That information will be before us and will have to be laid before some Board or other entity.

Mr. Jeremiah Clifford: 198 Ogden Parma TL Rd: Spoke regarding the decision back in the 70' regarding fighting the dump at the corner of Gillette and Ogden Parma TL Rd. Also spoke regarding the traffic generated currently by Suburban and the increase in traffic.

Mr. Fregoe: I need to redirect you we need to talk about the code I cannot address the traffic, I cannot address what is happening at intersections. I do not have that information.

Mr. Clifford: That is a piece of your decision.

Mr. Fregoe: That piece will have to play out at a future meeting. It cannot happen tonight.

Mr. Brian Ricotta: Sias Lane: It is my understanding that it is against Town Code to store explosive material or radioactive material. Seeing we are going to be receiving refuse material from all over the state, who is to say that any of that will not be in the garbage that will end up at the transfer station?

Mr. Hall: Who told you that we are going to be receiving garbage from all over the state?

Mr. Ricotta: It is my understanding.

Mr. Hall: This Board will not allow that if it comes before us for a Zoning issue. I can assure you that. That is just to work the crowd up. The issue tonight is if the Code Enforcement Officer had the authority to accept the application, per the code? That is what we are here to determine. Did he do it properly?

Mr. Young: I would be interested in knowing because the argument is going to boil down to, for this Board to determine if Mr. Crooks believed this fell under the commercial storage part of the code. I would like to hear from whomever out there wants to argue for or against that proposition. Whether a transfer station can be consider to be a commercial storage facility or not. That is what this whole thing is going to boil down to for this Board. For or against, either way.

Mr. Brian Galland: 220 Gillette Road: Expressed concern with the smell currently from the empty dumpster on the property. Also expressed concern over the proximity to the Erie Canal. Stated that the nuisance regarding the odor should be addressed in the determination of this.

Mr. McAtee: A Board in the Town of Ogden will absolutely address all of those issues. This is just not the venue for that tonight.

Mr. Fregoe explained the process for obtaining information regarding future meetings, via the Town website (www.ogdenny.com), the Suburban News, the posting in the main hallway at the Town Hall or calling the Building Department. We have 60 days to make a decision or 2 months from now. It will not be formally advertised and you need to check to see if it is on the agenda.

Mr. Mary Lou Clifford: 198 Ogden Parma TL Rd.: I do not think anyone here is putting Jack Crooks on trial. He is a good man but as Mr. Schum said, you are the guys that are now in the Black Robes. Do you question this man's judgment on this issue? There were 3 lawyers that stood here and all had a different opinion. I appreciate where you are coming from, you have so much to consider. You need to do your job and determine whether the decision that was made is truly what is the right decision and not let your emotions for him get in your way. I do think the history of Ogden needs to take into account for this issue and the history of Ogden has been to protect all of its people all of the time.

Matt Kosha: 40 Upton: I want to ask for a clarification. What Mr. Hall stated is that this Board is here to decide if the Building Inspector was allowed to accept the application. From what council said earlier I understand that the Board is here to make a determination based on the same evidence that the Building Inspector had. I know there is a difference in that it is ok that he accepted the application or to actually make a decision in agreement or not. The Board's job tonight is to determine if the decision is accurate or if the application should have been allowed to be accepted?

Mr. Fregoe: We need to determine if the determination made by the Code Enforcement Officer was within the standards of the code. We may agree or we may disagree. Mr. Crooks, the application came before you, how long did you have to review it before a decision was rendered.

Mr. Crooks: About a day and a half.

Mr. Fregoe: We have a little advantage over Mr. Crooks. The application came before him and he had a day and a half. I have been looking at this thing for 2 weeks now and I am going to be spending another 4 to 8 weeks to look at it still. I have been presented a ton of reading material that I am going to go through. We have a little advantage over what Mr. Crooks had. We have time to review this.

Mr. Kosha: Was Mr. Crooks under a time constraint to render a decision on that application.

Mr. Crooks: I felt no pressure.

Mr. Fregoe: I think that is the standard practice by the Building Department; they try to render a timely decision.

Mr. Crooks: I also checked with counsel prior to rendering that decision.

Mr. Kosha: The code in some of its ambiguity, the interpretation is to be made in the spirit of the code. One of the things brought up when Mr. Crooks read his letter he stated the storage of the garbage could not be there more than 7 days. I believe the spirit of the code is important. I think that that portion of the code was written for the reason Mr. Inzana mentioned, when you have a business and a dumpster, the neighbors do not want to see the dumpster. You need to screen that. The spirit of the code in that regards would refer to not being able to pile up the garbage in front of your house for more than 7 days. I do not believe that the spirit of the code intended to say that there was going to be a facility to store or process trash on a daily basis. As long as the garbage does not stay there for more than 7 days that somehow that is in the spirit of the code. I believe that a hasty decision was made by the Building Inspector. Certainly this code could be evaluated for days in regards to this issue. I do not think the spirit of the code was taken into account.

Mr. David Walton: 2 Black Forest Drive: Spoke regarding his environmental concern regarding Larkins Creek.

Mr. Fregoe: That is for a different meeting.

Mr. George Johnson: 270 Gillette Road: One of the things I heard tonight is that they are calling the garbage solid waste. Garbage is not solid.

Mr. Kris Schultz: 4 Black Forest Drive: I want to say that I believe that the Building Inspector made the correct decision based on the information he got. The code is pretty vague. In the code it talks about light industrial uses being uses that do not generate a nuisance. I understand that the Board now has more time to look into those issues. I know storage has been a big issue but since you do have the time to look into that and it is specifically called out as a distinction between industrial and light industrial. I think you really need to get a handle on what constitutes nuisance and if in fact a transfer station would violate what would generally be considered a general nuisance than it should not be allowed in light industrial. I think it is important that since the Board has the time now they really do look at that issue along with storage and everything else. If that is glossed over and put onto Planning, it could be looked at right now. Since it is specifically mentioned in the light industrial code I think it should be addressed.

Mr. Diponzio: I just want to just clarify the authority of the Board on this application is. That is outlined in my December 8 correspondence. The Board of Appeals according to the code, The Board of Appeal shall hear and decide appeals from and review any order requirement, decision or determination made by an administrative official charged with the enforcement of this chapter. Under subsection B of 210-99 ZBA may reverse or modify or affirm in whole or in part. Any such appeal, order, requirement, decision or determination. The Board may make such order, requirement, decision or determination as in its opinion ought to be made and for such purposes shall have all the powers of the officer of whom the appeal was taken. The Board sits in place of Mr. Crooks. The Board has acknowledged that you do have the luxury of time and additional information. Part of the initial application does contain the engineering report that was submitted in support of the site plan and application that Mr. Crooks had the opportunity to review.

For point of clarification the EPA does delegate the enforcement authority to each of the states and in this instance it has delegated this authority to the NYS DEC.

The other point is that with all of the discussions coming up tonight regarding the nuisance. I think that speaks to the point that this really should be before this Board for a use variance. The proposed use impact would come before this Board and they would have to demonstrate how this use is not going to adversely impact this neighborhood.

Mr. Schum: the last item that Mr. DiPonzio mentioned, when the quoted section 210-99, that authority comes with the same burdens that Mr. Crooks had at the time, the statute he had at the time. You cannot go outside the scope of that. Mr. Crooks or this Board can never order any applicant before the Town to apply for a use variance. That is not within Mr. Crooks authority or this Boards. All Mr. Crooks could do was accept an application for processing or deny the application. One or the other.

Mr. Fregoe: Just to clarify if he does deny it than the applicant has the chance to file an appeal before this Board.

RESOLUTION #2A

Introduced by Mr. Fregoe

Seconded by Mr. Young

That the public hearing regarding the appeal of Gary Inzana be closed.

Vote of the Board

Ayes: Fregoe, Hall, Herman, Irwin, McAtee, Young, Zale

Nays: None

Absent: Burley

RESOLUTION #2B

Introduced by Mr. Fregoe

Seconded by Mr. Irwin

That the Appeal of Gary Inzana, 286 Gillett Road, Spencerport, NY 14559 to appeal the Code Enforcement Officers determination that the proposed waste transfer station at 23 Turner Drive is a permitted use in the Light Industrial (“LI”) Zoning District, be tabled for a period of 62 days.

Vote of the Board

Ayes: Fregoe, Hall, Herman, Irwin, McAtee, Young, Zale

Nays: None

Absent: Burley

III. MINUTES

RESOLUTION #3

Introduced by Mr. Young

Seconded by Mr. McAtee

That the minutes of the **October 1, 2009** meeting of the Ogden Zoning Board of Appeals be approved as previously corrected:

Vote of the Board

Ayes: Fregoe, Irwin, McAtee, Young
Nays: None
Abstain: Hall, Zale
Absent: Burley

RESOLUTION #4

Introduced by Mr. Irwin
Seconded by Mr. Hall

That the minutes of the **November 5, 2009** meeting of the Ogden Zoning Board of Appeals be approved as previously corrected:

Vote of the Board

Ayes: Fregoe, Hall, Irwin, McAtee
Nays: None
Abstain: Young, Zale
Absent: Burley

Motion made by Mr. Fregoe to adjourn, Seconded by Mr. Irwin to adjourn the January 7, 2010 meeting of the Ogden Zoning Board of Appeals at 9:27.

Respectfully submitted,

Jack Crooks, Secretary