

**OGDEN ZONING BOARD OF APPEALS**  
**March 4, 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

Joe Inzana  
Linda Donohoe  
Matt Coccia  
Mary Rapp  
Lori Stone  
Ann Inzana  
Michael Zale  
George Brocious  
Arthur DaVia  
Alfons Waechter  
Geoff Brown  
Erik Grimm  
Florence Giannavola  
Tom Scoppa  
Mary Lou Clifford  
Kathleen Kelly  
Mr. & Mrs. Lopa  
Karen Rakoski  
Chuck Povelaitti  
Frederick Maisel  
Maria Gentile

Spencer Read  
Jim Donohoe  
Margaret Nonal  
Jason DiPonzio  
Gary Inzana  
George Marron  
Gail Brocious  
Arlene DaVia  
James DiNapol  
Frances Waechter  
Gary Parker  
Sue Grimm  
Sherie Pickering  
Heather Butterman  
Jeremiah Clifford  
Dennis Kelly  
Rick Michell  
Frank Rakoski  
Laura Inzana  
Diane Walton

*The Ogden Zoning Board of Appeals was called to order at 7:01PM.*

**I. PLEDGE OF ALLEGIANCE**

As you will remember from the January Meeting we did close the public hearing so we will not be hearing public comment tonight. What that leaves us up here, the six of us, we are going to discuss the issue amongst us in public. We will review some of the codes brought up in the January meeting and put our thoughts to those. I think most of us have a final statement, written of some form. I will make one note. When it comes time to vote on this. I will read this in the affirmative format, which will be basically granting the application of Mr. Inzana and will vote based on that interpretation. We also have six members tonight. We are a 7-member board.

Whichever way this goes we need 4 votes to get this to pass. 3-3, I guess the appeal will be denied.

## II. OLD BUSINESS

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. Crooks as I have in earlier proceedings I will recuse myself as I am a principal in this appeal.

Mr. Fregoe: There were a number of code issues that were brought up in the January meeting. I would like to go through those. I wrote them up in numerical order. I think I will ask the fellow Board members to comment on the codes. Some of them may not have a comment from any members.

First we are here for the 210-99.B(9);

### **210-99:**

**A:** The 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 or by an officer, department, board or bureau of the Town.

**B:** The Zoning Board of Appeals may reverse, modify or affirm, in whole or in part, any such appealed 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 from whom the appeal is taken.

Just to clarify that we sit here tonight as a Board, 6 members, we are basically at square one. Decisions made prior to this carry no substantial weight in our decision here tonight. We are basically starting at square one, reviewing this and making the decision as if we are 6 code enforcement officers.

One of the chapters brought up is chapter 162-2;

**162-2:** The purpose of this chapter is to provide for the management, on a town-wide basis, of all solid waste generated within the Town of Ogden and to authorize the supervision and regulation of the storage, collection and disposition of all or part of any solid waste generated within the Town of Ogden, emphasizing source reduction, recovery and recycling of certain materials in the waste stream.

I have no comment on that, but I do not know if anyone else on the Board has anything to add to that? I think it is just a general statement that came up in the January meeting as we were talking about waste.

Next was 165-5.A(1);

**165-5A (1):** 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 (7) days, except for holidays, Sundays, vacations or extraordinary weather or except where caused by or arising out of the construction or remodeling of a dwelling or other building on the premises or incidental to the landscaping of said premises or customary agricultural operations thereon, in which cases due care shall be taken that such accumulation shall not create an unsightly appearance or unreasonably disturb the comfort and response of the neighborhood and shall be removed within a reasonable time or immediately upon completion of the work causing such accumulation.

That code somewhat ties into something else that was in 210-34.F(12), where it talks about the weekly pickup. In 210-34.F there were performance standards. I think the understanding is that these are the performance standards of industries that are in operation. It basically says; No industrial use shall be established or maintained unless it complies with the performance standards in this section. Continued conformance with such standards shall be a requirement for the continuance of any certificate of occupancy and/or zoning permit.

**(12):** Liquid or solid wastes. The discharge of any or all wastes shall be permitted only if in complete accordance with all standards, laws and regulations of the County Department of Health, New York State Department of Environmental Conservation or any other regulatory agency having jurisdiction. Facilities for the storage of solid waste shall be so located and designed as to be screened from the street or from any adjoining property and so as to discourage the breeding of rodents or insects. All wastes are to be properly stored and removed weekly.

Again we are talking about waste getting removed on a weekly basis. The one thing that caught me in that 210-34.F, it basically allows each business to keep a waste hopper on site. It does note that it needs to be screened. When I say screening I am thinking of some type of stockade fence, some type of solid fencing. Maybe it is a chain link fence with some type of screening ribbon or curtain. It does not say it needs to be fully enclosed but screened. "And the hopper shall be emptied on a weekly basis", similar to residential services that are noted in 165-5.A(1). Any comments on that?

Mr. Young: I think we talked about it before, the performance standards are necessarily something you would look at after you determine that something is allowed in a light industrial district. You do not work it backward. You do not say if it is a performance standard it is something you can do there. Obviously my position is the performance standard is what you get to once you determine if an allowable process.

Mr. Fregoe: I agree with that statement. We also had 210-34.A; Legislative intent. The purpose of the Light Industrial District is to provide areas, which may accommodate certain non-nuisance industrial uses, as well as to provide local employment opportunities. This district is suitable for areas with adequate utilities, proximity to adequate transportation facilities and proper relationship to other land uses and natural features. Industrial uses should have characteristics, which are compatible with the rural/suburban character of the Town and should be appropriately sited, such as in industrial parks. Industrial uses may include those in manufacturing and production utilizing previously prepared materials, but not those utilizing raw materials or any other process or activity which would result in or cause dissemination of excessive amounts of dust, smoke, gas, fumes, odors, noise, glare, vibration or any other nuisance to adjacent buildings or land. This district specifically excludes residences.

I did not have a whole lot of comment other than the intent of the light industrial district. It also kind of went along with the 310-34.E, where they talk about prohibited uses and they bring up the same thing about the dust, the gas, the smoke, the odors, the glares and all that stuff. That is the only link I had between those two chapters. Anyone have any comments?

210-34.B, where it talks about permitted, principal uses: Permitted principal uses. All permitted uses are subject to Occupational Safety and Health Act and National Fire Safety Code regulations. The following principal uses are permitted in the LI Light Industrial District. We seemed to focus on item 10 here; Commercial storage establishments. That is basically all it says, anyone want to comment on that?

Mr. Young: I think that is the heart of what we are getting at here.

Mr. Fregoe: I will throw my comments out there first and we will see where this discussion goes.

Commercial Storage Establishments, one of the things that came up was, how long is storage? How long does it have to be stored? Not having an answer and not having it spelled out in the codebook I decided to do a Google search. I went into Google and I looked up commercial storage establishments in Rochester, NY. Basically what I find, and I really was not surprised by it, was the typical storage establishments that you see. The U-Hauls, the self-storage, even some warehouse type operations, where they give you some heated storage. Most of these businesses are dealing with monthly rental rates. I did not see anybody that I could find on a short list or long list that was going to give me a daily rental or a weekly rental. They are basically a monthly rental situation. We talked about this waste transfer station. It may have hourly storage. The stuff may be on the floor and may be in the back of another truck within 5 or 10 minutes. It depends on the flow of waste coming in. This hourly storage or two hourly storage or half a day storage is not in the same time frame that would be associated with a commercial storage establishment. The business model for a commercial storage establishment is to store others property for extended periods of time so they can collect rent or fees. That is the business model behind that. The goal is to keep the building full with other peoples property, so they can collect rents and fees.

There was a comment made about a FedEx and UPS facility. A FedEx and UPS hub would not fit the definition of a commercial storage establishment in this case. They are not in the business of storing your packages. There is no intent to store packages. Their intent is to deliver your packages not hang on to them.

With this facility there is no intent to store trash. I do not think there ever is an intent to store trash in this building. The business model for this facility is to fill larger trucks and get them out of the building as soon as possible.

I will throw it open to the Board.

Mr. Young: I will start off. I will preface this with these are my comments and my ideas. Section 210-99.B of the code requires this Board to review the code enforcement officer's determination. This application is a permitted use of the code. The standard for our review is not arbitrary and capricious as previously stated by Mr. Schum. That standard will be used in an article 78 proceeding should either party to this action appeal this Boards determination. I do not believe that Mr. Crooks was either wrong or right in his interpretation of the permitted uses allowed under Ogden's light industrial district. The very nature of the word interpretation allows for different people to have differences of opinions. However our responsibility is to determine whether we as a Board agree with the Code Officers interpretation. In that regard I must answer in the negative. I do not believe that a reasonable interpretation of the permitted uses allowed in a light industrial district in Ogden would allow a waste transfer station. I do not believe that when the drafters of the code envisioned what uses should be allowed in a light industrial district that anything such as a garbage transfer station was envisioned, especially with its proximity to a

residential neighborhood. I likewise do not agree with the position put forth by the proponents of this garbage transfer station that it is permitted as a commercial storage facility, which under certain circumstances would be allowed in a light industrial district. A common sense reading of the code would envision a warehouse that stored supplies or dry goods which are either sold at a separate location or used in some permitted manufacturing facility. It only makes sense that a manufacturing facility, which is permitted in a light industrial district, would need a place in close proximity to the manufacturing plant to store the raw goods. In this case a waste transfer station, where a continuous stream of trucking vehicles continually deliver and haul away all types of garbage is not in my mind, a commercial storage facility. It is more of a processing facility where waste is brought in, processed in some fashion and then hauled away at some future time. The mere fact that the waste is stored there for some period of time does not change the character of the operation, nor does it make it a commercial storage facility. For the foregoing reasons, plus the reasons previously stated by the Board I find that the code enforcement officers interpretation and determination that a waste transfer station is a permitted use in a light industrial district to be an error.

Mrs. Zale: I just want to say going to back to code 210-34.B section 6 says light manufacturing, processing, fabrication, assembly, packaging of products from previously prepared materials such as cloth, plastic, paper, leather and metal products, produced elsewhere is within the code. I was torn because I think the processing is what we are saying should not be in light industrial but it is saying that it could be. I was torn. I do not know if you guys have an opinion on that.

Mr. Young: Processing for me would mean that you are making something. In this case the word transfer says what it is. Bringing something in from someplace else and transferring it out to go to someplace else. There is no process. Yes technically there is a process because you have to dump it, move it around, separate it and take it back out. I think the processing is actually making something out of raw material. That is my opinion.

Mr. Hall: I do not know how many homes we have in the Town of Ogden exactly, but we have quite a few. It is my understanding that at that home this material is generated and processed into containers. The salvageable, the plastics, the bottles. They are separated, they are processed. They are at each and every home and put out to the street to be stored on the street until they are picked up. Common sense tells me that they are not doing anything different than each and every home in this town is doing, by processing your garbage, putting it in that container, taking it to the street and waiting for someone to pick it up. I think what we get hung up on is that we want to find some way to make this a very deep and difficult situation. Common sense says all of us generate garbage. We need to be more green. One way to be more green is to take the little trucks to a transfer station, dump them and put the garbage in a larger truck to haul away to be further processed. It is a process from our home to this transfer station, there it is merely dumped not sorted again, not played with, not picked through, just dumped. Reloaded onto a larger truck and taken away. I do not have a problem with what was done by Mr. Crooks.

Mr. Irwin: I am going to go ahead and read my statement. I based my opinion off of 210-34.B: We have established that a transfer station will not be principally used as, this is the monotonous part, bare with me; scientific research or experimental development of materials, methods or products including engineering and laboratory research, manufacture of electronics or optical instruments or devices, administrative professional or executive offices, printing, publishing and book binding, fabrication of paper products, including packaging materials, office and household paper supplies and stationary, the processing and fabrication of plastics and plastic products including product design and development, molding, mold repairs and alterations, finishing and packaging of plastics and plastic related products, welding and welding related activities provided

that these activities are suitable in a protective room with adequate ventilation, materials shall be stored in fireproof cabinets, adult uses, commercial storage establishments.

Here is where we seem to be at an impasse. In a waste transfer station, indeed considered a principal use... is a waste transfer station indeed considered a principal use in terms of a light manufacturing processing, fabrication, assembly or packaging of products from previously prepared materials such as cloth, plastic, paper, leather and metals produced elsewhere? Manufacturing implies that machines tools and labor will be used to create a desirable end product, cars, clothing, beauty supplies, etc. Fabrication creates the assumption that some type of raw material will be transformed into an end product. Processing and action simply means putting something through prescribed processes. Extracting minerals from ore for example. There must be an end result. Although one can consider compacting and recycling a form of processing in this case I consider it to be pushing the envelope and stretching the spirit of the code. This would most likely not be the primary function. Assembly requires something to be put together. There will be no packaging of products from previously used materials. The bottom line is this, waste would enter the site until pickup and transfer remaining waste through the entire process. No manufacturing, processing, fabrication or assembly has taken place as I understand these concepts and as I interpret this code. The bottom line is waste in, waste out. I therefore disagree with the code enforcement officer's interpretation of this code. Thank you.

Mr. McAtee: The code as written leaves itself open to a significant interpretation. This Board was told that our standard of review must find that Mr. Crooks decision was unreasonable or irrational or arbitrary and capricious, if we do not agree with Mr. Crooks decision. I do not think that Mr. Crooks decision was arbitrary and capricious or unreasonable and irrational. According to our Code book section 210-99.B the opinion of this Board is all that is needed to settle this appeal. I do not agree with Mr. Crooks interpretation, I do not agree with his decision, but it certainly was not arbitrary and capricious. I do not believe that a transfer station is a commercial storage establishment and therefore the transfer station would not be a permitted use in a light industrial district. Nor do I find any other way to interpreting our code that would convince me that this is a permitted use. In fact the more realistic interpretation of the code may be that since a transfer station is not specifically listed as a permitted use, it must be prohibited. I am not willing to draw that line in the sand at this time. I do not agree with Jacks decision.

Mrs. Zale: After reviewing all the documents submitted on behalf of all parties and reviewing the code of The Town of Ogden, I feel that the approval of the application for Suburban Disposal was within the code. I do not want to re-read all the codes but 210-34.B6 and 10, I took the processing as an actual process of processing the materials. Where it said previously prepared materials I took that as someone discharging their materials, they are already used. 210-34.F(12), where it states solid and liquid waste would be removed within a week; I used that code as waste is any product not wanted, I believe that discarding of this is within the standards. I believe that a waste transfer station is within that code. I do personally have some contingencies, I know we talked about the screening and I would like to see that done if this was approved. I also talked about the definitions within code 210-6, where it said a structure is any construction requiring temporary or permanent support or attachment of soil including but not limited to oil, gasoline, propane tanks and pumps, signs, display boards, sheds and storage buildings. I know that there was some conversation about facility versus storage buildings. I feel that all those words can be used interchangeably. Facilities, establishments, storage buildings, I took that as the structure or facility being within this code. As I stated before, I do believe that the approval of this application was appropriate based on the codes alone and my interpretation of them, I feel that this facility is acceptable in a light industrial zoning property.

Mr. Fregoe: I guess one other comment I will add, as you can see we have various opinions here which is good. The code is vague, there is no hard true definition to the code. I have a tendency to want to error on the conservative side a tad. In January we could not talk about the traffic implications, the noise, the dust. We were dealing with the code. Sitting here as a human you want to think about those things in the back of your mind. Again, personally, erring on the conservative side I would like to hear more of the details exactly what this is going to produce as far as traffic, and noise and whatever else is going to happen. I think eventually that will play out before one of the Boards in this Town and I would like to make sure it does get played out before one of the Boards in this Town so that we can have all the facts of what this facility will and will not do. Jack does not get that information when he makes his determination and we really do not have that information either in making our determination here tonight. Again if I am going to sit here and try to interpret the code, a gray code at best I think I am going to lean a little conservative myself.

Mrs. Lawyer are we all set?

Mrs. Field: If this Board feels it is appropriate, make a motion.

#### **RESOLUTION #1A**

Introduced by Mr. Fregoe

Seconded by Mr. Young

That the Board classify the application of **Gary Inzana, 286 Gillett Road, Spencerport, NY 14559, as a Type II SEQR Action.**

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

Nays: None

Absent: Burley

Mr. Young: Before we second this, for clarification purposes, you are making a motion that Mr. Inzana's appeal, that the code enforcement officer's determination was an error.

Mr. Fregoe: Yes that is a good point and thank you for clarifying that. We are basically agreeing with Mr. Inzana's appeal, which would nullify the determination that was previously made by the Building Department, if I said that correctly. Good point.

#### **RESOLUTION #1B**

Introduced by Mr. Fregoe

Seconded by Mr. Hall

That the 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, the Board voted in favor of this appeal.

#### **Vote of the Board**

Ayes: Fregoe, Irwin, McAtee, Young

Nays: Hall, Zale

Absent: Burley

### III. MINUTES

#### **RESOLUTION #2**

Introduced by Mr. Fregoe

Seconded by Mr. McAtee

That the minutes of the **January 7, 2010** meeting of the Ogden Zoning Board of Appeals be approved as previously corrected:

Mr. Fregoe had a change under item #2 that had been previously corrected.

#### **Vote of the Board**

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

Nays: None

Absent: Burley

Motion made by Mr. Hall to adjourn, Seconded by Mr. McAtee to adjourn the March 4, 2010 meeting of the Ogden Zoning Board of Appeals at 7:40.

*Respectfully submitted,*

*Jack Crooks, Secretary*